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Human Rights and the functioning of the democratic institutions in emergency situations

Wrocław, 3-5 October 1996

Proceedings of the UniDem Seminar organised in Wrocław (Poland) on 3-5 October 1996 in co-operation with the University of Wrocław and with the support of the Japan Foundation, the European Commission, Bank Zachodni SA of Wrocław and Konrad Adenauer Foundation

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a. Opening statement by Mr Roman DUDA

Rector, University of Wrocław

It is indeed a great honour and pleasure for me to attend the opening ceremony of the seminar "Human rights and the functioning of the democratic institutions in emergency situations" organized by the European Commission for Democracy through Law. On behalf of the Senate and the whole community of the University of Wrocław, I wish to extend a warm welcome to all the distinguished members of the Commission and guests attending the seminar, in particular to:

- Professor Jerzy Makarczyk, Judge at the European Court of Human Rights
- Ms Jane Liddy, President of the First Chamber, European Commission for Human Rights
- Mr Mevljan Tahiri, Member of the Parliamentary Assembly of the Council of Europe

I am also pleased to welcome representatives of the local authorities:

- Prof. Janusz Zaleski, Voivode of the Wrocław Voivodeship
- Zygfryd Zaporowski, Vice-Mayor of the City of Wrocław
- Dr Jerzy Bara_ski, Chairman of the Legal Commission of Wrocław City Council
- Mr Tadeusz G_uszczuk, President of Bank Zachodni S.A., Wrocław
- Professor Leon Kieres, President of the Self-government Government

The Council of Europe, which exists since 1949 and of which Poland has been a member since 1992, constitutes the only all-European organisation with universal goals, working strenuously towards cooperation and integration of member states. It has many spectacular achievements, in particular in the realm of human rights. Particularly important for us is the fact that since 1989 the Council supports the countries of Central and Eastern Europe in their transition towards a free-market economy and democracy. In this respect the European Commission for Democracy through Law is most active and most helpful.

This is not the first meeting of the Commission in this country. The first was held in Warsaw in 1993 and now we have the honour and pleasure to host the second meeting in this old European city.

Let me say a few words on this occasion about our university, its old and dramatic history. As early as 1505, Ladislaus II Jagiel_o, King of Bohemia and Hungary,

signed the university foundation deed which, however, was not followed by an actual development of the university. The state borders were constantly changing and it was only as late as 1702, when the Austrian Emperor Leopold I established a Jesuit academy with two faculties: Philosophy and Theology. The magnificent main building of our university dates back to those times, though the full university was established later, in 1811, when the Protestant Viadrina University (founded in 1506) was moved here from Frankfurt-on-the-Oder by the King of Prussia. Despite its German character, the University was an oasis of openness and tolerance and attracted many Polish students, especially from Silesia and Wielkopolska, incorporated then into Prussia. The situation changed again during World War II. In June 1939, on the brink of the war, Polish students were expelled "never to return back" but they were back fairly soon. In January 1945, the German university was evacuated and after a 3-month siege, Polish professors from the University of Lvov arrived in Wrocław to organize a new, Polish university. Now we are one of the largest and most important universities in the country, with 1600 academic staff members and 26 000 students.

I hope that the seminar will be successful and that besides meetings you will also have an opportunity to see the city. Let me wish all of you a pleasant and interesting stay in Wrocław.

b. Opening statement by Mr Ergun ÖZBUDUN

Professor at the University of Bilkent, Ankara, Vice-President of the Turkish Foundation for Democracy, Member of the European Commission for Democracy through Law

It is a particular pleasure for the European Commission for Democracy through Law to have been given the opportunity by the Institute of Public Law of the University of Wrocław to hold our seminar here, in Wrocław. In fact, it is not the first time that we have had the opportunity to co-operate with the Law Faculty of the University of Wrocław. Three years ago, in May 1993, the University of Wrocław was already one of the co-organisers of a UniDem Seminar on the Relationship between International Law and Domestic Law. This seminar did not take place here in Wrocław, but in Warsaw, and so it is only now that we have the pleasure of getting to know this magnificent old town and its university.

But this earlier seminar had already permitted us to appreciate the high quality of this Law Faculty and so we were extremely pleased when the Institute of Public Law offered to host our UniDem Seminar on Human Rights and the Functioning of the Democratic Institutions in Emergency Situations. This topic was one of the first to be addressed by our Commission, which had led to the small publication you found in your files, and we were then looking for a sponsor to host a seminar concluding our work on this topic.

Why did our Commission choose to address this topic ? Most of the member countries of the Council of Europe and our Commission are in the fortunate position not to have been forced to have resort to emergency provisions in recent years. Therefore it might appear at first sight that the topic we are dealing with is of a more theoretical and academic nature. But nothing could be further from the truth. By definition, the problem of emergency powers arises in crisis situations and fortunately such situations are exceptional. But when they arise they are all the more important and the stakes are particularly high. In fact, any political system can function fairly smoothly in times of civil peace and prosperity, but the real test comes as soon as it is confronted with a crisis. It is therefore essential to provide the democratic system with the necessary tools to cope with crisis situations. It would be unrealistic to expect that democracies are never faced with crisis situations and it would be dangerous to rely on the possibility of an unaltered functioning of the democratic institutions in them. In fact, procedures in democracies by their very nature are complex and require the balancing of many interests. In crisis situations, be they war, civil unrest or natural catastrophes, it is of the essence to take quick decisions which may be of major importance and, unfortunately, it will often be a necessity to temporarily restrict fundamental rights. Not to provide the democratic system with the necessary tools to survive in crisis situations would endanger its very existence. On the other hand, the crisis may also simply be a pretext for disregarding the usual democratic rules and there is a danger that a crisis mechanism instituted for the defence of democracy may be perverted and used to abolish democracy.

The democratic system, therefore, needs rules allowing it to function effectively in crisis situations which nevertheless may not be contrary to the fundamental rules of democracy itself. Our seminar will thus be devoted, on the one hand, to trying to define very precisely under which conditions emergency rules may be applied in a democratic system and, on the other hand, to determining to what extent the usual rules may be modified in such situations without abandoning the core of the democratic achievements.

It seems also very appropriate that this seminar takes place in a country of Central and Eastern Europe. The countries of Central and Eastern Europe have all, in a very short period of time, made the transition from one-party rule to pluralistic democracy. There is no country in the area which would any longer declare open hostility to democratic values. But, on the other hand, we should not overlook that the degree to which the democratic system has taken root in the societies of Central and Eastern Europe varies considerably. Polish society is well-known for its addictive love for freedom, but this cannot be said of all Central and Eastern European countries. And it is only natural that a system which was established very recently is not as well consolidated as a long established one. The likelihood

of being confronted with a crisis situation is therefore much greater in Central and Eastern Europe than in Western Europe. It makes thus a lot of sense if we try to anticipate and discuss the appropriate response to crisis situations in the democracies of Central and Eastern Europe before such a crisis has arisen. In our discussions on national law, particular attention will therefore be devoted not only to Western Europe, as in my report, but also to Eastern Europe, in the report of Prof. Wójtowicz, and of the short national presentations, half will concern Eastern Europe.

But another aspect which makes this topic particularly interesting for the lawyer is that it concerns not only national constitutional law but also international law. There are few areas in which there is such a large overlap between national law and international law and both the question of the conditions for introducing emergency measures and of the possible limitations to human rights in emergency situations is covered by the major international human rights treaties. You will therefore hear tomorrow reports by Prof. Kolasa and Mr Jacobs on the international Human Rights treaties and their practical application, and it is certainly striking to what extent the various treaties have found similar solutions to the same problems. It is very clear that the drafters of the major human rights treaties like the European Convention have been very conscious that any human rights protection system can only be as good as its crisis mechanism and that ignoring this aspect would leave the door open for undermining the whole system. They have therefore addressed the problem of emergency powers in a very similar way and this similarity, which also has many parallels with the treatment of the same question in domestic law, leads naturally to the topic of the final report of our seminar, namely the question whether some rules on the protection of human rights in emergency situations are already part of customary international law. Prof. Oraá, who is also the author of a major book on the subject, in his brilliant report has addressed this topic and it is obviously of utmost importance to know whether there are some protective rules applicable under customary international law in all states regardless of whether they are party to a specific treaty or not. Our last session will thus address the topic of whether there is a common universal core of human rights protected in emergency situations.

It would be wholly inappropriate to address this topic only from a purely European perspective. I am therefore particularly happy that financial support from the Japan Foundation has made it possible to have also non-European scholars present here at our seminar, in particular Prof. Higushi from Tokyo who will enlighten us on the Japanese approach to our problem. I would therefore like to conclude with our thanks to the Japan Foundation and the European Commission whose financial support has made it possible for us to invite most of the foreign participants who are here today.

c. Opening statement by Mr Takeshi GOTO

Consul at the Consulate General of Japan in Strasbourg, Observer to the European Commission for Democracy through Law

I am very pleased that Japan Foundation is able to support this UniDem Seminar on Human Rights and the functioning of the democratic institutions in emergency situations.

It goes without saying that the establishment of democracy, human rights, the rule of law and a market economy in Central and Eastern European countries has been one of the most important agendas for the world since the fall of the Berlin wall. The Council of Europe and, notably the European Commission for Democracy through Law, has been playing a historic role to this end. The government of my country fully shares the values of the Council of Europe. Thus, my government, in addition to the bilateral assistance to those States, wishes to support the Council of Europe as a natural forum for discussion and exchange of ideas to accomplish democratic security in Europe and to contribute to peace and stability in the world.

I understand that the Venice Commission has a unique status in the framework of the Council of Europe in that it consists of distinguished international and constitutional lawyers and that it provides effective and practical assistance to the Central and Eastern European countries in the field of the constitution and other important laws. My predecessor and I have been involved in the work of the Commission as an observer for over 3 years and we have always been impressed by its work.

In this context, Japan has already taken part in some of the seminars in the framework of UniDem; for example, the one on the role of the constitutional court which was held in Bucharest in 1994, and the one on constitutional justice and democracy by referendum which was held in Strasbourg in 1995. I am very glad that Professor Higushi, one of the most distinguished constitutional lawyers in Japan, who participated in last year's seminar, is once again here to attend this seminar. I hope that his contribution will stimulate a discussion and that this entire meeting will be an opportunity for an exchange of views and a fruitful and constructive dialogue to be beneficial for all the participants.

In conclusion, I would like to say once again how pleased my country is to be able to join this project with the aim of strengthening democratic security in Europe. I wish the seminar every success.

First working session
"The National Rules"

a. Emergency Powers and Judicial Review
by Mr Ergun ÖZBUDUN

b. Emergency Powers in the Constitutions of States in Central and Eastern Europe
by Mr Krzysztof WÓJTOWICZ

a. Emergency powers and judicial review by Mr Ergun ÖZBUDUN

Professor at the University of Bilkent, Ankara, Vice-President of the Turkish Foundation for Democracy, Member of the European Commission for Democracy through Law

How to reconcile constitutional government and the rule of law with crises that threaten public safety and sometimes even the very existence of the State is one of the most challenging questions of public law. In the words of Carl J. Friedrich this is a problem that has long "challenged the ingenuity of the best minds" in public law scholarship.[1] Among other leading scholars who significantly contributed to this debate are Clinton Rossiter[2], Frederick Watkins[3], Carl Schmitt[4], Edward Corwin, and Hans Kelsen[5]. John Finn, summarising this debate, concludes that "few of us doubt that States will take whatever action they deem necessary to ensure their physical survival. As a matter of political prudence, democratic governments are seldom willing to risk their survival by respecting a generous conception of individual liberties in times of crisis. Whatever the logic of the political theories to which governments subscribe, the harsh realities of necessity typically trump individual liberties and rights".[6] This conclusion is essentially the same as the Lockean argument that "a strict observation of the laws (in some cases) may do harm". The executive must have a power to act "according to

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[1] *Carl J. Friedrich, "Constitutional Reason of State: The Survival of the Constitutional Order" (Providence, R.I., Brown University Press, 1957), p. 108.*

[2] *"Constitutional Dictatorship" (Princeton, N.J., Princeton University Press, 1948).*

[3] *"The Failure of Constitutional Emergency Powers Under the German Republic" (Cambridge, Mass., Harvard University Press, 1939).*

[4] *"The Crisis of Parliamentary Democracy", trans. Ellen Kennedy (Cambridge, Mass., MIT Press, 1985).*

[5] *It is not my intention here to discuss the philosophical justification of emergency powers. For a good discussion of the views of the above-mentioned authors, as well as for his own significant contribution, see John E. Finn," Constitutions in Crisis: Political Violence and the Rule of Law" (New York - Oxford, Oxford University Press, 1991), particularly Chap. 1.*

[6] *Finn,"Constitutions...", p. 15.*

discretion, for the public good, without the prescription of law, and sometimes even against it".[7]

Nevertheless, this argument, no matter how much it is dictated by political necessities, leaves many legal questions unresolved. For example, can an emergency justify the total suspension of the Constitution as opposed to certain parts of it? Can an emergency regime be initiated in circumstances where the Constitution is silent? And, can there be effective, legally enforceable restrictions on the use of emergency powers? It is particularly the last question that concerns us here. But let us first briefly discuss the first two.

With regard to the first problem, it can be surmised that the total suspension of a Constitution on account of an emergency is a contradiction in terms, for in this case the individual or individuals who will exercise emergency powers will themselves be deprived of constitutional status and authority. Finn argues quite rightly that "once we suspend the Constitution, the status of the offices and institutions it creates are themselves problematic. An official who claims the Lockean prerogative, the power to suspend the Constitution, risks the absurdity of saying: "An officer who shall be recognised by criteria set forth in this Constitution, shall have the power to act contrary to the Constitution." Officers in the strict sense cannot have such a power".[8] In fact, most modern constitutions explicitly state that the basic structural features of government remain intact even in an emergency. For example, the Portuguese Constitution as amended in 1989 (Art. 19, para. 7) provides that "the declaration of a state of siege or emergency may affect the constitutional standards only within the limits set out in the Constitution and in the law; in particular, it may not affect the enforcement of the constitutional provisions concerning the powers and operation of the organs of supreme authority and the organs of self government of the autonomous regions, as well as the rights and immunities of its members". Similarly, according to Article 116, para. 5 of the Spanish Constitution, "Congress may not be dissolved while any of the states referred to in the present article remain in operation, and if the Houses are not in session, they must automatically be convened. Their functioning, as well as that of the other constitutional State authorities, may not be interrupted while any of these states are in operation." Under the Basic Law of Germany, the Bundestag cannot be dissolved in a state of defense (Art. 115 h), and "the constitutional functions of the Federal Constitutional Court and its judges must not be impaired" (Art. 115 g). Article 16 of the Constitution of the Fifth French Republic, while granting the President wide unspecified powers to cope

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[7] *Quoted by Finn, "Constitutions...", p. 17.*

[8] *Finn, "Constitutions", p. 18 - also, Sotirios Barber, "On What the Constitutions Means" (Baltimore, Md., Johns Hopkins University Press, 1984), p. 188.*

with emergencies, provides that Parliament may convene of right and that the President may not dissolve the National Assembly during an emergency. Thus, although emergency situations may, and usually do, entail certain transfers of competences among governmental agencies, typically increasing the powers of the executive and/or those of the central government in a federal State, such explicit constitutional guarantees ensure the continuation of the basic structural forms of constitutional government.

With regard to the second question, the answer must be yes, for even in the absence of explicit constitutional authorization, emergency powers can be deduced from the State's overarching responsibility to ensure its own survival and to protect the safety of its citizens. In the United States Constitution, for example, there is no specific reference to emergency situations except for Article 1, Section 9, which authorises the suspension of the writ of *habeas corpus* "when in cases of Rebellion or Invasion the public safety may require it". And yet there is broad agreement among American scholars that the Constitution permits the use of a variety of emergency powers.

Similarly in Switzerland, although the federal Constitution contains no explicit provision on emergency rule in the ordinary sense of the word, Swiss constitutional doctrine recognises three possibilities for emergency powers to be exercised. One is the regime of full powers *(régime des pleins pouvoirs)* which is applicable in case the Federal Assembly is unable to meet or the normal legislative procedure can no longer be followed. In this case, the Federal Council is implicitly empowered to take all necessary measures, even if they are unconstitutional, to protect the security, independence and the neutrality of the country, its economic interests, etc. When the Federal Assembly is able to meet, it has the power to confirm this "state of necessity" and to grant full powers to the Federal Council. This regime was implemented only during the two world wars. The second is the "regime of strict necessity", when the parliament can no longer function and therefore the Federal Council assumes the power to legislate by decrees of necessity even derogating from the Constitution. There is no example of such a regime in the constitutional history of Switzerland. The third are the possibilities offered by Article 102 of the Constitution, which gives the Federal Council the duty to look after the internal and external security of the country and to maintain its independence and neutrality. Since 1914, the Swiss government has invoked this article to issue ordinances, in times of immediate danger, in areas that have not previously been regulated by laws. Thus, in a sense, the Federal Council functions like an ordinary legislature. However, such ordinances cannot contain provisions against the Constitution, laws, and resolutions of the Federal Assembly.[9]

[9] *Ergun Özbudun and Mehmet Turhan, "Emergency Powers", European Commission for*

Since most modern constitutions do regulate, sometimes in great detail, emergency situations, the problems posed by the Constitution's silence on the matter are quite exceptional. On the other hand, the third problem mentioned above, i.e., the presence or absence of effective restraints on the exercise of emergency powers, remains very much valid and continues to occupy the minds of public law scholars. To some, including Carl Schmitt, the notion of crisis defies legal restraints; There can be no constitutional or legal norm applicable to chaos, he argues, for "every norm presupposes its normal situation, and becomes meaningless when this normal situation ceases to exist".[10] On the other hand, "there is also a long tradition of scholarship that does accept the possibility of restraints upon the exercise of emergency powers".[11] Emergency regimes, if they are to remain within the bounds of an overall commitment to constitutionalism and the rule of law, cannot possibly be absolute or arbitrary regimes. An emergency regime, by definition, entails an increase in the discretionary powers of the government, a relaxation of the limits upon the exercise of power, and restrictions on the fundamental rights and freedoms of citizens to a degree greater than in normal situations; Nevertheless, an emergency regime should operate within certain legal restraints, for there is always a potential for the abuse of State power, and experience has shown that the most serious violations of human rights tend to occur in emergency situations; In the words of John Finn, "the real problem posed by emergency powers for students of constitutionalism is not so much to curtail the use as to limit the abuse of those powers".[12]

It is here that the problem of review becomes especially important. For emergency powers not to degrade into arbitrary powers, it is required that "all exercises of emergency power must be subject to review by someone other than the holder of the power. This review is satisfied in the first instance by the proper inauguration of emergency powers and in the second by review after their exercise".[13] Most modern constitutions satisfy the first requirement by explicitly regulating how an emergency situation can be inaugurated.[14] The second issue, however, is more problematic. Assuming that the executive is the holder of the emergency powers,

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Democracy through Law (Council of Europe Publishing, 1995); pp. 5-6.

[10] *Quoted by Finn, "Constitutions...", p. 19.*

[11] *Ibid., p. 15.*

[12] *Ibid., p. 28.*

[13] *Ibid., p. 38.*

[14] *Özbudun and Turhan, "Emergency Powers", pp. 9-12.*

such controls can be exercised either by the legislature, or by the courts, and preferably by both.

Given the profoundly political nature of the problem, legislative control over the executive in emergency situations is essential. Typically,in most democratic constitutions such controls take the form of legislative participation in the initiation, extension, and termination of emergency rule, as well as the possibility of a legislative veto over the emergency decrees issued by the executive.[15] Since in a parliamentary democracy the executive is normally composed of party leaders and other leading party figures, however, legislative control may not be sufficiently effective in practice to curb the abuse of executive power. Therefore, in a State based on the rule of law, legislative control must be supplemented by appropriate and effective means of judicial control.

With regard to judicial review, a preliminary distinction has to be made between review over the legislative or executive act declaring an emergency, and review over the acts and actions of the emergency authorities including emergency decrees issued by the government. Regarding the first point, there is no general agreement among scholars about the appropriateness of judicial review concerning the declaration of emergency rule. Because of the highly political nature of this decision, such review may present difficult problems. While some argue that there should be no judicial review, others claim that a certain degree of judicial review is both possible and appropriate.

Comparative constitutional law does not provide a clear-cut answer on this point. In some European countries (Hungary, Switzerland, and Albania) the executive act declaring and emergency or the parliamentary resolution approving it cannot be reviewed by courts. Turkey also belongs to this category, despite the fact that its Constitution does not explicitly preclude it. The Constitutional Court ruled, however, that since Parliament's approval of the declaration of emergency is by way of a parliamentary resolution rather than a law, and since such resolutions are not in principle within the review powers of the Court, it had no jurisdiction in that matter. In another group of countries (Russia, Ireland, Greece, Cyprus, Malta) judicial review is possible but only on procedural grounds, i.e., limited to the examination of whether the relevant constitutional procedures were complied with. Finally, in some countries, full judicial review is possible. In the Federal Republic of Germany, federal legislation approving emergency rule or executive acts declaring emergency can be reviewed by the Federal Constitutional Court. The Federal Constitutional Court also has the right to review the material circumstances that led to the declaration of the state of emergency. In Spain,

[15] *Ibid., pp. 18-19.*

according to widely shared opinion, judicial review would be possible if the Constitutional Court equated the declaration of the state of emergency or the parliamentary authorization with a norm having the force of law. "Given the past constitutional jurisprudence ... the Constitutional Court could be expected to exercise self-restraint when called upon to judge the appropriateness of such declarations", but not when what is being judged are "the formal aspects of the declaration and its material limits".[16]

Even if full judicial review powers are recognised in respect of the act declaring emergency rule, important problems remain. To what extent can the courts be expected to judge on the material circumstances leading to the declaration of an emergency? What would be the margin of appreciation left to political (i.e., executive and legislative) authorities? No doubt, the latter are in a much better position than the courts to judge political necessities. They have access to classified information that courts normally do not have. These considerations seem to require that even in cases where the courts have full review powers, they should be expected to act with considerable self-restraint and leave political authorities a substantial margin of appreciation. This would amount to a judicial review more or less limited in practice to a review of the procedural regularity of the act.

Admittedly, it is difficult to draw precise boundaries between the competences of the legislative and executive authorities on the one hand, and those of the courts on the other. Here, the case-law of the European Commission and the Court of Human Rights may provide inspiration and guidance to national courts. As early as the Cyprus case in the 1950's, the Commission adopted the position that it was "competent to pronounce on the existence of a public danger", as well as "to decide whether measures taken by a Party under Article 15 of the Convention had been taken to the extent required by the exigencies of the situation". It added, however, that "the Government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation".[17] This approach has been reconfirmed in a number of cases, and perhaps most succinctly reiterated in a recent decision of the Court:

> "... it falls 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

[16] *Jaime Nicolas Muñiz, "Emergency Powers Provided for in the Spanish Constitution", response to the questionnaire on emergency powers, European Commission for Democracy through Law, p. 10.*

[17] *App. 176/57 Greece v. United Kingdom (1958-59) 2 Yearbook 174.*

> overcome the emergency. 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. Accordingly, in that matter a wide margin of appreciation should be left to the national authorities. Nevertheless, 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 it, and the duration of the emergency situation."[18]

The case-law of the European Court can be expected to influence the jurisprudence of national constitutional courts of member States in two ways. In cases where the Constitution is silent and the national court might be reluctant to exercise such review, it may feel encouraged to do so, since the absence of domestic judicial remedies will result in the admissibility of a subsequent application before the European Court. Secondly, in cases where the national Constitution or the prevailing judicial opinion permits such review, the European Court's attempt to strike a balance between the need for judicial review and the need to cope with the crisis is likely to provide useful guidelines for national courts.

Judicial review over the acts and actions of emergency rule authorities, as distinct from the possibility of judicial review over the declaratory act itself, seems less problematic. Decisions taken by the emergency rule authorities are basically unilateral administrative acts and should therefore be subject to review by courts. Although this seems to be the case in most European countries, there are still some problems that merit attention. In a minority group of European countries (Turkey, Greece, and Portugal) one type of emergency rule is the state of siege which involves, among other things, the creation of special military tribunals and the transfer of jurisdiction in respect of certain crimes to them (Turkish Constitution, Arts. 144, 145; Greek Constitution, Art. 48; Portuguese Constitution, Art. 19 and the law 44/86 on the state of siege). Especially to the extent that members of such tribunals do not enjoy the same independence as civilian judges and that their decisions cannot be appealed to general courts, such a situation is hardly compatible with the principles of the rule of law. An even more serious

[18] *Case of Brannigan and McBride v. United Kingdom, Judgment (5/1992/350/423-424), 26 May 1993, para 43.*

problem is raised by the Turkish law on the state of siege (as amended in 1980 by the then military regime) which precludes judicial review over the administrative acts of martial law authorities. Although this law is clearly unconstitutional, its unconstitutionality cannot be challenged before the Constitutional Court on account of the Provisional Article 15 of the Constitution which exempts all laws passed during the National Security Council regime (1980-83) from judicial review as to constitutionality. Finally, Article 148 of the Turkish Constitution precludes judicial review over law-amending ordinances issued by the Council of Ministers during the state of emergency or the state of siege until they are approved by the legislature and thus become ordinary laws. The Turkish Constitutional Court has ruled, however, that it had the competence to review such ordinances to the extent that they are not strictly required by the exigencies of the situation or are not limited in application to the emergency zone and to the duration of the emergency rule. Furthermore, the Court has held that such ordinances cannot bring about changes in ordinary laws.

Similar problems, even if of lesser gravity, have sometimes been encountered in other States. For example, the 1968 amendments to the German Basic Law amended Article 10 concerning the privacy of posts and telecommunications, adding a paragraph to the effect that "this right may be restricted only pursuant to a law. Such law may lay down that the person affected shall not be informed of any such restriction if it serves to protect the free democratic basic order or the existence or security of the Federation or a Land, and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament". Thus the amendment "provides that instead of recourse to the courts, review shall be by bodies or agencies appointed by the Bundestag". This amendment was challenged in the Federal Constitutional Court, but the majority of the Court "concluded that review by a nonjudicial agency did not violate the principle of separation of powers inherent in Article 20".[19]

It may be too optimistic to hope for a democratic world that would no longer need emergency regimes. But what must and can be done is to keep these regimes within effective legal restraints bounded by constitutionalism and the rule of law. Emergency regimes should not be permitted to degrade into arbitrary regimes. Judicial review, exercised with a proper amount of self-restraint and a sense of political realism, is essential to accomplish this aim.

b. Emergency powers in the constitutions of states in Central and Eastern Europe by Mr Krzysztof WÓJTOWICZ

Professor at the Department of International Law, University of Wrocław

[19] *Finn, "Constitutions...", pp. 199-200.*

1. The concept of emergency powers

2. Types of emergency rule

3. Conditions for the use of emergency powers

4. The organ empowered to declare emergency rule

5. Control over the declaration of emergency rule

6. Time range of execution of emergency powers

7. Emergency measures

8. Control of the execution of emergency powers

9. Responsibility of the organ executing emergency powers

Conclusions

This comparative survey is based on the Constitutions of the following States: Bulgaria (July 12, 1991), Croatia (December 22, 1990), Czech Republic (December 16, 1992), Hungary (August 24, 1990), Lithuania (October 25, 1992) Poland (Interim Constitution - October 17, 1992), Romania (December 8, 1991), Russia (December 12, 1993), Slovakia (September 1, 1992), and Slovenia (December 23, 1991).

The post-communist states in Central and Eastern Europe, which now break with the recent past, strive in their constitutionalism to form a fully democratic system which is based, among other things, on the principle of the separation of powers, and which guarantees its citizens a wide range of rights and freedoms. The framers of constitutions in the new democracies have, however, to answer the question whether in a time of crisis these democratic principles can be temporarily altered in order to overcome the peril and to restore normal conditions. The answer is affirmative: a democracy cannot be defenceless when attempts against its institutions are made, as well as when situations arise that objectively may lead to a break-down of the social order. It cannot be claimed in this case that such effectiveness is a privilege of a totalitarian State.

In contrast to the latter system, however, any construction of emergency powers in a democracy should be designed so that any derogation from democratic principle

is only permitted to the extent necessary to control promptly and effectively the exigency in question, and to ensure that the temporary "dictatorship" does not transform into a permanent one.

1. The concept of emergency powers

Common experience shows that sudden crises will inevitably occur, threatening some general values usually associated with such notions as independence, the internal order in a State, economic welfare, political freedom, democracy, etc. Emergencies may entail the use of measures which are not only unacceptable in "normal" times but which even contradict the very nature of democratic rule. These measures essentially involve a temporary change in the way State organs function and the introduction of restrictions on the rights and freedoms of citizens.

A situation of this type is occasionally called "constitutional dictatorship"[20], to contrast it with absolute dictatorship, free of constitutional limitations.

The circumstances which form a threat to the State and the special legal measures prescribed to overcome the crisis are reflected in such constitutional institutions as martial law, a state of emergency, a state of siege, a state of defence, etc.

Some constitutions provide also for a separate institution of a state of war, which, when declared as a result of alien aggression or the necessity of fulfilling obligations towards allies, defines the status of the State in international relations.

With respect to internal relations, it is the declaration of adequate emergency rule (Article 84/10, 12 and 100/5 of the Bulgarian Constitution, Article 19/3/g, h of the Hungarian Constitution, Article 24 and 36 of the Polish Interim Constitution, Article 86 and 102/j of the Slovak Constitution) or the use of special measures (Article 80 and 101 of the Croatian Constitution) that have specific results within the State.

There are also constitutions which do not provide for a separate state of war but which empower specific organs to regulate the issue of war by law (Article 71/j and 106/f of the Russian Constitution) or to undertake adequate measures to oppose aggression (Article 84/16 of the Lithuanian Constitution, Article 92/3 of the Romanian Constitution). In these constitutions, emergency rules are regulated by separate provisions.

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[20] *Cf. C.L. Rossiter, Constitutional Dictatorship. Crisis Government in the modern Democracies. Princeton 1948*

In comparison, the Czech Constitution provides for a very limited degree of regulation: it provides only for a state of war declared "in the case of attack on the Czech Republic or when it is necessary when fulfilling international obligations with respect to mutual defence against attack" (Article 43/1 of the Czech Constitution).

2. Types of emergency rule

Generally the classification of emergency rules is related to the type of threat which justifies the declaration of emergency rule. The threats may be political in nature (war, coup d'état, mutiny, rebellion), economic (economic or financial crisis, strikes) or they can be natural disasters.

Sometimes the two former types of threat are treated together as a narrower concept. For example in the French doctrine of constitutional law, the expression *pouvoirs de crise* (crisis powers) is related to crisis situations that are political in character, in contrast to the concept of *pouvoirs exceptionnels* (emergency powers), which include also measures used to cope with natural disasters[21].

In the constitutions under review various solutions can be found.

Apart from the Czech Constitution, which mentions only the state of war and which does not provide for declaration of emergency rule, other constitutions distinguish one (the emergency state in Article 92 of the Slovenian Constitution) or more types of emergency rule.

In the latter case sometimes it is the constitution itself that defines the nature of particular states of emergency, as well as the differences between them. Usually this is done by distinguishing martial law, declared in case of external threats, from a state of emergency, declared to cope with internal threats (Article 142 and 144 of the Lithuanian Constitution, Article 36 point 1 and Article 37 point 1 of the Polish Interim Constitution, Article 87/2 and Article 88 of the Russian Constitution). The Hungarian Constitution mentions three types of emergency rule: state of exigency - Article 19/3/h, state of emergency - Article 19/3/i, and situation of public danger - Article 35/1/i.

Other constitutions mention only the names of particular states of emergency, leaving their more detailed definition to statutes (Article 64/2 of the Bulgarian Constitution, Article 72/1/e and Article 93 of the Romanian Constitution, Article 102/k, 1 of the Slovak Constitution).

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[21] *Cf. Duhamel, Y. Meny, Dictionnaire constitutionnel, Paris 1992, pp. 785-786*

There is no separate type of emergency rule related to the "state of economic necessity" or the "state of economic crisis".

3. Conditions for the use of emergency powers

As already stated, the necessity for declaring emergency rule arises because a threat has occurred[22].

A question that needs to be answered is, however, which type of threat justifies the use of emergency powers to cope with it. It is not useful to list particular situations, as it is not possible to predict all possible dangers. Thus, constitutional texts need to be worded generally in such a manner as to cover all potential types of threat, while at the same time avoiding the possibility of an entirely arbitrary evaluation of the conditions.

The interpretation of the concept of "public emergency threatening the life of the nation" is instructive for the States parties to the European Convention of Human Rights[23]. The interpretation is relevant to the possible derogation from the obligations of the contracting parties. "Public emergency" occurs, according to the Commission, when four conditions are fulfilled:

1. The threat must be actual or imminent.

2. Its effects must involve the whole nation.

3. The continuance of the organised life of the community must be threatened.

4. The crisis or threat must be exceptional to the extent that the normal measures and restrictions permitted by the Convention for maintaining public safety, health and order are plainly inadequate[24].

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[22] *In Anglo-American law, for example, the term emergency means "An event or occasional combination of circumstances calling for immediate action or remedy", Ballantine's Law Dictionary.*

[23] *Convention on Human Rights and Fundamental Freedoms from November 4, 1950; Konwencja o ochronie praw cz_owieka i podstawowych wolno_ci; the Polish Dziennik Ustaw No 61/1993, item 284.*

[24] *Cf. Short Guide to the European Convention on Human Rights. p. 120; a wider discussion in M.A. Nowicki. Wokó_ Konwencji Europejskiej. Warszawa 1992, p. 116.*

It seems, however, that the constitutionalisation of rules related to the occurrence of a danger or public emergency requires that other conditions should also be taken into consideration. One has to take account in particular of previous experience, which shows that the way danger is coped with depends on its intensity and character.

The least frequent situation in the constitutions under review is when the conditions for declaring emergency rule are omitted altogether (the Slovak Constitution).

In the Slovenian Constitution, in Article 92, danger is defined in a general way as "a state of emergency is declared when the existence of the State is threatened by a great and general danger". The definition of the conditions are described in a more detailed way in Article 101 of the Croatian Constitution (on which point it is clearly modelled on Article 16 of the French Constitution). According to this Article, emergency measures can be undertaken "in the event of ... an immediate danger to the independence and unity of the Republic, or when government bodies are prevented from regularly performing constitutional duties";

Occasionally there is a distinction between dangers which are external from those that are internal, and this distinction corresponds to that marking a state of martial law from emergency rule (cf. the constitutions of Lithuania, Poland and Russia, referred to above). A certain sub-category of this approach is the solution adopted in the Hungarian Constitution where the internal danger is defined more precisely than the external one. State of exigency is declared in Hungary "in case of a state of war or if the danger of an armed attack by a foreign Power ... is imminent", a state of emergency - "in case of armed actions aimed at overthrowing the constitutional order or acquiring exclusive power, furthermore, of grave forcible actions committed with arms or weapons, threatening the safety of the life and property of citizens, in an extremely wide range of elementary disaster or industrial calamity", and a state of public danger in case of danger to the life and property of citizens because of natural disasters.

4. The organ empowered to declare emergency rule

Both doctrine and the constitutions are extremely diversified with respect to the organs that can declare emergency rule. In classical doctrine, the decision to declare constitutional dictatorship should not rest in the hands of a person or those persons that are to perform the function of the dictator[25]. This solution more effectively prevents concentration of powers performed under the pretext of

[25] *Rossiter..., op. cit., p. 298.*

fighting some danger. On the other hand, however, when coping with an internal crisis or when organising defence against a sudden external attack, it is more efficient when decisive and prompt steps are taken, and when decision-making is centralised accordingly. From this point of view the executive is better equipped to respond to danger[26].

There are constitutions which essentially delegate this power to Parliament, but in cases when it cannot convene or when it does not sit emergency rule is declared by the executive organ. This provision can be found in Article 100/5 of the Bulgarian Constitution, Article 19 and 19A of the Hungarian Constitution, Article 67/20 and 142 and 144 of the Lithuanian Constitution, and Article 92 of the Slovenian Constitution. Of those listed above, only the Hungarian Constitution explains that "parliament shall be considered prevented from passing these resolutions if not in session and its convocation encounters insurmountable difficulties owing to the briefness of time as well as to the events that have given rise to the state of war, the state of exigency or the state of emergency" (Article 19/A/2), "the fact of Parliament's being prevented as well as the well-foundedness of declaring a ... state of exigency or proclaiming a state of emergency shall be established jointly by the Speaker of Parliament, the President of the Constitutional Court and the Prime Minister" (Article 19/A/3).

Another solution is to vest the power of declaring a state of emergency solely in the executive organ - the President (Article 36 and 37 of the Polish Interim Constitution, Article 87 and 88 of the Constitution of the Russian Federation, Article 93 of the Romanian Constitution, Article 102/k, 1 of the Slovak Constitution [martial law on the motion of the government]).

5. Control over the declaration of emergency rule

When the organ empowered to declare emergency rule is the Parliament, then the Parliament itself, by adopting an adequate method of taking this decision, provides democratic control over it. In Croatia the decision of the Sabor on the restrictions of rights in emergency situations is taken by a two thirds majority vote of all the deputies (Article 17). In Hungary, the decision to proclaim a state of emergency or state of exigency can be passed only by a two-third majority vote of deputies to the National Assembly (Article 19/4).

Sometimes a motion from another organ is necessary to pass a resolution on emergency rule: in Bulgaria, a motion from the president or the government; in Slovenia, from the government.

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[26] *Cf. P. Leroy, L'organisation constitutionnelle et les crises. Paris 1966, p. 35.*

If the decision to proclaim a state of emergency is taken by the President, the Parliament may exercise some form of control. So, in Bulgaria "the National Assembly is immediately convened to pronounce on the undertaken decision [by the president])" (Article 100/5).

Approval by the Parliament, or one of its chambers, for the decision of the President to declare emergency rule is required by the Constitutions of Lithuania (Article 142 and 143), Romania (Article 93), Russia (Article 102/1/b/c), and Slovenia (Article 92). The time limit for approval is defined in various ways. Approval is given at the nearest session of Parliament (Lithuania), when Parliament convenes (Slovenia), at the first session "when no longer prevented", or it convenes in extraordinary session. Such an extraordinary session may be convened immediately (Lithuania) or within 48 hours after emergency rule has been declared (Romania).

In Poland, the Interim Constitution does not provide for any control by Parliament over the decision of the President to declare martial law. With respect to states of emergency, Parliament's control is limited to expressing consent to extension of the period of emergency rule for more than three months (Article 37/1).

Apart from political control by Parliament, the act enforcing the state of emergency may be subjected to judicial review by the Constitutional Court. The Court, within its general jurisdiction, reviews whether the act conforms to the Constitution (Lithuania, Russia) and to ratified international agreements and general principles of international law (Slovenia).

6. Time range of execution of emergency powers

Some of the constitutions under review do not indicate the duration of all or some emergency states, treating this as an open issue (Bulgaria, Lithuania - martial law, Poland - martial law, Romania, Slovakia, and Slovenia).

There are countries however, in which the duration of particular emergency powers is expressly defined, with an option for their extension. In Lithuania, for example, the state of emergency is declared for six months (Article 144), in Poland - for three months, renewable only once for no longer than three months with Parliament's consent.[27]

7. Emergency measures

[27] *In other countries, for example in Russia, the duration of the state of emergency is sometimes defined by the Constitution.*

As a result of a declaration of emergency rule, human rights and freedoms are temporarily restricted or suspended. This breach of the normal constitutional order can be justified only by the necessity to sacrifice one good in order to protect another, superior good. This does not mean, however, that there can be arbitrariness on this issue.

First of all, discussion of contemporary constitutional solutions should take into account international human rights protection instruments.

Article 15 of the European Convention of Human Rights is the most direct one. It provides that:

"1. 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.

2. No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war or from Articles 3 [prohibition of torture or of inhuman or degrading treatment or punishment], 4 (paragraph 1), [prohibition of captivity or slavery] and 7 [prohibition of retroactive criminal legislation]."

The freedom of the States parties to the Convention is thus limited when they restrict civil freedoms under emergency rule. This limitation is also included in the Constitutions of Central and Eastern Europe.

First of all, the principle of proportionality is established in a manner similar to that provided for in the Convention system. Under the principle of proportionality, emergency measures should be used only to the extent that they are necessary to counteract the danger (Article 17 of the Croatian Constitution, Article 55/3 of the Russian Constitution, Article 49/2 of the Romanian Constitution, and Article 16 of the Slovenian Constitution).

Also, those human rights are specified which cannot be violated even in times of emergency. This method is adopted in the Constitutions of Bulgaria (Article 57/3), Croatia (Article 17), Russia (Article 56/3), and Hungary (Article 8/4).

In another solution, the Constitution lists in detail the rights and liberties that are subject to restrictions, thus ruling out the restriction of the other ones (Article 145 of the Lithuania Constitution, Article 16 of the Slovenian Constitution).

Sometimes, as in Article 17 of the Croatian Constitution, a reservation is made that the "restrictions of rights cannot result in the inequality of persons due to race, colour, sex, language, religion, national or social origin" (similarly in Article 16 of the Slovenian Constitution).

Certain general interpretative principles are also introduced: "when restricting fundamental rights and liberties, their essence and significance should be protected" (Article 13/4 of the Slovenian Constitution).

In Poland the Interim Constitution does not include a catalogue of fundamental rights and does not determine which rights and freedoms can be derogated from under martial law or emergency rule. With respect to this issue Article 36, paragraph 2 and Article 37, paragraph 4, refer to the respective Acts.

Apart from civil rights, emergency rule may also result in a change in the organisation of State organs, particularly by increasing the powers of the executive in relation to those of the legislature. Notably, the President may be granted the power to issue special decrees with the force of law (Article 101 of the Croatian Constitution, Article 108 of the Slovenian Constitution, and Article 93 of the Romanian Constitution).

Sometimes this power is executed not independently, but at the motion of the government (Slovenia - Article 108) or with the countersignature of the Prime Minister (Romania - Article 99/2).

