

Dipartimento di SCIENZE POLITICHE Cattedra INTERNATIONAL LAW

Human Rights in Times of Emergency: A Comparative Analysis of the European Convention and the UN Covenant on Civil and Political Rights

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INTRODUCTION

The cognizance of the existence of a direct, causal link between state of emergency and gross violations of human rights, and the datum of the international society's awareness of this fact¹, propelled the present investigation on the essence of the state of emergency.

At the heart of an emergency, there is always a danger, a peril characterized by a twofold menace: subversion of reality and peoples' deprivation of their certainties. Because of the first threat, emergencies are usually categorized as exceptional situations, opposed to normalcy, which can be dealt with only through the employment of equally exceptional measures. Because of the second threat, the certainties that individuals risk to lose consist in their rights guaranteed under normal conditions, as consequence of those very exceptional measures necessary for the restoration of normality.

When situations of emergency "threatening the life of the nation" obtain, competing interests emerge: the interest of private citizens and the interest of public security. The challenge is to strike the appropriate balance to reconcile those interests in favor of the general interest of the Nation. Regrettably, the achievement of this fortunate balance is not a sure occurrence, and encroachment of human rights under the watchdog of national security, governments' abuse of emergency legislation in order to remaining in power, or subversive groups' invocation of the emergency in order to seize power, are a historical reality.

What is stunning is that these practices still occur in the 21st century, when human rights have been developing for more than half a century, forming a coherent body of law being allegedly protected and enforced at national, regional and universal level.

¹ International Commission of Jurists, *States of Emergency - Their Impact on Human Rights: A Comparative Study by the International Commission of Jurists*. (Geneva, 1983)

After the Second World War, the international community allowed for an unprecedented expansion in safeguarded rights of all people, with the recognition of a human rights dimension to the quest for international peace and security. Gradually, a slow process of erosion of the main pillar on which the entire structure of international law is built – namely, *state sovereignty* – took place in favor of other two, opposed, dimensions: the one of supranational organism and the one of the individuals. The interrelation between these two dimensions encompassing State level constitutes the bedrock of the machineries of protection of human rights, and the proper functioning of the supranational element is essential for the safeguard of fundamental guarantees at national level.

An important, recent step in the dialectic between States, individuals and international community is constituted by the Responsibility to Protect (R2P), which enshrines the principle of “sovereignty as responsibility”. By virtue of this principle, sovereignty does no longer mean absolute shelter from foreign interference, but becomes now conditional on the ability of a State to “carry [its] primary responsibility for protecting [the] population from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement”².

Even though issues of genocide, war crimes, crimes against humanity and ethnic cleansing will not be the subjects of the present work, the doctrine of “sovereignty as responsibility” is very relevant, because it is precisely the security of the people and States response to this threat what is at stake during states of emergency and what will be the central focus of this analysis.

With the creation of regional and universal organs, the state of emergency was re-elaborated so to be framed in and reconciled with the new international order. The expanded powers to which States resorted for dealing with public emergencies were reframed in terms of “derogations” from their undertaking under the treaties. Hence, Article 15 of the European Convention on Human Rights and Fundamental Freedoms, Article 4 of the International Covenant on Civil and Political Rights and Article 27 of the American Convention on Human Rights (all derogation provisions) were designed to regulate a lawful recourse to emergency powers by State Parties

² The three pillars of the responsibility to protect as stipulated in the Outcome Document of the 2005 United Nations World Summit (A/RES/60/1, PARA 138-140) and formulated in the Secretary-General’s 2009 Report (A/63/677) on Implementing the Responsibility to Protect.

and, at the same time, to ensure that these powers would not extend to the detriment of human rights.

The recourse that State Parties have made of the faculties permitted by these provisions is debatable, and it spans from unrestrained abuse of and complete negligence of the entire derogation regimes. There are several instances of misuse of derogatory powers, which are more widespread and various under the International Covenant than under the European Convention. The aim of this study is to discern the reasons behind this misuse, and the consequences stemming *vis-à-vis* human rights thereof. Contextually, it will be necessary to examine the extent to which international supervision on derogations is effective and to what extent international bodies have the authority, the willingness and the means for ensuring the respect of fundamental guarantees during the emergency.

In the present attempt to tackle the complexity inherent to the state of emergency, an etiological investigation on the phenomenon aimed at explaining its *raison d'être* will be proposed (Chapter One). Such a narrative will identify the archetype of the state of exception in the Roman Law institution of the *iustitium*³ and will then analyze the emergency as a special condition in which the extra-legal becomes legal by virtue of a suspension of the law, suspension that is intended to preserve the system in which the rule of law itself can be realized. This path into the genealogy of the state of exception will necessarily acquire philosophical overtones, with reference to the fundamental doctrine of necessity, which will be essential for a full understanding of the repercussions that the invocation of a state of emergency has in practice.

Right after, a thorough analysis of the *raison d'être*, meaning and scope of the articles regulating emergency situations under ICCPR and ECHR will be provided (Chapter Two), together with a commentary of the textual requirements prescribed therein. This assessment will be carried out through a scrutiny of State practice and of the jurisprudence of the organs competent on the issue.

To make sense of this framework, and to fully answer the questions behind this research, the extent to which international bodies –be they regional or universal- are able to monitor States' compliance with the conditions imposed by the articles will

³ Giorgio Agamben, *State of Exception*, (Chicago: University of Chicago Press 2005), 41

be assessed (Chapter Three). Obviously, the tabulation of human rights, be it at international or regional level, is hardly useful to the individual without an effective means of implementation and without a recognized right of access to justice before international organs, and that is why the second part of this assessment will be focused on the right of access to justice, ideal ground to test the efficacy of the entire structure of protection of human rights under state of emergency at both national and supranational level.

CHAPTER ONE

FROM EMERGENCY POWERS TO DEROGATION MEASURES

PART I: State of Emergency

1.1 *Historic-Philosophical Framework and Empirical Considerations*

Most constitutions contain emergency provisions. These provisions are designed to deal with situations of crisis or public danger whenever they occur and to restore order. In different legal systems, emergency measures take various forms: in civil law countries, the state of siege, which has its origin in the French Revolution⁴, is very common; instead, common law countries, such as the United Kingdom or the United States, present various kinds of martial law⁵; interestingly, in the Italian constitution, there is no such provision but legislation by emergency executive [*governativi*] decrees is the case in point⁶. A very well known example of emergency article that had several historical implications is Article 48 of the Weimar Constitution.

For a genealogical investigation on the topic, we can follow Agamben in identifying the archetype of the state of exception in the Roman law institution of the *iustitium*.⁷ Upon a decree declaring a *tumultus* – that is, a situation of extreme danger for the safety of the Republic-, the Senate would issue a *senatus consultum ultimum*, by which the consuls, and in the most severe cases also the praetor and all citizens, were urged to take whatever measure necessary for the preservation of the state.

⁴ Agamben, *supra* note 3, at 11

⁵ Subrata Roy Chowdhury, *Rule of Law in a State of Emergency*, (London: Pinter Publishers, 1989), 12

⁶ *id.* at 16

⁷ *id.* at 41

In Nissen's analysis of the *iustitium*, it appears clear that the proclamation of the final decree had the aim to free the magistrates from the restriction of the law in order to better deal with the exigencies of the situation. In this way, extra-legal measures could be implemented without being illegal because the law was simply cleared away (in fact, the term *iustitium* means 'suspension of the law')⁸.

These last brief considerations on the nature of the *iustitium* are illuminating because they target the legal problems related with the legal definition of the acts perpetrated during the emergency: they escape any legal definition and are placed in a hollow and standstill of the law. However, it is of the greatest importance that the state of emergency keeps some relation to the juridical order in which it is inscribed, because, even if it is a *de facto* suspension of the law, it has as its ultimate goal the preservation of a system in which law can be realized.⁹

Indeed, the state of emergency is a borderline situation, a ground of dialogue between the juridical and the political, between the norm and law. It embodies the blurring of the inside-out distinction within legality. This ambiguous character resulted in a proliferation of philosophical theories on the states of exception, on its legal justification and origin, and on its consequences.

The pivotal importance of the concept of the state of emergency, and its most rigorous analysis, was taken up by one of the most debated authors of the past century, Carl Schmitt, who presented the theory of the state of emergency as a theory of sovereignty.

For Schmitt, the emergency amounted to any kind of political or economic disorder that required the use of extraordinary measures¹⁰. In a somewhat romantic way, he glimpsed in the power of decision over these extraordinary measures the ultimate source of identification of the authority. In fact, with the opening sentence of *Political Theology*, "Sovereign is he who decides on the exception", Schmitt expressed his idea that it is the monopoly of decision, not the traditional monopoly of force, the defining characteristic of the authority.

This monopoly is even more important in the context of a borderline situation – as the exception is-, a situation whose successful resolution can be achieved only

⁸ *id.*, at 46; see Adolph Nissen, *Das Iustitium. Eine Studie aus der römischen Rechtsgeschichte*. (Leipzig: Gebhardt 1877)

⁹ *id.* at 33-35

¹⁰ Carl Schmitt, *Political Theology*. (Cambridge: The MIT Press 1985), 5

through the employment of undefined and unlimited powers. The question of who decides that a crisis amounts to an emergency, of who sets its temporal limits, of who makes the rules to overcome it, is crucial not only for the reestablishment of normality, but also for the legitimacy of the normality itself. In Schmitt's words: the crisis "confirms not only the rule, but also its existence, which derives only from the exception".¹¹

State practice does display an ample use of decisional powers in this sense, corroborating Schmitt's idea that the state of exception is the wellspring of sovereignty, that is the foundation of a new legal-political order. However, in my opinion, the dangers of applying this approach in the present international order should be recognized, as, to invoke these positions to justify a government born after a crisis, is detrimental for the democratic order and undermines the very liberal democratic foundations of the source of authority. This consideration can be easily corroborated by mentioning the Nazi takeover after the application Article 48 or by reference to all the regimes that created situations of permanent state of emergency to remain in power (e.g. in many States in Latin America or in Egypt in after Morsi's deposition).

Legal scholars identify the source of the state of exception in the theory of necessity¹², whose starting point is the Latin maxim *necessitas legem non habet*. The exception is here reduced to *status necessitatis*, meaning that the acceptance of the latter results in the justifications of the former. Such a start complicates the discussion rather than helping it, because the Latin adage can be interpreted in two contrasting ways: as 'necessity does not recognize any law' or as 'necessity creates its own law'.

On the one hand, necessity can be understood as freeing a particular circumstance from the application of the law, in this way having the power to render licit what is illicit. On the other hand, in diametrical opposition, necessity can be conceived as being the ultimate ground and very source of law beyond legislation. This position

¹¹ *id.* at 5-15

¹² Hartman, *supra* note 10, at 12; Antonio Cassese, *International Law*, Oxford University Press, 2005, 255

was endorsed by Santi Romano¹³, who saw in the state of exception ‘an “illegal” but perfectly “juridical and constitutional” measure producing new norms’¹⁴.

While the limits and interpretative uncertainties that follow from the ambiguity of the concept are evident, the customary law doctrine of necessity is widely recognised to be the juridical base of the state of emergency¹⁵, with all the practical problems that follow and which will be dealt with in details later.

1.1.1 State of Emergency in Liberal Democracies

As I was mentioning before, a problem of substance of law can emerge in respect to emergency powers in the context of liberal democracies because of the emptiness and standstill of the law generated by the application of the exception. This danger of illiberal content to be deemed legitimate, and of officials to be authorized by law to act arbitrarily, was underlined by Schmitt in his critique to liberalism, which he deemed to be excessively concerned with legal formalism while neglectful of ‘the political’¹⁶. As a matter of facts, it has been argued by many¹⁷ that, to react against emergencies, the state is compelled to adopt extra-legal measures. The content of these measures must be left open to determination by the factual situation because it is a feature of the emergency itself to be fundamentally insusceptible to advance regulation.

A brighter perspective is offered by Dyzenhaus¹⁸, who identifies two different ‘cycles of legality’ that can unfold after a declaration of state of necessity. On the one hand, an ‘empty’ cycle can take over, whereby formality is taken to the extreme and gives only a façade of legality. On the other hand, there could be a ‘virtuous’ cycle, where the institutions of the legal order can check on the content of the measures required to ensure their legality. While the concretization of the latter is an inevitable fact according to Schmitt, Dyzenhaus argues that, for the latter to take place, only two conditions have to be present: first, that the actors be committed to the principles of the legal system and, second, that, when this condition does not

¹³ Cited by Agamben, *supra* note 3, at 27

¹⁴ *id.*, at 24-28

¹⁵ Sergio Bartole, Benedetto Conforti and Guido Raimondi, *Commentario alla Convenzione Europea per la Tutela dei Diritti dell’Uomo e delle Libertà Fondamentali*, (PADOVA: CEDAM 2001), 426

¹⁶ David Dyzenhaus, *Carl Schmitt in America*, paper on file with Prof. Francioni. 4

¹⁷ See Clement Fatovic and Benjamin A. Kleinerman, *Extra-Legal Power and Legitimacy: Perspectives on Prerogatives*. (New York: Oxford University Press 2013)

¹⁸ Dyzenhaus, *supra* note 16, at 13

obtain, the legal system be reformed to make such realization possible – be it through judicial supervisions, administrative tribunals or parliamentary committees.

Positive law scholars' approach share Dyzenhaus' positivism. This is evident, *inter alia*, in the Paris Minimum Standards, which stress the importance of the separation of powers during the time of the exception. Indeed, after the declaration of the state of emergency by the executive, it is essential that the former is confirmed by the legislature and that the judiciary and legislature's power remain intact and separate.¹⁹

In this way, the interests of the legal subject –i.e. the individual subject to state power- should be secured, as they constitute the principles that form the ultimate ground of legitimacy of both the formal and the substantive components of the legal order.²⁰

1.2 Positive Law on State of Emergency

After this historic-philosophical introduction on the states of exception, I want to move toward a more empirical ground of analysis, giving particular consideration to the international community's attitude in this respect. Various measures have been taken internationally with the aim of monitoring the use of the state of emergency by States and to create a framework of regulation for its application. With no doubt, this is of the greatest importance given the fact that situations of emergency – be it in the form of severe political unrest or social crises, internal armed conflict or terrorism- are by definition moments in which the fundamental guarantees of the citizen are most in danger.

