States of Emergency - Moderating Their Effects on Human Rights

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There has been a runaway proliferation of emergency regimes worldwide in recent decades. This, coupled with the high incidence of human rights abuses which accompany them, has made states of emergency a matter of increasing concern among human rights policymakers and monitors. The author evaluates the various measures that have been taken by the international community to moderate the effects of emergencies, and outlines possible future strategies to increase the effectiveness of such measures.

Au cours des dernières décennies, nous avons assisté à une prolifération effrénée des régimes d'urgence partout dans le monde. Les responsables de l'élaboration et du respect des droits de la personne lorgnent avec inquiétude ce phénomène qui s'accompagne d'une montée des abus des droits de la personne. L'auteur évalue les diverses mesures prises par la communauté internationale pour mitiguer les retombées des états d'urgence et propose des stratégies futures qui pourraient éventuellement accroître l'efficacité de ces mesures.

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Introduction

States of emergency have increasingly engaged the attention of lawyers, academics and policymakers concerned with the protection of human rights. One reason is that human rights have been seen to be at much greater risk during emergencies, real or imagined, than during periods of relative normality.\(^1\) The subject has also attracted growing interest on account of the proliferation of emergency regimes\(^2\) throughout the world in recent years, many of them of questionable provenance.\(^3\) Of particular concern is the occurrence of informal states of emergency because they present difficult problems of amenability to international control.\(^4\)

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1. The validity of this generalization depends, of course, on how one defines “normality.” As will be shown later, there are some jurisdictions where the “normality” itself is deeply antithetical to respect for human rights, e.g., countries which are under “permanent” or “institutionalized” states of emergency, in which case the generalization fails.

2. The term “emergency regime” will, for the sake of convenience, be used throughout this article synonymously with “emergency government,” except where the context indicates otherwise.

3. The United Nations appointed Special Rapporteur on the subject listed, in his annual report published in 1996, 87 countries which have experienced emergency rule at one time or another since 1 January 1985. He acknowledged that this list may not be exhaustive by recognizing the possibility of “the existence of a state of emergency in other countries [which] might not have come to his knowledge”—UN Doc. E/CN.4/Sub.2/1996/19, 7-32, at paras. 32-38. As the Special Rapporteur graphically observed in an earlier report, “If the list of countries that have proclaimed, extended or lifted a state of emergency during the past 10 years... were transposed onto a world map it would be disturbing to note that it would cover almost three quarters of the Earth’s surface, and that no region would be left out.”—UN Doc. E/CN.4/Sub.2/1995/20, 5 at para. 11.

4. *De facto* emergencies involve either “the adoption of exceptional measures without a state of emergency having previously been proclaimed” or “the maintenance of exceptional measures after [a] state of emergency has been officially lifted”—see UN Doc. E/CN.4/Sub.2/1993/23, 35, at para. 23. Institutionalized emergencies, on the other hand, involve the incorporation into “ordinary” law of exceptional measures before a state of emergency is formally terminated, and their continuation thereafter.
This article will examine the legal and practical justification for emergency powers, and trace the history of their evolution in international law. It will describe recent and ongoing efforts by intergovernmental and non-governmental organizations to moderate the effects of emergency regimes on human rights. An attempt will also be made to analyze the effectiveness of provisions in the major international human rights instruments designed to control the abuse of emergency powers. The discussion will also encompass suggestions for improvement of the existing system of controls on the exercise of such powers, at both international and domestic levels.

Emergency rule—or crisis government, as it is often generically called—is not a recent phenomenon. The concept has been in existence for almost as long as organized government itself. Juridically, it is based on the principle of necessity, which recognizes the right of every sovereign state to take all reasonable steps needed to protect and preserve the integrity of the state—a right whose importance has been underlined by writers and philosophers down the centuries. Spinoza believed that “the virtue of a State is its stability,” while Rousseau was of the opinion that “the people’s first intention is that the state shall not perish.” Bracton declared that “what is not otherwise lawful necessity makes lawful.” Machiavelli made out a strong case for emergency powers by arguing that, in the absence of such powers, “a strict observance of the established laws [in any Republic] will expose her to ruin.” Even Thomas Jefferson, a staunch advocate of limited government, agreed that:

The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and those who are enjoying them with us; thus absurdly sacrificing the end to the means.

In medieval times, emergency powers were handed down by the ruling princes to “commissioners” appointed under royal prerogative. These functionaries exercised such powers on the basis of special instructions which were tailored to meet specific exceptional situations. A similar system operated in ancient Rome, but here the functionary concerned

8. Discourses, XXXIV.
enjoyed much wider powers and was called a "dictator." The dictator was often given complete charge of running the state after being entrusted with a specific task such as prosecuting a war or suppressing a rebellion. A noteworthy feature of the system was the strictly temporary nature of the arrangement: no sooner had the dictator executed the task entrusted to him than he would lay down his office and the state would return to its normal functioning. So effective was the institution that, in the opinion of one writer, the dictatorship "remained a bulwark for the Republican government and it did not lead to a usurpation of powers." Another writer has called it "the most unique and successful constitutional emergency institution in all recorded history."

This tradition of emergency rule has been transmitted down the centuries by successive generations of rulers and today finds expression in almost all political systems. There is hardly any modern constitution which does not recognize the right of the executive to suspend the normal rules of government, including the rights and freedoms of citizens, during periods of crisis. Legal commentators have sometimes argued about the nature of such powers. Some believe that they represent a means to "preserve a constitutional state in the face of crisis while nonetheless requiring that it respond through measures consistent with its constitutional heritage." Others assert that they represent "an extra-constitutional resort to raw political power, necessary but not lawful." A few have questioned the need for such powers, arguing that "even our liberal, democratic world, is full of young Marines—sometimes they are politicians, sometimes policemen, sometimes judges, sometimes soldiers—

10. A celebrated example was that of Lucius Quinctius Cincinnatus, an elderly farmer, who was asked by the Roman Senate in 458 B.C. to save the Republic from a potentially devastating attack on government forces by a central Italian tribe. Despite being made absolute dictator, Cincinnatus willingly and voluntarily relinquished all his powers sixteen days after he had assumed them, following his success in repelling the attack. He then quietly returned to his farm; see, e.g., Rossiter, supra note 6 at 16.


12. Rossiter, supra note 6 at 28.

13. The crises covered normally include war, natural disasters, economic emergency, and secessionist, insurrectionary or subversive violence. For the purposes of this study, however, crises arising from natural disasters and economic emergency will be excluded, unless otherwise indicated.


who would destroy us to save us: they are as much to be guarded against as those against whom they would protect us.”

A wide range of terminology has been used to describe the crises situations which justify resort to extraordinary measures: some examples are state of emergency, state of civil emergency, state of siege, state of war, state of internal war, state of exception, state of public danger, state of catastrophe, state of tension, state of alarm, state of urgency, state of national defence, state of national necessity, state of special powers, state of suspension of guarantees, general or partial mobilization, military regime, and martial law. The nomenclature adopted varies from constitution to constitution, and is often the product of a country's specific historical experiences. Some constitutions provide for more than one type of emergency rule, to allow the government greater flexibility of response, depending on the intensity of the crisis confronting it. The variety of terms have been compendiously described as constituting “exceptional circumstances,” namely,

circumstances resulting from temporary factors of a generally political character which in varying degrees involve extreme and imminent danger, threatening the organised existence of a nation, that is to say, the political and social system that it comprises as a State, and which may be defined as follows: 'a crisis situation affecting the population as a whole and constituting a threat to the organised existence of the community which forms the basis of the State.'

Whatever the nomenclature used, there are at least two broad features common to all emergency regimes: a significant increase in the powers of the executive branch of government, to the detriment of the legislative and judicial branches, and an abridgement or suspension of the rights and freedoms enjoyed by the citizenry. As often as not, these measures are

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17. Given the profusion of terminology, most writers on the subject use an omnibus heading such as 'states of emergency' or 'states of exception' to denote the entire range of emergency powers. Joan Fitzpatrick, for example, prefers the expression "states of emergency" because it “possesses the advantages of breadth of reference to a wide variety of factual circumstances, de-emphasis upon any particular pattern of formal legal alterations, stress upon the temporary crisis aspect of the situation, and a hint of danger”; see J. Fitzpatrick, Human Rights in Crisis: The International System for Protecting Rights During States of Emergency (Philadelphia: University of Pennsylvania Press, 1994) 1. That phrase will be used in the present article also to describe emergency regimes generically, unless the context requires otherwise.
also accompanied by massive grants of powers to the military and other security forces, including immunity from prosecution for acts carried out by them in furtherance of the emergency rule.

The similarities notwithstanding, it is possible to identify certain characteristics peculiar to one or more of the above mentioned forms of crisis government. A clear distinction can be drawn between, for example, a state of siege, which is essentially a civil law construct, and martial law, which owes its origin to the English common law. Whereas the former is a creature of statute, and is usually initiated by a specific, often detailed, declaration by the legislature or the head of the government, the latter is a much more flexible concept whose initiation requires no special formality. Secondly, the task of checking abuses during a state of siege is usually assigned to the legislature, while under martial law that responsibility falls to the courts. Thirdly, common law courts also perform, at least in theory, a more vigorous function to retroactively correct individual past abuses after a martial law regime has ended, in a way that courts in civil law countries seldom do. Fourthly, some commentators have argued that declarations of martial law tend to be less comprehensive than states of siege, in terms both of their territorial reach and their objectives.

It is possible to identify yet another, more distinct, form of emergency rule applicable in countries such as the United Kingdom which do not have a written constitution. This consists of the use of ordinary, often permanent, legislation passed by Parliament which authorizes a concentration of power in the hands of the executive during periods of crisis. The most famous example of such legislation is the Defence of the Realm Consolidation Act, 1914 (DORA), enacted by the British Parliament

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19. C.J. Friedrich found the law of martial law to be vague and obscured by a maze of conflicting precedents. “Although it is customary,” he said, “for the executive ‘to declare martial law’ before initiating extraordinary measures, this declaration does not entail any very definite consequences. It may be a mere threat. It may presage the most extreme measures, violating all the customary limitations upon governmental powers”; Friedrich, supra note 11 at 561.

20. In civil law countries such abuses are usually rectified by legislation prospectively. This difference between a state of siege and martial law is less significant than might appear at first glance because, in practice, the record of common law courts in correcting past abuses is not particularly commendable. Usually, legislatures in common law countries enact legislation at the end of martial law periods which confer immunity from prosecution for acts carried out during martial law.

21. See, e.g., J.B. Kelly & G.A. Pelletier, Jr., “Theories of Emergency Government” (1966) 11 South Dakota L. Rev. 42 at 56-57. The authors point out that: “Seldom is martial law applicable to an entire country, while such application is not uncommon for the state of siege. Martial law does not encompass the authority to order total economic planning for the nation, something which was done in France in World War I under the state of siege power.”

soon after the commencement of World War I, which allowed the British Cabinet to make regulations on a wide range of subjects dealing with public safety and the defence of the realm for the duration of the war. Such regulations were subject to little legislative or judicial scrutiny, and effectively resulted in rule by executive decree which was no different in its comprehensiveness from a classic state of siege. DORA was revived during World War II and, subject to certain modifications, used just as effectively as it had been during the Great War.

Why are states of emergency important as a discrete subject of study? From a practical point of view, the answer is obvious: because of their close connection with the incidence of grave and widespread violations of human rights. That link, it would be fair to say, has now been sufficiently firmly established to put the question beyond any doubt, although it would be wrong to generalize too much and attribute every case of gross and systematic violation of human rights to an emergency regime. Indeed,

Many individual rights and interests are much more systematically abused in wartime than in other states of emergency, though it is not entirely clear that all these constitute breaches of human rights. And in some totalitarian regimes some individual and collective rights are more systematically ignored in ‘normal’ times than during states of emergency in other regimes. Total repression can be maintained by relatively peaceful means for long periods, as [was the case] in South Africa and some eastern European [countries].

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23. They could, in theory, be challenged before the courts as being ultra vires, but such challenges were rarely successful: see, e.g., King v. Halliday, [1917] A.C. 260.
24. Kelly and Pelletier, supra note 21 at 60-61.
25. This time, as well as giving Parliament the right to annul regulations within 28 days of their issuance, the Act expressly prohibited military or industrial conscription, and the trial of civilians by courts-martial. The last two prohibitions were, however, lifted by subsequent legislation.
26. As a leading study carried out by the International Commission of Jurists pointed out, “The most serious violations [of human rights] tend to occur in situations of tension when those in power are, or think they are, threatened by forces which challenge their authority if not the established order of the society”; States of Emergency: Their Impact on Human Rights (Geneva: International Commission of Jurists, 1983) i.
Besides, the phenomenon of *de facto*, i.e. undeclared, emergency regimes and other ambiguous situations\(^2^9\) also poses complex problems and raises serious questions about an exclusive reliance on the concept of states of emergency in the global quest to end human rights violations.

That said, it would be folly to dismiss out of hand the relevance of states of emergency, at least in strategic terms, to the international campaign for better human rights protection. Clearly, there are benefits to be gained by focusing on states of emergency and studying their effects on human rights. For one thing, it will help identify the flaws, deficiencies and lacunae present in the existing international—largely treaty based—mechanisms for the protection and promotion of human rights—which do recognize the concept explicitly—and to rectify those weaknesses wherever possible. For another, it will, as Joan Fitzpatrick suggests, offer guidance on devising newer non-treaty based universal standards which could be made binding on all states regardless of whether they sign them or not. The process would also help in creating “model legislation that could be voluntarily adopted by states as a preventive measure against future abuse of human rights during emergencies, particularly by states undergoing a process of democratization after a long period of repression.”\(^3^0\) A focus on states of emergency may also be useful in a further preventive way in that, because the existence or imminence of an emergency situation is usually a good predictor of human rights abuses, close attention to their use may serve as an early warning system.

It needs to be recognized, of course, that there are formidable obstacles to be overcome in carrying out any meaningful study of states of emergency and their impact on human rights. These include: the vast field of study, given the number, diversity and complexity of emergency regimes extant at any given point of time; definitional problems arising from the profusion and inexactitude of terminology employed in different legal systems and regions; difficulties in establishing clear causal relationships between states of emergency and particular human rights violations or particular patterns of violations; wide variations in the standards laid down in existing regional and international instruments on

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human rights; and, a lack of consensus on the rights and freedoms which need to be protected during periods even of acute crisis.

Many of these problems have, not surprisingly, bedevilled efforts to devise an effective system of international supervision and control of states of emergency and related regimes. Such mechanisms as have been put in place in recent decades are increasingly seen as weak and incapable of tackling the myriad problems thrown up by the bewilderingly diverse and complex range of emergency regimes that have sprung up over the years.

I. States of Emergency and International Law

States of emergency were not, until recently, the subject of any special concern in international law. The only exceptional situation addressed by the earlier systematic mechanisms for the protection for human rights was war, and the approach here was, by and large, to accept that individual rights and freedoms had to be subordinated to the interests of states in wartime. Hence the rather limited protection afforded to civilians in the Geneva Conventions of 1949 which merely require that those not taking any active part in hostilities be treated humanely and without discrimination.

The first deliberate attempt to specifically address the question of emergencies other than war came in 1950 when the Council of Europe began putting together the European Convention on Human Rights. The architects of this document introduced the concept of “derogation” which meant that states parties could legally suspend their obligation to respect and enforce the rights contained in the convention during times of “war or other public emergency threatening the life of the nation.” Some rights were, however, made strictly “non-derogable” on the grounds that they were too fundamental and too precious to be dispensed with.

31. Art. 3, common to the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention for the Amelioration of the Condition of the Wounded Sick and Ship-wrecked Members of Armed Forces at Sea; Convention Relative to the Treatment of Prisoners of War; and Convention Relative to the Protection of Civilian Persons in Time of War, all dated 12 August 1949, 75 U.N.T.S. 31, 85, 135 & 287 respectively. These provisions are collectively known as “Common Article 3.”

32. These protections were further elaborated in the Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol II”), 8 June 1977, 75 U.N.T.S. 31.


34. This concept had also been accepted by the drafters of the Geneva Conventions: Common Article 3 made the right to a fair trial non-derogable. The content of this right has been described at greater length in Protocol II.
even during the gravest of emergencies. The derogation clause was in addition to specific limitations clauses governing individual rights in the Convention.

A similar approach was adopted in two other international instruments which followed: the American Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR), although the number of non-derogable rights in these documents varies both from the European Convention and from each other. These instruments also use slightly different phraseology to describe the crises which would justify derogation: the American Convention opting for "war, public danger, or other emergency that threatens the independence or security of a State Party" and the ICCPR for "public emergency which threatens the life of the nation."

