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QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Study of the implications for human rights
of recent developments concerning situations
known as states of siege or emergency

Special Rapporteur: Mrs. N. Questiaux (France)

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INTRODUCTION

1. By resolution 10 (XXX) of 31 August 1977, the Sub-Commission on Prevention of Discrimination and Protection of Minorities expressed its deep concern at the manner in which certain countries applied the provisions relating to situations known as state of siege or emergency. Being convinced that a connection existed between such application and the situation regarding human rights in the said countries, it considered that a comprehensive study of the implications for human rights of recent developments in that sphere would be conducive to the achievement of the aims pursued by the United Nations with respect to human rights. It requested two of its members, Mrs. Questiaux and Mr. Caicedo Perdomo, to undertake the preparation on a preliminary basis of the broad lines of such a study, with assistance from the Secretariat and in the light of information provided by Governments on the legislation and jurisprudence applicable to such situations, and to report to the Sub-Commission at its thirty-first session (see document E/CN.4/Sub.2/397).

2. At the request of the Rapporteurs and on their behalf, the Secretary-General drew the attention of States Members of the United Nations, the specialized agencies and non-governmental organizations in consultative status with the Economic and Social Council to the contents of resolution 10 (XXX) and requested them to provide such relevant information as they might wish to submit to the Rapporteurs.

3. At its thirty-first session, by resolution 5 D (XXXI), the Sub-Commission, expressing appreciation for the preliminary oral presentation given by Mrs. Questiaux, recommended that the Commission on Human Rights request the Economic and Social Council to authorize Mrs. Questiaux, in collaboration with Mr. Caicedo Perdomo and with assistance from the Secretariat, to continue the study of this subject, in the light of the relevant information applicable to such situations, and to report to the Sub-Commission at its thirty-second session (E/CN.4/Sub.2/SR.810, paras. 70-88). That authorization was given by the Council (resolution 1979/34) on the recommendation of the Commission (resolution 17 (XXXV)).

4. For reasons beyond her control, the Special Rapporteur was not in a position to present her preliminary study to the Sub-Commission either at its thirty-second or at its thirty-third session. During the thirty-fourth session, the Special Rapporteur presented an oral interim summary of her study and informed the Sub-Commission that the final text of her study would be presented at the thirty-fifth session. The interim summary was reproduced in document E/CN.4/Sub.2/490. It will be noted that, by resolution 10 (XXX), the Sub-Commission had introduced a change in its working methods in that it entrusted the study jointly to two rapporteurs from two different legal systems. Unfortunately, their respective commitments during the year prevented them from meeting and agreeing together on the broad lines of the study.

5. It was against this background that the suggestions made by Mrs. Questiaux for use as a framework for the study were submitted to the Sub-Commission at its thirty-first session on her sole responsibility. The main points of the resolutions and debates referred to in this study are summarized in the paragraphs that follow.

6. Resolution 7 (XXVII) of 20 August 1974 entitled "The question of the human rights of persons subjected to any form of detention or imprisonment" refers, in paragraph 1, to the Sub-Commission's decision to review this matter annually. It decided, in that regard, to take into account any reliably attested information from Governments, the specialized agencies, the regional intergovernmental organizations and non-governmental organizations provided that such non-governmental organizations acted in good faith and that the transmission of such information was not motivated by political considerations incompatible with the principles of the Charter of the United Nations. In paragraph 2 of the resolution, the Secretary-General was requested to transmit to the Sub-Commission the information referred to in paragraph 1 (see document E/CN.4/Sub.2/354, p. 52).

7. When, for the first time, it undertook the annual review of the developments that had taken place in the fields within its competence (resolution 4 (XXVIII) of 10 September 1975), the Sub-Commission noted, among issues that deserved particular concern, the prolonged and often indefinite detention of large numbers of unconvicted persons without formal charges brought against them, etc. (see document E/CN.4/Sub.2/364, p. 60).

8. In connection with the consideration of these matters at its twenty-ninth session in 1976, the Sub-Commission, underlining the importance of the matter, took the view that the question of the human rights of persons subjected to any form of detention or imprisonment in situations of public emergency or a state of siege should be examined in depth.

9. Accordingly, on 31 August 1976, the Sub-Commission adopted resolution 3 A (XXIX) to the effect that it would be desirable for relevant reliably attested information, relating in particular to the problems of the human rights of persons subjected to any form of detention or imprisonment in situations of public emergency or a state of siege, to be provided by Governments and the various organizations concerned. It considered that the question should be further examined in the light of article 4 of the International Covenant on Civil and Political Rights and article 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (E/CN.4/Sub.2/378, p. 47).

10. At the same session, the Sub-Commission adopted decision 2 (XXIX), dated 20 August 1976, appointing a Special Rapporteur to formulate the "first draft of a body of principles for the protection of all persons under any form of detention or imprisonment"; ^{1/} that decision was endorsed by the Commission on Human Rights, the Economic and Social Council and the General Assembly.

^{1/} Converted into a draft at its thirty-first session and submitted to the Commission on Human Rights for consideration pursuant to Sub-Commission resolution 5 C (XXXI) (see document E/CN.4/Sub.2/417, p. 61). This draft was transmitted by the General Assembly to all Governments in accordance with Economic and Social Council resolution 1979/34.

11. The consideration of this question at the thirtieth session of the Sub-Commission in 1977 (E/CN.4/Sub.2/395, sect. III) constitutes the most direct precedent relating to the present study (see documents E/CN.4/Sub.2/SR.780, E/CN.4/Sub.2/420, pp. 12 et seq., and E/CN.4/Sub.2/399, p. 26). In the course of those deliberations, it was pointed out that there was a connection between situations known as a state of siege or emergency and the unfortunate developments noted in the treatment of persons who had been detained or deprived of their liberty. Resolution 10 (XXX) was adopted on account of those very problems.

Sources

12. Mention should be made of the difficulties encountered during the study as a result of (a) the non-existence of works of comparative law in the sphere of emergency legislation, and (b) the problem of knowing with a sufficient degree of exactitude the status of emergency law in a particular country at any given time, because of the proliferation, alongside the emergency legislation proper as provided for in the Constitution, of special laws derogating considerably from the ordinary laws while assuming their form (this is the case, for instance, with so-called internal security or national security laws).

13. In general, apart from the documents already referred to in the preceding paragraphs, account has been taken of the resolutions and deliberations of the various United Nations bodies that highlight the scope and topicality of this new subject.

14. In this connection, the reports submitted by Governments to the Human Rights Committee under article 40 of the International Covenant on Civil and Political rights have afforded a valuable source of information, together with the travaux préparatoires and discussions that related in particular to article 4 of the Covenant which stipulates the conditions under which certain guarantees may be suspended in time of crisis.

15. This information was supplemented by the information provided by Governments, specialized agencies and non-governmental organizations in reply to the above-mentioned letter transmitted by the Secretary-General pursuant to resolution 10 (XXX). 2/

16. Mention should also be made of the importance of the reports drawn up by the Secretary-General on the basis of the information provided by non-governmental organizations on the question of the human rights of persons subjected to any form of detention or imprisonment, in accordance with the relevant provisions of Sub-Commission resolutions 7 (XXVII), 4 (XXVIII) and 3 A (XXIX) concerning the annual review of new developments in this field (see documents E/CN.4/Sub.2/394 in 1977, E/CN.4/Sub.2/408 in 1978, E/CN.4/Sub.2/431 in 1979, E/CN.4/Sub.2/445 in 1980 and E/CN.4/Sub.2/471 in 1981). These five reports lay particular stress on the fact that in some countries emergency powers unfortunately take on a permanent character and often serve as legal cover for large-scale and systematic violations of human rights.

2/ Only about 30 countries responded to the Secretary-General's request. In most cases, the replies consisted merely of a reference in that connection to the Constitution; references to case-law were the exception. The list of countries that replied appears in annex 1 to this document.

17. There are also some references to a state of siege or emergency in the replies of Governments to the "questionnaire on the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment". In paragraph 1 of resolution 32/63 of 8 December 1977, the General Assembly requested the Secretary-General to draw up and circulate among Member States a questionnaire soliciting information concerning steps they had taken, including legislative and administrative measures, to put into practice the principles of the Declaration. Paragraph 1 of the questionnaire concerns the measures taken or contemplated, in particular, to prohibit torture and other cruel, inhuman or degrading treatment or punishment in exceptional circumstances such as a state of war, a threat of war, internal political instability or any other public emergency (see document A/34/144).

18. As regards complementary materials, the final report prepared by Mrs. Erica-Irene A. Daes on the individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights is of great value for our analysis. 3/ Inter alia, it shows that, even though the individual's duties to the community may involve limitations on human rights and freedoms in certain cases, and in particular the restrictions laid down pursuant to article 29 of the Universal Declaration, there are fundamental principles inherent to the dignity of the human person which every legal system is bound to respect as being inalienable (see documents E/CN.4/Sub.2/432/Rev.1 and E/CN.4/Sub.2/432/Add.1-3) and from which there can on no account be any derogation.

19. The relevant aspects of certain cases of human rights violations that are subject to a special procedure (see documents A/33/331, A/35/522 and E/CN.4/1429) have also been considered, as well as the reports of the Working Group on Enforced or Involuntary Disappearances set up by the Commission on Human Rights in resolution 2 (XXXVI) of 29 February 1980 (see documents E/CN.4/1435 and E/CN.4/1492). The relevant parts of the United Nations report entitled "Study of the right of everyone to be free from arbitrary arrest, detention and exile", prepared by an ad hoc Committee established by the Commission on Human Rights and published in 1964 (United Nations publication, Sales No.: 65.XIV.2) have likewise been taken into consideration.

20. As for United Nations specialized agencies, two sources have attracted special attention: certain decisions of the ILO Governing Body's Committee on Freedom of Association and the relevant reports of the ILO Committee of Experts on the Application of Conventions and Recommendations. With regard to regional bodies for the protection of human rights, account has been taken of certain positions of principle taken both by the European Court and by the European Commission of Human Rights, together with the numerous recommendations made by the Inter-American Commission on Human Rights to several countries in that region which have been placed under a state of siege.

21. Outside the regional framework, and in addition to the resolutions and discussions of the various United Nations bodies, we would draw attention to the importance in this connection of the work of the Belgrade Conference, organized by the International Law Association in 1980, and the symposium on human rights and fundamental freedoms in the Arab countries, organized by the Union of Arab Jurists in Baghdad in May 1979. At those two international meetings, emergency situations were analysed in depth and very important recommendations were made. 4/ Similarly, account was taken of certain relevant work of the Law Association for Asia and the Western Pacific (LAWASIA - Hong Kong, November 1980) and the Association of Latin American Lawyers (AALA - Lima, April 1980).

3/ E/CN.4/Sub.2/432/Rev.1

4/ Article 4 of the Convention on Human Rights in the Arab countries, the adoption of which was recommended in the conclusions of the Baghdad symposium, provides for emergency situations in terms similar to those of article 4 of the International Covenant on Civil and Political Rights. In addition, a set of draft principles on the detention and treatment of persons during a state of emergency was adopted.

Scope of the study

22. The terminology of crisis powers varies according to the judicial system concerned (state of siege, of emergency, of alert, of prevention, of internal war, of suspension of guarantees, martial law, special powers, etc.).

23. For the sake of clarity, these various terms will be grouped together under the heading "states of emergency" as a juridical expression of crisis powers linked to a de facto situation: "exceptional circumstances". "Exceptional circumstances" will mean, in the context of the present report, circumstances resulting from temporary factors of a generally political character which in varying degrees involve extreme and imminent danger, threatening the organized 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 organized existence of the community which forms the basis of the State". This somewhat over-simplified definition has been formulated for the purposes of the present report; it does not exclude other definitions such as that drawn up by the European Court of Human Rights in the Lawless case. When such circumstances arise, then both municipal law, whatever its theoretical basis, and international law on human rights allow the suspension of the exercise of certain rights with the aim of rectifying the situation, and indeed protecting the most fundamental rights.

