THE RIGHT TO A FAIR TRIAL IN STATES OF EMERGENCIES

NON-DEROGABLE ASPECTS OF ARTICLE 14 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Master of Arts in Law and Diplomacy Thesis

Submitted by EVELYNE SCHMID

April 15, 2008

Supervised by Prof. LOUIS AUCOIN

© 2008 AUTHOR

http://fletcher.tufts.edu

THE FLETCHER SCHOOL

TUFTS UNIVERSITY

ABSTRACT

This thesis examines international norms of fair trial in states of emergency. It identifies the list of judicial safeguards which have to be provided to every accused individual, irrespective of his or her status in international law and irrespective of whether the situation amounts to an armed conflict or not. It shows that current legal discussions about the applicable law in the "war on terror" do not sufficiently recognize that a minimum floor of due process must be provided to all accused; regardless of whether humanitarian treaty law applies or not.

Specifically, this thesis proceeds from the assertion that human rights law applies in peacetime as well as in times of emergency, including in armed conflict. Building on two Advisory Opinions of the International Court of Justice, the International Covenant on Civil and Political Rights applies as long as a State party has not made a valid derogation from its provisions. The Covenant prohibits any derogations that would be inconsistent with the states other obligations under international law. Applying this principle of consistency to the administration of justice, it is possible to identify which aspects fair trial (article 14 of the Covenant) must be considered non-derogable. This thesis argues that those aspects of fair trial which are common to the legal regimes dealing with international armed conflict on the one hand and internal armed conflicts on the other must be provided in all types of emergencies, including those which fall short of the legal threshold of an armed conflict.

The author finds that at least twelve aspects of fair trial constitute the minimum floor of due process. Any derogation from these aspects would be inconsistent with customary law – which is binding on all states – and therefore be invalid. This framework provides a strong contention against arguments that certain individuals are situated in legal gray zones between human rights law and international humanitarian law where the current framework of international law does not apply. The twelve non-derogable aspects of fair trial are the minimum yardstick from which no reduction is permissible.

It's time that we end the infinite quarrels about the legal norms applicable to detainees in the "war on terror" and hold our governments accountable for the protection of, at the very least, the non-derogable rights of the detainees under their authority.

TABLE OF CONTENTS

LIST OF ACRONYMS v

INTRODUCTION 1
Structure and Methodology 3
Delimitation: Focus on the International Covenant on Civil and Political Rights 6

CHAPTER I: THE RELATIONSHIP BETWEEN HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW: ARMED CONFLICT, STATES OF EMERGENCY AND THE "WAR ON TERROR" 8
A. Why the Existing Framework of International Law is Adequate 8
1. Personal Freedoms and National Security 10
2. How should we understand terrorism in legal terms? 11
3. Why the principle of consistency can be used to identify the non-derogable aspects of fair trial in "gray zones" emergencies 12
B. Advisory Opinions of the International Court of Justice 13
1. Legality of the Threat or Use of Nuclear Weapons Advisory Opinion 14
2. Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ("The Wall opinion") 16
C. Regional Human Rights Organs and United Nations Reports 17
1. Juan Carlos Abella v. Argentina: The Inter-American Commission on Human Rights 18
2. Banković and Others v. Belgium and 16 Other Contracting States: The European Court of Human Rights 19
3. Human Rights Council: Report of the Mission to Lebanon in 2006 19

CHAPTER II: THE CRITERIA OF VALID DEROGATIONS FROM THE ICCPR 21
A. The Existence of an Emergency: The Principle of Exceptionality 23
B. Official Proclamation: The Principle of Publicity 25
C. The Principle of Necessity and Proportionality 26
D. The Principle of Consistency 27
E. Non-Discrimination 29
F. Non-Derogable Rights: Article 4(2) 29
G. Procedural Requirements: The Principle of Notification 30

CHAPTER III: NON-DEROGABLE ASPECTS OF FAIR TRIAL RIGHTS 39
A. The Drafting History of Article 4 with Regard to Article 14 as a Derogable Provision 40
B. Why Certain Aspects of Fair Trial Must be Non-Derogable 41
C. Identification of the Non-Derogable Aspects of Article 14 with the Help of the Principle of Consistency 46
1. Legislative History of the Principle of Consistency 48
2. What are the Sources of a State's "Other Obligations" Under International Law? 49
3. But What are the Non-Derogable Aspects of Article 14? A List 53
3.1. The Nature of the Tribunal: Trial by an Independent, Impartial and Regularly Constituted Tribunal 54
3.2. The Law Applied 57
3.3. The Judicial Procedures 59
3.3.1. Does the Process need to be Public? 59
3.3.2. To be Promptly Informed About the Charges 61
3.3.3. Legal Assistance and Communication Between the Accused and his or her Representative 61

3.3.4. All Necessary Rights and Means of Defense and the Right to Examine Witnesses 66
3.3.5. To be Tried in Presence 69
3.3.6. The Presumption of Innocence 70
3.3.7. The Right not to be Forced to Testify Against Oneself or to Confess Guilt 71
3.3.8. How Speedy does a Trial Need to be? Administrative Detention and Fair Trial 72
3.3.9. Assistance of an Interpreter 74
3.3.10. The Right to be Advised of Available Remedies and their Time-Limits in Case of Conviction 74
3.3.11. Ne bis in Idem 75

CONCLUSION 77

BIBLIOGRAPHY 86

APPENDICES 98

List of Acronyms

AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
CA3	Common Article 3 of the Geneva Conventions
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GC	General Comment of the Human Rights Committee
GVA III	Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949
GVA IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949
HRC	United Nations Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
UN	United Nations

"You are aware of the confusions, of the incompleteness, of the lack of ordinary sanctions, and of all that might be said in criticism of international law. Yet here you are, assembled in Washington, at no little personal inconvenience, to reiterate your inveterate belief that international law is an existing and indestructible reality and offers the only hopeful foundations for an organized community of nations. There is no paradox in this. Those who best know the deficiencies of international law are those who also know the diversity and permanence of its accomplishments and its indispensability to a world that plans to live in peace."

(Justice Robert Jackson, in 1945, to the members of the American Society of International Law shortly before the start of the war crimes trials in Nuremberg) [1]

INTRODUCTION

States have voluntarily accepted a minimum floor of fair trial rights. Certain aspects of fair trial can never be dispensed with and must be provided in all circumstances; in internal or international armed conflicts as well as in any other emergency situation. This thesis identifies these non-derogable aspects of the right to a fair trial. It will address this topic with a view on arguments made in the context of the "war on terror"[2]. These arguments claim that for some individuals in "legal gray zones", no particular international judicial standards are applicable. Strongly rejecting these arguments, this thesis states that it is possible to identify aspects of the fair trial provision of the International Covenant on Civil and Political Rights (hereinafter: ICCPR or the Covenant) from which no temporary curtailment is allowed.

This identification proceeds as follows: First, because human rights law continues to apply in times of armed conflict and all other types of emergencies, the ICCPR is the right instrument to provide the criteria of valid derogations. Second, among the criteria of derogation, the principle of consistency prohibits any derogation measures which would be inconsistent with the state's other obligations under international law. Third, by identifying the customary "other obligations" incumbent on all states, it is possible to draw a list of those aspects of fair trial from which no derogation is permissible. The argument is based

[1] Robert H. Jackson, "The Rule of Law among Nations," *American Bar Association Journal* 31 (1945), 290.

[2] I employ the term "war on terror" to designate the current strategies, activities and doctrines employed to counter terrorism. I do however vehemently reject the idea that all counter-terrorist measures automatically take place in the framework of armed conflict in the legal sense.

on the idea that those guarantees which are considered non-derogable in both types of armed conflict – the gravest sort of emergencies – must also be considered non-derogable in all other situations of exigency. These non-derogable humanitarian standards common to both types of armed conflict are also part of customary international law. By analyzing which aspects of fair trial are part of customary law, we can find those minimum elements of fair trial that are applicable in all times and to all states; independent of the applicable treaty-law. If this argument is accepted, the endless legal quarrels about the qualification of a situation as an armed conflict or the legal status of detained individuals fade into the background. States in the fight against terrorism – or in any other situation – need to provide at least the non-derogable judicial safeguards that are part of customary law.

This thesis is written against the background of legal arguments surrounding the US Military Commissions but it does not discuss the United States Military Commissions Act of 2006 in detail. By clarifying which judicial guarantees have to be provided in all circumstances, it will easily become evident how the Military Commissions Act is inconsistent with international law. Most importantly, this thesis hopes to show how the discussions on the legal status of the detained individuals in Guantánamo and elsewhere are misplaced. Whether and which parts of humanitarian treaty-law apply to the detainees caught in the "war on terror" is, of course, not entirely irrelevant. However, it is crucial to acknowledge that a considerable number of judicial guarantees is non-derogable and therefore has to be provided in all circumstances and to all individuals. This consideration has been wantonly neglected in the debates surrounding the "war on terror". Is time that we not only affirm the non-derogability of the prohibition of torture, cruel and inhuman or degrading treatment but that we also remind our governments that some judicial standards can never be dispensed with.

It is not surprising that the law on states of emergency is close to move beyond the reach of law and that it is difficult to keep governments within a framework of law in a situation of emergency. The rules on derogation draw lines in the sand and often confront governments

which have decided that their difficulties can not be resolved within the framework of law. Conscious of the fact that too many regimes have been using states of emergency for decades to take draconic measures as they think fit, this essay is in particular directed at the arguments made by the administration of the United States. This does not mean that the United States should be singled out "as an enemy of human rights"; this is a reproach I clearly dismiss.[3] However, if the most powerful member state of the United Nations and one of the original drivers of human rights law blatantly disregards the voluntarily accepted procedures, the need for clarifying what the acceptable means of dealing with emergencies are is especially great. The United States' delegation during the drafting of the Covenant strongly advocated for an inclusion of the entire fair trial provision among the non-derogable rights.[4] This paper does not go as far as to suggest that states do not have any leeway with judicial procedures in emergency situations. But it points out to certain aspects of fair trial which are so crucial for preserving a legal order that protects basic human rights that they can not be dispensed with.

Structure and Methodology

The argument of this thesis is structured as follows: First, Chapter I deals with the question of the applicability of human rights law in armed conflict and considers the simultaneous applicability of human rights law and humanitarian law as the accepted interpretation confirmed by the International Court of Justice (ICJ) and other international organs. The position that human rights law does not apply during armed conflict has been clearly rejected. The ICJ held twice in advisory opinions that the question whether a human rights provision applies during an armed conflict should be answered by looking at the derogation regimes. Derogations under exceptional circumstances allow a state to temporarily curtail

---

[3] See for instance A/HRC/6/17/Add.3, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Mr. Martin Scheinin) - Mission to the United States of America," (2007).

[4] David S. Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights: [Articles 8, 10 and 11 of the Universal Declaration of Human Rights]* (The Hague; Boston: Martinus Nijhoff Publishers, 2001), Chapter 4 "Travaux préparatoires to Article 4".

some human rights.[5] The effect of a valid derogation is to allow a state to take measures that in other circumstances would be a violation of its obligations under the Covenant. In other words, the ICJ suggests that as long as a state has not derogated from a human rights provision, the human rights treaty fully applies irrespective of the existence of an emergency, including an armed conflict.

Second, Chapter II will examine the derogation regime of the ICCPR more closely. According to the two advisory opinions of the ICJ, the ICCPR continues to apply during armed conflicts, "except by operation of article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[6] In other words, the derogation regimes constitute the hinge between human rights law and humanitarian law. It is the operation of article 4 which determines whether there is a partial move away from human rights law. By laying out the seven requirements of a valid derogation, Chapter II also makes reference to communications brought before the United Nations Human Rights Committee (HRC) as well as case-law of regional human rights courts. Since the United States government has not notified any derogation from the Covenant, Chapter II includes a detailed discussion of the procedural requirements of Article 4. Importantly, the second chapter introduces the meaning of the principle of consistency. The principle of consistency will later be the main tool to specify the Human Rights Committee's allusion to the "fundamental requirements of fair trial" which can never be dispensed with (see chapter III).[7] While all human rights treaties do not permit derogation form the prohibition of retroactive criminal laws,[8] they do not itself specify which of the other elements of a fair trial can not be derogated from.[9]

---

[5] Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford; New York: Oxford University Press, 2005), p. 351.

[6] *Legality of the Threat or use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226*, para. 24.

[7] *General Comment 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), Reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 186 (2003),* para 16.

[8] Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford; New York: Oxford University Press, 2005), p. 157.

[9] This is explicit in American Convention. See *American Convention on Human Rights,* Article 27(2).

Chapter III applies this analysis to the fair trial standards of the ICCPR. The ICCPR article dealing with fair trial rights – article 14 – is not listed among the non-derogable provisions and therefore not categorically non-derogable. During the drafting of the ICCPR, states have expressly stated their wish to be able to derogate from the right to a fair trial. To say that the entirety of article 14 is non-derogable would therefore come close to impermissible judicial activism and an encroachment upon the state parties' right to defend the life of the nation in grave emergencies. However, recognizing that article 14 in principle is derogable does not imply that states can depart from the right to a fair trial as they see fit. In particular, no derogation is valid if it is "inconsistent with [a state party's] other obligations under international law".[10] Chief among these obligations are non-derogable rights in customary and conventional international humanitarian law. Customary law is binding on all states and no derogation will be valid if it departs from these minimum rights, even in those situations where the treaty-law of the Geneva Conventions or their additional protocols does not apply. If an emergency falls short of the legal thresholds of an armed conflict, a state is still bound by the minimum guarantees of customary law. This reasoning is based on the idea that there is no reason why a state should be allowed to take more drastic measures in emergencies which do not qualify as an armed conflict. Standards which are applicable in the most serious emergencies – armed conflicts – must necessarily also be applicable in all other types of emergencies not meeting the threshold of an armed conflict.

I will argue in Chapter III that the convergence of the fair trial articles in the two additional protocols to the Geneva Convention provide a sound basis for an assessment of the customary minimum floor of fair trial. These two protocols were adopted in 1977. Protocol I (AP I) relates to the international armed conflicts and Protocol II (AP II) extends protection to victims of internal conflicts. I will compare the two relevant articles that deal with judicial guarantees: article 75(4) of the First Additional Protocol to the Geneva Conventions and

[10] *International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Entered into Force Mar. 23, 1976.*, Article 4(1).

article 6 of the Second Additional Protocol. Those judicial standards that are common to both protocols are applicable in both types of armed conflict. Rather than entering the acrimonious debate as to the relationship between *opinio juris* and state practice with regard to the creation of customary international law in the field of human rights and humanitarian law, I will take advantage of the monumental study on customary international humanitarian law that was recently conducted by the International Committee of the Red Cross (ICRC).[11] By analyzing which judicial standards are common to both types of armed conflict, each of the non-derogable aspects of fair trial will be discussed and interpreted in Section 3 of Chapter III. This minimum floor of due process is therefore also applicable in the "war on terror", to all accused individuals under a state's control.[12]

Delimitation: Focus on the International Covenant on Civil and Political Rights

This paper is centered on the ICCPR as one of the constituent treaties of the International Bill of Rights. This treaty is ratified by the wide majority of states.[13] While recent literature on human rights has increasingly stressed the neglected importance of economic, social and cultural rights,[14] the focus of this thesis on the right to a fair trial stems from the author's concerns with regard to the administration of justice in times of "global terrorism" and the accompanying climate of fear. Insofar, this thesis deals with a surprisingly classic topic of human rights law and concerns the vertical relationship between states and individuals.

The choice of focusing on the fair trial provision of article 14 of the ICCPR is based not only on its obvious importance for the enjoyment of most other human rights but also the fact that it is not listed among the non-derogable provisions in article 4(2) of the Covenant.

---

[11] Jean-Marie Henckaerts, Louise Doswald-Beck and International Committee of the Red Cross. *Customary International Humanitarian Law. Volume I, Rules* (Cambridge: Cambridge University Press, 2007). And Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Vol. 2, Part 2 Practice.* (Cambridge: Cambridge University Press, 2003).
[12] This includes those detained extra-territorially if under effective control of a state.
[13] Office of the High Commissioner for Human Rights, "Status of Ratification of the International Covenant on Civil and Political Rights," http://www2.ohchr.org/english/bodies/ratification/4.htm (accessed March 31, 2008).
[14] *International Covenant on Economic, Social and Cultural Rights, Adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, Entry into Force 3 January 1976.*

There is thus great need for careful analysis to determine what minimum aspects need to apply during a state of emergency. On the one hand, some argue that if an article is not included in the list of non-derogable articles, states could freely choose how and to what extent to depart from the stipulations of the treaty. The US government argued that it is not even necessary to actually derogate from article 14 but that the entire treaty was unbinding in times of war. This stance is clearly inconsistent with case-law of the World Court and other courts. On the other extreme, one could argue that no derogation at all should be permissible from article 14. Not surprisingly, most states argue that this would be impractical and naïve in situations of emergency. While the inescapable realities of emergency situations can not be overlooked, arguments "that the normal procedures of investigation and criminal prosecution have become inadequate" and that "ordinary courts can no longer be relied on as the sole process for restoring peace and order"[15] have regained a lot of attention in the context of the "war on terror".

It should be noted that by identifying the minimum judicial standards, I do not imply that states can automatically claim to abide only by those minimum standards. The US authorities for instance have not claimed any derogation from the ICCPR after the terrorist attacks of 2001. The US Military Commissions Act of 2006 therefore needs to comply with higher legal standards. This thesis however shows that it even fails to meet the non-derogable minimum floor. In addition, it should be noted that this thesis does not deal in detail with the second ICCPR article on fair trial. Article 15 of the Covenant prohibits retroactive criminal laws and is explicitly made non-derogable by the ICCPR.[16] This is uncontroversial and does not need to be further elaborated here. Moreover, this thesis does also not deal with questions of sentencing.

---

[15] Arguments of the respondent governments in *Lawless v. Ireland, Lawless v. Ireland,* discussed in Stephanos Stavros, "The Right to a Fair Trial in Emergency Situations," *The International and Comparative Law Quarterly* 41, no. 2 (Apr., 1992), p. 345.
[16] ICCPR, *supra* note 10, Article 4(2).

CHAPTER I: THE RELATIONSHIP BETWEEN HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW: ARMED CONFLICT, STATES OF EMERGENCY AND THE "WAR ON TERROR"[17]

Before presenting the case-law and scholarly writing on the relationship between human rights law and international humanitarian law (IHL), a brief section reasons why the existing legal framework is generally adequate to deal with challenges of international terrorism. While this thesis underlines the relevancy of the derogation regimes and their usefulness to determine the applicable legal standards in various situations of emergencies, it makes sense to first clarify the general reason why we should rely on existing international law. This section will in particular address arguments that the existing framework of law is unsuitable for regulating measures taken in the "war on terror".

A. Why the Existing Framework of International Law is Adequate

In 2005, two hundred highly qualified publicists provided the US Congress with a document declaring that "with respect to the 'global war on terror', there is no law-free zone."[18] Indeed, as a whole, existing international law is adequate to deal with terrorism. Terrorism is explicitly prohibited in humanitarian law even if states have so far not agreed on a comprehensive definition of the term.[19] The prohibition of acts of terrorism against persons in the power of the adversary as well as in the course of hostilities, demonstrate that IHL protects civilians and civilian objects against these types of assault when committed in armed conflict. Those suspected of such acts may be criminally prosecuted by states, but

---

[17] For an outline of the relationship between human rights law and IHL, see H. -J Heintze, "On the Relationship between Human Rights Law Protection and International Humanitarian Law," *International Review-Red Cross* 86, no. 856 (2004), 789-814.

[18] "The Cleveland Principles of International Law on the Detention and Treatment of Persons in Connection with the "Global War on Terror" (Case Western Reserve University School of Law, November 7, 2005, 2005).

[19] For an excellent introduction to arguments on both sides of the debate, see Charles Garraway, "The "War on Terror" Or: Do Rules Need Changing?" *Chatham House International Law Briefing Paper IL BP 06/02,* September 2006, 2006. Article 33 of the Fourth Geneva Convention prohibits "collective penalties and likewise all measures of intimidation or of terrorism," while Additional Protocol II (Article 4(2)(d)) prohibits "acts of terrorism" against persons not or no longer taking part in hostilities. Acts aimed at spreading terror among the civilian population are strictly prohibited in Additional Protocol I (Article 51(2)) and Additional Protocol II (Article 13(2)).

not without offering the applicable judicial guarantees.[20] Where similar acts are committed outside the context of an armed conflict, they mostly fall within the realm of domestic law and Chapter II shows, states may often legitimately use their emergency prerogatives to deal with them. The ICRC points out that while IHL is adequate to deal with terrorist acts and "new" types of violence, "the fight against terrorism requires the application of a range of measures – investigative, diplomatic, financial, economic, legal, educational and so forth – spanning the entire spectrum from peacetime to armed conflict, and that IHL can not be the sole legal tool relied on in such a complex endeavour."[21] As the ICRC writes, it should also be noted that the law is just one among many tools used to regulate behavior and that indeed no branch of law, whether international or domestic, can – on its own – be expected to completely regulate a phenomenon as complex as violence.

Recent cases before several domestic courts in Europe and beyond have asked whether fundamental human rights or the extent of possible derogations from them should be reinterpreted. These decisions have unequivocally confirmed that existing standards are appropriate for the fight against international terrorism.[22] The US Supreme Court in *Hamdan v. Rumsfeld* held that the conflict with *Al Qaeda* was covered by Common Article 3 of the Geneva Conventions and could therefore be decided by reference to the existing legal framework.[23] The European Commission for Democracy through Law (the Venice

---

[20] "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," *International Review – Red Cross*, no. 853 (2004), 213-244, p. 6.
[21] Ibid., p. 10.
[22] *Opinion on the Protection of Human Rights in Emergency Situations Adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006) on the Basis of Comments by Mr Pieter Van DIJK (Member, Netherlands), Ms Finola FLANAGAN, (Member, Ireland) and Mr Jeffrey JOWELL (Member, United Kingdom)* (Strasbourg: European Commission for Democracy Through Law (Venice Commission),[2006])., para 30, note 40. The Venice Commission cites the following cases: *United Kingom House of Lords, Judgments - A (FC) and Others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004); German Bundesverfassungsgericht, Aviation Security Act, 1 BvR 357/05; Israeli Supreme Court, Public Committee Against Torture in Israel v. the State of Israel Et Al., Case HCJ 5100/94; Israeli Supreme Court, the Center for the Defense of the Individual v. the Commander of IDF Forces in the West Bank, Case HCJ 3278/02; Shafiq RASUL Et Al., Petitioners,v. George W. BUSH, President of the United States, Et Al.; Fawzi Khalid Abdullah Fahad Al Odah, Et Al., Petitioners,v. United States Et Al.* Nos. 03-334, 03-343; 542 U.S. 466, 124 S.Ct. 2686 (Supreme Court of the United States 2004).
[23] *Hamdan v. Rumsfeld, United States Supreme Court, 126 S. Ct. 2749 (June 29, 2006)*.

Commission) concluded that no reinterpretation of the framework of international law in general and the derogation regimes in particular is necessary or warranted.[24] Indeed, the system of article 4 of the ICCPR was put in place to safeguard the rule of law with a system of checks and balances.

1. Personal Freedoms and National Security

How should we then analyze the relationship between states' obligations and prerogatives to defend their population and to provide security on the one hand and their obligation to safeguard the human rights of suspects on the other? It is often suggested that we should view the two sides of the equation through a "balancing lens". It is thought that we need to find the correct balance between restricting personal freedoms and lowering risks to national security. This balancing model to analyze the interlinks between human rights and security is however problematic as it takes for granted that restrictions of personal freedoms - which often affect individuals very unevenly - would automatically lead to a higher level of security.[25] The Venice Commission points out that "the best way to fight those who threaten state security and public safety is not primarily to restrict personal rights and freedoms, but to strengthen democracy and the rule of law, which are precisely meant to protect the individual against arbitrary and disproportionate restrictions of his human rights and freedoms by the authorities."[26]

Derogation regimes are precisely one such element of the rule of law. Rather than discussing the "proper balance" between national security concerns and personal freedoms

---

[24] Venice Commission, Ibid., para. 30. See also *Council of Europe Convention on the Prevention of Terrorism,* (Warsaw, 16.V.2005), Article3 (1).