All the three leading instruments prescribe, broadly speaking, seven controls, two procedural and five substantive, on the use of emergency powers. The procedural controls are: (a) a requirement that every state of emergency must be formally declared by the government introducing it; and (b) a further requirement that the details of such emergency, as well as the precise nature of any derogations involved, must be notified to a prescribed authority. On the substantive side, the treaties require that,

35. Supra note 33, Art. 15 (2). The non-derogable rights listed in this article are: right to life; prohibition against torture or other inhuman treatment; prohibition against slavery or servitude; and prohibition against retroactivity of criminal offences.
36. These clauses prescribed the broad heads under which many of the rights guaranteed by the Convention could be subjected to formalities, conditions, restrictions or penalties by domestic law. Recognized grounds for such restrictions include: interests of national security, territorial integrity, and public safety; prevention of disorder or crime; protection of health or morals; protection of the reputation or rights of others; and maintenance of the authority and impartiality of the judiciary.
39. The American Convention lists the following eleven rights as non-derogable: right to juridical personality; right to life; right to humane treatment; freedom from slavery; freedom from ex post facto laws; freedom of conscience and religion; rights of the family; right to a name; rights of the child; right to nationality; and right to participate in government [Art. 27(2)]. The ICCPR lists the following seven rights as non-derogable: right to life; prohibition against torture or other inhuman treatment; prohibition against slavery and servitude; prohibition against imprisonment for inability to fulfil a contractual obligation; prohibition against retroactivity of criminal offences; right to recognition as a person; and freedom of thought, conscience and religion [Art. 4(2)].
40. Supra note 37, Art. 27(1).
41. Supra note 38, Art. 4(1).
42. In the case of the European and American Conventions, this authority is the Secretary-General of the Council of Europe and of the Organization of American States, respectively. In the case of the ICCPR, it is the Secretary-General of the United Nations.
for any state of emergency to be valid, the government concerned must establish: (a) the existence of an exceptional threat to the security of the state or of its people;\(^{43}\) (b) proportionality between the emergency measures contemplated and the threat; (c) the absence of any discriminatory feature in the emergency measures or procedures; (d) the compatibility of all derogation measures with the state’s other international obligations; and (e) the complete insulation of certain ‘core’ rights, such as the right to life, from derogation.

As important as the above mentioned standards are, their true worth can only be gauged by the effectiveness of the mechanisms provided for their enforcement. Here, a distinction has to be drawn between the two regional instruments on the one hand, and the ICCPR on the other. Whereas the European and American Conventions originally provided for an adjudicatory mechanism in the form of a Commission\(^{44}\) and a Court\(^{45}\) (the European Commission was abolished in November 1999 under reforms which provided for a single-tier structure), the ICCPR relies largely on a reporting system which is much less adversarial in

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43. The phraseology in the three instruments has been the subject of some controversy: whereas the *European Convention* and the ICCPR talk of a “public emergency threatening the life of the nation” (Arts. 4 and 15, respectively), the *American Convention* talks of an “emergency that threatens the independence or security of a State Party.” The controversy has centred around whether it is the state, the government, or the people of a state that should legitimately be the subject of protection.

44. The European Commission on Human Rights and the Inter-American Commission on Human Rights, located in Strasbourg (France) and San José (Costa Rica), respectively. Both these Commissions were empowered to receive complaints of violations of the Conventions from states parties and from individuals living in any of the signatory countries [Art. 24, 25 of the *European Convention*, Articles 44, 45 of the *American Convention*]. In the case of individual complaints under the *European Convention*, and inter-state complaints under the *American Convention*, they could only be entertained where the states parties concerned have recognized the competence of the respective body to receive such complaints. The position regarding the Inter-American Commission continues unchanged, while the European Commission, as noted above, has now been abolished.

45. The European Court of Human Rights and the Inter-American Court of Human Rights, also situated in Strasbourg and San José, respectively. Cases can only be referred to the Courts by the respective Commissions or by states parties connected with a case before such Commissions under each system [Art. 48 of the *European Convention* and Art. 61 of the *American Convention*]. With the abolition of the European Commission, cases can now be taken directly to the Court.
character. In neither case do the bodies concerned have any direct sanctions at their disposal; they can merely enter findings which are communicated to the states parties concerned for suitable action.

A sufficient body of jurisprudence has emerged in the past two or three decades under these instruments, notably under the regional conventions, to enable an assessment of their respective effectiveness in addressing the human rights problems associated with states of emergency. Much of the controversy has centred around the ability of the mechanisms to inquire into and adjudicate upon two issues: (i) the genuineness of emergencies claimed by governments as meeting the definitions laid down in the respective instruments; and (ii) the need for particular measures derogating from the provisions of the instruments to counteract the actual threats facing a state. The jurisprudence under the three instruments will be reviewed individually before their effectiveness is evaluated.

II. Mechanisms of Human Rights Treaties

1. The European Convention

Taking the European Convention first, the Commission and the Court have formally asserted their power to examine the factual legitimacy of any emergency, but they have qualified this assertion by accepting that

46. Under this system, states parties are required to submit periodic reports to the Human Rights Committee, a body of 18 independent experts, on how they have given effect to the provisions of the Covenant within their territories. The Committee can, and usually does, question representatives of states parties at public hearings on the content of their reports [Art. 40]. There are also provisions allowing for more adversarial-type proceedings, namely, interstate complaints (called "communications") concerning the implementation of the Covenant [Art. 41], and complaints ("communications") by individuals concerning violations of rights guaranteed by the Covenant [Optional Protocol to the ICCPR, 1966]. Both the latter provisions are only applicable where a state-party has specifically recognized the competence of the Human Rights Committee to receive such communications. The Human Rights Committee does not, however, play a judicial, or even quasi-judicial, role nor does it perform a fact finding function in the way that the Inter-American Commission does.

47. Under the European system, the Committee of Ministers of the Council of Europe had been made responsible for execution of the findings of the Commission or the Court [Articles 32, 54] while under the American system, the Commission and the Court are empowered to transmit their findings directly to the states parties. There is one further possibility under the latter system: where a state party fails to implement the findings of the Commission within a prescribed period, the Commission may, at the expiry of that period, decide to publish its report (which is otherwise kept confidential between itself and the state party concerned) [Art. 51]. Under both systems, the respective Courts are empowered to grant just monetary satisfaction to complainants [Art. 50, European Convention; Art. 68, American Convention]. The American Convention expressly provides that any order for compensatory damages may be executed in the country concerned in accordance with domestic procedures for the execution of judgments against the state [Art. 68]. The ultimate sanction available under either system, should a state party wilfully fail to comply with such findings, is expulsion of the state-party from the regional treaty body concerned.
governments should enjoy a fairly wide margin of appreciation in deciding whether an emergency meeting the requirements of Article 15 exists or not, and what powers are needed to deal with it. In one case, the Commission rejected the government’s claim for an emergency requiring a derogation from the Convention after making a fairly thorough evaluation of the facts which were advanced in support of the claim, but in other cases, it has accepted the government’s assessment of the situation. It has defined ‘public emergency’ as:

an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.

As to the issue of whether particular measures resorted to by a state were justified, even where the legitimacy of an emergency was not in doubt, the European Court has laid down a number of tests, including, principally, (i) whether ordinary law or action, otherwise compatible with the Convention, was not enough to meet the demands of the emergency; and (ii) whether there was any proportionality between the measures contemplated and the needs of the emergency. Here, again, the Commission and the Court have accepted that governments enjoy a margin of appreciation in assessing the necessity for particular measures. In the Lawless case, for example, the Commission refused to interfere with the Irish government’s assessment that detention without trial was more efficacious than trials before ordinary or special criminal courts, and in Brannigan, it acceded to the British government’s view that extended
detention without judicial supervision was necessary to successfully investigate terrorist crimes. However, the Commission and the Court have not always deferred to the governments’ judgment in this area. In *Brogan v. United Kingdom* for instance, the Court disagreed with the British government’s view that detention of terrorist suspects for up to four days and six hours without judicial supervision was reasonable, in circumstances where the government had not formally exercised its right of derogation under Article 15. More recently, in *Aksoy v. Turkey*, it held that similar detention for up to 14 days was unacceptable, even though the government had in this case entered the necessary derogation.

2. **The American Convention**

Turning next to the Inter-American mechanisms, one of the most striking features of this system is that it has been infinitely more active in monitoring and dealing with states of emergency than either its European or UN counterpart. As well as assessing compliance by states parties to the American Convention, the Inter-American Commission (IACHR) has, for over three decades, undertaken on-site visits to, and special studies of, countries with a state of emergency. The on-site visits have been particularly noted for their boldness: they have resulted in secret detention cells being unearthed, corpses of human rights victims being exhumed from clandestine graves, and safe passage being provided for...
hostage takers. For an inter-governmental body, the IACHR has also been unusually vocal in rejecting the argument, often advanced by governments, that terrorism justifies extreme responses from state agencies. More controversially, it has consistently refused to formally examine or condemn human rights violations by non-governmental actors such as terrorists.

On the adjudicatory side, the record of the IACHR is a mixed one. It has shown a marked reluctance to deal expeditiously with complaints of human rights violations, with the result that its caselaw is less profuse than that of its European counterpart. However, it has produced some bold decisions, including two where it denounced laws passed by Argentina and Uruguay granting amnesty to their respective military and police forces for emergency related human rights abuses. It has also been very innovative in the use to which it has put complaints: they have resulted in on-site investigatory visits and special reports. The IACHR has an advantage over its European counterpart in that, while adjudicating complaints, it can draw adverse inferences against a respondent government that fails to rebut the allegations in the complaint within a reasonable period of time.

The Inter-American Court of Human Rights has demonstrated an equally bold approach on matters concerning states of emergency. Despite a paucity of judgments on the subject from this body, there have been at least two Advisory Opinions of crucial importance. These have held that the remedies of habeas corpus and amparo are among the

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64. The organization has countered this argument by asserting that only governments lacking broad popular support will rely on state terrorism, while those enjoying such support will strive to maintain the rule of law even in the face of terrorism; see, e.g., Report on the Situation of Human Rights in Argentina, OEA/Ser.L/V/II.49, doc. 19, corr. 1, at 25-27 (1980) and Annual Report of the Inter-American Commission on Human Rights 1990-1991, OEA/Ser.L/V/II.79 doc. 12, rev. 1 (1991) at 504-5.
68. Art. 42, American Convention. The Commission used this power, for example, to make a presumption that allegations contained in fifty cases of 'disappearances' in Peru were true, after the Peruvian government failed to respond despite several requests from the Commission; see Annual Report 1990-1991, supra note 64 at 251-422.
69. Under Art. 64 of the American Convention, the Inter-American Court is empowered to give Advisory Opinions on 'the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.' Such opinions may be sought by any member state of the OAS on both abstract questions and questions relating to specific situations.
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judicial guarantees which may never be suspended during an emergency. The Court underlined the importance of these non-derogable guarantees by asserting that their denial would violate the principle of separation of powers inherent in the concept of the rule of law.\(^\text{70}\) The Court has also been commended by human rights monitors for its procedural ingenuity and boldness. In several cases it has sought and obtained extensive witness testimony, including circumstantial evidence, where the applicants concerned were unable to supply any such testimony.\(^\text{71}\) Also, it has not shirked from passing effective interim orders where necessary, for example, to prevent the intimidation of witnesses.\(^\text{72}\)

3. The International Covenant on Civil and Political Rights

Turning, finally, to the United Nations system, it is necessary to look at the work of: (i) the Human Rights Committee, the main treaty based body charged with implementing the *International Covenant on Civil and Political Rights*; and (ii) two non-treaty based entities, the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which are also concerned with monitoring states of emergency. Reference will also be made to some of the other mechanisms within the United Nations system, such as the procedures of the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), and the Committee Against Torture, all of which concern themselves, albeit indirectly, with one or more aspects of human rights protection during emergencies.

The principal mechanism through which emergency regimes are formally monitored by the Human Rights Committee is the periodic report review process under Article 40 of the ICCPR. Under this process, which usually takes place at five yearly intervals,\(^\text{73}\) all states parties are required to submit a report describing the progress of their implementation of the Covenant, including derogations if any under Article 4, and the Committee is entitled to question government representatives on their...
content in public hearings. The Committee is also empowered to make
general comments on such reports, and to receive inter-state com-
plaints as well as ‘communications’ from individuals alleging viola-
tions of the Covenant by states.

The record of the report review process is mixed. As well as suffering
from the problem of resource constraints to which the entire United
Nations system has been prone for several years now, and which tends
significantly to hamstring the Committee’s research capacities, the
Committee has sometimes been viewed as less than demanding in its
questioning of governments. As Fitzpatrick has noted, for example,
“states that have not been the focus of NGO activism, that have not been
the subject of other international procedures, that file a brief and abstract
report and/or send a low-level representative to the Committee’s meet-
ings may escape from the report review essentially unscathed, without the
true picture of their human rights situation emerging.” The problem has
been compounded by a deliberate decision by the Committee, during its
drafting of guidelines for the submission of periodic reports, to leave out
information concerning derogations; this has provided an excuse for
states parties frequently to maintain a studied silence on this vital point.

Examples of countries which have escaped lightly as a result of soft
treatment by the Committee include: Tunisia, which in its 1987 periodic
report, merely made a bald assertion that its emergency measures,
initiated in 1984, were “more symbolic than real”; Zambia, which in its
first periodic report, reviewed in 1987, did not even mention that an
emergency, declared on extremely flimsy grounds several years before,
was still in force, let alone provide any justification for it; and Iraq,
which made the astounding claim that, despite its long and bitter war with

74. Art. 40(4).
75. Art. 41. This provision, which requires states parties to make a specific declaration
recognizing the competence of the Committee to receive such complaints, has never been used
so far.
76. Optional Protocol to the ICCPR. Such complaints can only be entertained if the state party
alleged to be guilty of the violations, has recognized the competence of the Committee to
receive such "communications" (Art. 1).
77. Fitzpatrick, Human Rights in Crisis, supra note 17 at 87.
78. The decision was prompted by a fear on the part of some members that, if a specific
reference was made to derogations, it might lead to a weakening of the notification requirement
under Art. 4(3) of the ICCPR: see UN Doc. A/32/44, para. 138. Unfortunately, this view seems
to have prevailed even when the Committee issued its revised guidelines for periodic reports
80. This emergency, in force since Zambia’s independence from British rule in 1964, had
been proclaimed on grounds of the country’s involvement in liberation struggles in South
Africa, refugee problems, tribal divisions and economic stress. See UN Doc. CCPR/C/SR.771
Iran, it did not consider an emergency to be in existence. The Iraqi government, furthermore, claimed that, far from imposing any curbs on the rights of its people during that war, it was able to expand their enjoyment of human rights—a claim which went virtually unchallenged.\(^1\)

The Committee has, however, sometimes departed from this timid approach and shown a willingness to subject governmental representatives to searching questions. Its treatment of the Chilean and Argentinean periodic reports in the early 1980s and 1990s offers good examples of robustness. In the case of Chile, the Committee took the unusual step of characterizing the government's initial report, submitted in 1979, as insufficiently detailed and asked for additional information. When this information was submitted in 1984,\(^2\) the Committee found it still far from satisfactory. After a close scrutiny of this second report, the majority of Committee members expressed the opinion that the emergency proclaimed by the government could not be justified under Article 4. "\[W\]hat was called an emergency in Chile," they said, "had nothing to do with what was intended by the same term in article 4."\(^3\) The Committee also strongly deplored the Chilean government's failure to send a proper derogation notice to the Secretary-General.\(^4\) In the case of Argentina, the Committee grilled the government's representative on a wide range of issues including the failure of the Argentinean constitution to guarantee the non-derogable rights listed in Article 4, the possibility of a state of emergency being declared on flimsy grounds such as the fear of internal disturbances, and the constitutional propriety of a state of siege being imposed after the country had returned to civilian rule.\(^5\)

The Committee's willingness to adopt a tougher line appears to have become more marked in recent years. In 1989, it sharply criticized Cameroon for failing to comply with the strict standards laid down in Article 4 for derogations.\(^6\) In 1990, it rejected the Yemeni government's argument that the problem of economic underdevelopment justified the

\(^{1}\) *HRC Report, 1987*, supra note 79 at para. 197.

\(^{2}\) As part of Chile's second periodic report which had by then become due under the five-year rule.

\(^{3}\) *Report of the Human Rights Committee 1984*, UN Doc. A/39/40, at 83, para. 449. They found no merit in the government's claim that the existence of terrorist activities, coupled with the adverse effects of the world economic situation at the time, justified the emergency.


\(^{5}\) UN Doc. CCPR/C/SR.952 (1990), paras. 11, 13, 14, 16, 22, 31 and 36.

\(^{6}\) *Report of the Human Rights Committee 1989*, UN Doc. A/44/40 Annex VII, at para. 461. Cameroon was criticized again in 1994 for failing to "notify in the correct manner" the proclamation of a state of emergency in the country's north west province two years earlier; see UN Doc. CCPR/C/79/Add. 33, para. 7.
declaration of a state of emergency. In 1992, the Committee found the emergency provisions in the Ecuadorian Constitution to be far too broadly worded so that it allowed the government to declare a state of emergency merely in response to, for example, labour unrest. In 1993, the Committee questioned Ireland’s continued resort to emergency powers since 1976 without sufficient justification. In 1991, it expressed strong reservations over India’s use of anti-terrorist legislation which did not comply with the Covenant’s provisions, and over the Indian government’s failure to enter appropriate derogations in respect of other measures taken to deal with secessionist violence in different parts of the country.