24. In exceptional circumstances, those parts of the rule of law which constitute "states of emergency", and which are held "in reserve" as it were, can be applied under certain conditions. In theory, the de facto situation which constitutes the exceptional circumstances is thus without legal validity (a) in municipal law, as long as a state of emergency has not been proclaimed, and (b) to a lesser degree in international law, as long as the state of emergency has not been the subject of a communication to the competent international bodies, in accordance with the procedures provided for in the relevant international instruments and known as "notification procedures".

Field of application

25. Three emergency situations may be envisaged, resulting from (1) a serious political crisis (armed conflict and internal disorder), (2) force majeure (disasters of various kinds) or (3) particular economic circumstances, notably those relating to underdevelopment.

26. As indicated in the travaux préparatoires concerning article 4 of the International Covenant on Civil and Political Rights, only the first two situations are covered by the expression "public emergency" in article 4. The travaux préparatoires do not directly cover the effects of underdevelopment as exceptional circumstances authorizing certain derogations or limitations in respect of the fundamental rights of the individual. Without commenting on the substance - the breadth of the question posed would require a special study to be devoted to it, we shall simply recall with the Commission on Human Rights that, these fundamental rights and liberties being indivisible, the right to development, as a human right, can be conceived only in accordance with effective respect for these rights and liberties (resolution 36 (XXXVII); E/CN.4/L.1561/Add.4).

27. Force majeure (earthquakes, tidal waves, cyclones and other natural disasters) will be taken into consideration only in the cases, of which there are very few, expressly and specifically provided for in the international instruments in force, notably in ILO Conventions 29 and 105.

28. There remain emergency situations resulting from a serious political crisis. According to positive international law, four hypotheses come into this category:

International armed conflicts;

Wars of national liberation;

Non-international armed conflicts;

Situations of internal disorder or internal tension.

29. The first two hypotheses and, under certain conditions, the third constitute the area of application par excellence of the humanitarian law of war as established by the Geneva Conventions of 1949 and the Protocols relating thereto. They will therefore not come directly within the scope of the study, although humanitarian law is considered by a significant section of opinion as a branch of the international law of human rights, with the result that the latter, by its very basis, would cover the four hypotheses mentioned above. This overlapping and complementarity therefore make it necessary, for the sake of clarity, to establish precisely the only emergency situations which will come within the scope of the study.

30. Sub-Commission resolution 10 (XXX) refers to "situations known as state of siege or emergency". It is clear from this wording, as from the travaux préparatoires, that situations of war in the terms of humanitarian law are not envisaged. ^{5/} Moreover, this limited approach is justified by the fact that the standards applicable in case of war have already been studied in depth and that their application has given rise to numerous case-studies establishing "case-law".

31. It thus appears consistent with our terms of reference to devote the main part of this study to the fourth hypothesis (internal disorder or internal tension), in other words, to the only exceptional situations resulting from a serious political crisis and giving rise to the proclamation of a "classic" state of emergency, whatever term may be used by the proclaiming authority. We would at the same time reaffirm, as is in fact clearly stated in the American Convention (art. 27 (1)) and the European Convention (art. 15 (1)), that the guarantees prescribed by international law in the event of exceptional circumstances apply equally "in time of war".

^{5/} In this context it will be noted that in the development which follows the Special Rapporteur has deliberately refrained from illustrating her remarks with examples drawn from certain emergency provisions applied by the State of Israel in the occupied territories. General Assembly resolution 2727 (XXV) of 15 December 1970 entitled "Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories" and the subsequent resolutions on this subject refer expressly in this case to the application of the fourth Geneva Convention relative to the Protection of Civilians in Time of War.

Objective

32. The present study does not aim to answer the question - fundamental in international law - of "crisis powers", or to propose a comprehensive definition of a state of emergency. In conformity with resolution 10 (XXX) - and particularly in the light of article 4 of the International Covenant on Civil and Political Rights, the study will be confined to an analysis of the relationships which may exist between the implementation of states of emergency and violations of human rights, notably when such violations result from the correlative deterioration of the institutional framework of the State.

33. On the basis of this general approach we shall examine in depth, as the mandate of the Sub-Commission has expressly invited us to do, the situation of persons who, under the regime of a state of emergency, are subjected to any form of detention or imprisonment. In this respect we shall analyse the extent to which the recent development of the implementation of states of emergency compromises, both in municipal law and in international law, the effectiveness of protective mechanisms and of international surveillance, in order to propose means of guarding against the violations observed. The study is also expected to serve as a methodological work of reference which will make it possible to assess the argument of "the specific nature of the rule of law", frequently quoted in justification by the Governments involved, and to facilitate the examination of cases and complaints with the aim of achieving a synthesized classification. The intention of the sponsors of the resolution was to propose specific means of influencing, where possible, the factors which underlie violations of human rights in exceptional circumstances.

CHAPTER I

THE LIMITS OF BRINGING STATES OF EMERGENCY INTO EFFECT

34/35. Both in international and in municipal law, the fundamental precept is consistency between the principle of emergency legislation and democratic principles, subject to three conditions:

That this legislation pre-dates the occurrence of the crises;

That it contains a priori or a posteriori control procedures;

That it is designed to be applied as a provisional or, more precisely, a temporary measure.

It is as if the legislation were set aside for the safeguarding of institutions if the need should arise.

A. The guarantees prescribed by international law

36. In order to reconcile the higher interests of human rights and the contingencies of the sovereignty of States, the instruments relating to the protection of human rights are conceived in broadly balanced terms.

37. With this in mind, the negotiators of such instruments take care to make them flexible in scope by offering to States adapted mechanisms for accession which enable them to overcome their reticence during the ratification procedure. This is the object, in normal times, of the "interpretation clauses" and the "restriction clauses". 6/ In addition, "derogation clauses" are provided for crisis situations in order to enable States, when confronted with such situations, to loosen the stranglehold of their obligations without running the risk of their membership of the community of States parties being called in question.

38. The power of derogation is expressly controlled by the following articles:

Article 4 of the United Nations International Covenant on Civil and Political Rights;

Article 27 of the American Convention on Human Rights; and

Article 15 of the European Convention on Human Rights.

39. This power may be exercised by the States parties only under certain procedural and substantive conditions which, for the sake of clarity, we shall set out in the form of principles and whose observance may be assessed by control bodies. 7/

6/ Concerning "interpretation clauses", see the following examples: article 8 (3) (b) and (c) of the International Covenant of Civil and Political Rights; article 5 (3) of the American Convention on Human Rights; article 4 (3) of the European Convention on Human Rights. For "restriction clauses", see: articles 12 (3), 13 (3), 19 (3), 21 and 22 (2) of the International Covenant on Civil and Political Rights; articles 12 (3), 15 and 16 of the American Convention on Human Rights; articles 8 (2), 9 (2), 10 (2) and 11 (2) of the European Convention on Human Rights, which under certain conditions authorize the contracting parties to restrict, in municipal law, the scope of certain guarantees as from the time of accession to the instrument, independently of any crisis situation.

7/ See the proceedings of the fifth international symposium on the European Convention on Human Rights (Frankfurt-am-Main, 9-12 April 1980), in course of publication by the Council of Europe; in particular, the report by Mr. T. Stein on derogations from the guarantees enunciated in the instruments relating to human rights.

See also: Council of Europe, document H.(70) 7: report of the Committee of Experts on Human Rights to the Council of Ministers, Strasbourg, September 1970, on problems arising from the co-existence of the United Nations Covenants on human rights and the European Convention: differences in guaranteed rights, pp. 18-21.

1. Procedural guarantees

40. In municipal law, a state of emergency must be announced by proclamation. In other words, its implementation must be preceded by a publicity measure in the form of an official declaration (principle of proclamation). Any party which avails itself of the right of derogation must, within a brief period, inform the other States parties through the intermediary of the depositary of the instrument, specifying: the reasons adduced, the nature of the measures taken and the provisions from which it has derogated (principle of notification).

2. Substantive guarantees

41. The circumstances invoked must constitute an exceptional and imminent public danger, threatening the existence of the nation (principle of exceptional threat); the measures must be in proportion to the actual requirements, that is to say, taken and maintained "to the extent strictly required by the exigencies of the situation" (principle of proportionality); they must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin (principle of non-discrimination); and they must not touch on certain inalienable guarantees which can in no case admit of derogation (principle of inalienability of fundamental rights).

3. The implementation of guarantees

42. It is in the light of these principles that we propose to analyse the scope of international surveillance, particularly in the exercise of the power of control which the relevant instruments accord to the protective bodies which they establish: the United Nations Human Rights Committee, the European Commission of Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (hereinafter referred to as: the Committee, the European Commission, the European Court, the Inter-American Commission and the Inter-American Court).

(a) The principle of proclamation

43. Only the International Covenant on Civil and Political Rights requires the state of emergency to be officially proclaimed (art.4, para.1). The idea seems to have been to reduce the number of de facto emergency situations by encouraging the States parties to respect a certain formality of procedure in municipal law. Neither the American Convention on Human Rights nor the European Convention imposes this rule of publicity. However, the European Commission took the view, 8/ at the time of the Cyprus v. Turkey case, that in order to invoke the right of derogation prescribed in article 15 of the Convention, the derogating State should justify this beforehand by an official proclamation. The European Court, for its part, had previously expressed a more subtle view in the Lawless case, 9/ considering that the principle of proclamation, however justified it might be for preventive purposes, should not constitute a prerequisite for the control of the competent bodies.

8/ Applications Nos.6780/74 and 6950/75, report of 10 July 1976, para.527.

9/ Yearbook, IV, pp.482 et seq. (para.47).

(b) The principle of notification

44. According to the International Covenant and the American Convention, the State which exercises the power of derogation must inform the depositary, in the person of the Secretary-General, who must in turn inform the States parties. The European Convention does not explicitly attribute such a role to the Secretary-General of the Council of Europe, but in resolution (56) 16 of 26 September 1956 relating to the interpretation of article 15, paragraph 3, of the Convention, the Committee of Ministers of the Council of Europe filled this gap. Thus there is in practice no difference between these instruments in the implementation of the principle of notification.

45. Similarly, it is no longer disputed that the derogating State must fulfil the obligation of notification within a brief period. The derogation must be notified "immediately" according to both the International Covenant and the American Convention. Given the silence of the European Convention on this point, the Commission, followed by the Court, ^{10/} also considered in the Lawless case that the formality of notification comprised "a time element".

46. It remains to determine the object of the notification and the extent of the Secretary-General's powers. Concerning the object of the notification, the European Convention imposes a broader obligation. Apart from the provisions from which a State party has derogated, the reasons by which it was actuated and the date on which it terminates such derogation, all cases provided for in the three instruments, the European Convention extends the obligation to inform to include the nature of measures taken.

47. We have found it useful to study in concrete terms the practice of the Council of Europe. This comprises four stages:

(a) The derogating State addresses to the Secretary-General a note verbale summarily indicating the grounds invoked (brief description of the manifestations of the political crisis), a list of provisions of the Convention which are to be restricted or suspended, and if applicable the expected period of derogation and its geographical extent. The emergency clauses of municipal law referred to in the note are often appended;

(b) The Secretary-General acknowledges receipt;

(c) He then notifies the invoked derogation to the other States parties by transmitting to them a copy of the note verbale. If the derogating State has appended the emergency clauses of municipal law being implemented, the States parties are informed that these clauses can be communicated on request;

(d) The Secretary-General transmits a copy of the note verbale, for information, to the Presidents of the Commission, the Court and the Parliamentary Assembly.

^{10/} European Court of Human Rights, Lawless case (merits), Judgement of 1 July 1961.

48. The extent of the depositaries' powers of discretion remains uncertain. According to article 15 (3) of the European Convention, the Secretary-General must be kept "fully" informed of the measures and the reasons therefor, a detail which does not appear in the International Covenant or in the American Convention. In view of work carried out by the United Nations International Law Commission, it would be extremely useful to hear the opinion of members of the Sub-Commission on this point.

49. The International Law Commission dealt with this question in its draft articles on the Law of Treaties adopted in 1966. According to the Commission, the [depository's] responsibilities included, in particular, that of ascertaining whether the signatures, instruments or reservations conformed to the treaty or to a given article, in order, if necessary, to draw the attention of the State concerned to the point in question. Sir Humphrey Waldock, Special Rapporteur, while approving the Commission's proposition, defined its limits in an interesting manner. The depositary has no power of discretion over the validity of the reservation; however, if he doubts its regularity, he must inform the reserving State accordingly, and, in case of a divergent reply, bring to the knowledge of the States parties not only the reservation but also the arguments exchanged on the subject of the apparent irregularity.

