ILA Committee on Human Rights in Times of Emergency

Topic

In recent years, different states have declared or invoked a state of emergency in order to derogate from certain rights guaranteed by the respective international human rights treaties to which they are parties. Under the European Convention of Human Rights (ECHR), for example, Ukraine, France and Turkey recently have notified and extended such states of emergencies. All three states have done so also under article 4 of the International Covenant on Civil and Political Right (ICCPR). Since 1990, 30 states from all regions of the world have claimed states of emergencies and derogated from the ICCPR (status at 6 June 2017). Other countries, such as Egypt, Ethiopia, the Philippines and the United States have also declared states of emergency but have not entered derogations under the relevant treaties.

The invocation of a state of emergency permits the executive to derogate from certain obligations under the constitution and under international human rights treaties, and to impose exceptional and temporary measures in order to preserve the life of the nation in time of war or other emergency. During states of emergency, violations of human rights have been perpetrated, including forced disappearances, summary or arbitrary executions, widespread and systematic torture, abrogation of the right of association, especially for political groups, labor unions and human rights organizations, unjustified limitations on the freedom of the press, expression and assembly and external exile or internal displacement.

Human rights in times of emergency are not a topic of first impression for the ILA. In the 1980s, the ILA Committee on the Enforcement of Human Rights Law ("the Enforcement Committee"), chaired by Professor Richard B. Lillich, studied states of emergency. The Enforcement Committee identified three causes of states of emergency: natural disaster, war and internal strife or disturbance. In 1984, the 61st Conference of the ILA, held in Paris in 1984, approved a set of "Minimum Standards of Human Rights in a State of Exception".[1] These Standards governed the declaration and administration of states of emergency and included 16 articles on non-derogable rights.

The Paris Conference authorized the Committee to shift its focus from the formulation of substantive standards to the investigation of the prospects for improving international monitoring of human rights practices under states of emergency. In 1986, the Enforcement Committee presented its first Interim Report to the Seoul Conference. This Interim Report systematically assessed monitoring: first, in the UN system, by the Commission on Human Rights and the Sub-commission; second, by the International Labor Organization; third, in the Organization of American States, by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights; fourth, in the Council of Europe by the European Commission on Human Rights and the European Court of Human Rights and also by the Committee of Ministers and the Parliamentary Assembly; fifth, by non-governmental organizations, in general, and, in particular, by the International Committee of the Red Cross.

In 1988, the Enforcement Committed presented its Second Interim Report to the ILA Conference held in Warsaw, Poland. This Report was unable to achieve its planned program due to a lack of funding. The Report did note that the UN Sub-commission had begun to publish the first annual list of states that declared a state of emergency, but also noted the failure of

[1] ILA Rep. 1984, p. 56; 79 AJIL 1072, 1985.

states to proclaim and notify many other emergencies. The Report included a very interesting section on the definition of *de facto* emergencies through the creation of a typology of emergency situations.

In 1990, the Enforcement Committee submitted its Final Report as well as "Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency," proposed by the Committee's co-Rapporteur, Professor Joan F. Fitzpatrick. The Guidelines provide recommendations to the bodies to which they are addressed: (1) treaty implementation bodies, (2) charter organs and subsidiary bodies of intergovernmental organizations, with a particular competence in human rights and (3) non-governmental organizations.

The proposal for the creation of a new Committee – the Committee on Human Rights in Times of Emergency – is designed to take up this subject due to the number of states of emergency that have been declared since 1990, in order to systematically assess normative developments against the background of institutional changes at the regional and international level, and to propose a set of recommendations aimed at mitigating the tension between a state's sovereign right to defend its institutions and people in situations of emergency and the imperative of respecting, protecting and ensuring the human rights of individuals and groups in such times.

A number of the intergovernmental bodies studied in the two Reports of the previous Committee, such as the UN Human Rights Commission and the Sub-commission and the European Commission on Human Rights, no longer exist. Consequently, an updated assessment of international monitoring of human rights practices under states of emergency would need to take into consideration the work of newer bodies, such as the UN Human Rights Council, new mechanisms, such as the Universal Periodic Review and new UN Special Procedures. It would also assess the work of regional mechanisms and courts, which have amassed a host of practice and case law in this area in the past 30 years.

Mandate

The work of the new committee would consist of an Interim Report and a Final Report, the Interim Report to be presented to the Kyoto Conference in 2020 and the Final Report to the Lisbon Conference in 2022.

