# Derogating from Human Rights Provisions: Comparing State's Obligations under Universal and Regional Human Rights Treaties

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## 1. Introduction

Human rights constitute the set of fundamental guarantees to which all individuals are entitled for their common belonging to humanity. Within the international legal sphere, the proclamation of these principles as universal normative values represented the first step, after the Second World War, toward a new conception of individuals' rights *vis-à-vis* the state. From the level of inter-state relations, in which public international law regulates interactions among international subjects, that is, states or international organisations (IGOs), the focus has been shifted to the relations between states and individuals.

As Judge Cançado Trindade of the Inter-American Court of Human Rights (IACtHR) has pointed out, the main difference between public international law and human rights law should be understood in terms of intrinsic inequality among subjects[1]. Human rights law operates in defense of those who are ostensibly weaker and more vulnerable, i.e. victims of human rights violations. In other words, fundamental freedoms stand in defense of those in greater need of protection, thus moderating the imbalance of power between states and individuals.

The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the European Convention of Human Rights (ECHR) allow states to either make reservation or derogate from conventional obligations. This paper will not consider the reservation regime, though particularly interesting in the analysis of human rights provisions. The analysis will be centered exclusively on derogation clauses. Specifically, the following comparative effort will focus on the role of the Human Rights Committee (HRC), the IACtHR, and the

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[1] Judge Augusto A. Cançado Trindade, Separate Opinion, *Blake v. Guatemala*, Judgment of 22 January 1999.

European Court of Human Rights (ECtHR) in defining the meaning of derogating provisions in relation to two key concepts, namely the concept of proportionality and the concept of non-derogable rights.

The need for a careful speculation on these two fundamental legal aspects regarding human rights treaties is of crucial importance in a historical moment where some states seem to question whether the human rights regime of protection should be revised in light of the threat posed by international criminal organisations. In particular, as the ECtHR has recently noticed in *A. & Others v. The United Kingdom* it is of utmost importance to recall attention on these concepts as fundamental boundaries to states' actions even in cases of major threats, as in the case of international terrorism[2].

As many scholars argue, particularly when confronting well organised criminal organisations (e.g., those commonly referred to as terrorists) states face a dilemma, that is, how to respond to an imminent societal demand for security while minimising the risk to overly compromise the enjoyment of fundamental freedoms[3]. Balancing the need of security with the necessity to protect and maintain civil liberties is not always a simple task. The declaration of a state of emergency leaves to national political authorities the power to determine the extent to which individual rights should be sacrificed[4]. However, states do not enjoy an unlimited right to derogate even in a serious crisis. Limitations to their discretional power in adopting emergency legislations has to be found not only in their own constitutional constraints, but also in their international obligations under international human rights law. Modern constitutions of democratic countries similarly embody fundamental rights and provide means of protections for their citizens. Although these principles are embedded in their political contexts, giving these rights different meanings according to their cultural heritage, the distinction between international law and domestic law in the field of human rights has become less clear-cut than it was in the past[5]. Indeed, the phenomenon of borrowing and transplantation from the international jurisdiction to national jurisdiction is now common[6]. National judicial authorities often refer to internationally defined principles either as a source of inspiration in the definition of constitutional rights or as the

[2] *A. & Others v. The United Kingdom*, Judgment of 19 February 2009, Application no. 3455/05.

[3] C. Warbrick, *The European Response to Terrorism in an Age of Human Rights*, in «European Journal of International Law», vol. 15, no. 5, 2004, p. 990.

[4] For a comprehensive overview regarding the concept of state of emergency see: A. Benazzo, *L'emergenza nel conflitto fra libertà e sicurezza*, Torino, Giappichelli, 2004; G. de Vergottini, *Guerra e Costituzione, nuovi conflitti e sfide alla democrazia*, Bologna, il Mulino, 2004; see also P. Bonetti, *Terrorismo, emergenza e costituzioni democratiche*, Bologna, il Mulino, 2006; G. de Vergottini, *Costituzione ed emergenza in America Latina: Argentina, Cile, Ecuador, Perù, Venezuela, convenzione interamericana*, Torino, Giappichelli, 1997.

[5] See J. Waldron, *The Extraterritorial Constitution and the Interpretative Relevance of International Law*, in «Harvard Law Review», vol. 121, no. 7, 2008.

[6] C. McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversation on Constitutional Rights*, in «Oxford Journal of Legal Studies», vol. 20, no. 4, 2000, p. 501. As the author suggests, although most post-Second World War constitutions have specifically laid down elements which set them apart, most of them also have a common core of human rights provisions that are strikingly similar; they often derive from the Universal Declaration of Human Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights, and the two United Nations Covenants of 1966.

legal basis for their rulings[7]. In other words, fundamental principles such as human rights are conceived not simply as having a domestic character that reflects one country's society, but as universal values part of a whole that reflects a worldwide spread set of general norms[8]. In this direction goes Justice Kirby of the Australian Supreme Court when explaining that «to the full extent that its text permits, Australia's Constitution [...] accommodates itself to international law, including insofar as that law expresses basic rights. The reasons for this is that the Constitution not only speaks to the people of Australia [...] it also speaks to the international community as the basic law of the Australian nation which is a member of that community»[9].

