

Human Rights in the Arab World: A Regional Legacy in Crisis

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In the wake of the so called 'Arab Spring' the contentious reality of human rights in the Arab world remains one of the core reasons of populace dissatisfaction. Despite the recorded improvements in terms of facing development challenges, revolutions and counter revolutions erupted to declare a rejection of status quo and demand more respect to individual rights. This historical change calls the reconsideration of a regional legal culture that reflects a clear struggle to establish a judicial legacy protecting human rights over states. This paper looks into the regional legal mechanism offered by the Arab Charter on Human Rights and the limitation to its relevant Commission and Court practice. Other regional and universal contexts will be visited to identify best practice and available limitations. This will include each of the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the American Convention on Human Rights (ACHR).

Keywords: Human Rights; Arab World; Judicial Legacy; Development; Regional Treaties;

Introduction

While development of human rights standards alongside the theoretical debate took place in Western regional context, in terms of civil and political rights Arab countries are committed internationally to each of the standards set by the International Covenant on Civil and Political Rights and the Arab Charter on Human Rights. The later however entered into force in 2008 and in terms of enforcement its relatively recent established committee for human rights received limited number of reports and hence have little to offer in terms of implementation and enforcement.

In the Arab world the discourse on human rights was always overloaded with Western values and colonial legacy. The Arab Charter of human rights went through stages of amendments before its revised draft received enough ratification to enter into force. The Charter is seen by the wider international community as an opportunity for the Arab states to confirm their commitment to international standards. Nonetheless the formation of the Charter propagated ongoing debates of cultural relativism and universality of human rights. In the context of minimum standards of human rights, the Arab charter seems to be consistent with the language and standard offered by other international treaties

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although domestic application offers experiences that stand short of these standards¹.

The legal transformations that have taken place across the globe with regard to management of natural resources and climate justice provide a valuable insight into the complex nature and development of Human Rights as a subfield of international law specifically with regard to the need to uphold rule of law in times identified as an escalating state of crisis. The Arab world as a developing reality is transfixed by recurring themes of conflict and security, which remain embedded within the historical legacy of colonization and independence. The consequential reality of the region today offers no change in the existing themes and discourse. The wave of revolutions and counter revolutions since 2011 recreated a conflict and hostility to International law. All of these multifaceted threads became historically entrenched within a fragile landscape dominated by a security discourse while still struggling with economic and human development.

Regional efforts to set standards of human rights are so essential in making the change in states and maybe individual perception of human rights values. Although court decisions, by establishing legal precedents, constitute a form of strong standard setting, regional arrangements are also successful at diffusing and reinforcing human rights norms and standards in their regions in cooperation with member states. To understand the level of commitment the Arab Charter is aspiring to reach by its provisions with regard to minimum standards of human rights, this paper examines similar provisions in other relevant international treaties namely the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the American Convention on Human Rights (ACHR). While these treaties developed in different regional and cultural contexts the evolved body of international jurisprudence provides a significant source of reference and offers multiple insights into similar practices and experiences.

The most visible contributions of regional human rights arrangements usually occurs in the form of court rulings and attempts by commissions to sway the behaviour of member states². In the context of the Arab Charter individual cases are yet to be considered by the Arab Court for human rights which seems to be a reflection of an existing domestic reality that subordinates human rights to national security. While considering the problematic relation between the Arab World and development of human rights as a domestic application, it is essential to remember that any legal culture of a nation is significant in terms of how citizens recognise not only the judiciary but also the political system at large. The manner in which legal institutions function also has an effect on a country's political, economic, and social development performance. While law is intended to produce a just society, it is ultimately a social structure that has gone through a political process³. The pedagogical set of questions with regard to whether law changes society or society changes the

¹Natarajan (2012).

²Human Rights Council (2017).

³Fairclough & Fairclough (2013).

law remain in fact in the centre of any critical study methodological or contextual Study⁴.

In line with the main focus, this paper will highlight the phenomenon of a ‘permanent state of emergency’ as one of the most challenging types of emergency situations. Permanent emergency is described as ‘the permanent character that derogation assumes in some countries in other words the maintenance of the derogation measures for a protected period even though the emergency has ended’. The *Questiaux Report*⁵ refers to a number of other types of emergencies and considers the permanent emergency under the ‘institutionalised emergencies’ category. ‘These are processes that have... formed part of a theoretical approach to democracy which gives rise in different areas to concepts of so-called “authoritarian”, “restricted” or “gradual” democracy’⁶.

For this purpose, the next section will start by presenting a brief picture of the historical development of the legal concept of derogation and some of the more important studies and international efforts with regard to emergency powers. After that, the legal standards provided by derogation clauses in human rights treaties and the most relevant judicial interpretations of these standards will be explored.

International Law Limitation or Derogation

While the United Nation Charter 1945 provides for the promotion and respect of human rights and refers explicitly in its preamble to the strict manner in which the use of force is permissible in times of conflict⁷, the Charter does not contain any detailed provision about the possible limitation or derogation of human rights.

The Universal Declaration of Human Rights, 1948 contains a general limitation clause but makes no reference to the derogation of human rights during states of emergency. Article 29 (2) sets out that:

“(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

In addition to addressing the limitation of human rights and freedoms, Article 29 refers indirectly to the duties that an individual has with regard to the community. Furthermore, it establishes that while a limitation to a right is

⁴Davies (2007).

⁵Questiaux, N. (1981). [Hereinafter – The Questiaux Report].

⁶*Questiaux Report*, paras 129-145

⁷Preamble of the United Nations Charter available at <http://www.un.org/aboutun/charter/>

to be allowed, a set of principles is to be respected to ensure that the core of the right remains effectively protected⁸.

Article 3, common to four *Geneva Conventions 1949*, sets the most important standards in humanitarian law which applies in War and armed conflicts:

“(1) Persons taking no active part in the hostilities, members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”

Article 3 identifies further the acts which shall remain prohibited ‘at any time and in any place whatsoever’ with respect to the above-mentioned persons. Thus, clearly Article 3 provides for a minimum standard to apply during an internal conflict under all circumstances. However, Article 3 falls short of offering a tight clause to regulate derogations in states of emergency.

Apart from Article 3 which covers only the case of war, international law regulating the derogation of human rights during states of emergency has often been considered by United Nations organs, conferences of experts, scholars, and a variety of different organizations. Organizations and scholars have given special attention to this phenomenon in an attempt to prevent human rights violations in times of emergency. Although relatively little has been said about the deviant phenomenon of a permanent state of emergency, this phenomenon has not been completely ignored.

Limitation

It is vital before discussing the derogation clauses in human rights treaties to briefly consider the nature of derogation from human rights obligations as compared with limitations on the exercise of human rights under normal circumstances.

Derogation and limitation clauses are similar in that they limit a state’s obligation in the area of human rights; however, the two concepts serve different purposes. While limitation intends to restrict the extent to which obligations of human rights apply because of a serious situation, derogation indicates a total suspension of specific rights because of an extreme emergency.