50. This suggestion deserves attention. Consideration should be given to the advisability of applying it to the procedure for notification of the right of derogation. It would be based not on a power of discretion - a sanction which the instruments in question do not recognize in the depositary - but on the obligation imposed, for example by article 15, paragraph 3, of the European Convention, to inform the depositary "fully" in order that the latter should be able, in his turn, "fully" to inform the States parties.

51. No doubt the word "fully" is deliberately omitted from article 4 of the International Covenant and article 27 of the American Convention, which strictly speaking envisage only the obligation to inform. But the Convention deals only with the purely formal aspect of the notification procedure since the informant must specify "the provisions from which it (the State party) has derogated" and above all "the reasons by which it was actuated" (art.4, para.3). In this way the proposition of the extended interpretation of the depositary's powers, as defined in article 4 of the International Covenant and article 27 of the American Convention, appears to us to be usable. It would make the notification procedure a more effective element of international surveillance while respecting the principle of the sovereignty of States, since the depositary would have no other power than to bring his request for supplementary information, and the reply, to the attention of the other States parties.

52. At the very least a similar result could be obtained through the implementation of article 40 of the International Covenant, which obliges the States parties to submit to the Human Rights Committee "reports on the measures they have adopted which give effect to the rights recognized" [in the Covenant], which includes, if applicable, the manner in which the right of derogation is exercised.

53. It should be noted that a similar obligation is provided for in article 27 of the American Convention, whereby reports must be submitted to the Inter-American Commission, and more directly in article 15 of the European Convention in favour of

the Secretary-General of the Council of Europe, who exercises this power "on his own responsibility and at his discretion", as confirmed by proceedings before the consultative Parliamentary Assembly of the Council of Europe. 11/

54. Whichever approach is taken, it appears to us important that, whether by virtue of the specific functions of the depositary or in consequence of the above general obligation to inform, the implementation of the right of derogation should be given particular attention.

(c) The principle of exceptional threat

55. On the basis of the criteria generally applied by the Human Rights Committee in considering the reports of Governments or individual applications, by the European Court in the Lawless case 12/ and by the Commission in the Greek case, 13/ the following elements must, as Professor I. Stein says (op.cit., note (6)), be present.

1. The crisis situation must be taking place or at least imminent. The possibility of invoking the derogation clause is subject to a time-limit so as to persuade States not to make use of it solely for the purpose of prevention without a crisis having been declared or for purposes other than a return to normal (principle of provisional status).

2. The situation of danger must be such that the normal measures and restrictions authorized by the instruments in normal times manifestly no longer suffice to maintain public order.

3. The situation of danger must affect, on the one hand, the whole of the population and, on the other, either the whole of the territory (this being a fortiori the case in a situation of external war as provided for, for instance, under the Inter-American and European Conventions) or certain parts thereof.

11/ This article stipulates that the Secretary-General has the right to request from any other contracting party an explanation of the manner in which its internal law ensures the effective application of all the provisions of the Convention. In ratifying the Convention, all States have accepted this provision. Consequently, they are bound to provide the required explanation. The Secretary-General, in requesting the said explanation in conformity with article 57, acts on his own responsibility and at his discretion in the exercise of the powers which the Convention confers upon him independently of any other power which he may possess by virtue of the Statute of the Council of Europe. The power attributed to him in article 57 "is not subject to control, nor subordinated to instructions". (cf. declaration of the Secretary-General of the Council of Europe on article 57 of the European Convention on Human Rights made before the Juridical Commission of the consultative Parliamentary Assembly at Oslo, 29 August 1964, Council of Europe, European Convention on Human Rights, Collected texts, Strasbourg, 1979, p.91.)

12/ Paragraph 28 of the judgement.

13/ Report of the Commission, Yearbook XII.

4. Lastly, there must be a threat to the very existence of the nation, that is to say, to the organized life of the community constituting the basis of the State, whether this means to the physical integrity of the population, to territorial integrity or to the functioning of the organs of the State (the test applied by the European Court since the Lawless case).

56. It should be noted, in this connection, that the Court considered itself competent to determine whether or not such a threat exists. Similarly, in the Ireland v. United Kingdom case, it held that, while it is indeed the responsibility of every State to determine whether the existence of the nation is threatened and that, in so doing, it has a wide measure of discretion, the fact remains that the exercise of that discretion cannot be exempt from all control. This power of control was particularly effective in the Greek case, in which it was held that a basic condition of article 15 - the existence of a public danger threatening the life of the nation - had not been fulfilled, which amounted to a violation of the Convention.

57. Reference must likewise be made, again in connection with the Greek case, to the position taken by the Commission Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine Complaints (see Official Bulletin of ILO, vol.LIV, 1971, No.2). The complaint concerned the violation of the Freedom of Association and Protection of the Right to Organize Convention (No.87) and the Right to Organize and Collective Bargaining Convention (No.98). The Government submitted inter alia that the measures had been taken in the light of exceptional circumstances which it was for the Government alone to evaluate. On the basis of the information and data it received, the Commission decided that none of those factors was such as to enable it to conclude that there had existed, in Greece in 1967, a state of emergency or exceptional circumstances that could justify temporary non-compliance with the Conventions in question. Accordingly, the Commission rejected the argument of "justificatory fact" adduced by the Government.

58. It is this same approach which, in a different way, marks the work of the United Nations Human Rights Committee in connection with its consideration of the reports submitted by the Governments of States parties under article 40 of the Covenant.

59. For instance, in the case of Chile, the Committee, after studying the two reports submitted by the Government (CCPR/C/1/Add.25 and 40), found that "the information provided on the enjoyment of human rights set forth in the Covenant [was] still insufficient". It should be noted, for the purposes of our study, that several members of the Committee took the view, for example, that some of the arguments adduced by the Chilean Government, such as "national security" and "latent subversion", did not, in that case, justify any derogation whatsoever from the obligations laid down in the Covenant.

(d) The principle of proportionality

60. Even assuming that the existence of a crisis situation is beyond dispute, the international body responsible for surveillance still has to determine whether the measures of restriction or suspension enacted go beyond the strict limits required by the situation. This principle, which is expressed in similar terms in the three instruments concerned, has its basis in the theory of self-defence, which requires the existence both of an imminent danger and of a relationship between that danger and the measures taken to ensure protection against it, which measures must be proportionate to the danger.

61. To the best of our knowledge, until the beginning of 1982 the Human Rights Committee had still not had to give an opinion on the principle of proportionality when considering an application. There again, it was when it was considering the reports of Governments submitted to it under article 40 of the Covenant that the Committee decided on a certain approach, namely, that the principle of proportionality must not be the subject of an over-all assessment in abstracto.

62. Rejection of the abstract assessment was discussed in particular connection with the report concerning Chile. It was noted inter alia that the report "failed to meet the requirements of article 40, paragraph 2, of the Covenant since it merely provided an idealized and abstract picture of the legal framework which should ensure the protection of civil and political rights in Chile and that the description itself ... made no reference to the practical enforcement of the legal norms" and, lastly, that it "ignored the true situation in the country and did not make for proper examination of that situation". 14/ The "in concreto" assessment also resulted in the Committee's analysing the principle of proportionality not on an over-all basis, but derogation by derogation and even in time and space. When the report of the United Kingdom of Great Britain and Northern Ireland was under consideration, members of the Committee expressed concern about the United Kingdom's continued derogation, on the basis of article 4, from articles 9, 10, 17, 21 and 22 of the Covenant, and requested an explanation as to the reasons for, and extent of, such derogation. It was felt that it was the duty of the Committee to verify whether each of the derogations made under the article was justified. On other occasions, the Committee considered the territorial scope of a state of emergency and its limitation in time. 15/

63. In identical terms, the supervisory bodies set up under the European Convention have likewise developed a large body of case-law which serves to clarify the following points: 16/

The measures should - at the very least - apparently make it possible to abate or bring to an end the specific situation of danger, even though as regards the Convention their justification is not dependent on ascertaining whether they in fact achieve their objective;

Other less stringent measures, in particular, the restriction clauses that are admissible in normal times (see para.55 above), must be insufficient - even though it has been held that the principle of proportionality was not ipso facto infringed despite the fact that, subsequently, the measures were abated or brought to an end without any corresponding abatement of the intensity of the danger having been noted; 17/

14/ Report of the Human Rights Committee, General Assembly, Official Records: thirty-fourth session, Supplement No.40 (A/34/40), United Nations, para.73, p.18, report of Chile.

15/ Idem., para.293, p.72, report of the Syrian Arab Republic; idem., (thirty-fifth session), para.243, p.54, report of Colombia.

16/ Op.cit., foot-notes 3, 10 and 12.

17/ Publications of the European Court of Human Rights, Ireland v. United Kingdom case, Judgements and decisions, Vol.25, para.214.

Lastly, the principle of proportionality must be deemed to have been observed if the apparently undue severity of the measures taken, particularly in the case of suspension of the ordinary guarantees, is offset by the introduction of extra-judicial guarantees as a replacement. 18/

We shall revert to this point, in which grave danger is inherent.

(e) The principle of non-discrimination

64. Article 4, paragraph 1, of the Covenant and article 27, paragraph 1, of the American Convention stipulate that measures of derogation shall not involve discrimination based solely on the ground of race, colour, sex, language, religion or social origin. There is no such safeguard in the European Convention or, rather, it is not specially provided for under article 15, which relates to the exercise of the right of derogation, but it is covered by article 14, which is general in scope since it prohibits any discriminatory measure in the exercise of all the rights and guarantees recognized under the Convention. Article 14, however, is not among the provisions that article 15 lists as those from which there can be no derogation in time of crisis. A doubt therefore subsists which could be removed by case-law in what is to be hoped would be a favourable sense.

65. The importance of the word "solely" should be noted. 19/ It may well happen that, within the scope of the clause of derogation, the measures strictly required by the situation involve action directed against - or specially affecting - a group belonging, for instance, to a particular race or religion (for example, the quelling of a riot).

66. In so far as such action may be described as discriminatory, it would not constitute discrimination "solely" on the grounds of race or religion ... since it was rendered necessary to the extent strictly required by the situation. Such, at least, is the prevailing interpretation given by doctrine.

(f) The principle of inalienability of certain fundamental rights

67. All the relevant instruments establish a list of principles which admit of no derogation in any circumstances. Although the list varies from one instrument to another, the inalienability of the following principles is common to all of them:

Right to life (Covenant, art.6; European Convention, art.2;
American Convention, art.4);

Prohibition of torture (Covenant, art.7; European Convention, art.3;
American Convention, art.5);

18/ Idem., Ireland v. United Kingdom case, series B, Memoranda and documents, Vol.23-1, report of the Commission, p.124.

19/ In this connection: op.cit. (foot-note 6), Committee of experts on human rights of the Council of Europe, para.69.

Prohibition of slavery (Covenant, art.8; European Convention, art.4; American Convention, art.6);

Prohibition of retroactive penal measures (Covenant, art.15; European Convention, art.7; American Convention, art.9).

This is the minimum provided for under the European Convention; in addition, the Covenant and the American Convention provide for:

The right to recognition of legal personality (Covenant, art.16; American Convention, art.18);

Freedom of conscience and religion (Covenant, art.18; American Convention, art.12).

Lastly, the principle of inalienability extends to other principles which vary according to the instrument concerned. The Covenant, for instance, provides especially for prohibition of imprisonment for civil debt (art.11), while the American Convention goes still further since the list includes: rights of the family (art.17), rights of the child (art.19), right to a nationality (art.20) and right to participate in public life (art.23).

68. On this point, of course, each State is bound only by the instruments that it has ratified. But the idea of a basic minimum, ^{20/} from which no derogation is possible, is present in a sufficient number of instruments to justify our approaching the matter by reference to a general principle of law recognized in practice by the international community, which could, moreover, regard it as a peremptory norm of international law within the meaning of article 53 of the 1969 Vienna Convention on the Law of Treaties, whereby "... a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted ...". It therefore seems to us that the peremptory nature of the principle of non-derogation should be binding on every State, whether or not it is a party and irrespective of the gravity of the circumstances. In this connection, it should likewise be noted that in time of war, and even in the case of armed conflict not of an international character, article 3, which is common to the Geneva Conventions on the humanitarian law of war, prohibits "at any time and in any place whatsoever" the infringement of a basic set of principles that are deemed to be inalienable, such as prohibition of torture.