A less frequently met solution is the introduction of changes in the structure of State authorities under emergency rule. In Hungary, when the state of exigency is declared, the National Assembly sets up a Council of National Defence, which is constituted by the President, the Speaker of Parliament, the leaders of the Parliamentary Factions, the Prime Minister, the Members of the Council of Ministers, the Chief Commander of the Defence Forces and the Chief of Staff. The Council has the right to undertake special measures and to issue decrees (Article 19/b of the Constitution).

Besides the establishment of restrictions on the extent of interference into civil rights, the constitutions include provisions on other limitations of emergency powers.

Most often this is the prohibition on the dissolution of Parliament (Article 101 of the Croatian Constitution, Article 28/A/1 of the Hungarian Constitution, Article 37/2 of the Polish Interim Constitution, Article 93/2 of the Romanian Constitution, Article 109/5 of the Russian Constitution). This is related to prolongation of the mandate of Parliament if it expires during emergency rule

(Article 64/2 of the Bulgarian Constitution, Article 28/A/2 of the Hungarian Constitution, Article 37/2 of the Polish Interim Constitution, and Article 81 of the Slovenian Constitution).

In Hungary, during a state of exigency, the operation of the Constitutional Court cannot be restricted (Article 19/B/6).

In the Constitutions of Russia (Article 118), Bulgaria (Article 119/3), Lithuania (Article 11), Slovenia (Article 126) and Romania (Article 125/2), the creation of special courts is specifically prohibited, sometimes with the exception of a state of war (Lithuania).

There are also provisions that prohibit changes in the Constitution (Article 147 of the Lithuanian Constitution, Article 37/3 of the Polish Interim Constitution, and Article 148 of the Romanian Constitution) or in certain Acts, for example in electoral laws in Poland.

8. Control of the execution of emergency powers

The most frequent control measure mentioned above is the obligation imposed on the executive to present the act declaring emergency rule to the parliament to be approved or dismissed. It should be understood that lack of parliamentary approval is equivalent to the end of emergency rule.

Further, during emergency rule, Parliament may control the measures undertaken by the executive. The requirement of approval of emergency decrees by Parliament or by one of its chambers is included in the Constitutions of Croatia (Article 101), Romania (93/1), and Slovenia (Article 108).

Constitutional regulation of control of this type is most developed in Hungary. During the state of exigency, the President promptly informs the speaker of the National Assembly about the emergency measures undertaken. During the state of emergency, the Assembly or, when it cannot convene, its Commission of Defence, sits permanently. The Assembly or the Commission may suspend the use of emergency measures undertaken by the President (Article 19/C/3 of the Constitution). The measures introduced by decrees remain in force for thirty days, unless the period of their validity is prolonged by the Assembly or the Commission.

9. Responsibility of the organ executing emergency powers

The Constitutions do not provide for special ways of calling the President to account for an unjustified declaration of emergency rule or for the abuse of related powers.

Those provisions can thus be used which define the constitutional responsibility of the President more generally. For breach of the Constitution, the President may be removed from office by Parliament (Article 86 of the Lithuanian Constitution, Article 93 of the Russian Constitution, Article 95/1 of the Romanian Constitution), the Constitutional Court (Article 103 of the Bulgarian Constitution, Article 105 of the Croatian Constitution, Article 31/A/5 of the Hungarian Constitution, Article 109 of the Slovenian Constitution) or the Tribunal of State (Article 50 of the Polish Interim Constitution).

Conclusions

This survey leads to the conclusion that the framers of the constitutions of the countries of Central and Eastern Europe under discussion, with the exception of the Czech Republic, rejected the view that, as it is impossible to anticipate all possible dangers, by the same token, it is not possible to establish *a priori* by constitutional provisions the ways of coping with them. On the contrary, it was accepted that constitutional regulation of emergency rules provides a better protection against abuse of emergency powers. This approach seems to be more appropriate because, at the point where constitutions pass in silence over the question of emergency powers, additional interpretations are necessary to fill gaps in the law; as a result, controversies might arise, as well as arbitrariness of evaluation.

With all the diversification of constitutional regulation of emergency rules, in the countries under discussion one can see an attempt to make such an institution of emergency rules as effectively defends the democratic system, and which at the same time provides obstacles to the situation leading to dictatorship and to arbitrary interferences with civil liberties.

These goals may be achieved by granting the power to declare emergency rule to Parliament or to the head of the executive (the President), but under the supervision of Parliament. The supervision involves both the justification of the declaration of states of emergency as well as of the measures undertaken during emergency rule. Such checks are necessary to prevent the use by the executive of emergency powers to increase its status in an unjustified way, at the cost of other constitutional organs.

The differentiation of particular types of state of emergency allows one to respond in a gradual way, proportionate to the type of impending danger.

In States in the process of building democracy, human and civil rights and freedom are under special constitutional protection. This is reflected in the construction of emergency rules such that a "hard-core" of inalienable rights is retained, and such that other rights are restricted in scope only to the extent strictly necessary.

Obviously a complete review of the institutions of emergency powers would entail analysis of the provisions of those Acts that in greater detail regulate the way emergency provisions are executed. It would also be interesting to examine the practice of States in the matter. This would be, however, beyond the scope of this survey.

Second working session
"The National Rules (continued)"

a. A few basic ideas on the preconditions for instituting an emergency regime in a democracy
by Mr Yoichi HIGUSHI

b. The national rules in Germany
by Mr Theodor SCHWEISFURTH

c. Human rights and the functioning of democratic institutions under emergency situations in the Spanish constitution
by Mr Jaime NICOLAS MUÑIZ

d. Rules relating to emergency situations in Hungary
by Mr János ZLINSZKY

e. Crisis management under the Greek constitution
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f. Rules applicable in Romania during emergencies
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by Mr Giuseppe CATALDI

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a. A few basic ideas on the preconditions for instituting an emergency regime in a democracy by Mr Yoichi HIGUSHI

Professor Emeritus, Tokyo University, First Vice President of the International Association of Constitutional Law

I shall begin by pointing out a paradox: that the first speaker this afternoon comes from a country which has no constitutional provisions on emergency situations.

Is this a clear omission? Or is this silence itself an answer? That is the question which I shall try briefly to answer. I shall therefore pick up where Ms Kriari left off; this morning she started the discussion on the preconditions for being able to talk about an emergency regime which protects rather than undermines constitutional democracy.

It would be appropriate, however, to say a few words about positive law in Japan on this subject, as embodied in laws and parliamentary legislation.

The main point is that, in the first instance, the Prime Minister is responsible for dealing with emergencies, while Parliament has political control of the exercise of emergency measures and the courts retain judicial authority.

Let us consider the example of internal emergency situations as defined by the Law on the Police. In the event of a major natural disaster, riot or other emergency situations enumerated in the Law, the Prime Minister may declare a state of emergency, which must be debated in Parliament within twenty days. The direct legal effect of the declaration of a state of emergency is that the Prime Minister assumes direct control of the national and local police forces, which are normally run by the Police Committees, ie independent administrative committees at national or local level. No provision is made either for the suspension of

fundamental rights or for restrictions on constitutionally guaranteed rights other than the existing statutory restrictions applying in the ordinary course of events. This is regarded as a logical consequence of the lack of any specific constitutional provisions.

The Constitution, which was proclaimed on 3 November 1946 and entered into force on 3 May 1947, deliberately omitted such provisions for historical reasons.

The previous Constitution, ie the Constitution or, more accurately, the Imperial Charter of 1889, did indeed contain a series of provisions on emergency powers, for example Article 31, which stipulated that constitutional provisions defining subjects' rights and obligations could not prevent the exercise of the Emperor's prerogatives in the event of war or a national disaster. While it is true that this article was never applied, it nevertheless reflected the very essence of the pre-1945 authoritarian regime. Thus, it was impossible not to be against any system of emergency powers, upon the resumption of the process of democratisation in the country after 1945.

This state of affairs was not specifically Japanese. Immediately after the fall of the dictatorships in 1945, wariness with regard to emergency powers was more necessary than ever, the best-known example being the Grundgesetz in the original 1949 version.

While this was the case during the first process of democratisation around the world after 1945, the contrast is striking when we look at the second democratisation process since 1989.

In today's Europe, making provision for states of emergency is considered a necessity for democracy itself. As Mr Özbudun pointed out in his excellent paper, many people say that it is over-optimistic to believe that democracy can be maintained without provision being made for emergency regimes.

I would like to turn this statement the other way around. In my view, in order to assign an emergency regime the role of protecting democracy, it is essential to believe in the possibility of effectively controlling the government in power. From this point of view, it is not because of optimism but rather because of a certain degree of pessimism that, in a country like Japan, people have been and still are careful about giving an emergency regime constitutional legitimacy.

In contrast with Federal Germany, which in 1968 introduced constitutional provisions regulating in detail the state of emergency system, the Constitution's silence on this point still weighs heavily in Japan today. For instance, the proposal for an almost total overhaul of the Constitution made in 1994 by a leading right-

wing newspaper did not dare touch on this sensitive point, although it criticised public opinion's continued reticence on this subject as being due to an "allergic" reaction.

Certainly, we are faced with a dilemma.

On one hand, when the constitutional legitimacy of the exercise of emergency measures is not recognised, governments try to fall back on the notion of supra-constitutional full powers. Instead of "dictatorship by delegation", to use Carl Schmitt's expression, we see the risk of "sovereign dictatorship" emerging.

On the other hand, however, the more sophisticated the state of emergency system, the greater the risk of succumbing to the temptation of having recourse to this weapon, thereby by-passing the difficult process of laying the foundations of democratic society on a day-to-day basis.

Some would thus argue the case for restricting freedoms in order to preserve freedoms, and others would continue to say that the cure should not be worse than the illness. Two conditions would need to be met to control such a violent cure.

Firstly, the sick person's capacity to withstand the possibly fatal side effects of the medicine, in other words a sufficiently mature democracy. Secondly, the existence of good doctors, in which connection I would emphasise the importance of a community of liberal values between the countries of the region, which should keep watch over one another and show vigilance with regard to what is being done in the name of the exercise of emergency powers. Vigilance at international level, in a legal and, above all, judicial form, such as the European Convention on Human Rights, or in a more general and political form. This is, broadly speaking, what you have had in Europe since 1989 and is cruelly lacking in Asia.

From this point of view, I was encouraged to hear, in the last session of the colloquy, the report by Mr Oraá who stated that customary international law on human rights protection in emergency situations is developing.

He convincingly cites many reports and opinions of UN committees and experts. This intellectual and erudite source confers legitimacy on developing customary law. It is also important, as he emphasised, to distinguish between what States say and what they actually do. Some States resort to torture, but they no longer claim that this is a good thing. That is a fact. However, on precisely this point, the gap between developing customary law and current customary law remains enormous. There are no grounds for optimism, if we look at the practice, rather than simply the *opinio iuris*, of States.

In Europe, you can and must all play the indispensable role of "doctor" for each other, to ensure that doses of this dangerous medicine are reasonable. In Asia, decisions to introduce emergency powers are taken less to protect the liberal constitutional order than to maintain order full stop. I shall refer only to the imposition of martial law on 20 May 1989 which led to the tragic night of 3 June in TienAnMen Square.

We have to choose between these two risks. And, to be in a position to choose, we have to measure and precisely assess how mature a particular democracy is and how vigilant members of the international community are about their fellow members. These are the points which I would like to bring to your attention on the preconditions for instituting an emergency regime in democratic societies.

b. The national rules in Germany by Mr Theodor SCHWEISFURTH

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1. Historical background

It is well known that the Basic Law as a whole was drafted against the background of experiences with the Weimar Reichs-Constitution (WRV). This is true, not least with respect to the provisions regulating situations of emergencies. Under Article 48 para. 2 WRV the Reichs-President could exercise a commissionary dictatorship giving him the right to take measures necessary to restore public security or order; this right involved the suspension of fundamental rights and liberties such as the right to personal liberty, the inviolability of the home, the privacy of correspondence, post and telecommunications, freedom of expression, especially the freedom of the press, freedom of assembly and the freedom of association. Right at the beginning of the Nazi regime an ordinance of February 28, 1933 (known as the "Reichstag-Burning-Ordinance" - "Reichstagsbrandverordnung") suspended all politically relevant fundamental rights "until further notice"; this suspension lasted in fact until the end of the Nazi regime which, therefore, was truly characterised as a permanent state of emergency. It was the aim of the framers of the emergency provisions of the Basic Law to construct constitutional barriers against a repetition of such a development.

The original 1949 version of the Basic Law contained very few provisions on emergency powers. It has to be remembered that Germany at that time was still an occupied country. In Art.5 of the General Treaty between the Federal Republic of Germany and the three Western Powers of 1952/54 the occupation powers reserved themselves emergency rights which were to expire as soon as the German authorities would get the pertinent powers by the German legislator. This did not happen until 1968 when, accompanied by a vehement nation-wide

discussion, the German constitution-revising legislator inserted a new chapter "Xa. State of Defence" into the Basic Law - now usually called "the emergency constitution" - and approved seventeen emergency amendments to the Basic Law. Due to this constitutional history the emergency provisions, chapter Xa excepted, are scattered in the present version of the Basic Law and they are therefore difficult to survey.

2. Concept and Types of Emergency

The concept of emergency in the German constitution is based on the distinction between emergency situations in the proper sense and situations of constitutional disturbances (Verfassungsstörungen). Both situations have nothing in common.

Constitutional disturbances occur when federal state organs or the Länder of the Federation do not comply with their constitutional obligations. Two provisions of the Basic Law deal expressly with such situations. The first one is Art. 81 GG, the so-called *state of legislative emergency (Gesetzgebungsnotstand)*. In case a motion of the Federal Chancellor for a vote of confidence does not obtain the consent of the majority of the members of the Bundestag, the Federal President "may" dissolve the Bundestag (Art.68 GG). If, in that case, the Federal President does not dissolve the Bundestag, then Art. 81 GG opens the possibility for the Federal President to declare, at the request of the Federal Government, and with the consent of the Bundesrat, "a state of legislative emergency" with respect to a certain bill, if the Bundestag rejects that bill, although the Federal Government has declared it to be urgent. After the declaration of a "state of legislative emergency" and after a repeated rejection of the bill or adoption of it in a version stated to be unacceptable to the Federal Government, the bill shall be deemed to have become a law to the extent that the Bundesrat consents to it. It is rather curious that Art. 81 GG signifies this situation of a functional disturbance of the constitution as "(legislative) emergency". The historical background of this provision is the experience of the last years of the Weimar Republic when the Reichstag was unable to adopt bills due to the lack of majorities.

The second provision concerning a mere constitutional disturbance is Art. 37 GG, the so-called *federal enforcement (Bundeszwang*). This provision has in view the situation in which a Land fails to comply with its obligations of a federal character imposed by the Basic Law or another federal law. In this situation, the Federal Government may, with the consent of the Bundesrat, take the necessary measures by way of "federal enforcement" to enforce the compliance by the Land. To carry out this "federal enforcement" the Federal Government has the right to issue directives (Weisungen) to all Länder and their authorities. This situation, again, is not a genuine state of emergency.

Emergency situations in the proper sense, on the other hand, occur when *third sides* act upon or against the state, let it be from outside or within the state. Accordingly, the Basic Law distinguishes, in the classical manner, between the internal state of emergency and the external state of emergency; although the Basic Law itself does not use these terms, we will use them for systematic reasons. Internal and external States of emergency have several sub-types. With regard to the internal state of emergency, the Basic Law distinguishes between the state of danger to the public security and order, the state of danger caused by a natural disaster or by a particular grave accident, and the state of danger to the existence or to the free democratic basic order of the Federation or a Land (emergency of the State). The external state of emergency can occur as state of defence or as state of tension.

3. Internal State of Emergency

With regard to the internal state of emergency the relevant provisions of the Basic Law do not establish a different substantive regime of emergency law; they only modify in some respects the normal attribution of competencies with regard to the relations between the Federation and the Länder as well as among the Länder themselves.

3.1. The State of Danger to the Public Security or Order, Article 35 para. 2 (1) GG

According to Art. 35 para. 2 (1) GG a Land may, in cases of particular importance, call upon forces and facilities of the Federal Border Guard (Bundesgrenzschutz) to assist its police, in order to maintain or to restore the public security or order, if, without this assistance, the police could not, or only with considerable difficulty, fulfil a task. As the Federal Border Guard only acts to assist the police of the given Land, it is charged with the (executive) function of a Land and is therefore bound by the law of the Land.

3.2. The State of Danger caused by Natural Disaster or particularly Grave Accident, Article 35 paras. 2 (2) and 3 GG

Whereas the term "natural disaster" is quite clear, it should be mentioned, that the term "particular grave accident" also includes deliberately caused catastrophes such as sabotage or acts of terrorism; this understanding is not disputed.

In states of danger caused by natural disasters or particularly grave accidents it is important in a short time to mobilise forces as much as necessary in order to encounter the danger; the idea behind the relevant emergency rules is that in these cases the federal structure of the State shall not be an obstacle. Therefore, under

this type of emergency, the Länder, as well as the Federal Government, have emergency powers as follows.

A Land affected by a natural disaster or a particular grave accident is authorised to request the assistance of the police forces of the other Länder, the forces and facilities of other administrative authorities (e.g. the civil defence corps, emergency civil engineering corps, fire brigades), the Federal Border Guard and even the Armed Forces. These forces remain part of their original institutions, but they act as agents of the requesting Land, and they are therefore subject to its laws and its directives. This is also true with regard to the Armed Forces.

If the natural disaster or the accident endangers the territory of more than one Land, then it can be the Federal Government's turn. The Federal Government then may take the initiative but only "as far as it is necessary effectively to combat" the danger. The Federal Government may instruct the Land governments to place their police forces at the disposal of other Länder. This instruction of the Federal Government replaces only the request of the affected Länder; the assisting police forces are still regarded as forces of their "homeland", but, as they fulfil a task of the affected Länder, they are subject to their law and the directives of the respective Land government. Additionally the Federal Government is authorised to employ units of the Federal Border Guard and of the Armed Forces in support of the police forces. The legal status of these units differs from that of the (requested) police forces; these units are not placed at the disposal of the Länder, but exercise an original federal competence, they are not subject to a Land's directives. But the Federation will have to seek close co-operation with the affected Länder, because the Constitution aims at the support of the police by the federal units of the Border Guard and the Armed Forces.

3.3. The State of Danger to the Existence or the Free Democratic Basic Order of the Federation or a Land (Emergency of the State - *Staatsnotstand*), Art. 91, 87 a para. 4 GG

The "imminent danger to the existence or to the free democratic basic order of the Federation or a Land" is regarded by the Basic Law as the most serious type of internal emergency. Here the Basic Law has in mind revolutions, a coup d'état and other violent acts aiming at giving Germany a form of state different from that of the Basic Law or at the abolition of the state in its present existence. The notion of the "free democratic basic order", used in Art. 91, Art. 87a para. 4 and also in Art. 21 GG which deals with political parties and in Art.11 para. 2 GG, has been defined by the Federal Constitutional Court "as an order which represents a political order determined by the rule of law, based on the self-determination of the people according to the will of the respective majority and on liberty and equality, excluding any rule of force and arbitrary rule. Among the fundamental

principles of this order are at least: the respect for human rights as set forth in the Basic Law, particularly for the right to life and the free development of personality, the sovereignty of the people, the separation of powers, the responsibility of government, the executive subject to law, the independence of the courts, a multiparty system and equal opportunities for all political parties, including the right to constitutionally set up an active parliamentary opposition" (BVerfGE 2, 1 (12); 5, 85 (140)). In order to avert an imminent danger to this basic order, the Basic Law provides for emergency powers of the Länder and of the Federal Government.

A Land, after the exhaustion of all its possibilities, may, at its own discretion, request the assistance of police forces of other Länder, the forces and facilities of other administrative authorities or the Federal Border Guard (Art. 91 para. 1 GG); these are the same powers as in the state of danger caused by natural disasters or particularly grave accident (Art. 35 para. 2 (2)), with the exception, however, of requesting the assistance of the Armed Forces. The addressee of such a request must make sure that the legal conditions of the request are fulfilled, and, if they are, is obliged to render assistance to the respective Land.

The Federal Government has to safeguard the interests of the state as a whole. The Federal Government is therefore also entitled to take action, however only on the condition that the Land, where the danger is imminent, is not itself willing or able to combat the danger. In that case the Federal Government is empowered to place the police forces of the Land and of the other Länder under its own directives, and it may also employ units of the "federal police", i.e. the Federal Border Guard (Art. 91 para. 2 (1) GG). On the same condition, the Federal Government may, as far as it is necessary for effectively combating the danger, also issue directives to the Land governments if the danger extends to the territory of more than one Land (Art. 91 para. 2 (3) GG).

It is imaginable that the employment of the police forces and of the Federal Border Guard is insufficient to avert the imminent danger. In that case, and under the presupposition as envisaged in Art. 91 para. 2 GG, the Federal Government may employ the Armed Forces as an *ultima ratio*. The task of the Armed Forces is confined to the support of the police forces and the Federal Border Guard in the protection of civilian property and in combating organised and militarily armed insurgents (Art. 87 a para. 4 (1) GG).

3.4. The Functioning of Democratic Institutions in Internal Emergency Situations

Parliamentary control. It follows from the provisions just referred to that the Basic Law empowers the executive (Länder governments and Federal

Government) to determine internal emergency situations and permits the executive to make use of the emergency rules without parliamentary approval; no special promulgation of such determination or of the measures taken is necessary. Under the viewpoint of parliamentary control one may doubt whether this regulation in the Basic Law - based certainly on the idea that prompt action may be necessary - is really satisfactory. But we have to take into consideration that, compared with the normal situation, the extent of parliamentary control is not reduced at all in internal emergency situations. The attribution of competencies between the executive and legislative powers is unchanged. Parliament is not prevented from its regular controlling functions including the overthrow of government (Art. 67 GG - vote of no-confidence). Moreover, special provisions even widen the control of the representative bodies: All measures taken by the Federal Government in the state of danger caused by natural disasters or by particularly grave accidents must be revoked at any time upon the request of the Bundesrat and in any case without delay upon removal of the danger (Art. 35 para. 3 (2) GG). The measures taken by the Federal Government in the state of danger to the free democratic basic order shall be cancelled when the danger has been removed, "otherwise at any time at the request of the Bundesrat" (Art. 91 para. 2 (2) GG); the employment of the Armed Forces in that state of danger has to be terminated if the Bundestag or the Bundesrat so requires (Art. 87 a para. 4 (2) GG).

Judicial review. The rules on internal emergency do not restrict judicial control. It is of the utmost importance that no state action based on emergency law is withdrawn from judicial review, especially from that of the Constitutional Court. But one has to bear in mind that most of the requirements for the measures taken in the state of emergency are highly discretionary. The decisions of the courts will therefore usually be limited to the control of the abuse of constitutional powers. It is to be hoped that the most effective element of judicial control can be seen in the fact that the other institutions which are empowered to take action in emergency situations know that their actions are subject to judicial control.

Control by the people. Art. 20 para. 4 GG recognises a right of all Germans to resist any person or institution attempting to abolish the constitutional order of the Basic Law. This right, however, is strictly subject to the condition that no other remedy (especially through the courts) is possible. The right to resist can be regarded as the final control (by the people) of possible abuse of emergency situations.

3.5. Human Rights in Internal Emergency Situations

The respect for fundamental rights is ensured during the internal state of emergency. The Constitution neither suspends nor restricts fundamental rights and

liberties by a general clause or by general empowerment. There are only some special regulations in the articles on fundamental rights themselves. However, it cannot be excluded that the regular constitutional limits drawn to the fundamental rights might be extended in the case of an internal state of emergency, because in times of emergency the endangered public interest will gain more weight in relation to civil liberties influencing their evaluation in compliance with the principle of proportionality.

According to Art. 11 para. 2 GG the freedom of movement may be restricted by or pursuant to a law in the case of imminent danger to the free democratic basic order of the Federation or of a Land or in case of natural disasters or particular grave accidents.

On the other hand Art. 9 para. 3 (3) GG safeguards explicitly the right to strike during the internal state of emergency, it forbids directing the Armed Forces or the police forces against any industrial conflict.

4. External State of Emergency

4.1. State of Defence *(Verteidigungsfall)*, Art. 115a seq. GG

The state of defence marks the most dangerous threat to the existence of the state and the functioning of its organs.

4.1.1. *Definition*

Art. 115a GG defines the state of defence as the situation when "the federal territory is being attacked by armed forces or when such an attack is directly imminent". It follows already from the wording of this definition that the constitutional term "state of defence" is not identical to the term "state of war" under international law, because a "directly imminent attack" is not yet the outbreak of war. This follows also from the competence of the Federal President to issue declarations under international law pertaining to the existence of a state of defence; this point will be dealt with later.

4.1.2. *Determination, promulgation and termination of emergency rule*

The determination of the state of defence is made as follows: There must be a request by the Federal Government addressed to the Bundestag, then the determination shall be made by the Bundestag with the consent of the Bundesrat. The determination by the Bundestag requires a two-thirds majority of the votes cast, but this majority shall include at least the majority of the members of the

Bundestag, Art. 115a para. 1 GG. The consent of the Bundesrat requires at least the majority of its votes, Art. 52 para. 3 GG.

Under special circumstances, the determination of the state of defence can also be made by the so-called *Joint Committee (Gemeinsamer Ausschuß)*. This is a special constitutional organ which had been introduced into the Basic Law by the amendments of 1968. The Joint Committee consists of 48 people, two thirds of whom shall be members of the Bundestag delegated in proportion to the strength of its parliamentary groups, and one third shall be members of the Bundesrat, at which each Government of a Land appoints one member, Art.53a GG. Due to its composition the Joint Committee figures as a "small Bundestag" as well as a "small Bundesrat" acting in joint session. The Joint Committee is a permanent constitutional organ because it is formed at the beginning of each legislative period (§ 2 Rules of Procedure of the Joint Committee). The Joint Committee has to be informed by the Federal Government about plans to be put into effect in the event of a state of defence, Art. 53a para. 2 GG.

The special circumstances under which the Joint Committee can make the determination of the state of defence are defined as a situation imperatively calling for immediate action *and* the existence of insurmountable obstacles preventing the timely meeting of the Bundestag *or* there is no quorum in the Bundestag, Art. 115a para. 2 GG. The requirement for this determination is the same as for the determination by the Bundestag: a respective request by the Federal Government, a two-thirds majority of the votes cast, which shall include at least the majority of the members of the Joint Committee. The Joint Committee shall make the determination of the state of defence not until having received the information by the acting President of the Bundestag that insurmountable obstacles prevent the timely meeting of the Bundestag or that there is no quorum in the Bundestag, (§ 9 Rules of Procedure of the Joint Committee).

The determination of the state of defence has to be promulgated by the Federal President in the Federal Law Gazette. If this cannot be done in time, the promulgation shall be effected in another manner (Art. 115a para. 3 GG). A special "Law on simplified Promulgations and Announcements" (of July 18, 1975) provides for promulgation via radio, television and the press.

There is another provision in the Basic Law (Art. 115a para. 4) which provides for what can be called an automatic beginning or start of the state of defence. This is the case when the federal territory is being attacked by armed force and the competent organs of the Federation are not in a position to make the determination. In this situation the determination of the state of defence "shall be deemed to have been made and promulgated at the time the attack began". As soon as circumstances permit the Federal President shall announce such time.

When the determination of the state of defence has been promulgated (or shall be deemed to have been made and promulgated) *and* the federal territory is under armed attack, the Federal President may, with the consent of the Bundestag, or - under the circumstances described above - of the Joint Committee, issue "declarations under international law pertaining to the existence of a state of defence", Art. 115 a para. 5 GG. Such a declaration refers primarily to the determination of a "state of war".

The termination of the state of defence can be declared at any time by a decision of the Bundestag with the consent of the Bundesrat; the latter may request the Bundestag to make such a decision. When the prerequisites for the determination of the state of defence no longer exist, the state of defence must be declared terminated without delay. The decision of the Bundestag has to be promulgated by the Federal President, Art. 115 l para. 2 GG.

4.1.3. *The functioning of the democratic institutions during the state of defence: Changes in the distribution of powers and continuity of democratic institutions*

The legal consequences of the determination of the state of defence consist in a considerable shifting of legislative and executive competencies.

Shifting of legislative competencies. Upon the occurrence of a state of defence, the Federation shall have the right to exercise concurrent legislation even in matters belonging normally to the legislative competence of the Länder; (one of the most important of these matters is the police). In order to protect the interests of the Länder such laws, however, require the consent of the Bundesrat, (Art. 115 c para. 1 GG).

The Basic Law contains in chapters VIII, VIIIa and X detailed provisions regulating the administration and the fiscal system of the Federation and the Länder. Federal laws to be applicable upon the occurrence of a state of defence may regulate the administration and the fiscal system in divergence from these chapters to the extent required for averting an existing or directly imminent attack. Such laws also require the consent of the Bundesrat (Art. 115 c para. 3 GG).

During the state of defence a *simplified procedure of federal legislation* is provided for. Normally, Federal Government bills shall be submitted first to the Bundesrat; after the Bundesrat has stated its position on such a bill it is submitted to the Bundestag (Art.76 GG). Under the "emergency constitution", bills marked as urgent by the Federal Government shall be forwarded at the same time to the Bundestag and the Bundesrat; both bodies shall debate such bills in common and

without delay (Art. 115 d paras. 1 and 2 GG). The mediation procedure between Bundestag and Bundesrat by means of a special mediating commission provided for in Art. 77 GG is not applied.

In the simplified legislative procedure just described, legislation is carried out still by the Bundestag and the Bundesrat. But it is possible also that instead of these ordinary bodies the Joint Committee acts as an "emergency parliament". The prerequisite for this take-over of legislative competencies is the determination by the Joint Committee that insurmountable obstacles prevent the timely meeting of the Bundestag or that there is no quorum in the Bundestag. This determination must be made with a two-thirds majority of the votes cast, which shall include at least the majority of the members of the Joint Committee. The Joint Committee then has the status of both the Bundestag and the Bundesrat and exercises their rights as one body (Art. 115 e para. 1 GG).

This substitution of the Bundestag and the Bundesrat by the Joint Committee is certainly one of the most central state of defence provisions. But this provision shall guarantee the existence of a parliamentary body during the state of defence, however in a diminished composition, in case the parliament as a whole is unable to act. The alternative would have been the transfer of legislative powers to the Federal Government. The creation of the Joint Committee shall demonstrate that such a transfer is dispensable. It may be further criticised that it is the Joint Committee itself which is authorised to ascertain that the Bundestag and the Bundesrat cannot meet, because this amounts to a self-empowerment of the Joint Committee. But what should the alternative be? If the empowerment were dependent upon a decision of the Federal Government, the Government, by not taking such a decision, would be able to act in a parliamentary vacuum. Furthermore, one must point to the legislative restrictions laid upon the Joint Committee. The Joint Committee has not the competence to enact laws which revise the Basic Law or which render it ineffective or inapplicable either in whole or in part, nor the competence to enact laws concerning the transfer of sovereign powers to inter-governmental institutions (Art. 115 e para. 2 GG). Finally, the Bundestag may, with the consent of the Bundesrat, at any time repeal laws enacted by the Joint Committee and the Bundesrat may require the Bundestag to take a decision in this matter (Art. 115 l para. 1 (1) GG).

Shifting of executive competencies. Within the Federal Government the power of command over the Armed Forces, which is normally vested in the Federal Minister of Defence (Art. 65 a GG), passes to the Federal Chancellor (Art. 115 b GG).

According to Art. 115 f GG during the state of defence the Federal Government may, but only to the extent required by the circumstances, issue directives not only

to the independent federal administrative agencies but also to Land governments and even, when it deems the matter urgent, to administrative authorities of the Länder. Additionally, the Federal Government is also authorised to employ the Federal Border Guard throughout the federal territory, thus widening the Border Guards competencies. The application of this provision would effect a far reaching centralisation of the administrative powers with the Federal Government.

On the other hand, during the state of defence a decentralisation of administrative powers is also possible in case the appropriate federal organs are incapable of taking the necessary measures to avert the danger and the situation calls for immediate independent action in different parts of the federal territory. Under these conditions, the Länder governments are authorised, within their territorial area of jurisdiction, to issue directives to federal administrative authorities and to decide on the operation of the Federal Border Guard (Art. 115 i para. 1 GG). But such measures of the Länder governments may be revoked at any time by the Federal Government (Art. 115 i para. 2 GG).

During normal times, the Armed Forces do not exercise powers in the interior. During a state of defence the Armed Forces are authorised to protect civilian property and perform traffic control functions to the extent necessary to fulfil their defence mission. They may also be entrusted with the protection of civilian property in support of police measures (Art. 87a para. 3 GG).

No changes of judicial competencies. The legal position of the courts is not changed during a state of defence. With respect to the constitutional status and the exercise of the constitutional functions of the Federal Constitutional Court, Art. 115 g GG explicitly orders that they are not allowed to be impaired; the law on the Federal Constitutional Court may be modified by a law enacted by the Joint Committee, only in so far as the modification is required, also in the opinion of the Constitutional Court itself, to maintain the capability of the Court to function. The term of office of a member of the Constitutional Court due to expire while the state of defence exists shall end six months after the termination of the state of defence (Art. 115 h para. 1 (3) GG). Of course, it cannot be excluded that factual developments during the state of defence may prevent the courts from exercising their functions, but such a factual situation cannot be mastered by the emergency constitution.

The constitutional prohibition of extraordinary courts (Ausnahmegerichte, Art. 101 GG) is not suspended during the state of defence. Art. 96 para. 2 GG, however, allows the establishment of special federal military courts for the Armed Forces to which the jurisdiction over its members would pass in the state of defence.

Continuity of the democratic institutions. Taking into account that the normal functioning of democratic institutions might be impossible during the state of defence and providing for substitute organs such as the Joint Committee, the Basic Law principally aims at the continued functioning of constitutional bodies during the state of emergency as well as in the period following immediately after its termination. This is visible in the following provisions: During the state of defence the dissolution of the Bundestag is excluded (Art. 115 h para. 3 GG). As elections to the parliaments could be impossible in practice, the Bundestag and the Land parliaments remain in power, their legislative terms, due to expire during a state of defence, expiring six months after the termination of the state of defence. The term of office of the Federal President due to expire while the state of defence exists shall end nine months after the termination of the state of defence (Art. 115 h para. 1 GG).

It should be stressed that members of the Federal or the Länder Governments are not protected by similar rules. An overthrow of the Federal Government is possible and may be executed even by the Joint Committee. Thus the parliament and the Joint Committee respectively retains the full power to control the executive.

4.1.4. *Human rights during the state of defence: Restrictions of fundamental rights and liberties*

A special feature also of the "emergency constitution" of the Basic Law is the absence of a general clause concerning the suspension or restriction of fundamental rights and freedoms. Restrictions are only admissible where the Basic Law so explicitly provides.

Within the Chapter "Xa State of defence" there is only one provision of this kind - Art. 115 c para. 2 GG - referring to expropriation and deprivation of liberty. This provision allows for provisional compensation in the event of expropriation and deprivation of liberty not based on the order of a judge for a period not exceeding four days instead of one day normally. Such deviations from Art. 14 and Art. 104 GG have to be regulated by federal law to be applicable upon the occurrence of a state of defence.

Likewise, as in internal emergency situations, the right to freedom of movement can be restricted by a law also during the state of defence (Art. 11 para. 2 GG). Laws serving defence purposes may also provide for also restrictions to the privacy of the home (Art. 17 a para. 2 GG).

Art. 12 a paras. 3, 4 and 6 GG allow restrictions of the right to the free choice of occupation or profession and exceptions from the principle that no occupation

may be imposed on any person. Thus persons liable to military service who are not required to render service may in general be assigned to an employment involving civilian services for defence purposes, including the protection of the civilian population. Women between eighteen and fifty-five years of age may be assigned to services in the civilian health system or in the stationary military hospital organization, but women may on no account render service involving the use of arms. All these restrictions are possible only by or pursuant to a law.

One may wonder, but it is really true, that the right to strike in order to safeguard and improve working and economic conditions is guaranteed not only during internal States of emergency but even during the state of defence (Art. 9 para. 3 GG).

Art. 10 GG deserves a special comment. In its original wording in 1949 it stated that the "privacy of posts and telecommunications shall be inviolable. This right may be restricted only pursuant to a law". The amendment of 1968 provides "that the law may stipulate that the person affected shall not be informed" of the restriction if it "serves the protection of the free democratic basic order or the existence or security of the Federation or a Land". The amendment further provides that instead of recourse to the courts, review shall be conducted by bodies and subsidiary bodies appointed by parliament. On the basis of Art. 10 GG the "Law on restriction on privacy of correspondence, posts and telecommunications" was enacted on August 13, 1968. This law is applicable independently from the existence of any state of emergency but it may gain enhanced importance during states of external as well as internal emergency.

As the ordinary courts and especially the Constitutional Court continue to exercise their functions, they are ready to protect the fundamental rights and freedoms of people also during the state of defence. It is of the utmost importance for this protection that the principle of the inviolability of the dignity of man laid down in Art. 1 Basic Law is untouchable also in a state of emergency. The same is true with respect to Art. 19 para. 2 prohibiting any state action that would directly affect the substance or core of any protected fundamental right.

4.2. State of Tension *(Spannungsfall)*, Art. 80 a para. 1

4.2.1. *The meaning (ratio legis) of Art. 80 a GG*

As we have explained above, certain provisions of the Basic Law are applicable only in the state of defence and in other (internal) emergency situations. The same is true for so-called simple emergency statutes. These statutes are debated, enacted and promulgated before the state of emergency arises. This anticipated enactment of emergency statutes makes good sense because law-making is not under the

pressure of an actual emergency situation and can be performed by intensive and relatively calm parliamentary discussions. The promulgated emergency statutes, as well as the pertinent emergency provisions of the Basic Law, represent a special category of federal law: they are in force but their application is possible only in the state of defence. Art. 80 a GG now paves the way to apply legal provisions of this kind already in a situation which is called *state of tension*.

4.2.2. *Definition*

The Basic Law does not define the term "the state of tension", but the common understanding is that the term is attached to the state of defence in that it designates a situation preceding the state of defence. State of tension designates an international dangerous situation, a crisis which might develop into an armed attack and thus cause a state of defence. It is self-evident that in such a situation it would be to the detriment of the Federal Republic of Germany and to the advantage of a potential aggressor if preparatory measures for the case of attack were not legally possible until an attack actually starts. Art. 80 a GG allows such preparatory measures. Thus the state of tension is the phase traditionally named "mobilisation".

4.2.3. *Determination, declaration and termination of emergency rule*

It is the Bundestag which in principle determines, with a two-thirds majority, that a state of tension exists; the consent of the Bundesrat is not necessary. Such a determination, however, may cause an escalation of tensions. To avoid this, the Basic Law provides that instead of a spectacular express determination of a state of tension, the Bundestag simply consents to the application of specific emergency statutes. To avoid the escalation of tensions also seems to be the reason why in this case only a simple majority of the votes cast is required, and a special promulgation or declaration of the state of tension is not stipulated by the Basic Law.

There is a third way to apply the pertinent legal provisions prior to the state of defence. The application of such legal provisions is admissible by virtue of and in accordance with a decision taken, with the approval of the Federal Government, by an international organ within the framework of a *treaty of alliance* (Art. 80 a para. 3 GG). In this case the consent of the Bundestag is not required. This provision refers to the membership of Germany in NATO and WEU.

All measures taken by virtue of legal provisions applicable during the state of tension, including those taken after a decision by an international organ within the framework of NATO or WEU, shall be revoked whenever the Bundestag so requests (Art. 80a para. 2). Thus the parliament remains master of the situation.

4.2.4. *Legal provisions applicable during the state of tension*

These legal provisions are partly inserted in the Basic Law itself, partly in the simple emergency statutes.

The assignment of persons liable to military service who are not required to render service to an employment involving civilian services for defence purposes including the protection of the civilian population as well as restrictions of the right to give up occupation, profession or employment are possible by or pursuant to a statute already under the state of tension (Art. 12 a para. 5 and 6 GG).

As in the state of defence, the Armed Forces are authorised also during the state of tension to protect civilian property (also in support of police measures) and to perform traffic control functions to the extent necessary to fulfil their defence mission (Art. 87 a para. 3 GG).

The main simple emergency statutes are the Catastrophe-Protection-Law, the Work-Securing-Law both of July 9, 1968, the Economy-Securing-Law, the Food-Securing-Law, the Traffic-Securing-Law, all three of them of 1965 but revised in 1968, and the Civil-Protection-Law of 1976.

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(This report is partly based on Eckart Klein, The States of Emergency according to the Basic Law of the Federal Republic of Germany, in: Bernhardt/Beyerlin (ed.), Reports on German Public Law, Heidelberg, 1990, p. 63 - 79)

c. Human rights and the functioning of democratic institutions under emergency situations in the Spanish Constitution by Mr Jaime NICOLAS MUÑIZ

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Summary

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I. Types of Emergency Rule

The Spanish Constitution expressly mentions and regulates constitutional situations of exception or emergency rule in Arts. 55.1, 116, 117.5 and 117.6 (see Appendix). The basic - clearly guarantee-oriented - regulation is contained in Art. 116 of the Constitution which outlines in detail the main characteristics of the different types of possible emergency rule, reserving development of this regulation for an organic law, which was subsequently passed as Organic Law 4/1981. Article 55.1 enumerates the fundamental rights which may be suspended during the most severe states of emergency. And Article 117 delegates to the law the regulation of military jurisdiction in the most extreme cases of emergency rule, the "state of siege" or "martial law" to use the terms contained in the Constitution (Article 117.5), prohibiting immediately thereafter (Article 117.6) the establishment of emergency courts.

The Spanish Constitution adopts an obviously diversified or plural model for declaring emergency rule, referring to three specific situations which it terms "state of alarm," "state of emergency" and "state of siege" (or "martial law"). The Constitution contains particularly detailed provisions as to the conditions in which the different states of emergency may be declared, the aspects of the functioning of the institutions in these situations (especially regarding the Parliament and the Judiciary) and the limits of the duration of periods of emergency rule. However, the Constitution does not specify the causes for which the emergency state may be declared, leaving this task to the organic legislator. In effect, Organic Law 4/1981, based on constitutional empowerment, adopts a differentiated rather than a **gradualistic** model, in which the different types of emergency rule provided for are based on different causes, rather than on different degrees of intensity of response to a generic emergency situation or threat to the normal functions of the democratic institutions. Thus, the Organic Law defines the three different states of emergency provided for in the Constitution as:

- "state of *alarm*," defined (in Article 4 of the Organic Law) as a response to "natural" emergency situations in order to confront catastrophes, calamities or public disasters (paragraph *a*), health crises (paragraph *b*) and periods of scarcity of basic commodities (paragraph *d*). A state of alarm may also be declared in cases of paralysation of basic public services (paragraph *c*), that is to say, in situations which may be interpreted as more or less significant threats to public order, which might also occur as a result of a crisis of scarcity.