One of the most important reactions to the disruption caused by World War II is undoubtedly the affirmation and development of human rights. An ever-expanding catalogue of fundamental principles, aimed at the protection of human beings, at the limitation of the harm that the powerful can inflict on the vulnerable, was put into practice through the elaboration of charters and treaties, at regional as well as at global level.

¹⁹ Richard B. Lillich, "The Paris Minimum Standards of Human Rights Norms in a State of Emergency", *The American Journal of International Law*, Vol. 79, NO 4 (1985), 1072

²⁰ *supra* note 18, at 43

The sanctity of the values entrenched therein is evident in the development of two different bodies of law, international humanitarian law and international human rights law. From the aftermath of WWII, when human rights law came to side international humanitarian law – already existing from the second half of the 19th century- , the general understanding of the nature of the relationship between these two used to see international humanitarian law as applying during wartime and international human rights law as applying during peacetime.

Such a view has been challenged by the practice of both states and international bodies, out of a humanitarian wish, we may say, to strengthen the protection afforded by international law to individuals affected by armed conflicts. First of all, the fact that human rights would cease to apply is not stated in any of the treaties; further, the UN General Assembly expressed its position in this regards in its resolution 2675 (XXV), where “convinced that civilian populations are in special need of increased protection in time of armed conflicts”, affirmed that “fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict”²¹. In addition, in its advisory opinions in the *Nuclear Weapon* case and on the *Palestinian Wall*, the International Court of Justice confirmed that “the protection of the International Covenant on Civil and Political Rights does not cease in times of war”²² and framed the relationship between international human right and international humanitarian law affirming that the latter be *lex specialis* in the context of armed conflicts²³.

This position regarding the applicability of human rights law in armed conflicts was later supported by a growing number of pronouncements by international political bodies, in the practice of judicial bodies, by advisory committees of experts and by the academia.²⁴ Human rights violations in the context of armed conflict have been condemned in a number of cases²⁵, thus showing how human rights law and

²¹ GA Res 2675 (XXV) *Basic Principles for the Protection of civilian populations in Armed Conflicts*, UNGAOR, 1922nd plenary meeting, 9 December 1970

²² *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Reports 226, para. 25

²³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ, para 106

²⁴ Ilia Siatitsa and Maia Titberidze, *Human Rights in Armed Conflict from the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to certain Hypothetical Challenges* <http://www.geneva-academy.ch/RULAC/pdf/Human-Rights-Law-in-Armed-Conflict.pdf> “££”

²⁵ International Committee of the Red Cross, *Customary International Humanitarian Law*, “Introduction to fundamental guarantees” https://www.icrc.org/customary-ihl/eng/docs/v1_rul_intofugu, accessed March 2015

humanitarian law are supposed not only to complement but also to strengthen each other.

After all this effort in the development of this two bodies of law, it may seem paradoxical that, at the peak of a crisis, States can proclaim a state of exception, thus allowing exceptions to be made to the normal legal regime, permitting restrictions if not suspensions of fundamental human rights. To the contrary, the presence of emergency clauses in most constitutions is generally justified by the idea of a sort of constitutional right of self-defense that the State enjoys, which can be interpreted under international law as a legitimate right of sovereign States to defend their constitutional order.

The need for control of this otherwise unlimited exercise of State power in the face of human rights was felt by the international society and resulted in multiple attempts to create a framework of regulation. In these regards, considerable work was done by the UN organs (see next paragraph) as well as by non-governmental international organizations, but it is very easy to be unsatisfied with the results obtained and to demand a re-categorization of the concept of state of emergency and of its scope.²⁶

The fact that a univocal understanding of the state of emergency cannot be provided emerges from the most important studies on the topic. For instance, the often-cited International Law Association (ILA)'s study on the state of emergency was built around two fundamental distinctions (1) between *de jure* (formally proclaimed) and *de facto* emergencies and (2) between those proclamations of emergency really justified by empirical facts and those not deserving to be classified as such. As many as six different empirical types of emergency were identified around these two linchpins of classification²⁷ and they still cannot be said to be comprehensive.

Another important study, the Questiaux model, underlined the existence of five "deviations" in the ordinary application of states of emergencies. These deviations spanned from the recurring lack of notification to treaty bodies, the establishment of permanent emergency by means of continued extensions of its terms, complex

²⁶ Angela Hegarty & Siobhan Leonard, *Human Rights: An agenda for the 21st Century*. (London: Cavendish Publishing Limited, 1999)

²⁷ Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (Philadelphia: University of Pennsylvania Press 1994), 11

emergency presenting overlapping legal systems, intensive use of decree legislation, and institutionalized emergency under authoritarian regimes.²⁸

It is evident, therefore, that an understanding of the state of emergency based on a general and vague identification of the “exception” runs the risk of oversimplifying the problem, thus preventing any effective control over it.

With the aim of entering into the merit of emergency legislation, important contributions by committees of experts and international law scholars resulted in the elaboration of limits and principles aiming to set minimum standards governing declaration and administration of states of emergency.

To this scope, the Paris Minimum Standards of human rights norms in state of emergency were the result of a 6 years study an ILA subcommittee and a 2 years revision by the full Committee on the Enforcement of Human Rights Law.

While recognizing the impossibility to foretell the details of any emergency and their unpredictable character, the writers tried to pin down, as much as possible, some guiding lines that States were expected to follow when declaring a state of emergency. The purpose of this work was to ensure that the rule of law was upheld even in times of crisis and that at least the basic safeguards to which individuals are entitled would remain in place after a declaration of emergency. The document contains also a list of 16 right deemed non-derogable drawn from Article 4 of The International Covenant on Civil and Political Rights, Article 15 of the European Convention on Human Rights and Article 27 of the American Convention on human Rights²⁹.

Another, similar, important contribution in these regards consisted of the Siracusa Principles, result of the work of a conference of experts, held in 1984, organized by many NGOs to examine the practical meaning of derogations under ICCPR.

²⁸ Hegarty & Leonard, *Human Rights: An agenda for the 21st Century*, 89

²⁹ Lillich, *supra* note 19, at 1072

PART II: Derogation Articles

1.3 International Organs Keeping Track of State of Emergency Declarations

Regional treaties (principally the European Convention on Human Rights and Fundamental Freedoms, The African Charter on Human and Peoples' Rights and the American Convention on Human Rights) and international agreements (importantly, the Universal Declaration of Human Rights and the United Nations Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights forming the "International Bill of Rights") were signed for the protection of the core of human rights in the world community.

As the question of the existence of a link between state of emergency and gross violation of human rights was recognized by the international society³⁰, international organs were urged to take the necessary measure to keep track with emergency situations on the world's surface and to have a clearer picture of the extent and magnitude of the phenomenon. This is why the Commission on Human Rights, by means of decision 1998/108, requested the Office of the United Nations High Commissioner for Human Rights to submit to the Sub-Commission on the Promotion and Protection of Human Rights at its fifty-first session and every second year thereafter, a list of all States that declared a state of emergency or which continued to implement it during the reporting period³¹. Thereafter, in 2001 the first list was issued³² and two other followed until the dissolution of the Commission of Human Rights, in 2006, following the adoption of resolution A/RES/60/251 establishing the Human Rights Council.

From this moment on, no mechanisms was enacted to substitute the one pursuant to decision 1998/108. The supervision on state of emergency issues was left to report

³⁰ International Commission of Jurists, *States of Emergency - Their Impact on Human Rights: A Comparative Study by the International Commission of Jurists*. (Geneva, 1983)

³¹ Commission on Human Rights decision 1998/108, *Question of Human Rights and States of Emergency*, E/CN.4/DEC/1998/108

³² Office of the High Commissioner for Human Rights, *Question of Human Rights and States of Emergency, List of States which have proclaimed or continued a state of emergency*, Report submitted in accordance with Commission on Human Rights decision 1998/108, Sub-Commission on the Promotion and Protection of Human Rights, fifty-third session, Item 3 of the provisional agenda E/CN.4/Sub.2/2001/6

cycles under treaty organs and to the Universal Periodic Review under the Human Rights Council.

On its part, the Human Rights Committee (HRC)—the treaty body established pursuant ICCPR- also made some effort toward the clarification of the state of emergency issue. It issued *General Comment NO. 5* on Article 4 ICCPR, prompted by the difficulties it had found in assessing some reports received by State Parties³³. These difficulties related mainly the lack of clarity regarding the proclamation of the state of emergency itself and the identification of the rights from which the States were derogating (I will deal with the issue of derogations in details later on this paper).

Anyway, *General Comment NO. 5* added little or nothing to the understanding and management of emergency situations, and this is why it was later replaced, in 2001, by the much more detailed *General Comment NO.29*. This document, inspired by important studies and documents such as the four previously mentioned, would become the linchpin of the UN handling of state of emergency affairs in the face of the derogations regime enacted by Article 4.

From a comparative analysis of the major human rights conventions, it emerges that the ECHR, ICCPR and ACHR all contain emergency clauses, namely Article 15 ECHR, Article 4 ICCPR and Article 27 ACHR. Even though the ICCPR and ACHR provisions were modeled after Article 15 ECHR, the three of them differ substantially in wording and contents (which will be examined in details later), while the African Charter does not display any derogation clause at all³⁴.

Emergency clauses, defined as derogation articles, have paramount importance in the functioning of international mechanisms for the protection of human rights. This is due to their special nature: they allow States, in cases of extreme “emergency that threatens the life of the nation”, to free themselves from their obligation under the covenants in order to deal with the situation and restore order.

While at first it may seem odd that, in situations of severe crises, when individuals are most in need of protection, States can expand their powers (emergency powers) and act unbounded with all the consequent risks for the population, derogation

³³ Human Rights Committee, *General Comment NO. 5*, UNHRCOR, thirteenth session, 1981. 1

³⁴ Sergio Bartole, Pasquale De Sena and Vladimiro Zagrebelsky, *Commentario breve alla Convenzione Europea per la Salvaguardia dei Diritti dell’Uomo e delle Libertà Fondamentali*. (Padova: CEDAM 2012), 556

articles actually play a key role for the safeguard of the individuals in a number of respects.

First of all, they constrain States from suspending fundamental guarantees as they wish by setting a number of limits that they are bound to respect: clear conditions of applicability are established, lists of non-derogable rights are provided, requirements of proportionality and boundaries for extension in time are set, and specific mechanisms for international supervisions are instituted. Consequently, what at first might seem an authorized extension of State's power to the detriment of human rights actually puts some constraints on what would otherwise be beyond control.

Emergency clauses also have a fundamental role of balance between human rights and national security. Indeed, most national constitutions provide emergency clauses that empower the Head of State or Government to take exceptional measures, including restrictions on or suspension of fundamental guarantees, during wartimes or other calamitous situations³⁵. Therefore, as should be evident from my previous analysis on state of emergency, the latter consists in exceptional situations in which extra-legal measures can be taken legally to protect and safeguard the normal constitutional order as well as the citizens who live therein. This is why it might be necessary, for the preservation of the State, to introduce temporary changes to the normal function of a legal order and of the guarantees there enshrined, for instance by ordering detention without trial, creating special tribunals or imposing restrictions on the freedom of movement.

Along these lines, following Hartman and others' reasoning to ascertain the juridical nature of emergency articles, these seem to find their justification in the customary law doctrine of necessity.³⁶ The state of necessity is articulated as a general limit to States' obligations under international law, meaning that breaches of international law are excused when the respect of the norms that are breached would endanger the very existence of the State. This doctrine, therefore, allows for a potentially undefined capacity for States to disengage from their duties under international law, and this is why the presence of derogation articles in international

³⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev. Ed.) (Kehl am. Rhein: Engel, 2005), 84

³⁶ Hartman, *supra* note 10, at 12

covenants is an essential component to limit the scope of applicability of the doctrine of necessity.³⁷

Further, the presence of derogation articles in the treaties permitted the development of mechanisms of international supervision of emergency situation. For instance, Article 15 ECHR establishes a duty of notification by which States must keep the Secretary General of the Council of Europe fully informed of *the measures* taken and of the reasons therefor. Slightly differently, States derogating under Article 4 ICCPR must inform the other State Parties, through the Secretary General of the United Nations, of *the provisions* from which they derogate. As it is evident, monitoring tools are in this way created that would otherwise be non-existent³⁸ (a critique of these monitoring and control aspects will be put foreword in Chapter Three).

Even more importantly, derogation articles put themselves as key-norms for the preservation of the regime created by the covenants. As noted by Bartole and others³⁹, Article 15 ECHR acts in such a way as to prevent States from using the presence of situations of crisis as a legitimate reason for withdrawal from the convention. Indeed, it must not be forgotten that derogation clauses reflect an uneasy compromise between States' proneness to be bound by international commitment for the protection of human rights and the *ragion di stato* (reason of state).

1.4 Understanding Derogations through State Practice

Once also the legal justifications for the presence of emergency clauses in international treaties have been provided, it is time to analyze their meaning in practice and to get a sense of how States implement these provisions. Indeed, different trends have been witnessed ranging from the abuse to the complete negligence of derogation articles. In still another sense, in some States, emergency and other states of exception have become the rule as a normal form of exercise of power, blurring into the normal constitutional order. This application of exceptional

³⁷ Bartole and others, *supra* note 34, at 426; Antonio Cassese, *International Law*, , 255

³⁸ Bartole and others, *supra* note 34, at, 427

³⁹ *id.*

measure as recurrent tools of government risks, among other things, to alter the traditional differences and divisions among constitutional forms.⁴⁰

In the literature⁴¹, it was soon recognized that a danger of misuse of derogation articles by States was a concrete possibility, and UN Human Rights Committee showed dissatisfaction *vis-à-vis* state practice under Article 4 in many reports as well as in several General Comments.