Limitations are sometimes described as ‘ordinary’ limitations since they can be imposed permanently and in normal situations in times of peace. Derogation, however, is called an ‘extraordinary limitation’⁹ as it is designed for particularly serious emergencies that require the application of extraordinary measures.

Based on the recognition that most human rights are not absolute, the exercise of certain rights is generally accompanied by certain limitations that

⁸Daes, E.-I.A. (1994) at 132. These principles are also relevant to the derogation of human rights.

⁹Sevensson-McCarthy (1998) at 49-51.

can be imposed in order to protect the rights and freedoms of others and national security. Rights and limitations are laid down in law, and these restrictions are necessary, as the UDHR clearly recognises in Article 29, for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society. Thus, the purpose of the limitation is to provide boundaries for the exercise of individual rights in favour of the rights of others or a specific public interest in normal situations, and therefore the limitation can be permanent.

Although similar, the derogation clause is designed to accommodate the needs of the state *vis-a-vis* the rights of individuals; it primarily seeks to allow governmental action to violate recognised individual rights in a period of extreme emergency beyond what governments could lawfully do in normal times. Thus, the concept of derogation is based on its temporary and exceptional nature¹⁰.

The rationale behind the derogation clause permitting the suspension of the exercise of certain rights is only for the purpose of restoring normality and to guarantee the exercise of the most fundamental human rights. It requires the possibility of legally suspending the exercise of certain rights temporarily as the only means of guaranteeing the effective enjoyment of the most fundamental ones.

Some have considered, however, that the two concepts are very closely linked and ‘rather than being two distinct categories...they form a legal continuum’. This close linkage is further evidenced by the fact that it is only when limitations on human rights are proved to be insufficient to maintain peace and order that derogations may be applied in accordance with certain strict conditions¹¹.

Earlier debates in the drafting of derogation clauses under the ICCPR and the ECHR reveal that there has been confusion as to the application of these terms¹². In the drafting of the ICCPR, it was argued that the eventualities of the derogation clause were sufficiently covered by the relevant limitation clause and that the limitation clause could be invoked in times of emergency¹³.

Derogation Clauses

*European Convention on Human Rights 1950*¹⁴

Article 15 allows a contracting state the possibility to derogate from its obligations in times of emergency:

¹⁰Gross (1998) at 440.

¹¹Sevensson-McCarthy (1998) at 49.

¹²U.N. Doc. E/CN.4/Ac.1/4, Annex 1 at 5 and 7. See also U.N. Doc. E/CN.4/82/Rev.1 *Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation*, pp. 3-5 and vol. i of the preparatory work, ECHR, Collected Edition, i.208.

¹³Oraa (1992) at 27.

¹⁴Entered into force in 1953.

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.

The threat must be to the life of nation, and the measures taken must be proportionate to the threat to the extent strictly required by the situation and consistent with other obligations under international law. Under Article 15(2) certain rights can never be derogated from: the right to life (Article 2), prohibition of torture, inhuman or degrading treatment, or punishment (Article 3), prohibition of slavery or servitude (Article 4.1), and criminal offences must not be retroactive (Article 7). Finally, Article 15(3) states that a member state has to inform the Secretary General of both the declaration and lifting of a state of emergency, and explain what measures have been taken and why.

*International Covenant on Civil and Political Rights, 1966*¹⁵
Article 4 provides:

1. 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.

Similar to Article 15 of the ECHR, Article 4 ICCPR provides that a member state may derogate from its obligation only if the life of the nation is threatened. However, Article 4 adds that the state of emergency must be officially proclaimed. Measures taken should (1) only be to the extent that they are strictly required by the exigencies of the situation, (2) should not be inconsistent with the state's other obligations under international law, and (3) should not involve discrimination on the grounds of race, colour, sex, language, religion, or social origin, which is an additional requirement to those provided by Article 15 ECHR. Article 4(2) lists a number of rights which are considered non-derogable even during a state of emergency: the right to life (Article 6); prohibition of torture; inhuman or degrading treatment or punishment (Article 7); prohibition of slavery or servitude (Article 8); prohibition of imprisonment on the grounds of inability to fulfil a contractual obligation (Article 11); prohibition on prosecution for offences which were not crimes when committed (Article 15); the right to recognition everywhere as a person before the law (Article 16); and freedom of thought, conscience, and religion (Article 18). Finally, Article 4(3) states that derogation and termination of any derogation must be reported to other states parties through the Secretary General.

¹⁵ Entered into force in 1976.

*American Convention on Human Rights, 1968*¹⁶

Article 27 of the convention provides that:

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

Particular standards are set for a state party: (1) the threat must be to the independence or security of a state party, (2) measures taken must be for the period of time strictly required by the exigencies of the situation, (3) these measures must not be inconsistent with other obligations under international law, and (4) they must not involve discrimination on the grounds of race, colour, sex, language, religion, or social origin. Under Article 27(2), suspension of the following rights is never permitted: right to judicial personality (Article 3), right to life (Article 4), right to human treatment (Article 5), freedom from slavery (Articles 6), freedom from ex post facto laws (Article 9), freedom of conscience and religion (Article 12), rights of the family (Article 17), right to name (Article 18), rights of the child (Article 19), right to nationality (Article 20), right to participate in government (Article 23), and the judicial guarantees essential for the protection of such rights.

Arab Charter on Human Rights 2004

The current Arab Charter was adopted in 2004 by the Council of the League of Arab States after the revision of an earlier version that was adopted in 1994 but not ratified by any member states. The original Arab Charter on Human Rights was adopted by the Arab League in 1994. However, it was widely criticised at the time by many human rights organisations both within the region and beyond as failing to meet international human rights standards, and not one Arab League state was prepared to ratify it. The Council of the Arab League adopted a number of Resolutions in 2002 encouraging the modernization of the Charter to correspond with international human rights standards.

The Arab Human Rights Committee was established in 2009 to supervise the implementation of the Charter by its member states through state reports and periodic reports. The Committee also submits annual reports to the Council of LAS. As of September 2016, the ACHR has been ratified by 17 out of 22 member states of the LAS. However, the Arab Charter on Human Rights includes many provisions that still raise the issue of compliance with international

¹⁶Entered into force in 1978.

standards, especially with regard to gender equality, the death penalty, and the right to derogations under emergency law.¹⁷

Article 4(1) states that measures taken should be to the extent required by the exigencies of the situation, consistent with state obligations under international law, and should not involve discrimination on the grounds of race, colour, sex, language, religion, or social origin.

Article 4(2) provides a list of fifteen rights that are non-derogable even in exceptional situations. These are (Articles 5-30): right to life, freedom from torture, right of security of person, to a fair trial, freedom from unlawful detention, no crime or punishment without prior provision in the law, freedom from imprisonment as a result of a failure to fulfil contractual obligations, the right to due process and fair trial, freedom from inhuman or degrading treatment while in detention, recognition as a person before the law, freedom of movement, the right to political asylum, the right to a nationality, and freedom of thought.