^{20/} See the list referred to (para.67), which provides for four fundamental rights.

This will apply a fortiori in the event of purely internal disorders. It would be paradoxical if the guarantees in peace-time were weaker than those in war-time. Similarly, many national constitutions, as we shall see, embody a series of inalienable rights which are very similar to the list set forth in the international instruments, although they sometimes go further.

69. After this analysis, one clear fact emerges: above and beyond the rules which have just been enunciated, one principle, namely, the principle of provisional status, dominates all the others. The right of derogation can be justified solely by the concern to return to normality.

70. In conclusion, and without further ado, we shall consider the seemingly special case of the exceptional circumstances connected with force majeure (cataclysm, natural disasters, ...). The principles that have just been analysed apply here in their entirety.

71. Reference must be made in this regard to the position of the ILO Committee of Experts on the Application of Conventions and Recommendations. In its study of the reports on Convention No. 29 on forced labour, it takes the view that, if the Convention does not apply to all labour or service required in cases of force majeure, it is on condition that certain limits which it stipulates are observed: there must be a genuine case of force majeure, i.e. the life or well-being of all or part of the population must be in danger; and the duration, extent and purpose of the service required must be strictly limited by reference to the exigencies of the situation (see general report of 1979).

72. Consequently, the case of force majeure, differs from the previous case only in its causes, which have no political connotation, and not in its legal effects, which are similar.

B. Comparative analysis of the guarantees provided by national emergency legislation

73. This analysis indicates that the guarantees afforded under international law are the reflection of those generally recognized - in theory if not in practice - under municipal law. This emerges clearly both from the replies of the Governments which agreed to take part in the study and from the work carried out, at the legal level, by non-governmental organizations and, in particular, by the International Commission of Jurists. Obviously, systems of national legislation reflect the various legal influences throughout the world just as they do the vicissitudes in the history of States. There is, however, sufficient reference to common ideas to enable them to be broadly classified on the basis of the following four criteria: forms and modalities of application: states of emergency introduced: effects in terms of place and duration: and extent of the rights and guarantees likely to be affected.

74. For the time being, we shall adopt a purely formal approach to this legislation, leaving until later an analysis of the discrepancy that frequently exists between the forceful nature of the legal solutions adopted and the numerous deviations noted in practice.

1. The different forms of emergency legislation and the modalities of its application

75. Subject to certain individual characteristics - or errors resulting from the difficulty in obtaining up-to-date information in this field, for which we may be

forgiven - the comparative analysis reveals that four types of legislation are generally provided for, often on a cumulative basis, under municipal law: 21/

(a) Emergency regimes proper, which are designated in a variety of ways depending on the country: apart from the conventional states of war, siege and emergency, reference is found to states of internal crisis, necessity, alarm, alert, disturbance, internal disorder, emergency, internal defence, assembly, catastrophe, or even martial law, prompt security measures, etc. These regimes are generally determined in advance - "held in reserve", as it were - under constitutional provisions or special laws. Their main purpose is to effect transfers of competence within the executive power (civil powers - military powers) and the judicial power (ordinary courts - special courts) or between those two powers. In principle, they do not effect any transfer of competence from the legislature to the executive and do not accordingly authorize the authorities to legislate by decree. The application of such regimes generally falls within the competence of the executive, subject to deliberation by or advice from parliament, either concurrently or subsequently (ratification or extension).

(b) Measures of legislative empowerment, on the other hand, are designed to transfer to the executive all or part of the powers of the legislature except, in principle, for the power to amend the constitution. According to terminology that varies from country to country, the executive is authorized to legislate by "orders", "emergency laws", "decree laws", "regulatory laws", "regulatory decrees", "proclamations", etc. The actual empowerment procedures are always laid down in the Constitution, which sets general limits to the delegation of power: it usually stipulates that the empowering act must specify the content, purpose and scope of the powers delegated. In other words, the authority vested in the executive extends solely to specific matters. Many constitutions also require that the empowering act should set a time limit to the delegation. Less often, the constitution specifies that the measures taken under the empowering act shall be subject to subsequent ratification, generally by parliament.

(c) Emergency powers subject to legislative ratification derive from the same idea, with this difference: parliament intervenes not a priori to empower but a posteriori, ratification being mandatory whereas it is not always provided for in the case of empowering acts. However, in the absence of a framework pre-determined by parliament, the executive enjoys greater latitude in such a case to determine the areas in which it may be required to legislate.

(d) Emergency powers through self-empowerment by the executive: This category, sometimes known as "special powers", can be clearly distinguished from the two preceding categories in that it precludes any intervention by parliament. A substitute guarantee is normally provided for: the head of the executive is required to consult in advance, or simply to notify, certain official bodies which vary according to the country (Council of Ministers, Constitutional Court or Council, Presidents of Assemblies, Council of State, Supreme Council of the Revolution, etc.). We thought it might be useful to give an example of this category by analysing briefly the special powers which article 16 of the French Constitution confers on the President of the Republic in the event of a crisis, our reason being that this article has been copied, subject to certain modifications, by a large number of new States. 22/ The effect of this regime is to concentrate all powers in the hands of the executive except the power to amend the constitution. Any infringement would amount to a "crime against the Constitution" under article 114 et seq. of the French Penal Code

21/ See Olivier A. Echappe "Tableau comparé des systèmes d'exception", Pouvoirs, No. 10-1979, Presses Universitaires de France, Paris.

22/ See Michèle Voisset, "Une formule originale des pouvoirs de crise", Pouvoirs, op. cit., see footnote 21.

and, upon the request of an absolute majority of the members of each of the Assemblies, the offenders may be brought before the High Court of Justice, which is itself composed of members of Parliament. For this reason, the French Parliament cannot be dissolved for the duration of the special powers. Apart from this extreme case, there is no direct control by Parliament. The competent courts may, however, exercise control indirectly, not over the validity of the proclamation of the special powers but over the measures taken pursuant to those powers, as is the case in France. The Council of State (Conseil d'Etat), which exercises control over the legality of all acts by the administrative authorities, has had occasion to deal, a posteriori, with measures taken under article 16 of the Constitution. It held that it was not competent to review the decision which brought the special powers into effect nor the legislative measures taken pursuant to those powers, since the Council of State is not empowered to call the law into question. It was, however, able to rescind individual emergency measures. This control, which is extremely limited in municipal law, is even more so at the international level: in this connection, France has entered a reservation to article 15 of the European Convention which has the effect of preventing the Commission, and also the Court, from exercising any control over the conditions under which the special powers taken pursuant to article 16 of the Constitution are implemented, at least so far as assessment of the "principle of proportionality" is concerned. This brief analysis of the "common law" of the various emergency systems indicates that, no matter what form is adopted, their implementation always involves a proclamation under municipal law. Parliament is frequently associated with this, in a variety of ways which may themselves involve a host of combinations: for instance, the constitution may provide that the legislative power, if in session, shall authorize the executive to declare a given emergency regime but, if it is not in session, it will be for the executive to take the initiative. And as a general rule, once parliament is meeting in ordinary session (or extraordinary, depending on the circumstances), it will be required to ratify either the implementation of the emergency regime itself or the measures taken pursuant to it or else to decide on its extension.

2. Situations that warrant the introduction of a state of emergency

76. All constitutions or special laws contain provisions setting forth in legal terms the situations of crisis that may be invoked. Such acts are defined in an infinite variety of ways, as is evident from the documents received, in particular, the study of the International Commission of Jurists.

77. The texts are not often drafted with absolute clarity (but see the replies from Belgium and the Sudan) and they refer to vague concepts such as maintenance of the peace and of public order, imminent national danger, internal disorders, subversion, insurrection and "danger threatening the fundamental liberal and democratic order".

78. However, two concepts emerge implicitly - and sometimes explicitly - from the wording used or from the context:

The concept of imminent danger: hence the need for a prompt reaction, which justifies the transfer of certain powers from the legislature and judiciary to the executive;

The concept of self-defence and its corollary: the adequacy of the measures taken in terms of the circumstances.

3. Effects in time and space

79. Some constitutions do not seem to mention any time-limit; in such cases, the state of emergency can remain in force as long as the circumstances that warranted its declaration subsist.

80. In most cases, however, clauses imposing time-limits are included. They take four forms:

The basic text does not include a time-limit but stipulates that the proclamation of the state of emergency itself shall set such a limit;

A fixed time-limit is expressly laid down in the basic text and cannot be extended (in Costa Rica, for example it is 30 days);

The time-limit may be extended without any condition other than compliance with the requirement to renew the formalities of proclamation (this is the most frequent case);

Systems providing for a limited extension, which amount to a compromise between the two previous systems: either the limit is expressly provided for in the text (for example, in El Salvador, it is 30 days and may be extended only once) or it depends on the occurrence of some event.

It will be seen that the variation in the choice of one or the other option depends less on the country than on the nature of the emergency regime in question: a state of siege will fall into the third category, while a state of emergency will fall into the fourth.

81. Ratione loci. Most systems provide that the suspension of guarantees may apply to all or part of the territory. In the latter case, the areas or localities must be expressly stipulated. In federal countries, the introduction of any territorial limitation is usually a matter for the federal authorities (in Brazil and Mexico, for example).

4. Determination of the scope of application of guarantees which may be subject to suspension or restrictions

82. Ratione personae. A state of emergency has effect erga omnes, although in a few cases, such as that of Bolivia, the Constitution apparently provides that the state of emergency shall have effect only as regards certain persons.

83. Subject to this reservation, there are three main cases:

No provision expressly defines the rights and guarantees that are subject to derogation or restrictions. Such a situation involves an obvious risk of erroneous interpretation, as happens, for instance, in the case of habeas corpus where there is no specific provision for its protection. In practice, there is a tendency in such cases, for national case law to hold, either that the remedy itself has been suspended or, and it comes to the same thing, that it can be invoked only in defence of those guarantees for which suspension is not provided and which, as we have seen, are not listed themselves.

Express provisions listing in negative terms the rights and guarantees that cannot be affected.

The reverse solution - the rights and guarantees likely to be affected are listed in positive terms and exhaustively (as, for example, in Costa Rica and Panama). This approach is obviously the one best calculated to guarantee individual and collective liberties.

84. It has been noted that municipal law, like international law, almost invariably asserts the inalienable character of a minimum of guarantees. The guarantees most often referred to are: the right to life, prohibition of slavery, and of inhuman, cruel or degrading treatment (especially torture), and respect for the principle of the non-retroactivity of criminal laws.

85. Furthermore, it is gratifying to note that the entry into force of the relevant international and regional instruments has brought about a significant increase in the range of rights and guarantees recognized as inalienable.

86. On the basis of this comparative approach to national laws, the following conclusions can be drawn:

There is a striking correspondence between national and international instruments in that they always seem to provide for control in a state of emergency, and control means criteria and the possibility of ensuring that they are respected;

Despite the wide variety of criteria, there is always present the idea that such control will be possible and that it will be exercised at three levels:

Assessment of the powers of the authority which takes the decision, to which the formal act of proclamation corresponds;

Assessment of the circumstances which warrant the entry into force of the state of emergency;

Assessment of the adequacy of the measures taken, to which the procedures for extension and, in general, the stipulation of a time-limit correspond - or should correspond.

87. Lastly, there are two main features:

The measures involved are provisional by nature, so that the constant, specific and immediate objective of the authorities is a return to normal;

There must be no alteration in the bases of the institutions whose functions are modified to meet the needs of the moment, so that they can revert to their original function when the crisis has been overcome.

88. These are the principles which seem, in the instruments, to underlie both international law and the more progressive forms of municipal law.

89. Subject to local adjustments, certain Governments which have recently revised their constitutions - or have expressed keen concern in this connection - have been guided by this ideal model.

90. Thanks to the kindness of my colleagues and of the Sub-Commission, I am also able to illustrate my remarks by certain cases which may be of value by way of example.