In the context of ICCPR, whose 168 State Parties have many and different forms of state, a tendency to use emergency powers to maintain *de facto* positions of power, especially on the part of military dictatorships, has sometimes popped up. Emergency legislation has been invoked under the watchword of national security to justify – *inter alia* - arrests, incommunicado detention, torture, exile and summary proceedings⁴².

There are multiple examples of misuses of Article 4 ICCPR. The State of Israel, for instance, has proclaimed the state of emergency only once, in May 1948 – and notified it to the Secretary General in October 1991- but it has remained into force ever since. In Egypt, the state of emergency was declared in October 1981, to be lifted only in November 2013.⁴³ On the other hand, from March 1983 on, Peru has transmitted an unbelievable amount of notifications under Article 4, each concerning the establishment or continuation of one or more states of emergency in different parts of the country. An extreme case in this direction is the notification that the Secretary General received by Peru in March 1992, which encompassed as many as 64 declarations or extensions of a state of emergency in different provinces of Peru⁴⁴. Peru's last notification under Article 4, occurred on March 4, 2015.⁴⁵

Many Latin American States have touched the peak of derogations' misuses. In that region as in others, the tendency by authoritarian regimes to impose a state of emergency as the *de facto* normality has been extensive (see, *inter alia*, Paraguay, Uruguay, Brazil or Colombia). For instance, the Committee expressed its concern and doubts with regard to the length of derogation measures taken by Chile,

⁴⁰ Agamben, *supra* note 3, at 2

⁴¹ Nowak, *supra* note 35, at 84

⁴² *id.* at 85

⁴³ See A/HRC/WG.6/7/EGY/1 and A/HRC/WG.6/20/EGY/1

⁴⁴ Angelika Siehr, "State practice with respect to derogations" LL.M. Yale University

⁴⁵ Peru: Notification under article 4 (3) ICCPR, 4 March 2015 C.N.159.2015.TREATIES-IV.4 (Depositary Notification)

Uruguay, Peru and El Salvador⁴⁶. In 1979, in the discussion of the *Chilean initial report*, it was argued that the junta was itself the real source of the emergency.⁴⁷

By referring to the negligence that some States exhibit *vis-à-vis* derogation articles, I mean their violation of the duty of notification of a state of emergency to the other State Parties. The Committee had to request State Parties to comply with this duty in multiple occasions, when states failed to notify states of emergency that were in place from an already long time. Such requests have been made, among others, to Iraq, Syria and Afghanistan.

Moving to the Council of Europe, the dangers resulting from the misuse of derogation articles are evident also in the context of ECHR under Article 15. The European Convention has a more limited number of State Parties, members of the Council of Europe. As affirmed in the Preamble, they share a common tradition of values and political ideals aimed at the preservation of justice and peace, which is grounded, importantly, in “ effective political democracy” and in “ a common understanding and observance of (the) Human Rights”.

Democracy is therefore not only an ideal condition, but also a concrete requirement for the defense and application of human rights. Moreover, it is beyond doubt that concept of “democratic society” is vested of fundamental importance throughout the whole Covenant, as corroborated by Strasbourg organs’ jurisprudence.⁴⁸

With respect to Article 15, it should therefore be consequential that, at least in theory, there cannot be any authoritarian State threatening to use this provision for any scope other than the preservation of the democratic order and of the democratic society. However, to circumvent the risk that Article 15 be used to dismantle democracy with the pretext of defending it from some kind of menace, it is necessary that the provision be not interpreted extensively.⁴⁹ The European Court has in fact affirmed that “democracy constitutes a fundamental element of the “ ‘European’ public order” and that the Convention itself “was in fact designed to maintain and promote the ideas and values of a democratic society”⁵⁰.

⁴⁶ Nowak, *supra* note 35, at 98

⁴⁷ *id.* at 102

⁴⁸ Bartole and others, *supra* note 34, at 8

⁴⁹ Bartole and others, *supra* note 15, at, 426-427

⁵⁰ *Zdanoka v. Latvia*, [GC] No 58278/00, §98, ECHR-II

A paradigmatic case on the issue here considered is the Greek one. Under the Regime of the Colonels, the Greek government wanted to adopt derogations to suspend constitutional guarantees. However, the Commission found that there was no emergency situation in Greece at the time that was not a direct consequence of the *anti-democratic* behavior of the government.⁵¹

In general, State Parties have usually refrained from invoking their derogation powers under Article 15 ECHR. The United Kingdom (which has used this capacity under both treaties) and Turkey are the State that have derogated more under ECHR. While other States that have filed notification of derogations to the Secretary General of the Council of Europe are Ireland, Greece, France, Albania and Georgia.

1.4.1 The Customary Law Doctrine of Necessity

Necessity was officially recognized as a circumstance precluding wrongfulness in Article 25 of *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts*. The principle was accepted by the International Court of Justice⁵² stating “the state of necessity is recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation... such ground for precluding wrongfulness can only be accepted on an exceptional basis.”

The similarity between the elements necessary for invoking necessity and those imposed by the derogation provisions of the treaties display the tight relations between the two.

Necessity can be triggered exclusively under exceptional circumstances involving a “grave and imminent peril” for an “essential interest of the State... or of the international community as a whole”. While the interest of the international community is not significant in respect to derogation cases, the competing interests that become central are on the one hand the interest of the State, intended as its very existence, and, on the other hand, the particular interests of the individuals.

Another important requirement is that the act in question “must be the only means of safeguarding the interest”. This means on the one side that the measures taken

⁵¹ Bartole and others, *supra* note 15, at 426

⁵² James Crawford, *The International Law Commission's Articles State Responsibility* (Cambridge University Press, 2002), 181

must be measures of last resort, on the other side that any conduct exceeding what is strictly necessary for that aim cannot be covered.

In addition, the ILC's Article 25 implies an inherent element of international supervision, that the "State concerned is not the sole judge" of whether the conditions of necessity have been met. This is very significant in respect to human rights in general and in respect to derogation issues in particular, because supervision is an essential aspect of human rights enforcement.

Particularly significant vis-à-vis human rights violations, is also the requirement that the State has not "contributed to the situation of necessity". By virtue of the application of this requirement to derogation cases, the HRC condemned Chilean authorities for being the real source of the emergency, in the same way the European Court did vis-à-vis the Greek Regime of the Colonels

In any case, during the 19th century, abuses of necessity motivated with conceptions of "fundamental rights of State" casted light on the dangers associated to the doctrine and it was consequently accepted that necessity could constitute a circumstance precluding wrongfulness only under certain very limited conditions.⁵³

In the next chapter, the legal basis for lawful derogation and the limits imposed by the articles will be exposed in details and the implications that the aspects of necessity just considered have on the state of emergency will be clear.

⁵³ *id.*, at 183

CHAPTER TWO

WHAT DO DEROGATION ARTICLES ALLOW FOR?

In the previous chapter I have provided a general framework for understanding what a state of emergency is and what implications and dangers follow from its proclamation. Fundamental guarantees, entrenched and protected by international human rights law in times of peace and strengthened by international humanitarian law in times of war, can be restricted or even suspended when the alleged national interest prevails over individual rights. International monitoring mechanisms are established pursuant to the presence of derogation articles in international treaties. Those articles set the procedural and substantial requirements for admissibility of derogations, to be respected by State Parties and checked upon by international bodies.

In this chapter, I will make a comparative analysis of the scope and application of the aforementioned requirements under Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention of Human Rights. I will recall both State practice and international bodies' reactions to assess the practical implications of the standards set in these articles. To this aim, I will follow the procedural *iter* established by the articles, starting with the proclamation of state of emergency and the notification of derogation measures by State Parties, to arrive to the review of such initiatives by international organs.

2.1 Notice Requirements

The fact that a state of emergency exists in a State Party to ICCPR and ECHR comes to the attention of the international organs and of its other members by means of official notification, as established by the third paragraph of the two articles. Both treaties indicate the relevant Secretary General as the depositary of such notification,

which should contain detailed information about the derogation, and of a subsequent notification communicating the termination of the state of emergency and the restoration of normalcy.

Unfortunately, these key procedural obligations have not always been respected by States. Hence, while on the one hand a distinction between *de jure* and *de facto* emergency⁵⁴ is deemed essential for understanding state of emergency issues theoretically, on the other hand the Human Rights Committee (HRC) has complained that the existence of states of emergency has at times come to its attention only incidentally (i.e. being *de facto* but not *de jure*), because of States' noncompliance with this obligation.⁵⁵

There are three main differences concerning the practice of notice under the two regimes: the timing of the notification, the role of the Secretary General and content of the notification.⁵⁶ As for the first difference, while Article 4(3) ICCPR requires State Parties to "immediately" inform of the derogations, Article 15 ECHR is silent about timing. However, from the jurisprudence of the European Commission and Court it is clear that the notice should be sent within a reasonable time so to ensure effective monitoring on the measures taken.⁵⁷

According to the texts, the role of the Secretary Generals is slightly different because while under ECHR she/he is the ultimate recipient of the notice, the UN Secretary General is instead only an intermediary between the derogating State and the other State Parties, who are the ones to which the notice is directed. Anyhow, this textual differences have been modified in practice: on the one camp, the Council of Europe Committee of Ministers decided that the Secretary General inform State parties as well⁵⁸, on the other camp, in the UN system, the UN HRC has asserted its competence on the topic, overstepping State Parties given their inability to deal with these facts.⁵⁹

⁵⁴ Hartman, *supra* note 10, at 7

⁵⁵ Human Rights Committee, *General Comment NO. 29* UNHRCOR (CCPR/C/21/Rev.1/Add.11), 2001, page 7 para 17

⁵⁶ Hartman *supra* note 10, at 19

⁵⁷ In *Lawless Case*, the notice was sent 12 days after the adoption of derogating measures and this was considered by the Court to be an acceptable time. On the contrary, in the *Greek Case*, the notification took four months to be sent, and the Commission deemed this disproportionate. (see Sergio Bartole and others, *Commentario alla Convenzione Europea per la Tutela dei Diritti dell'Uomo e delle Libertà Fondamentali*, 439)

⁵⁸ Hartman, *supra* note 10, at 19

⁵⁹ Nowak, *supra* note 35, at 101

The last difference is the only truly important one⁶⁰ because it concerns the content of the notice. Indeed, while Article 4(3) ICCPR compels State Parties to indicate the *provisions* from which they are derogating and the reasons therefor, Article 15(3) ECHR requires to indicate the *measures* that are taken. The latter mechanism is more effective than the former because it put more demanding and extensive obligations on States Parties: they have at least to provide the text of the relevant legislation and administrative regulations, thus giving a clearer picture of reality and ampler ground for supervision.⁶¹ This requirement also implies that the international bodies and the other State Parties should be notified when modifications or additional emergency laws are implemented. In the same way it excludes the possibility that implied derogations follow from previously sent notification, as confirmed by the Court in *Lawless* and *Brogan*⁶².

However, since Article 4 has been subjected to the criticism of being pure procedural formality resulting in the summary character of notifications (as so often was the case), the HRC clarified that notifications “should include full information about the measure taken (...) with full documentation attached regarding their law.”⁶³ Contextually, the HRC stressed that States should also include, in their reports submitted under Article 40, “sufficient and precise information about their law and powers in the field of emergency powers”⁶⁴. Additional requirements were set by the Siracusa Principles, suggesting, *inter alia*, that a copy of the official proclamation, with the effective date of imposition of the state of emergency and its length and a brief description of the anticipated effect of the derogation measures be submitted.⁶⁵

A substantial difference between the two mechanisms is Article 4(1)’s requirement of official proclamation of state of emergency. Indeed, under ICCPR, prior official proclamation of the ‘existence of public emergency threatening the life

⁶⁰ Hartman, *supra* note 10, at 19

⁶¹ *id.* at 19

⁶² *Lawless v. Ireland*, no. 332/57, ECHR 1999-II ; *Brogan and Others v. The United Kingdom*, no.11209/84; 11234/84; 11266/84; 11386/85§48, ECHR 1999-II

⁶³ Human Rights Committee, *General Comment NO. 29* UNHRCOR (CCPR/C/21/Rev.1/Add.11), 2001, page 6 para 17

⁶⁴ *id.* at, page 2 para 2

⁶⁵ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4

of the nation' is a *condition sine qua non* for the application of Article 4, and derogation of rights under the Covenant amounts to a violation of international law so long as the emergency is officially proclaimed.⁶⁶

There are multiple objectives behind this prerequisite. First, to avoid after-the-fact justifications for abuses on human right and to encourage States to act publicly from the beginning of the emergency. Second, to ensure the “maintenance of the principles of legality and rule of law when they are most needed”⁶⁷: the declaration and application of emergency law must occur in compliance with constitutional provisions. Indeed, as I pointed out in the previous chapter, most constitutions contain emergency clauses similar to those included in these international treaties, because it is primarily a domestic responsibility of the competent (judicial or legislative) organs to review the legitimacy of the proclamation of the state of exception.⁶⁸

However, there are some constitutions that do not provide for any emergency clause. This is largely due to historical reasons and it is not by chance that Italy, Germany and Japan are among those States whose constitutions lack this provision. For these systems, therefore, international derogation clauses come to play a particularly important role, providing the rules for what is otherwise regulated only by the ambiguous doctrine of necessity.