[25] The case-law digest of the High Commissioner for Human Rights also starts its introduction with a balancing model. See Office of the United Nations High Commissioner for Human Rights, "Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism," http://unhchr.ch/html/menu6/2/digest.doc (accessed March 12, 2008)., p. 3. For more reasons why the balancing model is not the most appropriate lens to analyze the restriction of freedom and the security needs in the war on terror, see Marks and Clapham, *International Human Rights Lexicon*.

[26] Venise Commission, *supra* note 22, para 29. The Commission also refers to the third paragraph of the Preamble of the UN Universal Declaration of Human Rights of 10 December 1948. "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." *Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948),* Preamble.

in the abstract, they provide the concrete guidance to determine the applicable legal rules. Because the rationale of the derogation regime is to restrict and regulate the temporary curtailment of human rights – even if it sounds counter-intuitive – they have the potential to enhance the rule of law by regulating what a state can do when facing an emergency situation.

2. How should we understand terrorism in legal terms?

But how should we understand terrorism in legal terms? While terrorism is certainly not a new phenomenon, the legal qualification of the current "war on terror" is controversial. Is it an armed conflict? If so, which type of an armed conflict is it? Is it a problem of domestic criminal law? Or are we dealing with an entirely new category of situation for which no legal framework yet exists? Suffice it to say that only the latter is clearly mistaken. The issue of how to qualify the fight against terrorism in legal terms and the status of various persons in this context has to be made with respect to each specific situation rather than by mere reference to the "global war on terror". Each situation of organized armed violence must be examined on a case-to-case basis to be qualified in legal terms. The ICRC takes a cautious approach and warns that it is "both dangerous and unnecessary, in practical terms, to apply IHL to situations that do not amount to war."[27] The use of the term "war on terror" is unfortunate for legal purposes. It seems to imply that any action against terrorist activities is regulated by humanitarian law. This is not the case and I emphasize that it is not my argument that we should apply humanitarian law beyond the scope specified by the treaties themselves. Unless there is an armed conflict, actions of states to combat terrorism will not be regulated by humanitarian law, but by domestic law which must both in peacetime and in times of conflict conform to international human rights standards. It is not my intention to argue that whenever a state claims to be in an emergency, we should automatically assume that IHL applies.

[27] *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 213-244, p. 8.

3. Why the principle of consistency can be used to identify the non-derogable aspects of fair trial in "gray zones" emergencies

The argument of this thesis is based on the idea that in order to determine whether measures departing from the ICCPR are lawful, we should have a stricter recourse to the principle of consistency. We should use customary international law – customary humanitarian standards in particular - to review whether anti-terrorist measures are consistent with a state's "other obligations under international law". This consideration can be made for all states of emergency, irrespective of whether the specific emergency amounts to an armed conflict and whether the humanitarian treaty-law applies. As I will argue in the paragraph below, a state can not take more drastic measures than it would be allowed to take if an armed conflict existed if a terrorist attack is not taking place in the context of an armed conflict. Customary minimum standards continue to bind the state in all circumstances.

If an obligation exists in IHL for both types of armed conflicts, there is no reason that a state would be allowed to take measures that fall short of this humanitarian standard in situations that do not amount to one or the other type of armed conflict. Terrorism is not *per se* a lesser or equal emergency than the one of an armed conflict and the determination must be made on a case-to-case basis. In any event, international law has no category of emergencies worse than those covered by the notion of armed conflict. Chapter II will explain that the derogation regime can only come into play in the existence of an emergency threatening the life of the nation. If a state takes emergency measures against terrorism, the state authorities have to show that the nation is faced with either a form of armed conflict or, if not, another threat to the existence of the nation. In either case, no measures must be taken that are inconsistent with the customary law that is applicable in times armed conflicts, the most serious form of public emergencies. The current treaty-law of international humanitarian law was negotiated after the Second World War and in the late

1970ies with the worst kind of public emergencies in mind. The drafters asserted in 1949 that the atrocities of the past war had to be abhorred and that even in wartime, there are limits to what is acceptable behavior. Humanitarian law was thus designed to apply in the worst situations threatening the existence of the organized life of the community. Its customary aspects constitute a minimum yardstick of humanity that also has to apply when states face terrorist threats, whatever their legal qualification. There is no doubt that humanitarian law applies in case of the worst possible scenarios of armed conflict. If states have to comply with judicial standards in the gravest possible situations, then they also have to comply with at least the same standards when they implement counter-terrorism measures.

This approach allows for comparative simplicity as the legal qualification of the emergency situation becomes less urgent. It is also apt to cope with arguments that there are gaps between the standards of humanitarian law and those of human rights law. The remaining real problem today is that states will ignore these standards. Before I can outline the concrete operation of the derogation regime of the ICCPR, an explanation of the relationship between human rights law and humanitarian law is warranted.

B. Advisory Opinions of the International Court of Justice

The ICJ twice stipulated on the application of human rights law in times of armed conflict. It issued two important advisory opinions that provide the most authorative interpretation of the relationship between the two bodies of law. The first opinion was requested by the World Health Organization asking the court to rule whether the threat or use of nuclear weapons is in any circumstances permitted under international law. While the ICJ did render the request inadmissible and refused to answer the question, the court's reasoning involved important substantive issues, among which the interaction of international humanitarian law and human rights law. The second relevant advisory opinion was requested by the General Assembly and asked whether the Israeli West-Bank barrier violated international law. Before

the court could answer the question, it had to determine the applicable law and therefore again considered the relationship between IHL and human rights law.

1. Legality of the Threat or Use of Nuclear Weapons Advisory Opinion

In the 1996 Legality of the Threat or Use of Nuclear Weapons Advisory Opinion,[28] the court considered the interaction of various branches of international law, particularly the norms of IHL, the rules governing the use of force and international human rights law. In paragraph 24 of its opinion, the court mentions how proponents of the illegality of the use of nuclear weapons have argued that such use would violate the right to life as guaranteed in article 6 of the ICCPR and in regional human rights instruments. "In reply, others contended that the International Covenant on Civil and Political Rights made no mention of war or weapons, and it had never been envisaged that the legality of nuclear weapon was regulated by that instrument. It was suggested that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict."[29]

The answer of the court is of paramount importance and clearly refutes the theory that human rights are solely designed to apply in peacetime:

> "The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

---

[28] *Legality of the Threat Or use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226*, para 24.

[29] Ibid., para 24.

In other words, the elements of the Court's answer are the following: First, human rights law applies also in times of armed conflict. Second, the only way certain provisions of human rights law cease to apply is if a state *validly* derogates. The question of whether a derogation from a provision contained in the ICCPR is permissible is regulated by article 4 of the Covenant (see Chapter II). Rights that are listed in Article 4(2) are non-derogable and the right to freedom from arbitrary deprivation of life is one such provision. Third, the Court then explains that in order to interpret the wording of the ICCPR provisions, humanitarian law should be taken into account. Analyses of the question of *lex specialis* can be found elsewhere.[30] Suffice it to say here that the court pointed out the importance of humanitarian law for interpreting the meaning of the Covenant's provisions. This does not imply the non-applicability of human rights norms, as this would directly contradict the Court's earlier sentence that human rights law continues to apply. Rather, it is directed at the way these human rights norms are interpreted. With regard to the right to life, the ICJ thus suggests that humanitarian law should be taken into account to determine the meaning of the phrase "arbitrary deprivation of life". If a combating soldier is killed during warfare, his death would in most instances not constitute a violation of article 6 of the Covenant because humanitarian law permits the killing of soldiers who actively take part in combat.

[30] For an outline of the *lex specialis* theory, see Martti Koskenniemi, International Law Commission. Study Group on Fragmentation of International Law. Chairman. *Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes": Preliminary Report* (Geneva: [UN], 2004). Michael Dennis is vehemently opposed to apply both bodies of law simultaneously: Michael J. Dennis, "Applying Human Rights Law and Humanitarian Law in the Extraterritorial War Against Terrorism: Too Little, Too Much, Or just Rights?: Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking all Around?" *2006 ILSA Journal of International & Comparative Law ILSA Journal of International & Comparative Law* (Spring, 2006). Schabas submits that the difficulty with attempts to reconcile human rights law and humanitarian law lies with the failure to grasp an underlying distinction between the two bodies of law. He distinguishes the approach of the ICJ from the one employed by the Human Rights Committee, see William A. Schabas, "Lex Specialis? Belt and Suspenders? the Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum," *SSRN eLibrary* (2007). For a nuanced analysis of the *lex specialis* theory, see also Boisson de Chazournes, Laurence and Philippe Sands, "International Law, the International Court of Justice and Nuclear Weapons," *British Yearbook of International Law* 71 (2001), 375-376.

2. Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ("The Wall opinion")

While the question of applicability of human rights law in armed conflict was only dealt with in two short paragraphs of the Nuclear Weapons Opinion, the ICJ confirmed its earlier holding in the so-called Wall Opinion.[31] Israel argued that not only would certain humanitarian treaties not apply in the Occupied Territories, but that human rights treaties, the two Covenants in particular, would not apply because of the existence of an armed conflict.[32] In Israel's report to the SG, Israel denies that the two Covenants are applicable to the occupied territories. "It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace."[33] While the Court also held that the human rights instruments apply outside national territory, it unambiguously confirmed its earlier conclusion in the Nuclear Opinion with regard to the relationship between international humanitarian law and human rights law.[34] The ICJ repeated that:

"… the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights."[35] The court then goes on to explain that there are three possible situations characterizing the relationship between IHL and human rights law: "Some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[36] For instance, one

---

[31] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136*

[32] Ibid., para 86 ff, especially para. 90. Also A/ES-10/248, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13- Tenth Emergency Special Session- Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory - Annex I - Summary Legal Position of the Government of Israel* [2003]).

[33] Ibid.

[34] Wall Opinion, *supra* note 31, para 105.

[35] Ibid., para 106.

[36] Ibid., para 106.

could mention the legal definition of military objectives as an exclusive matter of IHL and the right to vote as an exclusive matter of human rights law. Many other issues, including the right to a fair trial, are matters of both of these branches of law.

In other words, the ICJ confirmed that the only way human rights provisions would not apply, or not fully apply, is through the operation of the derogation regime. The Court's analysis in the following paragraphs is relevant for the current debate on what standards of fair trial are applicable in the "war on terror". Israel made use of its right of derogation under article 4 of the ICCPR by addressing a communication to the Secretary General of the United Nations on 3 October 1991.[37] In this communication, Israel announced to derogate from article 9 of the Covenant, but not from any other provision. The court did not consider whether Israel had the right to retrospectively invoke derogations from provisions other than article 9 but hold that because Israel's communication only concerned article 9 "the other Articles of the Covenant therefore remain applicable".[38] In clear terms, the court considered the absence of further notification of derogation indicated that all other provisions would fully apply.[39] Article 14 was therefore hold to be entirely applicable to Israel, while the Court suggested that humanitarian law could be used to interpret its specific clauses.

C. Regional Human Rights Organs and United Nations Reports

The following three cases are only a selective illustration of how regional human rights organs and UN experts have dealt with the relationship between human rights law and humanitarian law. These cases exemplify the simultaneous importance of both bodies of law. This finding supports the approach to identify the non-derogable aspects of fair trial by reference to international humanitarian law.

---

[37]Ibid., para 127. See also Office of the High Commissioner for Human Rights, "Declarations Recognizing the Competence of the Human Rights Committee Under Article 41," http://www2.ohchr.org/english/bodies/ratification/4_3.htm (accessed March 31, 2008).

[38] Wall Opinion, *supra* note 31, para 127. See infra, page 2 for the sub-section on the principle of notification.

[39] Ibid., para 136.

1. Juan Carlos Abella v. Argentina: The Inter-American Commission on Human Rights

It has been the Inter-American system offering the most precise analysis of situations where both bodies of law are applicable. Otherwise, jurisprudence that incorporates humanitarian law principles into the oversight of human rights violations is till tentative and generally under developed.[40] The most significant decision is the *Abella* case (also called the *Tablada* case, according to the location of the military base which was attacked). The case concerned an assault in 1989 by forty-two armed persons on a military base containing members of the national armed forces in Argentina. The attack precipitated a combat of approximately 30 hours between the attackers and Argentine military personnel which resulted in the deaths of 29 of the attackers and several state agents.[41] The complaining relatives of those killed went to the IACHR. They alleged both violations of IHL and of human rights law and the Commission found that it had the competency to apply both bodies of law directly. The Commission affirmed the importance of humanitarian law as a source of authoritative guidance in its resolution of claims alleging violations of the American Convention in combat situations.[42] Thus, while the American Convention is a human rights treaty similar to the ICCPR, humanitarian law was taken into consideration to interpret the Convention during armed conflict, as it was suggested by the ICJ's two Advisory Opinions.

[40] Oren Gross and Fionnuala Ni Aolain , *Law in Times of Crisis : Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), p. 263.
[41] *Inter-American Commission on Human Rights, IACHR, Juan Carlos Abella v. Argentina, Case no. 11.137, Report no. 5/97, 1997.* OEA/Ser.L/V/II.98 doc. 6 rev. 13 April 1998 CASE 11.137 *Inter-American Commission on Human Rights, IACHR, Juan Carlos Abella v. Argentina, Case no. 11.137, Report no. 5/97, 1997.* (Inter-American Commission on Human Rights November 18, 1997)., para 1.
[42] Ibid., para 158-161.

2. Banković and Others v. Belgium and 16 Other Contracting States: The European Court of Human Rights

The European Court has been more hesitant in explicitly discussing in its decisions the law of armed conflict or any other rules of international law other than the European Convention on Human Rights (ECHR). The case of *Banković* concerned the NATO bombing of a television station in Belgrade during the air campaign against the Federal Republic of Yugoslavia in 1999. The ECtHR held that while the Court must take into account any relevant rules of international law when examining questions concerning state responsibility, it must remain mindful of the Convention's special character as a human rights treaty.[43] The European Court has so far not said more about the interaction between humanitarian law and human rights law, although it has examined a considerable number of derogation claims (see Chapter II). At the same time, it has not rejected the simultaneous application of both bodies of law. In other words, while the ECtHR is mindful to refer only to the ECHR or its own jurisprudence instead of other sources of law, it does not question the simultaneous application of both bodies of law.

3. Human Rights Council: Report of the Mission to Lebanon in 2006

In summer 2006, an armed conflict took place in Lebanon and in Israel. The Human Rights Council decided to send four special Rapporteurs to Lebanon, among others, in order "to assess, from the perspective of international human rights and humanitarian law as covered by their respective mandates, the impact on the civilian populations of the armed conflict that affected southern Lebanon and other parts of the country and northern Israel between 12 July and 14 August 2006".[44] The Report of the four Rapporteurs is probably so far the

---

[43] *Banković and Others v. Belgium and 16 Other Contracting States - 19 December 2001,* 52207/99 [2001] ECHR 970 *Banković and Others v. Belgium and 16 Other Contracting States - 19 December 2001,* (European Court of Human Rights 2001), p. 57.

[44] A/HRC/2/7, *Report of the Special Rapporteur on Extrajudicial, Summary Or Arbitrary Executions, Philip Alston; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest*

best explanation of the relationship between human rights law and humanitarian law. In short, the joint report confirms all the points made above and builds upon the jurisprudence of the ICJ. In clearest terms, the four Rapporteurs state that "in addition to human rights law, the principles of humanitarian law are entirely applicable to this conflict and deviations from these principles can not be justified on the basis of the alleged novelty or distinctiveness of this conflict."[45] The report affirms that human rights law does not cease to apply in times of war, except in accordance with precise derogation provisions relating to times of emergency.[46]

To sum up the first chapter, the interpretation that both bodies of law, international human rights law and humanitarian law, apply during armed conflict is well established. According to the case-law of the ICJ, there is both one qualification and one exception to that: first, where humanitarian law provides a special interpretation of a human rights norm, the humanitarian law interpretation prevails. The human rights norm remains fully applicable but is interpreted in a different way than in situations where humanitarian law does not apply. Second, if such is not the case, the only avenue how a human rights provision does not apply is if a valid derogation is in place. The next chapter therefore examines the conditions of a valid derogation.

Attainable Standard of Physical and Mental Health, Paul Hunt; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari MISSION TO LEBANON AND ISRAEL, p. 4.

[45] Ibid, para 98 and para 14-31.

[46] Ibid., para 15.

Chapter II: The Criteria of Valid Derogations from the ICCPR

A derogation clause has been included in most international human rights instruments. These clauses safeguard the right of national governments to deal with public emergencies. States parties are allowed to take measures which would otherwise violate certain obligations that they have assumed under the treaty.[47] Derogation clauses are designed to prevent emergency measures from becoming permanent and to restrain governments from using states of emergency to legitimize their non-compliance with human rights instruments. Article 4 of the ICCPR prescribes when and how a state can derogate from certain provisions of the Covenant. In addition, numerous soft-law standards interpret the derogation regime. These include the work of the United Nations Special Rapporteur on Human Rights in States of Emergency,[48] unofficial expert statements such as the Paris Minimum Standards of Human Rights Norms in a State of Emergency[49], the Siracusa Principles,[50] and the more recent Turku Declaration on Minimum Humanitarian Standards.[51]

[47]Article 15 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms.* Article 4 of the ICCPR and article 27 of the *American Convention on Human Rights.* The African Charter on Human on People's Rights has no derogation clause. Other instruments with a derogation clause: The Revised European Social Charter (Part V, Article F), Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, Article 35, Arab Charter of Human Rights, Article 4b and 4c. See also Rosalyn Higgins, "Derogations Under Human Rights Treaties" In *The British Yearbook of International Law*, Royal Institute of International Affairs.; British Institute of International Affairs ed. (London: H. Frowde : Hodder and Stoughton, 1976); L. C. Green, *Derogation of Human Rights in Emergency Situations* (Vancouver: Publication Centre, University of British Columbia, 1978], 1978); Joan Fitzpatrick Hartman, "Derogation from Human Rights Treaties in Public Emergencies : A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations," *Harvard International Law Journal* 221 (1981), 1-52.

[48] The mandate was discontinued. See E/CN.4/Sub.2/1997/19, *Tenth Annual Report and List of States which, since 1 January 1985, have Proclaimed, Extended Or Terminated a State of Emergency, Presented by Mr. Leandro Despouy, Special Rapporteur Appointed Pursuant to Economic and Social Council Resolution 1985/3*, [1997].

[49] "Paris Minimum Standards of Human Rights Norms in a State of Emergency, Approved by Consensus during the 61st Conference of the International Law Association, 26 August - 1 September 1984 (Reprinted in 79 (1985) AJIL 1072)" (Paris, 1984). See also Richard B. Lillich, "The Paris Minimum Standards of Human Rights Norms in a State of Emergency," *The American Journal of International Law* 79, no. 4 (Oct., 1985), 1072-1081.

[50] U.N. Doc. E/CN.4/1985/4, Annex (1985), United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

[51] *Declaration of Minimum Humanitarian Standards, Reprinted in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995) (Declaration of Turku).*

Behind all these declarations on fundamental standards of humanity lays the idea that there is an irreducible core of norms that must be respected in all situations and at all times, "a safety net independent of any assertions that a particular conflict is below the threshold of applicability of international humanitarian law and is not addressed by existing international law."[52] These non-binding declarations and reports will be used to interpret each of the criteria of Article 4 as well as the specific meaning of the aspects of article 14 (in Chapter III).[53] Article 4 of the Covenant sets out the following requirements of a valid derogation from provisions of the ICCPR:

> Article 4
> 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 I 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.[54]

Each of these requirements will be discussed separately in this chapter. While discussing the derogation regime of the ICCPR, the elements of article 4 were often interpreted by the HRC with a view to case-law from the European supervisory organs. Therefore, this chapter contains references to European cases where relevant for the interpretation of article 4 of the Covenant.

---

[52] Asbjorn Eide, Allan Rosas and Theodor Meron, "Current Development: Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards," *1995 the American Society of International Law American Journal of International Law* (January, 1995)., p. 216. For a good outline of the history of the development of minimum humanitarian standards, see David Petrasek, "Moving Forward on the Development of Minimum Humanitarian Standards," *The American Journal of International Law* 92, no. 3 (Jul., 1998), 557-563.
[53] See also Djamchid Momtaz, "Les Règles Humanitaires Minimales Applicables En Période De Troubles Et De Tensions Internes," *Revue Internationale De La Croix-Rouge* 831 (1998), 487.
[54] ICCPR, *supra* note 10, Article 4.

A. The Existence of an Emergency: The Principle of Exceptionality

Not surprisingly, derogations are only justified in exceptional circumstances. As Marks observes, this central requirement is often not respected and emergency measures "often in fact become a way of deferring normality, [or] rather, they often become normality".[55] To comply with the Covenant, the situation must be a "public emergency threatening the life of the nation." The HRC has repeatedly stressed their "exceptional and temporary nature".[56] While the derogation clause of the ECHR is not identical to article 4 of the ICCPR, the HRC has in most instances referred to the European jurisprudence to determine if a situation justifies the invocation of a derogation.[57] The ECtHR held in the *Lawless v. Ireland* case that the emergency must be actual or imminent, involve the whole nation, threaten the organized life of the community and other restrictions permitted by the Convention must be plainly inadequate.[58] The HRC offers little additional guidance on what amounts to a state of emergency but underlines the need for states to consider their decision to invoke an emergency carefully, in the absence of armed conflict. Armed conflicts are clearly included in the definition of "emergency". The only reason why the term "armed conflict" was not explicitly mentioned in the ICCPR was the perception at that time that it could be read as an argument that war-fighting was permissible under the UN Charter. Because the UN Charter outlawed the unilateral use of force except in self-defense, it was thought that the ICCPR

---

[55] SUSAN MARKS, "Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights," *Oxford Journal of Legal Studies* 15, no. 1 (January 1, 1995), 69-95, p. 86.

[56] General Comment 29, *supra* note 7, para. 2.

[57] Questions on the appropriate margin of appreciation left to the state government and whether the HRC should use the same approach as the ECtHR are ongoing. Joseph, Schultz and Castan argue that the HRC does not adopt the margin of appreciation doctrine in relation to its interpretation of any provisions of the ICCPR, see Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed., Oxford University Press, 2004, para. 1.43.
Buergenthal on the other hand thinks that the Human Rights Committee uses a similar approach to the margin of appreciation as the ECtHR: Thomas Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations" In *The International Bill of Rights : The Covenant on Civil and Political Rights*, ed. Louis Henkin (New York: Columbia University Press, 1981), p. 82.

[58] *Greek Case, European Commission. Y.B. Eur. Conv. on H.R. 12, p. 186, Greek Case, European Commission. Y.B. Eur. Conv. on H.R. 12, p. 186,* para 153. See also Higgins, *Derogations Under Human Rights Treaties*, p. 301 and Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, p. 413, note 25.

should therefore not mention the term and instead simply use the notion of "emergency".[59] While armed conflicts in most cases fall under the heading of "emergency which threatens the life of the nation", target states rarely acknowledge a terrorist situation as an "armed conflict", because they fear it would lend legitimacy to the terrorists' cause and because it would attenuate the question of the applicability of IHL. It is in these circumstances where arguments about gray zone emergencies and the inexistence of any suitable legal standards are most frequently made and where the test of the existence of an emergency is most relevant.

It follows from the ordinary meaning of the term "public emergency threatening the life of the nation" that derogations can only be invoked in situations of extreme seriousness.[60] Even if the HRC's General Comment 29 does not specifically mention acts of terrorism, there is no doubt that terrorism, whatever its exact legal definition, is one of the most frequent reasons for states invoking public emergencies. There is little doubt that terrorism can amount to an emergency in the sense of article 4. What is however more problematic and absent from the Committee's General Comment (GC) on derogations is the question whether the requisite nature of a public emergency for article 4 purposes also covers emergencies in the context of *imminent* rather than *present* danger,[61] and whether terrorist attacks justify derogations by countries other than the one directly attacked. Such was the case of the United Kingdom's derogation after 9/11.[62] These two questions remain unsettled in the jurisprudence of the HRC.