The Interim Report would study the developments in standard setting with regard to states of emergency that have occurred over the past thirty years.[2] It would comprise a study of developments in the interpretative practice and jurisprudence of international bodies that supervise compliance with international human rights instruments. With that objective, the Committee will collect and analyze practice of both the UN and regional organizations and their competent courts, quasi-judicial bodies and other institutions, including the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Commission on and Court of Human Rights, the African Commission and Court on Human and Peoples' Rights, the ASEAN Intergovernmental Commission on Human Rights, as well as lesser known bodies, such as the OIC's Independent Permanent Human Rights Commission.

[2] Starting from existing studies, such as Jaime Oraá, Human Rights in States of Emergency in International Law, Oxford (Clarendon Press) 1992; for current contributions, see Evan J. Criddle (ed), Human Rights in Emergencies, Cambridge (CUP) 2016.

Thematic special procedures that have a direct relation with the topic, dealing with issues such as arbitrary detention, enforced disappearances, extrajudicial executions, torture, independence of judges and lawyers and the promotion and protection of human rights while countering terrorism, are important for this study. Similarly, the reports on attacks on freedom of expression and the press, peaceful assembly and association and the work of human rights defenders under states of emergency are also useful sources of information.

The second part of this Interim Report would also consider issues of standard-setting. It would study the jurisprudence of international human rights bodies in order to discern which rights in the international human rights conventions are non-derogable or *jus cogens* rights as interpreted by international human rights bodies. It is not a self-evident conclusion to simply cite the ICCPR and find the response in Article 4(2), or Article 15(2) of the European Convention on Human Rights or Article 27(2) of the American Convention on Human Rights. The UN Human Rights Committee's General Comment No. 29 on Article 4 of the ICCPR: Derogations during a State of Emergency, states in relevant part of paragraph 11 that the non-derogable rights listed in article 4 (2) of the ICCPR do not comprise an exhaustive list of non-derogable rights:

> The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g. arts. 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g. arts. 11 and 18). *Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. (Emphasis added)*

But, which rights are to be added to the list? General Comment No. 29 does not provide the answer. Advisory Opinion No. 8 of the Inter-American Court of Human Rights, 1987, on habeas corpus in emergency situations, attempts to provide a partial answer from the Inter-American system for the protection of human rights. The jurisprudence of the European Court of Human Rights indicates that the right of access to a judicial remedy qualifies as a non-derogable right.[3] What does the jurisprudence of international human rights bodies reveal are additional "judicial guarantees"?

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The Final Report, for the ILA Lisbon Conference in 2022 would focus on selected case studies of *de jure* and *de facto* states of emergency. By a *de facto* state of emergency, we mean a situation that is not notified to the international supervisory body pursuant to the relevant international human rights treaty.

[3] For an analysis of jurisprudence of the ECtHR see *Stefan Kadelbach and David Roth-Isigkeit*, The Right to Invoke Rights as a Limit to Sovereignty – Security Interests, State of Emergency and Review of UN Sanctions by Domestic Courts under the European Convention of Human Rights, 86 Nordic Journal of International Law (2017), forthcoming.

Before approaching the case studies, we identify the typical features of a state of emergency. Typically, states of emergency are characterized by an undermining of the democratic domestic system of checks and balances with a conferring of extraordinary powers upon the executive branch of government, usually at the expense of the legislature and the judiciary. The executive seeks to perpetuate him or herself in power by cancelling or postponing elections and attempting to revise the constitution. For individuals, states of emergency typically entail the suspension of guarantees, arbitrary arrests, torture, disappearances and the closing down of the ordinary judicial system of independent, impartial courts which are replaced by the creation of special tribunals, usually with military judges, and summary procedures that eliminate or drastically restrict the rights of the accused. The Committee will look at instances where states have declared an emergency and the legal aftermath of such declarations.[4] It will analyze whether national and/or international courts and international human rights bodies assessed the declaration of the state of emergency and how they met this challenge.

The mandate will focus on national security exceptions in anti-terrorism policies and in the suppression of coups and internal strife. If time permits, it will also cover other emergency measures, such as against environmental disasters. In that respect, the Committee can build on work presently being done by the International Law Commission, which deals with principles of solidarity and co-operation, humanitarian duties and the status of relief personnel rather than with state emergencies and their restrictions of the rights of victims or third persons,[5] as they may result from evacuations and takings of property.

