

The Human Rights Committee and Public Emergencies

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The implementation of the International Covenant on Civil and Political Rights¹ is vitally important to the development of world public order. The Covenant provides for establishment of a monitoring body—the United Nations Human Rights Committee—which has functioned since 1977 under article 40 of the Covenant and under the Optional Protocol relating to the Right of Individual Petition.² Although the mandate of the Committee, as described in article 40 of the Covenant, confers little specific enforcement power, the Committee has developed tactful procedures for engaging States Parties in extensive dialogue on their adherence to their treaty obligations.³

Though it includes members from a wide variety of countries, the Committee has managed to minimize the internal political conflicts which often paralyze international bodies. Members have shown a genuine dedication to the cause of human rights and to the promotion of the Covenant's standards. In fact, the Committee has stretched both its mandate and the substantive provisions of the Covenant as far as it practically can.

What, if anything, can the Committee do to curb violations of the Covenant? What has it done so far? Specifically, how has the Committee handled violations of the rights specified in article 4, paragraph 2 of the Covenant, rights which are non-derogable even in times of public emergencies? The answer should be twofold: the Committee has done little because the Covenant leaves it little or no room for active interference; but, at the same time, it has done much because it has used its mandate in an effective way, and it is continually developing procedures to review States Parties' observance of the Covenant.

This paper focuses on the Covenant's definition of public emergency,

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1. G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter International Covenant]. The Covenant and accompanying Optional Protocol were concluded and adopted by the General Assembly of the United Nations in 1966.

2. *Id.*

3. For an overview of the first five years of the Committee, see Fisher, *Reporting under the Covenant on Civil and Political Rights: the First Five Years of the Human Rights Committee*, 76 AM. J. INT'L L. 142-53 (1982).

and how the Committee has dealt with the four situations in which States Parties have declared such emergencies. Finally, the paper discusses the special procedures the Committee plans to establish to enable it to respond in a more timely fashion and more effectively to declared public emergencies.

I. Article 4 of the Covenant on Civil and Political Rights

The drafters of the Covenant anticipated circumstances in which it would be difficult to require States Parties to guarantee all the rights enumerated in the Covenant. In abnormal situations, the restoration of "normalcy" might require the temporary suspension of certain rights. Such suspension would be justified because the rights of all individuals under the jurisdiction of a given state would be in jeopardy, and because the suspension of certain rights would facilitate the restoration of public order. The stability achieved thereby would fully guarantee all human rights. On the other hand, the drafters foresaw that a general exemption clause would easily lead to abuses. The clause, therefore, was to be carefully drafted to specify the conditions under which derogations would be allowed.

Article 4, paragraph 1, provides that States Parties may "take measures derogating from their obligations under the present Covenant" in "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."⁴ The decision whether to exercise this power—i.e. the assessment of the situation as a state of public emergency—lies within the State Party's discretion. If a State Party chooses to use this power, it is bound by a series of formal requirements and substantive limitations which may be summarized as follows. The public emergency must: (a) threaten the life of the na-

4. International Covenant, *supra* note 1, art. 4, para. 1. Article 4 of the Covenant states:

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.

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

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

Id. art. 4.

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tion; and (b) be officially proclaimed. Derogating measures are only considered lawful: (c) to the extent that they are strictly required by the exigencies of the situation; (d) if they are not inconsistent with other obligations of the State Party under international law; and (e) if they do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.⁵ Moreover, (f) any State Party "availing itself of the right of derogation shall immediately inform the other States Parties to the Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated;" and (g) no derogation may be made from certain articles containing rights and freedoms so fundamental that they should be ensured under all circumstances.⁶

Article 4, paragraph 2, states that no derogation may be made from the rights specified in certain articles of the Covenant: the inherent right to life, with derogation from that right by the imposition of the death penalty being allowed only in accordance with the conditions of the Covenant;⁷ freedom from torture or other cruel, inhuman, or degrading treatment or punishment;⁸ freedom from slavery, slave-trade, and servitude;⁹ the right not to be imprisoned merely on the ground of inability to fulfill a contractual obligation;¹⁰ the right not to be tried for a criminal offense under retroactively applied law;¹¹ the right to be recognized as a person before the law;¹² and, freedom of thought, conscience, and religion.¹³

Clearly, the drafters of the Covenant did not take lightly the possibility of departure from the rules and created both obstacles that may have a restraining effect on States Parties and a bottom line comparable to the one contained in article 3 common to the Geneva Conventions on the Laws of War intended to guarantee a minimum standard of human rights under all circumstances.¹⁴

5. *Id.* para. 1 (emphasis added).