In 1995, the Committee urged the British Government to reconsider the need for the derogation notice filed by it in relation to the emergency in Northern Ireland, in light of the “significant decline in terrorist violence” that followed the recent ‘peace process’ there. The same year, the Committee expressed concern over many of the emergency laws and regulations enacted in Sri Lanka which, it felt, “may not be in full compliance with the requirement of the provisions of article 4 [of the ICCPR].” The Committee was also concerned that courts in Sri Lanka “do not have the power to examine the legality of the declaration of emergency and of the different measures taken during the state of emergency.”

In 1996, the Committee criticized Zambia for the lack of clarity in that country’s legal provisions governing the introduction and administration of a state of emergency, and noted with concern that the derogation of rights allowed under the Zambian Constitution went far beyond what is permissible under the ICCPR. It used even stronger language to condemn the military government of Nigeria for a wide range of laws and practices which were, in its opinion, clearly incompatible with the provisions of the ICCPR. It deplored the Nigerian government’s argument that some of the impugned laws were unassailable because they pre-dated the entry into force of the Covenant in Nigeria. “The Covenant,” said the Committee, “precluded measures derogating from the

89. Comments of the Human Rights Committee, UN Doc. CCPR/C/79/Add. 21, paras. 11-12.
91. UN Doc. A/50/40, paras. 427-428.
92. UN Doc. A/50/40, para. 448. Similar concern was expressed in respect of Bolivia where recent proposals for constitutional reform included a move to remove the powers of the Constitutional Court to review the declaration of a state of emergency; see UN Doc. CCPR/C/79/Add. 76 at para. 23.
93. UN Doc. CCPR/C/79/Add. 62 at para. 11.
State party’s obligations other than in the limited circumstances provided for by article 4 which have not been applied in the case of Nigeria. 94

The Committee has also expressed strong concerns over the practice of a government attaching reservations to its acceptance of the derogation provision itself, holding that this constituted “a serious inconsistency with the objectives and purposes of treaty law.” 95 However, the fact that the Committee has not expressly ruled such reservations to be invalid has been seen as a lacuna in its jurisprudence. 96 Fortunately, the lacuna has since been addressed, to some extent, by a General Comment adopted in 1994. 98 The only other General Comment on Article 4, adopted in 1981, 99 has been criticized for providing “little in the way of detailed and nuanced substantive interpretation” 100 of the article.

Even the more adjudicatory role available to the Committee under the inter-state and individual complaints procedures 102 has been seen to have had only a marginal impact on the protection of human rights during states of emergency. The inter-state complaints procedure has never been used so far, despite the fact that 45 countries, as of May 15, 1997, have recognized the competence of the Committee to entertain such complaints. As for individual complaints, 911 ‘communications’ had been received by January 27, 2000—from 63 of the 95 countries which have so far acceded to or ratified the Optional Protocol—but the Committee,

94. UN Doc. A/51/40 at para. 278.
95. UN Doc. CCPR/C/SR.555, para. 1, in relation to Trinidad and Tobago, which had made such a reservation. This reservation prompted formal objections from other states parties such as the Federal Republic of Germany and the Netherlands, who believed that it was incompatible with the object and purpose of the Covenant.
96. In the case of Trinidad and Tobago, the Committee merely asked the government to consider withdrawing the reservation.
98. General Comment No. 24/52 adopted on 2 November 1994, UN Doc. E/1995/49 (1995) 4 at para. 10. In this Comment, the Committee opined that “[a] reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency” would offend against the “object and purpose” test laid down in the Vienna Convention on the Law of Treaties.
99. General Comment No. 5/13, UN Doc. HRI/GEN/1/Rev.1 (1994) 5-6. This Comment laments the tendency of states-parties to provide but the barest of legal information in their periodic reports, e.g., about the mechanisms available for the declaration of a state of emergency, without describing the actual measures used. It also reiterates the well known principles of notification, proportionality and non-discrimination inherent in Art. 4.
100. Fitzpatrick, Human Rights in Crisis, supra note 17 at 96.
101. The need for a new General Comment, incorporating the Committee’s jurisprudence over the past decade and a half, was highlighted by the UN Special Rapporteur on States of Emergency in his 1995 report: UN Doc. E/CN.4/Sub.2/1995/20, 12 at paras. 31, 32.
102. Art. 41 and the Optional Protocol (1976), respectively.
although it has shown some procedural boldness, does not appear to have succeeded in generating sufficiently hard hitting case law.\textsuperscript{103}

The Committee has, for instance, formally asserted its power to review the legitimacy of an emergency declaration in one case,\textsuperscript{104} but shirked from using that power in practice, on the rather unconvincing grounds that the respondent government failed to supply the information necessary to make such a determination.\textsuperscript{105} The Committee has likewise avoided deciding the legality of derogations: in a Colombian case decided in 1982, for example, it merely lamented that the government had not provided "a sufficiently detailed account of the relevant facts to show that [a] situation of the kind described in Article 4(1) of the Covenant exists."\textsuperscript{106}

It has, however, shown greater robustness in some of its procedural rulings, holding, for instance, that, where a government had merely responded with vague and general denials of allegations against it, the Committee was entitled to draw an inference of culpability,\textsuperscript{107} and that the burden of proving or disproving allegations had, in some cases, to be shared between the complainant and the respondent state.\textsuperscript{108} The Committee has also held that it had the right to communicate directly with victims of human rights abuses who were deprived of their liberty.\textsuperscript{109}

4. Other Treaty Based Mechanisms

Other treaty based mechanisms which are concerned, albeit indirectly, with addressing human rights problems during states of emergency include the procedures of the International Labour Organisation (ILO)\textsuperscript{110}

\textsuperscript{103} Of these 911 communications, the Committee adopted 'views' in 333: 256 of them disclosed a violation of one or more provisions of the ICCPR and 77 did not; see online: <http://www.unhchr.ch/html/menu2/8/stat2.htm> (updated 27 January 2000).
\textsuperscript{104} Landinelli Silva v. Uruguay: Communication No. 34 of 1978 (decided on 8 April 1981), Selected Decisions under the Optional Protocol, UN Doc. CCPR/C/OP/1 (1985).
\textsuperscript{105} Ibid. at para 8.3.
\textsuperscript{106} Salgar de Montejo v. Colombia: Communication No. 64 of 1979 (decided on 24 March 1982), Selected Decisions, supra note 104 at para. 10.3.
\textsuperscript{107} E.g., Valcada v. Uruguay: Communication No. 9 of 1977 (decided on 26 October 1979), Selected Decisions, supra note 104 at para. 11.
\textsuperscript{108} E.g., Bleir v. Uruguay: Communication No. 30 of 1978, Selected Decisions, supra note 104 at para. 13.3.
\textsuperscript{109} E.g., Setelich v. Uruguay: Communication No. 63 of 1979 (decided on 28 October 1981), Selected Decisions, supra note 104 at para. 18.
\textsuperscript{110} These procedures comprise: (1) a convention based system which relies on periodic reporting by states-parties; (2) a convention based complaints procedure and a representations procedure; and (3) a special complaints procedure, available to governments, employers' organizations and workers' organizations, regardless of whether the accused state has or has not ratified the relevant convention.
and the UN sponsored Committee Against Torture (CAT). Despite its focus on freedom of association and workers’ rights, the ILO has made a significant contribution to the legal control of emergency regimes over the years. Time and again, it has reiterated the principle that:

If a plea of emergency is to be treated in international law as a legal concept there ... has to be appraisal by an impartial authority at the international level. It is for this reason that international tribunals and supervisory organs, when seized of such a plea, have invariably made an independent determination of whether the circumstances justified the claim, and have not allowed the state concerned to be the sole judge of the issue.\(^1\)

The organization has also buttressed other principles governing states of emergency by holding that:

as regards the enjoyment of civil liberties which are essential for the effective exercise of trade union rights, the plea of a state of emergency to justify the restriction of these liberties should only be involved in circumstances of extreme gravity constituting a case of *force majeure* and subject to the condition that any measures affecting in any way the guarantees established in the Conventions should be limited both in extent and in time to what is strictly necessary to deal with the particular situation.\(^2\)

The ILO has an effective system for gathering information on human rights practices around the world, including a well developed programme of on-site visits, which could be a useful supplement to other international efforts at monitoring human rights violations during states of emergency.

As for the Committee Against Torture (CAT), it too can provide a valuable input into the monitoring process through its reports on torture and other inhuman and degrading practices which are usually widespread during periods of emergency. Like the Human Rights Committee, the CAT functions primarily through a system of periodic reporting by states parties, and a voluntary individual ‘communications’ procedure, but it also has access to information from other sources, and is noted for greater forthrightness in its reports than some of the other UN sponsored

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bodies. Up until February 3, 2000, the Committee had registered 154 individual ‘communications’—from 19 of the 41 countries that have recognized its competence to deal with such complaints—and adopted ‘views’ in 38 of them.

5. Effectiveness of the Mechanisms of Human Rights Treaties

To sum up, it would be fair to say that, while each of the three treaty based systems has its own peculiar strengths and weaknesses, the regional mechanisms seem to be more effective than the ICCPR based system. Between the two regional mechanisms, the Inter-American system appears to have some advantages over its European counterpart. The Inter-American Commission has, for instance, shown a willingness to judge state conduct during emergencies by the standards of the American Declaration on the Rights and Duties of Man and of customary international law even where the government concerned may not have ratified the American Convention. The Inter-American Commission has also demonstrated a high degree of procedural ingenuity by undertaking on-site visits to countries with serious human rights problems, and through its practice of publishing special reports on emergency regimes, either on its own initiative or on the request of other organs of the Organization of American States, governments or even non-governmental organizations. No less significantly, the Inter-American Commission has been remarkably more forthright in its assessment—and condemnation—of human rights practices of its member states than either the European Commission or the U.N. Human Rights Committee. On the other hand, its case law has been less prolific than that of the European Commission. Ironically, the limited success of the Inter-American system has, in recent years, led to calls from some of its member states for changes to its rules of functioning which would, in the view of human rights activists, weaken

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113. In 1990, for instance, it criticized the Chilean government for not providing a satisfactory level of anti-torture training to its public officials despite previous undertakings to do so; see Report of the Committee Against Torture, UN Doc. A/47/44 (1990) at para. 375. The Committee has also condemned as “incompatible with the spirit and purpose of the [Torture] Convention” an Argentinian law which deprived torture victims of remedies for abuses which occurred during that country’s state of siege, although, for legal reasons, it was unable to entertain the complaints in question; ibid. at paras. 549-550.

114. Of these 38 cases, 18 disclosed a violation of the treaty and 20 did not; see online: <http:/ /www.unhchr.ch/html/menu2/8/stat3.htm> (updated Feb. 3, 2000).
even more the capacity of the Inter-American Commission and Court to tackle abuses.\textsuperscript{115}

As for the Human Rights Committee, it has been seen to be the weakest of the three mechanisms, not least because of: the problems inherent in the large number and wide diversity of states comprising the system; the paucity of its resources; the absence of permanent institutional structures such as a Commission or a Court; the inadequacy of its fact-finding capabilities; a general reluctance on the part of members to take on a more activist role in monitoring human rights performance of individual governments; and the absence of an authority to follow up recommendations and enforce compliance. Despite these shortcomings, it has nevertheless performed a useful role in highlighting state practices during emergencies, even if its success in bringing governments to account for human rights abuses has been rather modest.

III. \textit{Non-Treaty Based Mechanisms}

There are two main non-treaty based intergovernmental bodies concerned with states of emergency: the Commission on Human Rights\textsuperscript{116} and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.\textsuperscript{117} Both are organs of the United Nations, and are based in Geneva. Between them, there are several mechanisms and procedures relevant to human rights protection during states of emergency, of which two are most directly and specifically concerned with the subject: (i) the confidential procedure for the examination of situations which reveal "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms," commonly called "the 1503 Procedure";\textsuperscript{118} and (ii) the Special Rapporteur on the Question of Human Rights and

\textsuperscript{115} Among the changes proposed, notably by Mexico and Peru, are: that NGOs should not be allowed to bring cases to the Inter-American Commission or Court; that the confidentiality of reports and recommendations of the Commission should be preserved even when governments fail to respect them; that the Commission should not be allowed to undertake on-site investigatory visits; that the power of the Court, in exceptional circumstances, to waive the general rule requiring all complainants to exhaust domestic remedies be removed; and that the right to bring complaints of violations be restricted to citizens only; see, e.g. Katherine Sainsbury, "Proposed Changes Threaten Inter-American Human Rights System" (1997) 4 H. R. Trib. 13.

\textsuperscript{116} Hereinafter "the Commission."

\textsuperscript{117} Hereinafter "the Sub-Commission."

\textsuperscript{118} After the resolution under which it was created: Economic and Social Council (ECOSOC) Resolution 1503 of 1970, UN Doc. E/4832/Add.1 at para. 8. This procedure grew out of a previous resolution, No. 1235 of 1967, UN Doc. E/4393, which authorized the Commission to make a "thorough study" and to report on situations of violations of human rights. The latter resolution did not, however, provide any mechanism for resolving the problems presented by such situations; it merely allowed the Commission to debate them.
States of Emergency. For the purposes of this study, the work of these two mechanisms is particularly relevant.

1. The 1503 Procedure

Under the 1503 Procedure, the United Nations has a mandate to entertain "communications" from anyone, including non-governmental organizations and other groups, concerning violations by any state of any human right of which the author has "direct and reliable knowledge." These communications are put through a multi-stage filtration process, beginning with the UN Secretariat and ending with the Commission on Human Rights. The procedure has been described as a "petition information system" and contrasted with a "petitioner recourse system" such as under the Optional Protocol or under any of the regional human rights conventions, because the communications under the 1503 Procedure are treated simply as sources of information rather than as complaints. At the end of the process, the Commission might decide between several choices of action: (a) it may discontinue consideration of the case, either because the case does not reveal "a consistent pattern of gross violations," or because it has not met the Commission's admissibility.

120. Another mechanism which also deals with countries having significant human rights problems (including those under a state of emergency) is the 1235 procedure (supra note 118), under which there are public debates during sessions of the Commission and Sub-Commission every year. Outside the United Nations system, a major non-treaty based inter-governmental body which also concerns itself, albeit only peripherally and less visibly, with human rights matters globally is the European Parliament. That parliament has, over the years, passed resolutions expressing concern over the human rights situation in many countries experiencing formal or de facto states of emergency, including Burma, Indonesia/East Timor and Colombia. Another inter-governmental body which has similarly taken note of situations of gross and systematic human rights violations is the Commonwealth, a 54 member strong voluntary association of former British colonies. In 1995, it took the unprecedented step of suspending Nigeria from the organization for two years to register its strong disapproval of the human rights situation in that country.
121. Including those that are not members of the United Nations. Furthermore, the author of a communication need not have any connection with the state complained against.
122. Including those that are not provided for in any of the international instruments.
124. Indeed, one of the criticisms that has often been made of the procedure is that it treats authors of communications less favourably than it does respondent states, because at no stage of the process is the author kept informed of the fate of his or her communication, whereas governments are given multiple opportunities to respond as the communication progresses through the system.
125. E.g., the case against Zaire, which was "dropped" in 1991. This decision was criticized by many human rights monitors as they believed that there was evidence of "continuing human rights violations" in that country. Other cases similarly dropped include Burma (1979), Gabon (1986), Malaysia (1984), Pakistan (1984, 1985) and Venezuela (1982).
requirements, or because there has been a real and significant improvement in the human rights situation in the country concerned;\textsuperscript{126} (b) it may propose that the case be sent for consideration under another, more appropriate, procedure;\textsuperscript{127} (c) it may simply defer a decision on the case pending receipt of further information or clarification from the government; (d) it may designate a person to make direct contacts with the government;\textsuperscript{128} (e) it may decide to undertake a “thorough study” of the situation described in the case;\textsuperscript{129} or (f) it may decide to appoint an ad hoc committee to investigate the situation.\textsuperscript{130} The “thorough study” or investigation so ordered is usually carried out in private and any resultant report kept confidential.\textsuperscript{131} The Commission has also, on occasion, asked the UN Secretary-General to establish direct contacts with the government concerned\textsuperscript{132}—a practice which has been used at the instance of other plenary bodies. In 1996, for example, the General Assembly requested the Secretary-General to use his good offices to undertake discussions with the Nigerian government following an escalation of international concern over the human rights practices of the military regime of General Sani Abacha.\textsuperscript{133}

\textsuperscript{126} E.g., Argentina in 1984, when it reverted to democratic government after the end of the long state of siege.
\textsuperscript{127} E.g., the case against Equatorial Guinea in 1979, where the Commission decided that it would be more appropriate to have it taken up in public meetings under Resolution 1235, supra note 118. This resolution authorizes the Commission and the Sub-Commission to consider each year “the question of violation of human rights” and forms the basis for a wide-ranging public discussion on the subject, without any geographic or thematic restrictions. Such public discussions have, however, often been characterized by political manoeuvring and gross selectivity which have diminished their credibility.
\textsuperscript{128} E.g., in the case of Burma, where a Special Rapporteur was asked to initiate such contacts and report to the Commission in confidential session. When this process failed to produce any appreciable results, following lack of co-operation from the Burmese government, the Commission decided to appoint a Special Rapporteur under the public procedure in 1992.
\textsuperscript{129} E.g., in the case of Afghanistan in 1984, though in this case the recommendation was to undertake an “ad hoc study” of its human rights situation; UN Doc. E/CN.4/SR.63, at para. 1. Two other countries in respect of which “thorough studies” were ordered were Equatorial Guinea and Uganda.
\textsuperscript{130} The difference between an “investigation” and a “thorough study” is that the latter can be carried out without the consent of the respondent government but the former requires its consent. Also, an investigation can be ordered only if “all available means at the national level have been resorted to and exhausted” and if the subject matter of the case is not already being dealt with under any other UN, regional or other international procedure.
\textsuperscript{131} There has been a progressive dilution of the secrecy rule surrounding the 1503 Procedure since 1978 when, for the first time, the Commission announced the names of countries on which ‘decisions’ had been reached. The practice has been followed regularly ever since.
\textsuperscript{132} E.g., in the case of Uruguay.
\textsuperscript{133} An example of the use of the good offices technique by the Commission is to be found in the case of East Timor; see Commission Resolution 1997/63 dated 16 April 1997.
As with other UN mechanisms, the record of the 1503 Procedure has been a mixed one. To the extent that it allows a spotlight to be turned on emergency regimes globally, the procedure is a valuable tool for their study. It is also helpful in that it "represents the first recognition by the human rights community that monitoring and enforcement activity should be concentrated on situations in which the scale and intensity of alleged violations is the primary basis for [international] intervention." Other virtues of the procedure include its potential for bringing before the Commission and Sub-Commission situations in countries which are not always in the public eye, and the incentive it offers to engage governments in constructive dialogue:

Everything which induces a government to co-operate is particularly important because the efficacy of United Nations procedures in the field of human rights depends, to a large extent, on the measure of dialogue which can be established between the United Nations and the government of the country concerned. . . . By expressing regrets when communications are kept pending—particularly when this happens at the level of the Sub-Commission—instead of being forwarded to the superior organ, human rights friends overlook the point that there is no real solution to the problem at the end of the procedure. The succession of steps composing the procedure is more influential than the actual step itself.