⁶⁶ Nowak, *supra* note 35, at 92

⁶⁷ Human Rights Committee, *General Comment NO. 29* UNHRCOR (CCPR/C/21/Rev.1/Add.11), 2001, page 2 para.2

⁶⁸ Nowak, *supra* note 35, at 101

2.2 Legal Requirements and Applicability

The European Court and Commission and the HRC adopt broadly similar sets of criteria for ascertaining the legitimacy of any adoption of derogations, pursuant respectively to Articles 15 ECHR and 4 ICCPR. Both set two key substantive criteria: that there be ‘a public emergency threatening the life of the nation’ and that the measures derogating from the covenants be limited to the ‘extent strictly required by the exigency of the situation’. These two clear prerequisites are key because they settle objective standards and are therefore ‘capable of objective verification’.⁶⁹

2.2.1 ‘Public Emergency Threatening the Life of the Nation’

The first definition of the meaning of ‘a public emergency threatening the life of the nation’ provided in the European Court of Human Rights’ jurisprudence read as follows: “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed”⁷⁰. Subsequently, in the *Greek* case, the Commission pointed out four characteristics of a ‘public emergency’: the emergency be actual or imminent, its effects involve the whole nation, the preservation of the organized life of the community be threatened, and the danger be so exceptional that any normal measure is inadequate for dealing with it.⁷¹

On the part of the UN, the HRC failed to clarify the meaning of Article 4 in its *General Comment NO. 5*, which was consequently followed by *General Comment NO. 29*. In this document, the Committee broadly elaborated on the significance and limitations of derogations, without yet providing any clear-cut definition. However, given the consistency between the two articles, the definitions provided in the Council of Europe’s jurisprudence can be considered to be applicable also for Article 4 ICCPR.

A terminological difference between the two provisions is the inclusion of ‘war’ in the ECHR article as possible factor threatening the life of the nation that could justify resort to state of emergency. The term is here meant to include cases of officially declared war, cases of civil war, cases of *de facto* war lacking formal

⁶⁹ Hartman, *supra* note 10, at 16

⁷⁰ *Lawless v. Ireland*, no. 332/57§28, ECHR 1999-II

⁷¹ ECHR, *The Greek Case*: Report of the Commission (1969)

declaration or even other situations of conflict where the parties negate the existence of a war itself⁷². The drafters of the ICCPR provision decided not to include the word in their text not to give the idea that the United Nations accepted it, but, as it is logical, the possibility that a ‘public emergency’ be caused by a war was implied⁷³. Indeed, most cases of declarations of emergency under ICCPR have been justified by civil war or severe internal unrest such as subversive activities, guerrilla war or terrorism.⁷⁴

However, ‘public emergency’ threatening the life of the nation can extend beyond conflicts to include also extreme natural or environmental catastrophes, while severe economic difficulties can constitute the preconditions for social and political unrest that may put the life of the nation in danger. Therefore, because of the potentially unlimited scope of the notion of “public emergency”, it is essential that the term be interpreted restrictively and that the second important legal requirement be satisfied. The threat must be “exceptional, imminent and actual”⁷⁵ and thus not any severe emergency can qualify for the invocation of derogations, nor there can be states of emergency with a preventive purpose.

The HRC attaches particular importance to the fact that the emergency be “exceptional and temporary in nature”, because of the many cases of prolonged state of emergency that have come to its attention. On the other hand, the European Court of Human Rights’ case law never incorporated this requirement, but rather pointed to all the cases concerning the security situation in Northern Ireland as evidence of the possibility of prolonged public emergencies.⁷⁶

The Court has shown more flexibility than the HRC not only in respect to the temporal requirements that the emergency should satisfy, but also in relation to the temporal nature of the threat. In this sense, as for the requirement that the threat be ‘imminent’, the definition that the Court gave in *A & Other v. the United Kingdom* in respect to international terrorism was broader than in previous jurisprudence and affirmed that ‘an attack’ is ‘imminent’ to the extent that an atrocity might be

⁷² Bartole and others, *supra* note 15, at, 557

⁷³ Nowak, *supra* note 35, at 89

⁷⁴ *id.* at, 90 : e.g. Algeria, Argentina, Bolivia, Chile, Peru, Poland, Sri Lanka, The United Kingdom, Uruguay, Venezuela.

⁷⁵ Bartole and others, *supra* note 15, at 557

⁷⁶ *A and Others v. The United Kingdom*, [GC]no 3455/05 §1178, ECHR 1999-II

committed without warning at any time’⁷⁷. Moreover, the Court held that “the requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it”.⁷⁸

The issue of geographic coverage of the emergency can also be problematic, and apparently international organs endorse oscillating positions at different times. In the derogation letter of notice, States are required to indicate the geographical scope of the state of emergency they are declaring (take as example Peru in 1992, when it communicated 64 different states of emergency in as many different provinces at the same time) and in these cases the measures taken must be circumscribed to the limited territory there indicated. For instance, in *Sakik and others v. Turkey*, the European Court held unanimously that the derogation was inapplicable *ratione loci*, because the territories in question had not been indicated in the notice of derogation⁷⁹.

To the contrary, the British derogation measures in Northern Ireland demonstrated how a geographically limited source of danger could affect the whole population and thus put the life of the entire nation in peril⁸⁰. In the 9/11 aftermaths, with the rise of international terrorism, it became even more difficult to identify the physical source of the threat, and the geographical link between the former and the place where an emergency could take place became even more fragmented. In *A & Other v. the United Kingdom*, concerning the emergency measures taken by the United Kingdom after 9/11, the European Commissioner for Human Rights was of the opinion “that general appeals to an increased risk of terrorist activity post September 11 2001 cannot, on their own be sufficient to justify derogating from the Convention”⁸¹.

Instead, in the same case, the Court found that “it was for each Government, as the guardian of their own people’s safety, to make their own assessment on the basis of the facts known to them”⁸² and consequently agreed that that was the case of a public emergency threatening the life of the nation.

⁷⁷ *id.*

⁷⁸ *id.*

⁷⁹ *Sakik and Others v. Turkey*, no 87/1996/706/898-903, ECHR 1999-II

⁸⁰ Nowak, *supra* note 35, at 91

⁸¹ *A and Others v. The United Kingdom*, [GC]no 3455/05 §103, ECHR 1999-II

⁸² *id.*

Anyhow, it must not be forgotten that emergency ‘measures’ are to be translated in emergency ‘powers’, and hence an overly relaxed approach toward preventive measures runs the risk of allowing for unjustified violations of human rights.

2.2.2 ‘Extent Strictly Required by the Exigency of the Situation’

As for the second fundamental requirement shared by the two articles, namely that the measures be taken to the ‘extent strictly required by the exigency of the situation’, this element must be interpreted as a statement of proportionality. This means that the measures taken must be proportional in scope and in temporal and geographical coverage to the extent of the emergency and that, as tools of last resort, be motivated by the inadequacy of any other legal means for averting the crisis.

This assessment, as the former, is initially made by the relevant authorities at state level and later scrutinized by the international organs. Indeed, under both ICCPR and ECHR, State Parties bear the burden of proof in establishing the existence and magnitude of a public emergency.

Under Article 4 ICCPR, the compliance with the principle of proportionality is subject to review by the HRC, which has in multiple occasions expressed its dissatisfaction *vis-à-vis* State Parties’ practice in these regards and which has urged them to pay increased attention to this important limitation⁸³. On the other hand, the Strasbourg Organs have adopted an increasingly deferential attitude toward national authorities and have contextually elaborated the “margin of appreciation” doctrine – which will be analyzed later.

The bodies of the Council of Europe stressed the importance of judicial overview of the question of proportionality at domestic level⁸⁴ while also underlining governments’ duty to show not only that there is proportionality between the measures taken and the seriousness of the situation, but also that such measures are necessary for the safety of the nation⁸⁵. These last two elements must be satisfied for

⁸³ Siehr, “*State practice with respect to derogations*”, 11

⁸⁴ *A and Others v. The United Kingdom*, [GC]no 3455/05 §182, ECHR 1999-II

⁸⁵ Bartole and others, *supra* note 15, at 434

the test of proportionality to be exhausted, and, in this regards, supervision and scrutiny by the international organs is of fundamental importance⁸⁶.

The Strasbourg Court drew a very clear distinction between Article 15's phrase 'strictly required' and other articles' ordinary standards of necessity and proportionality. Necessity is surely a fundamental premise for derogations, but it by no means fully justifies them. To the contrary, 'indispensability' must be associated with the phrases 'strictly required' in Article 15 and 'absolutely necessary' in Article 2, meaning that a stricter and more compelling test of necessity must be applied in these situations than normally required.⁸⁷

The Court's endorsement of this approach suggests that in the ECHR system States' interest does not prevail over individual rights, but that various competing interests must be reconciled together in assessing proportionality. Both individual and collective rights are identified and protected by the convention, and the proper weight to be given to each is to be struck on a case-by-case basis, under the light of proportionality.

Thus proportionality not only rules out interferences with individual rights not necessary in a democratic society, but also determines the level of protection to be accorded to collective rights, considering the degree of interference they entail upon individual rights. This is made possible by means of international supervision of the proportionality test *vis-à-vis* States' own assessment of necessity.⁸⁸

The international organs of both treaties have stressed the need for regular review of derogation measures by independent national organs, to ensure that proportionality between reality and measures taken is kept in time and that the latter cease to exist when the former does not require them any longer⁸⁹.

⁸⁶ Enzo Cannizzaro and Francesca De Vittor, "Proportionality in the European Convention on Human Rights", in *Research Handbook on Human Rights and Humanitarian Law*, ed. by Kolb R. and Gaggioli G. (Edward Elgar: 2013), 127

⁸⁷ Christopher Michaelsen, "The Proportionality Principle in the Context of Derogation", *The Proportionality Principle in the Context of Anti-Terrorism Laws: An Inquiry into the Boundaries between Human Rights Law and Public Policy*, http://press.anu.edu.au/war_terror/mobile_devices/ch07.html

⁸⁸ Cannizzaro and De Vittor, *supra* note 86, at 127;129

⁸⁹ Nowak, *supra* note 35, at 98; Bartole and others, *Commentario alla Convenzione Europea per la Tutela dei Diritti dell'Uomo e delle Libertà Fondamentali*, 434

2.3 Limits to derogation measures

In addition to the two legal requirements I have just dealt with, which amounts to prerequisites for any claim of derogation, other conditions must be respected for derogations to be permissible. Following the Paris Minimum Standards prescription, “the power to take derogatory measures as aforesaid is subject to five conditions”: compliance with the principle of notification, respect of the principle of proportionality, consistency with other obligations under international law, prohibition of discrimination, and non-infringement of non-derogable rights⁹⁰. While I have already dealt with the issues of notifications and proportionality, I will now consider the other three.

A limitation of general order, however, which is only implicit in the two articles but dominant in both treaties, is that of “good faith motivation”⁹¹. The fact that a state of emergency should not be invoked, nor that derogations be made, with the purpose of crippling a nation’s democratic order is easy to conceive and it is true under ICCPR and even more under ECHR, whereby such a move would run counter the purpose of the covenant to maintain the order of a “democratic society”. Governments are required to act *bona fide* in all the procedures connected to emergency measures, from the assessment of the existence of a crises, to the choice and implementation of the measures thereby required.

A case in which the *bona fide* of a State Party was challenged is *Brannigan and McBride*, where it was alleged that the implementation of a derogation proclaimed after the adverse finding in *Brogan* was a mechanical response to the Court’s decision. The latter found that the existence of a public emergency in Northern Ireland was beyond doubt, but it was unwilling to examine how was that the State, before *Brogan*, could perfectly function without resort to derogations⁹².

2.3.1 ‘Consistent with other Obligations under International Law’

This requirement implies a clear connection between the two treaties here considered. It also means that there cannot be any recourse to international law by States in order

⁹⁰ Lillich *supra* note 19, at 7

⁹¹ Fitzpatrick, *supra* note 27, at 59

⁹² Fionnuala Ní Aoláin, “The Individual Right of Access to Justice in Times of Crisis: Emergencies, Armed Conflict, and Terrorism” in *Access to Justice*, ed by Francesco Francioni. Oxford University Press 2007, 68

to increase their exceptional powers. Importantly, this condition of consistency with other international obligations exists also in respect to international humanitarian law. This particular body of law is very relevant to the issue here analyzed and, as it was explained in the previous chapter, the mandatory respect of both international humanitarian law and human rights law in situations of emergency should act as a doubled guarantee for civilians' rights and dignity, by means of application of the rule that safeguards the rights at stake the most⁹³.

International bodies are therefore compelled to take into account a comprehensive set of laws when pronouncing themselves on States' conducts after proclamations of state of emergency. Under ECHR, this implies that the Court is called to interpret also other international treaties⁹⁴ as well as to apply the rules of international humanitarian law whenever there is acknowledgement of armed conflict. The Court had the possibility to express itself in this regards, and with mention to Article 15, in cases concerning Northern Ireland, South-East Turkey and Chechnya, even if none of those States had proven willing to qualify their internal situation as 'armed conflict'⁹⁵.

2.3.2 Discrimination

Concerning discrimination, contrary to Article 15 ECHR, Article 4(1) ICCPR expressly mentions this issue, requiring that derogating measures "do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin". The term 'solely' qualifies the whole sentence restricting its scope: it might be the case, e.g. for geographical reason, that emergency measures affect principally a particular group, but this is permissible so long as this match is not motivated by discriminatory reasons.

Article 15 ECHR does not contain any similar explicit limitation, nor enlists the right not to be discriminated against among non-derogable rights. However, there is wide agreement among scholars that the principle of non-discrimination, enshrined in Article 15 of the same Convention, must be conceived so as to implicitly permeate

⁹³ Bartole and others, *supra* note 15, at, 435

⁹⁴ *id. at*, 435

⁹⁵ Lindsay Moir, "The European Court of Human Rights and international humanitarian law", in *Research Handbook on Human Rights and Humanitarian Law*, ed. by Kolb R. and Gaggioli G., 481

the whole Convention and to be so fundamental that no derogation from it can be made under Article 15.⁹⁶

The European Court dealt with discrimination issues in most cases concerning derogations, the last one being *A and Others v. the United Kingdom*. Crucially, this is a case in point because the applicants challenged, *inter alia*, the legality of the derogation itself, claiming that their detention under *The Anti-terrorism, Crime and Security Act 2001* was in breach of their rights under Article 14 ECHR. The Court found that the derogating measures unjustifiably discriminated between nationals and non-nationals.

2.3.3 Non-Derogable Rights

The second paragraph of both articles is dedicated to a list of non-derogable rights, i.e. rights from which no invocation of derogation is possible even in times of public emergency. Also Article 27 of the American Convention, modeled, as the ICCPR provision, after Article 15 ECHR, is structured in the same way. However, the similarity between the second paragraphs of those articles does not go much further.