Finally, Article 4(3) states that derogation and termination of any derogation must be reported to other state parties.

Similarities and Differences

Similarities

The derogation clause in each of the treaties contains: requirements that the emergency threaten the life of the nation and the measures taken are strictly required by the exigencies of the situation. They also include a list of non-derogable rights; and a number of procedural obligations.

Differences

With regard to what constitutes a state of emergency, the ICCPR refers to a 'public emergency which threatens the life of the nation' while ECHR explicitly adds the case of war. The ACHR used a different approach and the wording 'war, public danger, or other public emergency that threatens the independence or security of the state party'. The ArabCHR however refers to 'exceptional situations of emergency'.

Despite this recorded history of the derogation clause, it appears that it came earlier, from a UK proposal to the UN Human Rights Commission in 1947 at the beginning of the drafting process of the ICCPR. The preparatory work (*travaux préparatoires*) of the Commission demonstrates that in 1949, the Commission adopted Article 4. After that, the European Convention borrowed the derogation clause from the draft Covenant—which had had the benefit of almost three years of discussion among the drafters of the UN Covenant on Civil and Political Rights—which explains the wording similarity in the

¹⁷Rishmawi (2005).

clauses¹⁸. Following that, in 1968 at the San Jose Conference, the drafters of the American Convention modelled their clause on the previous two treaties.

The first text that can be found to define an emergency is the one proposed by the UN Commission on Human Rights to the Economic and Social Council (ECOSOC), which contained the expression ‘in time of war or other public emergency’¹⁹. This expression was discussed in depth by the Commission in the following session²⁰. In light of these discussions, the principal choices made by the Commission were the following:

(1) In general, there was agreement on the suppression of any reference to war because it was felt that the Covenant should not envisage, even by implication, the possibility of war, as the UN was established with the object of preventing war²¹.

It is interesting to note that when the European Convention was being drawn up, the UK proposed the adoption of a derogation clause similar to that of the draft Covenants; in fact, the Convention borrowed from the latter the expression ‘in time of war and other public emergency’. Ironically, the UN Commission later suppressed the mention of war and the European Convention approved the former wording²².

(2) The drafters preferred to adopt a broad term such as public emergency, which in principle could embrace several situations.

(3) The provision of a further qualification of the term ‘public emergency’ requires that in order for the situation to justify the declaration of emergency, there should be a threat that is truly exceptional and affects the whole nation, thereby removing the risk of derogation in situations of less importance²³.

(4) The term ‘nation’ was preferred to ‘people’ because the word ‘people’ might give rise to some doubts as to whether it denoted all people or just a portion of them. ‘National emergency’ became the term normally used to describe a state of emergency in the article as it embraces all of the people in the state and provides the only justification for derogation.

(5) The derogation clause in the ICCPR, ACHR, and Arab CHR requires an official proclamation of emergency; whereas, Article 15 ECHR does not mention the need for an official proclamation.

(6) While the ICCPR, ACHR, and Arabic CHR²⁴ emphasise the requirement that measures taken are not to ‘involve discrimination on the grounds of race,

¹⁸Fitzpatrick (1994) at 55.

¹⁹UN Human Rights Commission (1947), report to the ECOSOC on the 2nd session (1947) *ESC (VI) suppl. I, annex B I*, Article 4.

²⁰Oraa (1992) at 11-17.

²¹UN Documents A/2929, p.67, para.39. *E/CN. 4/SR. 330*, 1 July 1952. Several representatives opposed the inclusion of the word ‘war’.

²²Text of Article 4 adopted by the Commission on 14 June 1949); UK proposal of 6 March 1950 to the European Convention, ECHR, ‘Travaux préparatoires’ to the Convention, *Collected Edition* at iii. 280.

²³Sevensson-McCarthy (1998) at 200-212.

²⁴This requirement was not included in the original Charter adopted in 1994; it has been added in the Revised Charter of 2004.

colour, sex, language, religion or social origin', such an emphasis is missing from the clause in the ECHR.

(7) The four clauses in the four treaties contain different lists of non-derogable rights—four rights in the ECHR, seven rights in the ICCPR, eleven rights in the ACHR, and fifteen rights in the Arab Charter on Human Rights.

As important as the above-mentioned standards are, their true worth can only be gauged by the effectiveness of the mechanisms provided for their enforcement. A sufficient body of jurisprudence has emerged in the past four to five decades under these instruments, notably under the regional conventions, to enable an assessment and comparison of their effectiveness in addressing the human rights problems associated with states of emergency. Much of the controversy has centred around the ability of the mechanisms to inquire into and adjudicate upon two issues: (i) the genuineness of emergencies claimed by governments as meeting the definitions (including the temporal factor and permanent states of emergency) laid down in the respective instruments; and (ii) the need for particular measures derogating from the provisions of the instruments to meet the actual threats facing a state (*de facto* emergencies). An attempt will be made in the next paragraphs to summarise the jurisprudence on these points.

Main Studies

Great efforts by inter-governmental and non-governmental organisations have been devoted to develop comprehensive standards for states of emergency. For example, the Martins study²⁵ for the ACHR and the Questiaux report for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities canvass available information about the behaviour of states during emergency situations, categorise the types of human rights abuses that appear to be associated with emergencies, and offer a set of recommendations directed to national authorities²⁶. NGOs and academics in recent years have also attempted to elaborate sets of general guidelines for controlling human rights abuses during states of emergency²⁷. These guidelines can be found in the 1984 'Paris Minimum Standards of Human Rights Norms in a State of Emergency' adopted by the International Law Association, the Siracusa Principles of 1984, the 1987 Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence, and the 1990 Turko/Abo Declaration of Minimum Humanitarian Standards.

Some of these studies remain a great inspiration for further research and investigation (for example, Fitzpatrick's critique and representation of the typology of emergency and the Minimum Standards adopted by the International Law Association). Others have been severely criticized on the basis of their clinging to a 'model hypothesis' and ignoring or showing

²⁵OEA/Ser.L/VII.15, doc.12 (1966). [Hereinafter - Martins Report].

²⁶Questiaux Report and Martins Report.

²⁷Fitzpatrick (1994) at 70-77.

unwillingness to acknowledge the frequency of deviations such as the implementation of permanent states of emergency. More recently, a study by Gross and Ni Aoláin provided a profound investigation of emergency powers and contended that a clear gap exists between theory and practice²⁸.

The following paragraphs will provide a brief account of the most important studies with regard to the earliest efforts and important relevant academic analysis.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities in Resolution 10 (XXX) of 31 August 1977 expressed its deep concern with the manner in which certain countries applied the provisions relating to situations known as states of emergency and requested two of its members, Questiaux and Perdomo, to undertake the preparation of a study about state practices in these situations. A report was completed in July 1982.