134. Most of the countries examined under the 1503 Procedure so far have been under a formal or de facto state of emergency: e.g., Albania, Haiti, Indonesia, Republic of Korea, Pakistan, Paraguay, Turkey, Uganda and Uruguay. At its 1997 session, the Commission on Human Rights decided to keep the following five countries under consideration under this procedure: Chad, Gambia, Kyrgyzstan, Saudi Arabia and Sierra Leone. Only rarely have countries which cannot by any objective standards be said to be under a state of emergency been drawn into this procedure, a prominent recent example being the United States of America, which had been under consideration briefly in 1997, apparently following complaints relating to aspects of that country's criminal justice system.

135. Hadden et al., supra note 28.


137. Ibid. at 183-184.
But its usefulness is reduced by a number of factors, notably its excessive secretiveness and the scope for political manipulation. A particularly worrying example under the latter category is the practice whereby officials from respondent governments are allowed to participate in either the screening or consideration of communications against their own governments. Besides, the investigatory and redressal roles of the mechanism are very limited, and the process is unduly dilatory. Prominent examples of de facto emergency situations where the mechanism failed to check egregious violations of human rights include Uganda and Argentina in the 1970s and 1980s, and Iraq, Somalia and Zaire in the 1990s. The procedure has caused such deep disappointment among some observers that one of them characterized it as "truly dangerous to human rights—and [one which] offers a useful refuge to repressive regimes." Another commentator less scathingly suggested that the procedure "would seem to have outlived whatever usefulness it might have had in the 1960s and 1970s." In any case, the procedure has been seen to be inappropri-

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138. Critics have wondered, for instance, as to why the Sub-Commission cannot publish the names of countries that it has decided to forward to the Commission, especially since the Commission has broken the rule of secrecy, ibid. at 183.

139. A telling example of such manipulation is the manner in which the government of Argentina first successfully blocked the use of this procedure to deal with complaints concerning gross human rights abuses within its territory for some time, and later—when this tactic failed—used it as an excuse to stifle any public debate about such abuses within other UN bodies; see Howard Tolley, "The Concealed Crack in the Citadel: the United Nations Commission on Human Rights' Response to Confidential Communications" (1984) 6 Hum. Rts. Q., 420 at 440-446.

140. This happens where such officials sit as "independent experts" in the Sub-Commission, after being elected to that body.

141. This happens where such officials sit as members of the Commission, after being nominated by their governments.

142. In this case, brought within the procedure's process in 1974, there was overwhelming evidence that Idi Amin, the country's President, had killed tens of thousands of people since 1970, but it was only as late as 1978 that the Commission decided to act, choosing to send an envoy to meet the President. By then it was too late, and in any case, Amin had been overthrown.

143. Here, the first attempt to activate the procedure, in 1977, failed at the initial hurdle of the Working Group of the Sub-Commission. By the time this hurdle was crossed a year later, the human rights situation had worsened so rapidly that the Commission was compelled to discuss it in its public procedure in 1979—a full year before the case had been accepted under the 1503 procedure. By then, considerable damage had been done, with hundreds of thousands of people having been subjected to disappearances by the ruling military regime. For a comprehensive account of this case see Iain Guest, Behind the Disappearances: Argentina's Dirty War against Human Rights and the United Nations (Philadelphia: University of Pennsylvania Press, 1990).

144. Ibid. at 441.

ate "[i]f the objective is to obtain prompt publicity or public action for serious human rights violations."\(^{146}\)

2. **Special Rapporteur on States of Emergency**

A more formal mechanism for the study and control of emergency regimes is to be found in the institution of the Special Rapporteur on States of Emergency, created by the Sub-Commission following that body's pioneering 1982 study on the subject.\(^{147}\) The mandate of the Special Rapporteur is essentially to prepare, on an annual basis, a list of countries that have proclaimed, extended or terminated a state of emergency since 1 January 1985 and to monitor their compliance with the domestic and international norms governing the subject. Despite suffering from the resource constraints that are endemic in the UN system,\(^{148}\) the Special Rapporteur, Mr. Leandro Despouy, was able to make some impressive strides during the decade and a half that he was in office. His first three annual reports reflected a cautious approach, listing only states that had experienced formally declared emergencies, but beginning with his fourth report, the Special Rapporteur showed a willingness to include *de facto* emergencies\(^{149}\) as well. He also attempted to examine some of the


\(^{148}\) In his 1989 report, for instance, Mr. Despouy bemoaned that "Given the increased burden on the Secretariat and the modest means made available for his study until now, the Special Rapporteur does not have all the assistance he needs to fulfil his obligations. Adequate assistance would mean, at the minimum, the availability of permanent human resources [he has had only temporary assistance so far] and, if possible, an increase in such assistance, as well as data-processing equipment for his own use"; UN Doc. E/CN.4/Sub.2/1989/30/Rev. 1, 10 at para. 27.

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wider issues connected with emergencies,\textsuperscript{150} though not in any great depth, and to identify some trends and draw some broad conclusions from his work so far.\textsuperscript{151} His efforts at establishing and maintaining contacts with governments have been reasonably successful: as well as carrying on a fruitful dialogue with government representatives in Geneva, the Special Rapporteur has undertaken visits to Russia, Haiti and the Republic of Korea\textsuperscript{152} where he had useful exchanges of views with the respective governments. Since 1992, he has more vigorously sought information from governments about any emergencies or emergency measures initiated by them, often following up reports which appeared in the mass media.\textsuperscript{153}

One of the areas in which the Special Rapporteur has not succeeded in meeting the targets which he set for himself is to provide detailed and comprehensive analyses of the emergencies listed in his annual reports, touching such aspects as: the cause of those emergencies, the degree and extent to which rights and freedoms have been suspended, and the impact they have had on different population groups.\textsuperscript{154} The Special Rapporteur could also be criticized for not following up vigorously enough the repeated requests of the Commission and the Sub-Commission to examine in depth \textit{de facto} emergency situations, although it must be acknowledged that he has shed some of his earlier excessive caution in dealing with such situations.

Despite its shortcomings, the mechanism of Special Rapporteur has, on the whole, served a useful purpose. There is clearly room for improvement, including a need to make the mechanism assume a more active role

\textsuperscript{150} E.g., the importance of the principles of non-discrimination and proportionality in derogation measures (1990); the link between arbitrary detention and states of emergency (1991); the impact of \textit{de facto} states of emergency on human rights (1993) and of emergencies on non-derogable rights (1994); and the role of \textit{habeas corpus} to guarantee non-derogable rights (1996).

\textsuperscript{151} See, e.g., the Special Rapporteur’s eighth annual report, UN Doc. E/CN.4/Sub.2/1995/20, 5-8 at paras. 10-16.

\textsuperscript{152} His visit to Russia was carried out in the context of the advisory services of the UN Centre for Human Rights (see UN Doc. E/CN/4/Sub.2/1993/23, 47-48, at paras. 78-83), while those to Haiti and the Republic of Korea were undertaken in his personal capacity.


\textsuperscript{154} References to such targets can be found, for example, in the Special Rapporteur’s reports for 1989 and 1993, UN Docs. E/CN.4/Sub.2/1989/30/Rev.1, 9 at para. 26 and E/CN.4/Sub.2/1993/23, 33 at para. 18.
in monitoring emergencies, but any such improvement is contingent upon the mechanism being better resourced.\textsuperscript{155}

3. Other UN Mechanisms

The subject of states of emergency has also featured in the work of other bodies and mechanisms within the United Nations system, albeit less directly. Of particular relevance in this context are the various thematic\textsuperscript{156} and country specific\textsuperscript{157} rapporteurs, working groups, independent experts and special representatives established by either the Commission or the Sub-Commission from time to time. These mechanisms deal, in a comparatively less politicized manner, with a variety of human rights issues that are a matter of concern in emergency situations, such as the protection of non-derogable rights. Their work has, on the whole, been seen to be fairly effective, both in highlighting patterns of abuses and, to a lesser extent, in offering redress to victims.

\textsuperscript{155} The likelihood of the mechanism receiving any boost to its resources appears remote at the moment. Indeed, the portents for the future of the mechanism were, in early 1997, rather bleak, with speculation being rife that its mandate might be terminated, or subsumed within another mechanism, when it came up for renewal at the 1997 session of the Sub-Commission. A resolution adopted by the Sub-Commission in 1996 requested the Special Rapporteur to "submit [his] final conclusions" in his tenth annual report, UN Doc. E/CN.4/Sub.2/1996/L.45, 2 at para. 2. In its 1995 annual report, the Working Group on Arbitrary Detention recommended that the Commission should consider merging the mandate of the Special Rapporteur with that of its own; see UN Doc. E/CN.4/1995/31, 19 at para. 56. However, in August 1997, the Sub-Commission decided to keep the mechanisms separate and to renew the mandate of the Special Rapporteur. Mr. Leandro Despouy was however replaced by a new Rapporteur, Mr. Ioan Maxim, who was asked to submit an eleventh annual report in August 1998 containing an updated list of States which have proclaimed or extended a state of emergency, together with further recommendations on the protection of human rights during states of emergency; see Resolution 1997/27, \textit{Question of human rights and states of emergency}, UN Doc. E/CN.4/ 1998/2; E/CN.4/Sub.2/1997/50 at 67. One change introduced by this resolution to the mandate of the Special Rapporteur was that, in future, he would be required to submit a list of countries which have terminated a state of emergency only once every five years instead of annually.

\textsuperscript{156} E.g., Working Group on Enforced or Involuntary Disappearances (1980-present); Working Group on Arbitrary Detention (1991-present); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (1982-present); Special Rapporteur on Torture (1985-present); Special Rapporteur on Religious Intolerance (1986-present); Special Rapporteur on Freedom of Opinion and Expression (1993-present); Special Rapporteur on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers (1994-present).

\textsuperscript{157} E.g., Special Rapporteur on Equatorial Guinea (1993-present); Independent Expert on Somalia (1993-present); Special Rapporteur on Afghanistan (1984-present); Special Rapporteur on Iraq (1991-present); Special Rapporteur on Burma (1992-present); Special Rapporteur on the Former Yugoslavia (1992-present); Special Rapporteur/Representative on Rwanda (1994-present); Special Rapporteur on Zaire (1994-present).
Most of these bodies have flexible procedures which allow for ease of access by individuals and groups.\textsuperscript{158} They are also seen to be more transparent\textsuperscript{159} and reasonably prompt in dealing with complaints.\textsuperscript{160} Some of them have used innovative working methods\textsuperscript{161} to maximize their effectiveness. On the negative side, they\textsuperscript{162} have sometimes been criticized for their reluctance to explicitly pin blame on governments, even when it is clear that a government is guilty of acts of commission or omission. Some have also been criticized for producing reports which are "descriptive and statistical rather than analytical."\textsuperscript{163}

Some of these bodies have specifically noted the link between states of emergency and the abuses which fall within their mandate,\textsuperscript{164} and their experience in dealing with such patterns of abuse which may be helpful in devising the international "measures of special vigilance" which

\textsuperscript{158} All that is required in most cases to activate these mechanisms is a simple letter from a victim of a human right violation or from any concerned individual or group.

\textsuperscript{159} As well as keeping their correspondents informed of the progress of their respective cases, these mechanisms publish fairly detailed annual reports in which statistical data and information about government responses are included. The Working Group on Arbitrary Detention has stated that, even where a detained person whose case it has taken up is released, it "reserves the right to decide . . . whether or not the deprivation of liberty was arbitrary"; see UN Doc. E/CN.4/1995/31, 23 at para. 14. This Working Group has also set out publicly, and in great detail, its methods of working; see, UN Doc. E/CN.4/1997/4, Annex I.

\textsuperscript{160} The Working Group on Enforced or Involuntary Disappearances has, for instance, evolved a very successful "urgent action" procedure under which its Chair is authorized, in appropriate cases, to raise allegations of "disappearances" with governments by telegram as soon as such allegations are drawn to its attention. Similar procedures have been set up by some of the other mechanisms also.

\textsuperscript{161} They undertake, for instance, on-site visits to countries which are the subject of their concerns, both to gain first hand knowledge of the local situation and to engage the governments concerned in a dialogue. No less noteworthy is the decision of the Working Group on Arbitrary Detention to adopt an openly "adversarial" investigative procedure in relation to complaints received (see UN Doc. E/CN.4/1995/31, 21, at Annex 1, para. 2) and its practice of publishing formal "decisions" taken on such complaints; see, e.g., UN Doc. E/CN.4/1995/31/Add. 1.

\textsuperscript{162} E.g., the Working Group on Enforced or Involuntary Disappearances.


\textsuperscript{164} The Working Group on Arbitrary Detention has, for instance, affirmed that abuse of states of emergency, and exercise of the powers specific to states of emergency without a formal declaration are among "the main causes for arbitrary deprivation of liberty"; see UN Doc. E/CN.4/1995/31, 15-16 at paras.38-39. A resolution adopted by the Commission on Human Rights in 1997 renewing the mandate of the Special Rapporteur on Freedom of Opinion and Expression similarly noted that the persecution of persons who exercise their right to those freedoms is aggravated \textit{inter alia} by states of emergency.
Questiaux called for in her 1982 study. Unfortunately, the information provided by these mechanisms is not always used effectively by the plenary bodies within the UN system. For example, non-governmental human rights monitors have criticized the Commission on Human Rights for ignoring well documented findings by the Working Group on Enforced or Involuntary Disappearances that “disappearances” are endemic in Turkey. One possible way in which the work of such mechanisms can be put to better use in the global efforts to moderate emergency regimes is by achieving a greater coordination between these mechanisms and between them and the major plenary bodies in the UN system.

Yet another mechanism that is available to deal with emergency situations under the United Nations system, albeit one whose effectiveness appears rather limited, is a special inter-sessional meeting of the Commission on Human Rights. This mechanism has only been used once so far, in August 1992, in response to the developments in the former Yugoslavia. The most obvious benefit of such a meeting is that it would provide a visible and high profile platform for intergovernmental discussions, but whether it could be used to trigger stronger, more direct international action to halt human rights abuses is uncertain. In the case of the former Yugoslavia, all that resulted from the meeting was the appointment of a Special Rapporteur who has carried out a number of investigative visits to report on the scale and intensity of human rights abuses in the territory.

More effective has been the recent use of the Security Council to deal with emergency situations, including the protection of human rights. The Council’s intervention in Iraq in 1991 and in Kosovo in 1999 offer the

165. Questiaux, supra note 18. Also, reports of mechanisms such as the Special Rapporteur on Torture or the Special Rapporteur on Summary and Arbitrary Executions can help in identifying the extent of abuse of non-derogable rights and thus help in assessing the efficacy of the derogation provisions.


167. Such a meeting can be convened under ECOSOC Resolution 1990/48 whenever members of the Commission feel the need.

168. This special session was convened “to discuss the dangerous situation in the former Yugoslavia”—see Letter dated 5 August 1992 from the Permanent Representative of the United States of America to the United Nations Office in Geneva, UN Doc. E/1CN.4/1992/S-1/2.
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most prominent examples of this technique.\textsuperscript{169} It needs to be noted, however, that resort to the Security Council is beset by a number of problems, not least of which being the high degree of politics involved in persuading the Council to adopt resolutions on such matters. However, with the decreasing ideological polarization among member states following the end of the Cold War, this technique might yet provide an effective way forward in dealing with at least some of the graver crisis situations, as has been demonstrated in Bosnia in the mid-1990s and, more recently, in Kosovo, where, despite sharp disagreements between Security Council members, a NATO led coalition of security forces was ultimately established by authority of Security Council resolutions. These actions hold out the possibility of increasing involvement by the Security Council in future emergency situations.