How do international human rights mechanisms of protection supervise, censor, and recommend over states' power to derogate from conventional rights? The following comparative analysis will try to identify a coherent set of international rules in the specific field of derogations, analysing the interpretation of the ICCPR, the ACHR and the ECHR in this specific context. Although the HRC, the IACtHR and the ECtHR differ in their legal nature, since the HRC is not a judicial body, a comprehensive analysis considering the regime of derogation cannot disregard the contribution offered by the HRC General Comments (GC).

## 2. Notification as a Substantial Safeguard

When a state decides to derogate from conventional guarantees, the first legal duty it must comply with is the obligation to notify its intentions to the competent body. This obligation, even if it might seem a mere formal requirement, is indeed an important safeguard against abuses[10].

According to the HRC, states must officially proclaim a state of emergency and subsequently inform the Committee. To be satisfactory, this communication must include not only the reasons behind the decision to declare the state of emergency, but also a series of further detailed information. The state is also obliged to inform the HRC about the national legal procedure for declaring the state of emergency and the content and the scope of derogating measures[11].

7 In *Marab*, the Israeli Supreme Court recalled fundamental human rights as defined in international law when deciding that judicial review even in time of emergency had to be prompt; see *Marab v. IDF Commander in the West Bank*, 28 July 2002, HCJ 3239/02, para. 22. The Italian Constitutional Court in its judgments no. 348 and no. 349 of 2007 expressly recognised the validity of the European Court of Human Rights' case law to rule on whether laws that are challenged are in fact unconstitutional.

8 A.M. Slaughter, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, in «Harvard Law Review», vol. 114, 2001, p. 2063.

9 *Newcrest Mining (WA) Ltd v. Commonwealth* (1997), 190 CLR 513, pp. 657-658.

10 P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, *Theory and Practice of the European Convention on Human Rights*, Mortsel, Intersentia Publisher, 2006, p. 1055.

11 *General Comment No. 29*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 2.

The IACtHR has shown concern about this formal requirement in particular in *Baena Ricardo*, when it found the Panama Government in violation of Article 27(3), since fundamental freedoms were *de facto* suspended in the country without any official communication to the Secretary of the Organisation of American States (OAS), so that Panama could not be excused from liability under Article 27[12].

Within the European regional system of protection, there has been no such an emphasis on the obligation to inform the Secretary of the Council of Europe *per se*[13]. Nonetheless, the ECtHR has required states to comply with Article 15(3) without delay. In this respect, if on the one hand, in *Lawless* the Strasburg Court did not consider twelve days as an unreasonable delay[14], on the other hand it (the Commission at that time) considered Greece's four months delay too long to be in conformity with Article 15[15].

The importance of the notification is to be found in the very structure of the notification which contains a number of essential information regarding: (1) the reasons behind a state's decision to derogate[16]; (2) the territorial scope of the derogation[17]; (3) the material scope of the derogation, i.e. the nature of the measures adopted by the state to deal with the emergency[18].

Indeed, on the basis of the information provided for by the notification, the three analysed systems of protection have grounded their decision regarding the appropriateness of the derogation and have developed a further limitation in relation to the territorial applicability of the derogation regime. In fact, neither Article 4 ICCPR, nor Article 27 ACHR, nor Article 15 ECHR refers to a geographical limitation. Nonetheless, under all the three system of protection has emerged the attitude to consider that whenever an emergency occurs, it cannot be automatically and broadly used as an excuse to generalise the suspension of conventional guarantees to the whole territory and population.

As the HRC has considered, a fundamental requirement for any derogating measures «[...] is that such measures are limited to the extent strictly required by the exigencies of the situation, [and this] requirement relates [...] [also] to the geographical coverage of the state of emergency [...]»[19]. The same logic has been applied by both the IACtHR and the ECtHR. In

[12] *Baena-Ricardo et al. v. Panama*, Judgment of 2 February 2001, para. 91. In this Judgment, the Court concluded that «[...] by virtue of the fact that a state of emergency in Panama, where some of the guarantees established in the American Convention would have been suspended, was not declared, this Court deems inappropriate the allegation by the State concerning the presumed existence of such state of emergency, in respect of which it shall analyze the alleged violation of such articles of said Convention as relate to the protected rights claimed in the application, without regard to the rule applicable to the states of exception, that is, Article 27 of the American Convention [...]». *Ibidem*, para. 94.

[13] A.M. Slaughter, *The International Judicial Dialogue...*, cit., p. 1069.

[14] *Lawless v. Ireland*, Judgment of 1 July 1961, Application no. 332/57, para. 97.

[15] In the *Greek* case there was a four-month delay between the implementation of derogating measures and notification. Although the derogation was held to be invalid because the Commission was not satisfied, that there was a public emergency threatening the life of the nation, the Commission noted that late notification would not justify action taken before the actual notification. Report of 5 November 1969, Yearbook XII, p. 43. On this point see, C. Ovey, R. White, *The European Convention on Human Rights*, Oxford, Oxford University Press, 2006 (4th ed.), p. 449.