The Questiaux Report stressed that bringing situations of emergency into effect must be consistent with democratic principles²⁹. This established link suggested three comprehensive principles: the legislation governing emergencies should be pre-date the occurrence of the crisis, and this legislation should contain prior control procedures stating that it is to be applied as a provisional or temporary measure. The report identified a profile pattern suggesting a reference model and 'deviations' from the model³⁰:

(1) States of emergency are not reported. The formal emergency is not reported to treaty implementation bodies; (2) *de facto* states of emergency during which rights are suspended without proclamation or notification, or the suspension of rights is continued after termination of a formal emergency; (3) permanent states of emergency, which covers perpetual emergencies either as a result of *de facto* systemic extension or because the constitution has not provided any time limit *a priori*; (4) complex states of emergency involving overlapping and confusing legal regimes through the partial suspension of constitutional norms and far-reaching decrees; and (5) institutionalised states of emergency under which an authoritarian government prolongs an extended transitional emergency regime with the purported, but questionable, aim of returning to democracy and the full reinstatement of constitutional guarantees³¹.

Questiaux's conceptualisation of emergency places a marked focus on the procedural mechanisms that allow for emergencies to be legally validated by municipal law. These include primary formal procedural guarantees, substantive guarantees, and the actual implementation of guarantees³². This framework contains an assumption that the existence of these formal requirements is sufficient to assure the protection of human rights in situations of exigency and consequently ignores *de facto* perpetuated states of emergency or 'permanent emergencies'³³.

²⁸Gross & Ni Aoláin (2006). *Martins Report* was also undertaken aiming: to examine the history of the state of siege, to determine if it is possible to set general principles that could be binding on all countries in the region.

²⁹*Questiaux Report*, at paras 34-35.

³⁰*Questiaux Report* at paras 96-145.

³¹Fitzpatrick (1994) at 21-23 and Gross & Ni Aoláin (2006) at 407-310.

³²*Questiaux Report*, paras. 40-63

³³Gross & Ni Aoláin (2006) at 307-310.

Gross and Ni Aoláin contend that the Questiaux Report, like much of the policy and legal analysis that followed, seems to miss an essential challenge, namely that most emergencies fail to conform to the formal typology. They argue that while Questiaux certainly notes the existence of permanent emergencies, her study seems to understate their widespread use by states. Further, Gross and Ni Aoláin consider that Questiaux's remarks on the scope of the study underscore its 'formalistic' approach, and thus its inherent limitations:

In theory, the de facto situation which constitutes the exceptional circumstances is thus without legal validity (a) in municipal law, as long as a state of emergency has not been proclaimed, and (b) to a lesser degree in international law, as long as the state of emergency has not been the subject of communication to the competent international bodies.³⁴

Studies assert that the Questiaux Report does not completely ignore the permanent emergency problem. It addresses and defines the phenomenon as the state of emergency that arises 'with or without proclamation...either as a result of de facto systematic extension or because the Constitution has not provided any time limit a priori'. However, the study identifies three common features of permanent emergencies:

Less and less account is taken of the imminence or otherwise of the danger; the principle of proportionality is no longer considered to be fundamental; no time-limit is envisaged³⁵.

In 1983, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities charged Ms. Daes to prepare the report 'The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights'³⁶. Daes discusses the principles that should govern the limitation, restriction, or interference of rights and freedoms. These principles include: the principle of legality; principle of the rule of law; principle that human rights and freedoms are absolute and that limitations or restrictions are exceptions; principles of equality and non-discrimination; principle of a fair and public hearing in judicial proceedings; principle of proportionality; and principle of acquired (vested) rights. This study emphasised, that these principles, while focusing on the limitation clause of Article 29 of the UDHR, are equally relevant to the derogation of human rights³⁷.

In 1985, the International Law Association, adopted a set of minimum standards to govern the declaration and administration of an emergency³⁸. These standards are intended to ensure that even when a government declares a *bona fide* state of emergency, basic human rights continue to be observed and

³⁴Questiaux Report at para. 24.

³⁵Questiaux Report, para 112-117 at 28. The same set of features has been emphasised by the ILA study, Chowdhury (1989) at 47-49.

³⁶E/CN.4/432/Rev.2 https://digitallibrary.un.org/record/52410/files/E_CN.4_Sub.2_432_Rev.2-EN.pdf

³⁷Sevensson-McCarthy (1998) at 49-191. Also Siracusa Principles 1984 were the outcome of a non-governmental conference, but they are a valuable reference for the interpretation of the derogation clause provided in the ICCPR.

³⁸The Paris Minimum Standards of Human Rights adopted by ILA in its 61 conference in 1984; see Lillich (1985) at 1072.

respected and call upon states that are in a state of emergency to be subject to judicial or other review. This study provides a typology of the emergency situation under the two categories of *de facto* and *de jure* emergencies. It highlights as well that the exclusive focus on ‘formal’ states of emergency barely scratch the surface of the widespread phenomenon of human rights abuses associated with states of emergency³⁹. The Association defined the permanent state of emergency as a ‘pattern of systematic extension of state of emergency which results in giving it a permanent status’, and refers to the features of permanent emergencies mentioned in the Questiaux report.

The International Commission of Jurists undertook a comprehensive analysis of states of emergency throughout the world that performed an in-depth examination of the practices of nineteen countries that had experienced states of emergency in the 1960s and 1970s⁴⁰. A number of relevant points were identified: (1) a distinction can be made between transitional regimes of exception with democratic goals and those with authoritarian goals; (2) resorting to a state of emergency corresponded in many situations to a government’s desire for and commitment to legalism; (3) states of emergency were frequently hidden by the exercise of excessive powers without formal acknowledgement of the existence of an emergency (*de facto* state of emergency); (4) empirical evidence demonstrated the tendency for a state of emergency to become perpetual or to effect far-reaching authoritarian changes in pre-existing ordinary legal norms; (5) in some cases, excessive use of emergency powers was partly explained by the persistence of absolutist moral values and political habits; and (6) the abuse of emergency powers was frequently a result of disregarding constitutional and legal safeguards rather than inadequacies in law *per se*. It has been argued that what is most notable about the study is that of the fourteen countries considered in the in-depth examination (excluding the Eastern European States), nine fall into the category of permanent states of emergency. Only two countries, Canada and India, fit the exemplary emergency model that is the working assumption of the major studies on emergency norms.

Some of these studies and their critique could provide some insight to how international studies focusing on emergencies have replicated to an extent the oversight by some historian and theorists when considering differences between types of emergencies.

³⁹Chowdhury (1989) at 6-25; Fitzpatrick (1994) at 3-20.