---

[59] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl [Germany]; Arlington, Va., U.S.A.: N.P. Engel, 1993), p. 77-8.
[60] Joseph, Schultz and Castan, *supra* note 57, para 25.44.
[61] Sarah Joseph, "Human Rights Committee: General Comment 29," *Human Rights Law Review* 2, no. 1 (January 1, 2002), p. 84.
[62] The UK justified its stance when derogating under Article 4 by referring to Security Council Resolutions 1368 and 1373, where the attacks were explicitly recognized as "a threat to international peace and security", interpreting 9/11 as an attack against the Western World rather than the Untied States alone. See S/RES/1368 (2001), "Threats to International Peace and Security Caused by Terrorist Acts," (12 September 2001 andS/RES/1373 (2001), "Threats to International Peace and Security Caused by Terrorist Acts," (28 September 2001).

Suffice it to say that the HRC like the ECtHR seem to assume that the national government is generally better equipped to determine the existence of an emergency.[63] Such a margin of appreciation can however be denied if the organ finds that the state is not acting in good faith.[64] States parties have substantial legislative and executive discretion in dealing with genuine emergencies, but the margin of appreciation is exceeded if a government would adduce no reasonable justification. The ECtHR stressed that international organs reviewing the legality of emergency measures must do so "in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied.[65] As already mentioned in chapter I, neither the HRC nor the ECtHR have so far engaged in an extensive examination of the characterization of any public emergency in terms of humanitarian law as this was done by the Inter-American Commission on Human Rights in the *Abella* case.[66] Rather the usual question facing the Commission and Court has been whether a derogating measure was strictly required by the exigencies of the situation (see below Section C).[67]

B. Official Proclamation: The Principle of Publicity

The second criterion of a valid derogation is its public proclamation within the constitutional and legal framework of the target state. Not all national constitutions have an emergency provision. For instance, the US Constitution is silent on this question while others, such as

---

[63] See Soerensen's opinion in *European Court of Human Rights (ECHR), Case of Lawless v. Ireland. Judgment of 1 July 1961 (Series A, no 3).* para 107: "the Government in question will generally be in the best position to decide what measures are necessary to cope with an emergency situation, and a margin of appreciation must therefore be left to the government". This position was implicitly endorsed by the ECtHR in *Lawless*, para. 28 and explicitly in "*Case of Ireland v. the United Kingdom, (Application no. 5310/71), 18 January 1978, para 207.*

[64] In the *Greek* case, no margin of appreciation was accorded to the Greek military government by the European Commissions. *Greek Case, European Commission. Y.B. Eur. Conv. on H.R. 12, p. 186*, while it was in *Case of Ireland v. the United Kingdom, (Application no. 5310/71), 18 January 1978*. See also Hartman, *Derogation from Human Rights Treaties in Public Emergencies : A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 1-52, p. 29.

[65] *Case of Ireland v. the United Kingdom, (Application no. 5310/71), 18 January 1978*, para 214. Buergenthal, *To Respect and to Ensure, supra* note 57, p. 82.

[66] Aisling Reidy, "The Approach of the European Commission and Court of Human Rights to International Humanitarian Law," *International Review of the Red Cross* 324 (1998), 513-529.

[67] See the sub-section on the principle of necessity and proportionality, on page 30.

the German Basic Law contain elaborate provisions.[68] What counts for article 4 of the Covenant is that the government in question has lawfully and publicly proclaimed the state of emergency. The aim of this criterion is to allow at least some form of accountability in times where national security and secrecy dominate the scene.

C. The Principle of Necessity and Proportionality

The derogating measures must be necessary and proportionate to the circumstances said to demand it and less extensive restrictions do not allow meeting the threat. The HRC emphasized in GC 29 that the state needs to provide justification of the measures taken in order to ensure that safeguards are provided to guarantee that the derogation does not endanger a non-derogable right.[69] In this respect, the HRC expresses the opinion that "no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party",[70] as wholesale disregard for any Covenant right could never satisfy the requirement of proportionality.

According to Joseph, this strict proportionality test contrasts with the level of supervision exercised by the ECtHR over the UK's derogation measures. In *Brannigan and McBride* v. *UK,* the majority of the Court conceded a "wide margin of appreciation" not only to the states' determination with regard to the existence of a state of emergency but also their response thereto.[71] Joseph argues that the more stringent approach of the HRC should be welcomed in view of the propensity of many states to abuse their power during states of emergency.[72] In any event, even if the court rejected the applicants' arguments that the United Kingdom was barred from derogation by virtue of its ICCPR obligations, the ECtHR

---

[68] Louis Aucoin, *Comparative Legal Systems: Course at the Fletcher School of Law and Diplomacy, Spring Semester*, 2008).
[69] *Aksoy v. Turkey (100/1995/606/694) 18 December 1996. Application no: 21987/93.* The ECtHR held that even if the Turkey derogation was in principle justified, it went too far as it disproportionately increased the risk of torture.
[70] General Comment 29, *supra* note 7, para 4.
[71] *Brannigan and McBride v. UK (1993), A-258-B, Brannigan and McBride v. UK (1993), A-258-B.* Discussed in: Joseph, *supra* note 61*,* p.81-98.
[72] Joseph, Schultz and Castan, *supra* note 57, para 25.63.

confirmed that derogation under the European Convention must not be inconsistent with a state's obligation under international law.[73]

D. The Principle of Consistency

The principle of consistency is the central focus of the subsequent argument about the identification of the non-derogable aspects of the right to a fair trial. A state can only derogate from provisions of the ICCPR insofar as the derogation measures are consistent with all other obligations incumbent on the state under international law, including customary international law. International humanitarian law and human rights treaties from which no derogation is permitted are of particular relevance.[74] In GC 29, the HRC conceded that it is not its function to review the conduct of states under other sources of international law. At the same time, the Committee said that it would take "a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant".[75]

This assertion of the HRC was greeted with much skepticism from states parties. The HRC faces serious barriers in fulfilling its mandate in derogation claims. The verification information on often volatile and complex legal and factual situations can be resource intensive and assessing the legality of the emergency itself, as well as the measures taken is often extremely delicate. The Committee said that even if it was not its function to review the conduct of a state party under other treaties, it could exercise its function under the ICCPR only if it could also check the derogation measures' consistency with a state's other obligations. This plainly follows from the ordinary meaning of article 4 of the ICCPR. States which were surprised by the HRC holding in paragraph 10 of GC 29 should be reminded that

---

[73] *Brannigan and McBride v. UK (1993), supra* note 71, para 67-73.

[74] The ICESCR and the Convention on the Rights of the Child (CRC) have no derogation clause. Only the United States and Somalia have not ratified the CRC. *International Covenant on Economic, Social and Cultural Rights, supra* note 14. And *Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (no. 49) at 167, U.N. Doc. A/44/49 (1989), Entered into Force Sept. 2 1990.*

[75] General Comment 29, *supra* note 7, para 10.

they voluntarily accepted the principle of consistency in ratifying the treaty and therefore agreed that their performance should be reviewed with a look to all their obligations under international law.[76]

The first trace of the application of the principle is found in the review by the HRC of the initial report of Afghanistan in 1985. One of the members of the Committee referred to standards in the second additional protocol to the Geneva Conventions while Afghanistan rejected the contention that the situation amounted to an armed conflict. The Afghan government denied not only the application of the four conventions, but also of CA 3 and of Additional Protocol II, to which it was not a party. The HRC regretted the scarce and abstract information contained in the report and was relied primarily upon data from other sources, which lead to a heated debate of the report.[77] The ECtHR in *Lawless* recognized its competence to determine *proprio motu* whether the principle of consistency had been fulfilled,[78] and the IACHR explicitly examined the principle of consistency in the *Miskitos* case. The Commission considered whether the compulsory relocation of 8,500 Miskitos in five camps far away from their lands was a lawful measure of derogation from the right to residence and movement of the American convention. The commission assessed that there was a state of emergency which justified the relocation of the Miskitos Indians, but that this was only consistent with Nicaragua's other obligations under international law if the right to freedom of movement and residence was granted to forcibly displaced people as soon as the emergency is over.

The reason why the HRC has not often referred to the principle of consistency is probably the fact that many derogation claims have been invalidated even before the principle of

[76] A similar argument was made by Mr. Sperduti in his dissenting opinion to the first Cyprus v. Turkey case in which he defended the reference to the Fourth Geneva convention in order to discover the acceptable standards of behavior. See *Cyprus v. Turkey (1982) 4 E.H.R.R. 482 before the European Commission of Human Rights, 10 July 1976, 482 Cyprus v. Turkey,* Applications 6780/74 and 6950/75 *Cyprus v. Turkey (1982) 4 E.H.R.R. 482 before the European Commission of Human Rights, 10 July 1976, 482 Cyprus v. Turkey,* p. 564.

[77] Jaime Oraa, *Human Rights in States of Emergency in International Law* (Oxford [England]; New York: Clarendon Press ; Oxford University Press, 1992)., p. 196ff.

[78] Ibid., p. 193. *European Court of Human Rights (ECHR), Case of Lawless v. Ireland*, *supra* note 63, para. 39-41.

consistency could be taken into account. For instance, in cases where the Committee was unsatisfied that an emergency existed in the first place or where measures clearly infringed with the explicitly listed non-derogable rights, there was no need to make reference to the principle of consistency. At the same time, it is also true that when examining emergency situations, most supervisory organs are hesitant to shift their examination to international humanitarian law.[79] If however the principle of consistency is assessed more robustly, there is no reason why they should not do so. Indeed, it is quite unconceivable how the Committee could discharge its mandate to examine a state party's compliance with article 4 of the Covenant without taking into account closely related standards in other sources of law. After all, the drafters of the Covenant expressly prohibited derogation measures which breach other international law obligations. If this provision is to be made effective, there is no reason why the HRC should be banned from examining the compliance of a state party's measures with other obligations of international law, including customary international law. I will return to this issue in Chapter III.

E. Non-Discrimination

The emergency measures must not involve discrimination on grounds of race, color, sex, language, religion or social origin. Unlike the general nondiscrimination provisions of the Covenant, such as articles 2(1) and 26, the listed grounds of prohibited discrimination are exhaustive.[80] In other words, as long as all the other conditions of article 4 are fulfilled, discrimination on the basis of, for example, political opinion or national origin, is not prohibited in times of emergency.[81]

F. Non-Derogable Rights: Article 4(2)

All human rights instruments which allow for derogations recognize the non-derogability of certain rights. The ICCPR includes the rights to life, to freedom from torture, inhuman and

---

[79] Oren Gross and Fionnuala Ni Aolain, *supra* note 40, p. 346.
[80] Marks and Clapham, *International Human Rights Lexicon*, p. 352.
[81] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl [Germany]; Arlington, Va., U.S.A.: N.P. Engel, 1993), p. 86.

degrading treatment or punishment, to freedom from slavery and to freedom from retroactive criminal laws in the list of non-derogable rights in article 4(2).[82] These are absolute safeguards an there is absolutely no legal argument to justify the departure from these non-derogable rights in times of emergency and in the "war on terror".

I suggest distinguishing three types of non-derogable rights: First, the explicitly listed non-derogable rights in paragraph 2 of article 4 have already been mentioned. Second, apart from the explicitly listed non-derogable rights, the principle of consistency mentioned in sub-section D ensures that the higher denominator of non-derogable rights must be followed if a state has also ratified another treaty that contains a wider list of non-derogable provisions or if customary international law prescribes that a safeguard can never be dispensed with. In addition, there is a third type of non-derogable rights: Livingstone uses the term "implied non-derogable rights"[83] to describe the idea that certain aspects of in principle derogable rights can not be validly derogated from if the non-derogable rights, such as the protection from torture, were to be effectively protected. Chapter III shows that the last two categories of non-derogable rights largely overlap. Those aspects of fair trial identified in Chapter III as non-derogable are covered in customary international law and therefore protected by the principle of consistency. At the same time, they are essential to safeguard the effective prohibition of torture, cruel or inhuman treatment or arbitrary killings.

G. Procedural Requirements: The Principle of Notification

Paragraph 3 of article 4 demands that any state party intending to make use of the right of derogation shall "immediately inform the other States Parties to the present Covenant (…) of the provisions from which it has derogated and of the reasons by which it was

[82] Stavros, *The Right to a Fair Trial in Emergency Situations*, p. 343.
[83] Livingstone, *International Law Relating to States of Emergency and Derogations from International Human Rights Treaties*, p. 4

actuated."[84] There are two separate obligations contained in article 4(3): First, the state needs to notify the other states parties to the ICCPR and second, it also has the obligation of providing information on the emergency. Buergenthal explains that a "state must provide information concerning the specified measures it proposes to take and the reasons compelling it to do so,"[85] and thus deliver all information that would enable others to determine the nature of the emergency. A notification that is incomplete in this regard does not comply with the requirements of article 4(3).[86] This subsection considers the question of the legal consequences if a state claims to face an emergency situation but has not or not fully complied with the procedural requirements of article 4(3).

While the ordinary meaning of the paragraph seems to indicate that the notification requirement is a separate condition of a valid derogation, the argument has been made that the benefit of derogation should not be denied in the absence of compliance with the notification requirement. This question stems out of the acknowledgement that good law takes into the account the needs of states to protect their nation in times of emergency. Is it realistic to hold a state accountable to full human rights treaties if it fails to notify its intention to derogate? This is controversial. Buergenthal advocates that article 4(3) plainly calls for notice to be dispatched almost simultaneously with the proclamation of the emergency or the taking of derogation measures.[87] Whether the failure to comply with the procedural requirements automatically invalidates any derogation has not been conclusively answered by the Committee. The HRC in GC 29 said that the "duty of the committee to monitor the law and practice of a state party for compliance with article 4 does not depend on whether the state party has submitted a notification."[88] Some authors have interpreted this sentence to imply the HRC's willingness to accept a derogation claim in the absence of

[84] ICCPR, *supra* note 10, Article 4(3).
[85] Buergenthal, *To Respect and to Ensure, supra* note 57, p. 85
[86] Ibid. p. 85. Buergenthal cites the *Greek Case, supra* note 64, p. 186, para 80-81.
[87] Buergenthal, *To Respect and to Ensure, supra* note 57, p. 84.
[88] General Comment 29, *supra* note 7, para 17.

compliance with the notification requirement.[89] According to Joseph, such was established in the early case of *Landinelli Silva v Uruguay,* where the Committee said that "the substantive right to the derogatory measures may not depend on a formal notification being made pursuant to article 4 (3)".[90] However, this was a case of partial failure to comply with the procedural requirements and the HRC criticized the lack of sufficient information provided by Uruguay (both in the original derogation notification and during the proceedings under the Optional Protocol) rather than the complete absence of any notification. The HRC has often rejected claims by governments that the situation in their countries allowed for a derogation with regard to procedural safeguards under article 4 "in the light of the scarcity of the information available, the generality of the allegations of the respondent Governments and their uncooperative attitude" and registered a violation of the right to a fair trial.[91]

What is clear is that very few communications of derogation submitted under the ICCPR so far would satisfy the procedural requirements demanded by the HRC in GC 29. Joseph mentions the December 18 derogation of the United Kingdom as the most detailed ever

---

[89] Livingstone, *supra* note 83, p. 6.

[90] *Jorge Landinelli Silva v. Uruguay, Communication no. R.8/34, U.N. Doc. Supp. no. 40 (A/36/40) at 130 (1981),* para 8.3.

[91] See *Beatriz Weismann Lanza and Alcides Lanza Perdomo v. Uruguay, Communication no. R. 2/8, U.N. Doc. Supp. no. 40 (A/35/40) at 111 (1980)*, p. 45; *William Torres Ramirez v. Uruguay, Communication no. R. 1/4, U.N. Doc. Supp. no. 40 (A/35/40) at 121 (1980)*, p. 49; *Miguel Angel Millan Sequeira v. Uruguay, Communication no. R. 1/6, U.N. Doc. Supp. no. 40 (A/35/40) at 127 (1980*; *Alberto Grille Motta v. Uruguay, Communication no. 11/1977, U.N. Doc. CCPR/C/OP/1 at 54 (1984),* p. 54; *Luciano Weinberger Weisz v. Uruguay, Communication no. 28/1978, U.N. Doc. CCPR/C/OP/1 at 57 (1984); Leopoldo Buffo Carballal v. Uruguay, Communication no. 33/1978, U.N. Doc. CCPR/C/OP/1 at 63 (1984)*; *Alba Pietraroia Alba Pietraroia v. Uruguay, Communication no. 44/1979, U.N. Doc. CCPR/C/OP/1 at 76 (1984),* p. 76. *Sergio Euben Lopez Burgos v. Uruguay, Communication no. R.12/52 (6 June 1979), U.N. Doc. Supp. no. 40 (A/36/40) at 176 (1981),* p. 88; *Consuelo Salgar De Montejo v. Colombia, Communication no. R.15/64, U.N. Doc. Supp. no. 40 (A/37/40) at 168 (1982),* p. 127.

The Interamerican Commission has also disregarded similar pleas and has quite often engaged in a more or less direct examination of compliance of emergency measures with article 8 (the right to a fair trial) of the American Convention. See for instance *1981 Report on Nicaragua and Response of the Nicaraguan Government to the Inter-American Commission on Human Rights, OAS Doc. OAE/Ser.P, AG/Doc.1369/81, 27 Oct. 198,* where the Nicaraguan government denied the Commission's competence to apply the exacting standards of Article 8, as the country was in a situation of national emergency. The Commission replied that the "state of siege", originally conceived as a special measure for dangerous or emergency situations, is established into a normal state of affairs and often abused.

submitted,[92] which nevertheless omits any explanation of the possible deviation from article 9(4), the right to judicial review of detention.

Gross and Ni Aolain argue that reliance on the procedural mechanisms underestimates its limitations,[93] because formal requirements are not sufficient to assure protection of human rights in situations of exigency. Or, others argue that the notification requirement is just a formal requirement which simply has the aim of informing the other states parties and therefore, the failure to notify would not seem to be very serious. While these are sound points, I would counter that while reliance on procedure is not a panacea, the notification requirement is indeed an additional requirement that the drafters felt would help to assure some accountability of the authorities taking emergency measures.

Following the rules of interpretation provided for in the Vienna Convention on the Law of Treaties,[94] there are six reasons why the notification requirement is a separate condition of a valid derogation: First, as already mentioned, the ordinary meaning of paragraph 3 and the verb "shall" indicate no ambiguity with regard to the demand of an immediate notification. Second, the context of article 4(3) leads to the same conclusion: the notification requirement is contained in a separate paragraph than the condition of an official proclamation of the state of emergency. Arguments that the proclamation of the state of emergency would be sufficient to invoke the derogation fail to explain why the paragraph with the notification requirement exists in the first place. Third, the object and purpose of the clause is to enable the supervisory organ to monitor the compliance, stressing the international accountability in situations of emergency. Buergenthal has

---

[92] Joseph, *supra* note 61, p. 96. For the derogation notification of the UK see Government of the United Kingdom, "Declaration Contained in a *Note Verbale* from the Permanent Representation of the United Kingdom, Dated 18 December 2001, Registered by the Secretariat General on 18 December 2001," http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm. For a discussion whether a derogation was warranted in the first place, see Human Rights Watch, *Neither just nor Effective: Indefinite Detention without Trial in the United Kingdom Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001*,[2004]. Human Rights Watch argues that the new legislation did not require derogation from the European Convention on Human Rights.

[93] Gross and Ni Aolain, *supra* note 40, p. 308.

[94] *Vienna Convention on the Law of Treaties, Article 31(1), May 23, 1969, 1155 U.N.T.S. 331.*

pointed out that even the ECHR, which does not contain an explicit notification requirement, was interpreted by the ECtHR to require notification within a "reasonable period".[95] Fourth, the *travaux préparatoires* confirm that states parties have voluntarily and consciously inserted the notification requirement as a condition on equal footing with the other criterion of a valid derogation. Yugoslavia, supported by Mrs. Roosevelt, introduced an amendment during the 8th session of the drafting commission. The amendment required states to explain the reasons behind derogations. Before the amendment was adopted with no votes of dissent, the delegate explained that "if international control was to be achieved, states must not only be required to give official notification but also to justify their action".[96] Fifth, case-law also seems to suggest that the procedural requirements are an independent criterion of a valid derogation: While there has never been an explicit statement to that purpose, the HRC did not accept a general justification - the existence of an emergency and the domestic legislative enactments - in order to derogate from article 14 guarantees. Numerous other cases were brought before the HRC concerning Uruguay. They often involved both the derogation clause as well as fair trial standards. In all these cases, the Uruguayan government employed "prompt security measures" (emergency laws) aimed at dealing with the alleged terrorist threat. Political opponents were frequently charged with "subversion" or "conspiracy against the Constitution". Special military tribunals were established and operated without he guarantees of article 14 of the Covenant. The government did notify the Secretary General of its intention to derogate from the Covenant but the notification did not state which due process rights had been derogated from. The government did also not make any submissions of fact or law to justify such measures. In these cases, the HRC repeatedly answered in the following way:

> "The Human Rights Committee has considered whether acts and treatments, which are *prima facie* not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, including the 'prompt security measures'. The Covenant (art. 4) allows national measures derogating from some of its provisions only in strictly defined circumstances, and the Government has not made any submissions

[95] Buergenthal, *supra* note 57, p. 84. Buergenthal cites the *Lawless* Case, *supra* note 63, para 47.
[96] Weissbrodt, *supra* note 4, p. 107 ff.

> of fact or law to justify such derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances."[97]

In another case from Latin America, the HRC found a violation of the right to appeal (article 14(5)) even though the government pleaded that the derogation of article 14(5) was justified because of the emergency. The applicant was denied the right to review of her conviction by a higher tribunal. This case confirms that the HRC took into account that the notice of the Colombian derogation did not mention article 14, but instead only concerned articles 19 and 21.[98] As already mentioned in chapter I, the same reasoning was used by the ICJ in the Wall Opinion.[99] Where a state notified to derogate from one article, no derogations were allowed for any other provisions not contained in the state's notification. Interpreting article 15 of the ECHR, the European Commission and Court have refused to accept as a matter of principle that a failure to meet the notification requirement could never attract the sanction of nullity of the derogation.[100]

Fifth and lastly, it would have unfair consequences to disregard the notification requirement for those states which do not notify any derogation: If one state makes a notification for a derogation of one provision, but not any other, this state would, as shown in the above mentioned case-law, subsequently be denied the benefit of derogation from any other provisions. As mentioned, Israel and Colombia were denied claims to derogate from articles other than those included in their notifications. If the notification requirement is not considered a separate condition of a valid derogation, it would be unfair if another state

---

[97] *Luciano Weinberger Weisz v. Uruguay, Communication no. 28/1978, U.N. Doc. CCPR/C/OP/1 at 57 (1984)*, para 14. Other cases from Uruguay with identical language include: *Leopoldo Buffo Carballal v. Uruguay, Communication no. 33/1978, U.N. Doc. CCPR/C/OP/1 at 63 (1984)*; *Alberto Grille Motta v. Uruguay, Communication no. 11/1977, U.N. Doc. CCPR/C/OP/1 at 54 (1984)*; *Ann Maria Garcia Lanza De Netto v. Uruguay, Communication no. 8/1977, U.N. Doc. CCPR/C/OP/1 at 45 (1984); Sergio Euben Lopez Burgos v. Uruguay, Communication no. R.12/52 (6 June 1979), U.N. Doc. Supp. no. 40 (A/36/40) at 176 (1981)*. See also Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford; New York: Clarendon ; Oxford University Press, 1991).

[98] *Consuelo Salgar De Montejo v. Colombia, Communication no. R.15/64, U.N. Doc. Supp. no. 40 (A/37/40) at 168 (1982)*.