6. *Id.* paras. 2 & 3.

7. *Id.* art. 6.

8. *Id.* art. 7.

9. *Id.* art. 8, paras. 1 & 2.

10. *Id.* art. 11.

11. *Id.* art. 15.

12. *Id.* art. 16.

13. *Id.* art. 18.

14. Geneva convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, No. 970, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, No. 971, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Conven-

II. "Article 4 States" before the Committee

The Committee has had an opportunity to consider the reports of four States Parties that have availed themselves of the right to derogate under article 4 and have notified the other States Parties accordingly. In chronological order of their appearance before the Committee, these four States are: the United Kingdom, Chile, Colombia, and Uruguay. Poland, the fifth State Party formally to invoke article 4, has not appeared before the Committee since the proclamation of martial law on December 12, 1981.¹⁵

A. *United Kingdom*

Upon ratification of the Covenant on May 20, 1976, the United Kingdom notified the other States Parties of its intention to take and continue measures derogating from its obligations under the Covenant because of the "campaigns of organized terrorism related to Northern Irish affairs" that, according to the notification, constituted a public emergency within the meaning of article 4, paragraph 1.¹⁶ In their consideration of the British reports,¹⁷ Committee members concentrated

tion Relative to the Treatment of Prisoners of War, No. 972, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, No. 973, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

15. Poland had appeared before the Committee in October 1979 for the consideration of its initial report.

16. The British notification read:

The Governments of the United Kingdom notify other State Parties to the present Covenant, in accordance with article 4, of their intention to take and continue measures derogating from their obligations under the Covenant.

There have been in the United Kingdom in recent years campaigns of organised terrorism related to Northern Irish affairs which have manifested themselves in activities which have included murder, attempted murder, maiming, intimidation and violent civil disturbances and in bombing and fire-raising which have resulted in death, injury and widespread destruction of property. This situation constitutes a public emergency within the meaning of article 4(1) of the Covenant. The emergency commenced prior to the ratification by the United Kingdom of the Covenant and legislation has, from time to time, been promulgated with regard to it.

The Governments of the United Kingdom have found it necessary (and in some cases continue to find it necessary) to take powers, to the extent strictly required by the exigencies of the situation, for the protection of life, for the protection of property and the prevention of outbreaks of public disorder, and including the exercise of powers of arrest and detention and exclusion. In so far as any of these measures is inconsistent with the provisions of Articles 9, 10(2), 10(3), 12(1), 14, 17, 19(2), 21 or 22 of the Covenant, the United Kingdom hereby derogates from its obligations under those provisions.

Notification under Article 4(3) of the Covenant, in Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1981, U.N. Doc. ST/LEG/SER.E/1, at 126 (1982).

17. The initial report of the U.K. is U.N. Doc. CCPR/C/1/Add.17 (1977). This report

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on the following issues: the consequence of the reference to Northern Irish affairs rather than to Northern Ireland for the territorial application of the derogating measures; whether the situation in and related to Northern Ireland threatened the life of the nation; the reasons and extent of the derogations undertaken; and whether there was a justification for each derogation.¹⁸ As usual, the Committee presented no formal conclusions, but it was clear from the debate that the members expected a full explanation and justification by the representative of the United Kingdom. The British representative made a comprehensive reply which referred to the European Court of Human Rights' unanimous decision that a situation threatening the life of the nation existed.¹⁹ He also described in detail the derogations made and asserted that none implicated the non-derogable rights enumerated in article 4, paragraph 2.²⁰

B. *Chile*

Following the coup d'état of September 11, 1973, the military junta of Chile exercised both executive and legislative powers and severely limited the powers of the judiciary. On March 11, 1976, a state of siege was declared which officially ended because it was not extended within the required period of time. Subsequently, on September 7, 1976, Chile's representative notified the States Parties through a letter to the Secretary-General of the United Nations that a state of emergency prevailed in that country.²¹

was supplemented by U.N. Doc. CCPR/C/1/Add.35 (1978). The U.K. has also filed an initial report covering the Channel Islands and the Isle of Man, U.N. Doc. CCPR/C/1/Add.39 (1979).