⁴⁰International Commission of Jurists, *States of Emergency; their impact on Human Rights* (Geneva; international Commission of Jurists, 1983); examined emergencies in Argentina, Canada, Colombia, Ghana, Greece, India, Malaysia, Northern Ireland, Peru, Syria, Thailand, Turkey, Uruguay, and Zaire and had a chapter devoted to a number of East European Countries.

Judicial Interpretation

The European Court and Commission

The European Commission on Human Rights was empowered to receive complaints of violations of the conventions from state parties and from individuals. Since 1 November 1998, when Protocol No. 11 entered into force, a single, full-time European Court of Human Rights came to replace the previous Commission and Court, and individual applicants have been entitled to submit their cases directly to the Court.⁴¹

The Court and Commission have produced the most extensive and interesting jurisprudence on the derogation clause of the European Convention. Some scholars argue that neither the Human Rights Committee nor the Inter-American Court provide as much substantive jurisprudence as the European jurisprudence⁴². Others claim that this jurisprudence reveals a substantial split between the theoretical discourse of the derogation regime and the reality in which derogation takes place⁴³.

The Commission and the Court have formally asserted their power to examine the factual legitimacy of any emergency, but they have qualified this assertion by accepting that governments should enjoy an adherent ‘margin of appreciation’ in deciding whether an emergency meeting the requirements of Article 15 exists, and what powers are needed to deal with it⁴⁴.

Considering the existence of an emergency, the *Lawless*⁴⁵ case and *Greek*⁴⁶ case are two of the most relevant examples.

Lawless case defined public emergency as ‘a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the state in question’⁴⁷. The European Court in this case adopted a workable and flexible standard of the concept of public emergency, and it gave the state a considerable ‘margin of appreciation’ to decide on its circumstances⁴⁸. Although the Court made no mention of the margin of appreciation as a term at the time⁴⁹, the doctrine was clearly reflected in its opinion, which contained language referring to the government’s discretion on the existence of public emergency⁵⁰.

⁴¹Articles 24 and 25 (ECHR).

⁴²Livingstone (2002) at 43-44

⁴³Gross (1998) at 454-455.

⁴⁴E.Ct.H.R. Ser.B, 1960–61, para. 90, p. 82.

⁴⁵*Lawless v. Ireland* (the Lawless case) (No. 1)(Application n° 332/57). Court 1960, p. 1-5 and 7-12.

⁴⁶Greek case Report of the Commission 1969, Year Book of the European Convention on Human Rights at p. 10 and 195

⁴⁷*Lawless v. Ireland* [hereinafter the Lawless Case] report of the European Commission adopted on 19 December 1959, application no. 332/57, para. 90.

⁴⁸The doctrine first appeared in the Cyprus case, *Greece v. United Kingdom*, 1958–1959 Year Book European Convention on Human Rights at p. 174.

⁴⁹See *Lawless case*/.

⁵⁰The Lawless case. (No. 1)(Application n° 332/57). Court 1960, para. 28 p. 56.

This doctrine of margin of appreciation and its wide application in this case and later cases were criticised extensively within the Court and Commission and by interested scholars⁵¹. By adopting this doctrine, both the Court and the Commission independently undermined their jurisdiction to review and determine the legitimacy of a derogation decision and the resulting measures. Ni Aoláin argues that by applying the doctrine of margin of appreciation, the Court and the Commission were ‘sowing the seeds of their own ineffectuality’⁵².

In the *Greek* case, the European Commission based its definition of public emergency on its earlier report in *Lawless*. However, the Commission adopted a stricter approach and gave little attention to the margin of appreciation, framing the inquiry instead around objective criteria: Was there a threat? Was it imminent? And was the threat of such an extent that it was likely to create political instability and disorder that would impact the organised life of the community?⁵³

These criteria required the state to provide significant evidence (burden of proof) of an imminent exceptional danger that threatened national order and security. The Commission concluded in the end that the evidence provided by the Greek government was not persuasive⁵⁴.

While in *Lawless*, derogation was considered necessary to fight an illegal military organisation that resorted to violence against a lawful government, it was clear in the *Greek* case, from the Commission’s point of view, that the military regime’s sense of urgency had resulted to a large extent from its desire to retain power and block a return to a constitutional democratic order⁵⁵.

It has been further noted that the Commission, in reality, granted a very narrow margin of appreciation, if any, to the Greek revolutionary government in what constitutes an emergency and relied instead on the (objective) criteria with no consideration of the government’s justification⁵⁶. Gross argues that the Greek case presents ‘a positive example of robust international judicial oversight’. He emphasises the fact that this approach has not been adopted in relation to any other assessments of valid derogations and it has been categorised by many as simply a ‘response to the anti-democratic character of the Greek government’. The non-democratic nature of the Greek government enabled the Commission to assume a rigid stance, as ‘not only would such a decision enjoy moral and political support, but it would be easily distinguishable from any future case involving a democratic regime, thus alleviating member states’ fears that a strong decision might be used against them in the future’.

In addition, it is argued that this specific pattern is clearly manifested when dealing with long-term or permanent emergencies⁵⁷:

⁵¹Gross & Ni Aoláin (2001) at 627-629.

⁵²Ni Aoláin (1995) at 110-112.

⁵³Report of the Commission, 5 November 1969, YB XII (1969), at 45-71, 72, 76 and 100. .

⁵⁴Greek Case Report of the Commission 1969, YB the European Convention on Human Rights.

⁵⁵Gross (1998) at 460-468.

⁵⁶Gross & Ni Aoláin (2006) at 274.

⁵⁷*Sakik and others v. Turkey*, and in the case of *Aksoy v. Turkey*.

The paradigm is most evidently shown where ‘democratic states’ introduce temporary legislation limiting rights protection in order to confront a finite crisis but subsequently allow such legislation to become entrenched and survive as an integral component of the state’s legal regulation⁵⁸.

Here, the boundary between emergency and ordinary law becomes extremely tenuous and the weakness from the accountability standpoint of international judicial accommodation is most evident⁵⁹. Scholars argue that this pattern is most evident in cases related to the conflict in Northern Ireland.

In the case of *Ireland v. United Kingdom*, there was evidence of violations of Article 3 (prohibition of torture and inhuman and degrading treatment), which is non-derogable even in a state of emergency. The decision on this case contributed further to the expansion of the principle of margin of appreciation since the Court declared that:

“It falls in the first place to each Contracting State, with its responsibility for ‘the life of its nation’, to determine whether that life is threatened by a public emergency and if so how far it is necessary to go in attempting to overcome the emergency⁶⁰.”

This doctrine was criticised later by Judge Martens of the European Court of Human Rights in the *Brannigan and McBride v United Kingdom* case, where he argued that such an approach to expanding the state margin of appreciation was inconsistent with the language of the Convention, which spoke of the need for measures to be ‘strictly required by the exigencies of the situation’⁶¹.