4. Initiatives by Non-Governmental Organizations

Non-governmental organizations (NGOs) have been playing an increasingly prominent role in promoting human rights worldwide, including in emergency situations. As well as monitoring abuses, they are active in lobbying, campaigning, providing relief and rehabilitation to victims,\textsuperscript{170} and assisting in standard setting at both domestic and international levels. NGOs vary quite considerably in size, structures, objectives, mandates, public profiles, working practices and political/ideological orientation. Many of them define human rights to encompass concerns which go beyond those enumerated in the international instruments; few, if any, focus exclusively on states of emergency, though several have shown a special interest in the subject.\textsuperscript{171}

\textsuperscript{169} Under Resolution 688, the Council authorised the use of all necessary force by member states to protect the ‘safe zones’ created for Kurds within Iraqi territory. This led to a sustained and concerted military action in the region by a UN force comprising defence personnel from several Western countries, led by the United States of America. In the case of Kosovo, by Resolution 1244, the Security Council authorized a NATO led security force (known as KFOR) to establish a “secure environment” for the safe return of the Kosovar Albanians displaced by the campaign of ethnic cleansing waged against them by the government of the Federal Republic of Yugoslavia.

\textsuperscript{170} The most prominent example in this category is the International Committee of the Red Cross (ICRC), which is an atypical NGO in several ways, not least because of its unusual organizational structure, the special status it enjoys under the Geneva Conventions, and its predominantly government based funding. The ICRC enjoys unprecedented access amongst NGOs to countries experiencing armed conflict or internal strife: its humanitarian initiatives, particularly prison visits and tracing activities, have been widely acclaimed.

\textsuperscript{171} E.g., Amnesty International, the International Commission of Jurists and the International Law Association (all of whom have published reports or studies concerning emergency regimes and their effects on human rights). Among academic institutions, the Queen’s University of Belfast deserves special mention: it has, since 1990, been involved in creating an international database on emergency regimes with a global focus.
By far the most valuable contribution made by NGOs to the international efforts at moderating states of emergency has been made in their role as providers and disseminators of information. Much of the information that drives the work of intergovernmental bodies charged with monitoring human rights abuses, whether on a thematic or territorial basis, comes from NGOs.\textsuperscript{172} The Special Rapporteur on States of Emergency has, for example, relied heavily on the detailed country by country documentation supplied by Amnesty International since the inception of his mandate.\textsuperscript{173} NGOs have also, through their campaigns and special studies, galvanized public opinion from time to time on specific aspects of human rights protection, which in turn has helped launch focused international initiatives. A striking example is the publication in 1983 of the International Commission of Jurists’ widely acclaimed study on states of emergency\textsuperscript{174} which triggered the UN Sub-Commission’s subsequent initiatives on the subject.

NGOs have also been quite active in the area of standard setting vis-à-vis states of emergency. In September 1984, the International Law Association (ILA) issued a set of guidelines\textsuperscript{175} which were aimed at clarifying the standards governing the initiation, use and termination of emergency powers. A few months earlier another non-governmental initiative, sponsored by a consortium of NGOs,\textsuperscript{176} had produced a similar document\textsuperscript{177} which focused on the limitation and derogation provisions of the ICCPR. More recently, the Association of International Consultants on Human Rights (CID) helped draft model legal provisions govern-

\textsuperscript{172} Eloquent testimony to this contribution can be found in the reports of the various Special Rapporteurs and Working Groups discussed above. The Special Rapporteur on Freedom of Opinion and Expression has, for instance, characterised as “primordial” the role played by NGOs in fulfilling his mandate; see UN Doc. E/CN.4/1995/32, 44 at para. 140. The Special Rapporteur on Summary or Arbitrary Executions has publicly acknowledged that without the contribution of NGOs to his efforts, “very little could have been done”; see UN Doc. E/CN.4/1993/46, 167, para. 690.

\textsuperscript{173} See, e.g., UN Doc. E/CN.4/Sub.2/1987/19, 8-9, para. 34.


\textsuperscript{176} The NGOs involved were: the International Commission of Jurists; the International Association of Penal Law; the American Association for the International Commission of Jurists; the Urban Morgan Institute of Human Rights; and the International Institute of Higher Studies in Criminal Sciences. These organizations brought together a group of 31 distinguished experts in international law in Siracusa, Italy.

ing states of emergency for possible use as a reference model by governments.\textsuperscript{178} The International Committee of the Red Cross (ICRC) has also, over the years, been involved in standard setting, albeit mostly in the area of international humanitarian law.\textsuperscript{179} As recently as 1997, the ICRC and a number of NGOs cooperated with the United Nations in a new initiative to consider the desirability of producing a declaration of minimum humanitarian standards which would be applicable in all situations of internal humanitarian violence.\textsuperscript{180}

IV. \textit{IGOs and NGOs - an Evaluation}

It is manifest from the foregoing survey of the activities of various intergovernmental and non-governmental bodies and mechanisms that, for all their shortcomings, they have made a useful, if limited, contribution to the international efforts at monitoring and moderating human rights abuses during states of emergency. Not surprisingly, some of them have been more successful than others. It is generally recognized that the regional IGO systems for human rights protection have been considerably more effective\textsuperscript{181} than their global counterpart, created under the ICCPR. Furthermore, among the regional mechanisms, the Inter-American system seems to have fared better than the European system. Most human rights scholars would also agree that, within the UN system, some of the mechanisms have achieved a higher degree of success in tackling the human rights problems associated with emergencies than others.

Even so, the overall picture that emerges from the experience of the working of these institutions is one of some disappointment, not least because, despite the efforts described, emergency regimes continue to


\textsuperscript{179} The ICRC adopts a more hands-on approach to standard setting: it does not shy away from presenting draft texts of new instruments to international diplomatic conferences. In 1988, its chief legal officer, Hans-Peter Gasser, was involved in an initiative which straddled the worlds of international human rights law and humanitarian law. He prepared and circulated a draft code of conduct for states experiencing internal strife, which, in the event, did not receive institutional support from the ICRC; see H-P. Gasser, “A Measure of Humanity in Internal Disturbance and Tensions: Proposals for a Code of Conduct” (1988) 28 Int’l. Rev. Red Cross 38.


\textsuperscript{181} It needs to be acknowledged, of course, that measuring “effectiveness” in the area of human rights monitoring during emergencies is not easy. The International Law Association, whilst noting that this concept is “multi-faceted” and “elusive”, has identified six possible criteria for such measurement: (1) exposing the fact of human rights abuse; (2) stopping or moderating abuses during the course of an emergency; (3) providing redress to individual victims through findings of violations, compensation, rehabilitation, release from detention, or clarification of the fate of missing persons; (4) securing punishment of violators; (5) terminating a state of emergency; and (6) prevention of possible future abuses or invalid imposition of emergency measures; see ILA Interim Report, \textit{supra} note 163 at 7.
flourish, even proliferate, and human rights abuses continue to occur pervasively under such regimes. Many factors have been identified for this state of affairs, which may be classed under four broad heads: structural, definitional, institutional and practical.

1. Structural Problems

Among the structural factors, the foremost problem is that, for all the exertions of the international community in the cause of the universality of human rights, governments are still notoriously reluctant to subject themselves to any real outside scrutiny. This reluctance becomes particularly marked during periods of crisis, when most administrations feel that they, and they alone, are capable of appreciating the threat to their national security, and that any outside intervention is at best an unnecessary distraction and at worst an intolerable intrusion into their domestic affairs. Even if this reluctance is not based on any doctrinal opposition to outside scrutiny, governments may still be less than willing to engage, except in the most superficial manner, with any foreign initiatives on the purely practical grounds that they “wish to be bound by as few constraints as possible”\(^{182}\) when faced with the task of ensuring the survival of the nation. As long as this powerful notion of national sovereignty continues to hold sway, no international mechanism with any real strength to oversee the conduct of emergency regimes is likely to command widespread acceptance.

Secondly, there is still a high degree of indifference to, suspicion of, and disagreement over international standards on human rights amongst both governments and peoples all over the world. Even among those countries which are sympathetic to the principle of universality, there is often genuine concern that not enough heed is being paid to social, cultural and other similar differences which may sometimes seriously put in question the relevance of rigid, all embracing universal standards. Put simply, the global consensus on human rights is still rather fragile.

A concrete example of this fragility of consensus can be seen in the area of non-derogable rights. There is still strong disagreement among governments over the appropriateness of some of the rights designated as non-derogable by the three major treaties, and this disagreement cannot but affect the way the treaties are implemented in different parts of the world. Yet, rather than attempting to resolve this disagreement, the human rights movement appears, effectively, to have turned a deaf ear to

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the protestations of the doubters, and gone on to claim an expanded list of non-derogable rights in many of its recent initiatives on the subject.

The Paris Minimum Standards, for instance, list as many as 16 rights which are considered non-derogable, including the right to a name, equal rights between men and women as to marriage, the right of equal access to public service and the right of a child to special protection by family, society and the state. While few would quarrel with the desirability of such rights in any democratic society, many might nevertheless wonder if these rights are so paramount as to deserve special protection on a par with, say, the right to life during a state of emergency. Besides, it can legitimately be argued that such over ambitiousness, however well intentioned, runs the risk of proving counter productive in the long run. From a purely practical view, therefore, there is a strong case for keeping the list of non-derogable rights short. As one leading commentator has argued, a short list “would have focused attention on those fundamental rights which should be especially protected in emergencies.” This is not to question either the validity of universalism or the need for expanding existing standards; it is, rather, a plea for gradualism.

Thirdly, all the efforts that have gone into promoting and publicizing international standards on human rights seem to have made precious little impact on the status of domestic law in many countries. The exhortation, contained in all the major instruments, urging states to take necessary legislative measures to give effect to these standards in their municipal law, has gone largely unheeded, with a large number of national constitutions still being out of step with those standards. This, again, reflects very poorly on the seriousness with which governments and people, by and large, take international standards.

183. Paris Minimum Standards, supra note 175 at 1075-1081 (Sec. (C), Arts. 1-16).
184. The inclusion of another right, viz. not to be imprisoned merely on the ground of inability to fulfil a contractual obligation, in the ICCPR’s list of non-derogable rights is similarly questionable. One writer has called its inclusion “bizarre,” contrasting it with the lower priority accorded to the right not to be arbitrarily deported, which, in his opinion, deserves greater protection during emergencies: see T. Meron, Human Rights Law-Making in the United Nations: A Critique of Instruments and Process (Oxford: Clarendon Press, 1986) at 92. A strong case can also be made for the inclusion of the right to judicial remedies — a right recognized explicitly only in the American Convention.
186. E.g., ICCPR Art. 2(2), American Convention Art. 2.
2. **Definitional Problems**

As for definitional problems, the unsatisfactory phraseology concerning the kind of emergency situations which justify derogation by governments remains a source of potential conflict. The ICCPR refers to “public emergency which threatens the life of the nation,”\(^\text{188}\) the European Convention to “war or other public emergency threatening the life of the nation,”\(^\text{189}\) and the American Convention to “war, public danger, or other emergency that threatens the independence or security of a State Party.”\(^\text{190}\)

It would appear that the latter instrument lays down a slightly more flexible standard than the other two,\(^\text{191}\) although the terminology adopted by the ICCPR itself could be faulted for being not sufficiently restrictive.\(^\text{192}\) There may be some merit in tightening up the provisions by specifying more clearly the types of situations, e.g. war, external aggression, armed rebellion and so on, which may justify a derogation.

Secondly, there is no clear guidance as to whether the threat envisaged in the articles means a threat to the life of the state, of the government in power, or of the people constituting that nation.\(^\text{193}\) The American Con-

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188. Art. 4(1). The framers of the ICCPR deliberately avoided the use of the word ‘war’ in the article, because they felt that “the Covenant should not envisage, even by implication, the possibility of war, as the UN was established with the object of preventing war.” UN Doc. A/2929, 67, para. 39.

189. Art. 15(1).

190. Art. 27(1). The rationale for using the phrase “public danger” was that this term was seen as covering natural disasters which were not necessarily a threat to the independence or security of a nation; see Buergenthal & Norris, eds., *The Inter-American System* (New York: Oceana, 1982) Vol. 1, Booklet 12, 135.

191. But the adjudications of the Inter-American Commission are reassuring: the terminology has been given much the same interpretation as that used in the ICCPR and European Convention; see Oraá, *supra* note 185 at 27.

192. But this phrase was used in preference to one which enumerated in detail the various types of emergencies that could justify derogations. A suggestion, for example, to substitute the phrase “a state of emergency caused by an enemy invasion or a state of war or in the case of public commotion or disaster gravely upsetting the normal life in the territory of a State” was rejected; see UN Doc. E/CN.4/660, 10, at para. 26. It has been argued that, notwithstanding the generality of the terminology adopted, the Human Rights Committee has, through its reviews of states parties’ reports and its opinions under the Optional Protocol, put a fairly restrictive construction on the article; see e.g. Oraá, *supra* note 185 at 20-22.

193. Interestingly, during the drafting of the ICCPR, the phrase “threatening the life of the nation” was chosen in preference to other phrases such as “threatening the interests of the people” and “threatening the security, safety and general welfare of the people” even though it was pointed out that the latter phrases “were more appropriate in a covenant which dealt with the rights of individuals and that such a phrase would also prohibit Governments from acting contrary to the interests and welfare of their people”; see M.J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987) at 85-86. The reason why references to ‘people’ were dropped was because it was felt that this term may not be construed as encompassing all people in a country, but only some people; see UN Doc. E/CN.4/SR. 330, 14.
vention appears to lean on the side of the state, though such an interpretation is by no means conclusive. The danger flowing from this ambiguity in language is that it may be exploited by an autocratic regime to declare an emergency and enter extensive derogations in circumstances where the only threat is to its own life, for example, through a popular uprising, as happened in India in 1975, rather than to the security of its people. One writer has suggested that a solution to this problem might be "to accept such a claim only in favour of democratic political systems, but to deny it to totalitarian regimes," although as he himself fairly concedes, "[i]deas about democracy and about a preferred political order are too diverse to provide a viable consensus on this question."

Thirdly, it is not clear whether the provisions cited apply to localized emergencies, however serious, but which only affect a small and clearly defined section of the population and not the whole country. The guidance offered by European case law on this point would suggest that, at least in theory, they do not. In the Lawless case, the European Court of Human Rights held that the emergency must be one threatening "the whole population," although in practice, that standard has not been applied strictly, as the example of Britain testifies. The British government has filed a number of derogation notices concerning emergencies obtaining in Northern Ireland and even further afield, e.g. in some of its overseas colonies, but whose terms have covered the population of Great Britain as well. All of these notices have gone unchallenged. Perhaps it might have been more desirable to use language similar to that used in the Paris Minimum Standards which defines a 'public emergency' as an exceptional situation affecting "the whole population or the whole population of the area to which the declaration [of emergency] applies."

194. Art. 27(1) of the American Convention refers to "war, public danger, or other emergency that threatens the independence or security of a State Party."
195. The Mexican Constitution (Art. 29) attempts to avoid this problem by using an alternative phraseology, namely, "emergency which may place society in grave danger" But this is no more satisfactory, given the vagueness of the term "society."
197. Lawless v. Ireland, supra note 48 at para. 28.
199. Art. 1(b), Paris Minimum Standards, supra note 175 at 1073 (Sec. (A), Art. 1(b)).
3. Institutional problems

With regard to the institutional factors, it has been suggested that the current machinery for monitoring states of emergency does not amount to a coherent system. The IGOs, for instance (which form the backbone of the system), have been criticized for "their tendency ... to deal, and then only erratically, with the symptoms of states of emergency rather than with the concept itself or with causes or prevention of human rights abuses under emergency regimes."200

Secondly, and self-evidently, lack of resources has also played a major role in reducing the effectiveness of the human rights monitoring system overall, especially at the intergovernmental level. Inadequate research and administrative support, cuts in travel provision for fact finders, cancellation of scheduled periodic meetings, and a host of other similar constraints have impaired both the thoroughness of data collection and the speed and sufficiency of response.