91. In Costa Rica, the proclamation of a state of emergency can come within the direct competence of Parliament. When the latter is not in session, this power vests in the executive but the proclamation serves to convene Parliament in extraordinary session within 48 hours. The proclamation by the President lapses if it is not approved by two-thirds of the members of Parliament. A fixed time-limit of 30 days at the maximum is expressly provided for and cannot be extended. The Constitution lists a priori those articles likely to be affected. Lastly, article 9 of the Constitution prohibits any delegation of a power to others.

92. The Constitution of Sri Lanka was amended in 1978 in a manner which from the normative point of view, fully reflects the need for guarantees which, in our view, are connected with the acceptance of a state of emergency. In the first place, it makes a point of specifying that the constitution provisions cannot themselves be affected by the Public Security Order which, according to our interpretation, means that most of the fundamental rights described, such as those in chapter III, and with the exception provided for in article 13, cannot be subject to derogation: this applies in particular to the essential rights involved in the defence of an arrested person. It also establishes stringent machinery for the automatic convening of Parliament and time-limits that make it possible to avoid uncontrolled prolongations and extensions.

93. The reply from the Swedish Government throws some interesting light on the question of rights from which no derogation is possible. Chapter II of the Swedish Constitution defines rights and freedoms some of which cannot be restricted even by an act of Parliament. This fundamental rule applies even if the country is at war or exposed to the risk of war or if it is in an exceptional situation that can be likened to a situation of war. In other words, the irrevocability of the principles has been expressly affirmed, even in the presence of the concept of exceptional circumstances.

94. The legislation in force in the Egyptian Arab Republic, as reflected in the State of Emergency Act No. 161 of 1958, as amended in 1967 by Act No. 60 and in 1972 by Act No. 37, pays particular heed to the temporary nature of such situations. Since 1972, the duration of the declaration of the state of emergency must be specified in advance. There is an automatic procedure whereby the declaration lapses if the National Assembly has been unable to reach a decision, and a certain number of fundamental rights are granted to prisoners while the state of emergency remains in force.

95. It therefore seems to us that the model which we are proposing as a basis for analysis is supported by these examples and we accordingly believe that this "reference model" could be adopted for the study. It is in relation to this "common law of the state of emergency" that we propose to describe, as a counterweight, the apparent "deviations" that are too frequently noted.

CHAPTER II

THE EFFECTS OF STATES OF EMERGENCY

A. Classification of states of emergency: from theory to practice or the reference model and risks of deviation therefrom

96. A comparative study of the implementation of states of emergency rather than of legislation brings out several situations particularly emphasized by the reports submitted to the Human Rights Committee under article 40 of the International Covenant on Civil and Political Rights.

97. In an increasing number of cases, the practices analysed seem actually to be "deviations" from the theory of exceptional circumstances in that they tend more and more to depart from the "reference model" described in the preceding chapter.

98. For the purpose of clarification, the seeming "deviations" most frequently encountered in practice have been grouped in five categories.

1. States of emergency not notified

99. As far as municipal law is concerned, this practice is in keeping with the reference model. It is open to criticism only from the standpoint of international law: for example, in cases where, although a State is bound by an international instrument, it does not comply with its obligation to notify the other States parties, through the depositary of the relevant instrument, for example, under article 4, paragraph 3, of the Covenant.

100. This omission has the effect of precluding the international surveillance authorities from exercising their judgement to the fullest extent.

101. The Human Rights Committee has expressed concern at this situation and, in application of article 40 of the Covenant, has reminded the countries in question of their obligations. In this connection, reference will be made to two cases studied by the Committee in its reports to the General Assembly at its thirty-fourth 23/ and thirty-fifth 24/ sessions.

102. On this occasion, the Committee explicitly recalled "that any State party ... availing itself of the right of derogation" was required to inform the other States parties of the provisions of the Covenant from which it had derogated, and of the extent of, and necessity for the derogations, and it requested information on the reasons why those requirements had not been complied with.

2. De facto states of emergency

103. Unlike the preceding situation, here there is no proclamation or termination of the state of emergency or (and this amounts to the same thing) the state of emergency subsists after it has been officially proclaimed and then terminated. More and more instruments are then promulgated which gradually suspend an increasing number of rights and guarantees when, according to the law, such rights and guarantees can be suspended only in virtue of a declaration or prolongation of a state of emergency.

23/ Thirty-fourth session, supplement No. 40 (A/34/40), p.72, para. 293.

24/ Ibid., thirty-fifth session, supplement No. 40 (A/35/40), p.55, para. 247.

104. In varying degrees, the following cases illustrate - or have illustrated - this situation.

105. The report of the Human Rights Committee concerning Suriname emphasizes that "neither a state of emergency nor a state of siege had been proclaimed in Suriname, even though a de facto state of emergency had existed for one or two months after the 1980 coup d'état". 25/

106. In Uganda, although the Chief of State then in office lifted the state of emergency within two months of assuming power, he took advantage of the abolition of Parliament to legislate by decree. Many instruments appeared to have been enacted which had the effect of gradually modifying the institutional machinery of the State, while restricting the exercise of public freedoms. For example, decrees Nos. 7, 13, and 15 of 1971 gave official sanction to the powers exercised by the security forces; decree No. 8 of 1972 granted those forces immunity; decree No. 7 of 1972 then authorized them to use force for the purpose of arresting persons suspected of armed robbery or of preventing them from escaping; decrees Nos. 3 and 12 of 1973 set up military tribunals with jurisdiction over civilians suspected of acts of sedition or subversion.

107. In certain respects, the case of South Africa comes into the same category, although, in some regions and more particularly in the "Bantustans", a state of emergency has sometimes been declared. 26/ In all other cases the applicable legislation produces similar effects to those associated with emergency situations, although none of the rules of form described in the reference model are respected prior to its implementation. Such legislation is fully in force in the territory of South Africa.

108. These enactments, which take the form of "ordinary law", contain substantive rules that are characteristic of emergency legislation, as is shown by the use to which they were put in Namibia, a country occupied by South African military forces and therefore in a state of war. In order to deal with this situation, the so-called "ordinary law" in force in South Africa was applied.

109. In other words, through the mere application of ordinary South African law, the same effects were obtained in Namibia as would have been produced by the proclamation of a state of war or even of a mere state of emergency. 27/

110. Thus, all the South African laws which carry the death penalty for political offences in peace-time were made applicable in Namibia on account of the state of war, namely, the Terrorism Act, No. 83 of 1967, the Sabotage Act, (General Law Amendment Act, No. 76 of 1962) and the Internal Security Amendment Act, No. 79 of 1976. 28/

25/ Thirty-fifth session, supplement No. 40 (A/35/40), p.66, para. 297.

26/ We refer to the declaration of a state of emergency in the Transkei on 5 June 1980, under section 44 of the Transkei Public Security Act and to Proclamation 252 of the Emergency Regulations of the Ciskei, September 1980.

27/ See the report of the United Nations Ad Hoc Working Group of Experts on violations of human rights in southern Africa (E/CN.4/1429, paras. 375 et seq.).

28/ See, for example, documents E/CN.4/1270, para. 296, and E/CN.4/1429, para. 406.

111. Similarly, nearly all provisions of South African ordinary law relating to security, which impose heavy penalties for the commission of political offences, as well as the legislation governing the situation of detained persons, have been made applicable in Namibia. 29/

3. Permanent states of emergency

112. This heading covers the institution, with or without proclamation, of states of emergency which are perpetuated either as a result of de facto systematic extension or because the Constitution has not provided any time-limit a priori.

113. Of the different variants of this situation, the following cases have been singled out as good illustrations.

114. A first form of perpetuation consists of systematically extending the state of emergency. Here, too, the exception tends to become the rule, since the country is governed by a systematically renewed state of siege. According to the report on Paraguay prepared in 1978 by the Inter-American Commission on Human Rights, it was not possible to determine exactly how long the country had been under an emergency regime, since the regime seemed to date back to 1929, with a brief six-month interruption in 1947. 30/ In other countries, the Constitution authorizes the Chief of State to declare a state of emergency, thus enabling him, under special powers, to take the measures required by the circumstances. It was under such special powers that, in Cameroon, for example, the legal regime of a state of emergency was instituted by an executive order of 4 October 1961. As a result, the state of emergency has been in effect since 1969, since the order authorizes the declaration of a state of emergency "in the event of repeated disturbances undermining public order and State security". The extension of this situation is not, therefore, a direct result of the proclamation of the state of emergency but of a wide interpretation of the special powers delegated to the executive power under the state of emergency itself.

115. Since that date, more than 35 laws, orders and decrees have extended the state of emergency every four or six months.

116. In Haiti, Parliament seems regularly to confer full powers on the Chief of State at the end of every parliamentary session, while, according to a report by the Inter-American Commission on Human Rights concerning that country, 31/ most of the basic guarantees have been suspended by annual decrees since 1971.

117. These different examples have common features:

Less and less account is taken of the imminence or otherwise of the danger;

The principle of proportionality is no longer considered to be fundamental;

No time-limit is envisaged.

29/ See documents E/CN.4/1030/Add.1, para. 9; E/CN.4/1222, paras. 332 and 333; E/CN.4/1311, paras. 372 and 376 and E/CN.4/1428, para. 419. See also the report by the International Commission of Jurists (16-18 July 1978) issued by the United Nations Centre against Apartheid.

30/ CIDH/OEA/Ser.L/V/II.43, 31 January 1978.

31/ OAS/Ser.L/V/II.46-Doc. 6, Rev. 1, 13 December 1979.

In cases such as those mentioned above, therefore, since the periods follow each other consecutively, a state of emergency has become the rule since 1959.

4. Complex states of emergency

118. These are by their nature the most difficult to analyse. They have a common feature, the great number of parallel or simultaneous emergency rules whose complexity is increased by the "piling up" of provisions designed to "regularize" the immediately preceding situation and therefore embodying retroactive rules and transitional regimes. This device is generally supplemented by the enactment of repressive laws assuming the features of ordinary laws (for example, national security laws, the accumulation of which produces the effects associated with state of emergency.)

119. The case of Turkey appears to come into this category. A state of siege has very frequently been established in this country and has been modified by successive proclamations in conditions of such complexity that, in many cases, it becomes very difficult to determine the legal basis for decisions taken under the emergency powers.

120. As always in such situations, there is an original reference model which remains applicable. Like the Constitution of 1924, the Turkish Constitution of 1961 defined different states of emergency with some degree of precision. These provisions have been subject to much subsequent modification, which has gradually altered their character, as the two following examples show.

121. At the constitutional level, for example, the "12 March" regime (the period from 1971 to 1973) first limited the proclamation of the state of siege to 10 provinces and then extended its scope to the entire country. In order to ratify this situation a posteriori, a special law was enacted (Act No. 1402 of 13 March 1971), which added new procedures to those already provided for in articles 123 and 124 of the Constitution of 1961 mentioned above.

122. A similar process, in another form, is revealed by analysis of the reforms made during this period in the organization and procedure of military courts. Act No. 353 of 26 October 1963, which referred only to the functioning of military courts in time of war, was the subject of a series of amendments, some of which were of a provisional character. Specific mention should be made of the amendments introduced by articles 15 and 23 of Act No. 1402. Article 15 seems to provide for the establishment of special courts, despite the prohibition of principle expressly provided for by article 32 of the Constitution.

123. After the Constitutional court had condemned the article on this ground, it was amended by Act No. 1728 of 15 March 1973 with a view to "regularizing" the situation. Article 23 was also to be declared unconstitutional by a second order of 15-16 January 1972 on the ground that it provided for continuation of the operations of military courts despite the termination of martial law. However, Act No. 1699 of 15 May 1973 "regularized" the situation by incorporating the article that had been declared unconstitutional directly into the Constitution.

124. Because of the growing complexity of this overlapping legislation, it has become extremely difficult in practice to contest the legality or constitutionality, as may be the case, of the state of emergency.

125. For example, after the proclamation of 1970 had been submitted to Parliament:

The Council of State declared itself incompetent on the ground that the act in question was no longer an administrative act- (Order of 3 July 1970);

The Constitutional Court, in an order of 17 November 1970, also declared itself incompetent, after observing Parliament had taken its decision by simple resolution and that its deliberations had not therefore given the proclamation the status of law.

