

# Methods Of Dealing With Violations Of Human Rights: What Needs To Be Done And Why It Is Not Done

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The recognition and protection of individual human rights under international law has been attained despite determined assertions of state sovereignty. Nevertheless, the inadequacy of international protection of human rights, as evidenced by the record of state practice, underscores the need to continue this struggle. The immediate task is the establishment of more effective protection of human rights precisely in situations in which states invoke national security to restrict these rights.

## I. International Protection of Human Rights

The principal international instruments dealing with human rights—the International Covenant on Civil and Political Rights,<sup>1</sup> the European Convention on Human Rights,<sup>2</sup> and the American Convention on Human Rights<sup>3</sup>—contain certain common elements that limit the circumstances in which a state may derogate from its obligation to protect human rights on grounds of public emergency. These common elements are:

1. Circumstances must exist which “threaten the life of the nation.”
  2. The measures taken by a derogating state must be “strictly required by the exigencies of the situation.”
  3. Certain rights are non-derogable under any circumstances.
  4. Derogations should not be inconsistent with any other obligations to which a state may be subject under international law.
  5. The derogating state should promptly report any derogations.<sup>4</sup>
- The first three elements could be considered as having acquired the

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1. G.A. Res. 2200(XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966) [hereinafter International Covenant].

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

3. O.A.S. Doc. 65, Rev. 1, Corr. 1, OEA/Ser.K/SVI/1.1, 9 I.L.M. 101 (1969) [hereinafter American Convention].

4. The derogation clauses are article 4 of the International Covenant, *supra* note 1, arti-

character of customary norms.<sup>5</sup>

The first element common to the above listed instruments recognizes that, in exceptional circumstances where serious and unexpected events threaten national security and the ordinary laws and institutions prove ineffective, certain restrictions of human rights may be justified. The definition of such exceptional circumstances, however, is still evolving. The European Convention and the International Covenant refer to circumstances which threaten the life of the nation, while the American Convention refers to circumstances which present a threat to the independence and security of the state. The European Court of Human Rights has provided a fuller definition, holding that "a public emergency threatening the life of the nation 'means' an exceptional situation of crisis or emergency which affects *the whole population* and constitutes a threat to *the organized life of the community*."<sup>6</sup> Thus, in the view of the European Court, a situation will not be regarded as a threat to the life of the nation unless it affects the whole population, and it may be inferred that a threat to the narrow interests of the ruling elite cannot be considered "a threat to the life of the nation" that justifies restrictions on human rights.

The second element common to human rights instruments is "proportionality"—the requirement that the emergency measures taken by a derogating state must be strictly circumscribed and compelled by the exigencies of the situation. The assessment of proportionality in turn requires that outside observers have access to the information necessary to subject the emergency measures to critical scrutiny. For this reason, the International Covenant requires of a derogating state an official proclamation of a state of emergency that includes a statement of the facts on which the claim is based. After such a proclamation, claims of States Parties to the Covenant may be examined by the United Nations Human Rights Committee, although even this minimal requirement of notification has not been followed in some fifteen instances.<sup>7</sup>

The third element common to the principal human rights instruments, perhaps the most important in terms of its potential for protecting individual human rights, is that which declares certain rights to be

cle 15 of the European Convention, *supra* note 2, and article 27 of the American Convention, *supra* note 3.

5. INTERNATIONAL COMMISSION OF JURISTS, STATES OF SIEGE OR EMERGENCY AND THEIR EFFECTS ON HUMAN RIGHTS: OBSERVATIONS AND RECOMMENDATIONS OF THE INTERNATIONAL COMMISSION OF JURISTS 18 (n.d.) [hereinafter ICJ REPORT].

6. Lawless Case, 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 472, 474 (Eur. Comm'n on Human Rights) (emphasis added).

7. ICJ REPORT, *supra* note 5, at 22, 37-38.

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non-derogable. Article 15 of the European Convention lists as non-derogable the right to life, the prohibition of torture and inhumane treatment, the prohibition of slavery, and the prohibition of retroactive application of criminal and penal laws. Article 4 of the International Covenant contains a similar list. Article 27 of the American Convention extends this list of rights to include the right to juridical personality, the right to nationality, and the right to participate in government.