[16] The United Kingdom derogation concerning Article 5(1) ECHR of 2001 reads: «The terrorist attacks in New York, Washington, D.C. and Pennsylvania on 11th September 2001 resulted in several thousand deaths, including many British victims and others from 70 different countries. In its resolutions 1368 (2001) and 1373 (2001), the United Nations Security Council recognised the attacks as a threat to international peace and security. The threat from international terrorism is a continuing one. In its

*Zambrano* the IACtHR held that the Decree-Law no. 86 issued by the Ecuadorean government on 5 September 1992 was not meeting the requirement of indicating a specific geographical coverage; indeed the Ecuadorian Decree-Law no. 86 was extending the intervention of the Armed Forces far behind to the limitations imposed by Article 27(1)[20]. In *Sakik*, the ECtHR observed that the Turkish descriptive summary of the content of its derogating measures extended the derogation regime only to part of its territory, thus the Court concluded that «[...] in the present case the Court would be working against the object and purpose of that provision if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation. It follows that the derogation in question is inapplicable *ratione loci* to the facts of the case [...]»[21].

## 3. Assessing the Emergency: The Margin of Appreciation Doctrine

According to the three systems of protection under analysis, derogations might be invoked only in those situations threatening the life of the nation. Both Article 27 ACHR and Article 15 ECHR also include the reference to «time of war» while Article 4 of the ICCPR does not mention it[22]. However, despite this lack in the formulation of Article 4, it seems unreasonable to read this provision as excluding the possibility for a state to derogate from the Covenant in situation of war[23]. Undoubtedly, the danger must be exceptional, i.e. the normal measures permitted by the treaty are plainly inadequate to deal with the situation[24]. As the European Commission on Human Rights clarified in the *Greek* case[25], an emergency to meet the requirements of a public emergency has to be imminent, affecting the whole nation, threatening the continuance of the organised life, and exceptional[26]. In other words, a state must be in a situation where a threat is perceived as unavoidable and non-evadable[27]. In this context, the so-called margin of appreciation doctrine has emerged as a central concept. Although the HRC has shown reluctance in adopting the margin of appreciation approach, the other two judicial bodies

resolution 1373 (2001), the Security Council, acting under Chapter VII of the United Nations Charter, required all States to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks. There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organizations or groups which are so concerned or of having links with members of such organizations or groups, and who are a threat to the national security of the United Kingdom. As a result, a public emergency, within the meaning of Article 15(1) of the Convention, exists in the United Kingdom». The full text is available at http://www.opsi.gov.uk/si/si2001/20013644.htm.

17 The Government of Turkey derogation of 1990 clearly defined a territorial scope in its content by establishing: «The threat to national security is predominantly occurring [sic] in provinces of South East Anatolia and partly also in adjacent provinces [Elazig, Bingol, Tunceli, Van, Diyarbakir, Mardin, Siirt, Hakkari, Batman, Sirnak]». The full text of the derogation is available at http://www.wihl.nl/finals/Turkey/Tr.LIM.%20Law%20on%20derogations%20to%20human%20rights,1990,eng..pdf.

18 For an example, see both the United Kingdom and Turkey derogation as quoted in notes 16 and 17.

19 *General Comment No. 29*, cit., para. 4.

20 The Court observed that «[...] the said decree provided for the intervention of the Armed Forces *throughout the national territory* [...]». *Zambrano Vélez et al. v. Ecuador*, Judgment of 4 July 2007, para. 48.

21 *Sakik and Others v. Turkey*, Judgment of 26 November 1997, Application no. 23878/94, paras. 37-39.

under consideration have significantly relied upon the possibility to leave states a margin of discretion[28]. Both the IACtHR and the ECtHR have expressly referred to the margin of appreciation, though the Inter-American Judge has mentioned it only recently.

According to the doctrine of the margin of appreciation, states are in the best position to determine the typology of measures deemed necessary in a specific situation. Indeed, this terminology was used for the first time by the European Judge in *Handyside*, and it was meant to represent an instrument allowing member states of the ECHR to implement conventional guarantees according to their societal contexts[29]. The margin of appreciation concept is an original and defining feature of the jurisprudence of the ECtHR. It seeks to balance the primacy of domestic implementation and enforcement with the need for supranational supervision[30]. The Strasbourg Court officially referred to the doctrine of the margin of appreciation for the first time in relation to Article 15 in *Ireland v. The United Kingdom*. In this judgment, the Court recognised that «by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international Judge to decide both on the presence of an emergency and on the nature and the scope of derogations necessary to avert it»[31]. Nonetheless, in the same pronouncement the Court delineated the limit of states' discretion in what the Court referred to as the European Supervision[32].

This logical approach has been also adopted by the IACtHR in *Zambrano*. The Court, recalling its European counterpart in *Lawless*, concluded that «It is the obligation of the state to determine the reasons and motives that lead the domestic authorities to declare a state of emergency and it is up to those authorities to exercise appropriate and effective control over the situation»[33]. However, as the ECtHR, the IACtHR established that «[...] it is up to the Inter-American system's organs to exercise an effective control in a subsidiary and complementary manner, within the framework of their respective competencies»[34].