Further, the case of *Brogan and Others v. United Kingdom*, addressing the case of four persons arrested in Northern Ireland under the provisions of section 12 of PTA 1984, (which provided for special powers of arrest without warrant), Judge Martens stated that while this case was not a derogation case, both the Commission and the Court held that the background circumstances of the case should be taken into account, and that ‘the background to the instant case is a situation no one would deny is exceptional’⁶².

Similarly, in *Marshall v. United Kingdom*, the Court rejected as inadmissible on the grounds of being manifestly ill-founded, a challenge to the derogation the UK maintained in Northern Ireland. This was despite the fact that the major terrorist organizations in Northern Ireland had agreed a ceasefire for two years

⁵⁸Gross & Ni Aoláin (2006) at 275 the Prevention of Terrorism (Temporary provisions) Act 1974 is the classic example of this phenomenon.

⁵⁹The consistent approach adopted by the Court and Commission with regard to the frequent derogations by the United Kingdom is a manifested example of these themes; Derogation of 20 August 1971, 1971 YB ECHR 32; Derogation of 23 January 1973, 1973 YB ECHR 24; Derogation of 16 August 1973, 1973 YB ECHR 26; Derogation of 18 December 1978, 1978 YB ECHR 22; Derogation of December 23 1988, 1988 YB ECHR 15; Derogation of 23 March 1989, 1989 YB ECHR 8; and Human Rights Act (Designated Derogation) Order 2001.

⁶⁰*Ireland v. United Kingdom*

⁶¹*Brannigan and McBride v United Kingdom*.

⁶²*Brogan and others v. United Kingdom*.

before the events that occurred in this case. The Court noted that the UK continued to be confronted with terrorist violence⁶³.

The Human Rights Committee

Under the ICCPR, states parties are required to submit periodic reports to the Human Rights Committee, a body of 18 independent experts, on how they have given effect to the provisions of the Covenant within their territories. The Committee has the authority to question representatives of states parties at public hearings on the content of their reports. There are also provisions allowing for more adversarial proceedings, namely, inter-state complaints (called ‘communications’) concerning the implementation of the Covenant⁶⁴, and complaints guaranteed by the optional protocol (‘communications’) by individuals concerning violations of rights⁶⁵. Both of these provisions are only applicable where a state party has specifically recognised the competence of the Human Rights Committee to receive such communications.

The Human Rights Committee has been considered to have less to say with regard to what may in practice amount to a state of emergency as it does not play any judicial role⁶⁶. In its early days, the Committee seemed to be ‘timid’ when questioning non-Western states about their derogation from the Covenant. While this situation changed eventually, some states have always had the chance to escape from the report review without presenting a true picture of their human rights situation, especially if they have not been the focus of NGO activism, have not been the subject of other international procedures, have not filed a brief and abstract report, or have sent a low-level representative to the Committee’s meetings⁶⁷. For example, the Committee confessed hopelessness with respect to the situation in Lebanon even though the country had never filed a notice of derogation during the years of civil war and the war with Israel⁶⁸.

Other states insist on a facade of normality, aiming to avoid the Committee’s scrutiny. Iraq insisted that it was in full compliance with its obligations under the Covenant despite being engaged in a major war with Iran and later in the Gulf. Although there were gross internal violations of human rights, Iraq had not found it necessary to declare a state of emergency⁶⁹.

The Human Rights Committee is traditionally considered to have failed to identify states of emergency in certain states and to have frequently declined to endorse the principle of proportionality in its examination of states’ practice. Thus, permanent emergencies have managed to escape the net of thorough examination. The Committee has been generally unwilling to hold that the situation is unjustified and has posed only awkward questions and offered mild

⁶³*Marshall v. United Kingdom*.

⁶⁴Art.40- 41 ICCPR.

⁶⁵The Covenant Optional Protocol to the ICCPR, 1966.

⁶⁶Livingstone (2002). See also Oraa (1992) and Sevansson-McCarthy (1998).

⁶⁷Fitzpatrick (1994) at 82-114.

⁶⁸U.N Doc.CCPR/C/SR. at 442-443 and 446-1983.

⁶⁹Human Rights Committee Report 1987.

suggestions to the countries involved⁷⁰. For example, with regard to an emergency in Egypt of over twenty years standing, the Committee urged the Egyptian government to consider reviewing the need to maintain this situation⁷¹.

This specific position is evident in the unique case of Syria, where the state of emergency has lasted for over 40 years, and in response to which, in 2001, the Committee issued a recommendation that the emergency to be ‘lifted as soon as possible’⁷².

Nonetheless, in its revised General Comment 29, the Committee stresses a ‘specific regime of safeguards’ to guarantee restoring state normalcy⁷³. The General Comment specifies primarily that derogating measures must be of ‘an exceptional and temporary nature’⁷⁴ and that geographical coverage and material scope of the state of emergency must be ‘limited to the extent strictly required by the exigencies of the situation’.

With regard to the fundamental non-derogable rights expressly mentioned in Article 4(2), the Committee suggested in Comment 29 that other rights should be upheld during a state of emergency. The fact that some of the provisions of the Covenant have been listed in Article 4 (2), as not being subject to derogation does not mean that other articles may be subjected to derogations at will, even where a threat to the life of the nation exists. The Committee suggested that it would not find that any derogation that was justified by the exigencies of the emergency could excuse the infringement of certain specific rights. These rights include taking hostages, imposing collective punishments through arbitrary deprivation of liberty, and fundamental principles of the right to a fair trial such as the presumption of innocence.

The Inter-American Commission and Court

The Inter-American Commission on Human Rights is empowered to receive complaints of violations of the Convention from states parties and from individuals living in any of the signatory countries. In the case of inter-state complaints they can only be entertained where the states concerned have recognised the competence of the respective body to receive such complaints. Cases can only be referred to the Inter-American Court by the respective Commission or by states parties connected with a case before such Commissions⁷⁵. Under the American system, the Commission and the Court are empowered to transmit their findings directly to the states parties.

The Commission interpreted the concept of ‘public emergency that threatens the independence and the Security of the state’ in a very similar way

⁷⁰Fitzpatrick (1994); Gross & Ni Aoláin (2006) at 297-304.

⁷¹CCPR/CO/EGY, para. 6, Concluding Observation of Human Rights Committee: Egypt, November 28 2002.

⁷²CCPR/CO/SYR Concluding Observations, Syrian Arab Republic April 2001.

⁷³CCPR/C/21/Rev.1/Add.11, 31 August 2001.

⁷⁴A/34/40, Report of the HR Committee (1981), para. 78. considered the state of emergency declared in Chile not to be justified by the circumstances

⁷⁵Articles 44, 45 and 61 of the American Convention

to the interpretation given by the other international bodies under the European and the UN systems, despite the different wording⁷⁶.