As a matter of fact the list of rights is different from time to time, even though a core group of four rights is present in all the three treaties, these are: the right to life, the prohibition of torture or inhuman or degrading treatment; freedom from slavery; and the prohibition on retroactive criminal laws.

Both the American Convention and ICCPR further contain the right of judicial personality and freedom of thought, conscience and religion. ICCPR alone includes the ban on imprisonment for failure to fulfill a contractual obligation; while the American Convention extends to incorporate rights of the family, rights of the child, right to a name, right to nationality, right to participate in a government and “the judicial guarantees essential for the protection of such rights”.

Such a widespread variation in the number and nature of the rights contained in these lists prompts interesting questions. First and foremost one could wonder if there is a theoretical justification for the selection of the singular right and if that justification steams from the importance of the right itself or from the relevance that that right could have in situations of emergency. Indeed, it is hard to understand why

⁹⁶ Bartole and others, *supra* note 15, at, 437

the right not to be imprisoned for failure to fulfill a contractual obligation would be particularly endangered during a public emergency, and, even more, why a State would need to put restrictions on that particular right.

Also, the identification itself of a set of rights worth preserving more than others might give the idea that hierarchy of rights actually exists, and that the inclusion of a right in that list implies its elevation and codification into customary international law. However, the lack of consistency among those lists shows how these conclusions are drawn too fast and cannot apply to all these rights. Maybe, only the four rights constituting the hard core shared by all the three provisions might be considered to amount to principles of *jus cogens*⁹⁷.

Beyond doubts, anyhow, is the fact that those four rights express the principles that “derogation should not excuse acts that would constitute an international crime, such as genocide or slavery and that these rights are essential to human dignity”⁹⁸.

It is worth mentioning that adjustments have been made to the lists by means of provisions in subsequent protocols to the treaties. According to Article 6(2) of the Second Optional Protocol to ICCPR, the right not to be executed cannot be subject to any derogation under Article 4 and is consequently added to the list. On the other hand, Article 3 of Protocol n. 6, concerning the abolition of death penalty, prohibits derogations from that protocol, while Article 4 of Protocol n. 7 extends the list of non-derogable rights to include the principle of *ne bis in idem*.

The HRC has in multiple occasions expressed its concern about derogations from non-derogable rights or about “risks of derogations [from these rights] owing to inadequacies in the legal regime”⁹⁹ of State Parties, e.g. in comments or concluding observations to Dominican Republic, Russian Federation, Israel, Iraq and Armenia. All these breaches corroborate the idea that States might not respect non-derogability, thus ignoring alleged peremptory norms of international law, when other interests (hopefully *national* interest) is perceived to be compelling.

Anyhow, international protection of the abovementioned rights and freedoms is not limited to their bare cataloguing. International organs’ jurisprudence, UN treaties and relevant treaty-based bodies, and the writings of many jurists and experts– e.g.

⁹⁷ Bartole and others, *supra* note 34, at 560

⁹⁸ Hartman *supra* note 10, at 15

⁹⁹ Human Rights Committee, *General Comment NO. 29* UNHRCOR (CCPR/C/21/Rev.1/Add.11), 2001, page 4 para 7.

the Siracura Principles or the Paris Minimum Standards- elaborated on the merit of each prohibition, developing detailed and specific guidelines for the safeguard of each right during public emergencies.¹⁰⁰ In this way, with the clarification of the meaning of the provisions, it gradually became possible to demand States a stricter compliance to those rules and, at the same time, to provide standards for review to which international organs could adhere.

2.4 Margin of Appreciation

Any meaningful attempt of compared analysis of the ICCPR and ECHR provisions and jurisprudence on state of emergency issue must mention the “margin of appreciation” doctrine.

This doctrine made its first appearance in *Cyprus* Report and was then upheld by the Commission in *Lawless*. The doctrine is based on the idea that “it falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it”¹⁰¹.

In almost all subsequent cases on derogatory powers, the Court recurred to the margin of appreciation, expanding the doctrine while reducing its own power to make any authoritative and meaningful supervision on alleged emergencies¹⁰². In the recent *A and Others v. The United Kingdom*, the Court repeated that it is “for each Government, as the guardian of their own people’s safety, to make their own

¹⁰⁰ Lillich *supra* note 19,

¹⁰¹ *Ireland v. United Kingdom* no. 5310/71, §207. 18 January 1978

¹⁰² Oren Gross, Fionnuala Ni Aolain, “From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article of the European Convention on Human Rights” in *Human Rights Quarterly*, Volume 23, Number 3, published by Johns Hopkins University Press, 2010, 632

assessment on the basis of the facts known to them”, thus again reaffirming its deferential attitude.¹⁰³

The margin of appreciation, however, must not be seen as implying unlimited power granted to governments based on their own assessments. Rather, it implies a wide but contained freedom to governments’ conduct under state of emergency, subject to *a posteriori* review by the organs of the Council of Europe when this is challenged before them. In this sense, according to the Court “the doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court.”¹⁰⁴

The question of the margin of appreciation is related to that of proportionality and to the judgments that national and international organs have to make in this regards. Indeed, recalling the abovementioned test of proportionality and surveying case law, we see that the Court generally tended not to challenge the existence of a public emergency (with the exception of the *Greek case*), but rather focused on the nature of the measures adopted.¹⁰⁵

The deference displayed in the Court’s attitude can be critically motivated by the sensitivity of some political questions or by the Court’s recognition of its own role as a supranational subsidiary body; in any of the two cases it would seem that the Court refrained from exercising its authority out of timidity and fear of States’ reaction.¹⁰⁶

However, for international supervision to be meaningful it is necessary that the margin granted to State Parties be narrow rather than wide and that international organs have the courage to lead in-depth investigations on the existence of any ‘public emergency threatening the life of the nation’ and to state accordingly. This is even more true because international organs, detached from the crisis and not involved in it as stakeholders, can provide a more objective and unbiased judgment on the existence of the emergency and on the measures necessary to avert it than national bodies can do¹⁰⁷.

Moreover, in ascertaining alleged human rights violation and in the pursue of the objective of the convention, i.e. the respect of human rights and freedoms, the

¹⁰³ *A and Others v. The United Kingdom*, [GC]no 3455/05 §180, ECHR 1999-II

¹⁰⁴ *id.*

¹⁰⁵ Bartole and others, *supra* note 34, atli 558

¹⁰⁶ Gross and Ni Aolain, *supra* note 102, at637

¹⁰⁷ *id.* at 639

Court's attitude *vis-à-vis* States' arguments should have critical overtones rather than deferential ones.

The HRC, on its part, has never incorporated the doctrine. Considering the criticisms above and the one that the margin gives too much leeway to moral and cultural relativism¹⁰⁸, this choice by the HRC can be interpreted as an attempt to promote openly the notion of universality of human rights disregarding relative differences. It seems that the Committee requires a stricter and more objective adherence to the text than the Strasbourg organs do, but unfortunately its weaker character (that I will investigate at length in the next chapter) results in problems of enforcement of these stricter demands, thus in turn being less effective than the ECHR system.

At the conclusion of this chapter, it is evident that procedural requirements of substance permeate the power of derogation, compelling States to take seriously the obligations of *bona fides*, notification, reporting, necessity and proportionality. These requirements must be interpreted as limitations aiming not only to enable States to resort lawfully to exceptional powers, but also to protect individual rights and dignity from possible abuses perpetrated under the disguise of derogations.

Therefore, the efficacy of the whole system must be measured in two directions: against the experience of the individual at national level and against the ability of the international organs to ascertain the quality and legality of such experience.

Bearing in mind the implications following from the wide margin of appreciation generally granted to States, assessment of these aspects will be the objects of the third and last chapter of this work..

¹⁰⁸ *id.* at 629

CHAPTER THREE

IMPLEMENTING DEROGATION CLAUSES IN THE PRACTICE OF THE ECHR AND THE HRC

In this concluding chapter my analysis will acquire more critical overtones aimed at casting light on the fallacies and possible improvements of the derogations system. However, before facing the problems related to monitoring mechanisms of emergency situations, judicial protection and access to justice, it is appropriate to make some general considerations on the Strasbourg machinery for the protection of human rights in states of emergency and on its United Nations counterpart, i.e. the Human Rights Committee.

The deferential attitude endorsed by the European Court of Human Rights and the elaboration of the margin of appreciation doctrine, both already present in the first judgments directly or indirectly concerning Article 15, steamed originally from the fear by the Strasbourg organs that States would feel challenged in their sovereignty and would thus abandon the system. This approach ran the risk of undermining its power of review both in theory and in practice and of giving the idea that the Court is not a defender of human rights but of Governments.

On its part, the Human Rights Committee has more assertively criticized States' alleged misuse of derogatory powers, or cases when they did not comply with the requirements set in the Covenant. However, its weakness always rested with its non-judicial, non-executive character resulting in a lack of consideration by States.

Another complicated aspect is the fact that, in exceptional situations, Governments are part to the dispute and can therefore not only be reluctant to international monitoring, but also biased in the administration of justice at national level and in conveying data to the international authorities. In addition, public emergencies are by their very nature politically sensitive questions, involving

situations of extreme strains for States who might want to be checked upon even less. This aspect has some implications also in respect to the margin of appreciation because States, despite being “in a better position”, are also in a “biased” position and lack the objectivity that a thorough supranational supervision would have.

Keeping these considerations in mind, I will tackle international handling of state of emergency from two, opposed, directions. On the one hand, I will assess the effective capacity of international organs to monitor and enforce a correct use of derogatory measures. On the other hand, I will consider individuals’ perception of this capacity and their expectations to see their right of access to justice secured and their claims of violation addressed before international bodies.

3.1 International Monitoring and Enforcement in Practice

The Human Rights Committee and the European Court of Human Rights are two of the international bodies most involved in the functioning of the two treaties here considered and their existence is vital for a dynamic development, and consequent application, of the legal systems. In respect to cases of state of emergency, these two bodies have clarified the meaning of derogations and the scope of their application through their practices of interpretation. Importantly, they have taken into account each other’s views when expressing their positions, thus consolidating a broadly firm and shared international understanding of the issue.

It must nonetheless be recognized that these two bodies differ in very critical ways, and that these differences are also mirrored by States practice *vis-à-vis* their statements. Indeed, there are multiple examples of HRC’s repeated calls on States (e.g. to comply with the procedural and substantial duties set in Article 4 ICCPR) that were almost ignored. On the other hand, decisions by the European Court of Human Rights have always had a very different impact on States, generally resulting in more immediate and tangible responses (e.g. the controversial derogation submitted by the United Kingdom after *Brogan*).

The reason behind this asymmetry is as much logical as intuitive: while the European Court of Human Rights is a fully judicial organ, the HRC is not. The latter has more an administrative function in respect to States’ reports and only a quasi-judicial character *vis-à-vis* individual complaints. Hence, the determinations by the

two organs fundamentally differ in force, because the judgments of the former are legally binding, while the positions expressed by the latter are “only” authoritative interpretations on the substance of the legally binding treaty provisions.

That said, these bodies’ effectiveness can be measured against three different but collectively exhaustive dimensions: their power of review, their fact-finding capacity, and their competence to have sanctions imposed in cases of States’ failures to comply with their undertakings.

3.1.1 Power of Review

None of the derogation articles in the two treaties considered in this work provides for any mechanism of *sua sponte* review. As explained in the Chapter Two, the Secretary Generals of both treaties are in charge of receiving notifications of derogations and of notifying them to the other State Parties. However, they do not have the duty, nor the faculty, to take any further move. Sticking to the text of the provisions, also the bodies that have asserted their competence in respect to derogations do not have the possibility to initiate autonomous investigations on the legitimacy of proclamations of state of emergency and on their compliance with the limits imposed by the treaties.

It would seem, therefore, that the only way by which these organs can pronounce themselves in these regards is to be triggered by individual or interstate complaints. The provisions of the two treaties that provide for interstate complaints are Article 41 ICCPR and Article 33 ECHR, while individual applications are provided for in Article 34 ECHR and are possible under ICCPR after the ratification of the First Optional Protocol.

The HCR has a comparative advantage over the European Court in respect to the capacity of expressing its opinions, that is, by means of the reporting cycles established by Article 40 ICCPR. By virtue of this mechanism, the HCR can request and acquire information and –importantly- express its opinions in the form of comments and concluding observations. However, HRC’s considerations run the risk

of being pointless and ineffective because of the modalities of submission of reports¹⁰⁹, which prevent the organ to act promptly in case of emergency.

To overcome this procedural obstacle that might jeopardize the whole system of protection, the HCR introduced for itself the faculty to request for submission of reports under Article 40 not only in accordance with the periodicity established in the treaty, but also at any other time the Committee deem appropriate.¹¹⁰ It further held that “in the case of an exceptional situation when the Committee is not in session, a request may be made through the Chairman, acting in consultation with the members of the Committee.”¹¹¹ For instance, in 2001 the HCR requested to Great Britain further information on emergency legislation in respect to the fight to terrorism following 9/11¹¹² pursuant to this capacity.

It is self-evident that the success of this monitoring mechanisms and the relevance and meaning of the HRC’s pronouncements is strongly dependent on States’ willingness and ability to comply *bona fide* with the procedural and substantial requirements set in the treaty.

On the other hand, under the European Convention on Human Rights there is no mechanism allowing for requests of further information before interstate complaints or individual petitions take place. This defect could be easily remedied for in a well functioning system as the Council of Europe is, but it may be the case that the overall scarce amount of emergency situations occurring in the democratic State Parties might have not pushed for the establishment of such an instrument.

Anyway, the lack of an automatic review process following a derogation notice remains a serious deficiency of both systems, depriving enforcement organs of any chance to promptly test the legitimacy of emergency claims and to provide the consideration and protection due to human rights.