[22] D. Gomien, D. Harris, L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Strasbourg, Council of Europe Publishing, 1996, p. 367.

[23] Indeed, analysing both the positions of France and the United Kingdom during the process of negotiation of the ICCPR, it is clear that one of the most important public emergencies considered at that time was exactly the outbreak of war. See UN.Doc.E/CN.4/SR.126, pp. 4-5.

[24] C. Warbrick, *The European Response to Terrorism...*, cit., p. 990.

[25] The *Greek* case (1969), in Yearbook of the European Convention on Human Rights, para. 153, p. 71.

[26] In this context, see D. O'Donnell, *Commentary by the Rapporteur on Derogation*, in «Human Rights Quarterly», vol. 17, 1985, p. 23.

[27] See A. Mokhtar, *Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights*, in «International Journal of Human Rights», vol. 8, no. 1, 2004, p. 68.

[28] According to the Human Rights Committee, «[...] the State party is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes Art. 4 [...]» and it is a Committee's function to verify «[...] whether States parties live up to their commitments under the Covenant». See, Views of the Human Rights Committee of 8 April 1980, following the Communication no. 34/1978, *Jorge Landinelli Silva et al. against Uruguay*, CCPR/C/12/D/34/1978.

[29] *Handyside v. United Kingdom*, Judgment of 7 December 1976, Application no. 5493/72, para. 48.

[30] M. Freeman, G. Van Ert, *International Human Rights Law*, Toronto, Irwin Law Inc., 2004, p. 38.

[31] *Ireland v. The United Kingdom*, Judgment of 18 January 1978, Application no. 5310/71, para. 207.

[32] In the words of the Court «[...] States do not enjoy an unlimited power in this respect [...] the domestic margin of appreciation is

## 4. Proportionality

Proportionality is a complex conceptual element in the analysis of the derogations regime. A fundamental tension exists in any constitutional order between the basic premise of a government constrained by the law and the perceived need to confront crisis[35]. However, emergencies are to be considered exceptional «moments» and temporality is inherent to the very concept of emergency, and consequently to proportionality. If crisis measures are protracted for indefinite time, emergency legislations evolve into ordinary legal provisions and the enjoyment of fundamental rights is permanently compromised, so that any speculation regarding *the exigencies of the situation* becomes meaningless. Thus, the temporal dimension is one of the elements deserving an accurate speculation when deciding whether states' actions were proportionate to the needs of a specific critical situation.

As the HRC affirmed, the temporal limit reflects the principle of proportionality, that is, when dealing with a crisis, states must avoid any disproportionate reactions beyond what is deemed necessary for a specific and limited amount of time[36]. The ECtHR has never examined the temporal dimension of the derogation, leaving the possibility to determine whether a measure was necessary in a specific historical moment, according to the margin of appreciation doctrine, to member states. In the case *Ireland v. The United Kingdom* the ECtHR clearly stated that it is not its duty to establish whether a policy has been unduly extended, but only whether this policy was lawful in light of the conditions and circumstances reigning when it was originally taken and subsequently applied[37]. Again, in *A. & Others v. The United Kingdom* the Court «[...] [did] not consider that derogating measures put in place by the United Kingdom in the immediate aftermath of the al'Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, could be said to be invalid on the ground that they were not "temporary"»[38].

The IACtHR in *Zambrano* clarified that any conventional derogation «[...] is limited to the extent and for the period of time strictly required by the exigencies [...]»[39]. In this case the American Judge did not directly focus on the temporal dimension of the emergency to affirm that there was a breach

thus accompanied by a European Supervision». *Ibidem*, para. 207.

33 *Zambrano Vélez et al. v. Ecuador*, cit., para. 47.

34 *Ibidem*, para. 48.

35 J. Lobel, *Emergency Power and Decline of Liberalism*, in «The Yale Law Journal», vol. 98, no. 7, 1989, p. 1386.

36 *General Comment No. 29*, cit., para. 2.

37 *Ireland v. The United Kingdom*, cit., para. 214.

38 *A. & Others v. The United Kingdom*, cit., para. 178.

39 *Zambrano Vélez et al. v. Ecuador*, cit., para. 47.

of Article 27(1); however it underlined how «[...] the state of emergency or suspension of guarantees was declared in Ecuador at least seven times from mid-1992 to mid-1996 [...]»[40], concluding that a long-term fight against crime «[...] by means of the suspension of guarantees, under the declaration of, the state of emergency does not comply with the American Convention's guidelines as to when such declarations are admissible [...]»[41].

Another important aspect to understand the concept of proportionality regards the analysis of the legislative measures adopted and the crisis a state is facing. Common to the ICCPR, the ACHR and the ECHR is the literal provision describing a situation of emergency as one threatening the life of the nation. Both the ICCPR and the ECHR explicitly prescribe that the possibility to derogate from conventional obligations exists only in those situations threatening the life of the nation. Although the ACHR offers a different formula, Article 27(1) ACHR reads «[...] *that threatens the independence or security of a State Party* [...]», possibly allowing for a broader legal interpretation of the scope of Article 27, the interpretation given by the Inter-American Court has been very strict.