The interpretation of this element has been strongly emphasised through the opinions of the enforcement bodies; furthermore, 'state of emergency' was described by the OAS as 'an institution essentially transitory in nature'⁷⁷. The Court also held this position in an advisory opinion in 1987; it revealed that the extension of a state of emergency as a result of systematic extension or because of the non-existence of any time limit under the Constitution is common under the Inter-American system⁷⁸. The 1978 Report on Paraguay by the ACHR contains a good illustration of this kind of state of emergency. According to the 1978 report of the Inter-American Commission, it was not possible to determine exactly how long the country had been under an emergency regime since the regime seemed to date back to 1929 with only six months of interruption in 1947⁷⁹. In 1986, Amnesty International estimated that the 'the state of siege has been in force almost continuously for over thirty years, although confined since 1978 to Asuncion and the Central department'.⁸⁰ The above would seem to indicate that so-called permanent states of emergency are unlawful.

In 1981, the Report on Columbia sharply criticised the past use of the state of emergency by the Colombian authorities. In addition to the fact that the authorities had failed to notify the Secretary General of OAS of the emergency according to Article (27)3, the report reveals that Colombia had been living in a state of emergency since 1948, changing it into an almost permanent system aimed at combating political and common violence in rural areas, and in recent years, in urban parts of the country as well. This systematic maintenance of the state of emergency created a system of exception, the indefinite duration of which affected the institutional functioning of the Colombian state of law⁸¹.

With regard to fundamental non-derogable rights, the Court emphasises that in addition to the rights mentioned in Article 27(2), there is another set of rights that should be considered non-derogable:

...judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6)[nobody shall be detained for debt] and 25(1)[rights to fair trial], considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees⁸².

⁷⁶Oraa (1992) at 14-16.

⁷⁷OAS (1982) The IACHR, at 336-339.

⁷⁸Permanent states of emergency are those which are perpetuated, with or without proclamation, either as a result of de facto systematic extension or because the Constitution has not provided any time limit a priori: Questiaux Report, para 112.

⁷⁹IACHR (1978).

⁸⁰Amnesty International Report 1986, p. 186.

⁸¹IACHR (1981).

⁸²Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987). Requested by the Government of Uruguay at 41(1).

In fact, the Court establishes the principle that all rights under the Convention are considered non-derogable: “[...]all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency⁸³.”

The Court further emphasised the principle of democratic society and legality and the interrelation between the two principles, holding ‘that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law’, and that: ‘The suspension of guarantees lacks all legitimacy whenever it is resorted to for the purpose of undermining the democratic system’.

Arab Commission for Rights and Court for Human Rights

The Arab Human Rights Committee carried out its first examination of state reports in 2012-2013, starting with Jordan, Algeria and Bahrain. The concluding remarks of the Committee are now published on its website in Arabic. Civil society organizations are allowed to disseminate these concluding remarks in their countries for public outreach (through different mediums of conventional media and social networks) and follow-up with the national authorities.⁸⁴ It is however essential to highlight the limitation offered by the status of the court. The final draft for the statute of the Arab Court of Human Rights has been revised to prevent individuals from applying directly to the Court and gives member states the sole right to file complaints. This undercuts the very reason of setting up the Court. The Arab Human Rights Committee can only receive state reports and issue recommendations. It cannot decide on individual or inter-state complaints, nor interpret the Charter. This limitation cripples the development of human rights as a guarantee in the face of state’s power and yet it is limitation renders the regional mechanism almost toothless.

The above studies, treaty provisions, and judicial interpretations all clearly refer to a set of requirements, characteristics, and principles to comply with when a state of emergency is declared and derogation from specific rights is invoked. While there is variation in the scope of non-derogable rights and the approach to a justified state of emergency, all of the attempted interpretations, whether within academia or under judicial application, share the following **Characteristics** and principles:

- In order to declare a state of emergency, the state should prove the existence of an imminent threat to the existence of the nation and include the whole population. Thus, states of emergency of a preventive nature are not lawful.

⁸³Habeas Corpus in Emergency Situations.

⁸⁴The Arab League and Human Rights: Challenges Ahead. The International Federation of Human Rights (2013).

- The threat must include the whole population. Although even if it occurs in one part and is proved not to have a direct effect on the rest of the population, it is accepted under the ILA Paris report of 1984⁸⁵.
- The declaration of an emergency situation should always be considered a temporary measure.
- Complying with the exceptional nature of derogations the state declaration of an emergency should not take place unless all of the normal measures to deal with the situation have been exhausted.

Principles

State parties to the treaties must act in accordance with a number of principles. The purpose of these principles is to gauge the threat a state is facing in order to minimise the possible danger of abuse of the derogation measures. Serving two different purposes, these principles are classified under two main categories—procedural and substantive principles.

Procedural Principles

The Principle of Notification

The notification principle aims to help provide efficient international supervision by requiring that all states parties subject to the relevant convention be notified of the derogation measures taken. In all four treaties, the derogation clause contains a similar notification requirement. The reason for including this provision is that the derogation from human rights obligations in a state of emergency is a serious measure and a matter of concern for the other states parties⁸⁶.

The Principle of Proclamation

The proclamation principle functions internally by making public the government's decision to declare a state of emergency⁸⁷. This declaration is an important decision in the life of the state, and provokes not only derogations from human rights standards but also a certain alteration in the distribution of functions and powers among the different organs of the state. One of the aims of this requirement was to reduce the incidence of *de facto* states of emergency, obliging states to fulfil their obligations under their domestic law.

⁸⁵ *Sakik and Others v. Turkey* and case of *Aksoy v. Turkey*.

⁸⁶ 10th session, Annexes, agenda item 28, pt.II, Draft Covenant, Report of the Secretary General, A/2929, p. 69, para. 47.

⁸⁷ Fitzpatrick (1994) and Gross & Ni Aoláin (2006) at 50; 'proclamation and notification are therefore complementary rather than alternative requirements'.

The requirement of proclamation does appear in the ICCPR and not ECHR and IACHR. The absence of such a requirement in the European Convention was considered by the Committee of Experts to be ‘a substantial difference’ in relation to the Covenant⁸⁸. Despite this, the European Commission in the *Cyprus Case*, after refusing to decide if the lack of notification according to Article 15(3) could attract the sanction of nullity⁸⁹.

Substantive Principles

The Principle of Proportionality

This principle can be deemed to constitute a general principle of international law⁹⁰. It was first applied in the customary international law of reprisals and self-defence and human rights is one of the areas in which the principle has found a major application. From an historical point of view, human rights and proportionality have always been linked⁹¹.

According to this principle, the derogation measures, in order to be valid, they must be necessary and proportionate to the gravity of the threat. This principle does not refer only to the extent but also to the period of time during which a derogation measure can be held to be justified.

The Principle of Non-discrimination

This condition is contained in the derogation clause of the ICCPR, the American Convention, and the Arabic CHR, but not in the European Convention. The absence of this condition has no major consequences as the discriminatory application of derogation measures is also forbidden under the European Convention by the operation of the general non-discriminatory provision of Article 14⁹².