[99] See *supra* page 16 on the *Wall Opinion*.

[100] Jaime Oraa, *Human Rights in States of Emergency in International Law* (Oxford [England]; New York: Clarendon Press ; Oxford University Press, 1992), p. 59.

which has not sent any notification of derogation would *ex post* be allowed to claim derogations from all derogable provisions of the Covenant.

It seems therefore that the notification requirement should be considered an independent criterion of derogation. Where a state has not notified a derogation, supervisory organs have repeatedly hold the state accountable to the full extent of the Covenant. At the same time, the problem with a total failure to comply with the notification requirement is not easy to resolve. Should international bodies apply the derogation clause *ex officio*? Oraa argues that if the derogation clause is construed as a sovereign right to the state, it is difficult to see how, if a state chooses not to rely on it, the international organ could apply the derogation clause and only the holder of the right can put it into practice.[101] On the other hand, it would be unrealistic to accept that in a de facto situation of emergency, this is not in some way taken into account. Interestingly, the HRC has taken a slightly different approach under the reporting procedure than under the Optional Protocol (individual communications). Under the reporting procedure, Oraa observes that the HRC has consistently pointed out that if no notification was made, a state can not apply the derogation clause.[102] Under the individual communications procedure, it seems that it has as a matter of principle left open the question of the nullity of the right of derogation but has held that a state can not rely on this right if it does not provide enough information through either the notice of derogation *or* the proceedings under the Optional Protocol.[103]

To sum up, an overly "absolutist" position on the notification requirement can and should not be the position of the human rights community. However, given the importance of avoiding the opaqueness of de facto derogations, I would suggest that article 4(3) should

---

[101] Ibid., p. 67. This argument is also made by Mr. Ermacora in his separate opinion in the Cyprus v. Turkey case, *Cyprus v. Turkey (1982) 4 E.H.R.R. 482 before the European Commission of Human Rights, 10 July 1976, 482 Cyprus v. Turkey,* Applications 6780/74 and 6950/75 *Cyprus v. Turkey (1982) 4 E.H.R.R. 482 before the European Commission of Human Rights, 10 July 1976, 482 Cyprus v. Turkey,* p. 565ff.
[102] Oraa, *Human Rights in States of Emergency in International Law*, p. 69.
[103] *Jorge Landinelli Silva v. Uruguay, Communication no. R.8/34, U.N. Doc. Supp. no. 40 (A/36/40) at 130 (1981)*, para. 8(3).

indeed be considered an important condition of a valid derogation. At the same time, I think it would be acceptable that the expectations of the Human Rights Committee with regard to the preciseness of the notification could be discussed as long as the state cooperatively provides precise information once a case is brought to the Committee. Therefore, the HRC could show some flexibility in cases of partial failure to comply with the notification requirement but clarify at the same time its stance on the consequence of total failure to notify any derogating measures. This position would be very close to the one suggested by the European Commission in the *Lawless* case. The Commission was of the opinion that the notice of the Irish Government was inadequate but would not invalidate the right in this particular case. In the final paragraph of the report, the Commission added that "in stating this opinion, however, the Commission is not to be understood as having expressed the view that in no circumstances whatever may a failure to comply with the provisions of paragraph 3 of article 15 attract the sanction of nullity of the derogation or some other sanction."[104]

The second chapter has examined the criteria of valid derogations under the ICCPR. Buergenthal stresses the need to interpret all obligations of the Covenant in accordance with its object and purpose.[105] Article 4 must be viewed as applicable only in rare and exceptional circumstances and as article 5(1) plainly indicates, is never to be used in a manner calculated to destroy the rights which the Covenant recognizes.[106] Chapter III will show how a good-faith interpretation of the Covenant and its derogation provision also recognizes that the effective prohibition on torture or inhumane treatment or punishment requires that the core fair trial safeguards must remain in place in all circumstances of emergency. With regard to the "war on terror", two of the discussed derogation criteria are difficult to assess: first, not everyone agrees on the definition of the "state of emergency threatening the life of the nation" and whether terrorist attacks automatically fall within this

---

[104] *Case of Lawles v. Ireland, supra* note 63, pp. 72-3, para. 80.

[105] Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, p. 91.

[106] ICCPR, *supra* note 10, Article 5 contains the so-called savings clause: "1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

definition. Second, the United States has not made any notification expressing its intention to derogate from provisions of the ICCPR and the discussion on the notification requirement of article 4 has shown that this could potentially lead to difficult legal questions. However, in whatever ways one answers these two problems, the measures taken must in no circumstances whatsoever fall short of the minimum non-derogable standards. This is why Chapter III provides concrete guidance to identify these minimum core safeguards with regard to the right to a fair trial.

CHAPTER III: NON-DEROGABLE ASPECTS OF FAIR TRIAL RIGHTS

The ICCPR article dealing with fair trial rights is not listed among the non-derogable provisions. Unlike the prohibition of torture or slavery, article 4(2) does not include article 14. Proposals to include the fair trial article in the list of non-derogable provisions were defeated not only during the drafting of the ICCPR but also for the American and the European Conventions.[107] States have therefore expressly stated their wish to be able to derogate from the right to a fair trial. To say that the entirety of article 14 is non-derogable would therefore come close to an encroachment upon the state parties' right to defend the life of the nation in grave emergencies.

However, recognizing that article 14 in principle is derogable does not at all imply that states can depart from article 14 as they see fit. Chapter II has already mentioned the criteria of a valid derogation and the present chapter applies these criteria to article 14. It will elaborate on the Human Rights Committee's holding that "certain fundamental principles of fair trial" can never be dispensed with. The main tool to identify these fundamental principles is the principle of consistency. The rights of fair trial that are part of the minimum floor of due process can be deduced from customary international law, customary humanitarian law in particular. No derogation will be valid if it departs from these minimum rights. Moreover, a closer look to the drafting history of the ICCPR's derogation provision shows that the vote of the delegates against the inclusion of article 14 among the non-derogable provisions was directed at certain elements of procedure but it was never their intention to imply that no particular standards of fair trial would apply during times of emergencies.

First, I suggest to briefly analyzing the *travaux préparatoires* of article 4 as an explanation of how article 14 was not included as a non-derogable provision. Second, I establish the conceptual argument why certain aspects of judicial guarantees can not be considered

[107] Stavros, *The Right to a Fair Trial in Emergency Situations*, p. 347.

derogable. Third and most importantly, through the principle of consistency, I will identify the non derogable aspects of article 14. The next section shows that the drafters' resistance to include article 14 among the explicitly non-derogable rights in article 4(2) was mainly founded in concerns about the publicity and openness of trials in situations of emergencies. A separate sub-section (see below, section C.1) will address the drafting history with regard to the principle of consistency. The next section is limited to the question of the inclusion of article 14 among the non-derogable provisions.

A. The Drafting History of Article 4 with Regard to Article 14 as a Derogable Provision

The drafting history of article 4 show that states explicitly wanted to safeguard their right to restrict access to a *public* hearing and to certain other aspects of a fair trial. At the same time, they did not intend to allow derogations from the entirety of judicial safeguards.

France and the United States advocated including the right to a fair *and public* trial in the list of non-derogable rights under the Covenant. Their proposal to include article 14 in article 4(2), which enlists the non-derogable rights, was defeated. The delegate of the United Kingdom for instance said that respect of the right to a public hearing would be impossible during wartime.[108] According to Stavros, the discussion during the drafting process showed that the vote of the delegates against the French and US proposals was apparently due to an instinctive negative reaction to the non-derogable character of certain aspects of the fair trial clauses, the publicity of the hearing in particular.[109] Stavros thinks that the same pattern characterized the negotiation of the European Convention on Human Rights. In that case, the final vote whether to include fair trial rights among the non-

---

[108] U.N. Doc. E/CN.4/SR.126 (1949), pp. 4 and 5. See Joan Fitzpatrick , *Human Rights in Crisis : The International System for Protecting Rights during States of Emergency* (Philadelphia: University of Pennsylvania Press, 1994), p. 53.
[109] Stavros, *The Right to a Fair Trial in Emergency Situations*, p. 348.

derogable provisions was taken on the basis of the right to a "fair and public trial".[110] Therefore, the non-inclusion of fair trial among the non-derogable rights does at least not indicate that the drafters intended to make the most basic aspects of judicial guarantees derogable; but rather that they were not prepared to accept the normal requirement of publicity and full judicial procedure as a non-derogable right applicable in times of emergency. The following section explains the concept why some aspects of fair trial must necessarily be considered non-derogable.

B. Why Certain Aspects of Fair Trial Must be Non-Derogable

Before applying the criteria of derogation explained in Chapter II to the right to fair trial, there are two reasons why there must be certain non-derogable fair trial guarantees.

The first reason is based on the importance of the explicitly listed non-derogable rights, such as the prohibition of torture, cruel and inhuman treatment. The inclusion of the right to a fair trial in the list of derogable rights has been questioned over the years and many have stressed the importance of guaranteeing some procedural protection for accused persons in all times of emergency. The following developments illustrate the acknowledgement of the importance of minimal fair trial standards if the non-derogable safeguards of article 4(2) are to be effectively protected. In 1982, Nicole Questiaux was charged by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) to undertake a study dealing with administrative detention during states of emergency.[111] In her comparative study, she examined patterns of national legislation concerning emergency

---

[110] Ibid., p. 348. Thomas Buergenthal and Robert E. Norris, *Human Rights: The Inter-American System* (Dobbs Ferry, N.Y.: Oceana Publications, 1982), p. 137.

[111] E/CN.4/Sub.2/1982/5, *Questiaux Report*. See also Reports of the Secretary-General to the Commission on Human Rights on minimum humanitarian standards (later: fundamental standards of humanity): E/CN.4/1999/92, *Report of the Secretary-General Submitted Pursuant to Commission Resolution 1998/29: Fundamental Standards of Humanity*,[1998]) and E/CN.4/2000/94, *Report of the Secretary-General Submitted Pursuant to Commission Resolution 1999/65: Fundamental Standards of Humanity*,[2000])., E/CN.4/2001/91, "Fundamental Standards of Humanity: Report of the Secretary-General Submitted Pursuant to Commission Resolution 2000/69," (2001).

powers.[112] Her study was followed by soft-law standards such as the principles adopted by the International Law Association in its 61st Conference in Paris in 1984[113] or the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights adopted by a group of experts at a conference convened in 1984.[114] While these and other documents are not identical in substance, they all suggest that to effectively protect the explicitly listed non-derogable safeguards, not every derogation from article 14 can be justified.

The Siracuas Principles assert that the respect for fundamental aspects of fair trial "is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation."[115] Leandro Despouy was appointed Special Rapporteur on Human Rights and States of Emergency and entrusted with the task to compile a list of countries which have proclaimed or terminated a state of emergency.[116]

In 1989, the Sub-Commission requested two members, Mr. Chernichenko and Mr Treat, "to prepare a brief report on existing international standards pertaining to the right to a fair trial" and to "recommend which provisions guaranteeing the right to a fair trial should be made non-derogable"[117]. Today, the US government argues that for some accused individuals, no particular international standards of fair trial apply. Against this context, it might sound surprising that the two members of the Sub-Commission in their initial reply

---

[112] Fitzpatrick, *Human Rights in Crisis : The International System for Protecting Rights during States of Emergency*, p. 21.
[113] Ibid., p. 20. See also Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (New York: St. Martin's Press, 1989).
[114] U.N. Doc. E/CN.4/1985/4, Annex (1985), United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.
[115] Ibid., para 70.
[116] Leandro Despouy and UN. Special Rapporteur on Human Rights and States of Emergency, *Explanatory Paper on the Best Way of Undertaking the Drawing Up and Updating of a List of Countries which Proclaim Or Terminate a State of Emergency each Year, and the Submission of an Annual Report to the Commission on Human Rights Containing Reliably Attested Information on Compliance with the Rules, Internal and International, Guaranteeing the Legality of the Introduction of a State of Emergency* (Geneva: Un, 1985), p.12.
[117] Stavros, *The Right to a Fair Trial in Emergency Situations*, p. 344.

suggested the adoption of an additional protocol making the entire article 14 of the Covenant non-derogable.[118] Such an additional protocol was never adopted and the collapse of notorious dictatorial regimes in Latin America might have contributed to shift the debates in the UN human rights organs to other topics. The "war on terror" however sharply indicates the need to renew the understanding of minimum fair trial rights.

Stavros concluded in 1992 that a minimum floor of due process for emergency situations already existed. He also showed "that this obligation has not been inflicted arbitrarily on the states parties by the international human rights organs in an exercise of blatant quasi-judicial activism. On the contrary, it has been voluntarily accepted by these states through their accession to a series of other international treaties".[119]

The IACtHR has famously said that "a temporary suspension of guarantees under article 27 [the derogation provision of the American Convention] does not imply a temporary suspension of the rule of law."[120] The HRC has similarly held that the judicial determination of lawfulness of detention may never be abrogated even if there is no such explicit stipulation in article 4 of the Covenant.[121] The reasoning was based on the idea that procedural guarantees must always remain in place to protect non-derogable rights.[122] Therefore, the list in article 4(2) of the ICCPR must implicitly contain judicial guarantees that allow the non-derogable rights to be effectively monitored and protected. The ECtHR

---

[118] E/CN.4/Sub.2/1990/34, *The Administration of Justice and the Human Rights of Detainees : The Right to a Fair Trial : Brief Report / Prepared by Stanislav Chernichenko and William Treat in Accordance with Resolution 1989/27 of the Sub-Commission.*,[1990]).., para 150.
As well as: U.N. Doc. E/CN.4/Sub.2/1991/29, *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening, Second Report Prepared by Mr. Stanislav Chernichencko and Mr. William Treat in Accordance with Resolution 1990/18 of the Sub-Commission and Resolution 1991/43 of the Commission on Human Rights* (Geneva: United Nations,[1991]).
For their final report, see S. V. Chernichenko and others, *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening: Final Report* ([New York]: United Nations Economic and Social Council, 1994).
[119] Stavros, *The Right to a Fair Trial in Emergency Situations*, p. 344
[120] *Habeas Corpus in Emergency Situations (Arts. 27(2) 25(1) and 7(6) of the American Convention on Human Rights, Advisory Opinion OC-8/87, 30 January 1987, Inter-Am. CT.H.R. (Ser. A) no. 8 (1987),* para 24.
[121] Ibid.
[122] General Comment 29, *supra* note 7, para 15, 11 and 16.

observed that denial of access to lawyer, medical doctor, relative or friend and the absence of any possibility of challenging the detention meant that applicant "left completely at the mercy of those holding him".[123] The European Court underlined that judicial intervention may lead to the detection and prevention of serious ill-treatment which is prohibited in absolute terms.

The conceptual argument about the non-derogability of certain judicial guarantees is therefore founded on the concern to protect the explicitly listed non-derogable rights. This concern was reiterated by the IACtHR. The government of Uruguay requested the Inter-American Court to issue an advisory opinion "on the scope of the prohibition of the suspension of the judicial guarantees essential for the protection of the rights mentioned in article 27(2) of the American Convention on Human Rights".[124] This important advisory opinion stated that "principles of due process cannot be suspended in states of emergency, insofar as they are the conditions necessary for the exercise of the remedies considered by the Convention to be non-derogable."[125] Applying that logic to the ICCPR, the procedural rights guaranteed in articles 9(4) and some aspects of article 14 are 'functionally' non-derogable. They are necessary to ensure non-abuse by the state of the absolutely non-derogable safeguards.[126]

The second argument why certain standards are non-derogable is based on the principle of proportionality. Denying all elements of article 14 can never be proportionate and strictly required by the exigencies of the situation. Just weeks before the terrorist attacks on September 11, 2001, the HRC adopted its 29th General Comment in which it examined article 4 of the Covenant. With regard to judicial guarantees, the HRC explained that the

[123] *Aksoy v. Turkey (100/1995/606/694) 18 December 1996. Application no: 21987/93*, para 76.
[124] *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) no. 9 (1987).*
[125] Ibid., para 30.
[126] Joan Fitzpatrick, "Protection Against Abuse of the Concept of 'Emergency'" In *Human Rights : An Agenda for the Next Century*, eds. Louis Henkin, John Lawrence Hargrove and American Society of International Law (Washington, D.C.: American Society of International Law, 1994), 203., p. 203. Cited in Joseph, supra note 62, p. 94, note 80.

principle of proportionality ensures that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behavior of a state party.[127] In other words, a complete denial of article 14 could never be a valid derogation because it could never be proportional and strictly required to deny all due process rights. Paragraph 6 of GC 29 is explicit with regard to the principle of proportionality in stressing that "the fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists."[128] The Committee then explains the reasons why some articles have not been included in the list of non-derogable rights and repeats the first argument made about the implicit non-derogability of certain rights in order to protect the rights listed in article 4(2): "The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights."[129]

"States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence".[130] In explicit terms, the Committee emphasizes the idea that the safeguards related to derogation are central to the rule of law. "As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The remaining sections identify and discuss these requirements.

[127] General Comment 29, *supra* note 7, para 4.
[128] Ibid., para 6.
[129] Ibid., para 15.
[130] Ibid., para 11.

C. Identification of the Non-Derogable Aspects of Article 14 with the Help of the Principle of Consistency

As mentioned previously, article 4(1) requires that no measure derogating from the provisions of the Covenant may be inconsistent with the state party's other obligations under international law. The principle of consistency is supposed to prevent a state party from adopting measures that violate the state's obligations under a treaty, such as the United Nations Charter, or under customary international law.[131] If a state claims to derogate from obligations under the Covenant which are required also by a humanitarian treaty is violating both agreements. Interpreting identical language in the Inter-American Convention on Human Rights, the Inter-American Commission recently reported that while states can derogate form certain due process rights in times of emergency, a state can not deny an individual more favorable protections that are non-derogable under other applicable international sources of law.[132] For instance, humanitarian treaties do not contain the possibility of derogation. Anti-terrorism initiatives do not lessen the obligations of states to remain in strict compliance with their other international obligations, specifically those under human rights and humanitarian law, including their customary aspects.[133]

Technically speaking, the principle of consistency only comes into operation once all the other conditions of the derogation clause have been satisfied.[134] Therefore, one could argue that because the US has not attempted to notify any derogation or because some of its measures even infringe on the non-derogable prohibition of torture, cruel and inhuman or degrading treatment or punishment, the present discussion of the principle of consistency is overly technical. However, identifying the non-derogable fair trial standards is the clearest

---

[131] Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, p. 82. Cites Karl J. Partsch, "Experience regarding the War and Emergency Clause (Article 15) of the European Convention on Human Rights" In *Israel Yearbook on Human Rights*, ed. Universitat Tel-Aviv ([Tel Aviv]: Published under the auspices of the Faculty of Law, Tel Aviv University, 1971)., 330.

[132] Interamerican Commission on Human Rights, *Report on Terrorism and Human Rights*,[2002]., para 20.

[133] Ibid, Para 4.

[134] *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin 76, IACHR, OEA/Ser.L/V/II.62, Doc. 10 Rev. 3, at 81 29 Nov. 1983*.

defense against all attempts to argue that the qualification of the legal situation or the status of an accused individual would make certain, or all, international instruments inapplicable.

The principle of consistency obviously only refers to the standards of IHL in those cases in which the laws of war are applicable and to those individuals to which it applies *ratione personae*. A less grave public emergency, which does not amount to an armed conflict, does not justify the application of the Geneva conventions as treaty-law.[135] However, my point is precisely that those minimum obligations of humanitarian law which are part of customary international law are also applicable in "gray zone emergencies". They constitute the minimum floor of due process that is non-derogable and has to be provided in all circumstances. These minimum customary safeguards do not cease to apply in the "war on terror" or any other situation.

States parties to the ICCPR have voluntarily pledged in the derogation clauses not to disregard during emergencies their other obligations under international law. This is not restricted to conventional sources because the term "international law" clearly includes customary law.[136] By determining the judicial guarantees applicable in both types of armed conflict and in customary law, an identifiable non-derogable minimum floor of due process is indeed guaranteed under the ICCPR during all times of emergencies. A brief outline of the drafting history of the principle of consistency justifies using this principle to identify the non-derogable aspects of article 14.

---

[135] Oraa, *Human Rights in States of Emergency in International Law*, p. 201.
[136] *Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 3 Bevans 1179,* Article 38.

1. Legislative History of the Principle of Consistency

The principle of consistency was first introduced in 1950 by the US delegation.[137] The delegation proposed an alternative text to paragraph 2 of the derogation clause in the context of the debate on which rights should be declared non-derogable in public emergencies. The aim of the US proposal was to substitute for the principle of non-derogability of certain human rights, a provision which simply stated that "no derogation may be made by any State under this provision which is inconsistent with international law or with international agreements to which such State is a party."[138] Mrs. Roosevelt, leading the US delegation, explained the rationale of the proposal: She mentioned that the conduct of states in time of war had been regulated in international conventions after long debates in large international conferences, in particular the 1949 Geneva Conventions. Therefore, the US delegation advocated that the drafters in the UN Commission should take full advantage of this legislation, instead of trying to work out which rights should be entrenched from derogation.[139]

To make that link explicit, the US delegation proposed a reference to the laws of war in order to assess which of those human rights provisions could not be derogated from in emergencies.[140] Mrs. Roosevelt opposed the inclusion of a list of non derogable aspects of fair trial as unnecessary because a list of due process rights was already contained in the 1949 Conventions. This means that the drafters intended that at least those rights should also be guaranteed in emergencies not amounting to armed conflict according to the Covenant. The US proposal was slightly amended by Belgium and finally adopted by consensus. This drafting history reveals two important points: First, the US delegation's reasoning suggests that there was no rejection to the applicability of human rights law in times of armed conflict as the operation of the derogation regime was purposefully linked to

[137] Oraa, *Human Rights in States of Emergency in International Law*, p. 191.
[138] Ibid., p. 191. It should be noted that this proposal includes customary international law because it refers to "international law or agreements".
[139] E/CN.4/SR. 195, "Summary Records of the Commission on Human Rights, Fifth Session, R. 195., para. 45 (29 May 1950) (Remarks of Mrs. Roosevelt).
[140] Oraa, *Human Rights in States of Emergency in International Law*, p. 192.

the laws of war. Second, the US proposal explicitly refers to the methodology employed throughout this thesis: humanitarian law provides the answer to what aspects of the right to fair trial can not be derogated from. The next session discusses what "other obligations under international law" should be used to assess the minimum floor of due process. It argues that customary standards of humanitarian law can be deduced from the convergence of the two additional protocols to the Geneva Conventions as well as from the vast study undertaken by the ICRC on customary humanitarian law.

2. What are the Sources of a State's "Other Obligations" Under International Law?

The non-derogable aspects of fair trial identified in this thesis are part of customary international law. They are also a concretization of the prescription of common article 3 of the Geneva Conventions that "no sentence shall be passed without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[141] As Prof. Jimenez de Arechaga has pointed out and as it is the central argument of this thesis; guarantees that are considered non-derogable in times of war must also be considered non-derogable in times of lesser threat to the nation.[142]

The four Geneva Conventions of 1949 are (almost) universally ratified.[143] Common article 3 (CA3) of the Geneva Conventions prohibits "at any time and in any place whatsoever sentences and executions without a proper trial affording all the guarantees recognized as indispensable to civilized people". Literally interpreted, CA3 governs armed conflicts not of an international character.[144] But as Stavros argues, it will be very difficult or impossible for

---

[141] Common Article 3 to the Geneva Conventions, paragraph 1(d).
[142] Inter-American Institute of Human Rights, *Final Recapitulation, Inter-American Seminar on State Security, Human Rights and Humanitarian Law* (San Jose: [1982]), p. 427.
[143] ICRC, "Ratification of the Geneva Conventions and their Protocols," http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (accessed February 29, 2008).
[144] Robert Kolb, *Ius in Bello: Le Droit International Des Conflits Armes ; Precis* (Bale; Bruxelles: Helbing & Lichtenhahn ; Bruylant, 2003), p. 71-113. See also *v. Rumsfeld, United States Supreme Court, 126 S. Ct. 2749 (June 29, 2006)*.

states parties to prove that derogation form the minimum floor of CA3 was "strictly required by the exigencies of the situation" in an emergency falling short of the threshold of an internal armed conflict.[145] Thus, if the guarantees of CA3 apply to the most serious cases of a public emergency not of an international character, it makes sense that they must at least also be provided if the situation falls short of the legal threshold of an internal armed conflict. This is further confirmed by the ICRC commentary on article 3.[146]

Most importantly, the ICJ in *Nicaragua v. United States*, ruled that the provisions of CA3 accrue to every state by virtue of customary international law and that these customary law rules constitute "a minimum yardstick of humanity" from which no reduction is permissible.[147] The next task is therefore to interpret the precise meaning of the broad wording of CA3 in customary international law.