- "state of *emergency*," prescribed "when the free exercise of the citizen's rights and liberties or the normal functions of democratic institutions, public services essential for the community or any other aspect of public order are altered to the extent that the ordinary powers prove insufficient to reestablish or maintain them (Article 13.1 of the Organic Law). Thus, the "state of emergency" is conceived as a "civil" emergency or an emergency affecting "public order."

- the "state of *siege*" (or *martial law*) is defined as a military emergency which may be declared "in the event of an insurrection or threat of insurrection or act of force against the sovereignty or independence, territorial integrity and constitutional order of Spain which cannot otherwise be resolved" (Article 32.1 of the Organic Law.)

Special mention should also be made at this time of Article 55.2 of the Constitution which provides for the suspension of the individual citizen's rights outlined in this precept in the case of investigations involving the activities of armed bands or terrorist groups. This gave rise to the passage of special anti-terrorist laws, which are presently included in the Penal Code and in the Law of Criminal Procedure by means of Organic Laws 3/1988 and 4/1988, respectively. This has made possible the application of certain extraordinary measures in the absence of an emergency situation and without having to declare such an emergency, although the material extent of these measures is fairly restricted, especially in comparison to the actions which may be taken in these emergency situations and, more specifically, in a state of emergency or a state of siege.

II. Declaration of Emergency Rule

1. The competences and the procedures for declaring the different states of emergency vary in each case:

- a "state of *alarm*" may be declared by the Government itself by means of a decree issued by the Council of Ministers, which is communicated to the Congress of Deputies (the lower house of the Spanish parliament), and for which the Congress will immediately be called into session (Article 116.2 of the Constitution and Article 6.1 of Organic Law 4/1981). The presidents (chief executives) of the Autonomous Communities have the mere right to petition the Government to declare a state of alarm when an emergency only affects all or part of their respective territories (Organic Law Article 5).

- a "state of *emergency*" may be declared by the Government by means of a decree issued by the Council of Ministers (Articles 116.3 of the Constitution and 13.1 of the Organic Law), but with the prior authorisation

of the Congress of Deputies, which cannot be interpreted as a "blank check," since the petition for authorisation must specify the nature of the special "powers" requested and all other measures to be taken by the emergency regime (Article 13.2 of the Organic Law). This petition may be accepted or rejected as a whole, or may be amended by the chamber (Organic Law Article 13.3).

- a "state of *siege*" may be declared by an absolute majority vote of the Congress of Deputies, but at the exclusive request of the Government, (Article 116.4 of the Constitution and Article 32.1 of the Organic Law).

2. As to the maximum duration and renewal procedures for declarations of emergency powers:

- the declaration of a "state of *alarm*" has a maximum duration of fifteen days, and may be prolonged by means of an authorisation by the Congress of Deputies (Article 116.2 of the Constitution and Article 6.2 of the Organic Law).

- the Constitution establishes the maximum duration of a "state of *emergency*" as thirty days, which may be extended for an additional period of the same duration (Article 116.3 of the Constitution and Article 15.3 of the Organic Law).

- the Constitution does not specify a maximum duration for a "state of *siege*" (martial law), but rather indicates that the Congress of Deputies will establish the period in each case in its preceptive proclamation (Article 116.4). The Organic Law (Article 32.2) reproduces this constitutional premise *verbatim*. However, neither the duration of a state of siege or its renewal can be interpreted as being unlimited. Article 2.2 of the Organic Law clearly describes the temporary nature of all situations of emergency powers provided for in the Constitution. Another prerequisite imposed by Article 2 of the Organic Law in all cases of emergency is the indispensable character of the measures adopted, as well as of the duration of these emergency measures.

III. The Functioning of Legislative under Emergency Rule

1. The basic rule of the constitutional and legal regulation of emergency powers in Spain is that the declaration of an emergency may never interrupt the normal functioning of the constitutional powers of the State (Article 116.5, paragraph 2 of the Constitution, with special emphasis on the "Congress", and Article 1.4 of the Organic Law). Thus, no powers may be transferred other than

those few which are specifically outlined in the norms developing Article 116 of the Constitution, development reserved in its entirety for an Organic Law.

2. The Constitution expressly prohibits the dissolution of the Congress for the duration of any state of emergency, in accordance with the role that the Constitution itself reserves for the Congress of Deputies in relation to the declaration, authorisation or renewal (and control) of such states of emergency. Although the expressed exception only refers to the Congress, dissolving the Senate would not seem viable, given the fact that one of the automatic effects of declaring emergency powers is precisely an automatic calling into session of both chambers (Article 116.5, first paragraph, in fine).

3. Spanish regulation of constitutional emergencies does not contemplate specific transfers of legislative, nor does it imply changes in jurisdiction in legislative competences. Thus, no emergency decrees or executive orders exist in the strict sense, nor may decree-laws be considered as a normative instrument to be used in emergency situations. Beyond the constitutional text itself, which grants the Government the power to dictate decree-laws "in cases of extreme emergency or necessity," the jurisprudence of the Constitutional Court has endeavoured to clearly differentiate this power from the emergency situations in the strict sense.

IV. Civil Direction of the Emergency Rule. The Role of Military Courts

The civil authorities do not lose their power even in the case of a state of siege. Organic Law 4/1981 does indeed provide for the Government to appoint a military authority to execute, under its direction, the necessary emergency measures. But it is the Government to which this Organic Law confers all of the extraordinary powers, established in the Constitution and in the Organic Law itself, which are to be exercised in a state of siege, insisting that the Government will continue to direct military and defense policy. It is also obvious that the Government continues to exercise all other powers which are not mentioned in the Organic Law. Thus, at most, this would imply that military authorities would exercise specific and concrete powers involving the administration and the police.

In developing the provisions of Article 117.5 of the Constitution, Organic Law 4/1981, Article 35 limits itself to permitting the declaration of a state of siege, which as stated previously requires an absolute majority vote of the Congress of Deputies, to determine which crimes will fall under military jurisdiction while in effect. However, this does not imply a broad assumption of judicial power on the part of military courts, nor the possibility of establishing courts martial, "courts of exception" being specifically prohibited by the Constitution (Article 117.6).

V. Restrictions and Guarantees of Human Rights under Emergency Rule

1. Having eliminated the possibility to effect changes or to restrict the functions of the constitutional powers and organs of the State, the broadest measures which may be adopted in relation to the declaration of emergency rule involve the suspension of constitutional guarantees. In such cases the Spanish Constitution has adopted a very limitative position which the organic law has strictly respected. In effect, the Spanish Constitution, in contrast with the most common models in comparative law, has not chosen to establish an intangible nucleus and define a series of precepts or constitutional rights which are not susceptible to suspension or change, but rather has outlined an exclusive and rigorous list of the rights which may be restricted in situations of constitutional emergency. Thus, according to Article 55.1 of the Constitution,

- during a state of *emergency*, the only rights which may be suspended are those recognised in Articles 17 (right to personal freedom), with the exception of 17.3 (rights of the detained and right to legal assistance), which cannot be suspended; Article 18.2 (freedom from unreasonable search and seizure or inviolability of domicile) and 18.3 (secrecy of communications); Article 19 (freedom of travel and residence); Article 20.1.a. (freedom of expression) and 20.1.d. (freedom of information) and 20.5 (prohibition of confiscation of publications without a court order); Article 21 (freedom of assembly and demonstration); Article 28.2 (right to strike); and Article 37.1 (right of collective bargaining).

- during a state of *siege*, the list of suspendable rights is only increased as regards Article 17.3 (rights of the detained; right to legal assistance).

- the declaration of a state of *alarm* does not imply the suspension of any fundamental rights.

2. In any case, suspension is always partial, generally consisting of the possibility of intervening in these rights without the required court authorisation, but this does not imply the disappearance of guarantees nor of judicial intervention. As mentioned previously, Articles 16 ff. of the Organic Law regulate in detail the rights affected with a strong view to providing guarantees. This interest can be observed, in its most significant example, in the "emergency" regime applied to personal freedom: the maximum period of arrest has been set at ten days (normally less than the duration of the state of emergency), with the detainee being brought before a judge within the first twenty-four hours, the judicial authorities having broad rights of permanent inspection during the detention, which must always be based on concrete evidence that the person arrested is about to commit, if not a crime, at least alterations in the public order

(Article 16). This desire to provide guarantees can also be observed in relation to other affected rights such as the suspension of the right to inviolability of domicile (Article 18.2), which is qualified by a series of formalities and prerequisites, including immediately communicating to a judge the reasons for and results of the search. As to the suspension of freedom of information, the need for prior judicial authorisation to sequester publications does, indeed, disappear, but the government authorities have no powers to oblige the media to include obligatory content.

3. Finally, we should note that the suspension of fundamental rights is never an automatic and global consequence of the declaration of emergency powers, but rather the decree declaring a such a state must specify to what point it makes use of the Constitution's provisions for these matters (Article 116.2 in fine and corresponding articles of the Organic Law).

VI. Judicial Control of Emergency Powers

1. The Constitution and, more explicitly, Organic Law 4/1981 establishes rigorous judicial control over the measures and acts resulting during the duration of situations of constitutional emergency.

2. The intervention of the judiciary is governed by a series of general principles contained in the Constitution and in the Organic Law:

a. As established in Article 116.6 of the Constitution and defined in Article 3.2 of Organic Law 4/1981, the declaration of states of emergencies does not affect the principle of responsibility of the Government and its agents.

b. The general principle of right to appeal is recognised concerning all acts and dispositions adopted by the governmental authorities by virtue of their emergency powers (Article 3.1 of the Organic Law).

c. As concerns the institutions, the declaration of emergency powers does not affect the functions of the ordinary judicial organs nor their competences and jurisdiction.

3. In accordance with these principles, the ordinary judicial organs have broad powers of control over the measures adopted by virtue of the declaration of the different states of emergency, even at the same moment in which they occur. Control is exercised over acts and dispositions in both in their formal aspects, as well as their content.

4. As to the possibility of exercising judicial control over the declaration itself, this would be possible, according to extensive opinion, if Constitutional Court equated the parliamentary authorisation or declaration of emergency powers to a norm having the force of law. Given the past constitutional jurisprudence in matters of control of the conditions which justify Government decree-laws, in any case, the Constitutional Court could be expected to exercise self-restraint when called upon to judge the appropriateness of such declarations, but not when what is being judged are the formal aspects of the declaration and its material limits.

VII. Appendix

Article 55

1. The rights recognised in Articles 17 and 18, clauses 2 and 3, Articles 19 and 20, clause 1, subclauses, a) and d) and clause 5, Articles 21 and 28, clause 2, and Article 37, clause 2, may be suspended when the proclamation of a state of emergency or siege (martial law) is decided upon under the terms provided in the Constitution. Clause 3 of Article 17 is excepted from the foregoing provisions in the event of the proclamation of a state of emergency.

2. An organic law may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the Courts and proper Parliamentary control, the rights recognised in Articles 17, clause 2, and 18, clause 2 and 3, may be suspended as regards specific persons in connection with investigations of the activities of armed bands or terrorist groups.

Unjustified or abusive use of the powers recognised in the foregoing organic law shall give rise to criminal liability in as much as it is a violation of the rights and liberties recognised by the law.

Article 116

1. An organic law shall regulate the states of alarm, emergency and siege (martial law) and the corresponding powers and restrictions.

2. A state of alarm shall be proclaimed by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorisation the said period my not be extended.

The decree shall specify the territorial area to which the effects of the proclamation shall apply.

3. A state of emergency shall be proclaimed by the Government by means of a decree decided upon by the Council of Ministers, after prior authorisation by the Congress of Deputies. The authorisation for and proclamation of a state of emergency must specifically state the effects thereof, the territorial area to which it is to apply and its duration, which may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements.

4. A state of siege (martial law) shall be proclaimed by absolute majority of the Congress of Deputies, exclusively at the proposal of the Government. Congress shall determine its territorial extension, duration and terms.

5. Congress may not be dissolved while any of the states referred to in the present article remain in operation, and if the Houses are not in session, they must automatically be convened. Their functioning, as well as that of the other constitutional State authorities, may not be interrupted while any of these states are in operation.

In the event that Congress has been dissolved or its term has expired, if a situation giving rise to any of these states should occur, the powers of Congress shall be assumed by its Standing Committee.

6. Proclamation of states of alarm, emergency and siege shall not modify the principle of liability of the Government or its agents as recognised in the Constitution and the law.

Article 117

5. The principle of jurisdictional unity is the basis of the organisation and operation of the Courts. The law shall regulate the exercise of military jurisdiction strictly within military limits and in cases of state of siege (martial law), in accordance with the principles of the Constitution.

6. Courts of exception are prohibited.

d. Rules relating to emergency situations in Hungary by Mr János ZLINSZKY
Judge at the Constitutional Court, Member of the European Commission for Democracy through Law

<u>Different forms of emergency situations in Hungary</u>

The Constitution of the Republic of Hungary defines the different types of emergency situations and lays down the most important rules governing them.

The Constitution mentions three types of emergency situation: a state of siege, a state of emergency and a state of danger.

A state of siege is proclaimed in the case of a state of war or the immediate danger of an armed attack by a foreign power. During a state of siege the National Defence Council exercises the powers of the Government and the President of the Republic and the powers delegated by Parliament.

A state of emergency is proclaimed in the case of serious acts of violence posing a threat to the constitutional order or in the case of natural or industrial disasters. During a state of emergency, special measures are put in place by the President of the Republic by way of decrees.

The third type of emergency situation is a state of danger, when the Government may pass decrees contrary to certain laws. In a state of danger, the threat to public order, public safety etc. is not as serious as in a state of emergency.

In addition to the Constitution, there are two laws containing rules relating to emergency situations.

One is the National Defence Act containing detailed provisions on measures applying during states of siege and states of emergency. This act came into force on 1 January 1994.

The other is the Civil Defence Act defining detailed rules applying to states of danger. The act came into force on 14 June 1996.

Declaration of an emergency situation

According to the Constitution of the Republic of Hungary, the National Assembly :

- decides on the declaration of a state of war and on the question of the conclusion of peace;

- proclaims a state of siege in case of a state of war or of the immediate threat of armed attack by a foreign power (danger of war) and sets up a National Defence Council ;

- declares a state of emergency in case of armed action aiming to overthrow the constitutional order or gain absolute power, in cases of acts of violence committed with arms or by armed units that jeopardise the lives and material security of citizens on a mass scale, of natural disasters or serious industrial accidents;

- decides on the use of the armed forces inside or outside the country (Article 19(3), points g,h,i,j).

Such decisions must be adopted by a two-thirds majority of parliamentarians' votes.

If Parliament is prevented from making the decisions concerned, the President of the Republic may decree a state of war, announce a state of siege, set up the National Defence Council, and proclaim a state of emergency.

Parliament is deemed to be prevented from making the decisions concerned if it is not in session and convening it is impossible because of brevity of time or the events that have caused the state of war, siege or emergency.

The fact of such prevention and the reasons for the declaration of state of war, emergency or siege shall be established jointly by the Speaker of Parliament, the President of the Constitutional Court and the Prime Minister.

At its first session following the termination of prevention, Parliament reviews the justification of a state of war, siege or emergency, and decides on the lawfulness of the measures taken.

A two-thirds majority of the parliamentarians' votes is needed for such a decision (Article 19/A, paragraphs 1,2,3 and 4).

Special measures and powers

During a state of siege, the National Defence Council decides on the use of the armed forces inside or outside the country and the introduction of the special measures defined in a separate law.

The President of the Republic presides over the National Defence Council, which is composed of the Speaker of Parliament, the leaders of the parties" parliamentary groups, the Prime Minister, the ministers, and the Commander and Chief of Staff of the Hungarian Army.

The National Defence Council exercises:

- the rights temporarily vested in it by Parliament

- the prerogatives of the President of the Republic, and

- the powers of the Government.

The National Defence Council may pass decrees in which it may suspend the application of certain laws or depart from certain legal provisions. It may also pass other special measures, but may not suspend the Constitution.

Unless Parliament acts to prolong their validity, decrees passed by the National Defence Council become ineffective as soon as the given state of emergency is over.

The activity of the Constitutional Court may not be restricted even during a state of emergency (Article 19/B, paragraphs 1, 2, 3, 4, 5 and 6).

When a state of emergency is declared, the President of the Republic decides, in the case of Parliament's prevention, on the engagement of the armed forces.

During a state of emergency, the special measures as determined by a separate law are introduced by decree of the President of the Republic.

The President of the Republic immediately informs the Speaker of Parliament of any special measures introduced. During the state of emergency Parliament or, in case of its prevention, its Committee of National Defence, is in permanent session. Parliament or its Committee of National Defence may suspend the special measures introduced by the President of the Republic.

Special measures introduced by decree remain effective for 30 days except when their effect is prolonged by Parliament or, in the case of its prevention, by its Committee of National Defence (Articles 19/C, paragraphs 1, 2, 3 and 4).

In the event of sudden invasion by foreign armed forces, the Government, in accordance with the defence plan approved by the President of the Republic and until a decision on the proclamation of a state of emergency or state of siege, takes the measures necessary to contain the invasion and defend the territory. Such measures must be appropriate and proportionate to the attack. The Government immediately informs Parliament and the President of the Republic of the special measures taken (Article 19/E, paragraphs 1 and 2).

In a state of danger, the Government, empowered by Parliament, may pass decrees and measures that depart from the provisions of certain laws (Article 35 (3)).

The armed forces may be used during a state of emergency proclaimed in accordance with the provisions of the Constitution, in the case of armed action aimed at overthrowing the constitutional order or seizing absolute power, or in serious cases of armed violence endangering the safety and property of citizens on a mass scale, when the deployment of the police is not sufficient.

During a state of siege or state of emergency, Parliament may not declare its dissolution and may not be dissolved.

If the term of Parliament expires during a state of emergency or state of siege, its mandate is automatically extended until the end of the state of emergency or siege.

Parliament dissolved may be reconvened by the President of the Republic in case of a state of war, the threat of war, or any other emergency situation. In that case, Parliament itself decides on the extension of its mandate (Article 28/A, paragraphs 1, 2 and 3).

Human rights in emergency situations

During a state of siege, emergency or danger, the exercise of fundamental rights may be suspended or restricted, with the exception of those rights provided for in Articles 54 to 56, paragraphs 2 to 4 of Article 57, and Articles 60, 66 to 69 and 70/E of the Constitution.

Specifically, the fundamental rights which cannot be suspended or restricted are the following :

- the right to life and human dignity; no one may be arbitrarily deprived of these rights;

- no one may be subjected to torture, or to cruel, inhuman or degrading treatment or punishment;

- the right to liberty and personal security; no one may be deprived of these rights except for reasons defined in the law and in accordance with legal procedure;

- persons suspected of committing a criminal offence and detained, must be released or brought before a judge as soon as possible. The judge is bound

to hear the person brought before him, and must produce a written decision adducing his reasons for releasing or arresting the detainee;

- anyone who has been unlawfully arrested or detained is entitled to compensation;

- everyone has legal capacity;

- no one may be held guilty until his criminal responsibility has been established by a final court decision;

- persons subjected to criminal proceedings are entitled to the right of defence in every phase of the proceedings;

- defence counsel may not be called to account for opinions expounded while presenting the defence;

- no one may be pronounced guilty of, or sentenced for, any act that was not considered a criminal offence under Hungarian law at the time it was committed;

- everyone has the right to freedom of thought, conscience and religion;

- men and women enjoy equality in regard to all civil, political, economic, social and cultural rights;

- children have the right to enjoy the care and protection of their families, the State and society; the social rights of women, mothers, young people and families may not be restricted;

- national and ethnic minorities share the power of the people; the State ensures their participation in public life; their social and cultural rights may not be restricted;

- no-one may be arbitrarily deprived of his or her nationality, nor may any Hungarian citizen be expelled from the territory of the Republic of Hungary;

- a Hungarian citizen may return to Hungary from abroad at any time;

- during a legitimate stay abroad every Hungarian citizen is entitled to protection by the Republic of Hungary;

- citizens of the Republic of Hungary are entitled to social security. In case of old age, illness, disability, being widowed or orphaned, and in case of unemployment through no fault of their own, they are entitled to the provisions necessary for subsistence.

e. Crisis management under the Greek constitution *

by Ms Ismini KRIARI-KATRANI
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In time of national crisis (war, danger of war, civil disorder or armed insurrection) it may be that the ordinary state administration cannot function properly, while at the same time the demands for quick action are increasing. It is generally acknowledged that a democratic constitutional government must be temporarily altered, to whatever degree is necessary, to overcome the peril and restore normal conditions. The fact that the institutions of free government cannot operate normally in abnormal times has always been recognized.[28] It has been recognised further that the parliamentary system should adapt itself to the exigencies of emergency situations, i.e.:

a. A part of the legislative competences of the Parliament must be transferred to Government,

b. During the crisis the Government will have more power and the people fewer rights,

c. Guarantees must be foreseen for the protection of the rights of the individuals and for the elimination of the inherent danger of abuse of emergency powers.

The balance between power and limitations, between the demands of war or insurrection and the demands of a democratic tradition is exactly what is needed for the persecution of an operative system of emergency regulations.

A free people with a history full of wars and revolutions, like the Greeks, are bound to be well acquainted with the uses, dangers and problems of crisis management institutions.

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* *National Report on Constitutional Law at the XIIIth International Congress of Comparative Law (Montreal-Canada, August 19th-24th 1990), originally published in Révue Hellénique de Droit International 44 (1991), pp. 149 et seq. and reprinted with the kind permission of the Hellenic Institute of International and Foreign Law.*

[28] *See Cl. Rossiter, Constitutional Dictatorship, Princeton, N. J., Princeton University Press, 1948, 2nd ed. 1963, p. 5, with rich references to historical experiences.*

I. The historical precedent

Although the independent Greek state was established in 1830, it was much later that an emergency institution was included in the written Constitution. During the works of the Constitutional reforms of 1911 it was a prevailing idea that one should avoid to resort to uncodified rules of emergency. A fall-back on such rules may always give reasons to question the legality of the acts of the state-authorities, and this should be avoided. It was, therefore, considered essential that specific provisions were inserted into the revised Constitution of 1911 (Article 91). The French laws on the state of siege (Law of 1849 and Law of 1878) served as the principal models for the Greek regulation.[29]

The text of Article 91 runs as follows:

"In case of war or general mobilisation owing to external dangers, a special law will regulate the temporary suspension, in whole or in part of the state, of the fundamental rights established in Articles 5 *(habeas corpus)*, 6 (guarantee of release of detainees accused of committing a political crime), 10 (freedom of assembly), 11 (freedom of association), 12 (inviolability of domicile), 14 (freedom of the press), 20 (secrecy of communication) and 95 (jurisdiction and procedure provided for political crimes and press offences), of the Constitution or some of these articles and, by putting into effect the Law on the state of siege, as this Law may apply on each occasion, establish extraordinary tribunals.

This Law may not be modified in the course of the work of the Parliament summoned for its application. It is applied in whole or in part by a Royal Decree issued by authorization of the Parliament. In case of absence of Parliament the respective Law can be put into effect without its authorization by a Royal Decree, countersigned by the whole Ministerial Council, but then the Parliament must be convoked by the same Royal Decree, under penalty of nullity, even though its term has ended or it has been dissolved, in order to decide about the further application or abrogation of the said Decree. The Parliamentary immunity provided for in Article 63 shall enter into effect from the publication of the said Royal Decree.

The effect of the above mentioned Royal Decree shall not, in the case of war, be extended beyond the end thereof, in the case of mobilisation its effect shall *ipso facto* terminate after two months, unless in the meantime it be extended again with Parliament's permission."

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[29] *N. Alivizatos, Les institutions politiques de la Grèce à travers les crises 1922-1974, LGDJ., t. LX, 1979, p. 16; Ismini Kriari, Constitutional Institutions mastering State-Crises in Greece and Abroad, Ph. D. thesis (in Greek), Athens, 1985, p. 156 f.*

Article 91 can be considered as a true form of constitutional emergency regulation, in the sense that the possible means of mastering a crisis are foreseen and prescribed in the Constitution.

The Law envisaged by Article 91 was promulgated one year later, in 1912. The main regulations of this Law No. 4069 "On the State of Siege" provided the technical details about the declaration, the form and effects of this measure. The major consequences of the declaration of the state of siege were the following:

a. the powers of police for the maintenance of order pass in their entirety to the military authorities. The maintenance of law and order throughout Greece is placed in the hands of the Greek Army. Article 9 of the Law No. 4069 dictates that the military authorities have the power, among others: to conduct searches by day or night in the homes of citizens; to deport liberated convicts and persons who do not have residence in the area placed in the state of siege; to direct the surrender of arms and munitions and to proceed to search for and remove them; to forbid publications which it judges to be of a nature to incite or sustain disorder; to prohibit public assemblies (in case of suspension of Article 10); to proceed to summary arrests and detentions (in case of suspension of Article 5);

b. another effect of the state of siege is that the military courts assume jurisdiction over all crimes and other offences against the security of the State, the Government, and the public safety and order, whatever the status of the perpetrators and their accomplices (Article 5 of the Law No. 4069).

It is evident that this law was conceived as an emergency device, designed for use in periods of war and invasion. It may be most precisely defined as an extension of military rule to the civilian population.

The end of the state of siege brings a virtually complete return to normal government and civil life. The regular authorities are immediately invested with their former competence, the suspended rights are restored to their previous status, the ordinary courts replace the military tribunals.

During World War I and *until* the signature of the Treaty of Sèvres in 1920, the emergency provisions were used solely to the interest of state defence. In the following difficult years, which coincide with one of the most turbulent periods of modern Greek history, the emergency devices have been turned several times against the order they were established to defend. The technique which had been initially designed and evolved for the defence of the democratic state was used as a weapon for its destruction. The limitations provided did not prevent a use of

Article 91, clearly deviating from the expectations of its framers, a use that was finally to become an abuse. One should mention here the common remark that an institution is always one thing in the hands of its framers and another in the hands of its users.

The governments that followed the abdication of King Constantine in 1922 used Article 91 as a convenient means to control politically the situation in a country flooded by 1,500,000 refugees after the catastrophe in Asia Minor. The state of siege was used by the political leaders as a tool to conquer power or stick to it; further, as a means to suppress the request for social changes, at that time in full bloom.[30]

A similar article was incorporated in the Constitution of 1927 (Article 87), which proclaimed the Second Greek Republic. This Constitution proclaimed that the Head of the State is no longer the hereditary King but the elected President of the Republic.[31] The Second Greek Republic lasted less than nine years and "its history was chequered and uneasy. A confusing succession of coups and countercoups was interspersed with periods of more constitutional governments ...".[32] The period ended with the dictatorship of I. Metaxas, the birth-certificate of which was a royal decree proclaiming the state of siege, on grounds not provided by the Constitution. According to the practice of the period, the Parliament was already dissolved earlier, so there was practically no institutional barrier against abuse of the emergency regulations.[33]

Article 91 of the Constitution of 1952, the first Greek Constitution after the Second World War, had the effect of transferring the right of declaring the state of siege from the legislature to the Executive (the King on the recommendation of the Council of Ministers).[34] Furthermore the state of siege was not foreseen only

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[30] *About the constitutional problems of the time see: N. Alivizatos, op. cit., p. 19 f.; G. D. Daskalakis, "Die Verfassungsentwicklung Griechenlands", JöR 24, 1937, p. 266-334; I. Kriari, op. cit., p. 180 f. For a historical survey see R. Glogg, A Short History of Modern Greece, 2nd ed., Cambridge University Press, 1986, p. 118 f.; Chris Woodhouse, Modern Greece, A Short History, new fourth ed., 1986, p. 207 f.*

[31] *A translation and presentation of this Constitution see in H. Gmelin, "Die Verfassung der griechischen Republik", JöR Bd 16, 1928.*

[32] *Woodhouse, op. cit., p. 214.*

[33] *Th. Veremis, The Greek Army in Politics, 1822-1935, Ph. D. thesis, Trinity College, Oxford, 1974.*

[34] *The King had come back after gaining an overwhelming majority in the referendum of 1946.*

in the cases of war or partial mobilization owing to external dangers but also in cases of serious disturbances of or manifest threat to public order and to the security of the country from internal dangers, as well.

The instrument of the state of siege was now to operate openly in the case of civil war. The Government was to judge whether there was a serious disturbance or a manifest threat from the internal danger: the traces of the civil war were evident.

Article 91 was put into effect only once, but it was in order to bury the democratic government it was supposed to support. A group composed of middle ranking officers seized power claiming that the bad political situation left no other alternative but the intervention of the army for the salvation of the country from chaos and anarchy. By means of Royal Decree of April 21 (No. 280/1967) they declared the state of siege and used the whole instrumentarium of Article 91 in order to establish a plain dictatorship.[35,36]

After the collapse of the Junta regime, in the Greek Constitution of 1975 the form of government is that of a parliamentary republic (Article 1 para. 1). Head of the State is the President of the Republic, elected by the Parliament for five years. The Constitution of 1975 followed the general trends of the post World War II European Constitutions for the reinforcement of the Executive, as a consequence of the need for efficient and speedy action, dictated by the disasters that this war had left behind.[37]

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[35] *See M. Kaltsogia-Tournaviti, "Greece: The Struggle for Democracy", JöR, NF Band 32, 1983, p. 297-353 (299f); E. Nikolopoulos, Les notions de légitimité et de légalité en Grèce de 1967 à 1974. Thèse, Paris, 1980.*

[36] *"The "Fifth Revisionary Parliament of the Hellenes" resolved in the form of a declaration, the nature of the abolition of the democratic regime on April 21, 1967 in its major Resolution D of January 19, 1975 entitled "on the coup of April 21, 1967, as well as the persecution of crimes and adjustment of relevant matters": "Democracy has never been legitimately abolished. The revolutionary movement of April 21, 1967, an action carried out by a group of officers and the situation deriving from it till July 23, 1974, were a coup for the usurpation of state power and the sovereignty of the people. Governments imposed by it were governments of coercion" (Article 1) in N. Kaltsogia-Tournaviti, op. cit., p. 305.*

[37] *On the main features of the Constitution of 1975, see P. Dagtoglou, "Die griechische Verfassung von 1975", JöR NF, 1983, p. 354 f.; A. Pantelis, "Les grands problèmes de la nouvelle Constitution Hellénique", Paris, L.G.D.J., LXIV, 1979; A. Raikos, "Constitutional Law", t. A, B, C, Athens, 1990 (in Greek); D. Tsatsos, "Die neue griechische Verfassung", R. v. Decker & C. F. Müller, Heidelberg, 1980, p. 22 ff. The process of transition from military to civilian rule and ensuing civil-military relations are treated by C. Danopoulos, "From military to civilian rule in contemporary Greece", Armed Forces and Society, vol. 10, No. 2, 1984, pp. 229-250.*

According to the Prime Minister at the time, C. Caramanlis, the Constitution provided for what he called a balanced system of government: it allowed the Executive to act quickly, but it did not interfere with the responsibilities of Parliament. This view was met with scepticism by the majority of the legal scholars and by his political opponents. Much, if not most of the criticism was centred on the constitutional status and powers of the President. Many of the critics wanted to reduce his role in the legislative process, by taking away or limiting his veto-power and his right to call plebiscites. Also they believed that one of the major threats to democracy was his power to dissolve Parliament, if it be, according to his opinion "in obvious discord with the public sentiment or if its composition does not ensure governmental stability" (Article 41 para. 1). Especially the wording of Article 48, the emergency article, which ominously bore the same number as the ill-fated article of the German Weimar Constitution, had been more disturbing.[38] According to it the President had the power to declare the stage of siege. Although the countersigning of that decree by the Prime Minister or the Cabinet was required, which was a guarantee of this exceptional measure, debates in the Revisionary Parliament concerning the state of siege were extremely sharp.[39] Since there was no prerequisite for a previous proposal for its declaration, plus the fact that the President could appoint a Prime Minister of his own choice, the creeping dangers for the liberties of the people seemed to be manifest. Some of the critics who were fearful of the possibility of presidential dictatorship argued that the power to declare the state of siege should be vested in Parliament and that Parliament should be able to end it.[40]

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[38] *Article 48 para. 1: "The President of the Republic may suspend throughout the State or in part of it, the operation of the provisions of Article 5 para. 4, Articles 6, 8, 9, 11, 12 paras. 1 to 4, Articles 14, 19, 22, 23, 96 para. 4 and Article 97, or some of these articles, may put into effect the law on the state of siege in force at the time and establish extraordinary tribunals: in case of war or mobilisation owing to external dangers by presidential decree countersigned by the Cabinet, and in case of serious disturbance or evident threat against public order and the security of the State arising from internal dangers, by presidential decree countersigned by the Prime Minister. This law may not be amended during its application".*

[39] *The controversy reached its climax in the Revisionary Parliament during the debates on the provisions concerning the rights and duties of the President of the Republic. The opposition withdrew from the session during their discussion, in protest against the uncompromising positions of the governing party. See, N. Kaltsogia-Tournaviti, op. cit., p. 324.*

[40] *For a very severe criticism of the emergency regulations see A. Manessis, "The legal-political position of the President of the Republic in the Governmental Draft of the Constitution", Nomikon Vima, vol. 23, 1975, p. 448 f.; also A. Raikos, Lecturers on Constitutional Law, t. A, Athens, 1980, p. 294 (in Greek). About the protection of the human rights and liberties in Greece, see J. Iliopoulos-Strangas, "Grundrechtsschutz in Griechenland", JöR NF 1983, p. 395 f.*

Even greater problems arose during the debates about the new law on the state of siege (No. 566/1977). Many of its regulations repeat the provisions of the former law 4069/1912. Yet some of the new ones have been considered, in the light of the latest historical experience, as being apt to authoritarian interpretation. Among them the following regulation is considered unacceptable to democratic constitutional conception: during the state of siege pending cases at the Criminal Courts, concerning crimes against the security of the State, the form of Government and public order, can be transferred to military courts, if so requested. This regulation is openly derogating from the general principle of the prohibition of retroactive application of the criminal laws, which is guaranteed in Article 7 of the Greek Constitution.[41]

II. The Constitutional revision of 1986

The years 1985-1986 more than any others revealed the difficulties that frequently arise in democracies, when efforts are made to reconcile the basic requirements of national security and the protection of the rights of individuals and groups.

Already before the electoral campaign for its second term the Papandreou Government announced on March 9, 1985 its intention to proceed to a revision of the constitutional regulations concerning the duties, responsibilities and, according to its opinion, "prerogatives" of the President of the Republic.

During the debates of the proposed revision in Parliament, Papandreou and his supporters stated repeatedly that the main aim of the Revision was the enforcement of the parliamentary characteristics of the governmental system and the reduction of the President's role in the legislative process and as a controlling and regulating instance of the government. This view was not shared by many prominent jurists, who argued that the elimination of the powers of the President ended up in an enforcement of the powers of the Prime Minister, considering that the Parliament's role, though nominally increased, is in effect a very limited one.

In fact, after the Revision of 1986, the Prime Minister shares with the President of the Republic the right to address messages to the Greek people (Article 44 para. 3) and the right to decide about the declaration of the state of siege (Article 48 para. 2).

Considering that Greece's political system is basically bipartite with two major parties striving for power (the one having the majority of seats in Parliament under the control of the other), it is easily understood that a resolution of the Parliament

[41] *Article 5 para. 4 of the Law 566/1977.*

under the control of the governing party is nothing else but a decision of its leader.[42]

The revised article 48 runs as follows:

> "1. In case of war or mobilisation owing to external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime, the Parliament, issuing a resolution upon a proposal of the Cabinet, puts into effect throughout the State, or in parts thereof, the law on the state of siege, establishes extraordinary courts and suspends the operation of the provisions of Articles 5 para. 4 (prohibiting the individual administrative measures restrictive of the free movement or residence in the country, and of the free exit and entrance therein of every Greek), 6 (*habeas corpus*), 8 (the right to be tried as assigned by law), 9 (inviolability of domicile), 11 (freedom of assembly), 12 paras. 1-4 included (freedom of association), 14 (freedom of expression and freedom of the press), 19 (secrecy of communication), 22 para. 3 (prohibiting any form of compulsory work), 23 (freedom of coalition and the right to strike), 96 para. 4 (excluding civilians from the jurisdiction of Military, Naval and Airforce Tribunals) and 97 (jurisdiction of mixed jury Courts comprising the punishment of felonies and political crimes), or part of them. The President of the Republic publishes the resolution of Parliament.
>
> In the resolution of Parliament is stated the duration of the effect of the enforced measures, which cannot exceed fifteen days.
>
> 2. In case of absence of Parliament or when objectively impossible for the existing one to convene in time, the measures mentioned in the preceding paragraph are activated following a presidential decree issued on the proposal of the Cabinet.
>
> The Cabinet shall submit the decree to Parliament for approval as soon as its convocation is rendered possible, even when its term has ended or it has been dissolved, but no later that fifteen days.
>
> 3. The duration of the measures mentioned in the preceding paragraphs may be extended every fifteen days, following a resolution passed by

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[42] *See the justified remarks of A. Manessis, "L'évolution des institutions politiques de la Grèce", in Les Temps Modernes, Décembre 1985, Numéro spécial: "La Grèce en mouvement", p. 772-814; also J. Catsiapis, "Les dix ans de la Constitution grecque du 9 juin 1975", RDP, 1987, p. 399 f. (407 f).*

Parliament which must convene regardless of whether its term has ended or whether it has been dissolved.

4. The measures specified in the preceding paragraphs are lifted *ipso jure* with the expiration of the time – limits specified in paragraphs 1, 2 and 3, provided that they are not extended by a resolution of Parliament, and in any case with the termination of war, if this is the reason of their enforcement.

5. As of the operation of the measures stated in the previous paragraphs, the President of the Republic may, following a proposal of the Cabinet, issue acts of legislative content to meet the extraordinary emergencies, or to restore the operation of the constitutional institutions.

Those acts are submitted to Parliament for ratification within fifteen days of their issuance or of the convocation of Parliament in session.

Should they not be submitted to Parliament within the above-mentioned time limits, or not be approved by it within fifteen days of their submittance, they cease henceforth to be operative. The law on the state of siege may not be amended during its enforcement.

6. The resolutions of Parliament referred to in paragraphs 2 and 3 shall be adopted by the majority of the total number of members, and the resolution mentioned in paragraph 1 by a three-fifths majority of the total number of members.

Parliament resolves in one only sitting.

7. Throughout the duration of the operation of the measures of the state of siege specified in the present article, the provisions of Articles 61 and 62 of the Constitution shall become effective *ipso jure* regardless of whether Parliament has been dissolved or its term has ended.[43]"

A. Circumstances invoking the state of siege

It is obvious that the law makers of 1986 proceeded to narrow the conditions for its declaration, in order to prevent any promiscuity in its use. The respective law regulating the consequences of the declaration of the state of siege is the same law

[43] *Articles 61 and 62 refer to parliamentary immunities.*

No. 566/77 mentioned above, p. 6. So the state of siege can be declared in cases of:

a. war,

b. mobilisation owing to external dangers,

c. an imminent threat against national security, and

d. in the case of an armed coup aiming to overthrow the democratic regime.

It was the two last terms, which caused the majority of objections. The term "national security" is not sufficiently precise to be used as a basis for limitations and restrictions of the exercise of certain rights and freedoms of the individuals. On the contrary, it is a term with a very broad meaning and application. Therefore it could be used by the State to justify unreasonable limitations or restrictions on the exercise of human rights. It is, however, accepted, that the concept relates to measures enacted with a view to safeguard territorial integrity and national independence from any external threat. It covers any activity prejudicial to the very existence of the State.[44]

Interpretation problems might also arise from the use of the term democratic regime (i.e., in the case of an armed coup aiming to overthrow the democratic regime), since it is not connected with the existing constitutional order; as it has been argued, even the possible usurpers might use the term, in order to explain their motivation.

While deciding about the declaration of the state of siege the competent State organs (Parliament, Prime Minister, President) should take into consideration Article 15 of the European Convention on Human Rights, since Greece has ratified it (Decree 52/19.9.74).

Article 15 para. 1 reads as follows: "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".

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[44] *N. Alivizatos, The Constitutional Position of the Armed Forces (in Greek), Athens, 1987, p. 199 f.*

The Commission and the Court of Human Rights provided for by the European Convention on Human Rights have, in a series of cases heard during the past twenty years, interpreted the requirements of the above-mentioned Article 15.

The Commission's report in the *Lawless* case contains two declarations of principles: first, it declared its opinion that a "public emergency threatening the life of the nation" means an exceptional situation of crisis or emergency which affects the whole population, and not only certain groups, and constitutes a threat to the organized life of the community of which the State is composed; and, second, it reaffirmed its opinion that a certain latitude – a certain margin – of appreciation must be left to the Government in determining whether there exists a public emergency calling for exceptional measures on its part, but that at the same time the Commission has the power and the duty, under Article 15, to examine the evaluation made by Government and to pronounce on it.

The Court reached the same conclusion by reasoning which was similar in substance. In its opinion it is for the Court to ascertain whether the requirements set forth in Article 15 for the exercise of the exceptional right of derogation were met[45,46].

B. Declaration

The important "innovation" of the Revision (though it is a return to the pattern of 1911) is that it places the authority for declaring the state of siege in the hands of the Parliament, upon a proposal of the Government (Article 48 para. 1).

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[45] *Yearbook of the European Convention on Human Rights, 1961, p. 472 f. A brief summary of the jurisdiction of the Court of Human Rights by the Special Rapporteur from the Council of Europe see in E. I. Daes, Freedom of the Individual under Law, New York, United Nations, 1990, p. 189-190.*

[46] *Article 4 para. 1 of the International Covenant on Civil and Political Rights corresponds to Article 15 of the European Convention on Human Rights:*

> *"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".*

The conditions for the application of emergency measures prescribed in the Covenant are stricter than those in the European Convention. See the thorough analysis in E. I. Daes, op. cit., p. 183 ff. and 203. Greece has not ratified the Covenant yet.