3.1.2 *Fact-finding*

Fact-finding is a crucial aspect of international supervision of States’ compliance with their undertakings *vis-à-vis* derogations. To be meaningful, the information

¹⁰⁹ *Rules of Procedure of the Human Rights Committee*, U.N. Doc. CCPR/C/3/Rev.3, Rule 66 (1994). (CCPR/C/3/Rev.10), Part II, XV

¹¹⁰ *Rules of Procedure of the Human Rights Committee*, U.N. Doc. CCPR/C/3/Rev.3, Rule 66 (1994).

¹¹¹ *id.*

¹¹² CCPR/CO/73/UK, 40 Dec. 6, 2001

gathered must come from both States and other sources (e.g. NGOs or third States) and the relevant international body must have the ability to test the reliability of these data¹¹³. Most importantly, the supervisory body must have the authority to make its own authoritative findings.

It is evident that this issue is closely related to the abovementioned one concerning the power of review and, I would suggest, it could be better understood as a fundamental component of the former.

As I repeated more than once in this work, the scrutiny of emergency declarations is a very sensitive issue, affecting politically both the domestic reality of a country and its international position, and any comment or judgment by international organs in these regards must be made with the greatest awareness of the facts as possible.

As for the Council of Europe, the European Commission seems to have the most efficient methods of investigations¹¹⁴, and its findings are often employed by the Court for its own judgments. In the first derogation cases, such as the *Greek* case or *Ireland v. UK*, the Commission showed good ability in hearing and handling considerable numbers of witnesses and voluminous, conflicting pieces of evidence as well as in carrying out on-site investigations. However, its inconsistency in the employment of judicial procedures has brought about governments' recalcitrance and suspicion (e.g. in *Ireland v. U.K.*) *vis-à-vis* its competences.

The European Court, on its part, has generally tended to rely on the Commission's findings and on the evidence provided by the parties to the cases rather than to use its own powers of investigation. However, despite its reliance on the Commission, the Court have proved its undoubted independence in its interpretation of the abovementioned findings, even pronouncing itself in a way opposed to that of the Commission in *Ireland v. UK*.

Anyhow, the Court, if willing to do so, has the power to take investigative measures and to travel to countries and hear witnesses or carry out on-site investigations in order to clarify the facts of a given case, but it has proved reluctant to do so in derogation cases.

I already pointed to the mechanisms of data gathering at the disposal of the Human Rights Committee in the previous section, consisting of reporting cycles

¹¹³ Hartman *supra* note 10, at 36

¹¹⁴ *id.* at 37

under treaty bodies and UPR. These systems give non-governmental organizations the chance to express their positions and communicate their findings as well as compelling State Parties to pronounce themselves on other States' conduct *vis-à-vis* human rights.

However, the effectiveness that UN reporting cycles can have in respect to state of emergency issues is subject to several and strong criticisms. In Joan Fitzpatrick's words, "Article 40 report process fails as a device for fact-finding in derogation situations because it is unfocused, subject to substantial delays, and unequipped either to produce or to test the veracity of relevant information"¹¹⁵.

The necessity to gather information from State Parties acted as an almost unrestrained fever on UN organs, generating the establishment of reporting mechanisms under all treaty-bodies and to the institution of the abovementioned Universal Periodic Review. To move a critique against the overlaps and redundancies of the UN system is beyond the scope of this paper, but it is a fact that must always be remembered when considering the practical inefficiencies of the United Nations in respect to human rights protection.

3.1.3 Sanctions

As it was recognized already by Hartman¹¹⁶, another serious defect of regional and international supervision of emergency situations is the absence of a system capable of sanctioning an abusive and unlawfully practice of emergency powers.

As for the international monitoring on state of emergency by the United Nations, carried out by the HRC pursuant ICCPR, there is a comprehensive deficiency in these regards. Indeed, it is well known that the only UN organ capable of taking measures with sanctioning objectives against a State Party is the Security Council pursuant to Chapter VII of the Charter of the United Nations. As previously said, the HRC can only express its views in general comments or at best make recommendations, running the risk of being largely ignored by States.

Furthermore, the total absence of review and sanction at the moment of notification gives to much leeway to States and undermines the entire derogation regime from its very beginning. As Hartman stated already in 1981, "The lack of

¹¹⁵ Fitzpatrick, *supra* note 27, at, 84

¹¹⁶ Hartman *supra* note 10, at

coercive sanctions in either treaty casts a shadow of futility over all the enforcement efforts, especially in situations of massive violations.”¹¹⁷

While, therefore, it is desirable but unrealistic to expect sanctions imposed against a State Party for its unlawful imposition of a state of emergency or measures going beyond the ‘extent strictly required by the exigencies of the situation’ therein, a more thorough response to these cases might be achieved by means of individual petitions (which will be considered in details in the next section). Anyway, it would be preferable that this fragmented and *ad hoc* approach for the protection of civilian and the persecution of wrongful practices be substituted with a more coherent and effective system, capable of safeguarding individuals both *a priori* and *a posteriori*¹¹⁸. In addition, even after a successful application by an individual before the HRC, it may still be necessary for the compliant to initiate new proceedings at domestic level in order to be paid just satisfaction. This fact can also mirror a certain negligence by States which do not even see themselves obliged to pay due compensation to an internationally recognized victim of their abuses.

Some commentators have put forward the idea of creating a Universal Court for Human Rights or a single unified treaty body, which would facilitate a more efficient processing of State reports and a more thorough consideration of individual complaints¹¹⁹ with imposition of appropriate compensation. This option would certainly serve the cause of human rights under state of emergency, but this perspective seems very unrealistic in the foreseeable future.

Moving to the Council of Europe, also this regional system is inefficient in terms of sanctioning mechanisms against State Parties who make improper use of emergency powers. Once again, review and control of emergency situations is not spontaneous and occurs only if triggered by interstate complaints or individual petitions. Hence, in the absence of any coercive arrangement, the Court can achieve its greatest results only by adopting a stringent and strict scrutiny of the requirements set in Article 15. To the contrary and unfortunately, the Strasbourg organ has applied the margin of appreciation doctrine widely and unwisely, thus showing all its

¹¹⁷ Hartman *supra* note 10, at 36

¹¹⁸ Kuwali D., “‘Humanitarian Rights’: How To Ensure Respect for Human Rights and Humanitarian Law in Armed Conflicts”, 346

¹¹⁹ Smith R. K. M., *Textbook on International Human Rights*. 5th ed. (Oxford University Press, 2012), 384

deference toward State Parties and political caution *vis-à-vis* their membership in the Council of Europe.

A case when there was a high chance that the sanction of expulsion be imposed against a State Party, upon, *inter alia*, the proclamation of a state of emergency, was against Greece in 1969. However, Greece avoided the sanction by denouncing the European Convention before the expulsion had taken place, thus moderating the international relations and public opinion damage, but still emerging as a human rights violator.¹²⁰

Anyhow, the European Court can impose sanctions against a State Party when the latter is found to be violating its undertakings under the Covenant in a case brought before the Court. The Court can not only issue legally binding orders for the payment of just satisfaction to the compliant, but can also order the respondent State to pay for the legal costs of the proceeding. In the absence of any coercive mechanism for the respect of state of emergency's conditions, these judgments come to acquire a particular value. Namely, while it is only the particular victim (the compliant) who is compensated for the abuses suffered, the sentence against the perpetrator should symbolically stand for retribution for all victims and stigmatization of the abusive State in the eyes of the international public.

Hence, it is still appropriate to say that "the findings of these bodies cannot be expected by themselves to cure the massive violations characteristic of derogation cases, though they may help moderate the emergency policies of a democratic state"¹²¹.

3.2 Aspects of Access to Justice

3.2.1 The Role of the Judiciary at Domestic Level

In the absence of any *sua sponte* review mechanisms, it is of the greatest importance that individual access to justice before international organs be secured and well functioning in order to ensure respect of the obligations undertaken by States with the ratification of the treaties and to prevent impunity.

¹²⁰Hartman *supra* note 10, at 49

¹²¹*id.* at 48

'Impunity' means "the impossibility, *de jure* and *de facto*, of bringing the perpetrators of violations to account since they are not subject to any inquiry that might lead to their being accused, arrested, tried, and, if found guilty, sentenced to the appropriate penalties, and to making reparations to their victims".¹²²

The possibility that massive impunity take place becomes perilously real under exceptional situations of public emergency, when individual human rights are most in danger and when their right of access to justice is less secured. As for international redress, even in condition of normalcy, the perceived distance from regional and universal bodies can dissuade victims from reporting abuses¹²³ and this perception can become even more marked and crucial under state of emergency.

The reasons why effective individual access to justice at international level is of pivotal importance during state of emergency are several. To tackle them from the right perspective, it is necessary to start from national level and analyze if and how access to justice is impaired therein, and then move to the international layer.

First, to have effective access to justice it is necessary that the judicial branch of the state work effectively. Hence, the question of the preservation of separation of powers and of the independence of the judiciary during state of emergency is paramount for the protection of human rights.

The role of judicial review in and of state of emergency was taken up by many commentators and particular attention was paid in this regard in the Paris Minimum Standards¹²⁴, where it was stated that "at regional or international level, every declaration of emergency by a State Party to regional or international human rights treaty shall be subject to such judicial review or other review as the terms of the particular treaty may provide; while at national level, such power of review shall be exercised in terms of the constitutions and legal tradition of the state concerned."¹²⁵

Indeed, the judiciary plays a pivotal role in the prevention of abusive emergency powers by the executive from the initial moment of declaration of the exception, and the relevance of this role must be preserved throughout the whole duration of the

¹²² Kuwali D., *supra* note 118, at 346

¹²³ *id.* at 343

¹²⁴ Lillich *supra* note 19, in section (B) Emergency powers and the protection of individuals: general principles and in Articles 7 and 16

¹²⁵ *id.* in section (A) Emergency: declaration, duration and control, 7

emergency. This condition is one of the most important guarantees for rule of law in state of emergency.

At the moment of the declaration of the emergency, judges should be in charge of checking the conformity of emergency legislation with the constitution, the conformity of each emergency measure with the scope of emergency legislation, the compliance with the requirement in the articles of the international treaties and the consistency with municipal laws or orders that have not been specifically suspended. Thereafter, the judiciary should have the authority to declare null or void any emergency measure or act not satisfying these requirements.¹²⁶

That the judicial branch is able to make these authoritative assessments is an indicator that the rule of law is well functioning in a country at the moment of a declaration of emergency and that human rights would be safeguarded from that moment on. A positive example in these regards is *A and Others v. The United Kingdom*, whereby the House of Lords and the Special Immigration Appeals Commission could openly challenge the legality of the emergency norms and of the derogation itself. It must be kept in mind, however, that the separation of powers and judicial guarantees are deemed to be essential elements of the rule of law in de ‘democratic countries’ of the Council of Europe, while this issue is more problematic at universal level, where different forms of state exist.

During the extension of a state of exception, multiple attempts aimed at impairing the power of the judiciary and undermining its functioning might take place. It follows that if these attempts are successful, individuals would find themselves unprotected against abuses. It might happen that in countries where a state of emergency has been proclaimed, “the protection of the individual by the judiciary becomes largely illusory”.¹²⁷

Chowdhury identified four main ways –or methods- with which the expansion of executive powers to the detriment of the judicial ones can occur: purges and punishments of recalcitrant judges (e.g. Grece during the Regime of Colonels), restructuring of the judicial system (e.g. institution of military or special tribunals, or

¹²⁶ Chowdhury, *supra* note 5, at 140

¹²⁷ *id.* at 130

reduction of judicial powers of review), carrot and stick policy, and promotion of judges who are supporting or who adopt a hands-off attitude.¹²⁸

The will of impairing individual access to justice can be put into practice not only by means of the boycott of the judiciary but also through the intimidation of lawyers and legal assistants.¹²⁹ Under the HRC, it was noted in Communication 63/1979 that lawyers were systematically harassed in Uruguay during the protraction of the state of emergency. Also, in 1986 in Chile, forty among lawyers, doctors and social workers of *Vicaria de la Solidaridad* were victims of bombings, kidnappings and detention.

3.2.2 Limitations on Due Process

Looking at State practice, during times of emergency it seems very common that limitations on due process rights and judicial guarantees do take place. They tend to occur principally in the form of expanded legal bases for detention and expansion of the length of time persons can be kept in state custody, or limitations on access to legal counsel and on access to judicial oversight.¹³⁰

With the rise of international terrorism following the events of 9/11, many systems witnessed the adoption of exceptional measures designed to fight this threat, which expanded toward substantial restrictions of civil liberties and undermined those procedural mechanisms that make judicial guarantees functioning and meaningful.

The main exceptional anti-terrorism measures taken by States consisted in the creation of special military tribunals for processing those charged with terrorism, the creation of *ad hoc* detention sites (notably Guantanamo), and, more generally, in the denial or restricted access for suspected terrorists¹³¹. What is regrettable is the fact that in the 9/11 aftermath most of the state that have introduced such emergency measures have not entered any corresponding derogation notice.¹³²

In the United Kingdom, the emergency legislation adopted *vis-à-vis* international terrorism in 2001 consisted of the already mentioned *Anti-terrorism, Crime and*

¹²⁸ Chowdhury, *supra* note 5, at 130

¹²⁹ *id.* at 140

¹³⁰ Ni Aoláin, *supra* note 92, at 63

¹³¹ *id.* at 88

¹³² *id.* at 66

Securit Act (2001), allowing for arrest or detention of a non-national suspected of terrorism who could not be repatriated because of judicial obstacles such as the risk that this person be subject to torture or death in her/his country. In France, the emergency legislation¹³³, expanding search and control powers, expressly stated “la sécurité est un droit fondamental. Elle est une condition de l’exercice des libertés” ; this is considerable because this phrasing recalls the underlining counterbalancing between individual guarantees and collective security.

After the terrorist attacks that took place in London on July the 7th 2005, a new wave of anti-terrorism legislation expanding police powers to the detriment of judicial guarantees was adopted in some States. For instance, in Italy, police custody, previously amounting maximum to 12 hours, was increased to 24 hours during which the suspect could be stopped without informing judicial authorities and without allowing for contacting the family or a defender¹³⁴. Also, provision was made that non-nationals could be expelled if suspected of being connected to terrorist groups without the requirement that any offence or crime be committed¹³⁵.