While CA3 is vague and only mentions "judicial guarantees which are recognized as indispensable by civilized people", other sources of humanitarian law provide the answer of what these indispensable judicial guarantees are. The Geneva Conventions have been supplemented by two additional protocols. Article 75 of the first protocol provides a detailed list of fair trial rights which states parties must afford to "everybody affected by the conflict", hence including to individuals within their own state.

---

[145] Argument of Jimenez de Arechaga, former president of the Inter-American commission, see *supra* note 142. See also International Commission of Jurists (1952-), *States of Emergency: Their Impact on Human Rights: A Study* (Geneva, Switzerland: The Commission, 1983).

[146] Jean Pictet and others, *The Geneva Conventions of 12 August 1949: Commentary* (Geneva: International Committee of the Red Cross, 1994), p. 36. "Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions…? We do not subscribe to this view. We think, on the contrary, that the scope of application of the article must be as wide as possible….What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages?"

[147] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Vol. 1986 I.C.J. 14, General List No. 70International Court of Justice, Judgment of 27 June 1986), para 219.

However – as treaty law – article 75 only applies if the first additional protocol applies as a whole and if there is a link between the activities for which the accused is prosecuted and the conflict. The second caveat is not very significant as in most cases where a state tries to derogate from the right to a fair trial under human rights law; it will target groups who will also be "affected" by the conflict. On the other hand, the first condition of the applicability of the first additional protocol is harder to fulfill. First, not all states have ratified the protocol.[148] Second, questions of the determination of the existence of an armed conflict of an international character can be extremely complex and often controversial. The much more straightforward argument would be the following: if article 75 can be considered to be part of customary international law, it would belong to all states "other obligations" and no derogation would be allowed exceeding the minimum floor of the "fundamental guarantees" contained in article 75. However, the next paragraph shows that if the vast majority of provisions in article 75 are part of customary law, others might not warrant the same claim. This concern stems from the fact that the laws of non-international armed conflict allow lower standards in some respects.

The ratification of the first protocol does not warrant the claim that it is on the basis of ratification that we could conclude that the guarantees of the article might be of customary nature.[149] The limited ratification of the AP I seems however due to the controversial provisions on combatant status of guerrilla fighters rather than because of article 75. The US has refused to ratify the first protocol primary because of its article 44[150] and not because of the fundamental guarantees contained in article 75. Legal Advisors of the Untied States Department of State have explicitly taken the position that the entire article 75 is of customary nature:

---

[148] See ICRC, *Ratification of the Geneva Conventions and their Protocols*, *supra* note 143.
[149] See *supra* note 148.
[150] "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, Entered into Force Dec. 7, 1978, Article 44. Article 44 extends combatant status to *guerrilleros* and lessens the requirements of distinction.

> "…the Untied States will consider itself legally bound by the rules contained in Protocol I only to the extent that they reflect customary international law. (…) "we support in particular the fundamental guarantees contained in article 75, such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions without any adverse distinction (…). We support the principle that these persons not be subjected to violence to life, health, or physical or mental well-being, outrages upon personal dignity, the taking of hostages, or collective punishments, and that no sentence be passed an no penalty executed except pursuant to conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure." [151]

While this is an unequivocal statement of a former official, I nevertheless suggest a more cautious approach to identify the customary elements of fair trial which can never be dispensed with. It is true that most aspects of article 75 of the first protocol could be definitely proven to be part of customary international law. But as long as there are potentially some aspects of article 75 which do not warrant the claim to be part of customary law, I suggest comparing article 75 with article 6 of the second protocol (which protects persons prosecuted for offenses related to non-international armed conflict). The vast majority of the guarantees in article 75 is also included in article 6 of the second protocol but there are some divergences. Therefore, the list of safeguards which are *common* to both additional protocols provides the most authorative source of the customary minimum floor of due process from which no derogation is allowed. Hence, the judicial guarantees which must be provided for in both types of armed conflict are those from which no reduction is permissible. These are the guarantees which have to be assured even in the worst situations of public emergencies and can therefore be considered a non-derogable part of customary international law.

---

[151] Michael J. Matheson, "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions: Remarks of Michael J. Matheson, Deputy Legal Adviser, United States Department of State in the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions," *The American University Journal of International Law and Policy* 2, no. 2 (1987), p. 420 and 427.

Fortunately, a detection of *opinio juris* and state practice for each of the identified aspects has been undertaken by the International Committee of the Red Cross' study on customary humanitarian law. In 1995, the 26th International Conference of the Red Cross and Red Crescent decided to assign the ICRC the task of preparing a report on the customary rules of international humanitarian law applicable in international and non-international armed conflicts.[152] The ICRC study is structured according to rules of customary law. Rule 100 -103 are concerned with fair trial guarantees. Rule 100 deals with the customary judicial guarantees and reads that "no one may be convicted or sentenced, except pursuant to fair trial affording all essential juridical guarantees".[153] This language is similar to the one used in CA3 as well as in article 75 of AP I.[154] While the ICRC study starts by outlining the general existence of fair trial rights in customary law and by outlining the sanction provided for the denial of fair trial, it then consecrates detailed attention to each specific element of a fair trial. The study is therefore extremely valuable to identify states "other obligations" from which no derogation is possible. Throughout the next chapter, reference will be made to the ICRC study for each specific guarantee. It should also be noted that in many cases, the appropriate assessment will not be the presence of particular safeguards in isolation but rather whether the totality of the proceedings amount, in the circumstances, to a fair trial.[155]

3. Compiling a List of the Non-Derogable Aspects of Article 14

Those aspects of fair trial which are contained in article 75 of the first protocol and in article 6 of the second protocol reveal that the non-derogable list of fair trial rights can be separated into three groups of issues. First, the non-derogable rights include aspects on the nature of the tribunal. Second, they regulate the law that can be applied. The third group of

[152] 26th International Conference of the Red Cross and Red Crescent, "Resolution 1, International Humanitarian Law: From Law to Action; Report on the Follow-Up to the International Conference for the Protection of War Victims," *International Review of the Red Cross* 310 (1996).
[153] Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law, supra* note 11, p. 352.
[154] Ibid. p. 352.
[155] Duffy, *The "War on Terror" and the Framework of International Law*, p. 319.

aspects concern the procedural guarantees accorded to the accused. Apart from these, the rule that no one may be convicted of an offense except on the basis of individual criminal responsibility and the general prohibition of collective punishments are indisputably fundamental rules of criminal law and need not be analyzed further for the purposes of this thesis.

3.1. The Nature of the Tribunal: Trial by an Independent, Impartial and Regularly Constituted Tribunal

This paragraph identifies the right to a hearing before an independent, impartial and regularly constituted tribunal to be part of the non-derogable safeguards.

The first right which appears in both lists of safeguards - article 75 of AP I and article 6 of AP II - is the right to a hearing before an independent and impartial tribunal. Article 14(1) of the ICCPR requires a "competent, independent and impartial tribunal established by law". Article 10 of the Universal Declaration of Human Rights refers to an "independent and impartial tribunal"[156]. It is clear that the requirements of impartiality and independence can never be dispensed with. Boh the HRC and the IACHR explicitly confirmed this requirement to be non-derogable.[157]

The situation is more complicated with regard to the requirement that a tribunal be "regularly constituted". Both protocols set forth the requirement of independence and impartiality, while the first additional protocol further adds that the tribunal must be "regularly constituted". Does that imply that in internal conflicts, the establishment of a tribunal could be handled with a higher degree of flexibility? This conclusion would

[156] *Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948),* Article 10.
[157] Human Rights Committee, General Comment 13, Article 14 (Twenty-First Session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para 4. *Annual Report of the Inter-American Commission*,[1973]), p. 34. And: Interamerican Commission on Human Rights, *Report on Terrorism and Human Rights, supra* note 132.

contradict Common Article 3 which also includes the regularity requirement. The ICRC study includes the "regularly constituted" element among customary law and finds it in military manuals, national legislation and reported practice.[158]

The interpretation of the term "regularly constituted" is however rather broad and does not absolutely exclude the establishment of special tribunals. It seems that special tribunals are indeed allowed under derogations from the ICCPR. Cases before the HRC and other bodies have been careful not to categorically rule out the possibility of creating special tribunals. At the same time, they have repeatedly stressed the problems caused by the displacement of ordinary courts by special tribunals, including military tribunals.[159] While the Committee decided that the creation of special tribunals does not *per se* violate article 4(1), it has observed that "quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice".[160] In a similar vein, the Committee and the International Commission of Jurists have on several occasions recommended that legislation be codified so that civilians are tried by civilian courts and not by military tribunals.[161] Therefore, the creation of special tribunals is not *per se* a violation but impartiality and independence must be preserved in all circumstances. In practice, military tribunals established in emergencies often do not comply with both of these criteria and regional human rights organs have found that the trial of civilians by military courts constitutes a violation of the right to be tried by an independent and impartial tribunal.[162] For instance, the ECtHR expressed doubts about the institutional guarantees of independence and impartiality in *Incal v. Turkey*, a case in which

[158] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law, supra* note 11, p. 355.
[159] Siracusa Principles, *supra* note 114, Principle 70(f). E/CN.4/Sub.2/1982/5, *Questiaux Report*, ub.2, para 192.
[160] General Comment 13, *supra* note 157.
[161] International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors : A Practitioners' Guide.* (Geneva: International Commission of Jurists, 2004)., p. 11.
[162] Cases cited in Henckaerts, Doswald-Beck, *Customary International Humanitarian Law, supra* note 11, p. 357. Also *Media Rights Agenda v. Nigeria, African Commission on Human and Peoples' Rights, Comm. no. 224/98 (2000), Media Rights Agenda v. Nigeria, African Commission on Human and Peoples' Rights, Comm. no. 224/98 (2000),* para 12.

a civilian was accused of disseminating separatist propaganda and tried in a special "National Security Court" in which two civilian and one military judge sat. The European Court found a violation of the fair trial provision of the European Convention on Human Rights because of the "close structural links between the executive power and the military officers".[163]

Even if the "regularly constituted" requirement can be interpreted as to allow special tribunals, if ordinary courts are operating normally, the creation of *ad hoc* tribunals or the transference of the trial of civilians to the military jurisdiction can hardly be justified and strictly required by the exigencies of the situation. The ECtHR examined the question in the *Lawless* case. The case of Northern Ireland shows that even in a very grave public emergency, trial of civilians by ordinary courts is possible, with some modification of the rules of procedure.[164] As the HRC has said multiple times, it is very hard for military courts trying civilians to comply with the requirements of fair trial rights, and this possibility thus largely remains theoretical. In the case of *Orlanda Fals Borda v. Colombia*, to judge civilians in offenses against the security of the state nullified the right to an independent and impartial tribunal not only because it violated the Colombian constitution but also because the emergency courts were not independent and impartial.[165]

As a further support for the customary nature of the right to a trial by an independent and impartial tribunal, the UN Basic Principles of the Independence of the Judiciary underline the need for a separation of powers between the executive and the judiciary, transparent

---

[163] *European Court of Human Rights, Case of Incal v. Turkey, 9 June 1998,* 41/1997/825/1031, para. 70-2.
[164] Oraa, *Human Rights in States of Emergency in International Law*, p. 118. During the period considered in the *Lawless* case, courts were operating normally but dissenting opinions said it would have been better to have special criminal courts because that could have avoided the long time of detention without trial.
[165] *Orlanda Fals Borda Et Al. Represented by Pedro Pablo Camargo v. Colombia, Communication no. 46/1979, U.N. Doc. CCPR/C/OP/1 at 139 (1985).*

mechanisms for the appointment and removal of judges and the assignment of cases.[166] The emphasis on independence and impartiality of the reviewing tribunal is even more important in times of emergency and the freedom from orders in the exercise of judges' duties is a minimum requirement of independence.[167]

In other words, an accused always has the right to be tried by a regularly constituted tribunal offering the guarantees of impartiality and independence. Special tribunals are only permissible to the extent that they fulfill the requirements of impartiality and independence.

3.2. The Law Applied

While this paper generally deals with article 14 of the ICCPR, the principle of *nullum crimen sine lege* (the principle of legality) contained in article 15 of the ICCPR is explicitly non-derogable. Suffice it here to say that the prohibition of non retroactive criminal laws (article 15 of the Covenant) is included in the list of non-derogable rights in article 4(2). The law under which someone is tried must also not impose a heavier penalty than the one applicable at the time when the offence was committed and there must be a clear and foreseeable legal basis for criminal prosecutions.[168]

The ICRC study on customary humanitarian law underlines that state practice establishes the rule as a norm of customary international law applicable in both types of armed

---

[166] *Basic Principles on the Independence of the Judiciary: Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders Held at Milan from 26 August to 6 September 1985 and Endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985*. See also L. M. Singhvi and UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur on the Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, *Final Report* (Geneva: UN, 1985).

[167] *European Court of Human Rights. Case of Piersack v. Belgium. Application no. 8692/79. Judgement 1 October 1982; Case of Sramek v. Austria, European Court of Human Rights,* 8790/79. para 38 where the requirement of independence was analyzed in considerable detail and no violation of independence was found. Compare to *Ettl and Others v. Austria, European Court of Human Rights,* 12/1985/98/146, para 34ff.

[168] Marks and Clapham, *International Human Rights Lexicon* and Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 371.

conflicts. Both protocols contain the rule and use the same language.[169] In addition, for states parties to the Convention of the Rights of the Child the same principle is also included in the convention and no derogation is permitted.[170]

The ICRC study provides a summary of how the principle of legality has so far been interpreted. Relevant for the current discussions on the "war on terror" is the idea that only the law can define a crime and prescribe a penalty and that the criminal law must not be extensively construed to an accused's detriment.[171] The ECtHR explained that this means that "the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omission will make him liable".[172] Therefore, overly broad "terrorist offenses" are not permitted under the principle of legality because the law must describe in "precise and unambiguous language" what the punishable offense is.[173] This requirement is equally valid in normal times as in times of emergency because it can be found in customary law.

The US Military Commissions are problematic with regard to these requirements. George Fletcher argues that the Military Commissions Act 2006 limit the commissions' jurisdiction to offenses against the law of nations (which due to domestic legal arrangements removes them from legislative competence). At the same time, the commissions are given excessive discretion in sentencing as no terms of imprisonment are provided and the commissions may otherwise impose any sentence. In Fletcher's view, this degree of discretion violates

---

[169] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, Entered into Force Dec. 7, 1978.* (hereinafter AP I), Article 75(4)c and "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, Entered into Force Dec. 7, 1978 (hereinafter AP II), Article 6(2)c.
[170] CRC, *supra* note 74, Article 40(2)a.
[171] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 372.
[172] *Case of Kokkinakis v. Greece, European Court of Human Rights,* Application no. 14307/88, para 52.
[173] *Castillo Petruzzi Et Al. Case [1999] IACHR 6 (30 may 1999),* para 121.

domestic American law as well as the international principle of equal protection before the law.[174]

In short, the principle of non-retroactive criminal laws is non-derogable and implies that there must be a clear and foreseeable legal basis for criminal prosecutions.

3.3. The Judicial Procedures

Apart from the nature of the tribunal and the law under which someone is tried, the procedural aspects are the third group of rights contained in article 14. Their aim is to ensure the equality of arms between prosecution and defense. Each aspect has been elaborated in case-law and sometimes in soft-law as well.[175] With slight variations, most guarantees in article 14 can also be found in humanitarian law and are also enumerated in statutes of the *ad hoc* criminal courts and the Statute of the International Criminal Court.[176] The following sub-sections discuss each aspect separately and identify to what extent it can be found in customary international law.

3.3.1. Does the Process need to be Public?

The first procedural right contained in article 14(1) concerns the right to a public hearing. It is clearly absent from the non-derogable due process rights in both additional protocols to the Geneva Conventions. Protocol I states that representatives of the protecting power must be entitled to attend the trial, unless, exceptionally, it is held *in camera* in the interests of security. In these exceptional circumstances, AP I demands that at least the judgment must be pronounced publicly.[177] The second additional protocol does not contain the requirement that the hearing be public. Not surprisingly, demands for proceedings behind closed doors

---

[174] George P. Fletcher, "On the Crimes Subject to Prosecution in Military Commissions," *Journal of International Criminal Justice* 5, no. 1 (March 1, 2007), 39-47.

[175] See in particular Louise Doswald-Beck, Robert Kolb and International Commission of Jurists, *Judicial Process and Human Rights: United Nations, European, American and African Systems: Texts and Summaries of International Case-Law* (Kehl, Germany; Arlington, Va.: N.P. Engel, 2004).

[176] The Rome statute additionally contains safeguards regarding the use of confession evidence. *Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90, Entered into Force July 1, 2002,* Article 65.

[177] AP I, Article 75(4)i.

are frequently made in times of emergencies. Moreover, states are allowed to restrict the right to a public hearing even when there is no emergency situation for reasons of morals, public order (*ordre public*) or national security in a democratic society or when it is in the interests of justice (e.g. for juvenile offenders).[178]

On the other hand, if states are legitimately allowed discretion to hold political trials *in camera*, the need for effective international supervision becomes all the more pressing. For instance, both the Paris Minimum Standards and the Questiaux Report suggest that if the right to public trial is suspended, at least the family of the accused should be permitted to attend.[179] The IACHR has set a precedent by sending its own delegates to observe emergency proceedings in Chile and in Colombia.[180] However, the requirement is absent in the Second Protocol and it therefore seems that states have a margin of discretion in limiting the publicity of a trial in an emergency situation; given that all other conditions of a valid derogation are fulfilled.

Acknowledging the difference between proceedings during ongoing emergencies and those conducted once the threat is over, the Nuremberg trials still offer an interesting historic account of the benefits of transparency of a trial. The Nazi trials were open to the public and correspondents and visitors from all part of the world attended the trials without restriction. There were public daily transcripts in German and English.[181] One of the chief prosecutors wrote about the advantages of conducting open trials. These advantages resound with topical strength during today's debates on the "war on terror" where most people turn their attention to the potential disadvantages of public trials and the need for secrecy. In Ferencz's words, the advantages however are equally important: "where the complete

[178] Restrictions or limitations are a separate concept than derogations and are dealt with in Article 5 of the Covenant.
[179] Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights during States of Emergency*, p. 21.
[180] Interamerican Commission on Human Rights, *Report on the Situation of Human Rights in Chile*,[1974]), Interamerican Commission on Human Rights, *Report on the Situation of Human Rights in Colombia.*,[1981]), p. 143.
[181] Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, 144-151, p. 145.

record is readily available for the scrutiny or criticism of legal scholars, the danger of tyranny is destroyed."[182]

For the purpose of identifying the non-derogable aspects of fair trial, the two additional protocols do however not permit the claim that publicity of the trial is non-derogable even if a degree of transparency of the proceedings often entails considerable advantages.

3.3.2. To be Promptly Informed About the Charges

There seems to be little or no controversy to the assertion that the right of the accused to be informed about the offenses is of customary nature and that therefore, no derogations are allowed from this aspect of fair trial.[183] The obligation to inform the accused of the nature and cause of the charges against him or her is contained in both additional protocols; both provisions were adopted by consensus.[184] The same obligation is contained in the Third and Fourth Geneva Conventions, the Statutes of international criminal tribunals and regional human rights instruments. Moreover, both additional protocols contain the requirement that information about the offenses must be provided "without delay".[185]

In short, no accused may be deprived of his or her right to be informed about the offenses and this right can not be eternally delayed.

3.3.3. Legal Assistance and Communication Between the Accused and his or her Representative

Legal assistance and confidential communication between the accused and counsel have to be provided to all accused. Especially if the publicity of the trial is severely restricted or abandoned, legal assistance is a crucial aspect of the fairness of a trial and an essential

---

[182] Ibid., p. 146.
[183] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 359.
[184] AP I Art. 75(4)a and AP II, Article 6(2)a.
[185] AP I Art. 75(4)a and AP II, Article 6(2)a. Article 14 of the ICCPR moreover requires that the information about the charges be provided "promptly and in detail in a language which he [the accused] understands". Both, article 75 of AP I and Article 6 of AP II require that this information is given "without delay". While they do not explicitly mention that the information must be provided in a language which the accused understands, a failure to ensure that the accused understands the charges so could easily be seen as a failure to provide "all necessary rights and means of defense".

safeguard to ensure that the defense is not disadvantaged *vis-à-vis* the prosecution. There is no doubt that the denial of legal assistance can never be justified. Denial of legal assistance would certainly violate the right of the accused to all necessary rights and means of defense (see below sub-section 3.3.4). The more complicated question concerns whether the right to legal assistance always includes the right to choose one's own counsel.

The ICRC study mentions that the denial of the right to counsel of one's own choice or any counsel was one of the bases for the finding of a violation of the right to fair trial in several war crimes trials after WWII.[186] Moreover, customary law suggests that the right to legal assistance must be provided much earlier than at the actual start of the trial.[187] If the interests of justice so require, the accused must be given free legal assistance.[188] Furthermore, the accused must be granted the right to communicate freely with counsel: the HRC and regional human rights tribunals have stressed the importance of confidential communication as an essential aspect of the means of defense.[189] Soft-law also indicates

---

[186] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 360. The ICRC study cite the following cases: *United States of America v. Alstötter Et Al. ("the Justice Case") 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948).* In the *Isayama* case, the accused were convicted for permitting and participating in "illegal and false trials and unlawful killings" because the executions were based on trials that involved falsified evidence, little or no evidence connecting the victims with the alleged illegal bombing was produced, the prisoners were denied Defence Counsel, the prisoners were denied the opportunity to obtain evidence or witnesses on their own behalf, the greater part of the proceedings were not interpreted to them and all the trials were completed in one day. *Trial of Lieutenant General Harukei Isayama and Seven Others, Case no. 32., United States Military Commission, Shanghei, 1st-25th July, 1946,* p. 69.

[187] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 361. As examples of soft-law standards, the Basic Principles on the Role of Lawyers use 48 hours as the time limit. *Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990,* Principle 7. The General Assembly Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment prescribes that access to legal representation must be given in "a matter of days". *Body of Principles for the Protection of all Persons Under any Form of Detention Or Imprisonment, G.A. Res. 43/173, Annex, 43 U.N. GAOR Supp. (no. 49) at 298, U.N. Doc. A/43/49 (1988),* Principle 15.

[188] Interamerican Commission on Human Rights, *Report on Terrorism and Human Rights*, *supra* note 132.

[189] Ibid., p. 363. See also General Comment 13, *supra* note 160, para 9. As well as *Civil Liberties Organization v. Nigeria, African Commission on Human and Peoples' Rights, Comm. no. 129/94 (1995)*.

that interviews between detainees and counsel may be within sight, but not within hearing of a law enforcement official.[190]

The Nuremberg trials allowed every defendant to be represented by counsel of his own selection, providing such counsel was qualified to conduct cases before German courts or was specifically authorized by the Tribunal. In practice, no German defense counsels were refused.[191] However, counsel of own choice does not expressly figure in the two additional protocols. The protocols include the requirement to "afford the accused before and during this trial all necessary rights and means of defense".[192] Both the *Questiaux Report* and Stavros argued fifteen years ago that the right to all necessary means of defense must be interpreted as guaranteeing counsel of own choice or at the very least legal aid counsel appointed by an independent body. The HRC found a violation in a long list of cases, including in derogation claim cases, where the accused was denied legal assistance or where appointed military officers acted as counsel.[193]

The European supervisory organs stressed that the legal assistance must be granted in all circumstances in order to ensure that "both sides of the case are actually heard".[194] They stressed that the accuser's lawyer is the "watchdog for procedural regularity"[195], especially if the government thinks that secrecy is necessary for the success of preliminary

---

[190] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 363 and *Body of Principles for the Protection of all Persons Under any Form of Detention Or Imprisonment, G.A. Res. 43/173, Annex, 43 U.N. GAOR Supp. (no. 49) at 298, U.N. Doc. A/43/49 (1988)*, Principle 18(4).