18. See 33 U.N. GAOR Supp. (No. 40) at 31, U.N. Doc. A/33/40 (1978) (summary of Comm. considerations); 34 U.N. GAOR Supp. (No. 40) at 53, U.N. Doc. A/34/40 (1979) (same); see also U.N. Doc. CCPR/C/SR.67 (1978); U.N. Doc. CCPR/C/SR.69 (1978); U.N. Doc. CCPR/C/SR.70 (1978); U.N. Doc. CCPR/C/SR.147 (1970); U.N. Doc. CCPR/C/SR.148 (1979); U.N. Doc. CCPR/C/SR.149 (1979) (summary records of meetings).

19. Ireland v. U.K., [1978] 2 E.H.R.R. 25 (Eur. Court of Human Rights).

20. U.N. Doc. CCPR/C/SR.70, paras. 28-33 (1978).

21. The Chilean notification read:

Notification under article 4 of the Covenant

Chile signed the Covenant on Civil and Political Rights and ratified it on 10 February 1972. This Covenant entered into force internationally on [23] March 1976.

As you are aware, my country has been under a state of siege for reasons of internal defence since 11 March 1976; the state of siege was legally proclaimed by Legislative Decree No. 1,369.

The proclamation was made in accordance with the constitutional provisions concerning state of siege, which have been in force since 1925, in view of the inescapable duty of the government authorities to preserve public order and the fact that there continue to exist in Chile extremist seditious groups whose aim is to overthrow the established Government.

As a consequence of the proclamation of the state of siege, the rights referred to in

When considering the Chilean reports,²² several members of the Committee expressed concern about the human rights situation in Chile, and questioned the legality of the derogating measures under article 4.²³ The Chilean report mentioned the possibility offered by the "internal legal order in Chile" of establishing an "exceptional legal regimen required by [emergency] situations, consisting essentially of war, civil commotion, latent subversion and public disaster."²⁴ The German member "strongly doubted whether the concept of 'latent subversion' . . . met the strict requirement of article 4 of the Covenant."²⁵ The Canadian member expressed concern about the Chilean government's inability to define what legal order had been functioning in that country since the coup d'état. He cited Chilean statements in other contexts that were inconsistent with its formal notification.²⁶ Other members wondered whether there was a state of normality, and if not, why extraordinary measures were required. They were not convinced by the Chilean representative's reply that five and one-half years after the chaotic events of September, 1973 the government could still continue the state of exception or state of emergency.

The Committee's dissatisfaction with the Chilean reports was expressed in an unprecedented statement by the Chairman, on behalf of the Committee, that "the information provided on the enjoyment of human rights set forth in the Covenant and the impact of the state of emergency was still insufficient."²⁷ The Chilean representative disagreed with this statement, but promised a new report. To date, no report has been submitted to the Committee.²⁸

C. Colombia

In its initial report, Colombia reported that it declared a state of

articles 9, 12, 13, 19 and 25 (b) of the Covenant on Civil and Political Rights have been restricted in Chile.

Derogation from these rights is expressly authorized by article 4 (1) of the Covenant.

I am informing the other States Parties of the foregoing, through you, in accordance with the provisions of article 4 (3) of the Covenant on Civil and Political Rights.

U.N. Doc. ST/LEG/SER.E/1, at 119 (1982).

22. See U.N. Doc. CCPR/C/11/Add.25 (1978), (replacing Add.15) (initial report of Chile); U.N. Doc. CCPR/C/1/Add.40 (1979) (supplementary report).

23. 34 U.N. GAOR Supp. (No. 40) at 26, U.N. Doc. A/34/40 (1978) (summary of Comm. considerations); see also U.N. Doc. CCPR/C/SR.127 (1979); U.N. Doc. CCPR/C/SR.128 (1970); U.N. Doc. CCPR/C/SR.130 (1979) (summary records of meetings).

24. U.N. Doc. CCPR/C/1/Add.25, at 12 (1978).

25. U.N. Doc. CCPR/C/ST.128, para. 17 (1979).

26. *Id.* para. 40.

27. 34 U.N. GAOR Supp. (No. 40) at 26, U.N. Doc. A/34/40 (1978).