### II. Improving Existing Procedures for Protection of Human Rights

Two recent reports—one entitled *States of Siege or Emergency and their Effect on Human Rights* by the International Commission of Jurists (ICJ Report)<sup>8</sup> and the other entitled *Minimum Standards of Human Rights Norms in a State of Exception* by the International Law Association's Subcommittee (ILA Report)<sup>9</sup>—have identified deficiencies in the existing legal framework for protection of human rights in times of emergency. Both reports make recommendations for improvements that should be studied carefully by human rights activists.

The ICJ Report makes five specific recommendations. First, it proposes that the list of non-derogable rights in the International Covenant should be extended at least to include prohibition of incitement to discrimination, hostility, or violence by advocacy of national, racial, or religious hatred; the right of minorities to enjoy their culture, practice their religion, and use their language; the right of a person deprived of liberty to be treated with dignity and respect; the right to hold opinions without interference; the rights relating to marriage; the rights of a child; and prohibition of arbitrary or unlawful interference with one's family or unlawful attacks on one's honor and reputation.<sup>10</sup> The ICJ Report proposes formulation of a new protocol to the International Covenant to add these rights to the list of non-derogable rights.

Second, the ICJ Report recommends that, because derogation from a variety of human rights is permitted in times of public emergency, the minimum standards that must be respected even in cases of administrative detention or other extraordinary criminal procedures should be clarified. It suggests that the *Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*,<sup>11</sup> cur-

8. ICJ REPORT, *supra* note 5.

9. INTERNATIONAL LAW ASSOCIATION, MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EXCEPTION, REPORT OF SUB-COMMITTEE OF THE INTERNATIONAL COMMITTEE ON HUMAN RIGHTS (1982) [hereinafter ILA REPORT].

10. ICJ REPORT, *supra* note 5, at 18-23 (suggesting changes to articles 20, 27, 10(1), 19(1), 23, 24, and 17 of the Covenant, respectively).

11. Working Group Report, U.N. Doc. A/C.6/36/L.16 (1982).

rently under consideration in the United Nations General Assembly, could articulate some of these minimum standards and should therefore be incorporated into the proposed new Protocol to the International Covenant. The ILA Report also addresses this matter and formulates a set of minimum standards to be observed in times of public emergency.

The third ICJ recommendation is that the new Protocol to the International Covenant contain a provision requiring review, after the end of a state of emergency, of the status of all persons convicted in courts where special procedures or laws were in force. The review provision also would govern all administratively imposed sanctions, such as loss of nationality, restriction of civil rights, or loss of employment. Fourth, the ICJ Report suggests that governments allow confidential visits to places of detention by delegates of the International Committee of the Red Cross. Such visits might provide a useful instrument for detecting and discouraging the abuses which tend to be associated with administrative detention.

The final recommendation of the ICJ Report is that the Human Rights Committee should assume a more active role in ensuring compliance with the requirement that signatories to the International Covenant on Civil and Political Rights give notice by proclamation of a state of emergency. When noncompliance is clearly established, the committee could publish a list of non-complying states. When it is unclear whether a state has complied, the state's representative could be informally approached. Moreover, when it appears that there may be a serious derogation from the right set forth in the Covenant, the Committee could make a formal request for a supplementary report.

In addition to the ICJ recommendations, other improvements are possible. The Human Rights Committee could oversee compliance with the Covenant provision that requires that measures derogating from human rights should not be "inconsistent with [the state's] other obligations under international law."<sup>12</sup> Emergency measures could be tested under several instruments, including the Geneva Conventions of 1949<sup>13</sup> establishing minimum standards to be observed in non-interna-

12. International Covenant, *supra* note 1, art. 4(1).

13. 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 the 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 Convention 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

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tional conflicts; the ILO Conventions on forced labour,<sup>14</sup> freedom of association,<sup>15</sup> the right to organize and the right to strike,<sup>16</sup> and discrimination in employment;<sup>17</sup> the UNESCO Convention against discrimination in education;<sup>18</sup> and the international Conventions on asylum,<sup>19</sup> protection of refugees,<sup>20</sup> and statelessness.<sup>21</sup>

The ILA Report sets out minimum standards of human rights norms to be observed in times of emergency. It has three parts, the first covering the declaration, duration, and control of emergency measures, the second articulating general principles, and the third containing an extended list of non-derogable human rights. After setting out the common elements in the three principal international human rights instruments, the first part of the Report enunciates the principles which it claims have achieved the status of customary norms.