[191] *Nuremberg Tribunal: MG Ord. no. 7 Art IV (c); Uniform Rules of Procedure, Revised to 8 Jan. 1948,* Rule 7 (a).

[192] AP I 75 (4)a and AP II Article 6(2)a.

[193] *Beatriz Weismann Lanza and Alcides Lanza Perdomo v. Uruguay, Communication no. R. 2/8, U.N. Doc. Supp. no. 40 (A/35/40) at 111 (1980).*; *Antonio Viana Acosta v. Uruguay, Communication no. 110/1981 (31 March 1983), U.N. Doc. Supp. no. 40 (A/39/40) at 169 (1984). Sergio Euben Lopez Burgos v. Uruguay, Communication no. R.12/52 (6 June 1979), U.N. Doc. Supp. no. 40 (A/36/40) at 176 (1981)*; *Ana María Teti Izquierdo v. Uruguay, Communication no. 73/1980, U.N. Doc. CCPR/C/OP/1 at 132 (1985).*; *Miguel Angel Estrella v. Uruguay, Communication no. 74/1980, U.N. Doc. Supp. no. 40 (A/38/40) at 150 (1983).*; *Violeta Setelich v. Uruguay, Communication no. 63/1979, U.N. Doc. CCPR/C/OP/1 at 101 (1985).*; *Lilian Celiberti De Casariego v. Uruguay, Communication no. R.13/56, U.N. Doc. Supp. no. 40 (A/36/40) at 185 (1981); Civil Liberties Organization v. Nigeria, African Commission on Human and Peoples' Rights, Comm. no. 129/94 (1995)*. *See Also:* Interamerican Commission on Human Rights, *Report on the Situation of Human Rights in Argentina*,[1980]).., p. 223; and Interamerican Commission on Human Rights, *Seventh Report on the Situation of Human Rights in Cuba*, [1983]).

[194] *Ensslin, Baader and Raspe v. FRG, no. 7572/76, 7586/76, and 7587/76, Decision of 8 July 1978.*.

[195] *Case of can v. Austria (Application no. 9300/81), Judgment 30 September 1985*.

investigations. While the Inter-American commission held the view that the presence of counsel during interrogations is the only guarantee which can effectively protect the non-derogable right of the accused not to be forced to testify against himself,[196] the European Commission has expressly failed to endorse that conclusion and said it was not realistic.

It therefore seems that some limitations of the right to counsel of own choice to eliminate the danger of collusion may indeed be permitted in exceptional circumstances.[197] The fear that some lawyers could play the role of an intermediary with terrorist organizations was raised in Germany during the activities of the Red Army Faction. The German authorities enacted emergency laws that one the one hand provided for counsel of own choice. At the same time, the emergency law provided for the curtailment of contacts between the accused in custody and his or her legal counsel. These measures were not examined before the human rights supervisory organs and it is unclear whether they would have been tolerated. In any event, the curtailment of communications could only be imposed in order to avert "imminent danger to life, limb or freedom of persons" and suspicion had to be based upon hard evidence.[198] The International Commission of Jurists has pointed out that in cases of serious risks of lawyers being involved in terrorist activities; the alternative is not necessary the complete derogation from the provision to grant a freely chosen counsel. A screening process, such as the US security clearance, rather than the imposition by the state of military lawyers, would still allow the defendant to choose his or her counsel.[199] As long as such a screening process is supervised by an independent body and is not abused to the detriment of the defendant, such a restriction of choice could potentially be justified.

---

[196] See Stavros, *The Right to a Fair Trial in Emergency Situations*, 343-365, p. 228-29 discussing App. No 9370/81 v. Uk 35 D.&R. 75.
[197] *Kröcher and Möller v. Switzerland, European Commission on Human Rights, 43 DR 34 25 (1982),* No. 8673/78.
[198] Oraa, *Human Rights in States of Emergency in International Law*, p. 117.
[199] International Commission of Jurists (1952-), *States of Emergency: Their Impact on Human Rights: A Study*, p. 428.

However, in situations of international armed conflict, counsel of own choice must be granted. We therefore need to distinguish cases of derogation during *international* armed conflict and cases of derogation in all other emergencies. The right to counsel of own choosing is therefore only strictly non-derogable in an international armed conflict where humanitarian treaty-law, the Third Geneva Convention in particular, applies. In the first category of derogations, the humanitarian law of international armed conflict applies and counsel of own choosing must be assured to both categories of individuals (prisoners of war on the one hand and civilians on the other).[200] The only two exceptions are failure of the accused to choose or the appointment of a lawyer by the "Protecting Power".[201]

In the second category of derogations, where no international armed conflict occurs, the right to counsel of own choice might under extreme circumstances be derogated from because customary law does not seem to unequivocally prescribe the unrestricted choice of legal counsel. However, in all emergencies, all other conditions of derogations must be fulfilled and a government must show how the derogation from the counsel of own choice is strictly required by the exigencies of the situation. For instance, a government would have to justify why freely chosen representatives would collude with the accused and why all other measures, such as security screenings, could not eliminate these risks. In addition, sufficient time and confidentiality for communication between the accused and his or her counsel must be granted if the right to "all necessary rights and means of defense" discussed in the next sub-section is to be effectively protected.

---

[200] In contrast to assertions of the existence of "unlawful enemy combatants", there is no such category. An individual is either a combatant or a civilian. If a civilian takes up arms and takes part in the combat, he or she can of course be punished for taking up arms but the individual can not be denied the judicial safeguards when this determination is made. The ICRC commentary reads: "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. ' There is no ' intermediate status; nobody in enemy hands can be outside the law." Pictet and others, *The Geneva Conventions of 12 August 1949: Commentary*, p. 51.
[201] GVA III, Art. 105 and GVA IV, Article 72.

3.3.4. All Necessary Rights and Means of Defense and the Right to Examine Witnesses

As the previous sub-section has shown, there is disagreement whether the term "all necessary rights and means of defense" includes legal assistance of own choice. The most probable interpretation of the term refers not to one single aspect but whether overall, the accused is provided with rights and means that effectively allow him or her to defend his or her case. Even before the 1949 Geneva Conventions and the ICCPR were ratified, a Japanese World War II General was punished for not granting American Prisoners of War a proper opportunity to defend their case.[202] Already in 1946, national courts concluded that "inadequate opportunity of defense counsel to prepare its case would seem to be a denial of justice under international law."[203] Shortly after the Nuremberg trials, one of the Chief Prosecutors explained what they considered to be part of "all necessary means of defense": Ferencz not only mentions that the defense lawyers outnumbered the prosecuting attorneys,[204] that at least thirty days must be allowed for the preparation of the defense, that the opposing party is given the opportunity to question the authenticity or probative value of *all* types evidence[205] but that moreover, "the United States Government provides a separate mess for the defense lawyers, where three adequate meals including American coffee are supplied."[206]

The US Military Commissions as well as numerous tribunals around the world deprive individuals of their means of defense that are incomparably more essential than the free American coffee provided in Nuremberg. The elements of sufficient time and facilities to prepare the defense are without doubt part of all "necessary rights and means of defense". They are also identified to be part of customary humanitarian law. The Third and Fourth

---

[202] *In Re Yamashita, 1946, 66 Sup. Ct. 340,* p. 353.

[203] Quincy Wright, "Due Process and International Law," *The American Journal of International Law* 40, no. 2 (Apr., 1946), p. 406.

[204] Ferencz recalls that the highest number of prosecuting attorneys employed in Nuremberg for all trials was *75* as compared with the 191 German lawyers engaged for the defense. Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, 144-151, p. 147.

[205] *Nuremberg Tribunal: MG Ord. no. 7 Art IV (c); Uniform Rules of Procedure, Revised to 8 Jan. 1948*, No. 7 Art. VII.

[206] Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, p. 147.

Conventions as well as ICCPR are explicit to specify that the necessary means of defense include sufficient time and facilities before the trial to prepare the defense,[207] and the ICRC study considers the time factor and the access to adequate facilities to be a customary interpretation of the term "all necessary rights and means of defense" and found these elements in military manuals around the world. Importantly, it is also assumed to comprise access to *all* types of evidence. What counts is that an accused be given a chance to question the authenticity or probative value of evidence against him or her. [208]

A further question is whether the right to examine witnesses is a non-derogable aspect of a fair trial. In the ICCPR, the right to examine witnesses is mentioned separately from the right to all necessary means of defense. The right is provided for in the Third and Fourth Conventions and the first additional protocol. The second additional protocol however is silent on witnesses and therefore prevents the straightforward conclusion on the non-derogability of the right to examine witnesses on the basis of a customary law nature of the right.

Similar to the right to counsel of own choice, in an international armed conflict, where the Geneva Conventions apply, the right to examine witnesses is clearly part of the necessary judicial guarantees.[209] Even before the 1949 Conventions, the inability to examine witnesses for the prosecution was one of the bases of the finding of a violation of the right to a proper opportunity of defense in the post-WWII trials.[210] In derogation cases involving an *international* armed conflict, both the defense and the prosecution must have the same right to examine witnesses under the same conditions. The purpose of the provision is to avoid that unreliable evidence is collected without giving a fair chance to the defense to examine the incriminating witness or to ask that witnesses on his or her behalf be heard. The ECtHR

---

[207] GVA III, Article 105(3) and GVA IV, Article 72(2) and ICCPR 14(3)b.
[208] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 361
[209] GVA III, Article 105 and GVA IV, Article 72.
[210] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 365. The study discusses the *Isayama* and *Alstätter* cases, see *supra* note 186.

explained that the aim of the examination of persons whose statements are used to convict the accused is to enable the defense to demonstrate prejudice, hostility of unreliability.[211]

For all other derogation cases in the *absence* of an international armed conflict, the sensitive character of evidence and the frequent intimidation of potential witnesses in national emergencies seem to imply that in some situations of emergency, the right to obtain witnesses indeed can be curtailed to some extent.[212] Recent developments of the international tribunals have also raised questions about the allowance of witnesses testifying under anonymity.[213] The fear that terrorist organizations may take revenge against witnesses can be real and if witnesses are threatened, this might well discourage other witnesses from appearing in court.

As a way out of the competing interests between the safety of the witnesses and the right of the accused to examine them, the International Commission of Jurists and the International Law Association have pointed out that as a safeguard it should be accepted that the defense has the right to test the veracity of the evidence of the prosecution witnesses. There is no reason on the other hand to justify the derogation of the defendant's right to present and examine his or her own witnesses. Therefore, the non-derogable core of the right must be the real chance of the defense to do two things: first, to present exculpatory evidence by means of presenting his or her own witnesses and second, to have a real possibility to examine the credibility of the witnesses of the prosecution. Whatever the accommodation for witnesses of the prosecution are made, what counts is whether the defense has a reasonable chance to examine if a witness's statement is credible and trustworthy.

---

[211] *Bricmont v. Belgium, European Court of Human Rights, Application no. 10857/84, 07 July 1989,* para 81 and *Kostovski v. the Netherlands, Application no. 11454/85, 20 November 1989,* para 42-43.

[212] Great Britain. Commission on Legal Procedures to Deal with Terrorist Activities in Northern Ireland. and Kenneth Diplock , *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland.* (London: H.M.S.O., 1972), Command 5185.

[213] The question of witness anonymity is an important and interesting issue but beyond the scope of this thesis. See for instance: Christine M. Chinkin, "Due Process and Witness Anonymity," (January, 1997). Or Monroe Leigh, "Witness Anonymity is Inconsistent with due Process," (January, 1997).

In short, the non-derogable aspects of the term “all necessary rights and means of defense” must include sufficient time and facilities to prepare the defense, access to all evidence used to convict someone and a real opportunity to challenge the value of evidence, the right to present defense witnesses and a real opportunity to examine the credibility of the witnesses presented by the prosecution.

3.3.5. To be Tried in Presence

To right to be tried in presence is without doubt non-derogable. It is contained in all instruments containing fair trial provisions.[214] Both additional protocols explicitly contain clear language on the right to be tried in presence. Some states however made reservations to this right upon the ratification of the two protocols to the effect that this provision is subject to the power of a judge to exclude the accused from the courtroom; but only if the accused causes such disturbances to impede the progress of a trial.[215] The HRC and the ECtHR have stated that a hearing *in absentia* is possible only if the state has given effective notice of the hearing and the accused chooses not to appear.[216]

Interestingly, the statute of the Special Tribunal for Lebanon explicitly allows for trials *in absentia.* The Statute of the Tribunal for Lebanon however only permits such trials when an accused fails to appear in court or even to appoint a defense lawyer, and only on the condition that, where the indictment could not be served or notified to the accused, it was duly publicized. [217]

In any event, the non-derogable rule is that the accused has a right to be tried in presence, but he or she can possibly forfeit this right by serious misbehavior in the courtroom or by choosing not to appear. Any derogation containing a blanket denial of the right to be tried in

---

[214] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 366.
[215] Ibid., p. 366.
[216] *Daniel Monguya Mbenge v. Zaire, Communication no. 16/1977 (8 September 1977), U.N. Doc. Supp. no. 40 (A/38/40) at 134 (1983),* para 14.1 *Colozza v. Italy, European Court of Human Rights, Application no. 9024/80, 12 February 1985,* para 32.
[217] The Nuremberg International Military Tribunal also allowed for trials *in absentia* in exceptional circumstances (Article 12 of the Nuremberg Charter). See Paola Gaeta, "To be (Present) Or Not to be (Present): Trials in Absentia before the Special Tribunal for Lebanon," *Journal of International Criminal Justice* 5, no. 5 (November 1, 2007), p. 1166.

presence would thus be inconsistent with the state's other obligations under international law.

3.3.6. The Presumption of Innocence

The presumption of innocence is a clearly part of the non-derogable aspects of fair trial. The HRC singled out the presumption of innocence in its 29th General Comment and explicitly held it to be non-derogable.[218] Apart from the presumption of innocence, the HRC only vaguely referred to other "fundamental principles" of fair trial in the same GC.[219] This approach of the Committee must in my view be criticized. The Committee is certainly correct to conclude that the presumption of innocence can not be dispensed with, but singling it out in its GC comes at serious disadvantages. The right to be presumed innocent until proven guilty according to law is included in both protocols and there is no doubt that it is a non-derogable aspect of article 14 of the Covenant. But as this chapter shows, the same is true for other aspects of article 14. The specific mention of just one non-derogable aspect may possibly give states grounds to argue that other, equally important aspects of article 14 do not have the same weight.

As far as the interpretation of the presumption of innocence is concerned, there is considerable case-law that specifies its meaning. In the *Ohashi* case, a war crimes trial after the Second World War, the court stressed that judges must not have preconceived notions of the outcome of the trial and that the court must satisfy itself that the accused was guilty.[220] This interpretation of the presumption of innocence is still the same today. The

---

[218] General Comment 29, *supra* note 7, para 11 and 16. The wording of paragraph 11 however makes clear that the presumption of innocence is not the only non-derogable aspect of Article 14: "…including the presumption of innocence" (emphasis added).
[219] Ibid., para 11.
[220] *Trial of Sergeant-Major Shigeru Ohashi and Six Others, Australian Military Court, Rabaul,20TH-23RD March, 1946, Law-Reports of Trials of War Criminals, the United Nations War Crimes Commission, Volume V, London, HMSO, 1948,* pp. 30-1. Recently, the HRC confirmed this interpretation and added that the presumption of innocence was violated when public statements made by high ranking law enforcement officials portrayed the author as guilty. See *Mr. Dimitry L. Gridin v. Russian Federation, Communication no. 770, U.N. Doc. CCPR/C/69/D/770/1997 (2000),* para. 8.3.

burden of proof lies on the prosecution, while the defendant has the benefit of the doubt.[221] There is also no disagreement that the presumption of innocence implies that guilt must be proven according to determined and consistent standards.[222]

Therefore, we can clearly include the presumption of innocence in the list of non-derogable aspects of due process.

3.3.7. The Right not to be Forced to Testify Against Oneself or to Confess Guilt

No accused individual must be forced to confess guilt or to self-incriminate. This safeguard is obviously closely linked to the prohibition of torture and cruel, inhuman or degrading treatment. In order to protect the non-derogable freedom from torture and cruel treatment, the prohibition of forced self-incrimination must be provided in all circumstances.[223] The right is clearly enshrined in both additional protocols and without doubt part of customary law. This was already considered to be the case in 1942, when the US Supreme Court held that the use of a confession obtained under compulsion constituted a denial of the right to fair trial.[224]

Moreover, because most states are now also parties to the UN Convention Against Torture (CAT),[225] they can under no circumstances allow statements which have been made as a result of torture as evidence in proceedings, except against the perpetrator of the torture. Article 2(2) of the Convention against Torture states that "[n]o exceptional circumstances

[221] General Comment 13, *supra* note 160, para 7.
[222] *Allenet De Ribemont v. France, European Court of Human Rights, Application no. 15175/89, 10 February 1995,* para 35ff.
[223] *Report on the Situation of Human Rights in the Republic of Guatemala*, Chapter IV.
[224] *U.S. Supreme Court Ward v. Texas, 316 U.S. 547 (1942),* p. 555. The court obviously applied domestic US law. It established that "the use in a prosecution for murder of a confession obtained by officers of the law by coercing the accused is forbidden by the due process clause of the Fourteenth Amendment."
[225] *Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, G.A. Res. 39/46, [Annex, 39 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc. A/39/51 (1984)], Entered into Force June 26, 1987,* Article 15.

whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture".[226]

Therefore, any derogation that would relax the prohibition of compelling an accused to testify against him- or herself or to confess guilt would be inconsistent with the state's obligations in customary law. At the same time, this would violate the state's general obligation under the Covenant to safeguard the non-derogable rights mentioned in article 4(2) and in most cases; it would also infringe the Torture Convention. In short, the right of the accused not to be forced to testify against him- or herself or to confess guilt must be considered non-derogable.

3.3.8. How Speedy does a Trial Need to be? Administrative Detention and Fair Trial

The right to proceedings of a reasonable length is *not* included in the lists of the two additional protocols and seems to be the clearest candidate of a derogable aspect of article 14 together with the publicity of the trial. The benefits of speedier trials in emergency situations are most likely outweighed by dangers of unsafe verdicts.[227] However, this can not mitigate the need for an independent review over emergency detention. The right to a proceeding of a reasonable length is closely related to the importance of effective *habeas corpus* review and the problem of administrative detention. The European supervisory organs have recognized that emergency situations quite often, if not always, result in detention of persons who do not pose a real threat to security.[228]

---

[226] Convention Against Torture (CAT), *supra* note 225, Article 2(2). A good faith interpretation of the Convention suggests that also the complete ban of evidence gained as a result of cruel and inhumane treatment (and not just torture itself) must be non-derogable. Some have argued the opposite and have argued that because art. 2(2) CAT only refers to torture, but not to inhuman or degrading treatment, this would indicate that the use of evidence from inhuman treatment, as opposed to torture, could be allowed in proceedings. This is not only inconsistent with the object and purpose of the treaty but also inconsistent with the ordinary meaning of Article 2 of the CAT which asks state to take *effective* measures to prevent torture. Allowing any form of coercion is hardly such an effective preventive measure. In addition, the prohibition of cruel and inhumane or degrading treatment or punishment is clearly and explicitly a non-derogable provision of the ICCPR. Moreover, as this sub-section has shown, compelling an accused to testify against him or herself is prohibited in customary as well as in treaty humanitarian law.
[227] Stavros, *The Right to a Fair Trial in Emergency Situations*, p. 358.
[228] *Lawless v. Ireland, supra* note 57, para 39. And: Ireland v. UK, supra note 65 , para 81.

The actual length of time is not specified in any instrument and must therefore be judged on a case-by-case basis taking into account factors such as the complexity and context of the case, the behavior of the accused.[229] The ECtHR in *Lawless* and in *Ireland v. UK* stressed the importance of the review of detention.[230] The fair trial implications of administrative detention are still unsettled,[231] and there is a dilemma between relatively high standards of due process to be afforded before tribunals but relatively low standards applicable to administrative detention in times of emergency. The risk to provide an incentive for states to resort to long administrative detention is clearly to the detriment of the rights of the accused.[232] The IACtHR in its famous advisory opinion on *Habeas Corpus in Emergency Situations* ruled that some form of limited judicial review of detention is non-derogable.[233] In other words, the fact that the derogability of right to a speedily trial has been recognized in order to allow some leeway for the investigating and prosecuting authorities to assemble a case does not mean that administrative detention is permitted without limits. Administrative detention is designed as a stop-gap measure to ensure response to immediate threat and must not become punitive in nature. As the Inter-American supervisory organs observed, denying access to a judicial review of detention effectively means converting the executive into a part of the judiciary.[234] It should also be mentioned that detention for prolonged periods without a fair trial violates the imposition of a penalty without prior benefit of trial and is difficult to justify as strictly required by the exigencies of

[229] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 364.
[230] Lawless v. Ireland, *supra* note 63.
[231] The question is complicated because some states have made reservations about the fair trial implications of administrative detention expressed by European Convention organs. Some supervisory organs have focused on the right to liberty in the first place, rather than the fair trial provisions. See for instance: (Lawless v. Ireland, para 111-2.). The HRC and IAC have applied the fair trial provisions (Article 14 of the ICCPR and Article 8 of the American Convention respectively.
[232] Stavros, *The Right to a Fair Trial in Emergency Situations*, p. 363.
[233] *Habeas Corpus in Emergency Situations, supra* note 120, para 35. See also the European Court of Human Rights: *Case of Lawles v. Ireland, supra* note 63, para. 36 and *Case of Ireland v. the United Kingdom, supra* note 64, para 36.
[234] Stavros, *The Right to a Fair Trial in Emergency Situations*, p. 363.

the situation. In explicit wording, the Human Rights Committee stressed that a state party may not depart from the requirement of effective judicial review of detention.[235]

Therefore, states may derogate from the provision to be tried without undue delay, but they must at the very least provide a limited form of judicial review in order to effectively monitor and protect the non-derogable rights of the detained individuals.

3.3.9. Assistance of an Interpreter

If the accused can not understand the language used in the proceedings, the ICCPR prescribes that he or she has the right to the assistance of an interpreter. This requirement is however not explicitly contained in any of he two additional protocols. The authors of the ICRC study mention however many indications that even where this requirement is not explicit, it is part of the parcel of the right to fair trial.[236] Concluding that this requirement is entirely non-derogable would however be inconsistent with my methodology to consider the convergence of the two additional protocols.

It nevertheless seems safe to conclude that if the accused does not understand the language of the proceedings, it is part of his or her "necessary means of defense" that at the very least a counsel of own choosing is competent to defense the case in the language employed by the prosecution and the judges.

3.3.10. The Right to be Advised of Available Remedies and their Time-Limits in Case of Conviction

Paragraphs 5 and 6 of article 14 of the Covenant prescribe the right to appeal and the right to compensation in cases of miscarriage of justice. It is difficult to argue that both these

---

[235] See *Concluding Observations of the Human Rights Committee: Israel. CPR/C/79/Add.93. 18 August 1998,* para. 21. See also the recommendation by the UN Sub-Commission concerning a draft third optional protocol to the Covenant: "The Committee is satisfied that States parties generally understand that the right to *habeas corpus* and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole." *Official Records of the General Assembly, Forty-Ninth Session, Supplement no. 40 (A/49/40), Vol. I, Annex XI, Para. 2*.