Specifically, the HRC clearly explained that «[...] If states purport to invoke the right to derogate from the Covenant [...] they must be able to justify not only that such a situation constitute a threat to the life of the nation, but also that all the measures derogating from the Covenant are strictly required by the exigencies of the situation [...]»[42]. In addition, according the «Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights»[43], a state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: «(a) affects the whole of the population and either the whole or part of the territory of the state, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant

40 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.102, Doc. 6 rev. 1, 16 April 1999, Chapter V, Ecuador, para. 44.

41 *Zambrano Vélez et al. v. Ecuador*, cit., para. 50.

42 *General Comment No. 29*, cit., para. 5.

43 In 1984, a group of 31 experts in international law, convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights and the International Institute of Higher Studies in Criminal Sciences, met in Siracusa, Italy to consider the meaning of Article 1(1) ICCPR, *inter alia*.

[...]»[44]. The Siracusa Principles also underlined that: «The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger»[45].

The IACtHR has underlined how «[...] since Art. 27(1) envisages different situations and since, moreover, the measures that may be taken in any of these emergencies must be tailored to "the exigencies of the situation", it is clear that what might be permissible in one type of emergency would not be lawful in another [...]»[46]. Thus, the lawfulness of the measures taken to deal with each of the special situations referred to in Article 27(1) depends upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures as balanced to the contingent crisis situation.

In *Castillo* the IACtHR recognised that, although there is no justification whatsoever for terrorism, its primary function is to safeguard human rights, regardless of the circumstances. Indeed, in light of this assumption, the Court condemned the Government of Peru for violation of Article 5 (Right to Humane Treatment), since «[...] the penalties established in the counter-insurgency laws [were] in many cases disproportionate to the seriousness of the offense»[47]. Again in *Ugarte* the IACtHR found the bombing by Peruvian authorities of a prison, to subdue a series of riots, to be a disproportionate answer to the actual danger[48]. The Inter-American Judge went further in 2007, when in the case of *Zambrano* offered a detailed explanation of how the Court might determine when the use of force can be perceived as exceptional, necessary, proportionate, and respecting the principle of humanity. In particular the ACtHR explained that the use of force must be limited by the principles of proportionality, necessity and humanity. The Inter-American Judge also emphasized how «[...] the principle of necessity justifies only those measures of military violence which are not forbidden by international law and which are relevant and proportionate to ensure the prompt subjugation of the enemy with the least possible cost of human and economic resources [...]»[49]. Furthermore, in order to clarify as much as possible its understanding of proportionality, the IACtHR clearly stated that «[...] the principle of humanity

44 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc. E/CN.4/1984/4 (1984), United Nations, Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, paras. 39-40.

45 *Ibidem*, para. 54.

46 Advisory Opinion OC-8/87, 30 January 1987, IACtHR (Ser. A) No. 8 (1987), *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*.

47 *Castillo Petruzzi et al. v. Peru*, Judgment of 30 May 1999, para. 89.

48 *Durand and Ugarte v. Peru*, Judgment of 16 August 2000. In this case the Court held that: «[...] In spite of accepting the possible detainees' responsibility for committing serious crimes besides and being armed, [...] these facts are far from constituting [...] sufficient elements to justify the amount of force used in this and in other rioted prisons».

49 *Baena-Ricardo et al. v. Panama*, cit., para. 85.

complements and inherently limits the principle of necessity by forbidding those measures of violence which are not necessary (i.e. relevant and proportionate) to the achievement of a definitive military advantage. In peacetime situations, state agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury and persons who do not present such a threat, and use force only against the former [...]»[50].

Both the IACtHR and the ECtHR commonly recognise that, when proceeding with the evaluation of state's compliance with the Convention, one of the most important factors to examine is the nature of the rights affected by the derogation, together with the circumstances leading to the emergency situation. In *Gomez-Paquiyauri Brothers*, the IACtHR considered that being seized by the police when walking on the street, without been caught *in flagante*, and without a Court order, represented a restriction of the right to personal liberty which was not justified by the situation in Peru in 2004[51]. In the same direction went the ECtHR in *Aksoy* when it recognised that Turkey was violating Article 5 ECHR in that «[...] insufficient safeguards were available to the applicant, who was detained over a long period of time [...]»[52].

In many occasions, the ECtHR had the possibility to reaffirm that the concept of proportionality is related to the scope of the measures taken by member states. Thus, if on the one hand the Court's opinion in *Lawless* was that the Irish government reacted proportionally to the threat posed by the IRA, on the other hand in the case of *Demir*, the adopted measures were considered disproportionate[53]. Furthermore, in *Branningan and McBride*, the Strasbourg Court identified six significant safeguards[54] in relation to extrajudicial detention. Specifically, the Court considered that: (1) *habeas corpus* was available to test the lawfulness of the original arrest; (2) detainees had an absolute and legally enforceable right to consult a solicitor after forty-eight; (3) detainees had the right to inform a friend or relative about their detention; (4) detainees had frequent access to a doctor; (5) within the forty-eight hours there were limits on government power to block access to counsel; (6) judicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrary withheld during the first forty-eight hours[55]. Nevertheless, some scholars

[50] *Ibidem*.