It should be for the legislative authority to decide whether a particular situation amounts to such a state of emergency as to warrant the adoption of special legal measures. As Cl. Rossiter pointed out: "The power to suspend the laws should always be lodged in the hands of those to whom the people have entrusted their making".[47] This comprises the best guarantee that no advantage will be taken of a stressful political situation to curtail abusively fundamental rights and freedoms. Another criterion which suggests itself from Roman practice is that the decision to institute emergency regulations should never be in the hands of the man or the men who will be authorised to master the crisis. The execution of the state of siege is the responsibility of the Cabinet and the Army, but by the grace of Parliament alone do they function.

The Government can proceed to such a declaration in case of absence of Parliament or when objectively impossible for the existing one to convene in time. The pattern of the Joint Committee of the Basic Law of the Federal Republic of Germany (Article 53a), which is intended to function as a kind of substitute legislation in times of emergency, when the Parliament might be unable to convene, was not followed.[48]

It becomes obvious, however, that the solution adopted in 1986 provides more opportunity for the Parliament to be effective in determining whether an emergency actually exists. Scholars are, for the most part, rather critical of the solution followed, fearing that it gives the Government too much discretionary power in crisis situations. The following points deserve a more careful regulation:

a. the Government should not have such an ample field of judgment as to the real possibilities of the Parliament to convene;

b. in the case of declaration of the state of siege by presidential decree, the Parliament should be convoked by the same decree, under penalty of nullity, in a much shorter period that the foreseen fifteen days;

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[47] *Rossiter, op. cit., p. 84.*

[48] *A similar institution is prescribed in the Swedish Instrument of Government, Chapter 13:2-3: in times of war or immediate danger of war, if it is impossible to keep the entire Parliament (Riksdag) assembled, it is provided that a War Delegation established within the Riksdag will replace it, if circumstances so demand. See Constitutions of the Countries of the World, Dobbs Ferry, N.Y., Oceana Publications Inc., Binder X, p. 111-113.*

c. the required majority for the resolutions mentioned in paragraphs 2 and 3 should also be the one of three-fifths, in order to secure a wider consensus.[49]

C. Limitations on the use of Article 48

1. Limitations found expressly in the Constitution

Whether the original declaration is made by the Parliament or is first, in the event of its being absent, to be initiated by the Government, in either instance it is a Parliament's resolution which alone can make the state of siege effective and lasting.

Since the Parliament is to remain in session for the duration of the state of siege, its vigilance is the chief, if not the only barrier, provided in the Constitution against the potential misuse of Article 48.[50] It is the legislature which is the chief instrument of criticism and control of executive activity in modern emergency situations; it is the legislature which can translate these criteria into effective limitations.

The responsibility of the Cabinet to Parliament continues and acts as a strong deterrent upon arbitrary executive action. Through the principle of ministerial responsibility as well as through the Parliament's right to disapprove or to amend any measures adopted by the Government under Article 48 paras. 2-5, the representatives of the people constitute the foremost limitation on the employment of emergency powers. Furthermore, the Parliament continues to function as the legislative and controlling authority of the Constitutional scheme.

Moreover, it is foreseen that the resolution or decree establishing the state of siege shall fix the limits of its duration. At the expiration of that period the state of siege comes to an automatic end, unless a new resolution shall prolong its life.

In addition to this restriction of time there is a restriction of space: the declaratory resolution or decree is to designate the specific areas to which the state of siege is to apply. This provision is designated to prevent further careless extension of the state of siege, to areas not actually in a state of emergency.

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[49] *Alivizatos, op. cit., 209 f.; critical approach also by C. Chrysogonos, "The State of Siege before and after the Constitutional Revision", in Law and Politics, t. 13-14, p. 285-327 (in Greek).*

[50] *Rossiter, op. cit., p. 87, 89.*

Legislative measures taken by the Government according to Article 48 para. 5 must be to the extent strictly required by the exigencies of the situation. They should serve only two purposes: to meet the extraordinary emergencies or to restore the operation of the constitutional institutions.[51]

The presence of Parliament guarantees the constitutionality of the presidential handling, since the President of the Republic in his action under the emergency article, as in his every action, is liable to removal from office for high treason or intended violation of the Constitution (Article 49 para. 1). The respective procedure is launched by one-third of the members of Parliament (Article 49 para. 2).

It must be noted that all uses of emergency powers and all readjustments in the organisation of the government should be effected in pursuit of constitutional or legal requirements. It is an axiom of constitutional government that no official action should ever be taken without a certain minimum of constitutional or legal sanction. This is a principle no less valid in time of crisis than under normal conditions.

As far as the judicial protection is concerned, one can see that absolutely no check is provided upon the declaration of the state of siege, neither at the time of its proclamation nor after the disturbed conditions have been allayed. The declaration is considered an *acte de gouvernement* and is in no way subject to judicial control.

The *recours pour excès de pouvoir* is the normal way to proceed against a flagrant abuse of power. The Council of State (High Administrative Court) might annul a measure beyond the competence of the officials charged with the maintenance of order.

2. Limitations arising from the nature of the Constitution

Article 48 permits the Parliament or the Government to abridge twelve articles of the Constitution, but no others.

Constitutional provisions authorising limitations or restrictions on individual human rights must be drafted in very precise terms. They should be interpreted strictly and in such a manner as to ensure that human rights are not interfered with otherwise, than as clearly and expressly intended. Any doubt concerning the

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[51] *This regulation was inspired by Article 16 of the French Constitution of 1958. A thorough interpretation of this article see in M. Voisset, L'article 16 de la Constitution du 4 octobre 1958, t. XXXIX, Paris, L.G.D.J., 1969.*

interpretation of such constitutional provisions should operate in favour of the individual.

The principles governing limitations or restrictions on human rights are the following.[52]

a. The principle of respect for the dignity of the individual

Since no derogation from the right to human dignity is permitted according to the Greek Constitution, the prohibition of torture or inhuman punishment or treatment should not be subject to any restriction or derogation. Hence, arrested or detained persons should not be physically or psychologically mistreated. Even matters of great importance, directly concerning the general interest of the State cannot take precedence over human dignity, since this must be inviolable.[53]

b. The principle of non-retroactivity of criminal law

No criminal offence will be judged in any court, other than the one initially prescribed by law. According to the principle, not only the retroactive application of criminal laws and penalties is prohibited; the fundamental principle *nullum crimen nulla poena sine lege* is also confirmed.

c. The principle of proportionality

Legally permissible restrictions should not go further than is absolutely essential to achieve the given purpose and they must be commensurable with that purpose. This follows from the principle of commensurability, which has constitutional status and whose observance can be verifiable by the Courts.[54]

So no institution should be adopted, no right invaded, no regular procedure altered any more than is absolutely necessary for the conquest of the particular crisis.

d. Extent of police and military discretion as regards the use of force

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[52] *E. I. Daes, op. cit., pp. 178-179, 200.*

[53] *According to Article 2 para. 1 of the Greek Constitution, "Respect and protection of the value of the human being constitute the primary obligation of the State".*

[54] *The principle of proportionality is derived from the general principle of the rule of law. See the decision of the Council of State 2112/1984, Review of Public Administrative Law, t. 28, 1984 (in Greek), p. 86 f.*

No more force should be used than is believed in good faith and on reasonable and acceptable grounds to be necessary and appropriate in the circumstances: the amount of compulsion used should never be disproportionate to the gravity of the danger to be avoided.

In a country where the electorate is vigilant, the legislature potent and the Constitution a document of inordinate power and sanctity with deep roots in the history and conscience of the people, those limitations should suffice to prevent any abuse of constitutional emergency power. After all, what is decisive is how deep a Constitution is embedded in the consciousness of its citizens, how its formulations of values have penetrated into our ideological conceptions. Should these limitations not suffice, then the ultimate barrier to the possible abuse of Article 48 is found in Article 120 para. 4 of the Constitution: "Observance of the Constitution is entrusted to the patriotism of the Greeks, who shall have the right and the duty to resist by all possible means to whoever attempts the violent abolition of the Constitution".

f. Rules applicable in Romania during emergencies by Mr Petru GAVRILESCU

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Under the Romanian Constitution, two types of emergency measures are possible: a state of siege and a state of emergency.

The introduction of a state of siege or of emergency

Article 93 (1) stipulates that the President of Romania shall, in accordance with the law, institute states of siege or emergency in the whole or in part of the country.

The decree which is issued by the President of Romania, in accordance with the powers granted him/her by Article 93 (1), must be countersigned by the Prime Minister. As in the case of all decrees issued by the President of Romania in the exercise of his/her powers, this decree is also published in the Official Gazette of Romania. Until it is published a decree does not exist.

Duration of the state of siege or emergency

The Constitution does not stipulate the maximum length of time for which a state of siege or emergency may last.

However, the introduction of a state of siege or emergency is temporary, since the Constitution stipulates that if **Parliament** is not in session, it shall be convened *de jure* and **shall function throughout the state of siege or emergency.**

The role of parliament

The decision to introduce a state of siege or emergency is subject to approval by parliament. When instituting the state of siege or emergency, the President of Romania must request parliament to approve the measure adopted within 5 days of its adoption. If parliament is not in session, it must be convened *de jure* within 48 hours of the institution of the state of siege or emergency.

Parliament may not be dissolved during the state of siege or emergency and remains in session for the entire duration thereof.

Supervision by the legislative assembly

The approval of the legislative assembly of the presidential decree introducing a state of siege or emergency and of any other instruments adopted during the said period is required by the Constitution. As already stated above, Article 93 (1) and (2) of the Constitution stipulates both that the measure adopted by the President instituting a state of siege or emergency must be submitted to parliament for approval and that parliament shall be in session throughout the period of the state of siege or emergency.

Courts of law

In pursuance of the Constitution - Article 125 (2) - the setting up of special courts is prohibited.

The Constitution stipulates that justice shall be administered by the Supreme Court of Justice and by other courts established by law.

The Organisation of the Courts Act, No. 92, of 4 August 1992, Section 10 of which lists the various types of court, provides that, within the limits set by the law, military courts shall also operate. It is also stated that the powers of the courts are laid down in law.

Section 11 of the said Act, No. 92/1992, stipulates that the organisation and functioning of military courts are regulated by (another) law.

Restrictions on the exercise of certain rights or freedoms

Under the Constitution - Article 49 (1) - the exercise of certain rights or freedoms may only be limited by law, and only if unavoidable in order to safeguard national security, public order, health or morals and citizens" rights and freedoms, to ensure the smooth conduct of criminal investigations or to prevent the consequences of natural catastrophes or extremely grave disasters.

This is the most important constitutional guarantee of the lawfulness of the restriction: it may only be instituted by law and only if unavoidable in the situations mentioned. The list is exhaustive. The solution adopted by the Romanian Constitution makes it possible not only for the courts to monitor the administrative act by which the restriction of a right or freedom is introduced under the conditions and limits on the exercise of the right regulated by an organic law (Constitution, Article 48 (2)), but also for the Constitutional Court to monitor the constitutionality of such a restriction, since a law or order going beyond the limited cases provided for in Article 49 (1) of the Constitution would be unlawful on the grounds that constitutional provisions had been violated.

Article 49 (2) of the Constitution stipulates that the restriction must be proportionate to the situation that determined it and may not impinge upon the existence of the respective right or freedom.

Consequently it purely restricts the exercise of the right and cannot have the effect of abolishing the said right. In fact a right which has been restricted is a right which can be freely exercised within the limits set. This is a constitutional guarantee which flows from the fact that such rights and fundamental freedoms are enshrined in the Constitution.

Another guarantee provided for in paragraph 2 is the proportionality principle according to which the restriction of a right or freedom must be in proportion to the situation in which it is required. Consequently a restriction may be established only for the purpose for which it was intended, and within the limits strictly required by the situation justifying the restriction.

The constitutionality of each of the two above-mentioned conditions may be subject to verification by the Constitutional Court, meaning that there is a constitutional guarantee on an institutional basis.

The Romanian Constitution clearly provides that certain human rights and fundamental freedoms may not be restricted in any way: the right to life (capital punishment is prohibited -Article 22 (1) and (3)); the right to the physical and psychological inviolability of the person (no one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment (Article 22 (1) and (2)); the right of every person to bring cases before the courts for the defence of

his or her legitimate rights, freedoms and interests may not be restricted by any law (Article 21 (1) and (2)); freedom of thought and opinion, as well as freedom of religion, may not be restricted in any way (Article 29 (1)) etc.

A further constitutional guarantee of fundamental rights and freedoms is provided for in Article 148 (3), of the Constitution, according to which "The Constitution shall not be revised during a state of siege or emergency ... ".

Organic law

Under the Constitution - Article 72 (3) (e) - states of siege and emergency are regulated by an organic law. This law has not yet been passed.

g. The national rules in the Russian Federation by Mr Yuri KOUDRYAVTSEV

Head of Secretariat, Constitutional Court, Russian Federation

1. For the first time in Russian (and Soviet) political history the constitution of 1993 contains a large list of rights and freedoms based on the main international instruments on human rights, i.e. the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights of 1966 and the European Convention on Human Rights of 1950. Moreover, Article 15, section 4 of the Constitution provides that "Universally recognized principles and norms of international law as well as international agreements of the Russian Federation shall be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules which differ from those stipulated by law, then the rules of the international agreement shall apply".

Article 17, section 1 says: "In the Russian Federation human and civil rights and freedoms shall be recognized and guaranteed according to the universally recognised principles and norms of international law and this Constitution".

The constitutional provisions contain guarantees against unlawful and voluntary restrictions of human and civil rights and freedoms. For instance, sections 2 and 3 of Article 55 read:

"In the Russian Federation no laws must be adopted which abolish or diminish human and civil rights and freedoms. Human and civil rights and freedoms may be limited by federal law only to the extent necessary for the protection of the basis of the constitutional order, morality, health, rights and lawful interests of other people, and for ensuring the defense of the country and the security of the state".

Special attention is given to the state of emergency as a situation able to threaten the full implementation and protection of human rights. The text of Article 56 of the Constitution reads as follows:

> "1. In the conditions of a state of emergency, in order to ensure the safety of citizens and the protection of the constitutional order and in accordance with federal constitutional law, certain restrictions may be imposed on human rights and freedoms with an indication of their limits and the period for which they have effect.
>
> 2. A state of emergency on the entire territory of the Russian Federation and in certain areas thereof may be introduced subject to the circumstances and in accordance with the procedure stipulated by federal constitutional law.
>
> 3. The rights and freedoms specified in Articles 20, 21, 23 (Section 1), 24, 28, 34 (Section 1), 40 (Section 1) and 46-54 of the Constitution of the Russian Federation may not be restricted".[55]

2. According to the Constitution, the state of emergency may be introduced by the President of the Russian Federation, as provided for in Article 88 which reads: "The President of the Russian Federation, in the circumstances and in accordance with the procedure envisaged by federal constitutional law, shall introduce a state of emergency in the territory of the Russian Federation or in certain parts thereof and shall immediately inform the Federation Council and the State Duma of this".

Article 87 contains provisions related to the introduction of the martial law.

The introduction referred to in Article 88 is made by means of a presidential decree which, in accordance with Article 102, sections 1 and 3, shall be approved by the Federation Council by the majority vote of the total number of its members.

3. The federal constitutional law mentioned in section 2 of Article 56 above, has not yet been adopted. The Law of the Russian Soviet Federative Socialist Republic "On the State of Emergency" of 17 May 1991 is still in force. At the time the Law was acknowledged as one of the most successful legal acts meeting the standards of international law. The Law defines "state of emergency" as a special temporary legal regime regulating the activity of the bodies of state power,

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[55] *Article 20 (the right to life); Art. 21 (prohibition of torture); Art. 23, part 1 (inviolability of private life); Art. 24 (protection of confidential information about person); Art. 28 (freedom of conscience and religion); Art. 34, part 1 (the right to free economic activity); Art. 40, Part 1(right to housing); Arts. 46-54 (rights and guarantees in the criminal procedure).*

enterprises, institutions and organisations and permitting restriction of rights and freedoms.

The state of emergency may be announced only under circumstances that can lead to a real, extraordinary and inevitable threat to the safety of citizens or to the constitutional order of the Republic, the elimination of which is impossible without emergency measures.

Article 4 of the Law defines specific grounds for the announcement of emergency rule:

a. Attempts of violent change of constitutional order, mass disorder, violence, ethnic conflicts, as well as blockade of certain territories threatening the life and safety of citizens or normal activity of state institutions.

b. Natural disasters, epidemics episodes, serious accidents threatening the life and health of the population.

The law envisages specific forms of administration on the territories where the state of emergency takes place: the existing bodies of executive power or specially created bodies of executive power.

Emergency regime is a temporary measure and must not exceed the period of one or two months: should the need arise, its term may be extended.

There is one undoubtedly positive feature in the Law: it contains a closed list of measures that may be applied under an emergency regime (articles 22 and 23). These measures include:

- a special regime of entry, departure and movement;
- intensified protection of public order and the objects of vital communications;
- the prohibition of strikes;
- the restriction of transport movement and its control,
- limitations on the freedom of press and other mass media by means of preliminary censorship, provisional seizure of technical means and duplicating machines;

- suspension of the activity of political parties, public organisations and movements which impede the normalisation of the situation;

- control of documents and, in exceptional cases, if there is information concerning weapons, searches on persons or within dwellings and means of transport;

- restriction or prohibition of arms' sale, sale of alcohol, provisional removal of arms, ammunition, poisonous substances;

- deportation of the infringers of public order who are not inhabitants of the territory at their own expense to the places of their permanent residence or out of the territory where the state of emergency is announced.

Article 27 of the Law stipulates the prohibition of measures that may justify torture, cruel, inhuman or degrading treatment or punishment or the restriction of the right to life, the right to freedom of thought, conscience, religion, the right to freedom from retroactive criminal legislation instituting a criminal offence or enhancing punishment. This list of restrictions almost repeats the provisions of Article 4, part 2 of the Covenant on Civil and Political Rights.

It should be noted, however, that some discrepancies with the Constitution of 1993 still exist. Among them:

a. Unlike the Constitution of 1993, the law in its Section V (Articles 26-36) contains no closed list of rights, the restriction of which is prohibited during the state of emergency;

b. Only the President has the right to announce the state of emergency (Article 88 of the Constitution). But the Law gives this right also to the legislative and executive bodies of the Federation and of its component entities (on their territories);

c. The Federation Council, according to the Constitution either approves or disapproves the presidential decree on the state of emergency. The Law, however, stipulates the right of the Parliament (former Supreme Soviet) to make changes and amendments to the decree, to control the territories concerned as well as to abrogate the emergency regime;

d. The Law provides for an agreement of the local authorities as a precondition for the announcement of the state of emergency caused by natural disasters, epidemics and serious accidents;

e. The Law allows alteration of the territorial jurisdiction of criminal and civil cases upon decision of the Supreme Court. This provision contradicts Article 47 of the Constitution which guarantees to each person "the right to have his (her) case heard in the court and by the judge within whose competence the case is placed by law".

These discrepancies obviously need correction. But it should be borne in mind that, according to the transitional provisions of the Constitution, "laws and other legal acts which were in force on the territory of the Russian Federation before this Constitution comes into force shall apply to the extent that they do not conflict with the Constitution of the Russian Federation".

Provisions regulating the actions of state bodies in emergency situations can be found also in the "Law on the President of the RSFSR" of 24 April 1991, the "Law on the Security" of 5 March 1992 and the "Law on the Defence" of 31 May 1996.

According to Article 5 of the "Law on the President of the RSFSR", the President:

"9. heads the Security Council of the RSFSR the structure, competence and order of formation of which are regulated by the law;

...

11. takes measures to safeguard the state and social security of the RSFSR ...;

12. in accordance with the Law of the RSFSR announces the state of emergency ..."

4. The state of emergency was announced in recent years on a number of occasions in some parts of the Russian Federation.

First, the so-called State Committee on Emergency Rule, illegally created by a group of former communist leaders, announced the state of emergency in Moscow on 19 August 1991, while the legitimate President of the USSR was blocked in his summer house on the Black Sea coast. By 21 August 1991 the riot was suppressed, the state of emergency lifted and the organisers of the *coup d'état* arrested.

A state of emergency caused by continuing mass disorder and ethnic armed conflicts accompanied by violence against the civilian population was announced several times in 1992-1995 in the republics of North-Ossetia and Ingushetia (North Caucasus) or in their respective parts.

On 3 October 1993, by the decree of the President N 1575, the state of emergency caused by the armed conflict between the federal legislative and executive branches of power was announced in the city of Moscow. The decree was later accompanied by other decrees and governmental decisions related to the peculiarities of the legal order, restriction of rights, functioning of energy systems and transport.

5. In the majority of cases, state power within the territorial limits of the state of emergency was vested in "temporary administrations" or other *ad hoc* bodies of power supported by the military. No special courts were organised in accordance with Article 118 which provides that "the judicial system of the Russian Federation shall be established by the Constitution of the Russian Federation and federal constitutional law. The creation of extraordinary courts shall not be permitted".

6. The most tragic events have taken place in the Chechen Republic. The federal military and police forces there have made numerous attempts to disarm unlawful paramilitary groups of the local activists. Dozens of thousands of soldiers and civilians from both sides were killed and wounded. Restrictions of rights and freedoms took place.

It should be noted, however, that no state of emergency in Chechnya has been formally announced. The federal authorities based their actions on the Constitution, the "Law on the President of RSFSR" and the "Law on the Security".

The Constitutional Court of the Russian Federation, according to Article 125 of the federal Constitution, verified the constitutionality of the set of acts related to the military activity in Chechnya, and announced its decision on 31 July 1995. The Court considered constitutional the majority of the provisions aimed against the threat the Chechen separatist regime and its military forces had become for the constitutional order and territorial integrity of the Federation and the rights and freedoms of the people. Only two provisions were recognised incompatible with the Constitution, namely: on the enforced expulsion from Chechen territory of those "dangerous for the security of society" and on the restriction of the rights of journalists.

The complicated and multinational discussion about the Chechen problem continues in Russia and outside. I am convinced that the problem must and shall be solved in a democratic, peaceful, just and fair way with full respect to the generally recognised individual, collective and people's rights and freedoms.

h. The national rules in the Republic of Belarus by Mr Alexander VASHKEVICH

Professor at the Belarusian State University, Judge at the Constitutional Court of Belarus

It is rather difficult even to imagine a Constitution of a State which does not mention the state of emergency.

In the 19th century a well-known Russian lawyer N. Korkunov wrote:

"In the life of any State there may be moments when sovereignty and integrity are at stake, when the existence of the State fully depends on this very minute. If an individual has a recognised right for self-defence in extreme conditions and necessity, a State cannot be deprived of such a right either. Hence, in the circumstances of a specific external or internal danger, the State has all rights to take extraordinary measures, temporarily limiting civil freedoms".

Nevertheless the first edition of the 1978 Constitution of the Republic of Belarus does not mention the state of emergency. Obviously the legislators believed that in a "developed socialist State" a state of emergency was totally out of the question.

The Chernobyl catastrophe, national hostilities on the territory of ex-Soviet Union/Karabagh etc, proved the contrary. On 27 October 1989, an Amendment to the Constitution was adopted providing for the duty of the Supreme Soviet of BSSR Presidium to consider, together with the Supreme Soviet of USSR Presidium, the declaration of a state of emergency on the territory of Belarus or part of it "to defend the interests of the State and the security of Soviet citizens". The USSR Law legally regulating the state of emergency, its declaration, and measures that may be taken, was adopted on 3 April 1990.

The collapse of the USSR and the acquisition of sovereignty by the Republic of Belarus made it necessary to introduce the necessary provisions on the state of emergency into Belarussian legislation.

The 1994 Constitution contains 6 Articles directly concerned with the state of emergency and regulating various aspects of such a state.

To what extent do they correspond to Article 4 of the International Convention of Civil and Political Rights, signed by Belarus, and to Article 15 of the European Convention of Human Rights and Freedoms. To answer this question we will have to analyze the Fundamental Law of Belarus, which fixes the following cornerstone notions.

1. According to part 18 of Article 100, it is the President who has the right to declare a state of emergency. His decision, though, has to be approved by the Supreme Council within three days. Parliament can either accept the President's decision or not.

The Constitutional Court has the right to check whether the President's decision conforms to the constitutional provisions and to international *agreements* ratified by Belarus. The Court can annul any decision which does not comply with the substantive obligations of the above-mentioned documents.

2. Article 100, 18 provides the list of all conditions which may lead to the introduction of a state of emergency. They are:

a. natural calamities;

b. catastrophes;

c. public disorders, accompanied by use of force or threat of use of force by groups of people or organisations, that may endanger the life and health of people, territorial integrity and the existence of the State.

3. The Constitution directly envisages the adoption of a special Law on the State of emergency by 15 March 1996.

4. According to Article 72, elections cannot be held during a State of emergency. Furthermore, no amendments to the Constitution can be made (Art. 148). We should also add that according to Article 7 of the Law on referendums, no referendum issues can be discussed or referenda held when there is a state of emergency.

5. In full accord with international law, even a state of emergency cannot limit:

a. the right to life;

b. the right not to be subject to torture, cruel, inhuman or humiliating treatment or punishment, not to be used for medical or other experiments without consent;

c. the presumption of innocence;

d. the right to define one's own attitude to religion, to profess alone or in a group any religion or none at all, to express and propagate religious beliefs, or to perform religious cults, ritual and rites (Article 63).

Thus, in general, the Constitutional provisions of the Republic of Belarus do not contradict international human rights standards. They are to be the foundation stone for the Law on the state of emergency which will shortly be discussed by Parliament.

In my opinion, the Law should also provide for the immediate convocation of Parliament automatically after the declaration by the President of the state of emergency, as in the 1978 Constitution of Spain.

i. Some thoughts on the suspension of fundamental rights in emergency situations within the Italian legal system by Mr Giuseppe CATALDI

Professor, University of Naples

I would like to discuss briefly the Italian constitutional experience concerning the issue of the suspension of fundamental rights in emergency situations.

It is well known that the Italian Constitutional Charter was drafted after the war, using the Weimar Constitution as a model. However, after extensive debate, the inclusion of the Weimar provision calling for the suspension of constitutional guarantees and attribution of special powers to the Government during emergency situations was intentionally excluded. This choice was evidently based on a rather pessimistic evaluation of this possibility. Recent experience had in fact demonstrated that the exercise of special powers tended to break down the foundations of democracy under the pretext of defending it from an alleged public danger. Significantly, Japan and Germany, which, like Italy, were involved in rebuilding democratic institutions following their common experience of war, also chose not to include this type of provision in their Constitutional Charters (special provisions governing emergency situations were later introduced into the *Grundgesetz* with the amendments of 1968).

But naturally, as was pointed out by Prof. Özbudun in his paper, the absence of specific constitutional provisions does not signify an absence of the rules and responsibilities required to cover emergency situations. The existence of these powers may be inferred from the obligations of State institutions to ensure the safety and security of its citizens; it is a necessity that arises as a source of the law. But what exactly are the legal tools which may be realistically used within the Italian legal system?

Leaving aside the state of war (governed by art. 78 of Constitution) it must first be pointed out that, for emergency situations in peacetime, art. 2 of the Law dated 18.6.1931 on public security, which is still formally in force even though enacted during the Fascist era, is to be read, as specified by the Constitutional Court, in the light of the constitutional modifications that have since been made. It follows that the Prefect's possibilities of limiting fundamental rights and freedoms, as established by the aforementioned article, are implicitly revoked.

It is thus clear that emergency situations in peacetime are to be governed exclusively by art.77 of the Constitution which authorises the Government, in extraordinary situations of need and urgency, to adopt legally valid provisional measures. These measures are to be submitted to Parliament on the day of issue, and are considered ineffective from the very beginning unless they are converted into Law within sixty days from their publication. Thus there exists a political control by Parliament over these acts, along with the judicial control by the Constitutional Court. This control, as specified by this same Court (particularly in decision n. 29 dated 27.1.1995) extends to the requirements for the adoption of exceptional provisions, that is, to the actual existence of a *de facto* situation of necessity and urgency requiring an exceptional tool, such as a "decree-law" (*decreto-legge*). The existence of this kind of situation is indeed a constitutionally valid requirement for the adoption of the provision in question.

The practice followed by the Government for the adoption of such decrees, however, has gone much beyond constitutional dictates. As a consequence of the progressive and significant increase in the number of these acts and of the disdainful habit of repeatedly reiterating decrees not converted into law by the Parliament, we have witnessed a process of "quasi substitution" of ordinary law by such decrees. Even the participation of the Italian armed forces in the Gulf War was decided by a "decree-law" of the Government (n. 17 of 1991). The consequences of this practice, especially with reference to the value of legal certainty in the relationship between the subjects, may be easily imagined and are particularly disconcerting when the decrees in question affect fundamental rights. Fortunately, both the Parliament and the Constitutional Court have become involved in this issue. Art. 15 of Law 23.8.1988 n. 400 (Provisions on Government activity and on the Presidency of the Council of Ministers) in fact re-structures the framework for the enactment of these decrees and requires, for each decree, a specific description and identification of the extraordinary circumstances that justify its adoption. We would also mention the very recent and important decision no. 360, dated 24.10.1996, in which the Constitutional Court affirmed the constitutional illegality of the decrees that limit themselves to re-submitting the content of previous decrees not converted by Parliament. The Court stated that for the Government to intervene in the same issue with an emergency decree procedure either the contents of the act should be renewed or the justifying

requirements, that is the basic requirements of necessity and urgency, should be changed.

Fortunately, in the almost fifty years since the Constitution came into effect Italy has not had any emergencies requiring an urgent regulatory intervention that might suspend, in a significant manner, the enjoyment of fundamental rights and freedoms. The only circumstance in which the requirement for an emergency legislation was felt occurred during the period of the "Red Brigades", a terrorist group active in the seventies and the first half of the eighties. Decree-law dated 15.12.79, converted to Law 6.2.1980, for example, provided for "urgent measures to safeguard the democratic system and public safety". These measures granted the police exceptional powers to arrest suspected persons, powers that, in the opinion of this writer, translated into the curtailment of individual freedoms and did not appear to be among those to be considered legally valid by art. 5 of the European Convention on Human Rights (on this point see Cataldi, *La clausola di deroga della Convenzione europea dei diritti dell'uomo*, in *Rivista di diritto europeo*, 1983, p. 10). In our opinion, the Italian Government in this case should have notified the Secretary General, in accordance with art. 15 of the Rome Treaty, of the derogation made to the provisions of art. 5.

j. Emergency situations in Armenia by Mr Khatchig SOUKIASSIAN

Counsellor responsible for external relations, Constitutional Court of Armenia
Associate Member of the European Commission for Democracy through Law

Points 13 and 14 of Article 55 of the Armenian Constitution distinguish the *state of martial law* (external factor) from the *immediate danger to the constitutional order* (internal factor). According to these two constitutional dispositions, the President of the Republic of Armenia:

> "13. Shall decide on the use of the armed forces. In the event of an armed attack against or of an immediate danger to the Republic, or a declaration of war by the National Assembly, the President shall declare a state of martial law and may call for a general or partial mobilisation. Upon the declaration of martial law, a special sitting of the National Assembly shall be held.
>
> 14. In the event of an immediate danger to the constitutional order, and upon consultations with the President of the National Assembly and the Prime Minister, the President shall take measures appropriate to the situation and address the people on the subject."

A. *A Priori* Conditions for the Application of Points 13 and 14 of Article 55 of the Armenian Constitution

The powers attributed to the President of the Republic by points 13 and 14 of article 55 of the Armenian Constitution are not unlimited; indeed, these points themselves, together with several other constitutional dispositions, impose restrictions on the measures that the President can undertake. These restrictions are as follows:

a. Conditions For the Application of Point 13 of Article 55

The power to declare martial law in Armenia is vested in the President of the Republic by point 13 of article 55 of the Constitution. Martial law can be declared under three circumstances:

- when there is an armed attack against the Republic;

- when an immediate danger of such an attack exists; or

- when the National Assembly declares war.

In other words, the Armenian President enjoys very little discretionary power when applying point 13 of article 55. The President of the Republic alone is empowered by the Constitution to evaluate whether such an attack against the Republic is imminent. Under the two other circumstances, the President of the Republic is bound by the *de facto* situation; either the Republic is effectively being attacked or the National Assembly has declared war (only the National Assembly of Armenia is empowered by the Constitution to declare war).

The application of point 13 of article 55 of the Constitution gives the President of Armenia the following constitutional powers:

- First, if the President decides to apply point 13 of article 55, he is then obliged to declare martial law publicly. He should appear before the Nation and inform it of his decision.

- Secondly, the President of Armenia is empowered to adopt resolutions (presidential decrees) on the use of the armed forces and to proclaim general or partial mobilisation.

In all cases, the National Assembly holds a special session. Even though the Constitution does not explicitly forbid the President of Armenia from dissolving the National Assembly when martial law is declared, as it does for the application of point 14 of article 55 of the Constitution (see below), this is implicit, since the National Assembly gathers in a special session while martial law is declared.

b. Conditions For the Application of Point 14 of Article 55

First of all, the President of Armenia is obliged to discuss his intention to apply point 14 of article 55 with the President of the National Assembly and the Prime Minister prior to its application. At the same time, the President must also address a message to the Nation in order to justify his decision. Even though constitutionally the President of Armenia is not bound by the opinions of the President of the National Assembly and the Prime Minister, in fact he cannot disregard their opinions and if they are radically opposed to his intentions, then he cannot carry them out[56].

Secondly, the President of Armenia can apply this disposition only when the constitutional order is threatened by an immediate danger, and the President of Armenia can only undertake measures that are relevant to the situation created by the crisis.

Finally, two restrictive mechanisms are entrenched in the Constitution; the National Assembly cannot be dissolved by the President of the Republic during the application of point 14 of article 55 (paragraph 4 of article 63), nor can the Government be forced to resign through censure voted by the National Assembly (article 84).

What happens if the President of the Republic orders the dissolution of the National Assembly *prior* to the application of points 13 and 14 of article 55? Can he then, in absolute freedom, in the absence of parliamentary control, take measures that violate human rights and fundamental freedoms?

Paragraph 2 of article 63 provides the answer to this query. It provides that "*The authority of the National Assembly shall expire ... on the opening day of the first session of the newly elected National Assembly, on which day the newly elected National Assembly shall assume its powers.*" Therefore, even if the National Assembly is dissolved by the President of the Republic prior to the application of points 13 and 14 of article 55, it still maintains power and carries on with its control over the President of Armenia until a new National Assembly is elected.

c. Other *A Priori* Conditions For the Application of Points 13 and 14 of Article 55

[56] *The National Assembly disposes of constitutional powers to impeach the President of Armenia, if the latter commits state treason or any other serious crime (article 57 of the Constitution).*

Article 45 of the Constitution imposes fundamental restrictions on the President of Armenia. According to this article, articles 17, 19, 20, 39, 41, 42 and 43 of the Constitution (which concern civil rights and freedoms) can under no circumstances be infringed by the President of Armenia in his application of points 13 and 14 of article 55 of the Constitution. Accordingly, the President of Armenia can never violate the following constitutional rights:

- the right to life (article 17 of the Armenian Constitution);

- the prohibition of torture, cruel treatment, degrading punishment and the subjection to medical or scientific experiments (article 19 of the Constitution);

- the inviolability of private and family life, the illegality of collecting, retaining, utilising and disseminating information about private and family life, as well as the confidentiality of correspondence, telephone conversations, postal, telegraphic and other communications (article 20);

- the right to a public trial by an independent and impartial court (article 39);

- the right to the presumption of innocence (article 41);

- the right not to testify against oneself, one's spouse or a close relative; inadmissibility of evidence obtained by illegal means; the prohibition against the imposition of a punishment more severe than that applied at the moment the crime was committed; and freedom from criminal liability if an act was not considered a crime by the law then in effect; non-retroactivity of laws (article 42).

Furthermore, the other civil rights and freedoms that are not included in articles 17, 19, 20, 39, 41 and 42, but have constitutional force, together with those "*other universally accepted human and civil rights and freedoms*" which are not mentioned in the Constitution (article 43) can be temporarily limited by the President of Armenia only in accordance with conditions established and measures permitted by corresponding laws passed by the Armenian Parliament.

B. *A Posteriori* Control Over the Application of Points 13 and 14 of Article 55

The Constitution empowers the National Assembly of Armenia to suspend the application of points 13 and 14 of article 55.

a. If at least one-third of the Deputies[57] of the National Assembly consider that the President of the Republic of Armenia has no valid reason to invoke points 13 and 14 of article 55, then they can appeal, according to point 2 of article 101, to the Constitutional Court of Armenia[58]. The latter proclaims its findings in the form of a conclusion of the Constitutional court which must be rendered, according to the first paragraph of article 102, no later than thirty days following receipt of the Deputies" application. And according to paragraph 3 of article 102 of the Armenian Constitution, the conclusions of the Constitutional Court are taken by two-thirds of the members of the Court (that is, six out of nine members of the Constitutional Court)[59].

In its examination of the conditions and circumstances of the application of points 13 and 14 of article 55, the Constitutional Court has the right to summons the President of the Republic, the President of the National Assembly, the Prime Minister, the Ministers, the Highest Commanders of the Armed Forces, other civilian officials as well as individual citizens. Furthermore, the Constitutional Court has the right to demand official documents, including binding: the President of the Republic or other officials may not ignore the convocation or refuse to produce the requested documents (article 60 of the Law of the Republic of Armenia on the Constitutional Court).

The conclusions of the Constitutional Court have no binding force[60] and the National Assembly can decide not to abide by them. It is only after hearing these conclusions that the Armenian Parliament can put the issue of suspending the application of points 13 and 14 of article 55 to a vote (see the last paragraph of article 81 of the Constitution). The National Assembly, with the vote of the

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[57] *That is, actually 64 out of 190, and for successive future legislatures, 44 Deputies" signatures are required for the National Assembly acquire the right to appeal to the Constitutional Court (article 63 of the Armenian Constitution limits to 131 the number of Deputies of the future National Assembly).*

[58] *Point 6 of article 100 of the Constitution empowers the Constitutional Court to examine appeals concerning the application of points 13 and 14 of article 55. According to the last paragraph of article 101 of the Constitution, "The Constitutional Court shall only hear cases that have been properly submitted".*

[59] *Otherwise, the resolutions of the Constitutional Court are taken by a simple majority of its members - that is, five out of nine members (see paragraph 3 of article 102).*

[60] *Contrary to the resolutions of the Constitutional Court, which are "final, may not be subject to review and shall enter into legal force upon their publication" (paragraph 2 of article 102), its conclusions are not binding. This means that even if the Constitutional Court finds that the conditions justify the President's application of points 13 and 14 of article 55, the National Assembly may still suspend their application.*

majority of the Deputies present at the session, decides whether or not to terminate the application of points 13 and 14 of article 55 of the Constitution initiated by the President[61].

b. A second control over the application of points 13 and 14 of article 55 is provided in the Constitution. According to the second paragraph of article 56, "*the orders and decrees of the President shall not contravene the Constitution and the laws.*" This constitutional disposition is applicable also when points 13 and 14 of article 55 are applied.

According to the first point of article 100 of the Constitution, the Constitutional Court examines the constitutionality of the orders and decrees of the Armenian President upon the application of at least one-third of the Deputies of the National Assembly (article 101, point 2). The Constitutional Court hands down a resolution (and not a conclusion) of the Constitutional Court (first point of article 100) with the majority, that is five out of its nine members (third paragraph of article 102).

The resolution of the Constitutional Court is final and not subject to review. If the Constitutional Court finds that the orders and decrees of the President of the Republic, emanating from the application of points 13 and 14 of article 55, are unconstitutional, they are immediately deprived of all legal force.

C. The Problems of the Application of Points 13 and 14 of Article 55

The application of this control over the President of Armenia raises two critical problems:

- First, the necessary condition of assembling 64 (and for future legislatures, 44) Deputies in order to acquire the right to apply to the Constitutional Court seems in general very restrictive. The Armenian Constitution does not cater for the actual weight of political forces in Armenia; today, the parliamentary opposition in Armenia does not dispose of the number of Deputies in the National Assembly required to make use of this theoretical right. The view is widely held in Armenia that this number should be reduced from one-third to 10 or 12 percent of the number of Deputies of the National Assembly.

- Secondly, as we saw earlier, the second paragraph of article 56 of the Constitution declares that the orders and decrees of the President of Armenia shall not contravene the Constitution and the laws. Although the

[61] *In order for the vote to be legal, at least 96 (and for the future legislatures, 66) Deputies have to be present at the session of the National Assembly (article 71 of the Constitution).*

Constitution provides for the examination of the constitutionality of the President's acts, it does not regulate the question of controlling their legality: the Constitutional Court does not dispose of such constitutional power. In fact, we do not know which authority is responsible for examining the legality of the President's orders and decrees and which are the legal persons that can apply to this authority on that matter. The reform of the judicial system, which is presently under way, is expected to provide an answer to this question.

Third working session
"Emergency situations in international legal instruments"

a. Rules on emergency powers in international human rights treaties
by Mr Jan KOLASA

b. Emergency situations: the practice of the organs of the European Convention on Human Rights
by Mr Francis JACOBS

c. Some thoughts on Article 15 of the European Convention on Human Rights
by Mr Giuseppe CATALDI

a. Rules on emergency powers in international human rights treaties by Mr Jan KOLASA

Professor of Public Law, Head of the Institute of Public Law, University of Wrocław

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Naturally, in my short paper I cannot even pretend to discuss the subject indicated in its title in a detailed and comprehensive manner. It would be neither possible nor desirable. This paper is limited to a general presentation only of the basic legal features of the emergency powers provided for in the emergency clauses of the three main human rights treaties: the International Covenant on Civil and Political Rights (the Covenant), the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), and the American Convention on Human Rights (the American Convention). The paper focuses on the most distinctive legal aspects of the rules formulated in the emergency clauses - on their legal merits and demerits.