[236] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 366.

aspects are part of customary humanitarian law. The ICRC study does therefore not directly speak of the right to appeal but of the right to be advised of available remedies. The right to appeal is not directly contained in the two Protocols of 1977 and the ICRC Commentary states that at that time there was not enough national legislation on the right to appeal in order to make this an absolute requirement – even though no one should be denied the right to appeal where it exists.[237] The ICRC study now argues that there have been significant developments in both national and international law since that time.[238]

What is however clear is that both additional protocols provide that convicted persons must be advised of their remedies and the time limits within these can be exercised.[239] The right to be informed whether and until when appeal is available is therefore a well-established basic aspect of the right to a fair trial. Whether also the right to appeal itself is a non-derogable component is more difficult to conclude but open to debate. The Inter-American Commission has affirmed this interpretation[240] and the right to have the conviction and sentence be reviewed by a higher tribunal according to law is included in the Siracusa Principles.[241]

In short, the right to be advised of available remedies is a minimum non-derogable aspect of fair trial. Even if it would be a stretch to argue that the right to appeal is part of customary law, the state has a duty to provide an effective legal remedy for violations of non-derogable rights under the general clause of the ICCPR (article 2(3)). This makes broad derogations from the right to appeal difficult to justify.

3.3.11. Ne bis in Idem

The final paragraph of article 14 of the Covenant stipulates that no one shall be liable to be tried or punished more than once for the same offense. The ICRC's Study on customary

---

[237] Claude Pilloud and others, *Commentary on the Additional Protocols of 8 June 1977* (Geneva; Lancaster: Nijhoff ; Kluwer Academic [distributor], 1987).
[238] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 369.
[239] AP I, Article 75(4)j and AP II, Article 6(3).
[240] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 369 discussing Interamerican Commission on Human Rights, *Report on Terrorism and Human Rights* and *Inter-American Commission on Human Rights, IACHR, Juan Carlos Abella v. Argentina, supra* note 41.
[241] Siracusa Principles, *supra* note 114, Principle 60. For comment see Daniel O'Donnell, "Commentary by the Rapporteur on Derogation," *Human Rights Quarterly* 7, no. 1 (Feb., 1985), p. 29.

humanitarian law concludes that while the so-called *ne bis in idem* rule is of customary nature even if it does not figure in the two protocols. The most probable reason why it was not explicitly included in the 1977 protocols is to allow reopening proceedings at a later time. The ICRC study argues that in exceptional circumstances this is even possible under article 14 of the Covenant.[242] For instance, where there is evidence of new facts or there has been a fundamental defect in the previous proceedings,[243] a trial may be reopened. Moreover, the *ne bis in idem* rule should also be distinguished from prosecutions for the same offense in different states.[244] Therefore, emergency measures have to be consistent with the prohibition not to try someone more than once for the same offense while it is permissible under certain limited circumstances to reopen proceedings at a later stage or in a different state's jurisdiction.

---

[242] Henckaerts, Doswald-Beck, *Customary International Humanitarian Law. Volume I, Rules*, p. 370.
[243] Protocol 7 to the European Convention on Human Rights is explicit with regard to this exception to the *ne bis in idem* rule: Protocol no. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, Entered into Force Nov. 1, 1988, Article 4.
[244] Henckaerts, Doswald-Beck., *Customary International Humanitarian Law. Volume I, Rules*, p. 370, note 471. See also General Comment 13, supra note 160, para 19.

CONCLUSION

International law prescribes a number of judicial safeguards which have to be provided to all accused individuals. The reactions to the September 11, 2001 attacks have renewed the debate on what is permissible in situations of exigency. Many complex legal and not-so legal arguments surround the "war on terror". To determine the minimal list of fair trial guarantees to be provided to all suspects, this thesis has suggested a straightforward argument that renounces to engage with unnecessary legal confusion around the applicability of humanitarian treaty-law and the status of detained individuals in international law. Instead, it has examined which judicial standards have to be provided in all situations by virtue of customary international law and the prohibition of derogation measures which are inconsistent with the minimum humanitarian floor of due process.

Human Rights Law in Armed Conflict

This thesis has started by outlining the reasoning behind the continuous application of human rights law in armed conflicts. Building on the International Court of Justice's two advisory opinions, Chapter I has explained that human rights law continues to apply during armed conflict, except by the operation of the derogation regimes contained in some international human rights instruments. Derogation clauses were included in the International Covenant on Civil and Political Rights to allow a state to defend its population from threats threatening the life of the nation. At the same time, these derogation clauses contain a number of criteria and regulate how far the authorities can go in temporarily curtailing some human rights. In particular, the derogation clause of the Covenant as well as of the regional human rights instruments prescribes that a derogation is not valid if it is inconsistent with the state's other obligations under international law.

This principle of consistency can be used to identify which aspects of the provision on fair trial, article 14 of the Covenant, should be considered non-derogable. Because customary law is binding on all states, it provides a straightforward way to identify the minimum floor

of fair trial that has to be afforded to all individuals, irrespective of whether conventional humanitarian law applies and whatever the status of the individual in international law is. If a state claims to be in a situation of emergency but denies the existence of an armed conflict, it nevertheless has to comply with the minimum guarantees applicable to both types of armed conflict. The standards common to both types of armed conflict prescribe what is permissible in the gravest type of emergency and there is no plausible argument why an emergency falling short of the armed conflict threshold would allow more drastic measures. I have argued that those aspects of fair trial which are common to the legal regimes dealing with international armed conflict on the one hand and internal armed conflicts on the other must be provided in all types of emergencies, including those which fall short of the legal threshold of an armed conflict. Any derogation from these aspects would be inconsistent with customary law, and therefore invalidate the derogation.

Non-derogable Judicial Safeguards

The result is a list of non-derogable judicial safeguards and a strong contention against all arguments that certain individuals are situated in an unspecified gap between two bodies of law. To say the same in a more provocative way: It is time that the current administration of the United States ends the infinite quarrels about the legal norms applicable to detainees in the "war on terror" before at the very least the non-derogable rights of the detainees that are held under its authority are protected. There are simply no legal black holes where no international rules apply. The non-derogable rights are the minimum yardstick from which no reduction is permissible. It should be emphasized that this thesis has not addressed the question which higher standards simultaneously apply to the US authorities in bringing suspected terrorists to trial. Because the United States has not notified any derogation under article 4(3) of the Covenant, it would not only be assessed with regard to compliance of the non-derogable provisions but the entire article 14. It does not help the US government if it proclaims itself to be in an emergency situation. The non-derogable aspects of judicial guarantees can never be dispensed with.

Based on the convergence of the rights contained in article 75 of the first additional protocol and article 6 of the second protocol, the following list of fair trial guarantees must be considered applicable in all circumstances:

1. The right to a regularly constituted tribunal which offers the essential guarantees of independence and impartiality
2. The principle of non-retroactive penal laws
3. The principle of legality (only the law can define a crime)
4. The right to be informed promptly of the charges
5. The right to legal representation, principally of own choice (or at the very least chosen by an independent organ), and the right to communicate with counsel. If justice so requires, the right to free legal assistance
6. The right to all necessary rights and means of defense (including sufficient time and facilities to prepare the defense, access to all evidence and the opportunity to challenge the value of evidence and the credibility of the witnesses of the prosecution, the right to obtain attendance and examination of defense witnesses and the chance to understand the proceedings if conducted in a foreign language)
7. The right to be tried in presence
8. The presumption of innocence
9. The right not to be forced to give incriminatory evidence or to confess guilt
10. The right to a review of emergency detention
11. The right to be advised of available remedies and their time limits and the right to appeal where it normally exists
12. The right not to be retried after a final judgment

Derogations are an essential part of the rule of law in emergency situations and it is always preferable for the rule of law if states that are convinced to be in a situation of emergency properly derogate from a provision instead of disregarding the legal regime. Frequently however, there is a profound gap between the theory and practice of the resort to emergency powers by states and corresponding oversight by domestic legal mechanisms.[245] The same analysis is equally applicable to the practice of states with regard to derogation and the oversight offered by international legal bodies.[246] The drafters of the ICCPR have empowered the HRC to consider a state's "other obligations under international law". The Committee is not only allowed but mandated to examine a state's adherence to international humanitarian law and to customary international law when it examines a derogation claim.

---

[245] International Commission of Jurists (1952-), *States of Emergency: Their Impact on Human Rights: A Study* (Geneva, Switzerland: The Commission, 1983), p. 305.

[246] Gross and Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, p. 304.

The Misleading Confusion About Applicable Legal Standards

Critics could ask whether this thesis is overly concerned with procedural fetishism and technicalities. Clapham and Marks argue that attention to procedural aspects distracts from the underlying context and the systemic phenomena instead of the particular event of the trial itself (or the absence thereof).[247] The "war on terror" raises fair trial questions that should not simply be viewed in technical terms. Behind the formal procedural questions raised against the background of individual detained in "legal black holes" lays a climate of fear and a sentiment of vulnerability of powerful nations. This does, however, not decrease the need for careful legal analyses. On the contrary, it should increase the attention to such questions. The confusion – sometimes, it seems, willfully encouraged – about applicable legal standards must be met with attempts to clarify the international regime applicable even in the worst types of emergency.

The Cost of Ignoring International Law

Contrary to what is sometimes expressed, international law was not created by do-gooders and law professors. Humanitarian law in particular has been drafted by experienced diplomats and military leaders, fully taking into account the security needs of a state confronted with dangerous adversaries.[248] The drafters of the ICCPR spent considerable time and thoughts on regulating what a government should be allowed to do in difficult situations. Armed conflict and terrorism were very much part of what they understood as "an emergency threatening the life of the nation". States have voluntarily felt the need to insert the derogation provision as the hinge between international human rights law and humanitarian law. It is therefore not warranted to claim the inappropriateness of international law for these exigencies. Rather, we need to stress the advantages of the framework of the rule of law and the regulation of emergency measures.

---

[247] Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford; New York: Oxford University Press, 2005), p. 161.
[248] M. Sassoli, "The Status of Persons Held in Guantánamo Under International Humanitarian Law," Journal of International Criminal Justice, no. 1 (2004), p. 104.

For instance, abiding by the derogation regime and strictly safeguarding non-derogable rights can have significant benefits. It would almost certainly increase the prospects of international law enforcement cooperation much needed in the "war on terror". Other states would be more willing to hand over sensitive information, suspects or finances to the United States if they were sure that international standards and procedures are followed. Other states would also be more willing to use evidence gained by US authorities in their domestic courts if they were comfortable that the evidence was gained without involving cruel, inhuman or degrading treatment or even torture. To illustrate this point, transatlantic judicial cooperation was a major issue in the Hamburg terror trials involving suspected organizers of the 9/11 attacks.[249] For reasons of state security, the American authorities refused to grant the German court access to a key-witness, who was at that time allegedly detained in American custody. The unavailability of the key-witness in practice meant that the German Constitutional Court quashed a decision by the lower court in Hamburg because of the failure to carefully weighting the evidence in a case where a key-witness was absent.[250] Motassadeq was accused of over 3,000 counts of accessory to murder and of membership in a terrorist organization. The German courts expressed doubts about the fairness of the trial in the absence of the key-witness and rejected the conviction on appeal. Moreover, it was thought that the interrogation records provided by the CIA would have to be excluded from the German courts; first because it was felt that they were gained through illegal interrogation techniques and second because the US authorities demanded that they could not be used beyond the intelligence community and the German courts do not allow for non-disclosed documents. Mzoudi, an associate of Mohammed Atta, was acquitted in February of 2004 after the same key-witness could not be made available. The United States refused to send him to Germany and the German courts did not trust the American

[249] Timo Kost, "Mounir El Motassadeq – A Missed Chance for Weltinnenpolitik?" *German Law Journal* 8, no. 4 (1 April 2007, 2007).

[250] Federal Court of Justice (*Bundesgerichtshof* – BGH), decision of 16 November 2006, published in Neue JuristischeWochenschrift, 384 (2007). Federal Constitutional Court, (*Bundesverfassungsgericht* – BverfG), decision of 10 January 2007, Reg. no. 2 BvR 2557/06. (Motassadeq cases). BGH, decision of 4 March 2004, published in Neue juristische Wochenschrift, 1259 (2004). 1262. BVerfG, 2 BvR 1382/02 vom 9.5.2003,
(Abdelghani Mzoudi), http://www.bverfg.de/entscheidungen/rk20030509_2bvr138202.html

interrogation records. Some observers believe that he would have been convicted had the witness been made available or had there been “trustworthy” interrogation protocols.

The proper adherence to the international norms contained in the ICCPR in general and the derogation procedure in particular might therefore entail significant advantages and enhance the trust of other states that the US administration is acting in good faith and in accordance with the norms it has itself decisively helped to create. Even if negative in tone, derogations are a form of validation for a government invoking emergency powers. They have an important potential to legitimize governmental action and there is no good reason why the US should not benefit thereof.[251] This legitimization was however voluntarily conditioned by the drafters of the Covenant. For the international rule system, it is highly problematic that this legitimization model seems to have lost attraction for the most powerful member and the original force behind the regime in question. Moreover, had a derogation clause been invoked by the United States in the immediate aftermath of September 11, the issue of the existence of an emergency would almost certainly not have been subject to dispute. This might be less clear today.[252]

The US Military Commissions Act

Apart from the derogation of the United Kingdom, no other notices of derogation from the ICCPR in respect of post-September 11 legislation have been submitted as of the time of writing. The US, India or Germany have made legislative changes after the attacks on the World Trade Center.[253] It is possible that some of these new laws do not breach the Covenant, and therefore do not necessitate derogation. However, this is not only highly unlikely, but nearly unconceivable to hold true for the US Military Commissions Act. To mention just a few problems with the Act: Arrested persons have not been informed on the charges against them at the time of arrest; they have not been brought promptly before a

---

[251] Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990). See also Oscar Schachter, "Towards a Theory of International Obligation," *Virginia Journal of International Law* (1967), p. 300.
[252] Duffy, *The "War on Terror" and the Framework of International Law*, p. 345.
[253] Joseph, *supra* note 61, p. 96.

judicial authority; and there are legitimate doubts about the independence and impartiality of the established Military Commissions. The extremely questionable rules for interrogation and for bringing forward evidence can hardly be seen to prevent torture and inhumane treatment. The few individuals who have actually been brought before a judge have complained about the lack of competent interpreters and restrictions on communication with their defense lawyers whom they often do not trust. In addition, long lasting detention in conditions of punitive character deny the presumption of innocence of its meaningfulness and there is a considerable difference in the treatment between US nationals and others in relation to the trial modalities. Further, the denial of an appeal, even in non-capital cases, does not seem to be a proportionate response to the terrorist emergency.[254]

The fact that the US has not sought (at least not formally) to derogate from the ICCPR can be interpreted in two ways: First, it can mean that the US appears to accept that the full range of the human rights provisions of the Covenant apply. The only other interpretation is that the US administration disregards its obligations in respect of the operation of the human rights procedures. Because, in practice, the US administration considers itself in a situation of emergency,[255] Duffy writes that the failure to notify derogation is difficult to interpret as anything other than contempt for international legal process.[256]

The legal status of detainees at Guantánamo Bay (and elsewhere) must be assessed on a case-by-case basis. No one disputes that the United States have a right to interrogate and to prosecute suspected terrorists for alleged actions that amount to war crimes or any other

---

[254] Ibid., note 4. See also David W. Glazier, "A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions," *Lewis & Clark Law Review, Forthcoming* (. and David Glazier, "Kangaroo Court Or Competent Tribunal?: Judging the 21st Century Military Commission," *Virginia Law Review* 89, no. 8 (Dec., 2003), 2005-2093.

[255] *Proclamation no 7453, Declaration of a National Emergency by Reason of Certain Terrorist Attacks, 66 Fed Reg 48, 199 (14 Sept 2001).* The absence of formal derogation has already been interpreted within the UN. The United States was assessed according to the full standards of the Covenant.

See E/CN.4/2006/120, "Situation of Detainees at Guantánamo Bay - Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Leandro Despouy; the Special Rapporteur on Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, Mr. Manfred Nowak; the Special Rapporteur on Freedom of Religion Or Belief, Ms. Asma Jahangir and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Mr. Paul Hunt" (2006).

[256] Duffy, *The "War on Terror" and the Framework of International Law*, p. 347.

acts that would be crimes if committed by US soldiers. However, safeguards such as the prohibition to coerce prisoners to testify against themselves when interrogated are fundamental, non-derogable rules of law. Judicial authorities should also be remembered that if the Third Geneva Convention applies as treaty-law to all or even just one single of the detained individuals, willfully depriving them of the rights of fair and regular trial amounts to a grave breach of the same Convention. Officials risk prosecution for these breaches in foreign jurisdictions as soon as any state party to the Convention decides to expend the necessary political will.[257] Indeed, each High Contracting Party to the Geneva Conventions is under an obligation to search persons alleged to have committed or to have ordered to be committed grave breaches in order to bring such persons before its own courts.

Yet, this thesis has only focused on the rules applicable irrespective of the legal status of detainees under humanitarian law and has clearly shown that all detainees, wherever they are detained and in whatever circumstances they were detained, must enjoy at the very least the non-derogable guarantees. Interestingly, the post-World War II trials on which the current US administration relies to defend the Military Commissions Act have themselves affirmed already in the 1940ies that these military commissions are regulated under international law.[258] The argument that international law does not prescribe specific safeguards for the use of such special proceedings can therefore be found even before the ratification of the Covenant and the 1949 Geneva Conventions.

---

[257] GVA III, Articles 129 and 130.

[258] In the *Yamashita* case, the United States Supreme Court in 1946 sustained the decision of a Military Commission appointed by General Mac-Arthur in the Philippines sentencing General Yamashita for failure to prevent atrocities during the Japanese occupation of the Philippines. The Chief Justice writing for the Court declined to hold that "due process" in the sense applicable to domestic American tribunals applied to a tribunal established under international law. Except as Congress had expressly declared otherwise, the competence and procedure of such tribunals were, he thought, *determined by international law*. Quincy Wright, "Due Process and International Law," *The American Journal of International Law* 40, no. 2 (Apr., 1946), 398-406, p. 399. In *Ex parte Qurin,* Congress sanctioned to any use of the military commission *contemplated by the common law of war* (emphases added). *In Re Yamashita, 1946, 66 Sup. Ct. 340,* p. 19-20.

Challenges for the International Human Rights Regime

Derogation provisions are at the same time a matter of legitimating government action and of protecting human rights. Article 4 is of fundamental importance for the integrity of the protection for human rights under the Covenant. In the words of the HRC, "on the one hand, [the Covenant] allows for a State party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards."[259] The ambiguities surrounding the concept of armed conflict in the "war on terror" highlights the need for a more rigorous approach on the part of treaty bodies to overseeing the validity of the assertion of a state of emergency and the measures taken.[260]

Against the background of legal debates surrounding the "war on terror", this thesis has stressed that a minimum of non-derogable provisions of fair trial must be granted in all circumstances. Clarifying and affirming the minimum standards of due process is of fundamental importance. It is deplorable that there is a need to do so if one considers the multiplicity of further challenges faced by the international human rights regime. Bearing in mind for instance the marginalization of social, economic and cultural rights, in the face of adamant poverty and inequalities that need focused and long-term international attention, it is not encouraging that international lawyers are busy defending the absolute prohibition of torture, cruel and inhuman treatment or the basic requirements of a fair trial discussed in this thesis. These requirements have not arbitrarily been set up by human rights activists. They have been purposefully designed by the delegations drafting the International Bill of Rights and states should immediately enhance the willingness of the oversight mechanisms to examine the phenomenon of emergency measures more robustly.

---

[259] General Comment 29, *supra* note 7, para 1.

[260] Joan Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights," *European Journal of International Law* 14, no. 2 (April 1, 2003), p. 252.

BIBLIOGRAPHY

International Court of Justice Cases

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America). Vol. 1986 I.C.J. 14, General List No. 70, International Court of Justice, Judgment of 27 June 1986.

Legality of the Threat Or use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226.

Legal Consequences Of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004.

Multilateral Treaties

American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, G.A. Res. 39/46, [Annex, 39 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc. A/39/51 (1984)], Entered into Force June 26, 1987.

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (no. 49) at 167, U.N. Doc. A/44/49 (1989), Entered into Force Sept. 2 1990.

Council of Europe Convention on the Prevention of Terrorism Warsaw, 16.V.2005.

*Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, 12 August 1949, TIAS no. 3365, 75 UNTS 287*a.

*Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, TIAS no. 3364, 75 UNTS 135*b.

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Entered into Force Mar. 23, 1976.

International Covenant on Economic, Social and Cultural Rights, Adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, Entry into Force 3 January 1976.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, Entered into Force Dec. 7, 1978.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, Entered into Force Dec. 7, 1978.

Protocol no. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, Entered into Force Nov. 1, 1988."

Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90, Entered into Force July 1, 2002.

Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 3 Bevans 1179.

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

U.N. Documents (Without Cases Before the Human Rights Committee)

A/810 (1948). Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

A/40/146 (1985). Basic Principles on the Independence of the Judiciary: Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders Held at Milan from 26 August to 6 September 1985 and Endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

A/43/49 (1988). Body of Principles for the Protection of all Persons Under any Form of Detention Or Imprisonment, G.A. Res. 43/173, Annex, 43 U.N. GAOR Supp. (no. 49) at 298.

A/CONF.144/28/Rev.1 at 118 (1990). *Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990.*

A/49/40 (1994). Official Records of the General Assembly, Forty-Ninth Session, Supplement no. 40 (A/49/40), Vol. I, Annex XI.

A/ES-10/248. *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13- Tenth Emergency Special Session- Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory - Annex I - Summary Legal Position of the Government of Israel,* 2003.

A/HRC/2/7. *Report of the Special Rapporteur on Extrajudicial, Summary Or Arbitrary Executions, Philip Alston; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari MISSION TO LEBANON AND ISRAEL,* 2006.

A/HRC/6/17/Add.3. "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Mr. Martin Scheinin) - Mission to the United States of America." (2007).

E/CN.4/SR. 195. "Summary Records of the Commission on Human Rights, Fifth Session."

E/CN.4/Sub.2/1982/5. *Questiaux Report*, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency.*

E/CN.4/1985/4, Annex (1985). United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights."

E/CN.4/Sub.2/1990/34. *The Administration of Justice and the Human Rights of Detainees: The Right to a Fair Trial: Brief Report / Prepared by Stanislav Chernichenko and William Treat in Accordance with Resolution 1989/27 of the Sub-Commission,* 1990.

E/CN.4/Sub.2/1991/29. *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening, Second Report Prepared by Mr. Stanislav Chernichencko and Mr. William Treat in Accordance with Resolution 1990/18 of the Sub-Commission and Resolution 1991/43 of the Commission on Human Rights*. Geneva: United Nations, 1991.

E/CN.4/1995/116 (1995). Declaration of Minimum Humanitarian Standards, Reprinted in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995) (Declaration of Turku).

E/CN.4/Sub.2/1997/19. *Tenth Annual Report and List of States which, since 1 January 1985, have Proclaimed, Extended Or Terminated a State of Emergency, Presented by Mr. Leandro Despouy, Special Rapporteur Appointed Pursuant to Economic and Social Council Resolution 1985/37*1997.

E/CN.4/1999/92. *Report of the Secretary-General Submitted Pursuant to Commission Resolution 1998/29: Fundamental Standards of Humanity,* 1998.

E/CN.4/2000/94. *Report of the Secretary-General Submitted Pursuant to Commission Resolution 1999/65: Fundamental Standards of Humanity,* 2000.

E/CN.4/2001/91. "Fundamental Standards of Humanity: Report of the Secretary-General Submitted Pursuant to Commission Resolution 2000/69, 2001.

E/CN.4/2006/120. "Situation of Detainees at Guantánamo Bay - Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Leandro Despouy; the Special Rapporteur on Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment, Mr. Manfred Nowak; the Special Rapporteur on Freedom of Religion Or Belief, Ms. Asma Jahangir and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Mr. Paul Hunt." (2006).