126. Another historical example is provided by the state of emergency which was in force in Brazil before the current period of relaxation began. Here too, the reference model had been laid down in the Constitution (article 155 on the state of siege). At the same time, an impressive number of texts relating to the functioning of institutions and the exercise of public freedoms were enacted one after the other and ultimately led to overlapping.

127. Professor Alfonso Arinos, who had been asked by the Brazilian authorities to report on the legal aspects of a return to the normal rule of law (report of 14 April 1978), found that 32/ "in the Brazil of 1978, the norms of public law as a whole appear to be a mixture of two constitutions neither of which would seem to be in force: 17 institutional acts, 9 constitutional amendments, 104 supplementary acts, 32 constitutional acts, 6 decree-laws of the same nature It should be added that many of these texts ... have been indirectly abrogated or neutralized". In conclusion, the author suggested that the only possible way of establishing a list of the constitutional provisions actually in force was to use a computer. At the time, the complexities of the legal situation seem to have made it possible for the authorities to implement a state of siege without the proclamation required by the Constitution, under which the President of the Republic may proclaim a state of siege, provided that a control procedure is observed. ... Yet an institutional act, No. 5, enacted by the Executive, granted the President of the Republic the power to proclaim a state of siege "proprio motu", without explicit abrogation of the corresponding provisions of the Constitution. Furthermore, nearly all the other articles in Institutional Act No. 5, which has the force of law, produced not only effects similar to those laid down by article 155 of the Constitution but even additional effects. In this way, it was apparently possible to place the country under a state of siege without the need for the executive power to resort either to the normal proclamation procedure laid down by the Constitution or the exceptional procedure of Institutional Act No. 5, which has now been abrogated.

32/ See Louis Joinet, article in Pouvoirs, No. 10, 1979, Ed. P.U.F., Paris.

128. In other words, proclamation of a state of siege, by virtue either of the President's constitutional powers or of his special para-constitutional powers, would have imposed fewer restrictions on the exercise of freedoms than those authorized by Institutional Act No. 5, which is permanently in force. Because of the complexity so created, these states of emergency are a serious obstacle to control by international surveillance organizations and by the competent bodies in municipal law.

5. Institutionalization of emergency regimes

129. These are processes that have emerged recently and form part of a theoretical approach to democracy which gives rise in different areas to concepts of so-called "authoritarian", "restricted" or "gradual" democracy.

130. They are all based on one of the exceptional situations described above. When the constitutional order is disrupted following a crisis, the exception tends to become the rule. It is convenient, in order to establish the lawfulness of a system, to provide it with an institutional basis in the form of a new structure for society which will ultimately be submitted for the people's approval, generally through a constitutional referendum.

131. These processes, which are designed to ease the transition to new forms of democracy, frequently entail the danger that practice will consolidate a constitutional order containing incipient autocratic tendencies.

132. Despite their respective special features, two recent draft constitutions, one adopted in Chile 33/ and the other rejected in Uruguay, both reflect this trend.

133. In the case of Chile, the process involved the maintenance of a hierarchization of powers and the establishment of an extended transitional regime.

134. A transitional regime (a minimum of nine years) may cover a period of 16 years during which the right to control institutions rests, in the final instance, with the military.

135. The permanent provisions of the Constitution (articles 39 to 41) in fact provide for progressive states of emergency. Three emergency situations are envisaged:

A situation of external war, during which a "state of alert" applies;

A state of internal war or "state of siege";

In case of serious disturbances of public order, danger or threats to national security, whether from internal or external causes, a "state of emergency" may be declared.

33/ It should be noted that, according to the official figures, the draft was adopted by a favourable vote of 57.06 per cent and a negative vote of 30.17 per cent and that the state of emergency was not suspended during the electoral period.

136. In addition to these three situations, which are of a political nature, there is the "state of catastrophe", proclaimed in the event of a public disaster.

137. Provision is certainly made for safeguards (control by the Congress in the first two cases, agreement of the National Security Council in the last two cases), but these will not become applicable until the end of the transitional regime.

138. During this period, in the event of disturbances of the internal peace, the President of the Republic alone is competent (see 24th transitional provision) to order arrests, limit the right of assembly and freedom of expression, prohibit entry into the territory or order expulsions, including the expulsion of nationals, and order restricted residence. It is expressly laid down that no appeal lies against these measures except to the authority which made the decision.

139. The Uruguayan draft constitution, though recently rejected by popular vote, deserves attention.

140. The draft also posited the principle of the hierarchization of powers, the power of decision lying with the military in the final instance. The point may be illustrated by reference to the procedure laid down in the draft for the appointment of the President of the Republic.

141. It should first be observed that, as in Chile, parties which might have direct or indirect relations with foreign institutions, organizations or political parties were not to be permitted (this is aimed at parties forming part of international groupings). Furthermore, any individuals who had had any political influence whatsoever before the advent of the new regime were to be excluded from political activity for a period of 15 years.

142. Subject to these reservations, it was stipulated that the authorized political parties should reach agreement, first among themselves and then with the Government, with a view to the nomination of a single candidate.

143. If agreement with the Government was not reached within a fixed period, nomination of the single candidate was to come within the exclusive competence of the armed forces. Stress was laid on the danger of the military authorities yielding to the temptation to bring pressure to bear during the first phase in order to delay the required agreement and thus to proceed to the nomination of the candidate.

144. From the legal standpoint, the purpose of the draft was to "regularize" a series of institutional acts which formed the "legal" basis of the emergency regime. With that end in view, it was proposed that the basic content of these acts should be directly incorporated in the permanent provisions of the draft or maintained in force under transitional provisions laid down, as in the case of Chile, by the Constitution itself.

145. It should be pointed out that, here too, the negative result of the referendum was the cause of a legal imbroglio. Some believe that the vote merely ratified the status quo, while others hold that it invalidated the Institutional Acts, thus involving a return to the Constitution of 1967.

B. The effects of states of emergency on institutions and the rule of law

146. The general effects of a state of emergency, whether due to a sudden disruption of the constitutional order (coup d'état) or to a slow process of institutional decline, are always characterized by two changes:

One in institutions, resulting from the redistribution of powers;

One in the rule of law, resulting from a steady decline of the principle of legality.

147. In the most typical cases, the rule of law is virtually transformed so that, at the end of the process, we are confronted with what amounts to an institutional and legal model of "deviant" states of emergency.

1. The emergence of a specific model: characteristics and purposes

148. Without any over-generalization, it may be said that the institutions of most of the countries in question are frequently characterized by the subordination not only of the legislative and judicial powers to the executive power, but even of the executive power itself to the military power.

149. This subordination may be brought about directly by a military takeover or indirectly through the establishment of superior supervisory bodies (for example, national security councils). How do these gradual shifts in institutional competence among the three powers take place?

150. With regard to the legislative power, it frequently happens that parliament is suspended or even dissolved, either as a result of a coup d'état: among the many precedents, reference may be made to the recent cases of Liberia (12 April 1980) and Bolivia (7 July 1980); or through a broad interpretation of the laws: on 27 August 1975, the Bahrain National Assembly was dissolved by an order made under article 65 of the Constitution in the following circumstances: the second paragraph of the article provides that, if elections are not held within two months, the Assembly must be reinstated; the order in question suspended the application of that paragraph, in violation of article 103 of the Constitution, which does not confer this power on the President until after martial law has been declared.

151. This institutional vacuum is sometimes filled by a para-legislative institution which, though its functions are purely consultative, still forms part of the "legislative power". This is the role played by the Council of State in Chile and Uruguay, and by the Commission of Legislative Assistance in Argentina.

152. In practice, whatever the terminology used (laws, orders, institutional acts, decree-laws, institutional laws, proclamations ...) the legislative function is, in the first and/or last resort, exercised by the executive power.

153. The judicial power is placed under control. Two methods are generally used to secure the co-operation of the judicial power. One consists in appointing "reliable" judges, the other in reducing the powers of ordinary courts in favour of those of emergency courts. In the first case, security of tenure is sometimes detained in principle but can be acquired only after a period of probation.

154. Another procedure consists of suspending judges when a crisis develops and later reinstating them - or not - on a case-by-case basis.

155. Similarly, the criteria of competence may be modified in two ways: either specific enactments gradually remove matters from the competence of the ordinary courts, transferring them to that of emergency courts, or the judicial power declares itself incompetent of its own accord. 34/

156. Once the executive power is in office and has cleared the ground, it re-organizes the machinery of State and brings it directly or indirectly under military control. This subordination of the formal structures of power does not result solely from the traditional influence of the armed forces in the State apparatus. It becomes institutionalized. The executive power is then exercised directly by a military officer or group of officers, by a civilian under military control, effected through a national security council or even the joint chiefs of staff, or lastly, by a group consisting of civilians and military personnel.

157. This subordination affects not only the higher State authorities but extends to the decentralized levels of administration: emergency legislation usually transfers the powers of prefects or equivalent officials to zone chiefs in a state of siege or emergency. In addition to their executive functions, these individuals often possess functions that are both legislative (proclamations, "bandos" ...) and judicial (confirmation or even modification of the sentences passed by emergency courts).

158. In addition to these measures, "guardians" are often assigned to persons with responsible positions in social organizations (State-owned undertakings, local communities and municipalities, associations and trade unions, educational and medical establishments, the press ...). The so-called "intervention" procedure is often practised, for example, in certain Latin American countries, through the appointment of an "interventor" (nominee), generally a member of the armed forces, to work with authorities in the categories mentioned above.

159. This "institutional transformation", even when caused by an abrupt change (coup d'état) does not produce its full effect until some time has elapsed. This explains the tendency that has been noted for these states of emergency to be perpetuated, especially where they have been proclaimed as the result of an act of force. Gradually, the country's legal regime itself changes character, developing into a specific institutional model. Even in a wide variety of situations, this model has one basic feature: as our analysis has shown, the principle of "hierarchization of powers" is substituted for the principle of "separation of powers", to which lip-service is always paid. At the summit of this hierarchization, that is, within the executive power, the civilian power itself, even when retaining certain prerogatives, is subordinated to the military power.

34/ See statements on habeas corpus by the President of the Supreme Court of Chile in the review, Ercilla of 28 May 1975, and the Bulletin of the Centre for the Independence of Judges and Lawyers, No. 3/4, p. 9. See also the report of the ad hoc committee on violations of the rights of members of parliament (Inter-Parliamentary Union, CL/128/81/6, 18 March 1981, p. 19, paragraph B, fine).

160. As the work of the Human Rights Committee has indicated, 35/ it may be asked whether such a model is defined "in terms of the stability of the regime or the stability of the State". It is significant that, in most cases, a state of emergency is proclaimed by a Government that has come into being as a result of an act of force carried out, by definition, outside the constitutional provisions and, in any event, through means that are not in conformity with article 25 of the Covenant, as was admitted by the representative of the Chilean Government in the Human Rights Committee. 36/

161. The various examples cited throughout this study show that, paradoxically, emergency legislation, which is theoretically designed to overcome internal disturbances, is most often invoked by those responsible for such disturbances, that is, by the perpetrators of coups d'état and hence of acts which by their nature are a source of exceptional internal disturbances. Where a state of emergency should be implemented in order to prevent an act of force, it is used to foster it and perpetuate its effects. This has a double purpose:

To utilize the rule of law - even where this is of an emergency character - in order to legitimize action: if the authorities cannot base this legitimacy on the exercise of popular sovereignty, as suggested by article 25 of the Covenant, they resort to the sovereignty they derive - without any reciprocal concession - from the "legalized" monopoly of force.

To take advantage of the perpetuation of the "state of emergency" in order to set up a repressive "legislative" arsenal designed to remove all prospect of a return to normality, contrary to the very purpose of the theory of exceptional circumstances.

For the institutional model we have just analysed involves a transformation of the rule of law, whose characteristics and purposes we must now define.

2. Transformation of the rule of law: characteristics and purposes

162. It does not seem excessive to speak of a veritable "transformation" of the legal system, since at the end of the process, as we have shown, the exception tends to become the rule. This is due either to the perpetuation of the state of emergency or to the fact that, although it has been lifted, many provisions that had been "normalized" in the form of ordinary laws ("national security" laws, "domestic security" laws) remain in force.