Thirdly, much of the international discourse and action on human rights is still vitiated by political posturing and manipulation, which means that the system as a whole suffers all too often from a crisis of credibility. Although the ending of the Cold War has eased some of the sharper ideological tensions between nations, it has not led to any let-up in the passion with which states protect and advance their own interests or those of their allies in international fora, often at considerable cost to the cause of human rights. Instances are legion, in bodies such as the Commission on Human Rights, of governments consistently and fiercely resisting moves to condemn abuses committed by certain regimes even where the evidence of such abuses is overwhelming.201 NGOs too often tend to be similarly selective in their fingering of governments for condemnation. As a result, the "even-handed and comprehensive scru-
tiny of human rights abuses associated with emergencies"202 which the ILA saw as a *sine qua non* for any effective monitoring regime has failed to materialize.203

Fourthly, the working of the existing mechanisms of international surveillance have revealed a number of deficiencies and lacunae which need urgent attention if the system is to be improved. Prominent among the problems are:

(1) *The Insufficiency of the Reporting Practices of Derogating Governments*

Under Article 4(1) of the ICCPR, governments which avail themselves of the power to derogate from any of the Covenant's provisions are required to notify fellow member states (through the Secretary-General of the United Nations) of the provisions concerned and to provide the reasons for the derogation.204 However, in actual practice, most governments do no more than submit bland, sketchy notices of derogation which make a general reference to the difficulties faced by them and which simply list the various treaty articles suspended. What is lacking, as Joan Hartman has pointed out, is "data on the actual extent to which emergency measures are being applied. Detailed information on the number of detainees, banned associations or censored publications is not required to be divulged unless an enforcement proceeding ensues."205 This leaves the Human Rights Committee with very little hard information on which to assess the legitimacy of the derogation.

(2) *The Inadequacy of Procedures to Review Derogations*

None of the three international instruments contains any mechanism for a prompt and automatic review by their respective enforcement bodies of the legitimacy of derogations. Indeed, none of them even imposes a formal obligation on either a state party or the respective Secretaries-

203. One of the glaring examples of this lack of even handedness, often criticized by objective observers, is the continued discriminatory treatment meted out to Israel in the Commission on Human Rights. Not only is that country systematically excluded from membership of the Commission, but it is singled out for condemnation under a special agenda item year after year. Also, the mandate of the Special Rapporteur appointed to examine human rights practices in the Israeli-Occupied Territories has been defined unprecedentedly widely and without any limit on its duration (currently the only such open-ended mandate within the UN system).
204. There is a broadly similar requirement under the *European Convention* Art. 15(3), though what it asks for is information about the "measures" taken by the government as well as reasons for the derogation.
General to inform the enforcement bodies of derogation notices. A modest attempt by the Human Rights Committee in 1982 to fill this gap, by requiring the Secretary-General: (1) to transmit all derogation notices to the Committee as soon as they are received; and (2) to impress upon all derogating governments the need for them to keep the Committee informed regularly of "the development of the emergency in so far as it affects the implementation of the Covenant," was deferred indefinitely.

Another suggestion to improve the present situation is contained in the Siracusa Principles, which require the Human Rights Committee to:

[D]evelop a procedure for requesting additional reports under Article 49(1)(b) from States Parties which have given notification of derogation under Article 4(3) or which are reasonably believed by the Committee to have imposed emergency measures subject to Article 4 constraints. Such additional reports should relate to questions concerning the emergency insofar as it affects the implementation of the Covenant and should be dealt with by the Committee at the earliest possible date.

Yet another proposal for improvement that has been mooted by Hartman is to make the validity of derogations dependent upon adequacy of notice:

Such a construction of the derogation articles is supportable, though it would impose a rather severe penalty on a neglectful state. The European Commission has hinted that in a flagrant case it might adopt this approach, but in actual practice compliance with article 15(3) has been analysed independently of the central issue of justification for emergency measures. The best solution for implementation organs would be to consider notice violations separately, but to nullify the derogation in cases of deliberately misleading or insufficient notice.

206. The ICCPR and the American Convention require states-parties to notify other states-parties of derogations through the instrumentality of the Secretary-General of the UN and the OAS respectively, while the European Convention merely requires states-parties to notify the Secretary-General of the Council of Europe. This divergence between the European Convention and the other two treaties has been rectified by a resolution passed in 1956 by the Committee of Ministers of the Council of Europe which asked the Secretary-General of that body to forward all derogation notifications received to other states-parties; Resolution 16 of 26 September 1956, cited in S.R. Chowdhury, Rule of Law in a State of Emergency (London: Pinter, 1989) at 92.

207. See UN Doc. CCPR/C/SR.349, para. 16.

208. A disturbing sidelight of that attempt was that, during the course of the debate on the proposal, one of the Committee members appeared to question the jurisdiction of the Committee to monitor emergency situations; see, P.R. Ghandhi, "The Human Rights Committee and Derogation in Public Emergencies", (1990) 32 German Y. B. Int'l. L. 323 at 334.

209. Principle 73, Siracusa Principles, supra note 177.

States of Emergency – Moderating their Effects on Human Rights

(3) The Lack of Control over Reservations by Governments

The European Convention and the American Convention explicitly permit reservations to be made to their provisions by states parties.211 The framers of the ICCPR, on the other hand, left the matter to be governed by the customary rules of international law.212 The practical effect of both approaches is much the same: reservations will only be valid under any of the three instruments if they are not incompatible with the object and purpose of the treaty concerned. The consensus of academic213 and judicial214 opinion is that reservations to non-derogable rights are not compatible with the object and purpose of any of the three treaties. However, this has not prevented some states from entering reservations, either generally to the derogation provisions215 or to particular non-derogable rights,216 and the treaty enforcement bodies have been able to

211. Art. 64, European Convention; Art. 75, American Convention. The latter specifically makes reservations subject to conformity with the provisions of the Vienna Convention on the Law of Treaties (1969).

212. They recognized that “the right of a contracting party to make reservations to a multilateral treaty was now an accepted principle, subject to the provision that such reservations were not incompatible with the object and purpose of the treaty”; see UN Doc. A/6546, at paras. 142-3. This principle has since been incorporated in the Vienna Convention on the Law of Treaties Art. 19(e). The Vienna Convention further requires that, for a reservation to be valid, it must be confirmed by the state concerned at the time of its accession to the treaty and not later (Art. 23(2)).

213. See, e.g., OraA, supra note 185 at 129; McGoldrick, supra note 97 at 306-7.

214. See, e.g., Belios v. Switzerland (1988), 132 Eur. Ct. H.R. (Ser. A). In this case, the judges ruled that Art. 64 of the European Convention “expressly prohibited reservations of a general character and prohibited by implication those which were incompatible with the Convention” (para. 52). See also The Effect of Reservations on the Entry into Force of the American Convention on Human Rights, (1982), Advisory Opinion OC- 2/82 Inter-Am. Ct. H.R. (Ser. A), No. 2, and Restrictions to the Death Penalty . . . (1982), Advisory Opinion OC- 3/83 Inter-Am. Ct. H.R. (Ser. A), No. 3. In the latter Opinion, the court held that a reservation which sought to empower a government to suspend any or all non-derogable rights was impermissible, but “the situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right of its basic purpose” (para. 61).

215. E.g., Trinidad and Tobago; see UN Doc. CCPR/11/Add.1, at 477; France; see UN Doc. CCPR/11/Add.1, at 470. Both of these reservations pertain to ICCPR Art. 4.

216. E.g., Congo (Art. 11, ICCPR – see UN Doc. CCPR/11/Add.1, at 469); Malta (Art. 2(2)(a), ICCPR – see UN Doc. CCPR/11/Add.1, at 474); Barbados (Art. 4(4), American Convention; see online: <http://www.oas.org/juridico/english/Sigs/b-32.html> (accessed Feb. 16, 2000)); Portugal (Art. 7, European Convention; see online: chm#PORTUGAL” http://www.coe.fr/tabconv/reservdecl/ldr5e.htm#PORTUGAL> (accessed Feb. 16, 2000)); Federal Republic of Germany (Art. 7(2), European Convention; see online: <http://www.coe.fr/tabconv/reservdecl/ldr5e.htm#GERMANY> (accessed Feb. 16, 2000)); Mexico (Art. 18, Art. 25(b), ICCPR – see UN Doc. CCPR/11/Add.1, at 475, and Arts. 12 & 23(2), American Convention; see online: <http://www.oas.org/juridico/english/Sigs/b-32.html> (accessed Feb. 16, 2000)); Uruguay (Art. 23(2), American Convention; see online: <http://www.oas.org/juridico/english/Sigs/b-32.html> (accessed Feb. 16, 2000)).
do precious little beyond criticizing such derogations and asking the states concerned to withdraw them.

4. Practical problems

Foremost among the practical problems is the lack of sufficient coordination between the various components of the present system, especially at the intergovernmental level, and this has led to unnecessary duplication of efforts and occasionally even to friction between two or more organs. Within the UN system, for example, it has been noted that there is not enough dialogue and feedback between, say, the Commission on Human Rights and the various thematic or country specific mechanisms, to the detriment of effective action by the former. A similar lack of coordination has characterized the efforts of NGOs; a good example, cited by the ILA, concerns submissions to the Special Rapporteur on States of Emergency. So far there has been no attempt on the part of the many NGOs who make such submissions to pool together their resources to gather and collate the relevant information.

Secondly, many of the inter-governmental bodies tend to place too much emphasis on consensus in their decision making which often leads to anodyne resolutions that "reflect nothing more than the lowest common denominator devoid of content and significance," even where the gravity of a situation calls for strong condemnation. This has not only prevented effective action being taken against governments who have brazenly disregarded their solemn undertakings to protect and promote human rights, but also undermined international efforts at standard setting.

217. The potential for such duplication is, to some extent, being reduced by recent innovative practices adopted by some of the UN organs. In 1994, for example, the Special Rapporteur on Torture and the Special Rapporteur on Summary or Arbitrary Executions decided to undertake a joint visit to Colombia instead of each of them undertaking a separate visit. The Special Rapporteur on Torture also agreed that, where any case involved the mandates of more than one UN mechanism, it would be permissible for each of those mechanisms to refer to communications received by the other concerning the case, thus avoiding unnecessary overlap and duplication of work; see UN Doc. E/CN.4/1995/34, 6-7, at paras. 8, 9. The Special Rapporteur on Torture has often addressed urgent appeals in conjunction with other UN mechanisms wherever possible; see, e.g., UN Doc. E/CN.4/1997/7.

218. In 1987, for instance, the UN Special Rapporteur on Chile expressed his displeasure over a Sub-Commission resolution which was critical of the human rights practices in Chile, arguing that this could jeopardize his relations with the Chilean government; see UN Doc. A/42/556, at para. 72.


220. ILA Second Interim Report, supra note 29 at 38.

Thirdly, despite the heightened interest in states of emergency in recent years, as reflected in the number and range of studies produced by IGOs, NGOs and academic specialists, there is still a dearth of comprehensive comparative data, both factual and legal, on the practice of emergency regimes in the different regions of the world. It was hoped that the work of the Special Rapporteur would fill this gap to a considerable extent, but that has proved not to be the case, largely because of resource constraints.

V. Informal States of Emergency

The current international system of controls has also raised questions concerning certain less clearly defined crisis situations that have been described variously as "de facto," "institutionalized" or "ambiguous" emergencies, or simply as repression. Although in these types of crisis governments should, in theory, still be amenable to measures of surveillance based on the concept of derogation, they do not always fit in easily with the reference model underpinning much of the current regime of controls. For example, the absence of a formal declaration and notification of such emergencies under the ICCPR or other relevant treaty might make it difficult for the international community and the human rights monitoring agencies to become aware of a large scale derogation of human rights with the necessary degree of promptitude. Joan Hartman/Fitzpatrick has identified some of the problems connected with these regimes in her pioneering work for the ILA, and her typology of emergencies offers a useful starting point for the analysis of such regimes.

De facto emergencies usually arise under one of the following two circumstances: (i) when exceptional measures are applied by a government without a state of emergency being formally declared; or (ii) when exceptional measures are continued after a declared state of emergency has been formally terminated. A good example of a de facto emergency is that encountered in common law jurisdictions such as the United Kingdom where there are no constitutional provisions for formal decla-

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222. Questiaux highlighted this lack of comparative data in her 1982 study, supra note 18.
223. This reference model itself essentially conforms to the civil law model of emergency powers.
224. See, e.g., ILA Second Interim Report, supra note 29 at 12-25, also discussed in Fitzpatrick, supra note 17 at 8-21.
rations of emergency\textsuperscript{225} and where exceptional measures can be initiated under ordinary legislation on either a temporary\textsuperscript{226} or permanent\textsuperscript{227} basis.\textsuperscript{228} This would, in Hartman/Fitzpatrick’s analysis, be an example of a “classic” \textit{de facto} emergency, i.e. one whose invocation is justified by the existence of genuine emergency conditions on the ground.

Hartman/Fitzpatrick has identified at least three other types of “classic” \textit{de facto} emergencies: (i) where the government has chosen to rely on ordinary law (which does not include any exceptional measure) to deal with the crisis facing the country;\textsuperscript{229} (ii) where an \textit{ad hoc} legal regime or a state of lawlessness prevails (e.g., Lebanon); and (iii) where the government, whilst terminating a formally declared state of emergency, has allowed its effects to continue by incorporating harsh special security laws into its ordinary legal regime.

Further down the scale are “ambiguous or potential” \textit{de facto} emergencies involving situations where the actual conditions on the ground do not justify the declaration of emergency and where no formal emergency is declared, but where the government resorts to sudden and unannounced assaults on human rights using permanent special security laws. Such laws are quite common in many countries, especially in the Common-

\textsuperscript{225} There is however a statute, the \textit{Emergency Powers Act} 1920 (U.K., 10 & 11 Geo. V, c. 56) which does provide for formal declarations of emergencies by the executive, and for the promulgation of emergency regulations, whenever there have occurred or are about to occur events of such a nature as are calculated to interfere with the supply of essential goods or services to the community. Any emergency declared under this Act must be ratified by Parliament within seven days. Several proclamations of emergency have been issued under this Act, to deal with industrial action by, for example, coal miners (1921), bus and tram drivers (1924), dockers (1948, 1970) and electricity workers (1970, 1973); see K. Jeffery & P. Hennessy, \textit{States of Emergency: British Governments and Strikebreaking since 1919} (London: Routledge & Kegan Paul, 1983).

\textsuperscript{226} E.g., the \textit{Northern Ireland (Emergency Provisions) Acts} 1973-1996, enacted to deal with terrorism relating to the affairs of Northern Ireland, whose major provisions had to be renewed by Parliament each year.

\textsuperscript{227} E.g., the \textit{Defence of the Realm Consolidation Act 1914}, \textit{supra} note 22, under which the government, i.e. the executive, could make regulations “for securing the public safety and the defence of the realm” without parliamentary approval. This law was repealed, though not immediately, after the cessation of hostilities in the First World War.

\textsuperscript{228} Even in jurisdictions that do have a written constitution, such as the United States of America, but the constitution does not provide for a formal declaration of emergency, it has been suggested that the exercise of powers by the executive during periods of (genuine) crisis might constitute a \textit{de facto} state of emergency. It has been argued that “emergency power was an unconstitutional exercise of power by the executive,” but was nevertheless justified by the doctrine of necessity; see, e.g. Jules Lobel, “Emergency Power and the Decline of Liberalism” (1989) 98 Yale L. J. 1385 at 1389.

\textsuperscript{229} Such a situation should not, says Hartman/Fitzpatrick, strictly be classified as a state of emergency at all, and should not “trigger any extraordinary international scrutiny of human rights conditions”; ILA Second Interim Report, \textit{supra} note 29 at 17.
wealth, and are used, in Hartman/Fitzpatrick's words, to achieve a variety of objectives, ranging from "preserving democratic government in the face of an anti-democratic threat; to protecting an autocratic government with some of the formal trappings of a democratic structure from widespread demands for true democracy; to 'preserving' the power of a government which has toppled a democratic regime in a sudden coup d'etat; to counteracting the separatist pressures of an irredentist movement or the threat of an armed opposition." Interestingly enough, most of the countries resorting to this technique are endowed with formidable formal emergency powers as well. They do not, however, appear to be particularly discriminating in their choice between the use of emergency powers and of permanent security legislation.

It is not difficult to see the typological problems posed by such situations. Their almost open-ended potential for derogation from some of the most basic human rights makes them vulnerable to the label of "permanent" emergencies, but where the crackdowns are relatively infrequent and their effects confined to a small number of targets (as is often the case with such situations), that label would seem exaggerated. Hartman/Fitzpatrick's solution to the problem is to judge each case on its merits. "Where the shift in government behaviour is sharp enough," she says, "human rights monitors should treat the altered situation as a functional emergency."

The same solution has been suggested for yet another difficult type of emergency, usually described as "institutionalized," under which a government terminates a formal state of emergency which has gone on for a long time in the absence of any real crisis, but not before creating a similar regime under ordinary law. Though similar to the ambiguous or potential de facto emergency described above, the important distinguishing characteristic of this type of emergency is that there are no crisis conditions present on the ground to justify its existence. South Africa under apartheid presented a controversial example of this phenomenon: in the mid-1980s the white minority government decided to end the formal emergency proclaimed under the Public Safety Act 1953, but only after it had replicated most of the emergency powers in its ordinary law.

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230. E.g., Singapore and Malaysia (Internal Security Acts); India (Terrorist and Disruptive Activities (Prevention) Act); Bangladesh (Special Powers Act).
231. ILA Second Interim Report, supra note 29 at 19.
232. For examples of such emergencies, see Chowdhury, supra note 206 at 47-49.
233. ILA Second Interim Report, supra note 29 at 22.
234. The most commonly cited example of an institutionalized emergency is from Paraguay, where a military government which functioned under a formal state of emergency from 1954 onwards, ended that emergency in 1987 but simultaneously made such far reaching changes to its ordinary laws that it was able to continue the status quo for several years.
The controversy centred around whether there was an actual crisis situation which justified the use of such powers.\textsuperscript{235} If there was, the resulting regime would have been classified as a “classic” \textit{de facto} emergency; if not, it would qualify as an “institutionalized” emergency.