28. See U.N. Doc. A/36/594 Annex A (Agenda Item 12) (1981).

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siege on October 7, 1976.²⁹ During his appearance before the Committee, however, the Colombian representative stated that “the state of siege had actually been in effect for 30, or even 32 years” but that “the institution had been refined to a point where assaults on public order could be countered in a way compatible with the rule of law [sic].”³⁰ In fact, it appears that the state of exception has become the rule in that country.

Members of the Committee, considering the report in July, 1980, expressed concern that the other States Parties had not been informed of the existence of a state of siege. Moreover, it was unclear to what extent Colombia had taken measure of derogation. The British member remarked that “a state of siege [was] not necessarily synonymous with a ‘public emergency which threatened the life of the nation.’” He questioned whether Colombia was using its right under article 4 to justify measures taken under the state of siege, such as the extension of military jurisdiction “which did not accord the normal guarantees of due process of law to the individual.”³¹

As an immediate result of the Committee’s consideration of the initial report,³² on July 18, 1980, Colombia submitted to the Secretary-General of the United Nations notification under article 4, paragraph 3.³³ The notification states that “during the state of siege in Colombia,

29. U.N. Doc. CCPR/C/1/Add.50, at 7 (1979).

30. U.N. Doc. CCPR/C/SR.226, para. 15 (1980); U.N. Doc. CCPR/C/SR.221, para. 8 (1980).

31. U.N. Doc. CCPR/C/1/SR.221, paras. 29-30 (1980).

32. Report of the Human Rights Committee, 35 U.N. GAOR Supp. (No. 40) at 54, U.N. Doc. A/35/40 (1980) (summary of Comm. considerations). See also U.N. Doc. CCPR/C/SR.221 (1980); U.N. Doc. CCPR/C/SR.223 (1980); U.N. Doc. CCPR/C/SR.226 (1980); U.N. Doc. CCPR/C/SR.333 (1981) (summary records of meetings).

33. The Colombian notification read:

In accordance with article 4 of the International Covenant on Civil and Political Rights, to which Colombia is a party, I wish to inform you that the Government, by Decree 2131 of 1976, declared that public order had been disturbed and that all of the national territory was in a state of siege, the requirements of the Constitution having been fulfilled, and that in the face of serious events that disturbed the public peace, it had become necessary to adopt extraordinary measures within the framework of the legal regime provided for in the National Constitution for such situations (art. 121 of the National Constitution).

The events disturbing the public peace that led the President of the Republic to take that decision are a matter of public knowledge. Under the stage of siege (art. 121 of the National Constitution) the Government is empowered to suspend, for the duration of the state of siege, those provisions that are incompatible with the maintenance and restoration of public order.

On many occasions the President of the Republic has informed the country of his desire to terminate the state of siege when the necessary circumstances prevail.

It should be observed that, during the state of siege in Colombia, the institutional order has remained unchanged, with the Congress and all public bodies functioning normally. Similarly, constitutionality checks are carried out even in the case of meas-

the institutional order has remained unchanged, with the Congress and all public bodies functioning normally."³⁴ This assertion confirms the belief that the exception had become the rule. Nevertheless the question concerning the nature of the state of seige under Colombian constitutional law appears to have been rendered moot—the state of siege was lifted on June 20, 1982, pursuant to Decree 1774 of June 9, 1982. On October 8, 1982, the Permanent Representative of Colombia communicated this information to the Secretary-General of the United Nations, in compliance with article 4, paragraph 3, of the Covenant.

D. *Uruguay*

Although Uruguay's initial report was due in 1977, it was not submitted until February, 1982.³⁵ The Committee considered the report in April and July, 1982.³⁶ Committee members were very critical of the report. They considered the human rights situation in Uruguay fraught with features unacceptable even by emergency standards. Specifically, they noted that Uruguay's notification under article 4 did not meet the requirements of that article, because the notification did not specify the derogating measures, the extent of the limitations of the rights which were being derogated from, and the reasons therefor.³⁷ Furthermore,

ures adopted under the exceptional regime established under article 121 of the National Constitution. Moreover, public freedoms were fully respected during the most recent elections, both the election of the President of the Republic and the election of members of elective bodies.

U.N. Doc. ST/LEG/SER.E/1, at 120 (1982).