[51] *Gomez-Paquiyauri Brothers v. Peru*, Judgment of 8 July 2004.

[52] *Aksoy v. Turkey*, Judgment of 18 December 1996, Application no. 21987/93, para. 8.

[53] ECtHR was not convinced that the *incommunicado* detention imposed upon the applicants for a period between sixteen to twenty-three days, was strictly required by the government's referred crisis. *Demir and Others v. Turkey*, Judgment of 22 September 1998, Application no. 23954/94, para. 57.

[54] *Branningan and McBride v. The United Kingdom*, Judgment of 23 May 1993, Application no. 14553/89, paras. 62-64.

[55] S.J. Schulhofer, *Checks and Balances in Wartime: American, British and Isreali Experiences*, in «Michigan Law Review», vol. 102, no. 8, 2004, p. 1951.

argue that the ECtHR has been strictly concerned with formalities and it is reluctant to look at the real situation. In *Brannigan and McBride*, for instance, the Court held, as it did in *Brogan*, that the *habeas corpus* was formally available[56]. In spite of that, in *Brannigan and McBride*, applicants argued that this right has been rendered ineffective since information on the status of a detainee could be delayed for forty-eight hours[57]. In the recent case of *A. & Others v. The United Kingdom* the Court upheld the decision of the House of Lords and found that «[...] the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals»[58]. In this case the Court did not consider the measure as such, but it focused on its target, i.e., non-nationals, emphasizing the discriminatory nature of this legislative provision[59].

## 5. Non-derogable Rights

The three international conventions under analysis enumerate a number of rights which cannot be derogated under any circumstances. Although Article 4(2) ICCPR, Article 27(2) ACHR, and Article 15(2) ECHR present the same «*core rights*» to which no derogation is ever allowed, the list provided in the second paragraph of these articles is dissimilar. All of them forbid slavery, torture, inhuman or degrading treatments, and do not permit derogation to the rights to life[60], the principle of non-discrimination, and to the principle of *nullum crimen, nulla poena sine praevia lege poenali*.

Fortunately, there are no cases regarding slavery or torture to be mentioned at this time. To what concerns inhuman or degrading treatments, both the Inter-American and the European Judge had to deal with this problematic issue. Providing a precise description of inhuman or degrading treatment is an uneasy task, particularly in cases involving authorities acting with the aim of preventing losses of lives. In these situations, the political environment might become quite flexible as to what can be considered appropriate for gathering crucial information to prevent other crimes. Therefore, the two international tribunals had to specify what the actual content of respectively Article 5 ACHR and Article 3 ECHR was. Both

56 *Brogan and Others v. The United Kingdom*, Judgment of 29 November, Application no. 11209/84.

57 S. Marks, *Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights*, in «Oxford Journal of Legal Studies», vol. 15, 1995, p. 80.

58 *A. & Others v. The United Kingdom*, cit., para. 190.

59 It is interesting to notice how in this judgment the Court recalls: «The United Nations Committee on the Elimination of All Forms of Racial Discrimination Concluding Observations on the United Kingdom, CERD/C/63/CO/11, dated 10 December 2003; The European Commissioner for Human Rights; Council of Europe Parliamentary Assembly Resolution 1271, Doc 9331, 6th sitting (2002); The Committee of Ministers of the Council of Europe in its Rec 1534 *Guidelines on Human Rights and the Fight against Terrorism*, adopted on 11 July 2002, at the 804th meeting of the Ministers deputies; The European Commission against Racism and Intolerance in its General Policy Recommendation no. 8 on Combating Racism while Fighting Terrorism, adopted on 17 March 2004, CRI (2004) 26.

60 According to Article 15(2) ECHR, the right to life is non-derogable save those cases where deaths are the result of lawful acts of war.

Courts emphasize that every type of humiliation, or treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors fall under the scope of these articles. In specific, the IACtHR in *Loayza Tamayo* and subsequently in *Castillo* specified that «[...] the degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance [...]»[61]. The ECtHR in *Ireland v. The United Kingdom* concluded that the so-called «five techniques»[62] constituted an inhuman and degrading practice of interrogation, in breach of Article 3 ECHR[63].

No reference can be found in relation to the right to fair trial. Nonetheless, though Article 4 ICCPR does not mention the right to fair trial among non-derogable rights, the HRC in its *General Comment no. 32* recalled attention on this specific issues by reminding contracting states that «[...] while Art. 14 is not included in the list of non-derogable rights [...] states derogating from normal procedures [...] should ensure that such a derogations do not exceed those strictly required by the exigencies of the actual situation [and] guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights»[64]. Furthermore, in his report, Martin Scheinin, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, also underlined that «[...] the principles of legality and the rule of law require that the fundamental requirements of fair trial must be respected, [...] and the right to take proceedings before a court to decide without delay on the lawfulness of detention must not be diminished by any derogation from the Covenant»[65]. It should be noted that both the *General Comment no. 32* and the Report by Scheinin are subsequent to the event of 11 September 2001, when for the first time, legal scholars started to deal with the challenges posed by concepts such as «war on terror» and «unlawful combatant» within the paradigm of human rights law.