I. LEGAL NATURE OF STATES' BASIC OBLIGATIONS

1. Legal Character of the Human Rights Treaties

The legal character of a treaty exerts a strong influence of the manner of its implementation and on the nature of the responsibilities of its parties. As is well known, traditional international treaties are based on the principle of reciprocity. Thus, they create obligations of mutual character between their parties. In contrast to them, the human rights treaties under consideration are not concluded to accomplish the reciprocal exchange of rights for the mutual benefit of their States Parties. They must be regarded as multilateral legal instruments which enable the States Parties "to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction". They should ensure the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and against all other contracting parties.[62]

The distinctive legal feature of human rights treaties is not limited only to the question of reciprocity. Analysing the European Convention, J.A.C. Salcedo concludes that the intention of the States Parties, members of the Council of Europe, was not to create reciprocal rights and obligations in pursuance of their national interests, but "to realise the aims and ideals of the Council of Europe as

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[62] *Inter-American Court of Human Rights, Advisory Opinion No. OC-2/82, September 24, 1982, Ser. A. Judgments and Opinions, No. 3, paras 29 and 33. Cited after T. Buergenthal, The Advisory Practice of the Inter-American Human Rights Court. 79 AJIL, 1985, pp. 22-23.*

expressed in its Statute and to establish a common public order of free democracies in Europe".[63]

The notion of a new public order and of humanity as a subject of that order can be found in the opinions of scholars and international organs. As early as in 1962, the European Commission of Human Rights stressed that an application by one State against another State under Article 24 of the European Convention is predicated upon a violation of the "public order of Europe". A similar way of thinking was presented by the European Court of Human Rights.[64]

These opinions have been shared by the International Court of Justice in the Barcelona Traction case (1970). The International Court expressly declared that human rights obligations are "obligations of a State towards the international community as a whole ... ; they are obligations *erga omnes*". Thus, all States have a legal interest in their protection.[65] In the Montreal Report of the ILA (1982), one can read that human rights "are no longer the reverse side of laws, their mirror image, as it were". Now they "must still exist even if all States with their statutes and laws were to collapse", since they are based "in the human being as such".[66] And since they are not derived from the State or any other external authority, they may not be taken away by any authority.[67]

Thus, the obligations deriving from human rights treaties possess a special legal character, which may be generally expressed in two most basic conclusions:

a. the exclusion of human rights from domestic powers of States within the limits defined in the human rights treaties;

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[63] *J.A.C. Salcedo, The Place of the European Convention in International Law; in R.S.J. Macdonald, F. Matscher and H. Petzold, The European System for the Protection of Human Rights, Dordrecht, Boston, London 1993, p. 15.*

[64] *Yearbook 4 (1961), pp. 116 and 140 (Austria v. Italy). Cited after J.A.C. Salcedo, p. 17; see also T. Buergenthal, Proceedings against Greece under the European Convention of Human Rights, 62 AJIL, 1968, p. 442.*

[65] *Barcelona Traction case, ICJ Reports 1970, p. 32. See also: C. Mik, On the Specific Character of State Obligations in the Field of Human Rights, 20 Polish Yearbook of International Law, 1993, pp. 129-132.*

[66] *ILA, Report of the Sixtieth Conference held at Montreal, August 29th, 1982 to September 4th, 1982 (ILA, Montreal Report 1982), p. 123.*

[67] *O. Schachter, Human Dignity as a Normative Concept, 77 AJIL, 1983, p. 835. Compare the opinion by M. Cohen, Towards a Paradigm of Theory and Practice: The Canadian Charter of Rights and Freedoms; International Law Influences and Interactions; in Essays in International Law in Honour of Judge Manfred Lachs, The Hague 1984, p. 90.*

b. there is, *in statu nascendi*, a new branch of international law which is creating a new legal order which encompasses a notion of international society as a separate subject of international law; some norms of this new legal order have the character of *erga omnes* obligations.

The above conclusions, based on the opinions of scholars and statements of international organs, create the context in which the derogation clauses of human rights treaties will be analysed.

2. Legal nature of Derogation Clauses

The right to derogate from human rights obligations is usually interpreted as the conventional expression of an old concept of necessity and a special adaptation of it to human rights in emergency situations.[68] For the purposes of this paper, whether this opinion is fully correct or not does not seem very important; what matters is how far the emergency clauses contained in the three main human rights treaties are similar to or differ from the old principle of necessity accepted in general international law.

Above all, in general international law the principle of necessity can always be applied by States in emergency situations without any obligation for States to follow any special procedure; in practice, it has been abusively invoked by great powers to justify attacks against small States.[69] It constitutes a truly sovereign right of States. In fact, the States Parties to the international human rights treaties have also a sovereign right to declare a state of emergency; the character of this right has not been questioned either in theory or in practice, e.g. in the Lawless case, Mr G. Maridakis stated as follows: "when a State is engaged in a life and death struggle, no one can demand that it refrain from taking special emergency measures".[70] A similar opinion is expressed in the ILA Report: "a State is not only entitled to, but is under an obligation to use such power to meet an extraordinary situation which otherwise could not be controlled".[71]

However, unlike in the application of the doctrine of necessity, a State invoking the existence of an emergency situation under human rights treaties cannot evade

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[68] *See, e.g. J. Oraá, Human Rights in States of Emergency in International Law, Oxford 1992, pp. 220-228 and J. Barboza, Necessity (Revised) in International Law; in Essays..., pp. 27, 41-43.*

[69] *See J. Oraá, p. 232 and J. Barboza, p. 27.*

[70] *Lawless case (Merits), European Court of Human Rights, Judgment of July 1, 1961, 56 AJIL, 1962, p. 207.*

[71] *ILA, Report of the Fifty-Ninth Conference held at Belgrade, August 17th to August 23rd, 1980, London 1982 (ILA, Belgrade Report 1980), p. 95.*

the obligations which it has undertaken by ratifying the said treaties.[72] Besides, it must be strongly stressed that the kind of emergency situation which may justify the derogation from human rights obligations is expressly defined in the human rights treaties under consideration. It means nothing less than a "public emergency which threatens the life of the nation".[73] Moreover, such a qualification of the invoked emergency situation must be proved by the derogating government, and international controlling bodies have the right to examine its nature. In the Cyprus case, the European Commission of Human Rights expressly declared itself competent to pronounce on the existence or non-existence of a "public danger".[74] The derogation clause defines the character of the measures which can be applied and also extends to them the supervision of international controlling bodies. They are subject to international scrutiny and review. These qualifications characterise the right to derogate from human rights obligations as a new right which is substantially different in comparison with the sovereign right based on the doctrine of necessity.

It must be remembered that the main object of the human rights treaties was to provide for a clear notion of a public emergency which would not be open to abuses by States, since it is precisely in emergencies that the protection of human rights is most needed.

After a thorough study of the human rights treaties J. Oraá arrives at a conclusion that the derogation clause contained in Article 4 of the Covenant is a new conventional rule, which at least in part has a norm-creating character. This is a new norm, which aims at the creation of a legal regime regulating the protection of human rights just in emergency situations. The formulation and general acceptance of this clause has not caused any major problems and is presented as a real success and the cornerstone of the human rights protection system.[75] In particular, the success concerns the relatively clear definition of the institution of derogation and the fact that it has been placed under the control of international bodies which function on behalf of the international community as a whole. Because of those treaties, derogation from human rights obligations can be acceptable only if events make them absolutely necessary and it they are proportionate to the danger that those events represent.

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[72] *See Landinelli case, the Human Rights Committee, Communication No. R 8/34, Adoption of Views, 8 April 1981, in A/36/40, pp. 132-133. Cited after J. Oraá, p. 21.*

[73] *Article 4 para. 1 of the Covenant. See a comparable notion in Article 15 para. 1 of the European Convention and Article 27 para. 1 of the American Convention.*

[74] *Yearbook, 2 (1958/9), p. 176. See also: R. Higgins, Derogations under Human Rights Treaties, 48 BYBIL, 1976/77, pp. 301-303.*

[75] *See, e.g. J. Oraá, p. 231 and R. Higgins, p. 286.*

II. CONCEPT OF AN EMERGENCY SITUATION

It is obvious that any investigation of the emergency clause must begin with a definition of the term "emergency situation" as it is formulated in the three human rights treaties.

It is true that there are some differences in the formulation of the concept of emergency in the three human rights treaties under consideration. However, these differences do not seem significant. The European Convention allows derogation in cases of "war or other public emergency threatening the life of the nation" (Article 15 para. 1). The Covenant refers to a "public emergency which threatens the life of the nation" (Article 4 para. 1), while the American Convention refers to a "war, public danger, or other emergency that threatens the independence or security of a State Party" (Article 17 para. 1).[76]

The divergencies between the European Convention and the Covenant seem rather to have a strictly formal character, since the notion of emergency formulated in Article 4 of the Covenant is directly applicable to war, which is the greatest public emergency. The concept of an emergency described in the American Convention appears, *prima facie*, rather different. However, practice shows that it does not differ from the concept of an emergency as understood by the other two treaties. In fact, the threat to independence or security of a State means a threat to the life of the nation.[77]

Of course, the conclusion that an "emergency situation" finds similar expression in the three human rights treaties does not, *ipso facto*, explain its real meaning. This question was extensively discussed at the ILA conference. The final reports contain the conclusion that it is not easy to define this term comprehensively in view of the wide variety of situations arising in various regions of the world and in view of governments" different perceptions concerning the degree and extent of the threat. In the discussion, the most often expressed opinion was that it is neither desirable nor possible to stipulate *in abstracto* a public emergency within the meaning of the term used in the three conventions under consideration. Each case has to be judged on its own merits, taking into account the overriding concern for the continuance of a democratic society. Nevertheless, it was considered essential that the term should be narrowly defined and restricted to concrete situations like

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[76] *Further information about the subject in: E. Özbudun and M. Turhan, Emergency Powers, European Commission for Democracy through Law (1995), p. 4 et seq, J. Oraá, pp. 12-14, and ILA, Report of the 61st Conference held at Paris (August 26th to September 1st, 1984), London 1985 (ILA, Paris Report 1984), p. 59.*

[77] *See J. Oraá, pp. 12-16.*

war, external aggression, armed rebellion or civil insurrection, when the survival or safety of a nation is at stake.[78]

In principle, the circumstances justifying derogation are as follows:

a. political crisis caused by war, domestic unrest, grave threats to public order or subversion;

b. public or national disaster; or

c. economic crisis.[79]

According to the ILA Seoul Report, in simple legal terms "a state of emergency invokes the imposition of measures which are regarded or presented by the governments as exceptional and temporary". However, numerous *de facto* states of emergency are characterised by such indicia as the concentration of power in the executive, the suspension or even abolition of the legislative, the suspension or limitation of the existing guarantees of individual rights, and the imposition of special "national security" laws providing for administrative detention of persons suspected of political or security offences or for trial by special tribunals.[80]

In addition to the differentiation in formal legal aspects, states of emergency vary also in their causes and may be characterised by an extensive array of limitations or suspensions of fundamental rights of varying scope and intensity.[81]

The statement of international norms regulating states of emergency is by contrast much simpler than the presentation of the various causes and effects of emergencies. The three major human rights treaties and the ILA Paris Minimum Standards nonetheless offer guidelines in this connection.

General agreement exists on the following principles: severity of cause (defined generally as "threatening the life of the nation"); good faith on the part of the

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[78] *ILA, Paris Report 1984, p. 59, ILA, Report of the Sixty-Fourth Conference held at Broadbeach, Queensland, Australia, 20 to 25 August, 1990, Sydney 1991 (ILA, Queensland Report 1990), p. 239, and ILA, Report of the Sixty-Second Conference held at Seoul, August 24th to August 30th, 1986, London 1987 (ILA, Seoul Report 1986), pp. 112-115.*

[79] *J. Oraá, p. 31. See also: ILA, Seoul Report 1986, p. 113.*

[80] *ILA, Seoul Report 1986, pp. 112-113.*

[81] *See ILA, Seoul Report 1986, pp. 112-114. See ILA, Report of the Sixty-Third Conference held in Warsaw, August 21st to August 27th, 1988, London 1988 (ILA, Warsaw Report, 1988), pp. 143-159. Contained there is a detailed classification of various categories of emergency situations.*

derogating government; proportionality (relating to geographic area, duration and choice of measures "strictly required by the exigencies of the situation"); proclamation of notification; non-derogability of fundamental rights; respect for other international obligations; and non-discrimination. However, there exist certain differences, in particular, in the definition of non-derogable rights.[82]

Again, while these standards are reasonably easy to set, they are very difficult to apply in a rigorous manner, as they require a reliable and thorough knowledge regarding the actual extent of the threat to the nation and the details of the undertaken emergency measures; a further factor complicating the situation is that all of this takes place in a very politically sensitive context.

In the Lawless case the Commission gave the following definition of a "public emergency threatening the life of the nation": "an exceptional situation or crisis of emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".[83] This definition was literally accepted by the European Court in its judgment in this case.[84]

The above definition was developed by the Commission on the basis of the French text of the judgment in the Greek case, in which the Court applied not only the word "exceptional" but also "imminent". Thus, in the Commission's opinion formulated in the Lawless and Greek cases, an emergency situation must be characterised by the following features, if it is to be qualified as a "public emergency" within the meaning of Article 15 of the European Convention.[85]

1. It must be actual or at least imminent; however, the so-called state of emergency of a preventive nature is not legal under international law.[86]

2. Its effect must influence the whole nation, though the ILA presents a more liberal view. In its Paris Report (1984), an emergency in a part of a territory and affecting only the population established there is also accepted as a legitimate emergency situation.[87] In the Ireland v. U.K. case both the

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[82] *ILA, Seoul Report 1986, p. 115.*

[83] *Report in the Lawless case of 19 December, 1959, B.1 (1960/61), p. 82. Cited after P. Van Dijk and G.J.H. Van Hoof, Theory and Practice of the European Convention on Human Rights, 2nd ed., Deventer-Boston 1990, p. 551.*

[84] *See ibidem, p. 551.*

[85] *Report of November 1969, Yearbook XII, The Greek case (1969), p. 72. Cited after P. Van Dijk and G.J.H. Van Hoof, p. 552.*

[86] *See J. Oraá, pp. 28-29 and 33.*

[87] *ILA, Paris Report 1984, p. 58.*

Commission and the Court seemed to support this position. R. Higgins quotes many examples of derogation made by the United Kingdom based on this position.[88]

3. The threat must concern the very existence of the whole nation. This is interpreted as a threat which "constitutes a threat to the organised life of the community of which the State is composed". This threat could concern the physical integrity of the population, territorial integrity, or the functioning of the organs of the State.[89]

4. The normal measures and restrictions permitted by the treaty for the maintenance of public safety, health and order are plainly inadequate. The declaration of emergency must be the last remedy.

Naturally, international law cannot provide an answer to every instant case of emergency. It provides only general principles with a view to:

a. ascertaining the circumstances which give rise to a state of exception;

b. limiting the degree to which such powers may be exercised in derogation from the guaranteed rights of the individual; and

c. devising procedures for the protection of the individual in a state of exception.[90]

One may conclude that a considerable endeavour has been made in this respect towards these objectives. Naturally, it needs constant perfection and monitoring.

III. BASIC PRINCIPLES REQUIRED FOR LAWFUL OPERATION OF THE DEROGATION POWERS

The derogation clauses of all three human rights treaties contain, in principle, similar basic rules required for the legal exercise of the derogation powers in emergency situations. These rules are: official proclamation, notification, non-derogability of certain fundamental rights, proportionality, non-discrimination and consistency.[91]

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[88] *R. Higgins, pp. 289-290.*

[89] *Lawless case, 56 AJIL, 1962, p. 201, para. 28. See also: R. Higgins, p. 301 and J. Oraá, p. 29.*

[90] *ILA, Montreal Report 1982, p. 89.*

[91] *See e.g. ILA, Paris Report 1984, pp. 64-71.*

1. Principle of Official Proclamation

The reason for introducing the requirement of an official proclamation of a state of emergency into the derogation clause was to reduce the incidence of *de facto* states of emergency operating beyond the reach of the international monitoring bodies. In fact, only the Covenant expressly requires the state of emergency to be officially proclaimed (Article 4 para. 1). Neither the European Convention nor the American Convention imposes *expressis verbis* this rule of publicity. However, practice under all these treaties is not so much differentiated. The European Commission of Human Rights expressed the view, at the time of the Cyprus v. Turkey case, that in order to invoke the right of derogation provided for in Article 15 of the European Convention, the derogating state should justify the act beforehand by an official proclamation. The European Court took the view less decisively, declaring that the principle of proclamation may be justified for certain purposes.[92]

The practice of the American region is also not quite so univocal. The Inter-American Commission of Human Rights in the Nicaragua-Miskitos case stated that the proclamation of an emergency situation by the Nicaraguan government could help to avoid "an atmosphere of terror and confusion" in relocation of the Miskitos and their dramatic flight to Honduras.[93]

In contrast to international human rights treaties, most State legal systems require an official proclamation of an emergency situation satisfying certain strict conditions.[94] The ILA Paris Report rightly stresses that every country's constitution should define a procedure for declaring a state of emergency.[95]

The act of the declaration of a state of emergency is an internal act of State. However, due to its inclusion in the derogation clause in the three international treaties, it became a treaty requirement. J. Oraá expressly states that a declaration of a state of emergency, when derogations from provisions of a treaty are involved, is no longer a matter of domestic concern. Such a situation presents the problem of whether and how far the international monitoring bodies should go in assessing this requirement of compliance with State law.[96] In fact, there is no general agreement about the appropriateness of judicial review concerning the declaration of an emergency situation. Because of its political nature, the

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[92] *ILA, Paris Report 1984, p. 59 and J. Oraá, p. 37.*

[93] *J. Oraá, p. 38.*

[94] *E. Özbudun and M. Turhan, pp. 4-13 and J. Oraá, p. 55.*

[95] *ILA, Paris Report 1984, p. 58.*

[96] *J. Oraá, pp. 34-37 and 59.*

justifiability of the declaration of emergency presents a difficult problem. There are those who say that there should be no control at all by the judiciary, and others who claim that a certain control would be appropriate.[97] The problem is further complicated by the fact that in evaluating the existence of a public emergency and the need for derogation measures, States enjoy a large and commonly recognised margin of discretion.

In the Greek case, the European Commission of Human Rights did not contest the fact that the proclamation of emergency by the revolutionary government did not conform to the Greek Constitution. This attitude of the European Commission is considered as a good example of the correct approach to the question. Due to the political nature of the proclamation, the majority of the specialists are of the opinion that the judiciary should confine itself only to checking whether all the constitutional and legal procedures have been complied with, and that it should not pass judgments on the substance of the declaration.[98]

In this context it seems worthwhile to quote the ILA opinion on the matter. The "Minimum Standards of Human Rights Norms in a State of Exception" read:

> "... any usurpation of State powers by extra-constitutional means, that is, by means other than those provided for in Article 21 of the Universal Declaration of Human Rights, is a departure from the basic norms ...; ... a government freely chosen by and responsible to the people alone is competent to proclaim emergency ..."[99]

And in the ILA Paris Report there is the following statement:

> "... there is no reason why, in appropriate cases, the judiciary should not be able to pronounce judgment invalidating the declaration of an emergency where, for instance, it is *mala fide* or a fraud on the exercise of constitutional powers."[100]

At the same time, paragraph 7 of the ILA "Minimum Standards" substantially limits the scope of possible judicial control: "A declaration of emergency shall not be subject to judicial control save and except to ensure compliance with constitutional or legal provisions relevant to such declaration."[101]

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[97] *E. Özbudun and M. Turhan, p. 19.*

[98] *J. Oraá, pp. 36 and 57-58.*

[99] *ILA, Montreal Report 1982, p. 90, paras. 11 and 12.*

[100] *ILA, Paris Report 1984, p. 64, para. 14.*

[101] *ILA, Montreal Report 1982, p. 95, para. 7.*

In conclusion, one can pose a fundamental question whether a revolutionary, antidemocratic government can legally profit on the derogation clause contained in the Covenant.

In practice, neither the Human Rights Committee nor any of the other international monitoring bodies have so far found a declaration of emergency null and void on the basis of the derogation clause, just because the declaration was not in accordance with the domestic law of the State in question.[102]

2. Notification

Unlike in the case of the proclamation, all the main human rights treaties contain express provisions concerning the question of notification of a derogation situation. According to them, a State declaring an emergency situation should inform the other States Parties to the treaty, through the depositary of that treaty, of the emergency measures, the provisions of domestic law from which they have derogated, the treaty provisions affected, the expected date on which the derogation terminates, and the reasons why it has been actuated.[103] The *rationale* behind this requirement is that all States Parties have the right to be notified in order to know exactly what the position of the derogating State is in respect of the treaty, and to be able to exercise their own rights accordingly.

With regard to the nature of the required information, unlike the Covenant or the American Convention, the European Convention requires that the Secretary General of the Council of Europe be kept "fully informed" about the actual emergency situation. Thus, he can ask for any additional information on his own responsibility and at his discretion because of the special powers conferred upon him under Article 57 of that Convention.[104] There is no similar provision in the Covenant. Thus, a suggestion to the effect that a similar power may be extended by analogy to the Secretary General of the United Nations as a depositary does not seem possible.[105]

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[102] *J. Oraá, p. 36.*

[103] *Article 4 para. 3 of the Covenant, Article 15 para. 3 of the European Convention, and Article 27 para. 3 of the American Convention.*

[104] *Article 57: "On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention." See also: ILA, Paris Report 1984, p. 65.*

[105] *ILA, Paris Report, p. 66.*

Under Article 4 para. 3 of the Covenant, a State Party exercising its right of derogation must "immediately inform" the other States Parties of the emergency measures undertaken. The European Convention, which has no requirement of an "immediate" notification, has been interpreted as requiring notification within a "reasonable period", a standard which in the Lawless case was deemed to have been satisfied by a delay of twelve days.[106]

The notification requirement is considered so important that a failure to comply with it could result in the loss of the right of derogation. However, the treaties do not expressly provide for such consequences and the notification practice under the three treaties varies considerably.[107]

In the opinion of certain scholars, the notification practice under the European Convention has been very consistent, and the European monitoring organs have always declared their readiness to check whether the derogation notice meets the requirement of Article 15 para. 3. There has been a widespread failure to notify derogations on the part of States Parties to the Covenant. Many States have not issued any notification at all; other States have sent notices which were too general and insufficient. The situation is no better under the American Convention. In fact, neither the United Nations monitoring organs not the Inter-American Commission of Human Rights appears to have sufficiently insisted on the importance of this requirement.[108]

This situation is well illustrated in the 1980-81 Annual Report of the Inter-American Commission. According to it, six States Parties to the American Convention had suspended human rights during the time period under review, and only two of them partially complied with the notification provisions of Article 27 para. 3. Yet no other States Parties complained, and the Commission itself raised the issue of compliance only in the case of Bolivia, without examining the problem in detail.[109]

Thus, it looks that neither the nature and extent of required information not the time and the consequences of a lack of information are unified and expressly regulated. However, in spite of all these deficiencies, it seems that the principle of information inherent in the human rights treaties plays a role of considerable importance in practice.

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[106] *Lawless case, 56 AJIL, 1962, p. 206, para. 47. See also: T. Buergenthal, p. 84.*

[107] *J. Oraá, p. 59 and 84-85.*

[108] *J. Oraá, pp. 85-86.*

[109] *See T. Buergenthal, R. Norris and D. Shelton, Protecting Human Rights in the Americas. Selected Problems, 3rd ed., Kehl-Strasbourg 1990, p. 355.*

3. Non-Derogable Rights

The principle of non-derogability of certain fundamental rights constitutes one of the most essential components of the derogation clause. It imposes an express limitation on the right of the States Parties to take measures derogating from fundamental human rights upon a declaration of an emergency situation. Although there was complete agreement on the necessity of including that principle in the derogation clause of the three treaties, the task of establishing a list of the non-derogable rights presented serious difficulties.[110] As a result, each treaty contains a different list of human rights belonging to this category.

The American Convention enumerates eleven such rights (Article 27 para. 2). It is the longest list, since the Covenant identifies only seven non-derogable rights (Article 4 para. 2), and the European Convention only four (Article 15 para. 2). In addition, only the American Convention provides essential guarantees for the protection of non-derogable rights: the Inter-American Court has stressed in this connection that a reservation with respect to non-derogable rights "must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted".[111]

The reasons for the inclusion of the principle of non-derogability in the human rights treaties were not expressed. Perhaps some of the rights were thought too important to permit derogation from them even in an emergency situation (e.g. the right to life). As far as the other rights are concerned, it appears inconceivable that derogation might be "strictly required", even in an emergency situation, e.g. the right to marry.[112]

In the three different lists of non-derogable human rights there are only four rights which are considered non-derogable by all three treaties: the right to life, the right to be free from torture or other inhuman or degrading treatment or punishment, the right to be free from slavery or servitude, and the principle *lex retro non agit* with respect to penal law. These four non-derogable rights constitute what is known as the "irreducible core" of human rights.[113]

One of the ILA Reports suggests that the non-derogable character of these four human rights should now be regarded as "reflecting general principles of law, ...

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[110] *J. Oraá, pp. 87 and 90.*

[111] *Advisory Opinion No. OC-3/83, September 8, 1983, Ser. A: Judgments and Opinions, No. 3, para. 61 (1983). See also: T. Meron, On a Hierarchy of International Human Rights, 80 AJIL, 1986, p. 17.*

[112] *See T. Buergenthal, pp. 83-84. For a different view, see: J. Oraá, pp. 94-96 and 97-101.*

[113] *J. Oraá, p. 96 or T. Meron, On a Hierarchy, p. 22.*

or ... as having created peremptory norms of international law within the meaning of Article 53 of the Vienna Convention".[114] According to J. Oraá, these four non-derogable rights "are not only customary international law, but also norms of *ius cogens*".[115]

Besides these four common non-derogable rights specified in the emergency clauses of the three human rights treaties, the American Convention contains a number of other non-derogable rights. However, only some of these additional rights bear a direct relationship to public emergencies, e.g. the right of freedom of conscience and religion or the right to participate in government. The other rights seem to have no direct implication for the security of the State, e.g. the right to be free from imprisonment merely on the grounds of inability to fulfil a contractual obligation or rights relating to family, e.g. the right to a name.[116]

There are also some other rights and principles which are held non-derogable by implication. J. Oraá classifies them into three categories:[117]

a. provisions related to the exercise of non-derogable rights, i.e. the right to an effective remedy and the prohibition on discrimination;[118]

b. provisions containing general exceptions;[119] and

c. provisions related to the mechanisms of implementation, i.e. inter-State applications, the right to individual petition, and the report procedure under the Covenant.

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[114] *ILA, Paris Report 1984, p. 69. See Section C in this Report: Non-Derogable Rights and Freedoms. Draft Articles 1-16, pp. 71-93.*

[115] *J. Oraá, p. 125 and T. Meron, On a Hierarchy, pp. 14-16.*

[116] *J. Oraá, pp. 97-101.*

[117] *J. Oraá, pp. 101-106 and P. Van Dijk and G.J.H. Van Hoof, p. 555.*

[118] *See Articles 13 and 14 of the European Convention, Article 2 para. 3 and Article 26 of the Covenant, and Articles 24 and 25 of the American Convention.*

[119] *Like the prohibition preventing the State from engaging in any activity aimed at destroying or limiting to a greater extent than is provided for the rights and freedoms recognised in the three treaties (Article 5 para. 1 of the Covenant, Article 17 of the European Convention, and Article 29 of the American Convention). As well as the prohibition on applying the permitted restrictions for any purpose other than the one specified in the treaties (Article 18 of the Covenant, Article 30 of the American Convention). The European Convention does not contain any express provision for this principle. J. Oraá, p. 103.*

Practice confirms the non-derogability of certain human rights by implication, e.g. the Inter-American Court of Human Rights expressed the opinion that the remedies of *amparo* and *habeas corpus* are among the judicial guarantees essential for the protection of the rights rendered non-derogable by Article 27 para. 2 of the American Convention. It further emphasised that the essential judicial guarantees include also judicial proceedings, which are inherent in representative democracy as a form of government under Article 29(c) and which must be exercised in the framework of due legal process as defined in Article 8.[120] The practice of the IACHR also confirms the extraordinary importance of these fundamental guarantees of fair trial, which it considers to be non-derogable in emergencies.[121]

This short presentation of the principle of non-derogable rights must lead to the conclusion that the international community as a whole has not yet established a uniform list of non-derogable human rights. In addition, the legal position of non-derogable rights is not quite clear with respect to derogable rights. An opinion exists that if a derogable right conflicts with a non-derogable right, the latter will not necessarily prevail, unless, of course, its status as a peremptory norm of general international law is recognised.[122] Thus, efforts should be directed at defining the distinction between ordinary and higher rights and the legal significance of this distinction. Such steps would contribute significantly to resolving conflicts between the above two categories of human rights.[123]

Advanced proposals have been put forward with a view to improving the existing situation of the principle of non-derogable rights. Above all, it is necessary and possible to build a sounder structure of human rights, which should be based on an enlarged core of non-derogable rights accepted by the entire international community. The ILA has already worked out an advanced proposal for such an improvement. It has prepared draft articles of sixteen non-derogable human rights and fundamental freedoms. These sixteen rights were, it seemed, recognised by the ILA as peremptory norms of international law.[124] First of all, the right to a fair trial and the right to remedy should find express formulation in all human rights treaties as non-derogable rights. These two rights are commonly presented as the most fundamental rights for the protection of human beings at all times. The

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[120] *ILA, Report of the Sixty-Third Conference held in Warsaw, August 21st to August 27th, 1988, London 1988, (ILA, Warsaw Report 1988), p. 139; J. Oraá, pp. 119-121.*

[121] *J. Oraá, p. 119; ILA, Warsaw Report 1988, pp. 137-138.*

[122] *T. Meron, On a Hierarchy, p. 16.*

[123] *Ibidem, p. 22.*

[124] *ILA, Paris Report 1984, pp. 71-73, and ILA, Report of the Sixty-Sixth Conference held at Buenos Aires, August 14-20, 1994, Buenos Aires 1994 (ILA, Buenos Aires Report 1994), p. 565.*

formal proposal of these guarantees by means of a protocol to the existing human rights treaties has also been suggested by various international organisations. However, in the opinion of some scholars, it seems politically unworkable for the moment.[125]

4. Proportionality

The principle of proportionality is contained, in various forms,[126] in each of the three treaties under investigation, and is a further significant safeguard against the abuse of emergency powers. According to this principle, every measure of derogation has to be justified by satisfying the test laid down in this rule. It means that at a time of an emergency the executive authority can only take such measures as are reasonably justified; they must be necessary and proportionate to the gravity of the threat; they should also be strictly proportionate to the needs of "the higher interest of society protected by the derogation".[127]

The rule of proportionality so defined constitutes a significant limitation on the assumption or exercise of emergency powers by derogating governments. Non-compliance with this rule is considered a very disturbing phenomenon in a regime of exception.[128] However, in testing the legality of a particular measure under this rule, the monitoring organs cannot substitute their own assessment for that of the State concerned. Their practice confirms the opinion that they can only review the legality of the measures introduced by the government concerned. Accordingly, the derogating government must be allowed to take derogating measures within the scope of its margin of appreciation recognised by international law.[129] The problem is, however, that the doctrine of the margin of appreciation is rather vaguely expressed. Although no one disputes it, its application creates enormous problems.[130]

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[125] *ILA, Paris Report 1984, pp. 82-86; J. Oraá, p. 107.*

[126] *For example, nowhere in the European Convention and its numerous protocols is the word "proportionality" used. However, the idea it contains is relatively clear in several of its provisions. See M.-A. Eissen, p. 125.*

[127] *ILA, Paris Report 1984, p. 66.*

[128] *ILA, Belgrade Report 1980, p. 100.*

[129] *See review of the practice in: ILA, Paris Report 1984, pp. 66-67.*

[130] *See e.g. ILA, Queensland Report 1980, p. 245; R.S. Macdonald, The Margin of Appreciation, in: H. Petzold (ed.), The European System for the Protection of Human Rights, Dortrecht-Boston-London 1993, pp. 83-84, and P. Sieghart, The International Law of Human Rights, Oxford 1983, pp. 99-102.*

Although there are some divergent opinions of monitoring organs on identical facts,[131] J. Oraá observes that in the application of the rule of proportionality the monitoring bodies of the three treaties have worked out some guidelines for its application and that there is a broad agreement in the general interpretation of the principle of proportionality by all monitoring bodies.[132]

5. Non-Discrimination

The principle of non-discrimination is expressly specified only in the Covenant and in the American Convention. However, its absence in the European Convention is not so significant, since the discriminatory application of derogation measures is also forbidden by the general non-discrimination provision of Article 14 of that Convention.[133] This principle means, in substance, that there should be no differential treatment among equals. The measures taken must not introduce any discrimination solely on the grounds of race, colour, sex, language, religion, nationality or social origins.[134] The use of the expression "solely" in Article 4 of the Covenant appears to imply that the derogations prohibited under this rule are only those where the grounds listed are the sole and exclusive reason for the discrimination. Measures having a legitimate purpose, but which affect a racial or religious group in particular, would not be prohibited.[135]

So far, the application of the principle of non-discrimination in states of emergency has not generally played a major role in the case-law of the international monitoring bodies.[136]

6. Principle of Consistency

The last, sixth basic principle required for the valid operation of the emergency powers of States is the so-called principle of consistency. It prohibits the derogating government from taking derogating measures which are inconsistent with its other international obligations, even if, *prima facie*, such measures seem

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[131] *See some examples in ILA, Queensland Report 1990, p. 245.*

[132] *J. Oraá, pp. 168-169.*

[133] *Ibidem, p. 188.*

[134] *ILA, Paris Report 1984, p. 84.*

[135] *For example, measures taken during a public emergency in a part of the country whose inhabitants belong to a religious minority would not be illegal merely because they affect that group. T. Buergenthal, pp. 82-83.*

[136] *J. Oraá quotes two cases of interest, pp. 88-89. See also: M.-A. Eissen, The Principle of Proportionality in the Case-Law of the European Court of Human Rights, in: H. Petzold (ed.), pp. 125-126.*

lawful under the treaty. International obligations may originate both from a treaty or any principle of customary international law.[137]

In fact, this principle has played little part in the case-law thus far. It has generated virtually no jurisprudence in the monitoring bodies.[138]

IV. GENERAL CONCLUSIONS

Above all, we have to recognise the obvious fact that genuine states of emergency occur very often, and that they warrant the imposition of restrictions upon human rights. During the 1985-1995 decade alone, some 90 countries have made full use of the practice of imposing *de facto* or *de jure* states of emergency. And the next fact - that the most massive and serious violations of human rights take place in emergency situations.

The emergency clauses contained in the three main human rights treaties institutionalise emergencies on the basis of international conventional law. They introduce a degree of regulation which imposes serious restrictions on the emergency powers of derogating governments. Derogations from human rights obligations can be acceptable only if events make them absolutely necessary and if they are proportionate to the danger that those events pose. What is more, this regulation is to be performed in the interest of the international community as a whole and rests upon *erga omnes* obligations. This is a very significant and unquestionable value of the emergency clauses contained in the human rights treaties.

The restrictions imposed on the emergency powers of the derogating governments are formulated primarily in the definition of an emergency situation and in the accompanying six principles specifying the conditions for the valid application of those principles.

The very essence of the definition is best expressed in the words used by the creators of the Covenant - it can be nothing less than a "public emergency which threatens the life of the nation". Very similar definitions are contained in the two other human rights treaties under consideration. It is true that they are rather laconic and formulated in general terms. However, due to an enormous variety of emergencies, this cannot be otherwise. A strict definition could be made only *in abstracto*. It is important to know that the practice of international monitoring bodies has developed a fairly unified interpretation and concretisation of these definitions - the threat must be exceptional, actual or at least imminent, and must threaten the very existence of the whole nation. Unfortunately, the same

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[137] *J. Oraá, pp. 191-206, and ILA, Paris Report 1984, p. 67.*

[138] *See e.g. P. Van Dijk and G.J.H. Van Hoof, pp. 554-555, and R. Higgins, p. 305.*

international organs have left too extensive a scope of discretion to the interested governments in the evaluation of the existing exigencies.

The basic principles introduced for the valid use of the derogation powers by the governments are the following: official declaration, information, non-derogability of fundamental human rights, proportionality, non-discrimination, and consistency. These rules are present in all three human rights treaties, although they are expressed variously and sometimes only in an indirect way. Despite this fact, in the practice of the monitoring bodies they have been interpreted in quite a uniform way.

These principles are often criticised both by scholars and practitioners. Most of those critical opinions concern details. The general concept of each of these principles meets with universal acceptance.

Certainly, the principle of public declaration should contain a clearer form and procedure for the act of proclamation and the principle of information a more precise time limit and a specification of the content of the information. Besides, the powers of the depositary of the treaty should be extended. On the other hand, the principles of proportionality, non-discrimination and consistency have been less criticised and have caused less difficulties in the practice of the controlling bodies.

Most critical opinions concern the principle of non-derogability of fundamental human rights. Undoubtedly, this principle needs further elaboration and basic changes. Above all, the list of the four common non-derogable rights should be extended to embrace some other fundamental rights. However, any extension of the list of non-derogable rights will have little meaning unless the right to a fair trial and some essential judicial guarantees are finally accepted as non-suspendable rights in any emergency situation. This absolutely necessary correction could be accomplished by the introduction of a special protocol.

b. Emergency situations: the practice of the organs of the European Convention on Human Rights by Mr Francis JACOBS

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Introduction

A state of war, or other public emergency, provides a crucial test for human rights. A solution had to be found for the problem in the scheme of the Convention. Indeed in the light of history, the problem could be regarded as the most serious threat to the very basis of the Convention. The existence or threat of an emergency situation, real or alleged, had been used all too often as a pretext for suspension of basic human rights.

Yet the problem is hard to resolve. As one recent study points out:

> "The dilemma posed by derogation clauses is as easy to state as it is hard to resolve. Once the necessity for derogation is conceded, it becomes difficult to control abusive recourse to the power of suspending rights that the provision permits. In many cases, the effective use of the power will require expedition. The evidence on which recourse to the power is based may be extensive but at the same time sensitive. The determination of the propriety of particular measures of derogation, once the existence of an emergency has been established or conceded, is a matter of practical judgment rather than refined analysis. Any review is inevitably open to the criticism that fraught decisions made at the time of crisis are being subjected to considered re-evaluation with the comfort of hindsight. It has been suggested that the value of judicial intervention in the exercise of what is essentially a political power is limited and that the more narrowly the power of derogation is confined, that is to say, the more serious the circumstances must be before it may be relied upon, the less the room for judicial review. However, the experience of abusive recourse to the derogation power is extensive enough for an abstentionist approach to be highly undesirable. In the nature of things, the national judicial means of redress will often have been undermined, so the responsibility of international institutions is the more compelling."[139]

Article 15 of the Convention

The solution devised by the authors of the Convention is set out in Article 15.

Article 15 provides:

> "1. 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.
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> 2. 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.

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[139] *Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights (1995), p. 490.*

> 3. 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."

So paragraph (1) permits derogations from the rights protected by the Convention, but by paragraph (2) no derogation is permitted from Article 2 on the right to life, except as stated, nor from Articles 3 on freedom from torture or inhuman and degrading treatment, Article 4(1) on freedom from slavery and servitude, nor Article 7 granting protection against the retroactivity of the criminal law. Furthermore paragraph (3) requires a State availing itself of this right of derogation to keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons for them, and to notify similarly when the derogations have been lifted.[140]

Article 15 incorporates, in effect, the principle of necessity common to all legal systems. Most States have provisions for emergency legislation, empowering them to take measures in a state of emergency which would not otherwise be lawful.

However, under Article 15, such measures are subject to the control of the organs of the Convention. If a State avails itself in a case, of its right of derogation, it is for the Commission and the Court to consider, first, whether a public emergency threatening the life of the nation could be said to exist at the material time; and secondly, whether the measures taken were in fact strictly required by the exigencies of the situation. Thirdly, such measures must be consistent with other obligations under international law. Finally, there must be timely notification to the Secretary General of the Council of Europe both of the introduction of derogating measures and of the reasons for them, and of the lifting of those measures.

The approach adopted by the organs of the Convention

The use of derogations under Article 15 arose for the first time in the *Cyprus* cases,[141] two applications brought by Greece against the United Kingdom when Cyprus was still under British rule. The Commission considered that it was "competent to pronounce on the existence of a public danger which, under

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[140] *This passage is based on Jacobs and White, The European Convention on Human Rights, 2nd edition 1996, p. 257.*

[141] *App. 176/57, Greece v United Kingdom, (1958-59) 2 Yearbook 174 and 182; App. 299/57, Greece v United Kingdom, (1958-59) 2 Yearbook 178 and 186.*

Article 15, would grant to the Contracting Party concerned the right to derogate from the obligations laid down in the Convention". The Commission also considered that it was "competent to decide whether measures taken by a Party under Article 15 of the Convention had been taken to the extent strictly required by the exigencies of the situation". It added that "the Government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation".[142]

Subsequently a political solution to the Cyprus problem was reached, and the Committee of Ministers decided that no further action was called for.

The existence of this control by the organs of the Convention was confirmed by the Court in the *Lawless* case.[143] The Irish Government had contended that, provided measures taken under Article 15 were not contrary to Article 18, they were outside the control of the Convention bodies. The Court said, however, "It is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled".[144] It accordingly considered, first, whether there could be said to be a public emergency threatening the life of the nation; second, whether the measures taken in derogation from obligations under the Convention were "strictly required by the exigencies of the situation"; and third, whether the measures were inconsistent with other obligations under international law.

The Commission has adopted the position that issues arising under Article 15 will not be examined unless they are raised by the respondent State. The *McVeigh* case[145] concerned the United Kingdom anti-terrorist legislation as it had been applied to the three applicants who had arrived in Liverpool on a ferry from Ireland. They were held for 45 hours without charge, questioned, searched, finger-printed and photographed. They made complaints under Articles 5, 8 and 10. At the material time, various derogations were in effect in respect of the United Kingdom, but the United Kingdom Government did not seek to invoke them in respect of the situation in Great Britain, as distinct from Northern Ireland. The Commission said:

> "In those circumstances the Commission considers that it is not called upon to consider any question under Article 15 and will confine itself to

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[142] *App. 176/57 Greece v United Kingdom, (1958-59) 2 Yearbook 174, at 176.*

[143] *Lawless v Ireland, Judgments of 14 November 1960, 7 April 1961 and 1 July 1961, Series A, Nos. 1-3; (1979-80) 1 EHRR 1, 13 and 15.*

[144] *Ibid., paragraph 22 of the judgment of 1 July 1961.*

[145] *Apps. 8022/77, 8025/77 and 8027/77, McVeigh, O'Neil and Evans v United Kingdom, Report of the Commission, 18 March 1981, (1982) 25 DR 15.*

considering whether the measures taken against the applicants breached their rights under Articles 5, 8 or 10 of the Convention, as alleged by them."