34. *See id.*

35. U.N. Doc. CCPR/C/1/Add.57 (1982).

36. Report of the Human Rights Committee, 37 U.N. GAOR Supp. (No. 40) at 58, U.N. Doc. A/37/40 (1982) (summary of Comm. considerations). *See also* U.N. Doc. CCPR/C/SR.355 (1982); U.N. Doc. CCPR/C/SR.356 (1982); U.N. Doc. CCPR/C/SR.357 (1982); U.N. Doc. CCPR/C/SR.365 (1982); U.N. Doc. CCPR/C/SR.373 (1982) (summary records of meetings).

37. The Uruguayan notification was contained in a telegram addressed to the Secretary-General of the U.N. by the Minister for Foreign Affairs of Uruguay dated June 28, 1979:

I have the honour to request that the requirement laid down in article 4(3) of the International Covenant on Civil and Political Rights should be deemed to have been formally fulfilled with regard to the existence and maintenance in Uruguay of a public emergency as referred to in article 4(1).

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

This issue has been the subject of countless official statements at both the regional and the international level.

None the less, my Government wishes both to comply formally with the above-mentioned requirement and to reiterate that the emergency measures which it has taken, and which comply strictly with the requirements of article 4(2), are designed precisely to achieve genuine, effective and lasting protection of human rights, the observance and

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the emergency measures, established for an indefinite period, amounted to permanent restrictions of human rights.

The Committee found that derogations from the non-derogable rights had occurred frequently, notably from the right not to be subjected to torture or other cruel, inhuman, or degrading treatment. The members also examined the extent to which the measures affected derogable rights, considering that the rights enumerated in the Covenant may not be suspended indefinitely. For example, with regard to the suspension of article 25 providing for the participation of citizens in the public affairs of their country, one of the members questioned when general elections were expected to be held.³⁸

III. General Comment 5/13

Over the years, the Committee has attempted to sum up its experience with the difficulties encountered in the implementation of the Covenant, and in monitoring the compliance or non-compliance by States Parties with its provisions. It has done so through general recommendations that do not address any State Party specifically. In formulating these general comments, the Committee relied upon the power bestowed by article 4, paragraph 4 to “transmit its reports, and such general comments as it may consider appropriate, to the States Parties.” At the time of this writing the Committee has submitted nine general comments to the States Parties.³⁹ The Committee has drafted these comments to make its experience available “for the benefit of all States Parties in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports,” and “to suggest improvements in the reporting procedure and to stimulate the activities of these States and interna-

promotion of which are the essence of our existence as an independent and sovereign nation.

Notwithstanding what has been stated above, the information referred to in article 4(3) concerning the nature and duration of the emergency measures will be provided in more detailed form when the report referred to in article 40 of the Covenant is submitted, so that the scope and evolution of these measures can be fully understood.

U.N. Doc. ST/LEG/SER.E/1, at 127 (1982).

38. U.N. Doc. CCPR/C/SR.357, para. 19 (1982).

39. General comments 1/13 through 5/13 were adopted by the Committee on July 28, 1981 at its 311th meeting and deal with articles 2, 3, and 4 of the Covenant. The text is contained in the Committee's 1981 Report, Report of the Human Rights Committee, 36 U.N. GAOR Supp. (No. 40) Annex 7 at 107, U.N. Doc. A/36/40 (1981). General comments 6/16 through 9/16 were adopted on July 27, 1982 and deal with articles 6, 7, 9, and 10 of the Covenant. They are contained in the Committee's 1982 Report, Report of the Human Rights Committee, 37 U.N. GAOR Supp. (No. 40) Annex 5 at 93, U.N. Doc. A/37/40 (1982).

tional organizations in the promotion and protection of human rights.”⁴⁰ The Committee has availed itself of the widest possible competence to review the implementation by States Parties, short of declaring a specific State Party in default.