Anyhow, States’ faculties in these regards, particularly *vis-à-vis* detention and police custody, must always be subject to the test of proportionality and necessity, and judicial supervision of the lawfulness of these measures and of the way they are carried out is indispensable.

As concluding remarks, reference must be made to the fact that, with the protraction in time of a state of siege, the possibility that this state of affaire becomes entrenched and corroborated practice, endangering individual rights, increases together with the need to ensure meaningful access to legal review at international level. As for such review, the more serious is the breach complained of, particularly those involving right to life, liberty and deprivation of liberty, the more fundamental

¹³³ French Law n. 1062 of 15 November 2001 (see Giuseppe Cataldi, “Le deroghe ai diritti umani in stato di emergenza”, in *La tutela internazionale dei diritti umani. Norme, garanzie, prassi*, edited by L. Pineschi (Milano: Giuffrè 2006), 762)

¹³⁴ Italian Law n. 155 of 31 July 2005 converting the law decree n.144 of 27 July 2005 (see Cataldi, “Le deroghe ai diritti umani in stato di emergenza”, 768)

¹³⁵ Cataldi, “Le deroghe ai diritti umani in stato di emergenza”, 770

it is to preserve the victims' right to "have access to remedial measures and to effective investigation and prosecution of the responsible person."¹³⁶

3.2.3 International Organs' Pronouncements on Access to Justice and Judicial Safeguards

This overview of the threats to which human rights in general, and individual access to justice in particular, can be exposed to under emergency situations has substantial consequences *vis-à-vis* individual access to justice at international level. This is so because under both ICCPR and ECHR, individual complaints to international bodies can be filed only after the exhaustion of domestic remedies. This requirement implies that the individual right of access to justice must be exercised primarily and exhaustively within the domestic legal system where the violation has taken place, and only thereafter, when conditions of admissibility are satisfied, the case can be referred to an international body.

What happens in situations of prolonged emergency when no national remedy is available or, better, when there is impossibility to exhaust all the domestic remedies allegedly available? As it should be evident from the last section, in cases of internal conflict or prolonged state of siege, these two can by themselves constitute a bar to the right of access to justice at domestic level and, in turn, at international level.

Appropriately, the European Court has held that "there is... no obligation to have recourse to remedies which are inadequate or ineffective." In addition, it has stated, "according to the 'generally recognized rules of international law' there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal. The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective".¹³⁷

It is evident that the right of access to justice is of pivotal importance during situations of public emergency or internal conflict but, despite its being a cornerstone of the rule of law, this right was not per se included among the lists of non-derogable

¹³⁶ Francioni Francesco, "The Rights of Access to Justice under Customary International Law", in *Access to Justice*, edited by Francesco Francioni. (New York: Oxford University Press, 2007), 46

¹³⁷ *Akdivar v. Turkey*, Application no. 21893/93, ECHR judgement of 30 August 1996, para 67

rights of either Article 4 ICCPR or Article 15 ECHR. This shortfall was remedied for by the HRC in *General Comment 29*, where it stated that “State Parties must comply with the fundamental obligation under Article 2, paragraph 3, of the covenant to provide a remedy that is effective.”¹³⁸ As for the American Convention, though not expressly mentioning judicial protection, it states that “judicial guarantees essential for the protection of such rights” are not subject to suspension.¹³⁹

Also the special interrelation that international humanitarian law and human rights come to acquire during state of emergency corroborates the idea that individual right of access to justice must be secured during emergencies: judicial remedies are guaranteed under humanitarian law (e.g. fair trial guarantees as contained in common Article 3 of the Four Geneva Conventions, or judicial protection of prisoners of war as protected by the First Protocol, Article 45¹⁴⁰) and, therefore, it would not make sense to allow for a lower level of protection during situations of public emergency, especially given the requirement of consistency “with other obligations under international law”.

Alongside the calls to respect and protect these fundamental guarantees, the international organs have stressed the importance of safeguards. In times of normalcy and peace, international laws allows states to have a wide margin of freedom in the articulation of their domestic system of justice and legal remedies, on condition that these remedies are effective and provide fair and impartial justice.

In times of emergency, instead, it is essential that a regime of safeguards against possible abuses, enforced principally but not exclusively by judicial bodies, be incremented in order to counterbalance the increased leeway accorded to State’s authorities (generally the executive branch).

As for the European Court jurisprudence, this point was present already in *Lawless*, a cornerstone case in the jurisprudence on derogations, whereby the Court positively recognized the establishment of a Detention Commission, where “any person could refer his case” and “whose opinion was binding upon the Government”.¹⁴¹ Always with reference to the UK, in the more recent case *A and*

¹³⁸ Human Rights Committee, *General Comment NO. 29* UNHRCOR (CCPR/C/21/Rev.1/Add.11), 2001, para 14

¹³⁹ Francioni Francesco, *supra* note 136, at 43

¹⁴⁰ *id.* at 44

¹⁴¹ *Lawless v. Ireland*, no. 332/57, 37 ECHR 1999-II ;

Others v. The United Kingdom, the Court positively remarked the establishment of the Special Immigration Appeals Commission in this sense.

On a more negative side, the case *Brogan v. the United Kingdom* casted light on a formal limitation on due process rights, that is, the persons detained and then released without charge were not brought before a judge during their detention, thus not having their right of access to judicial remedy to review the merits of their detention respected¹⁴². In this case, the Court stressed the requirement that procedural aspects of access to justice be secured during emergencies and indicated Article 5 ECHR to be the cornerstone of meaningful access to justice, to be respected both in times of normalcy and of exception¹⁴³.

Along these lines, in several “Turkish cases and eastern European cases”¹⁴⁴ the Court had the chance to rule on the question of emergency oversight and on limitations to the right of access to justice, whereby it emphasized the relevance of judicial control as a key element of the rule of law, worthy of particular consideration during situations of emergency.

Also the HCR as forcefully pointed out the importance of the creation of specific regimes of safeguards, proclaiming it in its *General Comment 29*, and returning on the point in several concluding observations¹⁴⁵. In the words of the Committee, the duty “to provide remedies for any violation of the provisions of the Covenant [...] constitutes a treaty obligation inherent in the Covenant as a whole”¹⁴⁶, and thus, even if not expressly provided for by Article 4, procedural and judicial guarantees must be secured under the emergency. As it is evident, this is of even more remarkable importance when non-derogable rights, such as the right to life, freedom from torture and personal liberty, are at stake.

The Committee also stressed that no measure affecting the procedural safeguards established by the provisions of the Covenant could be made and that the safeguards established at the time of the emergency should be “based on the principles of

¹⁴² Fionnuala Ní Aoláin, “The Individual Right of Access to Justice in Times of Crisis: Emergencies, Armed Conflict, and Terrorism”, 65

¹⁴³ *id.* at 66

¹⁴⁴ *id.* at 69

¹⁴⁵ Human Rights Committee, *Concluding Observations* to Sri Lanka, 27 July 1995 (CCPR/C/79/Add.59, par 13), *Concluding Observations* to Colombia 5 May 1997 (CCPR/C/79/Add.766, par 38)

¹⁴⁶ Human Rights Committee, *General Comment NO. 29*, para 14 UNHRCOR (CCPR/C/21/Rev.1/Add.11), 2001

legality and the rule of law inherent in the Covenant as a whole”¹⁴⁷. It also added “Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.”¹⁴⁸

In conclusion, “despite treaty and state practice supporting the individual right of access to justice, a number of questions and obstacles remain with respect to its effective implementation. [...] it is not sufficient to proclaim such a right formally if its actual enjoyment is not guaranteed by a system of fair and impartial administration of justice.”¹⁴⁹ In addition, the fact that the human rights regional systems’ derogation case law is principally focused on violations of due process rights¹⁵⁰, should be not only adduced as evidence of the peril to which this right is exposed to when an emergency is proclaimed, but also should constitute a call for renewed supervision of this fundamental guarantee.

¹⁴⁷ *id.* at para 16

¹⁴⁸ Human Rights Committee, *General Comment NO. 29* UNHRCOR (CCPR/C/21/Rev.1/Add.11), 2001, para 16

¹⁴⁹ Francioni, *supra* note 136, at 2

¹⁵⁰ Ní Aoláin, *supra* note 142, at 62

CONCLUSION

Under the light of the data presented in this work, and building on the considerations that emerged at different points, it is complicated to give a comprehensive and concluding opinion on the efficacy of the derogation systems functioning under ICCPR and ECHR.

Approaching theoretically the problems of the international control of emergency situations, the deep causes of its failures were identified in the initial incorrect classification attempts, which strived to pigeonhole emergencies within predetermined definitions thus emptying these labels of any meaning¹⁵¹. On the other hand, the subsequent strategy of sketching detailed frameworks to which States had to adhere when declaring a state of emergency¹⁵² seemed to be a more promising path, which was endorsed by international organs and which brought its positive results.

Still, despite the elaboration made on derogation articles by in the commentators and the international bodies, evidence shows States' negligence in respect to the formal and substantial requirements set in the provisions. Under the ICCPR, State practice spans from complete negligence to unrestricted abuse of derogations, and the HRC's authority and means to compel States to adhere more strictly to the conditions set by the treaty appears insufficient.

On the other hand, the control on states of emergency seems to be more efficient under the ECHR. This is mainly due, on the one hand, to the fact that the State Parties to this treaty share "a common heritage of political traditions, ideals, freedom and rule of law"¹⁵³ and are all democratic systems, and, on the other hand, to the fact

¹⁵¹ Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*

¹⁵² E.G. Paris Minimum Standards, Siracusa Principles, *General Comment NO. 29*

¹⁵³ *European Convention on Human Rights [Convention for the Protection of Human Rights and Fundamental Freedoms]*

that the regional system is better entrenched and better functioning than its universal counterpart and its bodies enjoy a stronger authority and more compelling enforcement measures.

Positively, the UN HRC and the Council of Europe's Court built on each other's official stances on state of emergency, thus elaborating a single, shared understanding of the issue. Obviously, the inescapable differences inherent to the two systems resulted in some divergences concerning not only the mechanisms and efficiency of supervision, enforcement and redress, but also the standards applied *vis-à-vis* State practice.

A critique that can be moved against the Strasbourg organs' handling of derogation cases certainly concerns their deferential attitude. Too often, the political sensitivity of the questions of public emergency, and the fear of States' reactions to its judgments, pushed the Court not to question the legitimacy of derogations but only to focus on the measures taken therein. The initial need to safeguard the stability of the system of the Council of Europe also moved the Court toward an unrestrained recourse to the doctrine of the margin of appreciation, whose employment was at times debatable.

On the other hand, the doctrine of the margin of appreciation was never endorsed by the HRC, because of its evident inapplicability under ICCPR given the marked heterogeneity of its State Parties. The Committee has often fearlessly denounced the misuse of emergency legislation and has repeatedly called its States Parties to a stricter compliance. Unfortunately, its weaker position, resting in its non-judicial, non-executive character, largely impaired its efforts, thus impairing also the protection of human rights after the invocation of state of exception.

The lack of a *sua sponte* screening of situations of emergency after the notifications of derogation received under the two treaties remain a serious inefficiency. International bodies would not lack informers, be they State Parties, NGOs, individuals or other governmental organizations, and, together with the employment of their considerable fact-finding tools, they could promptly assess the admissibility of derogations and reveal the presence and extent of possible abuses. However, the political sensitivity of the emergencies and the international organs' fear of States' reactions has not allowed appreciable improvements in the review

mechanisms of state of emergency situations, which are still referred to *a posteriori* screening.

Interstate complaints and individual petitions thus constitute the only mechanisms allowing for review of emergency situations, but it would be a desirable achievement to overcome this fragmented approach, so as to guarantee a more comprehensive protection of human rights, to be achieved by means of a prompter and more efficient system of stricter supervision.

For the moment, the sentences against States abusing of their powers symbolically stand for retribution for all victims, and stigmatization of the abusive State in the eyes of the international public seems to be the harsher punishment. If it is not possible to make any meaningful *ex ante* prevention of unlawful use of emergency measures, it would at least be desirable that *ex post* redress of the violations at international level be more substantial –especially for what concerns the HRC.

In this context, the fulfillment of the procedural and substantial requirements set in the derogation articles emerges as an essential component for an effective supervision at international level, and, therefore, States' compliance with these aspects has to be stressed with the greatest force in order to allow protection of human rights when they are most in danger. To this aim, the role of the judiciary is of the greatest importance, while the preservation of the rights of due process and access to justice, and the creation of judicial safeguards against expanded executive and police powers, remain fundamental element for the protection of human rights at national level.

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RIASSUNTO IN LINGUA ITALIANA
DIRITTI UMANI IN TEMPI D'EMERGENZA:
UN'ANALISI COMPARATA DELLA CONVENZIONE
EUROPEA E DEL PATTO INTERNAZIONALE SUI
DIRITTI CIVILI E POLITICI

Lo stato d'emergenza (o stato d'eccezione) si configura come una condizione di particolare gravità in cui l'esistenza stessa dello Stato e la vita dei cittadini vengono a trovarsi in pericolo e il cui superamento, volto alla restaurazione del precedente ordine, può essere raggiunto solo attraverso il ricorso a misure eccezionali.

Questo fenomeno costituisce un argomento d'interesse scientifico e studio in quanto comporta la sospensione dell'ordine costituzionale vigente, o almeno di alcune disposizioni significative, effettuata da parte della stessa autorità statale che dovrebbe esserne normalmente garante. Lo stato d'emergenza sembra quasi sottrarsi alla dimensione del diritto per porsi all'interno di una sfera extragiuridica, ma il suo principale fine, che consiste nella tutela dell'ordine costituzionale, lo definisce necessariamente come un istituto atipico, allo stesso tempo interno ed esterno all'ordine giuridico.