Public emergencies threatening the life of the nation

What then constitutes such a public emergency? In the *Lawless* case, the Court defined it as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed".[146] The danger must be exceptional in that the normal measures permitted by the Convention are plainly inadequate to deal with the situation. The Court found that the existence of a public emergency was "reasonably deduced" by the Irish Government. The Court had regard, in particular to three factors: the existence of a secret army (the Irish Republican Army □ IRA); the fact that this army was also operating outside the territory of the State; and the steady and alarming increase in terrorist activities in the period before the emergency was declared.[147]

In the *Greek Case*, the Commission had to consider the validity of a derogation by a revolutionary government. The respondent Government, which had seized power in Greece by a *coup d'état* on 21 April 1967 and had suspended parts of the Constitution, invoked Article 15 of the Convention. The Commission considered that the Convention applied in the same way to a revolutionary as to a constitutional government.[148]

As regards the definition of a "public emergency threatening the life of the nation", the Commission followed the definition given by the Court in the *Lawless* case.[149] The Commission sought to answer the question whether there was such a public emergency in Greece by examining the elements indicated by the respondent Government as constituting in its view such an emergency.[150] These elements were examined by the Commission under three heads: the danger of a Communist take-over; the crisis of constitutional government; and the breakdown of public order in Greece.[151]

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[146] *Ibid., paragraph 28 of the judgment of 1 July 1961.*

[147] *Ibid.*

[148] *The Greek Case, (1969) II Yearbook, at 32.*

[149] *Ibid., at 71-2.*

[150] *Ibid., at 44.*

[151] *Ibid., at 45.*

The Commission considered that in the present case the burden lay upon the respondent Government to show that the conditions justifying measures of derogation under Article 15 had been and continued to be met.[152] It concluded that the Government had not satisfied it that there was on 21 April 1967 a public emergency threatening the life of the Greek nation.[153]

Moreover the Commission, while referring to the government's "margin of appreciation", did not merely consider whether the Greek Government had sufficient reason to believe that a public emergency existed; it considered whether such an emergency existed in fact.

In *Ireland* v *United Kingdom*[154] both the Commission and the Court had little difficulty in determining that there was a public emergency threatening the life of the nation because of the terrorist threat from the activities of the IRA. This issue was not contested by Ireland. No argument was made on the basis that certainly at the time the major threat related only to a part of the United Kingdom.

Strictly required by the exigencies of the situation

If it is established that this first condition of Article 15 is satisfied, it must next be asked whether the measures which are the subject of the application were "strictly required by the exigencies of the situation".

In the *Greek Case*, as the Commission was not satisfied that there was a public emergency, the measures could not in any event be justified under Article 15. It was not therefore necessary to consider whether the measures taken were strictly required by the exigencies of the situation. Nevertheless, the Commission decide to examine that question also, on the hypothesis that there was a public emergency in Greece threatening the life of the nation.[155] The Commission found that, even on that hypothesis, the measures taken could not be justified under Article 15, because they went beyond what the situation required.[156]

In the *Lawless* case, the Court held, following the opinion of the Commission, that detention without trial was justified under Article 15. In considering whether such a measure was strictly required by the exigencies of the situation, the Court had

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[152] *Ibid., at 72.*

[153] *Ibid., at 76.*

[154] *Ireland v United Kingdom, Judgment of 18 January 1978, Series A, No. 25; (1979-80) 2 EHRR 25.*

[155] *The Greek Case, (1969) II Yearbook, at 104.*

[156] *Ibid., at 135-6 and 148-9.*

particular regard, not only to the dangers of the situation, but also to the existence of a number of safeguards designed to prevent abuses in the operation of the system of administrative detention.[157]

In *Ireland* v *United Kingdom*[158] the Court made an independent examination of the circumstances, but in doing so placed considerable emphasis on the margin of appreciation to be accorded to the State. The Court found that the system of extra-judicial deprivation of liberty was justified by the circumstances as perceived by the United Kingdom between August 1971 and March 1975.

The determination of whether measures taken are strictly required by the exigencies of the situation requires consideration of three elements. First, are the derogations necessary to cope with the threat to the life of the nation? Secondly, are the measures taken no greater than those required to deal with the emergency? This is a test of proportionality. Finally, for how long have the derogating measures been applied? There is no case law in which duration of the measures has been a crucial issue, but it is certainly arguable that measures, which at their inception were clearly required, could cease to be so if they proved to be ineffectual or if it could no longer be established that they were strictly required by the situation. The Court said in *Ireland* v *United Kingdom* that "The interpretation of Article 15 must leave a place for progressive adaptation."[159]

Consistency with international obligations

Measures which may be taken by a State under Article 15(1) must not be "inconsistent with its other obligations under international law". Thus, they must not conflict with its other treaty obligations, or obligations under customary international law. Any such measures are not permitted under Article 15. Hence, a State could not avail itself of Article 15 to release itself from its obligations, for example, under other human rights instruments. This would in any event be precluded by Article 60 of the Convention, which provides:

> "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

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[157] *Lawless v Ireland, Judgments of 14 November 1960, 7 April 1961 and 1 July 1961, Series A, Nos. 1-3; (1979-80), 1 EHRR 1, 13 and 15, paragraphs 31-38 of the judgment of 1 July 1961.*

[158] *Ireland v United Kingdom, Judgment of 18 January 1978, Series A, No. 25; (1979-80) 2 EHRR 25.*

[159] *Ibid., p. 83 of the judgment.*

The requirement of consistency with other international obligations is potentially significant in relation to the U.N. Covenant which in certain respects is more far-reaching than the Convention. Under Article 4 of the Covenant, which is broadly similar in its terms to Article 15 of the Convention, certain additional rights are "non-derogable", including the freedom of thought, conscience and religion; and the measures taken must never involve discrimination on grounds of race, colour, sex, language, religion or social origin.

The requirement of consistency with other international obligations has however played little part in the case law of the Court on Article 15 so far. In the *Brannigan and McBride* case[160] it was argued that Article 4 of the United Nations International Covenant on Civil and Political Rights required the emergency to be "officially proclaimed". Without expressing a view on the precise content of this requirement, the Court observed that the statement of the Home Secretary in Parliament on 22 December 1988 was formal in character and made public the Government's reliance on Article 15, and was "well in keeping with the notion of an official proclamation."[161]

The notification requirements

Article 15(3) requires notification both of the introduction of derogations and of the lifting of them. The precise nature of the obligation in this paragraph was considered in the *Lawless* cases where it was argued that notification to the Secretary General in July 1957 did not meet the requirements of the paragraph for three reasons: first, it did not indicate expressly that it was a derogation under Article 15; secondly, it did not refer to the existence of a public emergency threatening the life of the nation; and, thirdly, the matter had not been made public in Ireland until October and so could not be relied upon in respect of acts occurring between July and October. The Court did not consider that any of these factors tainted the notification; it was couched in terms sufficient to enable the Secretary General to understand the Irish Government's position. Furthermore the paragraph required the matter to be notified to the Secretary General and did not impose any obligation to publish the derogation within the State.[162] Nor did it regard a delay of twelve days between national adoption and notification outside the scope of a requirement of notification "without delay".[163]

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[160] *Brannigan and McBride v United Kingdom, Judgment of 26 May 1993, Series A, No. 253-B; (1994) 17 EHRR 539.*

[161] *Ibid., paragraph 73 of the judgment.*

[162] *Lawless v Ireland, Judgments of 1 July 1961, Series A, No. 1; (1979-80) 1 EHRR 15, p. 62 of the judgment.*

[163] *Ibid.*

In the *Greek Case*, there was a four month delay between the implementation of derogating measures and notification. Even though the derogation was held to be invalid because the Commission was not satisfied that there was a public emergency threatening the life of the nation, the Commission noted that late notification would not justify action taken before the actual notification.[164]

By contrast, there would seem to be nothing objectionable in a State making use of an Article 15 derogation to avoid granting rights under the Convention when it has been held to be in violation of the Convention. In the *Brogan* case[165] the United Kingdom was found to be in breach of Article 5(3) of the Convention in the period allowed for questioning before a suspect was brought before a judicial officer under the prevention of terrorism legislation. Prior to the judgment of the Court, it had considered that the legislation met the requirements of Article 5(3). In response to the judgment, instead of amending its legislation to ensure compliance with the period for bringing suspects before a judicial officer, the United Kingdom entered a derogation under Article 15. Obviously, that derogation could not apply retrospectively, and would be subject to assessment in the usual way by the Convention organs for compliance with the requirements of Article 15.[166]

Any doubt about the validity of the derogation filed following the judgment in the *Brogan* case has been resolved in the *Brannigan and McBride* case[167] where the Court said:

> "The power of extended detention with such judicial control and the derogation of 23 December 1988 being clearly linked to the persistence of the emergency situation, there is no indication that the derogation was other than a genuine response."[168]

Three remarks should be added on the scope of derogations *ratione temporis*. First, in considering whether the measures were permissible under Article 15, regard must be had to the situation before the emergency is declared. This was of

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[164] *The Greek Case, (1969) II Yearbook, at 41-3.*

[165] *Brogan and others v United Kingdom, Judgment of 29 November 1988, Series A, No. 145-B; (1989) 11 EHRR 1147.*

[166] *This is the view taken in J. Merrills, Human Rights in Europe, (Manchester, 1993), at 189-90, though P. van Dijk and G. van Hoof, Theory and Practice of the European Convention on Human Rights, (Deventer, 1990) at 557-8 take the view that the United Kingdom derogation 23 December 1988 was unlawful.*

[167] *Brannigan and McBride v United Kingdom, Judgment of 26 May 1993, Series A, No. 258-B; (1994) 17 EHRR 539.*

[168] *Ibid., paragraph 51 of the judgment.*

course done by the Court in the *Lawless* case and by the Commission in the *Greek Case*, but arguably not in the *Brannigan and McBride* case. Secondly, notification under Article 15(3) may have a very limited retroactive effect. No time limit is laid down for notifications, but the Court appeared to consider in the *Lawless* case that communication without delay is an element in the sufficiency of information required by that provision.[169] In the *Greek Case* the Commission considered that the initial notice of derogation was given within a reasonable time, but that there was undue delay in communicating the reasons for the measures of derogation.[170] Thirdly, it is evident that if the measures in question remain in force after the circumstances which justify them have disappeared, they represent a breach of the Convention.[171] In the *Greek Case*, accordingly, the Commission examined the evolution of the situation from the date of the *coup* to the time of compiling its Report.[172]

The paragraph contains no sanction, though, in practice, it may well be that a State would find great difficulty in proving its case if it failed to notify the Secretary General of the measures taken. After all, the essence of Article 15 is that the State reviews its ability to sustain the protection of the rights guaranteed by the Convention and concludes that certain of them must be limited in order to deal with an extra-ordinary situation.

The margin of appreciation

Some indications of the scope of the "margin of appreciation", an expression which recurs in the Commission's Report in the *Greek Case*,[173] can be found in the Court's judgment in the *Lawless* case. The Court held 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, which the Court proceeded to enumerate.[174] Thus, as in the case of other authorized limitations, the Commission and Court must consider whether the national authorities had *sufficient reason* to believe that a public emergency existed, within the meaning of Article 15.

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[169] *Lawless v Ireland, Judgments of 14 November 1960, 7 April 1961 and 1 July 1961, Series A, Nos. 1-3; (1979-80), 1 EHRR 1, 13 and 15, paragraphs 42-7 of the judgment of 1 July 1961.*

[170] *The Greek Case, (1969) II Yearbook, at 42-3.*

[171] *App. 214/56, De Becker, Report of the Commission, Series B, No. 2, at 133.*

[172] *The Greek Case, (1969) II Yearbook, at 92-103.*

[173] *The Greek Case, (1969) II Yearbook, at 72.*

[174] *Lawless v Ireland, Judgments of 14 November 1960, 7 April 1961 and 1 July 1961, Series A, Nos. 1-3; (1979-80), 1 EHRR 1, 13 and 15, paragraphs 23-30 of the judgment of 1 July 1961.*

The court has recently re-stated its approach to the determination of the issues raised by Article 15(1) in the *Brannigan and McBride* case, where it said:

> "The Court recalls that it falls 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. 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. Accordingly, in that matter a wide margin of appreciation should be left to the national authorities.
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> Nevertheless, 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 circumstance leading to, and the duration of the emergency situation."[175]

Conclusions

The following conclusions can be drawn from the above survey of the practice of the Convention bodies.

1. Clearly, the lodging of a derogation does not in itself remove the need for judicial scrutiny. Indeed, it might even be said that a derogation increases that need, since a State's conduct would otherwise be taken wholly outside the control of the Convention organs. The Convention case-law establishes that the Commission and Court remain competent to examine whether the conditions for lodging a derogation are fulfilled, and whether the requirements of Article 15 are otherwise satisfied most importantly, whether a public emergency existed, and whether the measures taken were strictly required by the exigencies of the situation.

2. The notion of a public emergency threatening the life of the nation has been strictly construed. There has been no case of derogation "In time of war" under Article 15, but the concept of "other public emergency" has been limited to truly

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[175] *Brannigan and McBride v United Kingdom, Judgment of 26 May 1993, Series A, No. 253-B; (1994) 17 EHRR 539, paragraph 43 of the judgment.*

exceptional crises: as the Court held in the *Lawless* case, in an approach followed in subsequent cases, there must be an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed. There may however remain some doubt under the case-law to what extent the Court is prepared to substitute its own assessment of the situation for that of the State concerned. Plainly it is not sufficient for the State simply to invoke such an emergency: its claim must be verified by the Court. The Court may however be content to find that the State had sufficient reason to consider that such an emergency existed.

3. A similar difficulty attaches to the other crucial issue, namely whether the measures taken were strictly required by the exigencies of the situation. That may entail examination of several questions: were the measures necessary and appropriate to meet the emergency situation? Were the measures no more severe, both in their scope and in their duration, than was necessary to deal with the emergency? And in addressing those questions, what is the appropriate yardstick for the Convention bodies to apply? The principle of proportionality will be invoked, but it is a somewhat flexible principle. The language of Article 15, in referring to measures "strictly required", suggests that the principle itself should be strictly applied. On the other hand, the very nature of an emergency might justify granting the national authorities a certain leeway. Once again, it is a question of judgment, a delicate matter of finding the appropriate balance. This is clearly a difficult exercise, although similar in principle to that running through the Convention system as a whole.

4. The task of the organs of the Convention is made even more difficult in cases falling under Article 15 by the heightened political element inherent in a state of emergency. As the Court itself has accepted, judges, and perhaps especially international judges, may not always be well placed to review, on the basis of hindsight, the delicate political issues involved. An illustration of the difficulties, admittedly in a different context, is provided by the case, not falling under Article 15, in which the Court had to pronounce on the actions of the UK security forces in shooting dead three IRA terrorists in Gibraltar. The Court was able to decide the case only by the narrowest majority and its decision provoked great controversy. Nevertheless in the relatively few cases falling under Article 15 the organs of the Convention have generally been able to perform their tasks sensitively and without provoking widespread criticism. Their practice in a delicate area can be regarded as generally satisfactory.

5. By way of postscript to the above general conclusions, mention may be made of the requirement of consistency with other international obligations. That requirement acquired a new significance with the entry into force of the UN Covenant. As has been seen above, the additional conditions are now imposed that the emergency must be officially proclaimed, and that the measures taken do not

involve certain forms of discrimination. In addition, certain further rights cannot be invaded under cover of a derogation.

6. Although the situation in present-day Europe cannot be taken as typical, it has to be said that there seems little evidence under the European Convention of abuse of the special regime provided for by Article 15. With the exception of the revolutionary regime in Greece in 1967, there is little indication that States have abused their powers. The Convention bodies, for their part, have exercised their jurisdiction moderately. In the result, there is little indication of improper use of the system. While some critics have argued that the case-law leaves the national authorities too much discretion, that view does not seem to be borne out by the way in which Article 15 has been hitherto applied in practice. On the contrary, the Article appears, in the light of experience, to be a well constructed provision, and one which has by and large been appropriately applied by the organs of the Convention.

c. Some thoughts on article 15 of the european convention on human rights by Mr Giuseppe CATALDI

Professor at the University of Naples

Taking the stimulating papers presented on the topic of emergency situations in International Law as a starting point, I will attempt to develop some of the points concerning the interpretation of the derogation clause of the Rome Treaty that I believe deserve special consideration.

In considering the juridical nature of the derogation clause, it appears that one must first of all emphasise that Article 15 covers the whole operational area of the "*rebus sic stantibus*" clause, thus making any reference to the latter within the framework of the Convention illegal, and therefore rendering it impossible for the States to use the development of a condition of "war or other public danger" as a legitimate reason to withdraw from the Convention. The "*rebus sic stantibus*" clause is to be considered important in such treaties only in the absence of provisions similar to those of Article 15. This criterion in fact fulfils both requirements of Article 62 of the Vienna Convention on the Law of Treaties for the legitimate withdrawal from and non compliance with the treaty.

As for the requirement of consistency with other obligations under international Law, as dictated by Article 15, para. 1, we must specify that this requirement implies that the provisions of the Convention are to be understood, in their totality, as a guarantee for a minimum standard of protection of human rights. In other words, the tacit principle implied by this provision is that international law can never be used to increase the exceptional powers of the State.

But the issue upon which I wish to concentrate briefly is the obligation, contained in Article 15, para. 3, of keeping the Secretary General of the Council of Europe fully informed both of the measures taken as well as the reasons that motivated the measures. In the same manner the Secretary General must be informed of the date upon which the measures cease to be in effect and the provisions of the Convention are once again fully applicable. This provision is intended to ensure that the nature and the scope of the derogations are specifically determined and defined. The problem, however, is that of providing an exact evaluation of the duties and obligations established by Article 15, para. 3 and, consequently, whether their non-compliance may lead to sanctions, in particular to the non application of para. 1. Although they have examined the issue several times, neither the Commission nor the Court ever specified all the requirements to be met for a notification of derogation to be considered valid. In the *Lawless* case the Court refused to take an official position on this point, maintaining that the most important consideration was that the notification allow the Secretary General to comprehend the position assumed by the State. It should also be noted that the Commission had criticised the letter of notification presented by the Irish Government. In the case of the claims against Greece the Commission reiterated

the principle, implicit in the formulation of Article 15, para. 3, that a late notification does not justify the measures adopted prior to the same notification.

Notification of measures of derogation is always necessary. No circumstances exist which allow for the automatic application of measures as for para. 1. According to the opinion of some of the minority members of the Commission in the case of *Cyprus vs. Turkey*, an opinion adopted by the latter State as its defensive stance, an armed conflict whose existence is well-known by the Contracting States leads to the automatic application of the rules of wartime humanitarian law and, by analogy, to the suspension of the provisions of the Convention that may be derogated. Without contesting the automatic application of the rules of international humanitarian law, it appears from Article 15 of the Rome Treaty that one cannot make a distinction between exceptional cases requiring notification of derogations and others that, on the contrary, lead to a suspension of the application of the Convention without any particular official requirements. One cannot even say that, should there exist a situation of war, the State must adopt derogations; it can opt not to do so. That is why it is always necessary to be aware of its decisions through the appropriate notification.

In conclusion, I believe it may be maintained that, a notification which is simply irregular does not prohibit the contracting State from referring to Article 15, para. 1. However, should the obligation as per Article 15, para. 3, be completely ignored by one of the contracting States adopting exceptional measures, the said State will be responsible, with respect to the other contracting States and institutions, for violation of the Convention, as the measures adopted may not be covered by Article 15. We also wish to point out that, in our opinion, with respect to the failure of notification of exceptional measures, the reverse supposition, that is the excessive and abnormal recourse to the derogation clause, is no less serious. In this instance, the repeated notifications effected in accordance with Article 15 have the effect of suspending the effectiveness of the Convention for extremely long periods and thus of greatly diminishing the significance of a nation's partnership in the Convention. This was the case with Turkey, for example, when, in the sixties and seventies, and at an almost monthly rate, it notified the proclamation and then the extension of a state of siege in many provinces because of internal disorders. For these almost permanent emergency situations we agree with the statements made by the claimants in the case of *Brannigan and Mc Bride vs. the United Kingdom* concerning the situation in Northern Ireland. Situations of this type require that the Commission and the Court, in evaluating the scope of the derogation notified, at the very least adopt more rigorous evaluation criteria, reducing the State's acknowledged margin of appreciation.

Final report
"Customary international law"

a. The protection of human rights in emergency situations under customary international law
by Mr Jaime ORAÁ

b. Intervention
by Mr Karol WOLFKE

a. The protection of human rights in emergency situations under customary international law by Mr Jaime ORAÁ

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ABBREVIATIONS

ADI Association de droit international
AFDI Annuaire français de droit international
AJIL American Journal of International Law
BYBIL British Year Book of International Law
CADH Convention américaine des droits de l'homme
CDI Commission du droit international des Nations Unies
CEDH Convention européenne des droits de l'homme
CIADH Commission interaméricaine des droits de l'homme
CIJ Cour internationale de justice
DUDH Déclaration internationale des droits de l'homme
ICLQ International and Comparative Law Quarterly
ILM International Legal Materials
ODIHR Bureau des institutions démocratiques et des droits de l'homme
PIDCP Pacte international relatif aux droits civils et politiques
RGDIP Revue générale de droit international public
YBECHR Year Book of the European Convention on Human Rights

I. Introduction

One of the most important problems in the international protection of human rights is that of identifying the standards governing these rights in situations of emergency. Public emergencies present a grave problem for States: that of overcoming the emergency and restoring order in the country while at the same time respecting the fundamental rights of individuals. The derogation clause of human rights treaties establishes a legal regime regulating this crucial problem. This clause has been described as the "cornerstone" of the entire system for protecting human rights, and as the most important provision of human rights treaties.[176]

[176] *See the remarks by Mr Prado Vallejo, a member of the UNHR Committee, in CCPR/C/SR. 351 (1982), p. 8, para. 33. See also the remarks of the Attorney-General of Ireland in the "Lawless case" (Counter-Memorial of the Government of Ireland), Ser. B: Pleadings, p. 224.*

Moreover, there are two additional reasons which make this topic highly relevant. First, in the last decades the gravest violations of fundamental human rights have occurred in the context of states of emergency. In these situations, States, using the emergency as an excuse, frequently deny the application of basic standards and take derogating measures which are excessive and in violation of international treaties on human rights. Therefore, in order to know the exact extent of the protection afforded by these treaties, a detailed examination of the treaty standards, undertaken in the light of the jurisprudence of the international monitoring bodies, is of fundamental importance.

Secondly, almost one third of the States of the international community are not parties to the international treaties on human rights which establish a legal regime for emergencies, and therefore treaty standards are not applicable as such to these States. This fact, together with the notable absence of studies on this question, has created a dangerous uncertainty concerning the main criteria governing human rights in emergencies in terms of general international law. This uncertainty can be seen in the practice of the UN monitoring organs. At the same time, some international treaties on human rights have no derogation clauses (i.e. the African Charter, and the ILO Conventions); consequently the regime applicable in these cases also remains uncertain. For these reasons, a thorough analysis of the standards in general international law is of paramount importance; this is the object of the present inquiry. In respect of this question, attention will be paid to the hypothesis which contends that some of the principles of the derogation clause have become, or are in the process of becoming, customary international law.

II. The Emergence of Some of the Principles of the Derogation Clause as Principles of General International Law

The doctrine of necessity is the doctrine which best corresponds to the plea of emergency in general international law, and having analysed elsewhere how it has been applied by the ILO organs in certain cases relating to human rights in emergencies,[177] it would be worth examining another approach to this question. The approach we are going to explore in this Seminar maintains that the legal regime of the derogation clause of the main treaties on human rights is basically a particular application of the doctrine of necessity to the subject of human rights in emergencies. Moreover, this approach also contends that the main principles of the derogation clause are emerging as principles of general international law. This approach, which has support in the doctrine and in the practice of international monitoring organs, requires close examination.

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[177] *Oraá J., "Human Rights in States of Emergency in International Law", Oxford, 1992, pp. 220ss.*

1. The legal nature of the derogation clause

It is true that the legal nature of the derogation clause has not received much attention from the doctrine.[178] Nevertheless, it has been qualified in several different ways; as a clause of suspension,[179] as a clause *rebus sic stantibus*,[180] and as a clause reflecting the principle of "supervening impossibility of performance" according to article 61 of the Vienna Convention on the Law of Treaties.[181] It has also been argued that the derogation clause has some relation with the doctrines of self-defence, *force majeure* and necessity. However, the theory which sees in the derogation clause a particular application of the doctrine of necessity is perhaps the one which enjoys the greatest support. Thus, Ago sees in the derogation clause of the Covenant a particular adaptation of the doctrine of necessity; this adaptation has been carried out taking into account the particular subject-matter and the nature of the legal obligations involved.[182] For his part, Ergec has seen the derogation clause as the concrete application, and adaptation, of the doctrine of necessity to the specific subject of human rights in emergencies.[183] Meanwhile, Castberg has pointed out that the drafters of the Covenant, in order to prevent arbitrary derogations taking place through the application of the dangerous doctrine of necessity in general international law, decided to establish an appropriate legal regime for those situations through the derogation clause. They did this because they realised that States may inevitably find themselves in situations in which it is impossible for them to comply with all the human rights obligations.[184] The International Law Association has also noticed that in drafting the Covenant the point of view which ultimately prevailed was that the doctrine of

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[178] *The only serious attempt to analyze its nature has been carried out by R. Ergec, "Les Droits de l'homme à l'épreuve des circonstances exceptionnelles", Brussels, 1987, pp. 39ff.*

[179] *Capotorti, "L'Extinction et la suspension des traités", in Recueil, 134 (1971), p. 488.*

[180] *Ouguergouz F., "L'Absence de Clause de Dérogation dans Certains Traités Relatifs aux Droits de l'Homme: Les Réponses du Droit International Général", R.G.D.I.P. (1994), pp. 289-336. A. Kiss, "Les Fonctions du Secrétaire Général du Conseil de l'Europe comme dépositaire des conventions européennes, AFDI 2 (1956), p. 685. Also Mr Ermacora, in the "Cyprus case", p. 179.*

[181] *E. Suy, "Droits des traités et droits de l'homme", in "Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte", Festschrift for H. Mosler (Berlin, 1983), p. 944.*

[182] *Ago R., "The International Wrongful Act of the State, Source of International Responsibility", YBILC 2.1 (1980), p. 45.*

[183] *Ergec, "Les droits de l'homme", p. 53.*

[184] *Castberg F., "The European Convention on Human Rights", (Leiden, 1974), p. 165.*

necessity permitting derogations from some rights had to be reflected in the major human rights treaties.[185] As far as the European Convention is concerned, Ganshof van der Meersch sees in the derogation clause the transposition to the international arena of the doctrine of necessity which is found in public law and which allows the suspension of human rights in emergencies.[186]

The derogation clause can be seen to have adopted several of the main principles of the doctrine of necessity. On the other hand, seven main principles constitute the legal regime of the derogation clause of the human rights treaties. These principles can be classified in three categories.

2. Three types of principles

1. There are some principles which are a clear reflection of the principles of the doctrine of necessity, namely, the principle of exceptional threat, the principle of proportionality, and the principle of temporariness. Moreover, the principle of non-derogability of some fundamental rights can be deemed to constitute an application of the doctrine of necessity as formulated by the ILC. The ILC says that a State cannot invoke the plea of necessity when "the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law".[187] In so far as the principle of non-derogability of fundamental rights refers to the four common non-derogable rights which are recognised as norms of *ius cogens*, it could be said that States cannot justify their non-compliance with these obligations using the plea of emergency.[188]

2. The derogation clause also contains at least one principle which has great importance in the human rights field, and which does not explicitly appear among the principles of the doctrine of necessity; this principle is the principle of non-discrimination.[189]

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[185] *ILA Warsaw Report (1988), p. 40.*

[186] *W. J. Ganshof van der Meersch, "Organisations européennes" (Brussels, 1966), p. 286.*

[187] *ILC, Report to the General Assembly, YBILC 2.2 (1980), 34 (draft art. 33(2) (a)).*

[188] *See the interesting observation by Meron on the fact that "peremptory norms" in general international law may possibly have a wider content than the concept of ius cogens in treaty law. Meron T., "Human Rights and Humanitarian Norms as Customary Law" (Oxford, 1989), pp. 220–2.*

[189] *However, one can say that this principle is implicit in the concept of proportionality and the purposive elements in necessity (see Oraá J., op. cit., p. 169).*

3. Finally, the derogation clause contains two principles which can be seen to be of a "procedural" nature and which seem in principle to be more suitable for application within the framework of treaty law than in general international law. These principles are the principles of proclamation and notification. Before analysing which of the principles of the derogation clause seem to be emerging as principles of general international law, a few remarks should be made concerning the process by which treaty provisions could become customary norms.

3. The derogation clause and customary international law: the "norm-creating character" of the ICCPR and the derogation clause

The recent importance given to the process by which rules of law formulated in treaties could become rules of customary international law has been recognised by the ICJ. As has been pointed out, the reason for this is that in the last 30 years the international community has been engaged, under the auspices of the UN, in the task of codification and progressive development of international law of an unprecedented scale.[190]

This has been done through general multilateral conventions covering whole branches of international law adopted in international conferences with the participation of a great number of States from all geographical areas. Jiménez de Aréchaga, talking about the process of formation of customary international law from a treaty norm as found by the ICJ in recent times, described three modalities: the declaratory, the crystallising, and the generating effect. In the first case, the treaty norm is no more than the formal and written expression of a pre-existing rule of customary law already in force. In the second case, a rule which was emerging, or in *statu nascendi,* crystallises as a customary rule and receives its first written expression through the dynamic of the international conference which concludes the treaty. Finally, in the third case, a treaty norm, not being declaratory of an existing norm or the codification of an emerging rule, may become a rule of customary international law through the subsequent practice of States.[191]

Although it is difficult in some cases to know if a treaty norm has codified or developed international law, it seems that prima facie the case of the derogation clause would better be described as a case in which, as a consequence of subsequent practice, the treaty norms (in this case some of the principles of article 4 of the ICCPR), are emerging as norms of customary law;[192] so the treaty norms

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[190] *Jiménez de Aréchaga, "International Law in the Past Third of a Century", Recueil, 159.1 (1978), pp. 1-344, p. 13.*

[191] *Ibid., pp. l4-5.*

[192] *The derogation clause of the Covenant is singled out here because the ICCPR is a*

would therefore have the "generating effect" of creating a customary rule. Sørensen, commenting on this generating process, says: "The Convention may serve as an authoritative guide for the practice of States faced with the relevant new legal problems, and its provisions thus become the nucleus around which a new set of generally legal rules may crystallise."[193]

Following the reasoning of the Court in the *North Sea Continental Shelf cases,* the first requirement for making this process possible is that the provision invoked would have a "norm-creating character".[194] It seems clear that the ICCPR and some of the principles of the derogation clause in particular have this character.

The norm-creating character of the ICCPR. As is well-known, what the drafters of the ICCPR tried to do was to define with greater precision, in the context of a treaty, the international obligations of States in the field of human rights, obligations which were not defined in the UN Charter and which were couched in very general terms in the UDHR. The drafters of the Covenant tried for the first time to regulate human rights obligations in the first international instrument of a universal character dealing with general obligations relating to civil and political rights.[195] The fact that the treaty has a law-making character seems therefore self-evident. Moreover, the ICCPR was the result of a long drafting process (from 1947 to 1966) carried out under the direction of the UN Human Rights Commission (1947–55), later discussed by the UN General Assembly, open to the participation of all States,[196] and finally adopted by the General Assembly in 1966 almost unanimously.[197] Up until 1 January 1996, it had been ratified by 133 States

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quasi-universal treaty, whereas the European and American conventions are regional treaties.

[193] *"North Sea Continental Shelf cases", ICJ Reports, 1969, dissenting opinion, p. 244.*

[194] *Ibid., pp. 41–42, para. 72. See also Jiménez de Aréchaga, "International Law," p. 22.*

[195] *The European Convention which was signed in 1950 and which has a similar content to the ICCPR was a regional treaty. Other human rights treaties concluded under the auspices of the UN, e.g. the Genocide Convention of 1948 and the Slavery Convention of 1956, are specialised treaties covering one single right or aspect; the ICCPR, on the other hand, is a general treaty in the sense that it tries to regulate the whole field of civil and political rights.*

[196] *The US "Restatement: Restatement of the Foreign Relations Law of the USA", American Law Institute (Washington, 1987), p. 154, accepts the virtually universal participation of States in the preparation of international agreements recognising human rights principles as evidence of practice building customary law. This position requires some caution. In fact it is possible to imagine a case in which a great number of States participate in the preparation of a treaty which is not then ratified by the majority of States. However, this did not happen in the case of the ICCPR.*

[197] *The ICCPR was adopted and open to signature on 16 Dec. 1966 by GA Resolution 2200A (XXI) with 106 in favour, and with no votes against or abstentions. For an account of the*

from every geographical area; this fact underlines the universal character of the treaty. The UN General Assembly has constantly recommended that those States which have not yet done so should ratify the Covenant.

The norm-creating character of the derogation clause. The fact that the derogation clause contained in article 4 of the Covenant at least in part has a norm-creating character also seems to be obvious. As has been pointed out, the main aim of the derogation clause was to create a legal regime regulating human rights in states of emergency. This was a new and a very important matter, because it is precisely in emergencies that the protection of human rights is most needed. The derogation clause was the result of a long drafting process in which a balance was carefully worked out between the interest of the State to defend the life of the nation when gravely threatened and the respect for individual human rights; the result has been seen to be a success.[198] Thus, the derogation clause has been considered to be a key article of the Covenant.[199]

Moreover, the derogation clause has not been the object of substantial reservations by States; these reservations could in theory have undermined its main principles. (The only substantial reservation was made by Trinidad and Tobago in 1978, but it provoked a formal protest from other States.[200]) Reservations to fundamental principles of the derogation clause seem to be against the "purpose and the object of the treaty" and are therefore forbidden by the Vienna Convention on the Law of Treaties. This reaffirms the "norm-creating character" of the derogation clause, in so far as the idea of making far-reaching reservations to a provision seems to go against its "norm-creating character".[201]

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process of drafting the Covenant, see V. Pachota, "The Development of the ICCPR," in Henkin (ed.), "The International Bill of Rights" (New York, 1981), p. 37.

[198] *Higgins R., "Derogations under Human Rights Treaties", BYBIL 48 (1976-7), pp. 281-320, p. 319.*

[199] *The derogation clause was described by a member of the UNHR Committee as "the cornerstone of the human rights treaties" (see above, p. 146).*

[200] *The reservation referred to the principle of non-derogability. See UN, "Multilateral Treaties", Deposited with the Secretary General, Status as at 31 Dec. 1986 (New York, 1987), p. 135. "The Federal Republic of Germany and the Netherlands raised a formal objection; they considered it incompatible with the object and purpose of the Covenant, ibid., pp. 137–8. See Oraá J., op. cit., pp. 131–2.*

[201] *See the reflections of the ICJ on this point in the "North Sea Continental Shelf cases", ICJ Reports, 1969, pp. 38ff., paras. 63ff.*

The fact that the derogation clause in article 4 of the Covenant qualifies in principle as a potential provision of a "norm-creating character" does not necessarily mean that all the principles of the provision are emerging, or are equally qualified to become, norms of customary international law. It is a well-known doctrine that some principles within a provision may become principles of general international law, while others do not. In fact, there is no need to expect the derogation clause as such to become part of general international law. This is because the derogation clause itself establishes a mechanism which is more appropriate for treaty law; in fact, the State which wants to derogate from the treaty provisions has formally to rely on the right to derogation recognised in the derogation clause. According to this procedure, the State has officially to proclaim the state of emergency and to notify the other States parties of the provisions derogated from and the reasons therefore (principles of proclamation and notification). However, in general international law, the doctrine of necessity can always be applied by the State in exceptional circumstances without any need for the State to follow any special procedures.

Having said that, this position does not mean that in principle these provisions of a "procedural" character cannot become norms of general international law. There is nothing in principle which prevents this process from taking place. In fact, as far as a "procedural" principle in a treaty becoming an emergent principle of general international law is concerned, an interesting parallel can be found in the law of the sea in the delimitation of the continental shelf between adjacent or opposite States. Article 6 of the 1958 Continental Shelf Convention establishes that the delimitation shall be determined first of all by agreement between the States. In the absence of agreement, article 6 provides the main criteria for delimitation.[202] In recent cases on delimitation, the ICI referred to this procedural principle of delimitation by agreement as a principle of general international law.[203]

As far as the "procedural" principles of the derogation clause are concerned, it could well be that an international obligation could emerge by which States have officially to proclaim a state of emergency and to make public the derogating measures taken, in order to justify their non-compliance with customary human rights norms; this practice, which is well-established in most municipal systems, can also become a principle of general international law. In fact, there is some

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[202] *See also art. 83 of the 1982 Convention on the Law of the Sea.*

[203] *"North Sea Continental Shelf cases", Judgment, ICJ Reports, 1969, p. 54. "Continental Shelf (Tunisia/Libya)", Judgment, ICJ Reports, 1982, p. 92 and para. 37. "Delimitation of the Maritime Boundary in the Gulf of Maine Area", Judgment, ICJ Reports, 1984, pp. 266, 311–2. "Continental Shelf (Libya/Malta)", Judgment, ICI Reports, 1985, pp. 31–56. See also R. R. Churchill and A. V. Lowe, "The Law of the Sea", (2nd rev. edn., Manchester, 1988), p. 156 ('delimitation by agreement remains the primary rule of international law').*

evidence in the doctrine and in the practice of monitoring organs to support this contention.[204]

Furthermore, in respect to the notification requirement, a practice could develop sometime in the future by which all States finding themselves in emergencies would have to notify the international community (perhaps the UN General Assembly through the UN Secretary-General or the Commission on Human Rights) of those derogations from human rights standards recognised as such under customary international law.[205] Even though the present development within the UN Human Rights Commission through the Special Rapporteur on States of Emergency seems to be moving in that direction, the moment when the obligation of notification, as a matter of customary law, will be a reality seems more remote.[206]

In conclusion, of the main principles constituting the general legal regime of the derogation clause, the principles which seem to be prima facie clear candidates for becoming principles of general international law regulating human rights in emergencies are the following: the principle of exceptional threat, the principle of non-derogability of fundamental rights, the principle of proportionality, and the principle of non-discrimination. What should now be analysed is the existing evidence concerning the emergence of these principles as principles of general international law.

4. Evidence of the emergence of some of the principles of the derogation clause as customary law

Among the types of evidence mentioned by the US *Restatement* and other sources in order to prove the existence of customary law,[207] the following have a special importance in showing the customary character of some of the principles of the derogation clause: the probative value of law-making treaties, the repetition of the same norm in several human rights treaties, the practice of judicial, quasi-judicial,

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[204] *In respect to the principle of proclamation in the "Siracusa Principles", principle No. 75; see also the comments by D. O'Donnell and J. F. Hartman in HR Quarterly, 7 (1985) 34, 131. See also the Resolution of the UN Sub-Commission 1988/24, below, p. 246 (see also pp. 244–5).*

[205] *A proposal in this direction was presented in the "travaux préparatoires" of the Covenant; sec A/2929, para. 47.*

[206] *A practice is developing under the Special Rapporteur on States of Emergency in the sense that States communicate to him the declaration of emergency, the derogated provisions, and the reasons thereof.*

[207] *See Oraá J., op.cit., ch. 8.*

and monitoring bodies in the application of norms and principles, and the acquiescence with those standards by States non-parties to the treaties.

a. *The Probative Value of Law-Making Treaties*

As has been pointed out by the doctrine, most of the international obligations relating to human rights are contained in treaties. However, some norms and principles of these main treaties may be regarded as expressing, or as generating, rules of customary law. In view of the fact that most of the human rights instruments state largely new norms, it would seem that these treaty norms, rather than being an expression of pre-existent customary rules, have in general generated new customary rules. Thus, some of these law-making treaties may also acquire a probative value in establishing the customary character of new norms. This is especially true in the case of multilateral treaties containing general standards, concluded after a long period of discussion and with the participation of a great number of States. Undoubtedly, the ICCPR qualifies as one of these treaties, and the derogation clause can be seen as a provision which contains principles of a norm-creating character.[208]

b. *The Repetition of the Same Norm in Several Human Rights Treaties*

Another element, which has been considered to be an important expression of State practice and evidence of customary law, is the repetition of the same norm in several human rights treaties, especially if these treaties are multilateral. Thus, more evidence of the general acceptance of the principles of the derogation clause of article 4 of the Covenant could be found in their being repeated in the main regional treaties, namely, in article 15 of the European Convention and article 27 of the American Convention; a derogation clause is also contained in the new Draft Convention for the Arab World.[209] Moreover, the fact that the same

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[208] *Ibid., pp. 231 ff.; see also pp. 230–1 for the universal character of the Covenant.*

[209] *Art. 42 says:*

"1. Any country in case of actual war, imminent danger or any crisis threatening its independence and security may declare a state of emergency and may take measures derogating from its obligations under the present Charter to the extent strictly required by the exigencies of the situation.

2. No derogation may be permitted under the preceding provision from respect for the right to life, security of person, recognition as a person before the law, the right to a nationality the principle of supremacy of the law or the right to freedom of religion and thought." (Para. 3 is similar to that of the other three treaties.)"