To make the analysis more specific, we pre-selected certain cases.[6] However, the following list is not exhaustive. It is one of the advantages of an ILA Committee, which brings together scholars from different national and regional backgrounds to work together, to be able to amend the list if members propose other interesting examples.

1. One case study will deal with terrorist attacks. This category is particularly interesting because we can observe various reactions in different states although they all deal with the same kind of security threats. Furthermore, it allows us to compare states where an emergency has been explicitly declared and notified, with other states that have imposed an undeclared emergency. We intend to focus on two states from each group. On the one hand, the United Kingdom and France are states that have declared emergencies in the past and where domestic courts[7] as well as the European Court of Human Rights have reviewed either the state of emergency or measures taken under it. On the other hand, we would like to an-

[4] For comparative studies see contributions in *Oren Gross and Fionnula Ní Aoláin* (eds), Law in Times of Crisis - Emergency Powers in Theory and Practice, Cambridge (CUP) 2006.

[5] Documents by the International Law Commission on the project *The protection of persons in the event of disaster* are found on http://legal.un.org/ilc/guide/6_3.shtml, accessed 28 May 2017; see also the Sendai Framework for Disaster Risk Reduction 2015-2020, adopted at the Third United Nations Conference on Disaster Risk Reduction, 14 to 18 March 2015; for legal writings see contributions in *Andrea de Guttry, Marco Gestri and Gabriella Venturini* (eds), International Disaster Response Law, Heidelberg et al (Springer) 2012.

[6] For a model-type approach based on practice see *Karin Loevy*, Emergencies in Public Law: The Legal Politics of Containment, Cambridge (CUP) 2016.

[7] For Britain *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56; but see *David Miranda v. Secretary of State for the Home Department*, [2016] EWCA Civ 6; for France Conseil constitutionnel, Décision no 2016-536 QPC, 19 February 2016.

alyze the United States of America, Canada or other states as countries which did not declare states of emergency or which did so but did not notify international human rights bodies and enter derogations.[8] Our hypothesis is that the outcomes are quite similar for the two groups of states, if judicial review is guaranteed.

2. A second case study looks at states of emergency that are declared after failed or successful challenges to the government in power. Here, we will assess the situation in Turkey after the failed attempt of a coup d'état, but also other states of emergency are of interest, such as those in Venezuela (2016), Ethiopia (2016), Thailand (2008-2009), Pakistan (2007), Algeria (1992-2011), India (1975-1977), or Egypt.

3. A third case study will deal with states of emergency in times of war, as they were declared in Ukraine and in Moldova in 1992 due to the Transnistrian war. We are not proposing to study again the relationship between international human rights law and international humanitarian law. The distinction between international armed conflict and non-international armed conflict does not seem to us to be decisive, the more so since the distinction between non-international armed conflict and an international armed conflict that is comprised of internal fighting forces but with the participation of foreign troops, is at times difficult to make. Rather, it is of interest whether a state of emergency is invoked on a regular basis in such cases, which role the exceptional circumstances play for state compliance with human rights and how far a loosening of standards is accepted by domestic and international supervisory bodies.

4. Finally, if time permits, we intend to look at emergencies that were declared after natural disasters, such as the state of emergency that was declared by New Zealand after the earthquake in Christchurch in 2013 or in Sri Lanka, Indonesia and the Maldives after the tsunami of December 2004. Some of the incidents are natural disasters triggering industrial accidents (like in Fukushima), in other cases industrial activities cause environmental catastrophes, like oil spills. One may ask which consequences this distinction might have with respect to the responsibility for human rights violations. We would also check the usefulness of the distinction between declared and undeclared emergencies against this category of cases.

Some of the situations typically resulting in states of emergency, such as terrorism, have already been studied extensively in international legal scholarship. There is also a rich reception of pertinent case-law, particularly so in Europe and the Americas. This academic literature will be used as a starting point for the analysis.[9] However, the mandate of the Committee aims at a more comprehensive reach, to which the case studies will contribute. It will inquire into African, Latin-American and Asian practice, and it will include the work done by the UN special rapporteurs on specific human rights questions as well as other pertinent statements and reports made under the auspices of the UN and its specialized institutions.