The first of these claimed customary norms is that wherever the Executive is competent to declare a state of emergency, such initial declaration shall be subject to confirmation by the legislature, as the representative of the people, within the shortest possible time. This principle is based on the fundamental premise that only an authority which is legitimate, in that it derives its authority from the will of the people, is competent to declare a public emergency. In other words, a "threat to the life of the nation" can properly be declared only by an authority which can legitimately claim to represent the nation. This would deny competence to all those who have seized power by extra-constitutional means, that is, by means other than those provided for in

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.

14. International Labour Organisation: Convention (No. 105) concerning the abolition of forced labour, *adopted* June 25, 1957, 320 U.N.T.S. 291.

15. International Labour Organisation: Convention (No. 87) concerning the freedom of association and protection of the right to organise, *adopted* July 9, 1948, 68 U.N.T.S. 17.

16. International Labour Organisation: Convention (No. 98) concerning the application of the principles of the right to organise and to bargain collectively, *adopted* July 1, 1949, 96 U.N.T.S. 257.

17. International Labour Organisation: Convention (No. 111) concerning discrimination in respect of employment and occupation, *adopted* June 25, 1958, 362 U.N.T.S. 31.

18. United Nations Educational, Scientific and Cultural Organization: Convention against Discrimination in Education, *adopted* Dec. 14, 1960, 429 U.N.T.S. 93.

19. Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6912 (1967).

20. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

21. Convention on the Reduction of Statelessness, Aug. 28, 1961, 16 U.N. GAOR Supp. (No. 21) at 49, U.N. Doc. A/CONF.9/15 (1961); Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 130.

Article 21 of the Universal Declaration of Human Rights.<sup>22</sup>

The two other norms claimed by the ILA Report concern the length and termination of the state of emergency, respectively. First, the duration of the emergency shall never exceed the period required to restore normal conditions, the initial term being fixed by law, and extensions being subject to prior approval by the legislature. Second, the end of the state of emergency shall be automatic upon the expiration of the term, and on termination, all rights and freedoms which were suspended or restricted during the emergency shall be automatically restored.

The second part of the ILA Report sets forth general principles to govern states of emergency, of which the following three are among the most important. First, emergency measures should not involve any discrimination on grounds of race, color, sex, language, religion, or social origin. Second, during the period of the emergency the fundamental functions of the legislature and the judiciary should not be impaired despite the relative expansion of the powers of the executive; and the prerogatives, immunities, and privileges of legislators as well as the guarantees of the independence of the judiciary should remain unimpaired. Third, as far as practicable, norms to be applied during an emergency should be formulated when no emergency exists.

The third part of the ILA Report proposes expansion of the list of non-derogable rights contained in the major international human rights instruments, and argues that because non-derogable rights represent "a core of essential human values" the concept cannot be a static one. The Report notes that the American Convention has already enlarged the core of essential rights, and that the experience of the frequent emergencies declared between 1966 and 1981 emphasizes the need for formulation of additional minimum safeguards. Thus, in addition to extending the list of non-derogable rights, the formulations contained in the ILA Report introduce certain important new safeguards. For example, the right to life contains a prohibition against the imposition of the death penalty for political crimes. The right to humane treatment is defined to make the state fully accountable for the enforced or involuntary disappearance of any individual within its jurisdiction. The right to a remedy provides that in every case of detention without trial writs of *amparo* and habeas corpus shall remain available to enable the supervisory jurisdiction of the courts to be invoked to determine whether the relevant law for preventive detention

22. G.A. Res. 217A, U.N. Doc. 1/777, at 71 (1948).

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complies with constitutional requirements, to determine whether the order of detention is in compliance with the law, and to ensure that every detainee is treated with humanity. According to the formulations of the ILA Report, the courts would also have the power to direct medical examination of the detainee and inspection of prisons or other places of detention to ensure humane treatment.