163. This transformation has a profound effect on the substantive criminal law (definition of offences and scale of penalties) and on the procedural criminal law (procedural guarantees) as well as on the rules governing competence.

164. As far as procedural rules are concerned, we will limit ourselves to examining the provisions relating to procedural guarantees.

Restrictions on the right of defence occur constantly. The following are a few examples chosen from among the many cases reported: In the procedure followed in the military courts set up in Turkey under the state of siege, the right of the accused to see his file 37/ was withdrawn as well as his right to request the removal of a judge

35/ Report of the Human Rights Committee to the General Assembly at its thirty-fourth session (A/34/40, p. 18, para. 74).

36/ Ibid., p. 23, para. 95.

37/ See, for example, the decision of Istanbul Military Court No. 1, file No. 1971/26, proceedings, pp. 77-78.

against whom there is serious, definite and consistent evidence of bias. ^{38/} In addition, the military court could base its conviction on the testimony of a single individual, without even requiring that individual to appear in person. ^{39/} In such situations, there is therefore a risk that some authorities will yield to the temptation of producing a "fictitious" witness and this may be sufficient to secure a death sentence. It should be noted that, under the Turkish law mentioned above, military courts could also rely solely on evidence obtained by the police during the preliminary investigation. In considering the effects of states of emergency on the fate of detained persons, we shall have occasion to revert to the weakening of defence rights, especially with regard to the elimination, de jure or de facto, of the remedy of habeas corpus.

Restrictions on the publicity of deliberations. These restrictions are sometimes based on the requirements of so-called State secrecy. In the report mentioned above (see foot-note 34), the Inter-Parliamentary Union cites the case of a Uruguayan senator and two deputies who were allegedly tried in camera and on the basis of written proceedings. In South Africa, publication of the name of a person arrested under the Terrorism Act without police authorization is prohibited by the Second Police Secret Act, No. 1306 of 1980. ^{40/}

165. With regard to substantive rules, the following trends may be observed:

Emergence of a series of apparently loose definitions, with the result that a wide circle of persons may be held to have committed offences. Advantage is sometimes taken of this lack of precision to transfer cases from the jurisdiction of the ordinary courts to that of the emergency courts by reclassifying acts. The Brazilian national security act (Decree-Law No. 898, as amended), for example, refers to a few of these offences. Article 3, paragraph 2, provides penalties for "psychologically adverse acts of war", defined as "the use of propaganda, counter-propaganda and activities in the political, economic, psycho-social and military sphere for the purpose of influencing or inciting opinions, emotions, attitudes or behaviour among foreign groups, enemy, neutral or friendly, in opposition to the pursuit of national aims".

In general, increased use of the death penalty, as indicated in the most recent reports by the Ad Hoc Working Group of Experts on violations of human rights in southern Africa. ^{41/}

Extension of the factors that constitute complicity. For example, Uruguayan legislation provides for punishment of assistance to political prisoners by placing it in the same category as complicity.

^{38/} See article 40 of Act No. 353, as amended by Act No. 1596.

^{39/} See article 153 of the same Act.

^{40/} See the report mentioned above (foot-note 30), pp. 19 and 20, para. 76, and p. 24, para. 83.

^{41/} E/CN.4/1429 of 28 January 1981. See also documents E/CN.4/1020, paras. 73-81; E/CN.4/1111, paras. 40-43, E/CN.4/1135, para. 18 and E/CN.4/1365.

Undermining of the presumption of innocence. This can be seen in the many emergency provisions which enable individuals to be detained without trial (administrative internment, detention at the disposal of the executive power ...). In southern Africa, residents in the so-called "independent homelands" may be subjected to detention without trial under Proclamation 276, issued by Pretoria in 1977. To give another example, under the Criminal Procedure Act of 1977, ^{42/} the police are authorized "in the execution of their duties" to shoot a person trying to escape arrest when there is no other way of stopping him. The Identity Act of 1977 ^{43/} bars recourse to all civil and criminal remedies in such a case. The report refers to a boy who was shot dead by a policeman in application of this legislation for stealing a bunch of grapes, with the result that, as the Committee's report stated, the policeman fulfilled "the triple functions of prosecutor, judge and executioner".

Violation of the principle of non-retroactivity of criminal laws. In addition to the Decree of 29 September 1980 promulgated in Suriname, we find, for example, the case in Liberia (see the report by the Inter-Parliamentary Union referred to in footnote 34) of the trial by court martial of the respective presidents of the House and the Senate following the 1980 coup d'état. The court was specially established under Decree No. 1 of the People's Redemption Council of the Liberian armed forces of 12 April 1980, which instituted the crime of "high treason" with retroactive effect. It will be noted that, in this instance, capital punishment was carried out immediately.

3. Intensification of repression resulting from modification of the rules governing competence

(a) The question of the retroactivity of criminal laws dealing with matters of form

166. We should like to draw the Sub-Commission's attention to a matter of particular concern which is rarely discussed. The principle of non-retroactivity to which we have just referred is, as we know, applied only to substantive criminal laws of increased severity, whereas "more lenient" substantive criminal laws and particularly - and this is the crux of the problem - criminal laws dealing with matters of form (procedure and competence) are applied immediately to existing situations. They therefore have de facto retroactive effect. It may therefore well be asked whether the application of such a principle should not be questioned when a state of emergency is in force. We have seen that states of emergency are always characterized by a reduction in the competence of the ordinary courts and an increase in that of the emergency courts, whether military or otherwise. In particular, when a state of emergency is declared following a coup d'état, many people are prosecuted, on the strength of the change in competence, for acts committed before this change occurred. Many mission reports submitted by non-governmental organizations show that, except of course where a risk of a death sentence is involved, counsel for the defence of victims of repression are frequently more concerned by the retroactivity of laws dealing with matters of form than by that of substantive laws, although

^{42/} See the report referred to in footnote 27, p.33, para.75, and p.70, para. 159.

^{43/} See also (E/CN.4/1365, paras. 33 and 34) and (E/CN.4/1270, para. 49).

only the latter is open to criticism in such circumstances. As a result of the crisis conditions in which such trials take place, sentences are in any case very harsh (although they may subsequently be mitigated or limited by an amnesty law), while the lack of guarantees resulting from the transfer of competence (the holding of prisoners incommunicado, in camera hearings, preliminary investigations at which the defendant cannot state his case, inapplicability of habeas corpus, court-appointed counsel for the defence ...) leads to massive violations of human rights, particularly to cases of torture, which frequently have more serious consequences than the detention following sentencing.

For these various reasons, we suggest that the principle of non-retroactivity should be extended to the criminal laws governing competence and procedure, at least when a state of emergency enters into force.

(b) Modification of competence resulting from the lowering of the age of criminal responsibility in the political field

167. This has occurred in South Africa. Under the Children's Act, children under 18 years of age are subject to appropriate legal treatment, as under most legal systems. However, under the Government Notice of 17 September 1980, 44/ they are specifically excluded from the benefit of the Children's Act, particularly in the case of prosecution for offences against security. Four laws are principally concerned: the Terrorism Act, No. 83 of 1967, the Internal Security Amendment Act, No. 79 of 1976, the General Law Amendment Act, No. 62 of 1966, and the Criminal Procedure Amendment Act, No. 62 of 1979.

(c) Intervention of the executive power in the settlement of disputes relating to jurisdiction

168. During crisis periods, a large number of emergency courts are often established and also in some cases special courts. Apart from the fact that these courts frequently interfere with each other's work, they come into competition with the ordinary courts, giving rise to sometimes insoluble jurisdictional disputes.

In such cases, the decision is generally the responsibility of the executive power: when martial law is declared, the authorities responsible for applying the law are usually responsible for settling such disputes.

169. In conclusion, it should be noted that the repressive machinery thus established may prove inadequate for the maintenance of security. The authorities concerned then have to use repressive practices which do not fall within any legal frame of reference, even one of an emergency character. In other words, the authorities ultimately violate their own legality: this is the final stage in the degradation of a constitutional State, a stage characterized by the advent of abductions followed by disappearances, political murders, and abuses of all kinds by the paramilitary or parapolice forces, abuses which are tolerated or even encouraged by the official authorities no matter what disclaimers may be made. We shall not dwell on this development, to which the Working Group on Enforced or Involuntary Disappearances gave full attention in its latest report. 45/

44/ See the report referred to in footnote 27, annex IV, p.2, para. 2, and p.9, para. 5.

45/ See document E/CN.4/1435 of 22 January 1981.

170. This explains why amnesty laws enacted during or after periods of emergency generally tend to whitewash the authors of such human rights violations instead of expunging the acts of which their victims were "accused", as the Ad Hoc Working Group of the Commission on Human Rights has emphasized with regard to Chile.

C. The effects of states of emergency on detained persons

171. Any state of emergency constitutes a potential danger for freedoms. Any deviation in the application of states of emergency gives concrete form to that danger. Attacks on human rights, as we have seen, are initially caused by the undermining of institutions, the most serious effect of which is the elimination of any power of opposition. This is when the phase of massive and repeated violations begins.

Such violations are of particular concern as regards persons subjected to detention. This applies both to persons detained before or without trial and to persons who have been convicted, i.e. who have been imprisoned pursuant to a court sentence.

1. The fate of persons detained before or without trial

172. Such persons are frequently detained under a vague legal regime and the guarantees they enjoy vary, if they exist at all. We would first point out that the violations committed also vary according to the status of the victim, or, more accurately, according to the nature of the acts of which he is accused. In our view, these situations should receive particularly close attention, because the violations generally concern rights and guarantees from which, as we have seen, international law permits no derogation "in any circumstances".

(a) Status of the victims:

173. Surveys on violations of the rights of detainees show that:

Such violations are more serious if the decision on detention is taken under an emergency regime;

The circle of victims widens in the case of "deviation by perpetuation".

174. In outline, the process is as follows: initially, a state of emergency is declared either as a result of the sudden or insidious appearance of violent disturbances (rebellion, terrorism, armed struggle ...) or in connection with a coup d'état. Both elements are often present at the same time.

175. In the first case, it is the individuals who have, or have had, or are alleged to have had, recourse to violence who are directly affected, followed by their sympathizers (networks providing them with shelter, supplies of various kinds ...).

176. In the second case, members of the government and political or trade union leaders of the preceding regime are added to this category.

177. This initial phase is generally one of massive and brutal violations. Then the state of emergency is perpetuated. A policy of progressively planned repression is established, for which a variety of legal texts provide support in the form of so-called "substitute" guarantees. In the long term, sophisticated techniques may be used (psychological or sensory tortures, compilation of computer files, incitement to denunciation, each citizen supposedly being the "guarantor of national security").

178. It is then that the circle of victims is widened to include active political opponents (members of parliament, committed militants ...), although they have never had any links with those accused of using violence. Next, the circle is broadened to include purely ideological opponents. Included in this "nebulous" area of repression, sometimes called the "grey area", are individuals whose democratic opinions are well known (this is the period of denunciation) or who, in their professional capacity, are required to give public expression to the views of others, views which they may not necessarily share (lawyers, journalists, teachers ...), but which are an embarrassment to the authorities; in the same grey area we find individuals who are required to take certain action by their code of professional ethics (doctors, surgeons, members of the clergy, such as priests, pastors, bonzes ...).

179. The families of the victims, as well as groups and individuals dedicated to the protection of human rights, are frequently in the same situation.

180. Apart from the category of persons charged with acts of violence (whose guilt is established by a system of proof offering adequate guarantees), the other categories are legally ill-defined and are essentially prisoners of opinion. They are the victims par excellence of the perpetuation of states of emergency, which continue to produce their effects after the violent disturbances have largely subsided. The principle of proportionality may be presumed to have been violated.

(b) The different kinds of detention

181. Starting with the most serious cases, the situations encountered can be reduced to five:

Persons who are victims of enforced or involuntary disappearance;

Persons whose detention has been officially recognized but who remain "incommunicado";

Persons who are in the same situation but who are not - or are no longer - incommunicado (in principle, this is the fate of persons subject to administrative internment or "placed at the disposal of the national executive power"; and, to a lesser extent, of those who are subject to "internal exile");

Persons detained in due and proper form but under a warrant issued by an emergency court;

Persons detained under a warrant issued by an ordinary court that is duly competent.