In conclusion, on an abstract level of international law, the question will be addressed whether there are generalizable rules that apply to states of exception, whether standards

[8] See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Boumedine v. Bush*, 553 U.S. 723 (2008) (for the United States); *Charkoui v. Canada* (citizenship and immigration), [2007] 1 SCR 350 (for Canada); cf. also *Richard Posner*, Not a Suicide Pact: The Constitution in Times of National Emergency, Oxford (OUP), 2006.

[9] For the EU see *Inge Govaere and Sara Poli* (eds), EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises, The Hague (Nijhoff) 2014.

are dependent on the respective protection system and whether universal standards may be formulated.

Work Plan and Time Schedule

The Committee plans to finish the analysis set out in the mandate within four years beginning with the next biannual ILA conference in Sydney.

The intended time schedule looks as follows:

- Until the 2018 meeting: constitution of the Committee, nominations by the branches; distribution of work, so that the process can start at the Sydney meeting with first contributions.
- First and second years (2018-2020): Study of the work of international and regional supervisory and adjudicative human rights bodies on states of emergency; compilation and synopsis of the results; comprehensive comparison of the practice with-in the systems of ASEAN, the AU, the Council of Europe, the EU, the OAS, the UN, etc. and their competent courts. Interim report in 2020 (Kyoto);
- Third and fourth years (2021-2022): Presentation of the state of the art in domestic and international practice; analysis of the different case studies by forming sub-groups focusing on particular cases; drafting of a set of recommendations;
- Final Report in 2022 (Lisbon). The Committee plans to finish the analysis set out in the mandate within four years beginning with the next biannual ILA conference in Sydney.

Chair and Rapporteurs

Chair: Christina Cerna and Stefan Kadelbach

Christina Cerna (US branch): B.A., New York University; M.A., Fulbright Scholar, Ludwig-Maximilians Universitaet, Munich, Germany; J.D., Dean's Fellow, American University; LL.M., Columbia University; Mid-Career Fellow, St Antony's College, Oxford University. Ms. Cerna retired from her post as Principal Human Rights Specialist at the Inter-American Commission on Human Rights (IACHR) with the OAS the end of December 2011, after 33 years. Since 2005, she has been an Adjunct Professor of Law at Georgetown University Law School. She is active in both the American Society of International Law and the American Branch of the ILA and chaired the International Human Rights Law Committee of the ILA from 2008-2016. She has been on the Advisory Board of International Legal Materials since 1996. From 2007-2014, she served as a consultant to ASEAN regarding the creation of a human rights mechanism (AICHR) in South East Asia and an ASEAN human rights declaration. She has written widely on international human rights law and been published in journals throughout the world.

Stefan Kadelbach (German branch): Born 1959; 1979-84 studies at Tuebingen and Frankfurt; Hague Academy of International Law (1986); 1984-87 preparatory civil service; LL.M., University of Virginia (1987/88); 1991 dissertation (Dr. jur.) on peremptory norms of public international law; 1996 PhD (habilitation) on administrative law under the influence of EU law; 1997-2004 professor (tenure) at the University of Muenster (Westphalia). Guest professor and lecturer at the University of Virginia (1999), the European University Institute Florence (2000), the Institute of State and Law of the Russian Academy of Sciences Moscow (2002/03)

and Chuo University Tokyo (2004). Since 2004 at Goethe University Frankfurt. Director of the Institute of Public Law, member of the Cluster of Excellence “Formation of Normative Orders”. Rapporteur of the International Law Association’s Human Rights Committee (2014-16). Working areas: foreign relations law, federalism, multi-level governance, human rights and general international law.

Rapporteurs: Niels Petersen and ***

Niels Petersen (French branch): Born 1978; 1998-2003 law student at the Universities of Muenster and Geneva; 2004-2006 Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg; 2006 Legal Advisor to the GIZ Legal Advisory Service to the Legal Reform in China, Beijing; 2006/07 Visiting Doctoral Researcher at the New York University School of Law; 2008 Dr. jur. (PhD in law) at Goethe University Frankfurt; 2007-2015 Senior Research Fellow at the Max Planck Institute for Research on Collective Goods, Bonn; 2009/10 MA in Quantitative Methods in the Social Sciences at Columbia University, New York; 2012/13 Hauser Research Scholar at the New York University School of Law; since 2015 Professor of Public Law, EU Law and International Law at the University of Muenster.

*** [The plan is to approach possible rapporteurs from the American and African systems as well as from an Asian country]