Article 27(2) ACHR reads «The foregoing provision does not authorize any suspension of the following articles [...] or of the judicial guarantees essential for the protection of such rights [...]». In addition, the IACtHR in his 1987 Advisory Opinion confirmed that the *habeas corpus* together with Latin American

61 *Loayza Tamayo v. Peru*, Judgment of 17 September 1997. In this case the Court recalled the ECtHR in *Ireland v. The United Kingdom*, and confirmed the interrelation between *incommunicado* and degrading treatments.

62 This terminology refers to certain interrogation practices adopted by the Northern Ireland and British governments during Operation Demetrius in the early 1970s. The five techniques were: wall-standing; hooding; subjection to noise; deprivation of sleep; deprivation of food and drink.

63 *Ireland v. The United Kingdom*, cit., para. 168.

64 *General Comment no. 32*, CCPR/C/GC/32 of 23 August 2007, para. 6. On this point, see C. Olivier, *Revisiting General Comment No. 29 of the United Nations Human Rights Committee: About Fair Trial Rights and Derogations in Times of Public Emergency*, in «Leiden Journal of International Law», vol. 17, 2004.

65 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/63/223, of 6 August 2008, para. 12.

*recurso de amparo* is to be considered as an essential guarantee for the purpose of protecting non-derogable rights[66]. In other words the IACtHR seems to consider that suspensions of judicial control might never be considered as strictly required by the exigencies of the situation. In *Suarez Rosero*[67], the IACtHR found Ecuador in breach *inter alia* of the judicial guarantees enshrined in Article 8(1) and (2) of the ACHR. Indeed, the Ecuadorean Criminal Code (Article 114bis) deprived all persons in detention under the Anti-Drug Law of certain judicial guarantees (as to the length of detention). Shortly afterwards, the Supreme Court of Ecuador decided to strike down the provision at issue of the Ecuadorean Anti-Drug Law, declaring it unconstitutional. The IACtHR in 1987 Advisory Opinion, has reminded states that judicial review is an essential element, in a democratic society, to avoid states' abuses, and the custody of a detainee *incommunicado* is never strictly required by the exigencies of the situation[68].

Article 15(2) ECHR does not explicitly mention the right to fair trial among non-derogable rights; however, the ECtHR has been proactive in emphasizing the importance of Article 5 in period of emergency, to the extent that it could be defined as a *quasi*-non-derogable right. In fact, if on the one hand the Strasbourg Court has always relied on states' *bona fide* (according to the margin of appreciation doctrine) in dealing with the emergency, on the other hand the «European supervision» has played a fundamental role in shaping the material scope of measures derogating from Article 5. While in *Ireland v. The United Kingdom* the Court accepted that a limited period of time without judicial review was justified by the exigencies of the situation, in *Brogan*, under the same circumstances (the situation in Northern Ireland was still very turbulent), the Court did not uphold its previous decision. Indeed, while in 1978 the extra-judicial twenty-eight-day detention was deemed as a necessary measure in response to the imminent threat faced by the United Kingdom, in 1988 a seven-day detention was considered as a violation of Article 5(3). In *Brogan*, the Court's view was that «[...] even the shortest [...] period of detention, namely the four days and six hours spent in custody [...] falls outside the strict constraints as to time permitted by first part of Art. 5 para. 3»[69].

The ECtHR pointed out how the notion of «promptness», in

66 Advisory Opinion OC-8/87.

67 *Suarez Rosero v. Ecuador*, Judgment of 12 November 1997, paras. 66-80.

68 Advisory Opinion OC-8/87, 30 January 1987, IACtHR (Ser. A) no. 8, 1987: *Habeas Corpus in Emergency Situations* (Articles 27(2) and 7(6) of the American Convention on Human Rights); Advisory Opinion OC-9/87 of 6 October 1987, IACtHR (Ser. A) No. 9, 1987: *Judicial Guarantees in States of Emergency* (Articles 27(2) and 8 American Convention on Human Rights).

69 *Brogan and Others v. The United Kingdom*, cit., para. 62.

relation to the right for a detainee to judicial review, must be narrowly interpreted to the extent that a broad interpretation of promptness «[...] would import into Art. 5 para. 3 a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision»[70].

In addition, in several occasions the Strasbourg Court implicitly acknowledged that there is a relation between violations of Article 3 and derogations from Article 5, since ill-treatment can be a consequence of arbitrary detention. In *Aksoy* for instance, the Court, examining the Turkish fourteen days extra-judicial detention, clearly stated that «[...] although the Court is of the view [...] that the investigation of terrorist offences undoubtedly presents the authorities with special problems, [a too long period of detention without judicial review] might lead to arbitrary interference with the right to liberty and torture»[71]. In other words, the Court concluded that, although it is up to states to decide what kind of measures it is better to adopt when fighting criminal organisations, any deviation from the conventional guarantees provided for by Article 5 must be carefully designed in order to avoid unjustified detention and ill-treatment as much as possible, when a subject is under state authorities' custody[72].