The Principle of Non-derogability of Human Rights

This is considered to be an essential principle in the regulation of human rights in states of emergency⁹³. All of the international treaties that include a

⁸⁸Council of Europe, Problems Arising from the Coexistence of the UN Covenant on Human Rights and the European Convention, report of the Committee of Experts (Strasbourg, 1970), doc. H(70)7.

⁸⁹*Cyprus case*, Report of the Commission (1976), EHRR4 (1979), p. 556.

⁹⁰Delburuck (1984) at 396-400. See also Mossler's in *Recueil des Cours: Collected Courses of The Hague Academy of International Law*, Volume 140, (1974) at 140-144, 147-148.

⁹¹Sevensson-McCarthy (1998) at 568-621.

⁹²*Ireland v. UK*, Ser. B: Report of the Commission, p. 28; *Inter-American Yearbook on Human Rights*, 1989, pp. 444-445; In the *Nicaragua-Miskitos*.

⁹³The UK representative in the drafting of the ICCPR at the time, Ms. Bowie, described the principle as ‘an essential one’, E/CN.4/SR. 127(127Jun 1949), p.7. Mr. Rene Cassin and other representatives made the same point, E/CN. 4/SR. 195 paras. 69 and 90. See also Mr. Oribe

derogation clause contain the vital principle of non-derogability. One of the striking features of the derogation clauses in the three treaties under consideration (ICCPR, ECHR, and IACHR), is that they contain a different list of non-derogable rights. It can be seen that despite agreement on the principle, the problem has been to establish which rights should be considered non-derogable.

Nevertheless, the four lists in the four treaties under consideration contain four common rights that are considered non-derogable in all of the treaties. These rights are: 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 and servitude, and the principle of non-retroactivity of penal laws. These rights are so fundamental that they are considered to be not only customary international law, but also norms of *ius cogens*. These four rights constitute what has been called the ‘irreducible core’ of human rights⁹⁴.

The protection achieved in the three treaties through the lists of non-derogable rights should be considered. Violations do occur and the international monitoring bodies have consistently denounced gross violations of these rights. Some of the most common violations are: violations to the right to life, such as executions carried out without due process; death resulting from torture or ill-treatment in prison; enforced disappearances; and death resulting from the executive use of force by law enforcement officials⁹⁵.

There are two areas in which the urgency to provide some minimum guarantees has been stressed by international monitoring organs and legal experts (especially the European Court and Commission)⁹⁶, namely, guarantees against arbitrary detention and guarantees of due process of law. The importance of these minimum guarantees is due to the fact that gross violations of the most fundamental rights (the right to life and freedom from torture) have been possible in part due to the absence of these guarantees⁹⁷. They are so fundamental and closely related to non-derogable rights⁹⁸ that it would be difficult to maintain that their derogation could be strictly required by the exigencies of the situation. In addition, the UN General Assembly has adopted by consensus a body of principles for the Protection for all Persons under any Form of Detention or Imprisonment. These principles, which are in line with the minimum standards mentioned before, are to be considered non-derogable in states of emergency.

(Uruguay) and Mr. Malik (Lebanon), paras. 71 and 87; See J. Oraa (1992) and A. L. Sevansson-McCarthy (1998).

⁹⁴Oraa (1992) at 96.

⁹⁵Ramcharan (1985); Weissbrodt (1986); Rodley (1987).

⁹⁶*Lawless case*, European Court of Human Rights, Ser. A: Judgment (1 July 1961), para. 28

In the *Lawless case* and in the *Ireland v. UK* case, it was pointed out that these two articles (Article 5, the right to be free from arbitrary arrest, and Article 6, the right to a fair trial and due process of law) were, after the four derogable rights, the most important rights of the Convention.

⁹⁷Meron (1987) at 135.

⁹⁸*Aksoy v. Turkey*, 23 EHRR para. 553 (Court report 1996). See also Amnesty International (1996) *Turkey: No Security without Human Rights*; AI (1995) *Turkey: A Policy of Denial*.

The Principle of Consistency with other Obligations in International Law

This principle aims to limit the application of an invoked derogation.⁹⁹ The operation of this legal criterion of the validity of the derogation measures can only come after all of the other conditions of the derogation clause have been satisfied.

Conclusion

The international legacy of regional practice offers the regional developing reality of the Arab World a fertile ground to learn from the best practice and build upon. Regional arrangements are also pivotal in the process of diffusing and reinforcing human rights norms and standards in their regions in cooperation with member states.

The derogation system in treaties and most of the studies share the same set of standards regarding the nature of the threat and subsequently the nature of declared emergency (exceptional, imminent threat and temporary state of emergency with aim to restore normalcy), general international legal principles (proportionality and consistency with other obligations under international law) show international concern in the context of states of emergency and applied protection for human rights (notification and proclamation) and a limited number of non-derogable rights.

States exceptional powers in times of crisis are highly complex phenomena, which can be triggered by diverse types of national and international crisis, and thus it is extremely difficult to adopt a coherent international strategy to gauge this issue. In particular, *de facto* and open-ended / permanent emergencies have posed particularly intractable problems in terms of classifications and amenability to measures of special vigilance.

While, by definition, a state of emergency is a temporary legal response to an imminent and grave threat, a perpetual state of emergency is a contradiction in terms. Nonetheless, States' practice proves that a state of emergency sometimes becomes virtually permanent in a number of scenarios: proclaimed emergency for over forty years (Syria), repeatedly renewed (Egypt), or because special measures are entrenched in ordinary laws which survive after the emergency ends (UK).

There has been significant advancement at both the regional and global level to monitor human rights abuses during the enforcement of emergency decree within a declared crisis. However, since the events of 9/11, concerns about mistreatment have amplified, especially related to more ambiguous aspects of the 'war on terror'. More significantly, within the Arabic context, monitoring the states from an exclusively emergency driven pretext is problematic, as the most states due to their colonised history were born into the reality of crisis and conflicts over power. Thus, the use of a scale that measures the intensity of human rights abuses as the yardstick to devise measures of international surveillance and

⁹⁹The application of the principle of consistency by the IACHR in *Nicaragua-Miskiyos*.

control may prove more beneficial. Furthermore, the recent developments in terms of civil unrest, revolutions and counter revolutions, provided for more violations of security resolutions from regional and international actors. These violations posing a security threat, has demonstrated the limitations for international action in the area, given the continuing attachment of governments to notions of national sovereignty, and to adopt a gradualist policy which, whilst not abandoning the search for international solutions, places greater emphasis on strengthening domestic mechanisms of control.

The statute of the Arab Court for Human Rights suffers from a crippling deficiency that needs to be addressed by accepting individual complains against states. This is so that the regional mechanism could resume some effectiveness and perhaps play a positive role in altering a domestic and regional legal culture that regards human rights violations as a guard against abuse of states' powers.

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