182. While under detention, a person may be subjected to these different regimes alternately or in succession.

183. A common feature of the first three cases is the absence of any intervention by a judge, even of an emergency character, including indirect intervention through recourse to habeas corpus. It has been noted that, frequently, either the emergency legislation in force expressly precludes such intervention or the courts declare themselves incompetent, or the lawyers or families of the victims

are dissuaded from recourse to such remedies by threats, blackmail, arrest and even assault or murder. In this context, the number of lawyers who have been murdered or are in exile is a sound guide to the deviation of an emergency regime. 46/

184. It is therefore no exaggeration to speak of a total absence of guarantees in the first two cases (missing persons or persons held incommunicado) and an almost total absence in the case of persons placed at the disposal of the executive power. The gravity of their situation results not only from the legal uncertainty affecting them (lack of a judicial decision, indeterminate duration ...) but also from the very relative extent of their right of communication. This is frequently hampered, in particular by the intensive practice of so-called "transfers in the interests of the service". In some countries, these individuals are constantly transferred from one place of detention to another, frequently at some considerable distance, without their families or counsel for the defence being informed. Many of them thus undertake expensive journeys without any certainty of being able to communicate with the detainee, so that the practice is tantamount to holding him incommunicado.

185. Another feature common to these categories, and particularly the first two, is that the inalienable rights referred to, for example, in article 4, paragraph 2, of the Covenant are almost always violated in such cases, because the arrangements made and the absence of communication are conducive to the practice of masked murder and torture.

186. Such situations should be totally condemned. However, realism demands that our conclusions should contain balanced proposals. In order of priority, we believe that they should cover the following points:

187. The need to ensure that all arrests are made public, either de jure through implementation of minimum procedural guarantees provided for by the emergency legislation itself, or de facto through the operation of human solidarity. The second option has, for example, encouraged a humanitarian organization to disseminate a "guide for detainees" in a country where political abductions have reached serious proportions; it provides practical advice all of which is designed to break the silence surrounding such arrests, since publicity is the best protection and effectively supplements the guarantees provided in the major international instruments.

188. The need to prohibit the holding of detainees incommunicado, or at least, if the practice cannot be prevented, to restrict it to exceptional cases, for which limitative provision would be made, and to a very brief period, equivalent to detention pending inquiries but in no circumstances to administrative internment.

189. The need to prohibit administrative internment of unlimited duration

190. The need to keep demands for "substitute" guarantees within strict limits similar to those accepted, for example, by the European Court of Human Rights in the case of Ireland v. the United Kingdom, referred to earlier. This is a practice which involves serious risks of deviation, a matter to which we will revert later.

46/ See Bulletin du Centre pour l'Indépendance des Magistrats et des Avocats, Nos. 3 and 4, p.5.

191. The last two categories (persons detained in due and proper form under a warrant issued by an emergency court or an ordinary court) present legal guarantees, although in varying degrees - which are restricted in the first case and normal in the second. Even in the second case, however, these guarantees are insufficient to prevent human rights violations under an emergency regime. Inalienable rights are generally respected, any violations largely occurring during the initial phase of arrest and during the military or police inquiry. Failure to respect the right to a fair trial generally accounts for the most frequent violations.

192. It can admittedly be argued that international law in no way prohibits derogation from that right. However, the restrictions established should not modify that right to the point of making it non-existent. ^{47/} In our view, this occurs when every stage of the trial (arrest, preliminary enquiry, investigation, proceedings, including the defence, which is undertaken by court-appointed military officers), is exclusively in the hands of the military and when the sentence often has to be confirmed by the higher military authorities, which are empowered to increase it.

193. In our opinion, the principle of inalienability of certain rights should not be interpreted - on the strength of a false antithesis - as authorizing the suppression of rights from which derogation is permitted by international instruments. Only admissible restrictions proportional to the circumstances may be imposed.

194. With regard to the ordinary courts, their competence should be systematically promoted. There is, however, no room for undue optimism, because, under perverted emergency regimes, the ordinary guarantees, although they may continue to exist de jure, are often rendered ineffective by the persecution of lawyers, witnesses, family members, and even judges, referred to above.

195. A compromise solution would be to organize the right to a fair trial as part of the system of permanent emergency courts. This was the choice made by France in setting up a state security court, although it should be noted that this court was dismantled by the French Parliament in 1981.

196. Despite important restrictions, the elementary principles of the right to a fair trial are respected in the concept of such courts. The restrictions which they involve may, in the last resort, be accepted in a period of emergency, but, in our view, are not justified in normal times. Because they are contrary to the principle of proportionality, they may be a source of serious abuse outside periods of crisis. In other words, it is not so much their emergency nature which calls for criticism as their permanent nature, another form of "perpetuation". ^{48/}

^{47/} See a case cited by the Commission on Human Rights as failing to meet minimum international standards of fair trial (document E/CN.4/1266 concerning Chile).

^{48/} For the opposite argument, see François Terré, "La justice en temps de crise", Pouvoirs, op.cit., p.38.

2. The fate of persons detained after conviction

197. Without prejudging the question whether the sentence leading to imprisonment was passed with sufficient guarantees, we find that, in practice, the conditions in which sentences are served reflect a relative improvement in the situation of detainees. Cases of torture clearly decrease. Although this is not a general rule, inhuman or degrading treatment persists only in connection with the material and/or psychological conditions of prison life.

198. We shall therefore limit our analysis to the stage of release. A prisoner may be released because he has completed his sentence as a result of an act of clemency (free pardon, amnesty, conditional release, reduction of sentence ...).

199. A person who has completed his sentence should logically recover the bulk of his fundamental rights, and particularly the right to reside in the national territory. It must, however, be recognized that this rule is being widely infringed in two ways:

200. By keeping the person concerned in preventive detention... The person concerned is kept at the disposal of the executive power and, in the light of the comments made above on that situation, this marks a retrograde step and is in a sense a violation of the "non bis in idem" principle. In some cases this situation is followed by disappearance.

201. By expulsion from the national territory. In fact, this is a form of exile that is prohibited, as we know, under article 9 of the Universal Declaration of Human Rights and article 12, paragraph 4, of the Covenant. It will be argued that, in some countries, such "expulsions" are carried out under a constitutional provision known as "the right of option". A detainee who meets the prescribed conditions has a choice between completing his sentence in prison or leaving the country for a longer period calculated on the basis of the sentence or the part of it remaining to be served. Historically, this form of deportation - a security measure which replaces long sentences - was intended for ordinary persons convicted of offences under the law. Its extension to political prisoners has swelled the already substantial numbers of political refugees. In fact, the original procedure has been distorted because the option is a purely formal one. The offender only has a choice between leaving the country or remaining subject to arbitrary imprisonment.

202. Such "release/banishments" should receive the Sub-Commission's attention. In any case they seem open to criticism when they take the form of exchanges of political prisoners, or, as was the case in recent years, an exchange between political prisoners and spies in the conventional sense of the term. This is a dangerous regulatory mechanism which leads to what might be described as a balance of policies of oppression.

RECOMMENDATIONS

203. Given respect for the guarantees provided for in the relevant international instruments, the principle of emergency legislation is compatible with democratic principles. Only the deviations to which we have referred and which are the source of serious and repeated violations of human rights are reprehensible.

On that basis, we propose, first, that the role of the specialist international surveillance organs should be made more effective and, secondly, that the guarantees provided in international instruments should be strengthened.

A. MEASURES PROPOSED FOR THE DEVELOPMENT OF THE ROLE OF SPECIALIST INTERNATIONAL SURVEILLANCE ORGANS

1. The Sub-Commission might include in its agenda a special item entitled "Implementation of the right of derogation provided for under article 4 of the International Covenant on Civil and Political Rights and violation of human rights" for the purpose of:

Drawing up and updating the list of countries which proclaim or terminate a state of emergency each year;

Submitting an annual special report to the Commission on Human Rights analysing compliance with the rules, internal and international, guaranteeing the legality of the introduction of a state of emergency. In that connection, reference would be made to the principles I have endeavoured to define (proclamation, notification, exceptional threat, proportionality, non-discrimination, inalienability of fundamental rights).

2. The Commission on Human Rights would consider the special report of the Sub-Commission at each of its sessions.

3. The Human Rights Committee: the reports of the Governments submitted to the Committee periodically should give a detailed account of the texts governing states of emergency, whether or not they have been put into effect.

The normative instruments of municipal law should be annexed and available to research workers in the form of a collection of documents administered by the Division of Human Rights.

4. Regional specialist bodies: the development of regional surveillance activities should be encouraged. Since the bodies concerned are better equipped to take account of geopolitical characteristics, they are in a position to take action that is more acceptable to Member States and therefore more effective.

5. The powers of the depositary of instruments of ratification and, consequently, requests for derogation pursuant, inter alia, to article 4 of the Covenant should be extended. The depositary should be able to seek additional information and explanations which would be transmitted to the States Parties and to the specialist bodies so that the international surveillance authorities have sufficient material on which to reach a decision.

6. The organization of seminars and symposiums should be encouraged with a view to comparing the experiences of countries which have proclaimed and then lifted a state of emergency, with a view to working together to find the most appropriate means of dealing with similar situations. 49/

49/ In this connection, reference should be made to the seminar on amparo, habeas corpus and other similar remedies organized by the United Nations in Mexico City in 1961 (ST/TAO/HR/12). At its thirty-fourth session the General Assembly noted such work with interest and emphasized that an international seminar on the subject would be timely (resolution 34/178 of 17 December 1979).

B. MEASURES PROPOSED WITH A VIEW TO STRENGTHENING THE SUBSTANTIVE GUARANTEES PROVIDED BY THE INTERNATIONAL LAW ON HUMAN RIGHTS

We have emphasized that, whereas under the relevant instruments the exercise of certain rights could be limited or even temporarily suspended in certain cases (relative inalienability), other rights had to be fully preserved even in exceptional circumstances (absolute inalienability).

We suggest that the list of rights of absolute inalienability should be extended by reference to the instrument which specifically confers the most liberal guarantees. 50/

With regard to the rights of relative inalienability, the limits that may be accepted, particularly when a state of emergency is in force, should not fall below a certain minimum threshold.

In that regard, the rights of detainees should be dealt with as a matter of priority with a view to establishing the absolute inalienability of some of them.

While it may be accepted, although not approved, that, in exceptional circumstances, a detainee's right to education and culture may not be fully respected, it is not logical that the right to a fair trial should not cover a minimum of inalienable rules, particularly since we have noted that the absence of such rules almost always encourages systematic violations of human rights.

To that end, the following proposals could be referred to a working group on detention or any other competent body.

1. In regard to the period of imprisonment,

any arrest followed by remand in custody should be made public without delay or at least be entered in a register;

the time during which a person is held incommunicado should not exceed a short period prescribed by the emergency law itself. In order to protect life and personal freedom, it should not be possible to suspend the habeas corpus procedure or similar remedies.

2. In regard to the inalienable elements of the right to a fair trial, the following should be guaranteed:

A minimum of communication with defence counsel, who should be freely chosen;

The proceedings should be made public, even if attendance is restricted to the family and, most important, to legal observers who are qualified or appointed by non-governmental organizations.

3. In regard to sentences: capital punishment should be abolished, particularly where political matters are concerned.

4. In regard to procedure: the principle of retroactivity of the criminal laws relating to competence and procedure should be suspended when a state of emergency enters into force.

50/ See, in this connection, the broad guarantees provided for in the American Convention on Human Rights.

ANNEX

LIST OF GOVERNMENTS WHICH HAVE REPLIED TO THE QUESTIONNAIRE ADDRESSED TO
THEM PURSUANT TO SUB-COMMISSION RESOLUTION 10 (XXX)

BARBADOS

BELGIUM

BURUNDI

CAPE VERDE

EGYPT

EL SALVADOR

GERMANY, Federal Republic of

ISRAEL

ITALY

JAMAICA

LIBYAN ARAB JAMAHIRIYA

MADAGASCAR

MAURITIUS

MEXICO

MOROCCO

NETHERLANDS

NORWAY

PAKISTAN

PANAMA

PHILIPPINES

SEYCHELLES

SURINAME

SWEDEN

UPPER VOLTA