See Draft Charter on Human and People's Rights in the Arab World, 1987, Istituto superiore

provision, in this case the derogation clause, is restated after eighteen years in identical terms can be seen as strengthening the principles contained within it.[210]

A finding of the West German Supreme Constitutional Court used the repetition of a treaty-norm in different treaties as evidence of customary law; the issue at stake was the principle *ne bis in idem*. The Court noted: first, that the principle was recognised in article 14(7) of the Covenant, which had been ratified by eighty States from all major legal systems; secondly, reservations to that article had not decreased its effect; and, thirdly, that the same principle was recognised in article 8(4) of the American Convention and article 4 of the Seventh Protocol of the European Convention. Bearing these elements in mind, the Court considered that the principle *ne bis in idem* was a general rule of international law.[211] The use of this kind of evidence of customary law has also been adopted in the judicial decisions of other national courts. Thus, Meron has found that the review of the recent US cases "reveals significant, though uneven and uncertain, resort to international human rights instruments as evidence of customary human rights law".[212]

c. *The Practice of the Organs of International Organisations and Similar Agencies*

As has been pointed out, "the practice of judicial, quasijudicial and supervisory organs has a significant role in generating customary rules".[213] It is true that many of these bodies, such as the European Court and Commission, the Human Rights Committee, and the Inter-American Court and Commission, usually apply treaty law rather than general international law. However, their decisions and jurisprudence are often invoked outside the context of treaty law and considered to be an authoritative interpretation of human rights norms in general international law. A detailed study of the jurisprudence of these bodies when applying the derogation clause as a matter of treaty law has already been carried out elsewhere; what remains is to examine the evidence found in decisions of international organs

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internazionale di scienze criminali, p. 15. For the reasons for the absence of a derogation clause in the African Charter, see Oraá J., op. cit., pp. 209 ff.

[210] *See G. Gaja, "A "New" Vienna Convention on Treaties between States and International Organisations", BYBIL58 (1987), 268.*

[211] *1987, Neue Juristische Wochenschrift (NJW), 2155 (quoted in Meron T., "Human Rights and Humanitarian Norms", pp. 132–4).*

[212] *Ibid., pp. 130–1.*

[213] *Ibid., p. 100.*

when applying the principles of the derogation clause as a matter of general international law.[214]

i) *The Practice of the Inter-American Commission of Human Rights (IACHR)*

The IACHR has also applied some of the fundamental principles of the derogation clause to those States non-parties to the American Convention but members of the OAS and therefore bound by the UN Charter and the American Declaration. In this section, two points will be examined: the main principles of the derogation clause applied, and the legal basis for the extension of these principles to States non-parties to the Convention.

The Principles of the Derogation Clause Applied outside the Convention

In the last decades, the IACHR has produced a certain corpus of doctrine on different important topics in the interpretation and application of the human rights instruments in the Americas; this doctrine, which comes from the Commission's reports and case-law, has been systematised to some extent by the same Commission.[215] Not surprisingly, the subject of human rights in states of emergency has been given a lot of attention. The position of the Commission on this topic and the principles applied are as follows:

The concept of a state of emergency and the legitimacy of the institution. The Commission considers the state of emergency, which is recognised in most national legal systems, to be a normal and legitimate institution when kept within certain limits. In fact, in emergencies, human rights standards cannot be the same as in normal or peacetime, because this would entail a serious risk to the maintenance of public order and state security. There is a need on these occasions to find a balance between the need for the defence of a legally institutional order and the protection of individual rights.

Principles applied by the Inter-American Commission:

1. *Principle of exceptional threat.* The declaration of a state of emergency and the suspension of fundamental rights are only legitimate in exceptional situations;

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[214] *See the interesting "Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency", produced by the International Law Association and presented at the Queensland Conference (l990).*

[215] *OAS, "The IACHR: Ten Years of Activities" (Washington, 1981), pp. 315ff. For the doctrine on States of Emergency, see ibid., pp. 336–8.*

these situations are mainly due to internal commotion or external attack. The exceptionality of the situation has been qualified in several ways: "serious and grave danger", "real threat to the public order or the security of the State", etc. In several cases, the Commission has not accepted the declaration of emergency and the widespread suspension of human rights, because the circumstances did not warrant them.[216]

2. *Principle of temporariness.* The state of emergency is an institution "essentially transitory in nature'; in other words, it cannot be established for an indefinite or prolonged period of time. This principle of temporariness seems to be a particular expression of the principle of proportionality.[217]

3. *Principle of non-derogability of fundamental rights.* In a proper state of emergency, fundamental human rights cannot be violated. Among the rights mentioned by the Commission as falling into this category are: the right to life, the right to be free from torture or other inhuman or degrading treatment or punishment, and the right to a fair trial. Among the violations of fundamental guarantees, it has referred to: the denial of the minimum guarantees of common article *3* of the 1949 Geneva Conventions, death sentences without due process of law before a competent tribunal, prolonged arbitrary detention without being charged and without fair trial and due process of law, deprivation of the freedom of the accused for a period longer than the maximum sentence he could receive, and expulsion of nationals. As will be seen below, it seems that the Commission considers the principle of non-derogability of article 27(2) of the Convention to be applicable also to non-parties to the Convention.[218]

4. *Principle of proportionality.* All derogating measures which are excessive in respect to the threat, and therefore not strictly necessary, have to be considered inadmissible. The Commission also considers that states of emergency should not alter to any appreciable degree the independence of the various branches of the government or lead to the denial of the rule of law.

This doctrine has been considered by the Commission as the "most admitted doctrine internationally", because it is the one which inspires the American Convention (art. 27), the ICCPR (art. 4), and the European Convention (art. 15). This doctrine and the principles referred to have also been applied by the IACHR to non-parties to the American Convention as a matter of general international

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[216] *See Oraá J., op.cit., ch. 1.*

[217] *Ibid. See also ch. 5, pp. 159 ff.*

[218] *See IACHR, Report on Paraguay, 1987, p. 16.*

law; thus, in the *Reports on Chile* in 1974 and 1985, *Paraguay* in 1978 and 1987, and *Uruguay* in 1978.[219]

There is an even clearer formulation of these fundamental principles (with a greater emphasis on the principle of proportionality) in the chapter dedicated to the Commission's doctrine on terrorism and the limits of the repressive action of States.[220] These principles were equally applied in the case of non-parties to the Convention (e.g. Argentina in l980).[221]

The legal basis for the extension of the main principles of the derogation clause to States non-parties to the American Convention

This important question can be formulated as follows: on what grounds has the IACHR extended the application of the main principles of the derogation clause to States non-parties to the American Convention? Is it that the IACHR considers these principles to be part of customary international law and therefore applicable to all countries, or is it that the IACHR considers these principles to be regional custom? Not surprisingly, the IACHR has not given a complete legal justification for this extension; however, some important hints on the legal foundation of the extension of these principles appear in several cases.

The first case in which the IACHR addressed this question was in the 1974 Report on Chile.[222] In this case, which took place before the American Convention had entered into force, the Commission referred to the necessity of suspending human rights in emergencies, and the said Law, whether domestic or international, does not ignore such realities. It weighs them fairly and gives solution for dealing with them, while adequately evaluating the good that is endangered. With respect to American international law, which is the normative system that the Commission must take primarily into account, it must be understood that, in the absence of conventional standards in force in this area, the "most accepted doctrine" is that which is set forth in the American Convention on Human Rights ... which has been signed by twelve American countries (among them Chile) and whose

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[219] *IACHR, Report on Chile, 1974 (see Buergenthal ed., "Protecting Human Rights", pp. 362ff.); Report on Chile, 1985 (pp. 43-45); Report on Paraguay, 1978, p. 19; Report on Paraguay, 1987, pp. 15ff.; Report on Uruguay, 1978, p. 19.*

[220] *OAS, "The IACHR: Ten Years of Activities", pp. 339–42.*

[221] *IACHR, Report on Argentina 1980, pp. 24–7. (The same principles were applied to a state party to the Convention: Report on Colombia. 1981, pp. 15–18.)*

[222] *IACHR, Report on Chile 1974, pp. 2–4 (quoted in Buergenthal (ed.), "Protecting Human Rights" (3rd edn., 1990), pp. 362–3).*

ratification has already begun. The Convention contains an express provision in Article 27 establishing to what extent a state may restrict the protection of human rights in exceptional circumstances, such as war.[223]

Professor Meron has seen in this position a declaration by the IACHR that article 27 reflects a regional customary law norm for the American system.[224]

This position seems to have been reflected in other cases. Thus, in the *Report on Paraguay,* 1978, in which the Commission once again declared that this "most accepted doctrine" inspired article 27 of the ACHR, the Commission added that the content of article 27 "is a reflection of convictions and beliefs that are firmly rooted in the minds of our people".[225] Furthermore, in the 1987 *Report on Paraguay,* the Commission was aware of the fact that Paraguay had not ratified the American Convention and therefore was only bound by the American Declaration, which does not contemplate the possibility of derogating from human rights standards. However, the Commission considered that the criteria derived from article 27 "in its day embodied the hemisphere's thinking on the subject". Following this reasoning, it considered that the principles of exceptional threat, temporariness, non-derogability of certain fundamental rights, and proportionality reflected "unanimous doctrinary thinking".[226]

Moreover, the Commission goes even further in its jurisprudence. It does not simply say that article 27 reflects the "most accepted doctrine" in the American continent (what Meron qualifies as "regional customary law'), but it seems to imply that this doctrine has a wider extension and can be defined as *"the most admitted doctrine internationally".* In its 1974 *Annual Report,* which has been incorporated into the *corpus* of the official Commission's doctrine, it said:

The Commission is not unaware of the reasons in favour of the attribution of special powers to the Executive Branch in exceptional situations, such as those which arise from internal commotion or external attack, but it takes into consideration the fact that the most admitted doctrine internationally, because it is that which inspires the American Convention ... (art. 27) as well as the UN ICCPR (art. 4) and the ECHR (art. 15), places precise limits on the use of special powers for the purpose of protecting human rights; and considers it necessary to

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[223] *Ibid., Chile ratified the Convention in 1990.*

[224] *Meron T., "Human Rights and Humanitarian Norms", p. 219 n. 262.*

[225] *IACHR, Report on Paraguay 1978, p. 19.*

[226] *IACHR, Report on Paraguay 1987 pp. 15–16*

harmonise the needs of a defence of a regularly established institutional order with the protection of the fundamental attributes of man.[227]

Furthermore, in the 1985 *Report on Chile,* the Commission confirmed this position by saying: "Indeed, international law - as formalised in Article 4 of the ICCPR. to which Chile is a party, and article 27 of the ACHR, which embodies the most received doctrine on this subject - has imposed a series of requirements and exigencies if a State is to limit the exercise of the rights and freedoms that are internationally recognised."[228]

The interpretation of the phrase "the most accepted doctrine internationally" presents some problems, mainly because the IACHR does not explain its meaning or provide any evidence for its claim.[229] The concept of "the most accepted doctrine" is a common one in civil law systems and is built upon the writings of the most distinguished legal authors (it must not be forgotten that the original text of these findings of the IACHR is in Spanish and that most of the members of the Commission come from civil law systems). The concept serves to support judges in their task of applying the law and to fill possible gaps, by giving them the guidance of the "most accepted doctrine".[230] It seems that the position of the Inter-American Commission is similar in these cases, in so far as it has to apply certain principles on human rights in emergencies, but there is no possibility of a direct application of treaty law (derogation clause) because the States involved were not parties to the American Convention; therefore the Commission solves the problem by recurring to the "most accepted doctrine". In many cases, the most accepted doctrine is evidence of what the law is; in this respect, it would come close to the "teachings of the most qualified publicists of the various nations", as a subsidiary means for the determination of the law. In the French text of article 38 of the Statute, this subsidiary source of law is called "la doctrine" (similar to the Spanish text "la doctrina'), which recalls the expression used by the IACHR when it referred to the "most accepted doctrine". However, the doctrine in international law can only be considered as evidence of the rules of law, and not as an

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[227] *lACHR, Annual Report, 1974, p. 36. Included in IACHR, "Doctrine", pp. 336–7. Also quoted in IACHR, Report on Paraguay, 1978, p. 19.*

[228] *IACHR, Report on Chile, 1985, p. 44.*

[229] *However, in the 1985 Report on Chile the Commission refers to the writings of Higgins, Hartman, Questiaux, and Grossman on this topic, ibid., p. 44 n. 11. The IACHR uses a flexible language when it refers to this most accepted (received, admitted ...) doctrine; hereafter the expression "most accepted doctrine" will be used.*

[230] *See e.g. the Swiss Civil Code (art. 1), "the most authoritative doctrine' (Williams, "The Swiss Civil Code: Sources of Law", p. 61).*

independent source.[231] (To some extent, also the general principles of law in article 38 of the Statute "were intended to equip the Court with the means of overcoming the deficiencies of international law resulting from its still imperfect development".[232])

If this is the case, the "most accepted doctrine internationally" will, in the jurisprudence of the IACHR, constitute evidence of general international law, in the same way as "the most accepted doctrine in American international law" is evidence of what has been qualified as regional customary law. The position of the IACHR could be interpreted in the sense that it affirms that article 27 of the American Convention was declaratory at the time of regional customary law, and that similarly, article 15 of the European Convention and article 4 of the ICCPR were declaratory, at the time of their signature, of customary international law. This interpretation needs close examination.

1. The contention that article 27 of the American Convention could at that time be deemed to constitute the crystallisation of a rule of regional customary law is not free from difficulties. One may argue that in 1968 (just before the signature of the Convention), and as a consequence of the "generating effect" created by the derogation clauses of the 1950 European Convention and the 1966 Covenant in the American continent, the "most accepted doctrine" on the subject of "human rights in states of emergencies" was precisely that expressed in the main principles of the derogation clause of those two treaties. This thinking was expressed in the extremely important 1968 IACHR Resolution on this topic. This resolution, which was the conclusion of a long period of study by the Commission on Human Rights in Emergencies, contains the main principles of the derogation clause.[233] Finally, following this argument, one may say that the crystallisation of this process was article 27 of the American Convention, which at the time embodied the "most accepted doctrine" (what Meron has qualified as regional customary law). Although this theory is not free from difficulties, that process could possibly have taken place by 1978. In fact, a certain homogeneity in the legal systems of the American States, in all of which the institution of a state of emergency has common characteristics, could have helped towards the creation of a regional custom.

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[231] *A. Verdross, "Derecho internacional público" (4th edn., Madrid, 1972), p. 99.*

[232] *H. Waldock, "General Course on Public International Law", Recueil, 106 (1962), pp. 1-250, p. 56. See also on this point the remarks by Bin Cheng in his "General Principles of Law as Applied by International Courts and Tribunals" (London, 1953; repr. Cambridge, 1987), Introduction.*

[233] *IACHR, Resolution on the Protection of Human Rights in Connection with the Suspension of Constitutional Guarantees or "State of Siege" (1968) (included in Buergenthal and Norris (eds.), "The Inter-American System", vol. iv, booklet 23, p. 8).*

2. Some aspects of the IACHR finding seems to imply that articles 15 of the ECHR and 4 of the ICCPR could at that time be considered to embody general international law; this contention is more controversial. It is hard to accept that the derogation clause of the European Convention, when it was signed in 1950, codified a rule of general international law ("the most accepted doctrine internationally"). It should not be forgotten that the ECHR was a regional treaty, which for the first time tried to regulate in general terms the issue of civil and political rights and to define with great precision the international obligations of States in this field. It was the first treaty on the matter and was signed a few years after the founding of the UN and less than two years after the Universal Declaration, which was not considered at the time to be obligatory as a matter of international law. Therefore, even if the drafting of the UN Covenant was following the same lines, it is hard to believe that article 15 of the ECHR could be considered as being declaratory of general international law.

It is also difficult to accept the contention that when the Covenant was signed in 1966, article 4 was declaratory of general international law.

Although the possible "generating effect" of the ECHR derogation clause could be seen as providing a possible means of creating a general rule, it is still difficult to have confidence in this view, especially if one takes into account that the Covenant was the first international treaty on human rights of a general character establishing clear legal obligations for States at a universal level. There is no evidence that by 1966 there existed a State practice as a matter of customary international law, in the sense that States behaved in accordance with the principles of the derogation clause.

The more plausible theory is this: the main principles of the derogation clause of the European Convention and the ICCPR as a provision of a norm-creating character have had a generating effect, first of all in the American continent, by creating a regional custom which was soon codified in the American Convention, and then by creating an emergent rule of general international law. The doctrine also provides evidence to show that these principles of the derogation clause are now emerging as general international law.[234]

In any case, whatever explanation one may find in the construction of the IACHR jurisprudence, the fact is that the Commission believes that the main principles of the derogation clause common to the three main treaties are not only part of "American international law", but also form part of the "most accepted doctrine

[234] *See below, Conclusions under 2.*

internationally". This goes some way towards proving that they are part of general international law. Accordingly, the IACHR has made this doctrine a part of its jurisprudence and has applied it to those States non-parties to the American Convention. Furthermore, no State, not even those affected by the application of these standards, has ever attacked the legal grounds of this position of the IACHR.

The jurisprudence of the IACHR on the application of the main principles of the derogation clause outside treaty-law has two important implications: (1) to affirm these principles within the American system as regional customary law; (2) to support the contention that these principles are also part of general international law, and could therefore also be applied by international bodies, especially those within the UN framework, when assessing human rights obligations in emergency situations for those States non-parties to the Covenant or to any other treaty with a derogation clause. This position seems to have been taken by the UN Special Rapporteur on States of Emergency.

ii) *The Practice of the UN Organs*

In this section the practice of the UN organs on the question of human rights in emergencies will be analysed. This will be seen outside the context of the strict application by the HR Committee of article *4* of the Covenant as a matter of treaty law. As is well known, the Covenant established a special organ, the Human Rights Committee, to apply the standards of the Covenant. The jurisprudence of the Committee has been examined in great detail in previous works. However, an interesting development in the recent practice of the UN Human Rights Committee dealing with emergency situations should be underlined here.[235] Since 1991, and in the light of extremely serious human rights violations, the Committee has more and more resorted to requesting emergency reports which were examined during the session immediately following their submission. Thus, the Committee has requested States such as Iraq, Yugoslavia, Bosnia, Croatia, Perú, Haiti, Angola, Burundi and Rwanda, to submit, within three months additional reports on the emergency situation. This has been done under the power given to the Committee by article 40.1.b) of the ICCPR. This is a very welcomed development in the practice of the UN Human Rights Committee.

Nevertheless, what will now be analysed, in order to find evidence of the application of the principles of the derogation clause as general principles outside treaty law, is the practice of the UN organs in respect to this matter. Firstly, however, a brief account of the history of the involvement of UN organs with this topic will be of some value.

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[235] *Nowak M., The Activities of the UNHR Committee. Developments from 1 August 1992 through 31 July 1995; 16 HRLJ (1995) pp. 377ff.*

A brief historical outline. As early as 1977, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities expressed its deep concern at the manner in which certain countries applied the provisions relating to states of emergency. What the Sub-Commission underlined above all was the link between the numerous violations of human rights and states of emergency, and it paid special attention to the matter of the prolonged and often indefinite detention of unconvicted persons.[236] The Sub-Commission decided to undertake a comprehensive study of this question in order to advance the aim of the UN with respect to human rights. This project was finally entrusted to Mme Questiaux, who produced a valuable study.[237] In the first part of this report, Mme Questiaux outlines the main principles of the derogation clause of the three main treaties, the effect of emergencies on the rule of law and on detained persons. However, Mme Questiaux did not address the problem of whether some of the principles of the derogation clauses should be deemed to constitute general international law.[238] At the end of the report, she recommended *inter alia* that the Sub-Commission might include in its agenda a special item entitled "implementation of the right of derogation provided for under article 4 of the ICCPR and violations of human rights", with the aim of drawing up a yearly list of States which proclaim or terminate states of emergency, and that the Sub-Commission should produce an annual report to the HR Commission analysing compliance with international standards of the legality of states of emergency; to this effect reference should be made to the principles of the derogation clause.[239]

This recommendation was accepted and put into effect by the UN Commission on Human Rights, which required the Sub-Commission to study further steps to ensure respect for human rights in emergencies throughout the world, especially respect for those non-derogable rights contained in article 4(2) of the Covenant. The Commission gave urgent priority to this question due to its great importance.[240] In order to fulfil this task, the Sub-Commission appointed Mr Leandro Despouy as Special Rapporteur.[241]

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[236] *Resolution 10 (XXX) of 31 Aug. 1977.*

[237] *E/CN. 4/Sub. 2/1982/15 (27 July 1982), "Study of the Implications for Human Rights of Recent Developments concerning Situations Known as States of Siege or Emergency".*

[238] *Nonetheless, see ibid., p. 19, in which she expresses the belief that the principle of non-derogability of fundamental rights is a principle of general international law and of ius cogens.*

[239] *Ibid., p. 44.*

[240] *UN Commission on HR, Resolution 1983/18.*

[241] *UN Commission on HR, Resolution 1985/23.*

Mr Despouy had to deal with an important problem which would influence the whole direction of his work: the problem was whether his study should be confined to those States parties to the Covenant (or other regional treaties with derogation clause), or should include all States. In the second case, a further question arose concerning the standards applicable to those States non-parties to any of those instruments. There were good reasons to hold that the work of the Special Rapporteur should be confined to States parties to those treaties (in fact, the wording of the item in the agenda of the Sub-Commission reads "implementation of the right to derogate provided for under article 4 of the Covenant ...", and moreover, Mme Questiaux's Report seems to refer only to treaty law). However, due to the far-reaching nature of Mr Despouy's mandate, the final decision was to include States non-parties as well.[242]

Having taken this position, the Special Rapporteur had to solve the further problem of the human rights standards in emergencies applicable to States non-parties to the Covenant. (It should not be forgotten that the mandate of the Special Rapporteur involved him in assessing the compliance of States with international standards). After explaining the principles of the derogation clause as developed by the supervisory organs under the treaties, Despouy had to consider to what extent "these principles are customary in nature". In an important statement, the Special Rapporteur said:

Having regard to the present state of international law, we believe that the answer should be that at least some of these principles are of the nature of customary law.[243]

The principles enumerated were: the principle of non-derogability, proclamation, legality, notification, exceptional threat, proportionality, temporariness, and non-discrimination. Referring to the Questiaux report, he confirmed that the national laws of most states are in conformity with these standards.[244] Despouy did not declare which principles have become customary law; neither did he address this question in his first two annual reports, perhaps because, as he pointed out, during the first stage of his work as Special Rapporteur he concentrated on gathering information concerning states of emergency, leaving the question of the

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[242] *See E/CN. 4/Sub. 2/1985/19, pp. 3–5. See also on this point the cautious position of Mr Al Khasawneh and the supporting opinion of the Int. Commiss. of Jurists in E/CN. 4/Sub. 2/1985/SR. 25/Add. 1, pp. 2–3 and 11.*

[243] *E/CN. 4/Sub. 2/1985/19 (17 June 1985). Explanatory paper prepared by Mr L. Despouy (Argentina).*

[244] *Ibid., p. 9., para. 24.*

principles concerning human rights in emergencies in general international law for a later stage. Even though he does not deal with the point explicitly, his position as a matter of principle on the customary nature of some of these principles is very much in line with the position of the IACHR.

However, in one of his reports,[245] the Special Rapporteur set up certain criteria and norms applicable in emergency situations; these criteria are part of an "international legal framework deriving from prevailing international norms, the practice of international organisations and the internal law of States, which provides a frame of reference for the legality of states of emergency".[246] These criteria are applicable to all States. Among the criteria identified by the Special Rapporteur the following were included: the principles of exceptional threat, proclamation, proportionality, limited geographic extent of the emergency, and the principle of non-derogability (he also stated his intention to draw up a list of non-derogable rights on the basis of international treaties and customary law).[247] Furthermore, Mr Despouy mentioned as a part of this legal framework: the need for a national monitoring mechanism (by Parliament or judicial review), the possible compensation for the victims of excessive emergency measures, and the need to maintain the power of non-military courts and the procedural guarantees of *habeas corpus*, *amparo*, and similar remedies.[248]

In order to produce his reports, the Special Rapporteur asked Governments through the UN Secretary-General to provide detailed information on states of emergency in order to assess their legality in the light of the main principles of the derogation clause. He therefore asked for detailed information on the following aspects: data of proclamation and termination, notification to international bodies (when applicable), legislative texts, reasons for the proclamation, the number and nature of rights suspended, the geographical extension of the emergency, persons affected, duration, etc.[249] It can easily be seen that the information referred to covers most of the aspects of the principles of the derogation clause.

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[245] *E/CN. 4/Sub. 2/1989/30/Add. 2/Rev. 1.*

[246] *Ibid., p. 2.*

[247] *Ibid. (paras. a, b. c, d, e). This has been done in part in his last report, E/CN.4/Sub.2/1995/20. pp 9-11. See also the interesting Report of the meeting of experts on non-derogable rights pp 44-63.*

[248] *Ibid., pp. 2–3 (paras. f. g; and 4b, c).*

[249] *E/CN. 4/Sub. 2/1981/19 (18 Aug. 1987), p. 6, "First Annual Report and List of States which since 1.1.1985 have Proclaimed, Extended or Terminated a State of Emergency, Presented by L. Despouy, Special Rapporteur".*

The response to this demand for information was quite impressive, especially if one takes into account not only the overall number of States which answered (68 at that time), but also the fact that twenty-six of these States were non-parties to the Covenant and many of them had been directly affected by a situation of emergency. The number of replies is especially significant when one remembers that a state of emergency is a highly sensitive matter and that the procedure of the Special Rapporteur implies a new development in this area. This information (together with that taken from other sources) has enabled the Special Rapporteur to produce eight comprehensive reports on states of emergency in the world.[250]

No State has ever made a declaration against the competence of the Special Rapporteur to undertake these steps. Even a country like South Africa sent information about the state of emergency declared there in l985.[251] Moreover, the information received bears witness to the fact that even States non-parties to the relevant treaties are willing to fulfil the fundamental principles of the derogation clause. This is particularly true in respect to the non-derogable rights contained in article 4(2) of the Covenant; no State has ever officially derogated from these non-derogable rights. The answers received from States, in line with the position of the Special Rapporteur on the customary nature of some of the principles of the derogation clause, could provide further, although not conclusive, evidence concerning the *opinio iuris* of States on these principles as general international law, especially when it is taken into account that no State has objected to the work or to the principles laid out by the Special Rapporteur.[252]

A recent resolution of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities is also in line with the position of the Special Rapporteur on the importance of the principles of the derogation clause as general international law; the Sub-Commission reaffirmed their importance for all States; the principles mentioned are: the principle of non-derogability, official proclamation, exceptional threat, and temporariness. It also recognised the

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[250] *For the first report see n. 70 above; for the second annual report: E/CN. 4/Sub. 2/1988/18 and Rev. 1 and Add. 1. For the third report: E/CN. 4/Sub. 2/1989/30, Add. 1 and Add. 2 Rev. 1. See also E/CN. 4/Sub. 2/1990/33 and Adds. 1, 2 (July-Aug. 1990). For the fourth annual report: E/CN. 4/Sub. 2/1991/28 (24 June 1991). Fifth Annual Report: E/CN.4/Sub.2/1992/23/Rev 1. Sixth Annual Report:E/CN.4/Sub.2/1993/23/Rev.1. Seventh Annual Report: E/CN.4/Sub.2/1994/23 and Corr 1 and Add 1. Eight Annual Report: E/CN.4/Sub.2/1995/20.*

[251] *E/CN. 4/Sub. 2/1989/30/Add. I (28 June 1989), E/CN. 4/Sub. 2/1990/33/Add 2, p. 3.*

[252] *The communications exchanged between the Special Rapporteur and the Government of Paraguay illustrate this new development within the UN organs, and the emerging obligations of States non-parties to the Covenant to comply with the principles of the derogation clause. See E/CN. 4/Sub. 2/1987/18 (22 May 1987).*

fundamental importance of enacting internal legislation in accordance with international norms for those States which have not yet done so.[253]

The monitoring of human rights in emergencies by the UN Commission on Human Rights. As the International Law Association has pointed out: "through the confidential procedure under ECOSOC Resolution l503, *ad hoc* studies of country situations, special mechanisms to deal with particular grave human rights abuses, general debate on human rights conditions and the adoption of resolutions, the Commission has made itself into one of the most important bodies currently monitoring human rights abuses under states of emergency."[254] After a detailed analysis of this monitoring function of the Commission in emergencies, some general conclusions can be drawn.

1. The contention that the situation of human rights in a country in a state of emergency belongs exclusively to the domestic jurisdiction of the State has systematically been rejected by the Commission and its *ad hoc* special committees or Special Rapporteurs when there is prima-facie evidence of gross violation of human rights; this has been a common contention by those States under scrutiny. The fact that there is a state of emergency does not prevent the exercise of the monitoring functions by the UN organs. These functions include at least the study of the situation through comprehensive reports and the making of recommendations".[255] Professor Brownlie has pointed out that these powers of supervision by the UN political organs are exercised through discussions of human rights issues, publicity, fact-finding machinery, and other means under article 14 of the Charter; in practice, article 2(7) has not been interpreted in a restrictive way.[256] Therefore the contention that a state of emergency is an exclusive "internal act of the state" has not been accepted by UN organs when gross violations of human rights are involved.[257]

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[253] *UN Sub-Commission Resolution 1988/24, adopted 1 Sept. 1988 without vote. "Question of Human Rights and States of Emergency", in E/CN. 4/l989/3 (25 Oct. 1988). See also E/CN. 4/Sub. 2/1990/33, p. 2, para. 4.*

[254] *ILA Seoul Report (1986), para. 32. For a survey of the supervision by the UN Commission on Human Rights in states of emergency, see ibid., paras. 32 ff.*

[255] *See E/CN. 4/1985/21 (19 Feb. 1985), p. 11 (where Ermacora quotes the UN Commission on South Africa which affirmed "the universal right of study and recommendation' on general problems of human rights, A/2505).*

[256] *Brownlie I., Principles of Public International Law (4th edn., Oxford, 1990), p. 571.*

[257] *See inter alia: E/CN. 4/1310 (1979), Annexe XXII, "Observations of the Government of Chile on the Report of the Ad Hoc Working Group". See also the report itself, pp. 2 ff. Also A/31/253 (8 Oct. 1976), "Report of the Ad Hoc Working Group on the Situation of Human Rights in Chile, para. 49; paras. 89ff., E/CN. 4/1983/18 (21 Feb. 1983), "Report on the Situation*

2. The monitoring functions of these bodies arise from the UN Charter and the general competence of the UN Commission on Human Rights, and not from any special mechanism established by a particular human rights treaty. Therefore the Commission studies those situations in respect both to parties and non-parties of human rights treaties; no distinction has been made as far as the right to monitoring these situations is concerned.

3. In respect to parties to the Covenant, the Commission and other bodies refer to the derogation clause as the legal regime applicable, although the quality of the legal analysis and the evaluative statements depend on the different bodies and *ad hoc* working groups; in several of these reports, a thorough analysis of fulfilment with the strict conditions of the derogation clause has been made.[258] In the case of Poland, the UN Under-Secretary-General sent a very detailed questionnaire to the Polish Government asking for full information about the way in which the state of emergency declared in 1981 affected not only non-derogable rights but also those which can be suspended according to article 4, the assumption being that there was a disproportionate suspension of rights.[259]

4. A further step was taken by the *Ad Hoc* Working Group on Chile when it applied the derogation clause of article 4 to Chile even before the entry into force of the Covenant. Although it can be said that, according to article 18 of the Vienna Convention on the Law of Treaties, Chile, once it had signed and ratified the Covenant, was obliged to refrain from performing acts which would defeat the object and purpose of the treaty,[260] the reasoning of the *Ad Hoc* Working Group was different. It required Chile to comply with the main principles of the derogation clause as a matter of general international law. In its First Report in 1975 the Group said that "these provisions (those of article 4) correspond to the generally recognised international standards of human rights in emergency situations". The provisions explicitly mentioned by the Group were the main principles of the derogation clause, namely, the principles of exceptional threat,

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in Poland by the Under-Secretary Hugo Gobbi," p. 2; E/CN. 4/1985/21 (19 Feb. 1985), "Report on Afghanistan by Prof. Ermacora", p. 11.

[258] *See the Reports on Chile. E/CN. 4/1310 (1979), pp. 14–16; A/31–253 (1976).*

[259] *E/CN. 4/1984/26, pp. 4–6. See also the UN HR Commission Resolution 1982/26 (arbitrary arrest, denial of the right of freedom of expression, peaceful assembly, right to form and join independent trade unions, etc.).*

[260] *E/CN. 4/SR. 1273 (1974) (Remarks of Cassese of Italy), p. 85.*

proportionality, consistency, non-derogability of fundamental rights (in particular arts. 6, 7, 8, 15, 18), and non-discrimination.[261]

In its Second Report, the *Ad Hoc* Working Group reaffirmed this doctrine and specified the legal basis for it; in an important statement the Group said: "article 4 of the ICCPR, which has been ratified by Chile and is expected to enter into force on 23 March 1976, may be considered as reflecting the general international law of human rights on the subject of emergency situations and limitations of human rights".[262] In order to support this contention, the Group made reference to the derogation clauses of the European and American Conventions, which contain the same main principles. This position is very much in line with the jurisprudence of the IACHR and that of the Special Rapporteur of the UN Sub-Commission.

5. Unfortunately, one of the characteristics of many reports of the UN Special Rapporteurs and *Ad Hoc* Working Groups in cases relating to States non-parties to the Covenant is a lack of analysis of the legal criteria used to assess human rights standards in states of emergency.[263] In the majority of cases, these bodies simply describe the gross violations of fundamental rights which have taken place. The legal basis for finding violations consists of the States' legal obligations arising from the UN Charter and those parts of the UDHR which have become part of customary law.[264] The Special Rapporteurs and similar bodies have insisted above all on the principle of non-derogability of fundamental rights as a principle of general international law. Thus, the Special Rapporteur on Iran (Andres Aguilar) maintained that the basic provisions of the UDHR have become customary international law and many of them norms of *ius cogens.*[265] In several cases, article 4 of the Covenant has been used as an "authoritative interpretation" of the Charter and of the UDHR on this subject of human rights in states of emergency.[266]

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[261] *A/10285 (7 Oct. 1975), p. 42, para. 106.*

[262] *E/CN. 4/1188 (4 Feb. 1976), p. 20, para. 59.*

[263] *See the remarks of the ILA Report to the Seoul Conference, 1986. in respect of the cases of Bolivia, Guatemala, and Equatorial Guinea, pp. 19–20.*

[264] *See e.g. the Report on Iran, E/CN. 4/l985/20, pp. 8–9; and the Report on Afghanistan E/CN. 4/1985/21, p. 36.*

[265] *Report on Iran, E/CN. 4/1985/20, pp. I9–20.*

[266] *See the positions of Aguilar and Gros Espiell in E/CN. 4/l985/20, pp. 8–9, and E/CN. 4/1500, p. 52, respectively.*

A brief analysis of the case of South Africa in the days of the dictatorship will illustrate the general position of the UN organs in monitoring States" compliance with their human rights obligations in situations of emergency.

The Case of South Africa. This case is interesting in so far as it refers to a State which was non-party to the Covenant and in a situation of emergency, and because it is a case which had received a good deal of attention from the international community and the UN organs.

A leading South African constitutional lawyer pointed out that "in recent years ... South Africa's security laws have received almost as much attention from the international community as her race laws".[267] In fact, at least since 1967, the UN organs have been concerned with the situation of human rights in South-Africa under the security laws. As the opposition to apartheid from the black population grew, the South-African authorities had to resort to all kinds of measures to overcome the unrest. It is therefore interesting to see how the UN organs have reacted and to find out on which principles they have founded their analysis of human rights standards in emergencies.

As in many other cases in which UN organs try to assess compliance with human rights obligations, States under scrutiny usually resort to the defence of domestic jurisdiction. South Africa was no exception, having pointed out that measures employed by a State to maintain national security fall exclusively within the domestic jurisdiction of that State.[268] Professor Dugard has shown that this position, which seems to be sound in principle, has two exceptions: emergency laws may in fact become a matter of international concern either when they become so arbitrary and oppressive that they violate human rights norms of customary international law, or when they are used by one racial group to suppress another in a manner which violates the norms on non-discrimination.[269] This position of Professor Dugard is in line with the present state of general

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[267] *J. Dugard, "The Conflict between International Law and South Africa Law', South-Africa Journal of Human Rights, 2 (1986), 6.*

[268] *See the South Africa's response to Resolution 418 (1977) in its letter of 4 Nov. 1977 to the UN Secretary-General (quoted in Dugard, "Conflict", p. 16).*

[269] *Dugard, "Conflict", p. 16.*

international law on human rights.[270] It is clear that States cannot use the defence of emergencies to justify gross violations of human rights.[271]

Moreover, there are some rights which have already acquired the status not only of customary law but also of *ius cogens;* these rights are non-derogable in general international law even in states of emergency; they include: the right to life, the right to be free from slavery, torture, or other inhuman or degrading treatment or punishment, systematic racial discrimination, and prolonged arbitrary detention.[272] Therefore, even States non-parties to the Covenant are obliged to comply with these standards in states of emergency as a matter of customary international law.

The reports of the *Ad Hoc* Working Group on South Africa have over the years contained a description of gross violations of most of these fundamental rights which have taken place in South Africa.[273] As is well-known, South Africa declared a formal state of emergency on 21 July 1985.[274] However, due to the strict security laws in force before that date, "black South-Africa may be said to have always lived under a permanent state of emergency".[275] In fact, there is little difference between the standards applied by the Group before and after the formal declaration of emergency, mainly because these reports refer to the violation of those rights from which there can be no derogation. A brief analysis of these two phases will establish this point clearly.

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[270] *See L. Henkin, "Human Rights and Domestic Jurisdiction", in T. Buergenthal (ed.), "Human Rights. International Law and the Helsinki Accord", (New York, 1977), pp. 21 ff. See also F. Ermacora, "Human Rights and Domestic Jurisdiction," Recueil, 124. 2 (1968), 371–451.*

[271] *Several UN General Assembly Resolutions have insisted over and over again on the need "to cease using the state of emergency or siege for the purpose of violating human rights" (e.g. UNGA Resolution 31/l24 of 15 Dec. 1979).*

[272] *See Oraá J., op. cit. pp. 215ff. (US Restatement).*

[273] *See inter alia E/CN. 4/950 (1967); E/CN. 4/984 and Add: 1–18 (1969); E/CN. 4/1020 (1970); E/CN. 4/1050 (1971); E/CN. 4/1076 (1972); E/CN. 4/1111 (1973); E/CN. 4/1135 (1974); E/CN. 4/1159 (1975); E/CN. 4/1222 (1977); E/CN. 4/1270 (1978); E/CN. 4/1485 (1982); E/CN. 4/1985/8 (1985); E/CN. 4/1986/8 (1986); E/CN. 4/1987/8 (1987); E/CN. 4/1988/8 (1988).*

[274] *The state of emergency has been renewed annually, the last time on 8 June 1989. However. on 8 June 1990, President De Klerk announced the end of the State of Emergency (with the exception of the territory of Natal). See E/CN. 4/Sub. 2/1990/33, Add. 2 (17 Aug. 1990).*

[275] *E/CN. 4/1986/6 Annexe (3 Sept. 1985), p. 1 "Violations of Human Rights in Southern Africa: Report of the Ad Hoc Working Group or Experts".*

Before the formal declaration of emergency in 1985: Before the declaration, the Working Group found several violations of some fundamental human rights. Thus, the Group attested the following practices against the *right to life* for which the Government was held responsible: deaths in prison, disappearances, killings by law enforcement officials as a consequence of using disproportionate force against unarmed demonstrators, and the imposition of capital punishment against generally accepted international standards, namely, for minor offences, in summary trials without full guarantees of fair trial and due process of law, with discrimination against black people in the majority of the death sentences, and retroactive application of the death penalty.[276]

In violation of the right to be *free from torture* and inhuman or degrading treatment or punishment, the Group found that there existed in South Africa an "administrative practice" of torture and ill-treatment of prisoners and detainees, including children. The Group also found that the practice of *prolonged arbitrary detention* was against basic international standards; these detentions could last up to six months, with the detainee usually being kept incommunicado, without any contact with a counsel, and without being brought before a judge. Finally, the area of violations of the *principle of non-discrimination* has been illustrated in all the reports. Leaving aside the whole system of apartheid as a system based on discriminatory grounds,[277] the application of emergency laws have also been found to be discriminatory in several areas, e.g. in the application of capital punishment, in the restriction of the right to freedom of movement and residence, in the description to labour camps, etc.

Since the imposition of a formal State of emergency until democracy was restored: Since the imposition of the state of emergency in 1985, the UN Commission on Human Rights has condemned "the dramatic escalation of violation of human rights".[278] In its preliminary evaluation of the state of emergency, the *Ad Hoc* Working Group has pointed out some practices against international standards along the same lines as those mentioned before.[279]

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[276] *The US Restatement also considers that capital punishment for minor offences is against customary international law when "grossly disproportionate to the crime", ii. 164.*

[277] *For a good analysis of the problem, see V. Jaichand, "International Human Rights Law, South Africa and Racial Discrimination", Journal of Legislation, 15 (Notre Dame Law School, 1988), pp. 29–44.*

[278] *UN Commission on HR, Resolution 1988/9.*

[279] *See E/CN. 4/1986/6, Appendix, "Violations of Human Rights in Southern Africa: Report of the Ad Hoc Working Group: Preliminary Evaluation of the State of Emergency", pp. 1–3*

The legal standards which these practices violate were contained, according to the Group, in the UDHR, the ICCPR, and other international instruments, as declaring general principles of law. Thus, the detention laws, due to their arbitrary character and the lack of safeguards against possible abuses, were in violation of article 9 of the UDHR and of general principles of law; the provisions on capital punishment, discrimination, the practice of torture, and the use of excessive and disproportionate force by law enforcement officials were also found to be in violation of other articles of the UDHR. Even if there is no general agreement on the fact that the whole UDHR has already become general international law, or that it is reflecting general principles of law, nobody doubts that the standards which refer to those fundamental rights mentioned by the Group have become general international law, and some of them norms of *ius cogens*.