## 6. International Coherence as a Legal Source

This comparative analysis shows how the three systems of protection are highly committed to minimise the risk deriving from the declaration of the state of emergency. Coherence can be found in the international definition of the limits states cannot exceed without breaking the rule contained in derogating clauses. The findings indicate that the HRC seems to be the most rigorous in defining the limits upon states in relation to derogations. As it has been underlined, the Committee does not share the same view of the IACtHR and the ECtHR according to which states deserve to retain a margin of appreciation. This position might well be justified by the non-judiciary nature of the HRC itself. Indeed, this important international body has the duty to prompt a series of principles whereas the analysed regional judges engage with

70 *Ibidem*.

71 *Aksoy v. Turkey*, cit., para. 78.

72 The availability of judicial review at the European level, with attendant possibilities for fact-gathering and public exposure, served as some check on executive power, and became source of pressure to limit departures from due process norms set by the Convention. See generally, L. Montanari, *I diritti dell'uomo nell'area europea tra fonti internazionali e fonti interne*, Torino, Giappichelli, 2002; C.A. Gearty, *The United Kingdom*, in Id. (ed.), *European Civil Liberties and the European Convention on Human Rights: A Comparative Study*, The Hague, Martinus Nijhoff, 1997.

states directly, as third parts in a legal dispute.

Regional Courts have the power to grant reparation for violations of treaty provisions (mainly in the form of monetary reparations, though the IACtHR has developed other forms of symbolic reparations[73]), so that their effectiveness need to be commensurate to a certain degree of flexibility. There would be no state willing to be judged by an authority whose perceived intent is to impose its judicial view on very sensitive and political matters such as human rights provisions and the definition of what is the desirable degree of national security. In addition, as it has been recognised by both the Inter-American and the European Judge, national authority are in a better position than the international judge in the definition of the national needs of the moment. Indeed, it is for this very reason that international jurisdiction must allow a certain margin of discretion, which does not mean a passive acceptance of states' arguments.

On the contrary, moving from the assumption that states are ultimately in the best position to decide what it is appropriate in emergency situations, the two Courts have always engaged with governments in the discussion on whether measures adopted to secure the population were appropriate. In particular, following the principle of proportionality, both the IACtHR and the ECtHR have implicitly recognised that diminishing people's liberties in the name of security might have the unintentional consequence of diminishing citizens' security against the state. Indeed, when studying the Inter-American and European case law, one can appreciate how the two Courts do not intervene on a measure *per se*, but on its appropriateness in relation to the specific emergency states claimed they had to face.

Insecurity has increased after the terroristic attack of 11 September 2001. Many scholars are now rediscovering the importance of constitutional mechanisms in relation to public emergency, questioning to what extent it is legitimate to reduce fundamental freedoms in the name of national security. If, as Ackerman argues, terrorist attacks will be a recurring part of our future[74], then, it is also necessary to rediscover the role of international human rights organs and their capability to define a series of limitations to states' power not only to restrict, but also to suspend human rights provisions,

73 As suggested by Freeman and Van Ert, symbolic reparations encompass non-material forms of reparation that aim to commemorate and restore dignity to the victims of human rights abuses. M. Freeman, G. Van Ert, *International Human Rights Law*, cit., p. 375. The Human Rights Commission also emphasized the concept of symbolic remedies in its *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by General Assembly Resolution no. 60/147 of 16 December 2005. The IACtHR for the first time in *Loayaza* established the concept of «project of life», linked to satisfaction, among other measures of reparations (paras. 83-192).

74 B. Ackerman, *The Emergency Constitution*, in «The Yale Law Journal», vol. 113, no. 5, 2004, p. 1029.

formulating their judgments and views from outside the overly political debate typical of the national framework.
International supervision might enhance the possibility to prevent violations of fundamental freedoms by imposing a number of constraints to the state's authority to interfere on the individual's human rights which are likely to be disregarded internally when the emergency arises. However, the contribution of international mechanisms for the protection of human rights should not be seen only in terms of censuring states *a posteriori*. The role played by the international judges is also very important if one considers their influence in terms of creating sources of interpretation for national courts. History includes many instances of unwarranted domestic judicial deference and a frequent pattern of invalidating emergency powers only after the crisis had passed[75], but this trend might be reversed by an internationally shared definition of the exceptional power within the frame of conventional guarantees. As explained earlier on in this analysis, national judges are now more accustomed with the idea of «borrowing principles», particularly in the very sensitive context of human rights protection. This might provide support for the national judiciary *vis-à-vis* the executive power in times of emergency, thus reinforcing the democratic system of checks and balances traditionally threatened when a state of emergency is declared.

75 See W.H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime*, New York, Alfred A. Knopf, 1998.