Finally, there is the category of countries which experience prolonged repression of considerable severity, but without either a formal state of emergency being declared by the government or the existence of genuine crisis conditions on the ground. Hartman/Fitzpatrick believes that such situations should not find any place in the classification of emergency regimes, although they are a matter of serious concern to human rights monitors. Arguably, most of the republics of the former Soviet Union and its satellites in Eastern Europe would have qualified for this description before the collapse of communism, but more recent examples under this head would include military dictatorships such as the one under General Sane Abacha which prevailed in Nigeria until last year. Another possible candidate in this category might be North Korea, though some doubts have been expressed about the exact status of that country in the typology of emergency regimes.\textsuperscript{236}

\textbf{VI. Assessing the Severity of Emergencies}

The Hartman/Fitzpatrick classification, though comprehensive, is by no means exhaustive. It does not, for instance, explicitly provide for what Questiaux has called “complex” emergencies,\textsuperscript{237} namely, “the great number of parallel or simultaneous emergency rules whose complexity is increased by the ‘piling up’ of provisions designed to ‘regularise’ the immediately preceding situation and therefore embodying retroactive rules and transitional regimes.”\textsuperscript{238} Nor does it offer precise guidance on the differences between the various types and levels of real emergency, or between the various levels in which the emergency measures may be considered acceptable. That assessment can, it is submitted, be made by applying the following four yardsticks.

\textsuperscript{235} The government argued that there was, citing the threat to the “life of the nation” from anti-apartheid activists, whereas many in the human rights community rejected this argument as untenable because, according to them, the threat was merely to the continuance of white minority rule.

\textsuperscript{236} Hartman/Fitzpatrick, for instance, believes that the regime of repression in North Korea could be regarded as an institutionalization of the formal emergency measures first introduced in that country in 1950; see ILA Second Interim Report, supra note 29 at 24.

\textsuperscript{237} Questiaux, supra note 18 at 29-32. The example of Turkey, which she cited, illustrates the difficulty with “complex” emergencies. Emergencies have been so often proclaimed in Turkey that it is very difficult to ascertain the exact status of the legal regime at any given time.

\textsuperscript{238} \textit{Ibid.} at 29 (para. 118).
The Factual Situation on the Ground

Despite the wide range of factual conditions which may give rise to an emergency situation, it is possible to identify certain discrete types of emergencies in the continuum between normality and the complete breakdown of organized government, based on the severity of threats to the established order. At the lowest end of the scale are situations in which a small number of organized disaffected groups resort to acts of sporadic but sustained terrorist violence to achieve certain political, social or economic goals, but who are not so powerful as to exercise control over any section of the population or national territory. This may be termed 'low level emergency' and a proper response to it might be the adoption of some special measures, such as limited powers of administrative detention, stop and search, and restrictions on movement of people and vehicles, but not a full scale emergency. Examples of such emergency would include the situation arising in Peru from the activities of the Tupac-Amaru rebels, or of the Baader/Meinhof gang in Germany in the 1970s.

Secondly, there are situations of 'preventive or repressive emergency' in which, although there is no visible sign of violent dissent, there is an underlying fear in the minds of the authorities—usually based on previous terrorist or other such activity by groups in society—that any relaxation of controls on freedom of expression or association might lead to large scale public disorder. This type of situation presents tremendous difficulties to human rights monitors, because, while the suppression of civil liberties will, in a large number of cases, be unjustified, on certain occasions, it may constitute a legitimate response to a potentially serious threat. In such circumstances, the adoption of slightly enhanced special measures, proportionate to the threat, may be justified. Examples of such emergency would include the situation in Malaysia immediately following the racial riots of 1969, or in Algeria in the months preceding and following the aborted 1991 general elections during which Islamic fundamentalists sought to subvert the secular character of the state.

Thirdly, there are situations of serious 'internal tensions and disturbances' in which organized groups of armed dissidents engage in acts of violence and looting which are more sustained, more frequent and more widespread than in a low level emergency, but which may not yet have reached civil war proportions. Here, the authorities may be justified in imposing tougher restrictions on various freedoms and civil liberties,

239. Some of the discussion which follows is based on Hadden et al., Monitoring Human Rights Abuses, supra note 28.
240. For example, the preventive detention of aliens during war time.
including curfews. Examples of such emergency would include the situation in Los Angeles immediately following the acquittal of the policemen involved in alleged brutality against the black motorist, Rodney King, in 1994.

At the top end of the scale would be situations involving full scale 'civil war' or 'internal armed conflict' in which the level or threat of violence is so high as to put the entire civilian population—or most of it—at risk. In such cases, resort to the severest of emergency measures (short of those affecting non-derogable rights) may be justified. One of the problems with crises like these is that, more often than not, they involve a collapse of constitutional government, so that there is no administration with the requisite authority present to oversee the implementation of the state of emergency, or, sometimes, even to ensure that it is imposed properly. Examples of such emergencies would include the situation in Bosnia following the break-up of the former Yugoslavia (1991-96) or that in north and northeastern Sri Lanka since the late 1970s.

It is, obviously, possible to identify more categories or levels of emergency in this continuum—or to sub-classify some of the categories identified, for example, by origin as political, religious or ethnic—but for the practical purposes of making an assessment of the legitimacy of most emergency regimes, the above classification will suffice.

(2) The Formal Legal Status of the Emergency

This feature will involve ascertaining whether an emergency is a formally declared or undeclared one, thus allowing for its classification as de jure or de facto, respectively. In carrying out this inquiry, the considerations outlined by Hartman/Fitzpatrick are particularly relevant. As part of this determination, it could also be ascertained, where appropriate, whether the state concerned has complied with the notification requirements under the ICCPR and/or a regional treaty. If the civil law model is adopted as the reference model, then all undeclared or de facto emergencies would automatically be deemed to lack legitimacy.

241. These are situations to which Common Art. 3 of the Geneva Conventions would almost invariably apply.
(3) *The Nature and Kind of Emergency Powers*

This factor will be a key element in the assessment of the legitimacy or otherwise of an emergency regime. Nearly all emergency measures involve certain common characteristics in terms of the exercise of powers, including:

(a) a substantial transfer of power from the legislature to the executive, and/or substantial expansion in the powers of the executive;

(b) the use of extended powers of arrest and detention to aid the investigation of alleged terrorist or other politically motivated activities;

(c) the use of administrative detention against persons suspected of broadly defined anti-state activity;

(d) the use of special courts and/or special procedures to deal with terrorist or other politically motivated offences;

(e) the use of newly created or enhanced penalties and punishments of an especially severe nature, including the death penalty, against those convicted of terrorism or other politically motivated offences;

(f) the imposition of wide ranging restrictions on the civil liberties of citizens, and the suspension of constitutional guarantees concerning human rights;

(g) a substantial reduction in powers of judicial review of executive action, including the suspension of procedures such as habeas corpus or *amparo*, and the conferment of immunity on members of law enforcement agencies from prosecution for acts carried out in pursuance of the emergency.

Each of the measures can then be checked for relevance and proportionality to the level and intensity of the threat identified earlier.

(4) *The Manner of Use of Emergency Powers*

An inquiry into the actual use or abuse of the powers invoked is as important as the determination under the previous head, if not more, in arriving at an overall assessment of the legitimacy of an emergency regime. This inquiry will cover, among other things, an evaluation of the extent to which the various powers have been used, whether there have been credible allegations or evidence of abuse, whether the principle of non-derogability has been respected, whether security forces have been properly instructed on the lawful limits to the use of force, whether those instructions have been followed, and so on.

Clearly, this kind of determination would pose formidable problems, not least because of the difficulties in obtaining sufficiently unbiased, accurate and reliable information, but that should not be an argument for inaction. A realistic approach might be to accept the limitations that are
inherent in such an exercise, but to proceed nevertheless with gathering as much credible data as can be obtained from both governmental and non-governmental sources, checking and cross-checking such data to the extent possible, seeking such corroboration as might be available, and then using the most reliable part of the resulting information to make a judgment. This process would be aided by suitable changes to the notification/reporting system under the international human rights instruments to rectify some of their deficiencies identified above. In particular, it would help if derogating governments were required to submit detailed information about the emergency measures initiated by them, including relevant statistical data, at frequent intervals after a derogation has been entered.

It would, of course, be naive to expect governments to provide a complete and unbiased picture of emergency conditions within their own jurisdictions, so there is a clear need for information from other, less subjective, sources. Human rights NGOs would figure high on any list of such sources, as would independent think-tanks and academic institutions, and such bodies should be drafted into the monitoring process as much as possible. For many years now, the idea of a specialized data centre to provide "a comprehensive and properly analysed listing of contemporary emergencies and their various actual effects on enjoyment of human rights" has been mooted by bodies like the ILA, and this idea has been welcomed by some of the IGO agencies involved in work on states of emergency. A modest attempt at establishing such a data centre was made by the Queen's University of Belfast in 1990, and initial feedback on its pilot studies, carried out for the following five years, has been quite encouraging.

VII. Alternative Approaches to Controlling Emergency Regimes

For all the advances that have been made in studying the effects of states of emergency in recent years, however, it would be idle to pretend that an exclusive focus on this concept to tackle gross violations of human rights world wide has been, or can ever be, wholly successful. Not only does the concept present serious definitional problems, so that its value as a

242. Fitzpatrick, supra note 17 at 173.
243. See, e.g., ILA Second Interim Report, supra note 29 at 45.
244. E.g., the UN Special Rapporteur on States of Emergency; see UN Doc. E/CN.4/Sub.2/1995/20. See also the supportive comments by Rosalyn Higgins as a member of the Human Rights Committee; UN Doc. CCPR/C/SR.973 at para. 33.
245. That data centre, with whose work the present writer was involved between 1990 and 1995, produced detailed profiles on nine countries, spread over four continents, which were under a state of emergency, or had experienced one since 1990; see online: <http://www.law.qub.ac.uk> (accessed Feb. 16, 2000).
predictor of widespread human rights abuses is somewhat diminished, but even its underlying emphasis on a benchmark of normality, to which deviating governments must eventually return, has not always worked effectively enough. In practical terms, placing too high an emphasis on formally declared emergencies has often led governments to simply move away from that concept and designate emergency measures as ordinary laws with a view to attracting less attention from human rights monitors. Given all these problems, it may perhaps be worthwhile to explore alternatives to the current approach, relying somewhat less on the formal emergency model as the basis of international control.

The case for such a reappraisal has been put by, among others, the ILA which, despite its strong support for international measures focusing on states of emergency, has not been oblivious to the dangers of over reliance on such measures. In the ILA’s view,

A complex web of incentives and disincentives affects resort to the formal emergency model. The most powerful incentive is a genuine desire to preserve the nation from an authentic threat. Formality and visibility of emergency measures offer no guarantee that human rights abuses will not occur, but resort to formal emergency powers is probably at least a neutral factor in determining whether fundamental rights will be violated by a regime perceiving genuine danger. Thus, the human rights community must be wary of establishing a monitoring process that creates too great a disincentive for states to choose the formal emergency model.246

This consideration has, of course, to be balanced against the risk of creating a monitoring process which is so lax that it encourages governments to declare states of emergency almost casually, and thus robs that term of all meaning.

1. Preservation of the Status Quo

There is, furthermore, the question of whether the preservation, or restoration, of the status quo should be the main desideratum in a human rights monitor’s approach to emergency regimes. What if the status quo is fundamentally anti-democratic or antithetical to human rights, as is often the case with autocratic or revolutionary governments? Would the resort to emergency measures by such governments, carried out to repulse democratic pressures, be justified, if the other pre-conditions for the imposition of such measures were met? A literal reading of the derogation provisions in each of the three major international human

246. ILA Second Interim Report, supra note 29 at 43.
rights instruments would suggest an affirmative answer. This question arose, quite starkly, in the case of South Africa under the apartheid regime where the status quo which was sought to be preserved by the imposition of emergency measures was white minority rule. In the eyes of the human rights community, this status quo was hardly worth preserving.

Interestingly, the question has not been the subject matter of any formal adjudication or authoritative comment so far by any of the human rights enforcement bodies. In one sense, it can be considered a definitional matter. As one writer put it, “if we define an emergency regime in terms of its origin in democratic politics, the democratic-authoritarian boundary must be respected; the concept of emergency powers is largely irrelevant in authoritarian political systems.” The ILA’s solution to the problem is to suggest that an ideal monitoring system should “create differential disincentives for resort to emergency powers, depending upon the character and aims of the supposedly threatened regime.” Alas, such a solution is not very practicable, as the ILA itself admits:

Such tailoring of the monitoring process will be quite difficult and sensitive. The growing acceptance of human rights norms and monitoring by IGOs still must be seen in light of the persistence of the Westphalian nation-state system and its principles of equality of states and non-interference in domestic affairs. A monitoring process precisely adjusted to the relative bona fides of various regimes’ claims to legitimacy would likely provoke denunciation by targeted governments.

An obvious way forward in such circumstances might be for human rights monitors to abandon the emphasis on the nature of the regime or the formal status of the emergency and to focus instead solely on the human rights violations, using some of the criteria indicated above. This may also be an appropriate solution to deal with some of the de facto emergencies discussed above, although it may necessitate changes to the current procedures for the examination of periodic reports under the ICCPR.

247. None of those provisions contains an express requirement that the measures adopted have to be “necessary in a democratic society,” as the limitation clauses attached to some of the rights guaranteed by the instruments do.
249. ILA Second Interim Report, supra note 29 at 43.
250. Under the current procedures, it appears that a state-party which has refused or failed to declare an emergency in terms of Art. 4 of the ICCPR could block any consideration of its human rights record by the Committee under that article; see, e.g., the case of Iraq (1987), cited in ILA Second Interim Report, supra note 29 at 6.
2. Improving Declarations of Emergency and Notices of Derogation

Another useful reform which would make *de facto* emergencies less problematic to deal with under the ICCPR would be for the Human Rights Committee to insist that all states parties to the Covenant should make provision in their domestic legal regimes for a formal declaration of emergency before they seek to file notices of derogation under Article 4. This change may not be effective against states parties determined to escape scrutiny under that article, but it is at least likely to make some of those that exercise *de facto* emergency powers fall in line with the requirements of Article 4. That it is possible to make legislative provision for declaration of emergencies even within the common law tradition has been proved by the practice in countries like the United States of America and Canada, both of which allow for emergencies to be formally declared under either their constitutions or ordinary legislation. Even the United Kingdom, which does not have a written constitution, has shown itself capable of providing for the declaration of emergencies, albeit for certain limited purposes, and it should not be difficult to extend this provision to other, more generalized, emergencies.

Assuming that the existing principle of derogation is to be maintained, the Human Rights Committee would do well also to issue more stringent guidelines concerning both the filing and the content of derogation notices. Firstly, the Committee should make the validity of any derogation notice conditional upon full and prompt compliance by the government with the notification requirement under Article 4. Secondly, it should insist that all derogation notices are filed with utmost dispatch, and in no case later than, say, 48 hours from the time of the declaration.

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251. The Constitution of the United States allows the suspension of the writ of habeas corpus (Art. I, Sec. 9(2)) and the use of military force to suppress insurrections and repel invasions (Art. I, Sec. 8(15)). Also, under the *National Emergencies Act* 1976, the President of the United States is required to make a formal proclamation of all emergencies and to inform Congress of any action taken under them.

252. The 1982 Constitution of Canada requires the government to issue a proclamation of emergency as a pre-condition to the adoption of emergency measures. A law passed in 1988, the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), contemplates four types of emergencies: war emergency; public order emergency; public welfare emergency; and international emergency. Express provision has however been made to preserve the government’s inherent power to deal with emergencies; see s. 2(2).


of the emergency.\footnote{255} Thirdly, the Committee should insist on greater specificity as regards the content of derogation notices, requiring, at a minimum, reasonably detailed information on the measures adopted and their effects on basic human rights such as personal liberty, freedom of expression, freedom of movement and freedom of association.\footnote{256} Governments should also be required to provide, at frequent intervals for as long as the emergency lasts, updated statistical data on, for example, numbers of persons detained under the emergency measures, numbers and types of associations banned and/or publications subject to censorship, numbers of security force personnel deployed to deal with the crisis, and numbers of casualties ascribable to emergency related violence.\footnote{257} This will go a long way in eliminating the "almost contemptuous vagueness"\footnote{258} of derogation notices which has hitherto prevented the Human Rights Committee from making meaningful determinations of the legitimacy of emergencies under Article 4. Continuous re-examination and re-assessment are indispensable to any effective system of supervision.