In the preliminary evaluation of the state of emergency, the UN Group of Experts considered that part of the South African legislation violated the principle of proportionality, in the light of the standards of article 4 of the Covenant.[280] Thus, the principle of proportionality is considered to be a general principle of law when assessing the legality of restrictions on human rights in emergencies also outside treaty law. Moreover, the use of article 4 as declaratory of international standards of human rights in emergencies for all States has also been adopted in a recent study of the International Commission of Jurists; of all the principles of article 4, this study especially underlines that of non-derogability.[281] Interestingly enough, the Commission used the derogation clause of the Covenant as the legal criterion for assessing the legality of human rights in emergencies after pointing out that South Africa does not deny that it has international obligations to respect human rights, but had tried to justify its non-compliance with them with the plea of necessity of *force majeure*.[282] The International Commission of Jurists, in line with the position of other international bodies, submits the legality of the plea of necessity to the strict conditions of the main principles of the derogation clause as the legal regime applicable in general international law. According to this report, the gross violations of non-derogable rights cannot be excused or justified on the basis of any supposed national emergency.

The case of South Africa in the past decades (fortunately those times came to an end), and the reaction of the UN organs, bring out several important points:

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[280] *Ibid., p. 2, para. 7.*

[281] *G. Bindman, ed., "South-Africa: Human Rights and the Rule of Law" (London, 1988).*

[282] *Ibid., pp. 148–149. For another excuse of the Government of South Africa, see Oraá J., op. cit., p. 254.*

1. All States have international obligations to respect basic human rights and fundamental freedoms, even if they are not parties to any general international treaty on human rights;

2. Although the question of derogating measures from human rights standards taken in a state of emergency or on grounds of national security is in principle within the exclusive domestic jurisdiction of the State, when these measures result in gross violations of fundamental human rights they are also a matter of international concern;

3. The violation of some fundamental rights, such as those mentioned by the UN *Ad Hoc* Working Group, are never permitted, not even in order to deal with the emergency: these standards are part of customary international law (as the USA *Restatement* has pointed out) or of the general principles of law recognised by civilized nations (as the Working Group has indicated several times);

4. The main principles of the derogation clause, especially the principle of proportionality, constitute important guide-lines in the assessment, as a matter of general international law, of the legality of restrictions on human rights even for those States non-parties to the Covenant, when these States try to excuse their non-compliance with human rights obligations under customary law with the plea of necessity.

iii) *The practice of the Organisation for Security and Co-operation in Europe (OSCE)*

An interesting and welcome development deserving special mention is the practice of the OSCE which has created standards and procedures concerning derogations from human rights principles. In the Copenhagen and in the Moscow meetings,[283] members of the OSCE reaffirmed their commitment to respect human rights in states of emergency following basically the same main principles included in the derogation clause of the treaties, namely. the principle of exceptional threat, the principle of proportionality, the principle of non-derogability of fundamental rights and the principle of non-discrimination. There is also a reference to the compliance with relevant domestic legal requirements for any State which wants to declare a state of emergency. Another interesting feature of these documents, is the reference to the obligation of States to maintain freedom of expression and information, in particular allowing the free circulation of information and ideas concerning human rights. It seems that in this way the OSCE enlarged the number of non-derogable rights.

[283] *Copenhagen Document (1990) para. 25 (29 ILM (l990) 1305); Moscow Document (l991) paras. 28.1-28.10 (30 ILM (l991)1683).*

At the same time, there is a clear commitment to provide other Member States with information concerning any emergency which is declared and the rights derogated from. This is a kind of recognition of the principle of notification to other States parties.

In the last decade, a dozen States belonging to the OSCE have declared a situation of emergency. Unfortunately, as has been pointed out, "the reporting record of that dozen participating States is far from being satisfactory: notifications to the OSCE organs have been inaccurate and seldom timely. So far, compliance with the Moscow regime appears to be erratic, partial and, by any standard, insufficient".[284]

Therefore, there is a need to pay much more attention within the framework of the OSCE to the issue of states of emergency. In this respect, it seems that the Moscow regime needs to be strengthened by means of additional provisions committing States to respond to bilateral or multilateral requests for information, to authorise OSCE on-site visits to regions in which derogating measures are in force and, to submit periodic reports to the OSCE.

d. *The acceptance of these principles by States non-parties to the human rights treaties*

Finally, another effective way by which treaty-norms may become customary international law is through the recognition of those standards by non-parties to human rights treaties. Due to the quasi-universal character of some of these multilateral treaties (e.g. the ICCPR) containing fundamental principles on human rights, it is very unlikely that States non-parties to these treaties will explicitly reject these norms of a general character; this fact will lead to an explicit recognition by States of the binding character of these norms. The evidence examined in this chapter as far as some of the principles of the derogation clause are concerned confirms this position. Within the Inter-American system, no State, not even those affected by their application, has ever attacked on legal grounds the application by the IACHR of the principles of the derogation clause to States non-parties to the American Convention.[285]

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[284] *Ghebali, V.-Y., The Human Dimension Regime on States of Public Emergency, OSCE ODIHR Bulletin (l995), vol. 4, No. 1, pp. 32-38. This is a good study of the standards of the Copenhagen and Moscow documents and the recent practice of the States within the OSCE framework.*

[285] *See above the principles applied by the IACHR.*

Likewise, within the UN system no State has ever objected to the work and the position of principle taken by the Special Rapporteur on the application of the principles of the derogation clause to States non-parties to the Covenant. The same can be said in respect to the application of the same principles by the UN Commission on Human Rights and other specialised organs.[286]

A particular expression of implied acceptance in building customary international law on human rights has been mentioned by Schachter when commenting on the reaction of States to international criticism because of violations of human rights. He has said:

> "It is important as well to consider whether the conduct criticised is defended by the perpetrators as legitimate, or, as is often the case, denied on factual grounds. In the latter event, one may plausibly infer that the State accepts the principles involved while denying its application in the particular circumstances."[287]

This, for instance, seems to be the case of South Africa, which did not contest the standards invoked by the Special Rapporteur but denied that the conduct complained of ever took place.[288] This position undoubtedly strengthens the legal force of the standards of the derogation clause invoked by the Special Rapporteur.

5. The application of the principles of the derogation clause to other areas of international law

a. *State Responsibility for Injury to Aliens (Human Rights of Aliens in States of Emergency in General International Law)*

State responsibility for injury to nationals of other States is a well-known area of international law which preceded in time the international protection of the human rights of individuals in general. There is no doubt that nowadays there is a certain overlap and cross-fertilisation between these two branches of international law, because both ultimately try to protect individual rights against possible abuses by the State. However, they also maintain a certain autonomy. In addition to those rights that a State is obliged to respect for all persons subject to its jurisdiction, under the law of State responsibility for injury to aliens there are some kinds of

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[286] *See above the principles applied by the UNCHR.*

[287] *Schachter, "General Course in Public International Law: International Law in Theory and in Practice", Recueil, 178.5 (1982), pp. 9-396, p. 338.*

[288] *E/CN. 4/Sub. 2/1989/30/Add. 1, Reply of the Government of the Republic of South Africa, pp. 6–13.*

injuries to aliens that have not been recognised as violating human rights.[289] It is interesting in this context to look at which principles regulate the human rights of aliens in situations of emergency according to this branch of international law. The recent US *Restatement* has tried to answer these questions according to general principles of international law governing State responsibility.[290]

After recalling how there are some rights in contemporary international law which are deemed non-derogable and binding on all States, the *Restatement* provides a detailed explanation of the legal regime of the derogation clause of the Covenant (art. 4), and adds: "the derogations permissible in emergency under the Covenant are presumably permissible also under this section (State responsibility for injury of aliens) in relation to nationals of other States as a matter of customary law". Thus, subject to the principle of proportionality contained in article 4 of the Covenant, "a State could lawfully seize or regulate property and detain or regulate the activities of persons, whether nationals or aliens".[291] In other words, the conclusion of the US *Restatement* is that the principles of the derogation clause of the Covenant, especially the principle of proportionality, are prima facie the legal regime applicable to derogations of human rights of aliens in emergencies as a matter of customary international law. This position gives further evidence that the main principles of the derogation clause are emerging as principles of general international law, and thus works in the same direction as the findings of the IACHR, the ILO organs, and the Special Rapporteur of the UN HR Commission.

This position of the US *Restatement* also has a supplementary importance. At the beginning of this chapter, it was shown that the legal regime of the derogation clause is an application and adaptation of the doctrine of State necessity to human rights in states of emergency. This doctrine in international law is envisaged as a justification for a non-performance of a legal obligation when certain strict conditions are met, and it therefore excludes State responsibility. The position of the ILO organs on the legal regime applicable to those ILO Conventions dealing with human rights issues, but without a derogation clause, has been to apply to that situation the doctrine of necessity in general international law, although, as has been seen, the formulation of some of those principles was borrowed from the derogation clause of the Covenant.[292] The position of the US *Restatement,* on the other hand, goes further, in the sense that when it is necessary to apply general principles of international law to this subject (human rights of aliens in

[289] *See the recent formulation of these obligations in the USA Restatement, ii. 184ff.*

[290] *Ibid., p. 185 comment (a).*

[291] *Ibid., p. 189 comment (h).*

[292] *For the doctrine of the ILO organs, esp. in the "Greek and Polish cases", see above, ch. 9.*

emergencies), the *Restatement,* instead of applying the doctrine of necessity, which would seem to be prima facie the obvious choice, applies article 4 of the Covenant (which contains similar principles) as a matter of general international law. This position further strengthens the use of the main principles of the derogation clause as general international law, the assumption being that these principles contain the appropriate adaptation of the doctrine of necessity to human rights in emergencies.

b. *The Law of Belligerent Occupation: The Case of Israel*

The main principles of the derogation clause could play an important role in the application of human rights treaties to occupied territories. In fact, the flexibility of the derogation clause (mainly through the principle of proportionality) could complement the Fourth Geneva Convention standards, and balance the two paramount principles of the general regime of occupation under international law, namely, the military imperatives of the occupation and the well-being of the population.[293] The case of the Israeli occupied territories could illustrate the application in general international law of this sound position.

The situation in the occupied territories has been for many years, and in some ways is still, a very special one under international law. First of all, because the main international instrument applicable, as far as human rights are concerned, is the Fourth Geneva Convention of 1949 which deals with the law of occupation. Secondly, because, even if the situation in these territories can be classified under article 4 of the ICCPR as a "public emergency threatening the life of the nation", due to the continuous unrest, Israel was not party to the Covenant until very recently, and therefore the derogation clause for many years could not be applied as treaty law. Thirdly, because although the Fourth Geneva Convention contains detailed legislation on the human rights of civilians in occupied territories, it is obvious that there is a need for this to be widened to include other human rights as defined in other international instruments like the UDHR or the ICCPR, especially because of the prolongation of the military occupation. Thus, Cohen considers that:

> "The UDHR and the International Covenants, as interpretations of the UD, could be used to supplement the traditional law of belligerent occupation in order to ensure for the civilian population the maximum human rights protection in occupied territory during prolonged belligerent occupation. Although the UD is not binding and the Covenants are binding only on those States parties to them, nevertheless the application of the law of

[293] *L. Oppenheim, "International Law, ii. Disputes, War and Neutrality", 7th edn., ed. H. Lauterpacht (London, 1952), 430.*

> human rights as expressed in these instruments could serve as a guide to the occupying power in the treatment of occupied populations under a situation of prolonged belligerent occupation."[294]

According to the same view, a government is bound in situations of occupation by three fundamental principles: the principle of non-derogability of fundamental rights, the principle of consistency (with reference to its international obligations under the Hague and Geneva Conventions, and other possible international instruments), and the principle of non-discrimination. Moreover, the principle of proportionality is also relevant in the sense that "the closer an armed conflict situation grows into a peacetime situation, the more human rights contained in the Universal Declaration and the Covenants apply.[295]

On the other hand, Meron has pointed out that:

> "a State in the security situation of Israel is, no doubt, entitled to invoke reasons of security in order to derogate from various provisions of the Universal Declaration, but her purpose should be to achieve the maximum recognition of human rights as may be consistent with necessary and legitimate security considerations."[296]

Meron agrees with the view that derogations to human rights obligations are acceptable only if events make them necessary and if they are proportionate to the dangers that those events represent.[297]

These principles of necessity and proportionality are precisely among the most important principles of the derogation clause of the three treaties. Thus, this position confirms the general thesis of this section on the applicability of some of the fundamental principles of the derogation clause as a general international law which is therefore binding on States non-parties to the Covenant. Interestingly enough, Amnesty International has also referred to article 4 of the Covenant in order to assess the rights of the population under belligerent occupation.[298]

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[294] *E. Cohen, "Human Rights in the Israeli-Occupied Territories", 1967–1982 (Manchester, 86), p. 9.*

[295] *Ibid., p. 65.*

[296] *T. Meron, "West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition," Israel YBHR 9 (1979), p. 113.*

[297] *Ibid.*

[298] *Amnesty International, "Report and Recommendations of an Amnesty International Mission to the Government of the State of Israel (3–7 June 1979)" including the Governments*

6. The principles of the derogation clause as "general principles of law"

Another complementary piece of evidence reinforces the position that the main principles of the derogation clause can be deemed to constitute general international law; these principles could be considered to be general principles of law recognised by most of the world legal systems according to article 38 of the ICJ Statute. In fact, Meron has pointed out that "it is surprising that the "general principles of law recognised by civilized nations". . . have not received greater attention as a method for obtaining greater legal recognition for the principles of the Universal Declaration and other human rights instruments." He adds: "as human rights norms stated in international instruments come to be reflected in national laws, ... article 38(1)(*c*) will increasingly become one of the principal methods for the maturation of such standards into the mainstream of international law." Thus, the distinction between customary law and general principles will eventually become blurred.[299] The recent US *Restatement* also considers one of the sources of international obligations on human rights the "general principles of law common to the major legal systems of the world.[300]

The institution of states of emergency and its encroachment upon individual rights is a very old institution in public law and can be traced back to Roman times. The institution came into being in exceptional situations of a temporary character when the life of the nation was threatened. Modern public law has recognised the institution and has incorporated it. Several writers have confirmed that most modern national legislation contains the institution, and that it has similar characteristics to those of the derogation clause. Thus, Questiaux affirms that the guarantees in international law (through the principles of the derogation clause) are a reflection of those contained in municipal systems.[301] As has been pointed out in reference to the European Convention, the derogation clause is a transposition to that Convention of the same principles recognised in the legislation of the European States. The same can be said in respect of the American Convention and in relation to the legislations of American States.[302]

Response and A. I. Comments (London, 1980), p. 47.

[299] *Meron T., "Human Rights and Humanitarian Norms", pp. 88–9.*

[300] *US Restatement, ii. 152. See the interesting reflections of Merrills on the role played by some general principles of law in the jurisprudence of the European Court of HR, "Development", pp. 160–83.*

[301] *Questiaux, "Study", p. 20, para 73.*

[302] *Ergec, "Les Droits de l'homme", pp. 56–100; Ganshof van der Meersch, "La Protection des droits de l'homme en droit constitutional compare", in Rapports généraux du IXe Congres*

Moreover, a recent study has contended that there is a striking convergence between the principles evolved in public international law and the principles codified in constitutions or judicially evolved in different legal systems.[303] At the same time, Despouy considers that international law has put together and systematised guarantees that are already recognised in municipal legislation; by doing that, international law, through the derogation clause of the Covenant, has filled some gaps in domestic legislation.[304] Other writers have seen in the derogation clause of the Covenant, which reflects the doctrine of suspension of human rights in emergencies, a general principle of law recognised by the major legal systems.[305]

It is true that considerable caution is required in transposing the principles of municipal law to the plane of international law, even if these principles are contained in most legal systems; in international law this procedure has been used in a restrictive way, its main purpose being to fill the gaps left by the other sources of international law (treaty and custom). However, general principles seem to have had a great importance, especially in this area of the relation between the State and individuals.[306] If this is true, recourse could be had to general principles of law, in the case of human rights in emergencies, in order to fill the gaps in the rules applicable for States non-parties to human rights treaties with a derogation clause, something which has in fact been done by the IACHR and the ILO organs. The fact of the inclusion of principles of municipal law on human rights in emergencies, reflected in the derogation clause of the three main treaties, proves that these principles are appropriate for application at the international level.[307] In

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international de droit comparé (Teheran 1974) (Brussels, 1977), pp. 659 ff. For the American System see Norris and Desio, "The Suspension of Guarantees". The regime on emergencies found in the new constitutions of African States is in line with the principles of the derogation clause; see B. D. Nwabueze, Constitutionalism in the Emergent States. (London, 1973), pp. 174–353.

[303] *A. M. Singhvi, "The Law of Emergency Powers: A Comparative Study", Ph. D. thesis (Cambridge, 1986), p. 638.*

[304] *Despouy, "Etats d'exception", p. 4.*

[305] *Kaufman and Mosher, "General Principles of Law and the UN Covenant on Civil and Political Rights", ICLQ 27 (1978), 610–13.*

[306] *See the interesting reflections of Schachter on this point in "General Course," pp. 74 ff.*

[307] *Schachter finds that the most important limitation on the use of municipal law principles in the international arena arises from the requirement that these principles must be appropriate for application on the international level, ibid., p. 78.*

this respect, Schachter believes that national law principles are often suitable for international application in the area of human rights.[308]

III. The principles which constitute emergent principles of general international law governing human rights in states of emergency

In the light of all the evidence adduced so far, in respect of the principles of the derogation clause, it would seem that there are some principles which constitute emergent principles of general international law.[309] These principles are, first of all, those common to the doctrine of necessity and the derogation clause, namely, the principle of exceptional threat, the principle of non-derogability of fundamental rights, and the principle of proportionality. As well as these common principles, one should add the principle of non-discrimination which also seems to be in a very advanced state of crystallisation.[310] Moreover, it could be said that some of these substantive principles are in fact already principles of general international law. This seems to be the case with the principles of proportionality and non-discrimination, and, at least as far as the four common non-derogable rights are concerned, the case with the principle of non-derogability. The same could probably be said in respect of the principle of exceptional threat. Although some writers have mentioned the principle of proclamation among the emergent principles, it seems that, for the reasons mentioned above, it is not as close to becoming customary law as the other four.[311] These four substantive principles are the most important and would provide both States and international tribunals with fundamental criteria with which to judge the conduct of States in respect of human

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[308] *Ibid., p. 79.*

[309] *The concept of "emergent rules (or principles) of customary international law" was used by the ICJ in the "North Sea Continental Shelf cases", see paras. 61, 62, 63, 69. See also dissenting opinion of Sørensen, p. 244.*

[310] *The contention that these principles are emerging as principles of general international law has been tentatively pointed out by some writers. Thus, one of the commentators of the "Siracusa Principles" has noted that "compliance with these principles is becoming part of the customary international law of human rights': O'Donnell in HR Quarterly 7 (1985), p. 34 (see also Hartman's commentary, p. 131). For the "Siracusa Principles", see principle No. 75. See also O'Donnell, States of Exception, Int. CJ Review, 21 (1978), 53, in which he considered the principles of exceptional threat, proportionality, and non-derogability as having "universal validity". The Int. Commiss. of Jurists has pointed out that some of the requirements of article 4(1) of the ICCPR suggest "the emergence of rules of customary international law", in "State of Siege or Emergency and their Effects on Human Rights: Observations and Recommendations of the ICJ" (Aug. 1981) (repr. in E/CN. 41Sub. 2/NG0. 93 (1981)). The "Oslo Statement" considers art. 4 as containing international law norms of universal validity (pp. 2ff.). See also ILA Montreal Report (1982), p. 94.*

[311] *See above the reflections on the norm-creating character of the derogation clause.*

rights in emergencies according to general international law. There follows a brief comment on these principles.

1. The principle of exceptional threat

According to the three main treaties, the derogation from human rights standards in emergencies is legitimate only in the case of "war or public emergency threatening the life of the nation". On the other hand, according to general international law, the plea of emergency (or necessity), is accepted as a justification for non-compliance with international obligations only in "exceptional circumstances" and when there is no other alternative course of action. Of course, it is theoretically possible for these two standards, the one arising from treaty law and the other from general international law, to be different, for example, in the case of States which have agreed in a treaty to declare states of emergency and suspend human rights in conditions which are stricter than those required in general international law.[312] However, if one looks at the qualifications placed upon this standard by general international law, this does not in fact seem to be the case. Thus, Ago refers to the existence of an "extremely grave and imminent peril", and the ILO Special Commission, in the case of Poland, refers to "circumstances of extreme gravity".[313] Also the UN Special Rapporteur on States of Emergencies, when trying to establish a general standard of emergency, speaks of "exceptional circumstances ... involving a serious and imminent threat to a country".[314]

Therefore it does not seem that these two standards are prima-facie different.

Of course, concepts such as "exceptional circumstances" and "grave danger" are difficult to define in abstract terms and to apply in particular cases. However, there is another important reason in favour of the application in general international law of a standard similar to that carefully worked out by the jurisprudence of the international bodies entrusted with the application of the main treaties on human rights. These institutions have developed an important jurisprudence in the interpretation of the concept of public emergency. This jurisprudence, which can be deemed to be quite similar in the work of the European organs, the UN Human Rights Committee, and the Inter-American Court and Commission, has found a careful balance between the need of the State

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[312] *See the position of Graefrath in the UN HR Committee: CCPR/C/SR. 349, p. 10, para. 37. See also Meron T., "Human Rights and Humanitarian Norms", p. 218.*

[313] *"Ago Report", p. 20, para. 19. For the "Polish case" under IL0 see "Polish case", p. 127. See also Bin Cheng, "General Principles", p. 31, "under very exceptional circumstances".*

[314] *E/CN. 4/Sub. 2/1985/19, p. 3.*

to derogate in order to protect the nation, and the enjoyment of individual rights. Seen in this light, the concept of "public emergency threatening the life of the nation" is in fact a very workable and realistic one, and there is no doubt that it can be of assistance to other international organs when applying the concept of "exceptional circumstances" in general international law. In fact, some of these international bodies have already, not surprisingly, made reference to that jurisprudence, and in particular to the concept of public emergency as elaborated by the European organs in almost forty years of case-law.[315]

In the *Greek case,* for instance, the ILO organs, applying general international law, reached the same conclusion as the European Commission when it applied the derogation clause, in the sense that nothing emerged from the evidence before the ILO organs to allow them to conclude that in Greece in 1967 there existed a state of emergency or exceptional circumstances which would justify temporary non-compliance with the ILO Conventions.[316] This finding supports the position that an emergency must attain a certain degree of gravity in order to justify a temporary non-compliance with human rights obligations.

2. The principle of proportionality

Similar considerations can be made about the principle of proportionality. As has been continually seen in the present work, this principle appears in almost all the findings of judicial or quasijudicial bodies as one of the main principles used in order to assess the legality of measures of derogation. The doctrine has also insisted on the importance of this principle in derogations under general international law. Thus, Higgins has pointed out that "derogations to human rights obligations are acceptable only if events make them necessary and if they are proportionate to the danger that those events represent".[317] Moreover, this principle has been regarded as a general principle of international law whose special relation with limitations on human rights has been underlined.[318] The principle of proportionality refers not only to the nature of the measures taken, in the sense that they must be proportionate to the threat, but also includes what the

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[315] *See e.g. the reference of the IACHR in the "Miskitos case", p. 115; see also A/10285 (1275), p. 47, para. 122 (UN Ad Hoc Working Group on Chile).*

[316] *lLO, "Greek case", p. 26. For the finding of the European Commission on this point, see YBECHR (1969), p. 76.*

[317] *R. Higgins, "Derogations under Human Rights Treaties" BYBIL 48 (1976–7), 282–3. See also Meron T., "West Bank and Gaza", p. 113; and McDougal et al., "Human Rights and World Public Order: A Framework for Policy-Oriented Enquiry", AJIL 63 (1969), 267.*

[318] *See Oraá J., op. cit., ch. 5, sect. 1.*

IACHR has called "the principle of temporariness" (which means that they cannot last longer than the emergency itself), and the limitation that they must be extended in geographical terms only to those places affected by the emergency. These limitations are the logical consequences of the principle of proportionality and would therefore seem to be applicable in general international law as well. In the interpretation of the principle of proportionality, the rich jurisprudence of the European organs could be of great assistance for other international bodies when applying the principle in general international law.

3. The principle of non-discrimination

There is no doubt that the principle of non-discrimination occupies an important position in the field of human rights; moreover, the UN Charter contains several references to the enjoyment of human rights without any discrimination.[319] Non-discrimination on racial grounds, and also on religious or sexual grounds, is considered a rule of customary international law.[320] Due to the fundamental importance of this principle in international law, and to the fact that it is also mentioned as a condition for the lawful derogation of rights in the UN Covenant and the American Convention, it seems that it should also be considered as a principle applicable in general international law relating to human rights in states of emergency. In any case, if a State wishes to take measures which establish differences between several ethnic or religious groups of the population, it has to prove that it is necessary to take these measures in order to overcome the emergency, or, in other words, that the measures have an objective and legitimate justification, and that they are also proportionate to the threat. This standard established by international bodies when applying treaty law should be extended to general international law.[321]

4. The principle of non-derogability of fundamental rights

This is another principle of crucial importance in the legal regime of human rights in emergencies. The principle *in se* has doubtless already emerged as a principle of customary international law; this means that even in situations of emergency

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[319] *For the importance of the principle in the human rights field, see Jiménez de Aréchaga, "International Law", pp. 174–7. See also McKean W., Equality and Discrimination under International Law (Oxford, 1983), pp. 277–87.*

[320] *Brownlie I., Principles, pp. 598–601; US Restatement, pp. 165–6; Lillich R., "Civil Rights", in Meron (edn.), Human Rights in International Law, pp. 115–70, pp. 132–3.*

[321] *The UN Special Rapporteur on Emergencies has suggested that all States should include in their domestic legislation the principle of non-discrimination as a non-derogable principle in emergencies: E/CN. 4/Sub. 2/1990/33, p. 5.*

there are some fundamental rights which cannot be derogated from. This principle has been considered as a general principle of law recognised by civilized nations, according to article 38 of the ICJ Statute.[322] The problem, of course, is to determine which rights are to be considered non-derogable. The three treaties establish different lists of non-derogable rights. And yet, at least the four common non-derogable rights can be assumed to constitute norms of *ius cogens* which are therefore non-derogable even for States non-parties to these treaties.[323] Furthermore, the ILA Montreal Report considers the list of non-derogable rights of the three treaties to be "indicative of some emerging customary norms in the area of non-suspendible human rights in states of emergency".[324]

Although this list is a useful indicator of non-derogable rights, it is not immediately clear that all those rights are in fact non-derogable in general international law. In fact, two objections to the lists of non-derogable rights could be expressed. The first objection is that the lists do not contain some fundamental rights which are indispensable for the protection of human beings and very much at risk in emergencies (special mention should be made of some minimum guarantees against arbitrary detention and some others concerning fair trial). The second objection is that the list of non-derogable rights in the ICCPR and in the ACHR contain some rights which are not so indispensable and at risk in emergencies.[325]

Although, as Meron has pointed out, the international community as a whole has not established a uniform list of non-derogable rights and there is no immediate prospect of a consensus reaching beyond the four common non-derogable rights,[326] some remarks should be made about the criteria that should govern a

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[322] *Questiaux, "Study", p. 19. See also Kaufman and Mosher, "General Principles", p. 612; Despouy, "L'État d'exception", p. 10.*

[323] *According to the US "Restatement", "prolonged arbitrary detention" would also be against ius cogens norms; however, if the conditions of the derogation clause are met in a state of emergency, the detention would not presumably be arbitrary (pp. 174–5).*

[324] *ILA Montreal Report (p. 20). On the other hand, the ILA, Paris Report contains 16 non-derogable rights which are believed to be general principles of law (p. 70). See also ILA Warsaw Report, p. 39.*

[325] *See Oraá J., op. cit., pp. 97–8.*

[326] *Meron T., "On a Hierarchy of International Human Rights", AJIL 80 (1986), 16. The UN Special Rapporteur on Emergencies in his last annual report included the result of the research on this very issue by a group of experts. The research confirmed the growing trend towards the strengthening and expansion of non-derogable core rights. However, some of the rights mentioned there seem to be controversial (i.e. the "right to know", the rights of peoples and minorities, including the right to self-determination, etc.). See E/CN.4/Sub.2/1995/20 pp 44-63.*

possible list. First, the list of non-derogable rights should be short and should include only those rights which must be protected because they are so fundamental and in danger of being violated in emergencies. According to this criterion, the four common non-derogable rights should be included in the list. Secondly, minimum guarantees against arbitrary detention and others relating to fair trial should also be included. This is for two reasons: first, because they are so fundamental that the derogation of these guarantees would put at risk the right to life and the right to be free from torture, and secondly, because no public emergency could justify the derogation of these minimum guarantees.[327] There is no reason why these same fundamental rights and guarantees should be derogated from by States non-parties to the three treaties, as a matter of general international law. The findings of some international organs applying human rights standards according to general international law support this position.[328]

In any case, the principle of proportionality, which is the main criterion for derogation in general international law, provides a strong safeguard against possible doubts in concrete cases concerning the non-derogable character of certain rights. In fact, a State which wants to derogate from some fundamental human rights in a situation of emergency according to the doctrine of necessity must prove that the derogation is necessary and proportionate to the threat.[329]

IV. Conclusions

1. The importance of identifying general principles governing human rights in states of emergency in the context of general international law has been shown at the beginning of this work. As we have pointed out, there are two main reasons why it is important to identify them: first, because there are some human rights treaties which have no derogation clauses (i.e. the African Charter and some ILO Conventions) and which therefore include no explicit indication of the legal regime applicable in emergencies; and secondly, because there are many States which are not yet parties to human rights treaties but which declare states of emergency and derogate from human rights standards.

2. There is no doubt that at this stage in the evolution of international law, all States have obligations to respect human rights arising from customary international law. However, one of the problems is to agree upon a list of

[327] *See Oraá J., op. cit., ch. 4.*

[328] *See e.g. the position of the IACHR and the UN Commission on HR and other Ad hoc bodies, above under the corresponding sections.*

[329] *See the interesting remarks by Meron T. in "On a Hierarchy of International Human Rights", p. 20.*

customary norms. Nevertheless, the object of this study is not the elaboration of a complete list of customary norms, but rather the identification of those principles which could justify non-compliance with these obligations in a state of emergency.

3. In order to identify these principles, two main lines of inquiry can follow. The first could focus on the doctrine of State necessity, which it has found to be the doctrine which best corresponds to situations of emergency. The doctrine of necessity is a well-known circumstance excluding responsibility for wrongfulness in international law, and it has been recognised by the ILC in the draft articles on the law of State responsibility. However, this doctrine is submitted in its application to strict conditions in order to avoid abuses. These conditions can be expressed in the terminology used to describe some of the principles contained in the derogation clause: the doctrine of necessity must respect three fundamental principles, namely, the principles of exceptional threat, proportionality, and non-derogability of peremptory norms. An illustration of the application of this doctrine of necessity in several cases relating to human rights in emergencies by the ILO organs has been examined elsewhere. In the absence of any derogation clause in some ILO Conventions, the ILO organs have in the *Greek* and *Polish cases* identified the plea of emergency with that of necessity in general international law, and have applied the principle of exceptional threat and that of proportionality as principles of general international law governing this matter. In other cases, the ILO organs have also made reference to the principles of temporariness and non-discrimination.

4. The second line of inquiry (the object of this study) has analysed the contention that some of the principles of the derogation clause are emerging as principles of general international law. This contention is in part based on the fact that the derogation clause has been seen as a particular application (or adaptation) of the doctrine of necessity to the subject of human rights in states of emergency in the main treaties. However, a close examination of the derogation clause has shown that it contains three types of principles. The first type of principle is a clear reflection of the principles of the doctrine of necessity (the principles of exceptional threat, proportionality, and non-derogability of fundamental rights). The second type of principle, that is, the principle of non-discrimination, is an important principle in the field of human rights, although it is not explicitly mentioned among the principles governing the doctrine of necessity in general international law. Finally, the third type of principle is that of a "procedural" character, namely, the principles of proclamation and notification. Even if these latter principles seem to be more suitable for application within the framework of treaty law, they could in theory become customary norms in the future. However, the principles which appear to be emerging as strong candidates for becoming general principles of international law are the principles belonging to the first two

types, in other words, the principle of exceptional threat, the principle of proportionality, the principle of non-derogability, and the principle of non-discrimination.

5. A detailed examination of all the existing evidence supports the contention that these principles are emerging as customary norms. This is so, *first of all,* not only because of the fundamental importance of the UN Covenant on Civil and Political Rights as a general multilateral treaty of a quasi-universal character, but also because of the repetition of these principles of the derogation clause in the other regional treaties dealing with the same rights. Thus, the European and the American Convention, the two most important regional treaties on the subject, contain similar principles in their derogation clauses. *Secondly,* the decisions of international organs in this field have confirmed the applicability of these principles of the derogation clause as norms of general international law. Thus, the IACHR has applied these principles of the derogation clause outside treaty law, in the sense that they have been applied to States non-parties to the American Convention. In its constant jurisprudence, the IACHR has held that these principles of the derogation clause constitute not only the "most accepted doctrine" in the American Continent and therefore regional customary law, but also the "most accepted doctrine internationally", as it is embodied in the derogation clauses of the three treaties under consideration. This position supports the contention that these principles can be deemed to constitute principles of general international law.

6. The recent developments within the organs of the United Nations also support this contention. Thus, after a period in which the UN Commission and Sub-Commission on Human Rights studied the question of human rights in emergencies within the framework of treaty law, the appointed Special Rapporteur on States of Emergency had to find some international standards applicable to States non-parties to the Covenant. This need arose from the fact that his mandate includes the study and assessment of the legality of states of emergency and the suspension of human rights of all States, and not only those parties to the Covenant which are subjected to the derogation clause as a matter of treaty law. Following the same line as the IACHR, the Special Rapporteur has considered some of the principles of the derogation clause to be principles of general international law. Moreover, many States have sent the information requested by the Special Rapporteur following the fundamental principles of the derogation clause. The Commission and the special organs, such as the *Ad Hoc* Working Groups and Special Rapporteurs, have in particular cases applied some of these principles to States non-parties to the Covenant.

7. The acceptance by States of this process of formation of customary norms has been shown by the fact that no State has rejected the position of principle

taken by the international monitoring organs on the application of these principles of the derogation clause outside treaty law. This0. has been seen within the Inter-American system, and in respect to the new developments occurring within the UN Commission on Human Rights through the Special Rapporteur. The same could be said with respect to the application by the ILO organs of some of these principles arising from the doctrine of necessity in similar cases.

8. Further evidence also supports the contention that the main principles of the derogation clause are emerging as principles of general international law: the principles have also been considered to be *"general principles of law"* recognised by civilised nations, according to article 38(1)(*c*) of the ICJ Statute. It is well-established that the institution of "state of emergency" permitting derogations from human rights is present in most legal systems; moreover, the principles regulating the institution in human rights treaties is considered to be a reflection of the legal regime of national legislations.

9. In the light of all this evidence, it seems that at least the principles of exceptional threat, the principle of proportionality, the principle of non-derogability of fundamental rights, and the principle of non-discrimination can be considered as emergent principles of general international law in a very advanced state of crystallisation. Moreover, it could be said that some of these principles are already principles of general international law. This seems to be true in the case of the principles of proportionality and non-discrimination, and of the principle of non-derogability of the four common rights recognised in the three main treaties; in fact, this last principle can be considered not only as a norm of customary law but also of *ius cogens.* The principle of proclamation is another candidate to become a customary principle in this field, but its crystallisation seems at the present time to be more remote than that of the other principles.

b. Intervention by Mr Karol WOLFKE

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In his report, Professor Oraá has successfully resisted the temptation existing in the noble struggle for human rights to make easy generalisations. This manifests itself in a thorough analysis of a relatively rich material and in the final cautious formulation of conclusions.

There remain, therefore, only very few remarks to be made referring not so much to the Author's own opinions, as rather to certain dubious trends in the present practice and doctrine of international law which could not, however, as it seems, be easily neglected in the Report.

This refers, for example, to the present frequent reckoning of certain principles (in this case, principles of non-derogability in human rights treaties) among norms of *ius cogens*, without mentioning any grounds (see, for example, pp. 173, 175, 188). Even disregarding the still existing lack of unanimity on the very concept and nature of *ius cogens* in international law, already the heavy consequences of a breach of such norms should, it seems, require evidence and not mere labelling for the existence of such norms.

Another misunderstanding may arise in connection with the recent use, not only in the literature and in the Report, but primarily in the ICJ Shelf Judgment of 1969, of the somewhat misleading terms "custom generating treaty" or "principles of norm creating character", which wrongly suggest that in certain cases conventional norms can by themselves generate general customary norms.

For such a "generation", as it is well known, appropriate practice and its, at least presumed, acceptance as law by the States to be bound by the emerging customary norm is indispensable. This results already from the basic Article 38.Ib of the ICJ Statute and also from several references made to the requirement of practice in the Report discussed here.

However, in order to avoid any possible doubt, it would, perhaps, be useful to quote the often neglected paragraph 74 of the Judgment already mentioned, where it is unequivocally stated that, for "the formation of a new rule of customary international law on the basis of what was purely conventional rule", it is indispensable that "State practice ... both extensive and virtually uniform in the sense of the provision invoked" exists, which "should moreover have occurred in such ways as to show recognition that a rule of law ... is involved".

A proof that the above-mentioned misunderstanding is still real may be found in par.4 of the Report where certain "types of evidence", having special importance in showing the customary character of some of the principles of the derogation clause, are mentioned, namely: l) "the probative value of law-making treaties", 2) "the repetition of the same norm in several human rights treaties", 3) "the practice ... (of various bodies) in application of norms", and finally, 4) "the acquiescence with those standards by States non-parties of the treaties".

As may be noticed, the "types of evidence" mentioned are of very different importance and their sequence should, in fact, be even reversed, as only the last of them, the acceptance by States non-parties, is really decisive here. Of course, the practice of the organs of international organizations is also very important. Its importance cannot, however, be compared with that of a State practice of respecting human rights.

As regards the first two "types of evidence", the probative value of "law-making treaties", and, in particular, the repetition of the same norm in several treaties, is merely secondary, at most strengthening the presumption of acceptance by non-parties, which is the most essential here.

In parenthesis, one might remark that the long-lasting drafting process of a treaty mentioned in the Report (see p. 155) does not seem necessarily to augment its "law-making character". On the contrary, it may prove a deep, lasting difference of opinions among the negotiating parties, that is, reducing rather any possible law-making value of the treaty.

Looking for a true custom-generating effect of certain treaties, rather the separate opinion by Sørensen in the Report (see p. 151), seems to contain a convincing conclusion. According to it, a convention "may serve as an authoritative guide for the practice of States faced with new problems".

To summarise, however, the final result of the very interesting and scrupulously carried out investigations by Professor Oraá turned out to be rather modest. Only few of the analysed conventional principles have already become general customary norms. The majority are still mere "candidates" for such norms or, at most norms, "in a very advanced state of crystallisation".

This seems to be another confirmation that only persuasion and other available legal means of pressure on States can lead to a wider accession to human rights treaties.

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Mr Gérard REUTER, President of the Audit Chamber, Member of the European Commission for Democracy through Law

MOLDOVA

Mr Mihai PETRACHI, Head of the Legal Division of the Parliament of Moldova, Member of the European Commission for Democracy through Law (Apologised)

ROMANIA / ROUMANIE

Mr Petru GAVRILESCU, Legal Adviser, Romanian Embassy, Brussels, Member of the European Commission for Democracy through Law

RUSSIA / RUSSIE

Mr Yuri KOUDRYAVTSEV, Head of Secretariat, Constitutional Court (Apologised)

Mr Vil KIKOT, Counsellor at the Constitutional Court

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Mr Giovanni GUALANDI, Vice-President of the Presidential Council of the Legal Institute of San Marino, Member of the European Commission for Democracy through Law (Apologised)

SOUTH AFRICA / AFRIQUE DU SUD

Mr J.O. KRIEGLER, Judge, Constitutional Court

Ms Louisa ZONDO, Chief Executive Officer, Human Rights Commission

SPAIN / ESPAGNE

Mr Jaime ORAA, Professor of International Law, Head of the Department of International Law, University of Deusto, Bilbao (**Rapporteur**)

Mr Jaime NICOLAS, Deputy Director, Centre for Constitutional Studies, Madrid

"THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA" / "L'EX-REPUBLIQUE YOUGOSLAVE DE MACEDOINE"

Mr Ilo TRAJKOVSKI, Professor of Sociology, Faculty of Philosophy, University of Skopje, Member of the European Commission for Democracy through Law (Apologised)

TURKEY / TURQUIE

Mr Ergun ÖZBUDUN, Professor at the University of Ankara, Vice-President of the Turkish Foundation for Democracy, Member of the European Commission for Democracy through Law (**Rapporteur**)

UNITED KINGDOM / ROYAUME UNI

Mr Francis JACOBS, Advocate General, European Court of Justice (**Rapporteur**)

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PARLIAMENTARY ASSEMBLY / ASSEMBLEE PARLEMENTAIRE

Mr Mevljan TAHIRI, Member of the Parliamentary Assembly, Delegation of "The Former Yugoslav Republic of Macedonia", Member of the Committee on Legal Affairs and Human Rights

EUROPEAN COMMISSION FOR HUMAN RIGHTS / COMMISSION EUROPEENNE DES DROITS DE L'HOMME

Ms Jane LIDDY, President of the First Chamber, European Commission for Human Rights

EUROPEAN COURT OF HUMAN RIGHTS / COUR EUROPEENNE DES DROITS DE L'HOMME

Mr Jerzy MAKARCZYK, Judge

STEERING COMMITTEE FOR HUMAN RIGHTS / COMITE DIRECTEUR DES DROITS DE L'HOMME (CDDH)

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Mr Krzysztof BRZEZINSKI
Mr Ryszard DRZEWIECKI

If emergency situations are fortunately not too frequent, they entail particular dangers for the functioning of the democratic institutions and for human rights, especially in newly established democracies.

During this seminar organised at the University of Wroclaw participants examined the legal rules applicable to such situations both under national constitutional law and international legal instruments. A large convergence of legal rules became apparent, leading to the final question whether there are already emerging rules of customary international law protecting human rights in such situations.

The European Commission for Democracy through Law (Venice Commission) is a consultative body on questions of constitutional law, created within the Council of Europe. It is made up of independent lawyers from member states of the Council of Europe, as well as from non-member states. Almost fifty states participate in the work of the Commission.

The Commission launched its UniDem (University for Democracy) programme of seminars and conferences with the aim of contributing to the democratic conscience of future generations of lawyers and political scientists.