La facoltà di ricorso allo stato d'emergenza è presente nella maggior parte dei sistemi giuridici ed è generalmente prevista da disposizioni di rango costituzionale. Ne è esemplificativo l'art. 48 della costituzione di Weimar, le cui conseguenze hanno avuto interesse internazionale permettendo la presa del potere da parte di Hitler.

La dottrina internazionalistica si è interrogata a lungo circa la particolare natura di questo istituto, il cui più controverso promotore è stato certamente Carl Schmitt, il quale, nella sua *Teologia Politica*, individuava una relazione diretta tra lo stato d'eccezione e la sovranità. Secondo Schmitt, la sovranità ha come caratteristica identificativa non il monopolio della forza ma il monopolio della decisione e, per tanto, il sovrano è "colui che decide sullo stato di eccezione". Per di più, Schmitt fa

derivare la legittimità dell'intero ordine giuridico dallo stato di emergenza stesso¹ conferendogli, quindi, un valore ancor più fondamentale. Le implicazioni e i rischi per gli ordinamenti liberal-democratici derivanti dallo stato d'emergenza sono molteplici e anche questi sono oggetto di riflessione.²

Per quanto concerne l'origine dell'istituto in questione è possibile individuarne l'archetipo già nel diritto romano, all'interno del complesso di norme facenti capo allo *iustitium*, che consentiva – o meglio, richiedeva – ai consoli, al pretore, e nei casi estremi, anche ai cittadini, di adottare qualsiasi misura necessaria alla salvaguardia della Repubblica.

Nell'ambito del diritto internazionale, lo stato d'emergenza si configura in chiave negativa come “deroga” agli impegni assunti con la ratificazione dei particolari trattati. All'uopo, l'art. 15 della Convenzione europea dei diritti dell'uomo e l'art. 4 del Patto internazionale sui diritti civili e politici saranno al centro del presente studio.

Le disposizioni derivanti dagli articoli sopracitati potrebbero apparire all'interprete di dubbia natura, - dal momento che permetterebbero una sostanziale espansione dei poteri dello Stato e una conseguente restrizione delle norme poste a protezione dei diritti umani – tuttavia, la maggior parte della dottrina ne ravvisa la legittimità nella teoria dello stato di necessità³, che opera come limite di ordine generale verso gli obblighi derivanti dal diritto internazionale. Inoltre, molteplici ragioni sono riscontrabili alla base presenza di queste norme. Basti dire che, attraverso una sua puntuale definizione, si evita che il potere di sospensione possa essere utilizzato in maniera impropria, andando a ledere ingiustamente le garanzie fondamentali. In secondo luogo, si esorcizza così l'eventualità che gli Stati possano addurre come motivo per disattendere gli obblighi derivanti dai trattati il manifestarsi di “un pericolo pubblico che minacci la vita della nazione”.⁴

Nell'affrontare la questione dell'apparentemente controversa riduzione delle garanzie e dei diritti dei cittadini nei momenti d'emergenza, siano questi costituiti da guerra internazionale, conflitti interni o severe crisi socio-politiche, è necessario

¹ Carl Schmitt, *Political Theology*. (Cambridge: The MIT Press 1985)

² David Dyzenhaus, *Carl Schmitt in America*

³ Sergio Bartole, Benedetto Conforti and Guido Raimondi, *Commentario alla Convenzione Europea per la Tutela dei Diritti dell'Uomo e delle Libertà Fondamentali*, (PADOVA: CEDAM 2001), 426

⁴ *Id.* at 426-427

richiamare le norme del diritto internazionale umanitario, che si occupano tradizionalmente proprio della regolamentazione di tali circostanze. Apparirà logico, in definitiva, dedurre che diritto umanitario e diritti umani siano non solo complementari ma contemporaneamente applicabili in questi casi, così da rafforzarsi reciprocamente, pur essendo stato rilevato che il diritto umanitario sia *lex specialis*⁵ applicabile ai conflitti armati.

Numerosi studi sono stati condotti al fine di analizzare la prassi degli Stati in merito allo stato d'emergenza e al fine di vagliare l'efficacia dei regimi di deroghe stabiliti dalla Convenzione e dal Patto per la tutela dei diritti umani in queste particolari circostanze. Gli esiti di questi studi sono stati parzialmente negativi, presentando sostanziali errori e punti ciechi nei tentativi di categorizzazione dei diversi tipi di stato d'eccezione. Più promettenti sono risultati gli approcci che hanno avuto come obiettivo l'elaborazione di una precisa e dettagliata guida d'azione per gli Stati che si avvalgano della facoltà di deroga.

E' proprio su questi studi che si è basato il Comitato dei diritti umani delle Nazioni Unite per la stesura del suo *General Comment NO. 29*, con il quale ha tentato di regolare l'uso, spesso smodato e contrario alle norme internazionali, che gli Stati Membri del Patto fanno del potere di deroga a loro riconosciuto dall'art. 4. In questo documento e in numerose osservazioni conclusive, il Comitato ha chiarito nei dettagli il significato delle disposizioni "pericolo pubblico eccezionale, che minacci l'esistenza della nazione" e "nei limiti in cui la situazione strettamente lo esiga" così da potersi auspicare una più attenta e precisa aderenza a tali condizioni da parte degli Stati parte del Patto.

Analoghe operazioni di chiarificazione sono state svolte dagli organi competenti nell'ambito del Consiglio d'Europa, seppur il ricorso alle deroghe fatto dagli Stati contraenti possa dirsi, in definitiva, moderato.⁶ Va riconosciuto, infatti, che il sistema regionale europeo, più culturalmente omogeneo e complessivamente più stabile, permette un più attento controllo delle situazioni d'emergenza e possiede maggiore efficacia sanzionatoria qualora atteggiamenti contrari alle norme imposte dall'art. 15 e, più in generale, dalla CEDU vengano rilevati.

⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ, para 106; *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Reports 226, para. 25

⁶ Bartole, *supra* note 3, at 428

Le differenze permeanti i due sistemi e caratterizzanti i rispettivi Stati contraenti hanno dato origine a parziali asimmetrie riguardanti i due regimi di deroghe, alcune derivanti dagli articoli stessi dei due trattati e altre dalla prassi degli organi incaricati. Un esempio del primo tipo di differenze può essere riscontrato nel requisito di proclamazione con atto ufficiale dello stato d'emergenza, che è richiesto dal Patto e non dalla Convenzione. Un esempio del secondo tipo può essere individuato nella dottrina del margine di apprezzamento, elaborata dalla Corte Europea e mai incorporata dal Comitato.

Tuttavia, la struttura dei due articoli è analoga, così come lo sono le ipotesi di applicazioni della norma ivi sancite. Quest'ultime determinano le condizioni per un uso legittimo della facoltà di deroga, costituite da l'eccezionalità dell'emergenza e dalla magnitudine del pericolo in questione, il quale deve minacciare "la vita della nazione". Inoltre, le norme pongono precise condizioni di ordine procedurale a cui gli Stati Membri devono attenersi per beneficiare del potere di deroga e ulteriori limiti entro i quali gli Stati devono mantenere le misure emergenziali. Questi limiti consistono nel principio di proporzionalità, nel principio del rispetto delle "altre obbligazioni derivanti dal diritto internazionale" e nel rispetto dei diritti inderogabili elencati nelle due norme.⁷

Quest'ultimo punto pone varie problematiche dovute alla mancata coerenza tra le liste di diritti inderogabili riconosciuti da Convenzione, Patto e Convenzione interamericana dei diritti umani; ad ogni modo, un "nocciolo duro" di questi diritti è condiviso da tutti i trattati ed è possibile ritenere che questi siano espressione di principi di *jus cogens*. Un'ulteriore anomalia è costituita dall'assenza di un esplicito divieto di discriminazione nell'articolo 15 della CEDU. Questo divieto è invece espressamente previsto dall'articolo 4 del Patto come requisito che caratterizzi le misure emergenziali. E' da ritenetene, ad ogni modo, che il principio di non discriminazione permei tutto il testo della Convenzione e sia, dunque, necessario anche in questo contesto.

La dottrina del margine di apprezzamento caratterizza il controllo esercitato dalla Corte del Consiglio d'Europa sulle misure di deroga e, per tanto, un'analisi dettagliata dell'applicazione della stessa è d'obbligo. Questa dottrina prevede che sia

⁷ Bartole, *supra* note 3, 426-441; Nowak M, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev. Ed.(Kehl am. Rhein: Engel, 2005) 84-107

in primo luogo lo Stato contraente a determinare l'esistenza di "un pericolo pubblico che minacci la vita della nazione" e a determinare quali siano le misure necessarie per fronteggiare la situazione. In questo modo, la dottrina regola sia la definizione di un equilibrio tra la sicurezza nazionale e i diritti individuali, qui contrapposti, che la relazione di sussidiarietà tra la Corte e lo Stato –ritenuto meglio informato circa i fatti in questione perché più vicino a questi.

Ad ogni modo, il principale problema dei due regimi di deroghe è costituito dall'assenza di un qual si voglia meccanismo spontaneo di revisione nei due sistemi. Per converso, la possibilità di parziale sebbene inefficace revisione si concretizza nei cicli di relazioni attivi sotto il controllo degli organi istituiti dai trattati delle Nazioni Unite e nella Universal Periodic Review. Resta, all'uopo, da rilevare che i benefici derivanti da questa revisione risultano deludenti a causa delle tempistiche e delle modalità della stessa. In campo Europeo, non vi è alcun meccanismo affine e il controllo viene rimesso completamente ai meccanismi giurisdizionali.

In entrambi i sistemi, la mancanza di un meccanismo di revisione spontaneo si accompagna alla mancanza di un regime sanzionatorio efficace. Questo è dovuto in parte all'iniziale riluttanza dimostrata dagli organi internazionali a contestare la *bona fide* degli Stati deroganti, e in parte alla sensibilità politica propria degli stati d'emergenza.

In tale contesto, in cui il controllo da parte degli organi internazionali del corretto e legittimo esercizio dello stato d'emergenza è esercitabile unicamente *a posteriori*, i ricorsi interstatali e i ricorsi individuali vengono ad assumere un particolare valore. La possibilità di ricorsi interstatali e individuali è sancita negli art. 33 e 34 della CEDU, mentre il Patto predispose solo per i ricorsi interstatali (art. 41), rimettendo alla ratificazione del Primo Protocollo Opzionale la facoltà ai ricorsi individuali.

In aggiunta a questa prima asimmetria, va detto che anche l'efficacia dei pronunciamenti degli organi ha, nei due contesti, valenza ben diversa. Mentre la Corte, in quanto organo giurisdizionale, può pronunciare sentenze a condanna dello Stato contraente che prevedano anche un eventuale risarcimento del ricorrente, le posizioni adottate dal Comitato hanno valore principalmente simbolico raccomandatorio e vengono, in alcuni casi, addirittura ignorate dagli Stati Membri.

Si rileva, inoltre, soprattutto tra gli Stati Membri del Patto, che gli obblighi di

comunicazione e notifica vengano ignorati, non permettendo così alcun tipo di controllo eccezionale, da parte degli organi internazionali, sulle misure emergenziali adottate dagli Stati e “mettendo così a nudo le deficienze dell’intero sistema di controllo”.⁸

E’, pertanto, essenziale che il potere giudiziario dello Stato, che si avvale dell’espansione di poteri permesso dall’emergenza, resti imparziale e vigile, nonché capace di assicurare un corretto utilizzo dei poteri emergenziali da parte del potere esecutivo. Le autorità giudiziarie svolgono, infatti, un ruolo essenziale⁹ sia nel primo momento in cui lo stato d’urgenza viene dichiarato, vagliandone l’applicabilità, che durante l’intero corso dell’emergenza stessa. Al fine di salvaguardare i diritti e le libertà individuali, è fondamentale che gli aspetti di ordine procedurale d’accesso alla giustizia vengano preservati con il massimo zelo e, inoltre, che non vengano poste restrizioni ai fondamentali aspetti del *rule of law*, assistenza legale e garanzie processuali.

Ad ogni modo, seppur gli organi della Convenzione e del Patto abbiano mutualmente richiamato la loro giurisprudenza così da elaborare una concezione unica e condivisa sull’argomento, le modalità attraverso cui gli Stati utilizzano lo stato d’emergenza non possono dirsi ancora soddisfacente. Una maggiore autorità e un ricorso meno generoso alla dottrina del margine di apprezzamento sarebbero auspicabili da parte della Corte, onde evitare il rischio che essa possa apparire in questi casi protettrice della sovranità dei governi più che dei diritti dell’uomo. Una maggiore indipendenza e un maggior coraggio nel condannare l’eccessivo, l’assente o l’errato uso dei poteri di deroga da parte dei suoi Stati Membri, viene dimostrata dal Comitato, la cui efficacia, purtroppo, rimane ridotta rispetto a quella della Corte, a causa della natura né giurisdizionale né esecutiva che lo caratterizza.

Per di più, con l’intensificarsi della minaccia del terrorismo internazionale, è stata riscontrata una tendenza a privilegiare le esigenze di sicurezza nazionale a discapito dei diritti dei cittadini e degli stranieri, ampliando i poteri investigativi e i termini

⁸ Cataldi G., “Le deroghe ai diritti umani in stato di emergenza”, in *La tutela internazionale dei diritti umani. Norme, garanzie, prassi*, di L. Pineschi. (Milano: Giuffrè 2006), 771

⁹ Chowdhury, Subrata R., *Rule of Law in a State of Emergency. The Paris Minimum Standards of Human Rights Norms in a State of Emergency*. (London: Pinter Publishers, 1989), 130-140

della detenzione cautelare¹⁰. In queste circostanze, ribadire con ugual tenacia l'importanza del controllo da parte degli organi giurisdizionali nazionali e la competenza del controllo degli organismi regionali e universali è di fondamentale importanza affinché un giusto equilibrio tra sicurezza collettiva e diritti individuali sia garantito.

¹⁰ Viarengo I., "Deroghe e restrizioni alla tutela dei diritti umani nei sistemi internazionali di garanzia", in *Rivista di Diritto Internazionale* (2005), 962