3. Increasing Enforcement Procedures

Other desirable reforms likely to enhance the effectiveness of the Human Rights Committee would include the establishment of procedures whereby all notifications addressed to the Secretary-General under Article 4(3) are automatically and promptly transmitted to the Committee. The Committee should also be allowed to ask for special reports from derogating governments on aspects of how an emergency is being implemented.\footnote{259}

\footnote{255. This requirement will check the currently widespread practice of governments either failing to submit derogation notices at all or submitting such notices weeks or even months after the emergency has been proclaimed. Under the \textit{European Convention}, a delay of twelve days to three weeks has been held to be acceptable (see the decision of the European Commission in \textit{Lawless v. Ireland}, supra note 48, and of the Court in the \textit{Greek Case}, supra note 48), but some writers have expressed dissatisfaction with this position; see, e.g., Schreuer, supra note 196 at 119.

\footnote{256. There may be some merit in the suggestion that a "model" derogation notice be created by the Human Rights Committee and/or the other treaty implementation bodies outlining the categories of information required to be submitted by derogating governments; see, e.g., Queensland Guidelines, supra note 254 at 5 (Guideline 5).

\footnote{257. Statistics have been asked for, and obtained, by the Committee in other contexts; see T. Opsahl, "The Human Rights Committee" in P. Alston, ed., supra note 145 at 401 fn. 144. However, one possible drawback of insisting on statistical data on arrests, deaths, etc. is that governments may be tempted to resort more and more to incommunicado detention, "disappearances" and extra-judicial executions. They may also, of course, furnish doctored statistics which may be hard to verify independently.

\footnote{258. Hartman, supra note 205 at 21.

\footnote{259. A modest attempt in this direction was made in 1993 when the Committee amended its rules of procedure to allow it to request governments for special reports at any time; see \textit{Official Records of the Human Rights Committee 1992/93}, UN Doc. CCPR/12/Add. 1, Annex IX at 506.}
consider such reports in special, inter-sessional meetings, and to make suitable recommendations aimed at ensuring better compliance with the provisions of the Covenant.\textsuperscript{260} Such reforms were mooted by members of the Committee themselves as far back as 1982,\textsuperscript{261} and they can all, arguably, be accomplished without amendments to the Covenant.\textsuperscript{262} Another proposal to enhance the fact finding capacity of the Committee, mooted by the authors of the Siracusa Principles, is that “the Committee should develop its procedures for the consideration of communications under the Optional Protocol to permit the hearing of oral submissions and evidence as well as visits to States Parties alleged to be in violation of the Covenant.”\textsuperscript{263}

Alternatively, it may be desirable to set up a separate body with an exclusive mandate to deal with emergency situations. Such a body will not only relieve the existing pressure on the Human Rights Committee, leaving it to concentrate on its other functions, but it may also help to achieve a degree of specialized supervision which the Committee cannot, given its current constraints, realistically be expected to develop.\textsuperscript{264} The new body should have wide ranging powers to, among other things, initiate \textit{suo motu} reviews of emergency situations, undertake on-site

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\bibitem{260} Similar changes can be made to the procedure under the European Convention also, which at present does not provide for any substantive scrutiny of derogation notices unless a complaint of breach of the Covenant is filed under either the individual complaints procedure or the inter-states complaints procedure.
\bibitem{261} See, e.g., UN Docs. CCPR/C/SR.334 and CCPR/C/SR.349. For a summary of the discussions which took place on the subject within the Human Rights Committee see J.A. Walkate, “The Human Rights Committee and Public Emergencies” (1982) 9 Yale J. World Pub. Ord., 133 at 143-145.
\bibitem{262} The Human Rights Committee is, for instance, already empowered, under Art. 40(1)(b) of the ICCPR, to ask states parties for reports (other than periodic reports) at any time of its choosing. The need to use this power effectively was underlined in the Siracusa Principles, \textit{supra} note 177, Principle 73.
\bibitem{263} Siracusa Principles, \textit{ibid.}, Principle 74.
\bibitem{264} An idea of the effect of those constraints can be had from some sobering statistics about the Human Rights Committee’s workload relating to the examination of periodic reports: by the end of 1996, as many as 114 countries out of 134 states-parties to the ICCPR had defaulted in the submission of their periodic reports, some going back as far as 10 years. Even if all the overdue reports were to be submitted without any further delay, it is estimated that it would take the Committee some 7.6 years to consider them, on the basis of its existing resources; see \textit{Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system} (Report of the independent expert appointed by the Secretary-General) UN Doc. E/ CN.4/1997/74, paras. 37-49.
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visits, and launch urgent action appeals to curb human rights abuses.\textsuperscript{265} It should also be empowered to act on credible information from any source whatsoever which may point to an emerging or ongoing crisis situation, and to initiate action even where no formal emergency powers have been invoked or derogations entered by the government concerned. The latter power would be especially important to deal with \textit{de facto} emergencies.

Proposals for such a body have been mooted by, among others, the Special Rapporteur on States of Emergency\textsuperscript{266} whose own mandate might be expanded into a Working Group or other similar mechanism to encompass the proposed new functions. The new body should serve as an early warning system for emergencies and should be adequately resourced if it is to perform any useful purpose. It should also work closely with the various thematic and country specific mechanisms already in existence and draw extensively from the information generated by them. Concurrently with these changes, there should be greater coordination between the existing human rights mechanisms which deal, even if only indirectly, with states of emergency, both within the United Nations system and between the UN and regional systems of human rights protection. These bodies should, in turn, cooperate more closely with NGOs active in the protection and promotion of human rights at both national and international levels.

A more modest immediate goal which may prove beneficial to the ongoing efforts at moderating human rights abuses during emergencies would be to expand the geographic coverage of the existing international human rights instruments by persuading more and more governments to ratify them.\textsuperscript{267} Particular attention should be given to instruments which have implementation bodies with fact finding or adjudicatory powers, such as the Optional Protocol to the ICCPR. Encouragement should also be given to the creation of more such instruments, whether at regional or global levels.\textsuperscript{268}

\textsuperscript{265} The desirability of separating responsibility for issuing urgent appeals, etc., from the responsibility for considering reports from states-parties has been mooted by, among others, the independent expert, who wrote: "[i]t is frustrating for a treaty body to have to remain inactive in the face of massive violations and it risks sending a signal of impotence, perhaps disdain and certainly marginality," \textit{ibid.} at para. 79.

\textsuperscript{266} Eighth Annual Report, UN Doc. E/CN.4/Sub.2/1995/20, 12, para. 31.

\textsuperscript{267} Currently, nearly one in three states has yet to ratify or accede to the ICCPR — see UN Doc. E/CN.4/1997/74 at para. 7.

\textsuperscript{268} One such instrument which is currently being drafted at the United Nations is an Optional Protocol to the Convention Against Torture which aims to create a global system of inspection of places of detention.
4. Domestic Controls

As important as international measures of surveillance and control are, there are obvious limitations to their effectiveness, as the experience of their working has demonstrated over the years. Given this reality, the focus must inevitably turn to measures of domestic supervision which, at the end of the day, constitute a stronger bulwark against the abuse of power during normal times and emergencies alike. As one non-governmental initiative, which studied this issue in some depth in 1987, noted:

A basic requirement for preventing breaches of human rights and humanitarian law during situations of public emergency or internal violence is the existence in each country of precise and effective national legislation for dealing with such situations in a manner consistent with the rule of law. Such legislation should include provisions establishing a national system of control and protection against violations of human rights and humanitarian law during situations of public emergency or internal violence.²⁶⁹

Self-evidently, any system of domestic control, in order to be effective, would presuppose the existence of a measure of constitutionalism in the country concerned. By constitutionalism is meant the principle that “the exercise of governmental power, which is essential to the realisation of the values of [a society], should be controlled in order that it should not itself be destructive of the values it was intended to promote.”²⁷⁰ Common manifestations of this principle in modern societies include an adherence to the rule of law, a separation of powers between the executive, legislative and judicial branches of government, and limits on government.

Domestic controls on the conduct of emergencies stem essentially from two main sources: legislative and judicial. In most countries, the fountainhead of all emergency powers is the national—or, in the case of a federal polity, the state—constitution, which prescribes in greater or lesser detail the circumstances under which a state of emergency may be brought into being, the extent of deviations permissible from the state of normality, the degree of oversight exercisable by legislative and/or judicial organs, and the manner in which the emergency may be brought to an end. Specific legislative controls usually include: a requirement that all invocations of emergency powers are approved, either beforehand or


soon after their introduction, by a specified majority of legislators; a duty on the executive to seek periodic renewals of the emergency mandate; time limits on the overall duration of the emergency; prohibitions on certain types of law making during the emergency; and a right on the part of the legislature to terminate the emergency at its discretion. Judicial controls, usually less clearly spelled out, include limited powers on the part of the courts to review emergency measures (but rarely proclamations of emergency) and to issue prerogative writs such as habeas corpus even in cases where the emergency regulations are couched in broad, subjective terms.

The efficacy of such controls is dependant on a number of factors, not least the precision with which the laws and regulations are formulated, the prevailing politico-legal climate in the country, the state of public opinion, the willingness and capacity of the relevant enforcement mechanisms to strike a proper balance between the competing claims of state security and societal freedoms, and, most of all, the degree of constitutionalism present at any given time. While such controls have been seen to work moderately well in some situations, the record of their use has, on the whole, revealed depressingly familiar shortcomings. In a large number of cases, legislative oversight has been scuttled either by the prorogation or dissolution of parliament or state assemblies during emergencies, or by the executive managing to bulldoze measures through such bodies by the sheer strength of its numerical majority. As for judicial supervision, it has often been thwarted by a combination of legal measures aimed at ousting the jurisdiction of the courts in sensitive situations.

271. For example, in the United Kingdom where, in relation to the long standing conflict in Northern Ireland, it would be fair to say there has, on the whole, been responsible and meaningful oversight by the British Parliament of the various emergency laws, and a more than perfunctory degree of scrutiny by the courts of executive action taken under those laws.
272. E.g., in the Philippines, where President Marcos, after declaring martial law in 1972, postponed the convening of the legislative assembly for seven years. During the whole of that period, he ruled by presidential decree which, he claimed, had the force of law.
273. E.g., in Burma, where the National Assembly was summarily dissolved on the declaration of a state of emergency in September 1988.
cases,\textsuperscript{275} extra-legal tactics such as intimidation of the judiciary,\textsuperscript{276} and an unfortunate tendency on the part of many judges to adopt an attitude of relative passivity in times of political crises.\textsuperscript{277}

Even so, there have been some notable examples of judicial controls succeeding in moderating the wilder excesses of certain emergency regimes, including \textit{de facto} ones, and these serve to reinforce the usefulness of such controls. Some of the decisions of the Brazilian and Argentinian courts in the 1960s and 1970s, and those of the South African courts in the 1980s, for instance, suggest that, even in fairly difficult circumstances, judges can and do assert themselves in the cause of human rights. The Supreme Court of Argentina ruled in a 1967 case that, notwithstanding the express terms of a law which declared \textit{amparo} proceedings unsuitable for challenging the constitutional validity of a statute, a citizen could still resort to those proceedings to impugn legislation that "clearly results in violations of any human rights." It reached this decision on the grounds that the letter of the law should not be read so as to "impede the fulfilment of [its own] purposes."\textsuperscript{278}

Likewise, the Supreme Federal Tribunal in Brazil, dealing with a 1968 case involving the suspension by the military government of some bankers, businessmen and a lawyer from their respective professions, boldly treated it as a petition for \textit{habeas corpus} and struck down certain sections of the \textit{National Security Law} under which the action had been

\textsuperscript{275} E.g., in India, during the 1975-77 state of emergency, when Prime Minister Indira Gandhi succeeded in getting a pliant parliament (many of whose members had been put in jail under draconian preventive detention laws) to pass a law which took away the right of the courts to decide election cases involving the prime minister. Significantly, that state of emergency had followed a decision of one of the High Courts unseating Mrs. Gandhi as a Member of Parliament on grounds of electoral malpractices. For a reasoned critique of that emergency, see H.M. Seervai, \textit{The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism} (Bombay: N.M. Tripathi Pvt. Ltd., 1978).

\textsuperscript{276} E.g., in Sri Lanka, where, faced with judicial assertiveness which led to a number of judgments against the government, President Jayawardene required all superior judges to take a new oath of allegiance, on pain of instant dismissal.

\textsuperscript{277} E.g., in India, where the Supreme Court timidly accepted the government's submission during the 1975-77 state of emergency that, as long as a presidential order suspending the enforcement of fundamental rights was in force during an emergency, the citizen had no redress against executive arbitrariness, even where it could be shown that the act complained of was taken in bad faith; \textit{Additional District Magistrate, Jabalpur v. Shivakant Shukla} [1976] A.I.R. 1207 (S.C.). For a comparative study of judicial passivity in eight selected common law jurisdictions see G.J. Alexander, "The Illusory Protection of Human Rights by National Courts During Periods of Emergency" (1984) 5 H.R.I.J. 1. See also D.C. Kramer, "The Courts as Guardians of Fundamental Freedoms in Times of Crisis" (1980) 2:4 Universal Human Rights 1.

taken. It based its decision on the “right to life” (a right not expressly guaranteed by the Brazilian Constitution), holding that “the rigours of the measures provided for in the [National Security] law . . . cry out against the essence of the human principles” inherent in the right of survival.\textsuperscript{279} The South African judiciary, in a celebrated 1962 case, refused to uphold the apartheid government’s view that legislative provisions which proscribed certain named organizations for their “subversive” aims also covered other organizations which carried out activities intended to achieve the same aims.\textsuperscript{280} Another example of judicial assertiveness came, rather surprisingly, from the Philippines Supreme Court which, at the height of the martial law government of President Marcos, ruled that it had the authority independently to review the constitutional sufficiency of any Presidential proclamation which suspended \textit{habeas corpus}.\textsuperscript{281}

Admittedly, such examples are exceptions rather than the norm. But they do hold out the hope of some leverage being exercised on emergency regimes through the use of domestic control mechanisms. Efforts should therefore be made to encourage the strengthening of such mechanisms wherever possible. Arguably, the most helpful first step in this direction would be to ensure the incorporation in national legal systems worldwide of international standards on such matters as independence of the judiciary\textsuperscript{282} and non-derogable rights,\textsuperscript{283} especially in countries whose governments are reluctant to sign up to more binding treaty based standards. Particular attention must be focused on making judicial remedies such as \textit{habeas corpus} a universally accepted non-derogable right. This goal may require a re-ordering of priorities by international human rights agencies, including a temporary abandonment of their ambitious plans to add other rights and claims to the list of non-derogable rights in the ICCPR, as well as a re-appraisal of their campaigning tactics. In particular, the human rights community must seriously consider using the powerful weapon of international aid—both bilateral and multilateral—to create a system of incentives and disincentives for the adoption, especially by developing

\textsuperscript{279} Vieira Netto, cited in Feinrider, \textit{ibid.} at 181-182.
\textsuperscript{280} S. \textit{v. Nokwe} (1962), 3 S.A. 71 (T). The effects of this judgment were, however, soon nullified by legislative intervention: the South African \textit{Internal Security Act} was amended to criminalize any act by any individual or group which was calculated to further the aims and objectives of the proscribed organizations.
\textsuperscript{281} \textit{Lansang v. Garcia} (1971), 42 S.C.R.A. 448. However, the Court qualified this assertion by emphasizing that the review function was limited to checking the factual basis of the proclamation and ensuring that the President had not overstepped his constitutional limits in issuing it, rather than to second guess the wisdom of the Presidential action.
\textsuperscript{283} Article 4, ICCPR.
countries, of basic minimum human rights standards. The success of this strategy will, of course, depend heavily on whether or not the actors involved are willing to eschew the political and ideological selectivity which has, in the past, so plagued such efforts.

The role of international pressure in bringing about domestic changes in human rights practices cannot be underestimated. Even where the aid weapon does not work (for example, in relation to relatively affluent repressive regimes), other forms of pressure can and often do produce tangible results. There is widespread agreement amongst analysts of the Indian emergency of 1975-77, for instance that, despite her repeated and contemptuous rejection of international calls for moderation, Mrs. Indira Gandhi was far from impervious to foreign pressure. Her decision in March 1977 to call a general election, even though she had succeeded in stifling all domestic opposition to her autocratic rule, is widely attributed to a desire on her part to burnish her democratic credentials in the eyes of the wider world. A similar desire to be on the right side of international opinion—or, at any rate, not to alienate it too much—was discernible in the way the Indian government sought to blunt some of the rougher edges of the *de facto* emergency between 1980-95.

**Conclusion**

States of emergency represent a formidable challenge to human rights policy makers and monitors, not only because of their rapid proliferation across the world, but also because of the continuing difficulties in working out a coherent international strategy to rein in some of their more complex variants. Informal or *de facto* emergencies have posed particularly intractable problems in terms of classification and amenability to measures of special vigilance. While a good deal of progress has been made in recent years at both regional and global levels to moderate human rights abuses during such emergencies, those efforts have been hampered by a number of structural, institutional and practical problems. One possible way of overcoming these problems might be to move away from an exclusive focus on the emergency concept and to use the scale and intensity of human rights abuses as the yardstick to devise measures of international surveillance and control. It may also be well to recognize the limitations of international action in this area, given the continuing attachment of governments to notions of national sovereignty, and to adopt a gradualist policy which, whilst not abandoning the search for international solutions, places greater emphasis on strengthening domestic mechanisms of control.