### III. The Need for Sanctions

The improvements in the legal regimes suggested by the ICJ and ILA reports, if implemented, would provide more adequate and effective protection of human rights in times of emergency. In addition, there is a need for effective sanctions and penalties against delinquent states and individuals.

The sanctions suggested in the literature include: withdrawal of recognition from delinquent states (or at least suspension of diplomatic relations); establishment of universal criminal liability for individuals who commit gross violations of human rights such as torture or murder; and the suspension of private capital flows to delinquent states by the development of a doctrine of international public policy which would deny contractual validity to the agreements with such states.<sup>23</sup>

An effective variant of the last measure would be the establishment of a new international financial facility which would require a state's ratification of the International Covenant and the proposed new Protocol as a prerequisite for eligibility to receive funds. A state found guilty of a serious breach of its obligations under the Covenant or the Protocol could be disqualified from receiving funds. Such a facility, intended to promote capital flows to developing countries, might be modeled after the World Development Fund proposed by the Brandt Commission. Because the facility would be multilaterally administered, it would be possible to ensure that an impartial body would determine whether a breach had occurred, thereby minimizing political or other extraneous influences.

The establishment of universal criminal liability for egregious government-sponsored human rights violators such as torturers and murderers would act as a substantial deterrent to future violations. The delinquents would no longer be able to evade justice by availing themselves of safe destinations abroad where they can retire in relative com-

23. T. Farer, *Sovereignty and Humanity: The Suppression of Tyranny* 14-20 (June, 1981) (paper presented at the United Nations Institute for Training and Research, Uppsala University Seminar).

fort. Instead, they would be prosecuted and punished wherever found. An example of these glaring violations is provided by events in my own country, Bangladesh. The confessed assassins of a head of state, his family, and of other political leaders left the country to safety and subsequently have been appointed to diplomatic posts. Civilized nations, some with knowledge of the relevant facts, some without, have extended to these criminals the status and privileges which international law reserves for diplomats. If universal criminal liability were recognized, similar violations would not be rewarded but properly punished.

### Conclusion

Much has been written about what needs to be done to protect human rights during public emergencies. Indeed, this symposium has made a valuable contribution in this field. The question remains, however, why the necessary actions are not taken. This takes us to the realm of power politics and global strategy—somewhat beyond the confines of this symposium. Yet, we cannot leave this subject without a comment on this dimension of the problem.

The “enemy-of-my-enemy is my friend” syndrome leads states to turn a blind eye to repressive regimes that are classified as “friends.” There are countless examples of such a global strategic calculus being applied to the benefit of authoritarian regimes guilty of heinous crimes against their own people in the name of national security. We are indebted to Tom Farer for incisive critiques of foreign policies which condone, or even induce, human rights violations and protect repressive regimes on the supposed grounds of strategic interests.<sup>24</sup> Yet, what Bishop Alfredo Novak of Sao Paulo has said about Latin America is equally valid in many other regions where

a perverse and contradictory process of economic growth [creates a social order] which is evidently unjust, favouring the enrichment of few and the impoverishment of many. To sanction and solidify this reality, authoritarian regimes have developed and “invoked” National Security, thus being able to silence and, in many cases, totally eliminate undesirable political and ecclesiastical opposition.<sup>25</sup>

Therefore, to fight for human rights one has to fight not only repressive regimes and their hirelings, but outlooks, attitudes, and modes of strategic thinking. The experience of nearly four decades since the end

24. See T. Farer, *supra* note 23. See also Farer, *Searching for Defeat*, 40 FOREIGN POL'Y 155 (1980).

25. Novak, *Development and Justice*, IFDA DOSSIER, Mar.-Apr. 1982, at 65, 67-68 (International Foundation for Development Alternatives).

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of World War II should have discredited such outlooks and attitudes. Regrettably, they have survived and are once again asserted in the 1980's. Yet, for men and women of conscience, the fight must go on, however daunting the odds and powerful the forces of resistance.