In General Comment 5/13 on article 4, the Committee, after recapitulating the object and purpose of the article and the practices found in some States Parties, concluded that

measures taken under article 4 are of an *exceptional and temporary* nature and may only last as long as the life of the nation concerned is threatened and that *in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made.*⁴¹

This statement leaves no doubt about the strict manner in which the article should be applied. By adding the final clause the Committee admonishes States Parties not to relax their vigilance after availing themselves of article 4 but rather to intensify their efforts to protect human rights. One might compare this language to advice offered by a physician to a seriously ill patient not to neglect himself but, on the

40. Report of the Human Rights Committee, 36 U.N. GAOR Supp. (No. 40) Annex 7 at 107, U.N. Doc. A/36/40 (1981).

41. 36 U.N. GAOR Supp. (No. 40) Annex 7 at 110 (emphasis added). General comment 5/13 states

(1) Article 4 of the Covenant has posed a number of problems for the Committee when considering reports from some States parties. When a public emergency which threatens the life of a nation arises and it is officially proclaimed, a State party may derogate from a number of rights to the extent strictly required by the situation. The State party, however, may not derogate from certain specific rights and may not take discriminatory measures on a number of grounds. The State party is also under an obligation to inform the other States parties immediately, through the Secretary-General, of the derogations it has made including the reasons therefor and the date on which the derogations are terminated.

(2) States parties have generally indicated the mechanism provided in their legal systems for the declaration of a state of emergency and the applicable provisions of the law governing derogations. However, in the case of a few States which had apparently derogated from Covenant rights, it was unclear not only whether a state of emergency had been officially declared but also whether rights from which the Covenant allows no derogation had in fact not been derogated from and further whether the other States parties had been informed of the derogations and of the reasons for the derogations.

(3) The Committee holds the view that measures taken under article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made. The Committee also considers that it is equally important for States parties, in times of public emergency, to inform the other States parties of the nature and extent of the derogations they have made and of the reasons therefor and, further, to fulfill their reporting obligations under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation.

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contrary, to make every effort to retain his human dignity and to make an extra effort to regain his health.

Moreover, the Committee considered equally important that States Parties, in times of public emergency, “*inform* other States Parties of the nature and extent of the derogations they have made and of the reasons therefore” and “fulfill their *reporting* obligations under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation.”⁴²

IV. The Need for a Special Procedure

Probably motivated by cases of public emergency occurring in States Parties such as Poland, where martial law was proclaimed in December, 1981, El Salvador, where an actual state of civil war exists, and Iran, where revolution continues—cases in which multiple violations of the Covenant have been reported—the Committee decided to devote a special debate to the problem of derogation and notification under article 4 and its relation to the reporting system under article 40. The debate took place in New York on March 22 and April 1-2, 1982.⁴³

At the beginning of the debate the Norwegian member submitted a proposal for a special procedure before the Committee to deal with public emergencies. This proposal was based on article 40 and general comment 5/13. It read:

The Human Rights Committee, acting under article 40 of the International Covenant on Civil and Political Rights, requests the Secretary-General, whenever a notification under article 4(3) has been made, immediately to act as follows:

- (a) To transmit the notification forthwith to the members of the Human Rights Committee;
- (b) To draw the attention of the State party concerned to general comment 5/13, and in particular to the comment regarding the content of the reporting obligations in this respect, and to inform it that the Committee will decide at its next ordinary or extraordinary session whether to request a special report under article 40(1)(b) and that meanwhile the Committee will appreciate being kept currently informed about the development of the emergency in so far as it affects the implementation of the Covenant.⁴⁴

Under article 4 a State Party is required to notify the other States Parties through the Secretary-General of the United Nations. The Com-

42. *Id.* (emphasis added).

43. See U.N. Doc. CCPR/C/SR.334 (1982); U.N. Doc. CCPR/C/SR.349 (1982); U.N. Doc. CCPR/C/SR.349 (1982) (summary records of meetings).

44. U.N. Doc. CCPR/C/SR.349, para. 16 (1982).

mittee need not be notified formally by either the State Party or the Secretary-General. Under the proposal, the Secretary-General would do two things he is not explicitly required to do under the Covenant: submit the proposal to the Committee and draw the attention of the State Party concerned to General Comment 5/13. These acts may result in a special procedure whereby a special report could be requested from the State Party at a regular or extraordinary session of the Committee. On the basis of that report the Committee would be able to establish the extent to which article 4 had been implemented by the State Party concerned. Adoption of this proposal would enable the Committee promptly to assess the problem and require justification from the State Party concerned.