S/RES/1368 (2001). "Threats to International Peace and Security Caused by Terrorist Acts." (12 September 2001).

S/RES/1373(2001). "Threats to International Peace and Security Caused by Terrorist Acts." (28 September 2001).

Human Rights Committee: Individual Communications, Concluding Observations and General Comments

Alba Pietraroia Alba Pietraroia v. Uruguay, Communication no. 44/1979, U.N. Doc. CCPR/C/OP/1 at 76 (1984).

Alberto Grille Motta v. Uruguay, Communication no. 11/1977, U.N. Doc. CCPR/C/OP/1 at 54 (1984).

Ana María Teti Izquierdo v. Uruguay, Communication no. 73/1980, U.N. Doc. CCPR/C/OP/1 at 132 (1985).

Ann Maria Garcia Lanza De Netto v. Uruguay, Communication no. 8/1977, U.N. Doc. CCPR/C/OP/1 at 45 (1984).

Antonio Viana Acosta v. Uruguay, Communication no. 110/1981 (31 March 1983), U.N. Doc. Supp. no. 40 (A/39/40) at 169 (1984).

Beatriz Weismann Lanza and Alcides Lanza Perdomo v. Uruguay, Communication no. R. 2/8,U.N. Doc. Supp. no. 40 (A/35/40) at 111 (1980).

Concluding Observations of the Human Rights Committee: Israel. CPR/C/79/Add.93. 18 August 1998.

Consuelo Salgar De Montejo v. Colombia, Communication no. R.15/64, U.N. Doc. Supp. no. 40 (A/37/40) at 168 (1982).

Daniel Monguya Mbenge v. Zaire, Communication no. 16/1977 (8 September 1977), U.N. Doc. Supp. no. 40 (A/38/40) at 134 (1983).

Human Rights Committee, General Comment 13, Article 14 (Twenty-First Session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994).

Human Rights Committee. *General Comment 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), Reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 186 (2003)*.

Jorge Landinelli Silva v. Uruguay, Communication no. R.8/34, U.N. Doc. Supp. no. 40 (A/36/40) at 130 (1981).

Leopoldo Buffo Carballal v. Uruguay, Communication no. 33/1978, U.N. Doc. CCPR/C/OP/1 at 63 (1984).

Lilian Celiberti De Casariego v. Uruguay, Communication no. R.13/56, U.N. Doc. Supp. no. 40 (A/36/40) at 185 (1981).

Luciano Weinberger Weisz v. Uruguay, Communication no. 28/1978, U.N. Doc. CCPR/C/OP/1 at 57 (1984).

Miguel Angel Estrella v. Uruguay, Communication no. 74/1980, U.N. Doc. Supp. no. 40 (A/38/40) at 150 (1983).

Miguel Angel Millan Sequeira v. Uruguay, Communication no. R. 1/6, U.N. Doc. Supp. no. 40 (A/35/40) at 127 (1980).

Mr. Dimitry L. Gridin v. Russian Federation, Communication no. 770, U.N. Doc. CCPR/C/69/D/770/1997 (2000).

Orlanda Fals Borda Et Al. Represented by Pedro Pablo Camargo v. Colombia, Communication no. 46/1979, U.N. Doc. CCPR/C/OP/1 at 139 (1985).

Sergio Euben Lopez Burgos v. Uruguay, Communication no. R.12/52 (6 June 1979), U.N. Doc. Supp. no. 40 (A/36/40) at 176 (1981).

Violeta Setelich v. Uruguay, Communication no. 63/1979, U.N. Doc. CCPR/C/OP/1 at 101 (1985).

William Torres Ramirez v. Uruguay, Communication no. R. 1/4, U.N. Doc. Supp. no. 40 (A/35/40) at 121 (1980).

Treaties, Digests and Books

Allain, Jean,. *International Law in the Middle East : Closer to Power than Justice*. Aldershot, Hants, England; Burlington, VT: Ashgate Pub., 2004.

Despouy, Leandro, UN. Special Rapporteur on Human Rights and States of Emergency. *Explanatory Paper on the Best Way of Undertaking the Drawing Up and Updating of a List of Countries which Proclaim Or Terminate a State of Emergency each Year, and the Submission of an Annual Report to the Commission on Human Rights Containing Reliably Attested Information on Compliance with the Rules, Internal and International, Guaranteeing the Legality of the Introduction of a State of Emergency*. Geneva: UN, 1985.

Diplock, Kenneth. Commission on Legal Procedures to Deal with Terrorist Activities in Northern Ireland. *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland.* London: H.M.S.O., 1972.

Doswald-Beck, Louise, Robert Kolb, and International Commission of Jurists. *Judicial Process and Human Rights: United Nations, European, American and African Systems: Texts and Summaries of International Case-Law*. Kehl, Germany; Arlington, Va.: N.P. Engel, 2004.

Duffy, Helen. *The "War on Terror" and the Framework of International Law*. Cambridge; New York: Cambridge University Press, 2005.

Fitzpatrick, Joan,. *Human Rights in Crisis : The International System for Protecting Rights during States of Emergency*. Philadelphia: University of Pennsylvania Press, 1994.

Franck, Thomas M. *The Power of Legitimacy among Nations*. New York: Oxford University Press, 1990.

Green, L. C. *Derogation of Human Rights in Emergency Situations*. Vancouver: Publication Centre, University of British Columbia, 1978], 1978.

Gross, Oren and Fionnuala Ni Aolain . *Law in Times of Crisis : Emergency Powers in Theory and Practice*. Cambridge: Cambridge University Press, 2006.

Henckaerts, Jean-Marie, Louise Doswald-Beck, and International Committee of the Red Cross. *Customary International Humanitarian Law. Volume I, Rules*. Cambridge: Cambridge University Press, 2007.

Henckaerts, Jean-Marie and Louise Doswald-Beck. *Customary International Humanitarian Law. Vol. 2, Part 2 Practice.,*. Cambridge: Cambridge University Press, 2003.

Inter-American Institute of Human Rights. *Final Recapitulation, Inter-American Seminar on State Security, Human Rights and Humanitarian Law*. San Jose: 1982.

International Commission of Jurists. *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioners' Guide.* Geneva: International Commission of Jurists, 2004.

International Commission of Jurists. *States of Emergency: Their Impact on Human Rights: A Study*. Geneva, Switzerland: The Commission, 1983.

Joseph, Sarah, Jenny Schultz, and Melissa Castan. *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*. Oxford etc. Oxford University Press, 2004.

Kolb, Robert. *Ius in Bello : Le Droit International Des Conflits Armes ; Precis*. Bale; Bruxelles: Helbing & Lichtenhahn ; Bruylant, 2003.

Koskenniemi, Martti and UN. International Law Commission. Study Group on Fragmentation of International Law. Chairman. *Study on the Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes": Preliminary Report*. Geneva: [UN], 2004.

Marks, Susan and Andrew Clapham. *International Human Rights Lexicon*. Oxford; New York: Oxford University Press, 2005.

McGoldrick, Dominic. *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*. Oxford; New York: Clarendon; Oxford University Press, 1991.

Nowak, Manfred,. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. Kehl [Germany]; Arlington, Va., U.S.A.: N.P. Engel, 1993.

Oraa, Jaime. *Human Rights in States of Emergency in International Law*. Oxford [England]; New York: Clarendon Press; Oxford University Press, 1992.

Pictet, Jean, Frédéric Siordet, M. W. Mouton, Jean de Preux, Oscar M. Uhler, and International Committee of the Red Cross. *The Geneva Conventions of 12 August 1949 : Commentary*. Geneva: International Committee of the Red Cross, 1994.

Pilloud, Claude, Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, and International Committee of the Red Cross. *Commentary on the Additional Protocols of 8 June 1977*. Geneva; Lancaster: Nijhoff ; Kluwer Academic [distributor], 1987.

Roy Chowdhury, Subrata. *Rule of Law in a State of Emergency : The Paris Minimum Standards of Human Rights Norms in a State of Emergency*. New York: St. Martin's Press, 1989.

Singhvi, L. M. and UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Special Rapporteur on the Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers. *Final Report*. Geneva: UN, 1985.

Weissbrodt, David S. *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights : [Articles 8, 10 and 11 of the Universal Declaration of Human Rights]*. The Hague; Boston: Martinus Nijhoff Publishers, 2001.

Articles and Book Sections

Boisson de Chazournes, Laurence and Philippe Sands. "International Law, the International Court of Justice and Nuclear Weapons." *British Yearbook of International Law* 71, (2001): 375-376.

Buergenthal, Thomas. "To Respect and to Ensure: State Obligations and Permissible Derogations." In *The International Bill of Rights: The Covenant on Civil and Political Rights*, edited by Louis Henkin. New York: Columbia University Press, 1981.

Buergenthal, Thomas and Robert E. Norris. *Human Rights: The Inter-American System*. Dobbs Ferry, N.Y.: Oceana Publications, 1982.

Chernichenko, S. V., William Treat, United Nations. Economic and Social Council., and United Nations. Sub-commission on Prevention of Discrimination and Protection of Minorities. *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening: Final Report*. [New York?]: United Nations Economic and Social Council, 1994.

Chinkin, Christine M. "Due Process and Witness Anonymity." (January, 1997).

Dennis, Michael J. "Applying Human Rights Law and Humanitarian Law in the Extraterritorial War Against Terrorism: Too Little, Too Much, Or just Rights?: Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking all Around?" *2006 ILSA Journal of International & Comparative Law ILSA Journal of International & Comparative Law* (Spring, 2006).

Eide, Asbjorn, Allan Rosas, and Theodor Meron. "Current Development: Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards." *1995 the American Society of International Law American Journal of International Law* (January, 1995).

Ferencz, Benjamin B. "Nurnberg Trial Procedure and the Rights of the Accused." *Journal of Criminal Law and Criminology (1931-1951)* 39, no. 2 (Jul. - Aug., 1948): 144-151.

Fitzpatrick, Joan. "Protection Against Abuse of the Concept of 'Emergency'." In *Human Rights : An Agenda for the Next Century*, edited by Louis Henkin, John Lawrence Hargrove and American Society of International Law, 203. Washington, D.C.: American Society of International Law, 1994.

Fitzpatrick, Joan. "Speaking Law to Power: The War Against Terrorism and Human Rights." *European Journal of International Law* 14, no. 2 (April 1, 2003): 241-264.

Fletcher, George P. "On the Crimes Subject to Prosecution in Military Commissions." *Journal of International Criminal Justice* 5, no. 1 (March 1, 2007): 39-47.

Gaeta, Paola. "To be (Present) Or Not to be (Present): Trials in Absentia before the Special Tribunal for Lebanon." *Journal of International Criminal Justice* 5, no. 5 (November 1, 2007): 1165-1174.

Garraway, Charles. The "War on Terror" Or: Do Rules Need Changing? *Chatham House International Law Briefing Paper IL BP 06/02,* September 2006, 2006.

Glazier, David. "Kangaroo Court Or Competent Tribunal?: Judging the 21st Century Military Commission." *Virginia Law Review* 89, no. 8 (Dec., 2003): 2005-2093.

Glazier, David W. "A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantanamo Military Commissions." *Lewis & Clark Law Review, Forthcoming*.

Hartman, Joan Fitzpatrick. "Derogation from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations." *Harvard International Law Journal* 221, (1981): 1-52.

Heintze, H. -J. "On the Relationship between Human Rights Law Protection and International Humanitarian Law." *INTERNATIONAL REVIEW- RED CROSS* 86, no. 856 (2004): 789-814.

Higgins, Rosalyn. "Derogations Under Human Rights Treaties." In *The British Yearbook of International Law*. Royal Institute of International Affairs.; British Institute of International Affairs ed. London: H. Frowde : Hodder and Stoughton, 1976.

ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts." *INTERNATIONAL REVIEW- RED CROSS.* no. 853 (2004): 213-244.

Jackson, Robert H. "The Rule of Law among Nations." *American Bar Association Journal* 31, (1945): 290.

Joseph, Sarah. "Human Rights Committee: General Comment 29." *Human Rights Law Review* 2, no. 1 (January 1, 2002): 81-98.

Kost, Timo. "Mounir El Motassadeq – A Missed Chance for Weltinnenpolitik?" *German Law Journal* 8, no. 4 (1 April 2007, 2007).

Leigh, Monroe. "Witness Anonymity is Inconsistent with due Process." (January, 1997).

Lillich, Richard B. "The Paris Minimum Standards of Human Rights Norms in a State of Emergency." *The American Journal of International Law* 79, no. 4 (Oct., 1985): 1072-1081.

Marks, Susan. "Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights." *Oxford Journal of Legal Studies* 15, no. 1 (January 1, 1995): 69-95.

Matheson, Michael J. "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions: Remarks of Michael J. Matheson, Deputy Legal Adviser, United States Department of State in the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions." *The American University Journal of International Law and Policy* 2, no. 2 (1987): 419.

Momtaz, Djamchid. "Les Règles Humanitaires Minimales Applicables En Période De Troubles Et De Tensions Internes." *Revue Internationale De La Croix-Rouge* 831, (1998): 487.

O'Donnell, Daniel. "Commentary by the Rapporteur on Derogation." *Human Rights Quarterly* 7, no. 1 (Feb., 1985): 23-34.

Partsch, Karl J. "Experience regarding the War and Emergency Clause (Article 15) of the European Convention on Human Rights." In *Israel Yearbook on Human Rights*, edited by Universitat Tel-Aviv. [Tel Aviv]: Published under the auspices of the Faculty of Law, Tel Aviv University, 1971.

Petrasek, David. "Moving Forward on the Development of Minimum Humanitarian Standards." *The American Journal of International Law* 92, no. 3 (Jul., 1998): 557-563.

Reidy, Aisling. "The Approach of the European Commission and Court of Human Rights to International Humanitarian Law." *International Review of the Red Cross* 324, (1998): 513-529.

Sassoli, M. "The Status of Persons Held in Guantanamo Under International Humanitarian Law." *Journal of International Criminal Justice,* no. 1 (2004): 96-106.

Schabas, William A. "Lex Specialis? Belt and Suspenders? the Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum." *SSRN eLibrary* (2007).

Schachter, Oscar. "Towards a Theory of International Obligation." *Virginia Journal of International Law* (1967): 300.

Stavros, Stephanos. "The Right to a Fair Trial in Emergency Situations." *The International and Comparative Law Quarterly* 41, no. 2 (Apr., 1992): 343-365.

Wright, Quincy. "Due Process and International Law." *The American Journal of International Law* 40, no. 2 (Apr., 1946): 398-406.

National Laws

Proclamation no 7453, Declaration of a National Emergency by Reason of Certain Terrorist Attacks, 66 Fed Reg 48, 199 (14 Sept 2001), United States of America.

National Cases and United Nations War Crime Trials

A (FC) and Others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) United Kingdom House of Lords, (2004).

Aviation Security Act, German Bundesverfassungsgericht, 1 BvR 357/05.

Federal Court of Justice (Bundesgerichtshof – BGH), decision of 16 November 2006, published in Neue JuristischeWochenschrift, 384 (2007) (Motassadeq).

Federal Constitutional Court, (Bundesverfassungsgericht – BverfG), decision of 10 January 2007, Reg. no. 2 BvR 2557/06 (Motassadeq).

Federal Court of Justice (Bundesgerichtshof – BGH), decision of 4 March 2004, published in Neue juristische Wochenschrift, 1259 (2004). 1262. BVerfG, 2 BvR 1382/02 vom 9.5.2003, (Abdelghani Mzoudi).

Hamdan v. Rumsfeld, United States Supreme Court, 126 S. Ct. 2749 (June 29, 2006).

In Re Yamashita, 1946, 66 Sup. Ct. 340, Supreme Court of the United States.

Public Committee Against Torture in Israel v. the State of Israel Et Al., Israeli Supreme Court, Case HCJ 5100/94.

Shafiq RASUL Et Al., Petitioners,v. George W. BUSH, President of the United States, Et Al.; Fawzi Khalid Abdullah Fahad Al Odah, Et Al., Petitioners,v. United States Et Al. Vol. Nos. 03-334, 03-343; 542 U.S. 466, 124 S.Ct. 2686, Supreme Court of the United States, 2004.

The Center for the Defense of the Individual v. the Commander of IDF Forces in the West Bank, Israeli Supreme Court, Case HCJ 3278/02.

Trial of Lieutenant General Harukei Isayama and Seven Others, Case no. 32., United States Military Commission, Shanghei, 1st-25th July, 1946.

Trial of Sergeant-Major Shigeru Ohashi and Six Others, Australian Military Court, Rabaul,20TH-23RD March, 1946, Law-Reports of Trials of War Criminals, the United Nations War Crimes Commission, Volume V, London, HMSO, 1948.

*United States of America v. Alstötter Et Al. ("the Justice Case") 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948)*Ÿ.

Ward v. Texas, U.S. Supreme Court 316 U.S. 547 (1942).

Regional Court Cases and Reports of Regional Supervisory Organs

Aksoy v. Turkey (100/1995/606/694), European Court of Human Rights, 18 December 1996. Application no: 21987/93.

Allenet De Ribemont v. France, European Court of Human Rights, Application no. 15175/89, 10 February 1995.

Banković and Others v. Belgium and 16 Other Contracting States - 19 December 2001. Vol. 52207/99 [2001] ECHR 970European Court of Human Rights, 2001.

Brannigan and McBride v. UK (1993),European Court of Human Rights, A-258-B.

Bricmont v. Belgium, European Court of Human Rights, Application no. 10857/84, 07 July 1989.

Can v. Austria (Application no. 9300/81), Judgment 30 September 1985.

Castillo Petruzzi Et Al. Case [1999] IACHR 6 (30 may 1999).

Civil Liberties Organization v. Nigeria, African Commission on Human and Peoples' Rights, Comm. no. 129/94 (1995)

Colozza v. Italy, European Court of Human Rights, Application no. 9024/80, 12 February 1985.

Cyprus v. Turkey (1982) 4 E.H.R.R. 482 before the European Commission of Human Rights, 10 July 1976, 482 Cyprus v. Turkey. Vol. Applications 6780/74 and 6950/75.

Ensslin, Baader and Raspe v. FRG, European Court of Human Rights, no. 7572/76, 7586/76, and 7587/76, Decision of 8 July 1978.

Ettl and Others v. Austria, European Court of Human Rights. Vol. 12/1985/98/1461987.

Greek Case, European Commission. Y.B. Eur. Conv. on H.R. 12, p. 186.

Incal v. Turkey, 9 June 1998. *European Court of Human Rights*, Vol. 41/1997/825/10311998.

Interamerican Commission on Human Rights. *Annual Report of the Inter-American Commission,* 1973.

———. *Report on the Situation of Human Rights in Chile,* 1974.

———. *Report on the Situation of Human Rights in Argentina,* 1980.

———. *Report on the Situation of Human Rights in Colombia,* 1981.

———. *Report on Nicaragua and Response of the Nicaraguan Government to the Inter-American Commission on Human Rights, OAS Doc. OAE/Ser.P, AG/Doc.1369/81, 27 Oct. 1981*

———. *Report on the Situation of Human Rights in the Republic of Guatemala, 1983.*

———. *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin 76, IACHR, OEA/Ser.L/V/II.62, Doc. 10 Rev. 3, at 81 29 Nov. 1983*.

———. *Seventh Report on the Situation of Human Rights in Cuba,* 1983.

———. *Habeas Corpus in Emergency Situations (Arts. 27(2) 25(1) and 7(6) of the American Convention on Human Rights, Advisory Opinion OC-8/87, 30 January 1987, Inter-Am. CT.H.R. (Ser. A) no. 8 (1987)*.

———. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) no. 9 (1987).*

———. *Report on Terrorism and Human Rights,* 2002.

Ireland v. the United Kingdom, European Court of Human Rights, (Application no. 5310/71), 18 January 1978.

Juan Carlos Abella v. Argentina, Inter-American Commission on Human Rights, IACHR, Case no. 11.137, Report no. 5/97, 1997. Vol. OEA/Ser.L/V/II.98 doc. 6 rev. 13 April 1998 CASE 11.137, Inter-American Commission on Human Rights, November 18, 1997.

Kokkinakis v. Greece, European Court of Human Rights, Vol. Application no. 14307/881993.

Kostovski v. the Netherlands, Application no. 11454/85, 20 November 1989.

Kröcher and Möller v. Switzerland, European Commission on Human Rights, 43 DR 34 25 (1982). Vol. No. 8673/781982.

Lawless v. Ireland. European Court of Human Rights (ECHR), Case Judgment of 1 July 1961 (Series A, no 3).

Media Rights Agenda v. Nigeria, African Commission on Human and Peoples' Rights, Comm. no. 224/98 (2000).

Piersack v. Belgium. European Court of Human Rights, Application no. 8692/79. Judgement 1 October 1982.

Sramek v. Austria, European Court of Human Rights. Vol. 8790/791984.

Miscellaneous

Aucoin, Louis. *Comparative Legal Systems: Course at the Fletcher School of Law and Diplomacy, Spring Semester,* 2008.

Government of the United Kingdom. "Declaration Contained in a Note Verbale from the Permanent Representation of the United Kingdom, Dated 18 December 2001, Registered by the Secretariat General on 18 December 2001." http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm.

Human Rights Watch. *Neither just nor Effective: Indefinite Detention without Trial in the United Kingdom Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001*2004.

ICRC. "Ratification of the Geneva Conventions and their Protocols." http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (accessed February 29, 2008).

ICRC, 26th International Conference of the Red Cross and Red Crescent. "Resolution 1, International Humanitarian Law: From Law to Action; Report on the Follow-Up to the International Conference for the Protection of War Victims." *International Review of the Red Cross* 310, (1996).

Livingstone, Stephen. "International Law Relating to States of Emergency and Derogations from International Human Rights Treaties." www.interights.org/doc/Livingstone_derogation_final.doc (accessed March 1, 2008, 2008).

Nuremberg Tribunal: MG Ord. no. 7 Art IV (c); Uniform Rules of Procedure, Revised to 8 Jan. 1948.

Office of the United Nations High Commissioner for Human Rights. "Declarations Recognizing the Competence of the Human Rights Committee Under Article 41." http://www2.ohchr.org/english/bodies/ratification/4_3.htm (accessed March 31, 2008).

———. "Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism." http://unhchr.ch/html/menu6/2/digest.doc (accessed March 12, 2008).

———. "Status of Ratification of the International Covenant on Civil and Political Rights." http://www2.ohchr.org/english/bodies/ratification/4.htm (accessed March 31, 2008, .

Opinion on the Protection of Human Rights in Emergency Situations Adopted by the Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006) on the Basis of Comments by Mr Pieter Van DIJK (Member, Netherlands), Ms Finola FLANAGAN, (Member, Ireland) and Mr Jeffrey JOWELL (Member, United Kingdom). Strasbourg: European Commission for Democracy Through Law (Venice Commission), 2006.

"The Cleveland Principles of International Law on the Detention and Treatment of Persons in Connection with the 'Global War on Terror'." Case Western Reserve University School of Law, November 7, 2005, 2005.

"Paris Minimum Standards of Human Rights Norms in a State of Emergency, Approved by Consensus during the 61st Conference of the International Law Association, 26 August - 1 September 1984 (Reprinted in 79 (1985) AJIL 1072)." Paris, 1984.

APPENDICES

These articles should not be interpreted in isolation without the general clauses of the respective treaties. They are simply reproduced here as a quick reference.

I. ICCPR Article 4 and Article 14
II. Article 75 of the First Additional Protocol to the Geneva Conventions
III. Article 6 of the Second Additional Protocol to the Geneva Conventions

I. Article 4 and Article 14 of the ICCPR

Article 4:
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 I 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.

Article 14:
1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he can not understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

II. Article 75(4) of the First Additional Protocol to the Geneva Conventions:

Article 75 -- Fundamental guarantees
(…)
4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt;
(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.
7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

III. Article 6 of the Second Additional Protocol to the Geneva Conventions:

Article 6 -- Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt.
3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.
5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.