Of course, the proposal cannot influence the official proclamation of a state of emergency, should the case arise, and, consequently, the notification of the Secretary-General. Therefore a State Party could escape the special procedure simply by not making a proclamation, but still continue to limit the enjoyment of rights and freedoms. Such a tactic would bespeak a State's preference for non-conformity with the Covenant over public exposure through Committee procedures of its emergency and its justification, or lack thereof. This outcome would be a potentially adverse consequence of the procedure.

Nevertheless, the Norwegian proposal met with opposition on other grounds. Objections to the procedure were raised by members from the German Democratic Republic and from the United Kingdom.⁴⁵ Their arguments raised both procedural and substantive issues concerning the Committee's role in monitoring emergency situations and its competence in matters affecting the life of the nation. The German Democratic member stated his belief that "there was nothing in article 4 to indicate or justify the assumption that States parties to the Covenant had transferred any competence in such matters [affecting the life of a nation] to . . . the Human Rights Committee."⁴⁶ The British member concluded that "[i]t would not be wise for the Committee to establish special procedures on the assumption that it had a special right to monitor emergency situations."⁴⁷

On the whole, however, the majority of the members who spoke on the subject agreed with the object and purpose of the proposal. The Austrian member said that "such a procedure would provide a quick

45. One cannot help but relate the opposition to the fact that both Poland and the United Kingdom have availed themselves of the rights under article 4.

46. U.N. Doc. CCPR/C/SR.344, para. 36 (1982).

47. U.N. Doc. CCPR/C/SR.351, para. 31 (1982).

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response to emergency situations and prevent possible cases of *excès de pouvoir* by States parties.”⁴⁸ The member from Senegal observed that “[t]he action [the Committee] took should be exclusively within the terms of article 40, paragraph 1 of which was sufficiently flexible and general to allow the Committee to request reports from States parties whenever an emergency situation arose.”⁴⁹ The Canadian member pointed out that: “under article 40(1)(b), States Parties had undertaken to submit reports whenever the Committee so requested. Thus, the Committee had the power to request a report at any stage.”⁵⁰ Agreeing with this point, the member from the Federal Republic of Germany added that the Committee’s decision on the periodicity of reporting was simply not sufficient to enable it to deal effectively with emergency situations.⁵¹ Other members, including those from Mauritius, Tunisia, Nicaragua, Ecuador, and Yugoslavia, welcomed the debate on the proposal, but emphasized the need for careful study of its implications. Ultimately, the Committee deferred a decision on the proposal, which had not been acted upon as of March, 1983.

V. Conclusion

A study of the Committee’s consideration of States Parties’ reports indicates that the Committee makes high demands on States Parties respecting the implementation of article 4. The Committee considers itself empowered to request and review all available information on states of public emergency and expects States Parties fully to justify any derogating measures. Although it recognizes a State Party’s discretion to determine whether a situation warrants the suspension of certain rights, it will question the grounds for application of a State Party’s emergency legislation when the crisis does not appear to meet the Covenant’s standard for a “public emergency which threatens the life of the nation.”⁵² The Committee will also question the need for continuing a state of exception, especially if the public emergency occurred in the distant past and the derogating measures appear to have been perpetuated for convenience.⁵³ The temporary character of the derogating measures must at all times be clear. It is not sufficient that a State Party establish a “state of siege” to qualify for applicability of article 4. The

48. U.N. Doc. CCPR/C/SR.349, para. 20 (1982).

49. *Id.* para. 22.

50. *Id.* para. 26.

51. *Id.* para. 28.

52. *See supra* notes 21-28 and accompanying text (case of Chile).

53. *See supra* notes 29-34 and accompanying text (case of Colombia).

State claiming a public emergency must substantiate its claim by demonstrating that the life of the nation really is at stake.⁵⁴

The Committee will check the derogating measures against the enumeration of non-derogable rights in article 4, paragraph 2. At the same time it will examine the suspension of derogable rights and check the suspension against article 4, paragraph 1, to see that it is strictly required, not inconsistent with other obligations, non-discriminatory, and of apparently temporary duration.⁵⁵ Finally, the Committee will demand that a State Party availing itself of the right of derogation scrupulously fulfill the obligations of article 4, paragraph 3, informing the other States Parties of all the provisions from which it has derogated and the reasons for such derogation.

54. *See supra* notes 16-20 and accompanying text (case of U.K.).

55. *See supra* notes 35-38 and accompanying text (case of Uruguay).