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Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics

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ARTICLES

RECONCEPTUALIZING STATES OF EMERGENCY UNDER INTERNATIONAL HUMAN RIGHTS LAW: THEORY, LEGAL DOCTRINE, AND POLITICS

Scott P. Sheeran*

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INTRODUCTION

States of emergency are today one of the most serious challenges to the implementation of international human rights law (IHRL). They have become common practice and are associated with severe human rights violations as evidenced by the Arab Spring. The international jurisprudence on states of emergency is inconsistent and divergent, and what now constitutes a *public emergency* is ubiquitous. This trend is underpinned by excessive judicial deference and abdication of the legal review of states' often

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dubious claims of a state of emergency. The legal regime, as positively expressed in international human rights treaties, does not adequately reflect the underlying theory and politics of emergency situations. The renaissance of IHRL as an effective constraint and regulator of states of emergency requires the articulation of a more holistic understanding and a new approach to the legal doctrine. This Article seeks to provide an enriched account of the international law on states of emergency, which can be reconciled with both theory and practice, and which will better protect human rights from regression in times of emergency.

The modern origins of the state of emergency as a legal concept came from nineteenth-century Western Europe and from the liberal democratic tradition. States of emergency are built on the somewhat artificial dichotomy of norm and exception, which endorses a bifurcated approach to balancing the interests of societal goals and individual rights. "State of emergency" is therefore a label that may provide instant legitimacy to the greater limitation of human rights by government.

Serious violations of human rights often accompany emergency situations, which are variously known as "states of emergency," "states of exception," "states of siege," and "martial law."¹ The central international human rights treaties envisage a regime of derogation allowing states parties to temporarily adjust their obligations under the treaties in exceptional circumstances. The two legal questions that constitute the heart of the derogation regimes are first, whether a situation constitutes a "public emergency which threatens the life of the nation," and second, whether the measures are "strictly required by the exigencies of the situation."² A third question or requirement is that the state derogating must notify the treaty depositary and therefore in practice the other state parties of its public emergency and measures of derogation.³

While states do not deny that human rights should continue to apply during an emergency,⁴ in practice they have co-opted and distorted the derogation regime under IHRL. One in-depth U.N. study concluded that about ninety-five states, or around half of the countries in the world, had been under a state of emergency, actual or declared, during the period of

1. Special Rapporteur for States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency: Tenth Annual Rep.*, ¶¶ 20, 33, 48, Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/1997/19 (June 23, 1997) (by Leandro Despouy) [hereinafter Special Rapporteur's Tenth Report].

2. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; see also Human Rights Committee [H.R. Comm.], General Comment No. 29: States of Emergency, ¶¶ 2, 4, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter General Comment No. 29] ("Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.").

3. *E.g.*, General Comment No. 29, *supra* note 2, ¶ 17; see also ICCPR, *supra* note 2, art. 4.

4. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 8.

1985–1997.⁵ The so-called Arab Spring—the popular uprisings in Tunisia, Egypt, Libya, Syria, Bahrain, Yemen, and elsewhere—are evidence of the need to reconsider this legal issue. It is no coincidence that many countries within the Arab Spring had in place abusive states of emergency that had lasted decades.⁶ Furthermore, many of the recent situations of “emergency” in these Arab states were arguably brought about by the respective governments’ violent responses to initially peaceful protests by their own people.

The jurisprudence on states of emergency and derogations under IHRL is inconsistent and divergent. The most prominent jurisprudence on this subject derives from the International Covenant for Civil and Political Rights (the Covenant) and the European Convention on Human Rights, both of which evidence a clear gap between the principles espoused and actual international decisions and determinations. This is unsurprising. It was a recognized view in the U.N. Commission on Human Rights in the 1950s, during the process of drafting the two international covenants, that the article on derogations “might produce complicated problems of interpretation and give rise to considerable abuse.”⁷

A central issue in the jurisprudence is determining the existence of a situation of emergency—a public emergency that threatens the life of the nation—that justifies derogation of international human rights obligations. The human rights treaty bodies have often abdicated responsibility for making this determination (for example, the European Court of Human Rights through the “margin of appreciation”⁸) and seldom overturn the assertion of a state of emergency by a government.⁹ The treaty bodies prefer to focus instead on the issue of proportionality of the emergency measures or rely on other elements of the legal test. The European Court of Human Rights, for example, has acquiesced to a government assertion that the threat of terrorism prior to any actual attack was a public emergency threatening the life of the nation.¹⁰ With such a potentially low threshold, it has become commonplace for regimes that do not respect

5. See Special Rapporteur for States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency: Final Rep.*, add., U.N. Doc. E/CN.4/Sub.2/1997/19/Add.1 (June 9, 1996) [hereinafter Special Rapporteur’s Final Report].

6. The situation in Egypt and Syria is an example of this. See *infra* Part II.B.

7. Cf. U.N. Secretary-General, *Annotations on the Text of the Draft International Covenants on Human Rights*, ch. V, ¶ 36, U.N. Doc. A/2929 (July 1, 1955).

8. The “margin of appreciation” doctrine associated with the European Convention on Human Rights (ECHR) is based on the notion that each society is entitled to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INT’L L. & POL. 843, 844–45 (1999).

9. The treaty bodies usually decide the cases on another basis. See *infra* Part III.A (concerning jurisprudential interpretation of the ICCPR and ECHR).

10. *A & Others v. United Kingdom*, App. No. 3455/05, ¶¶ 175–181 (Eur. Ct. H.R. 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403>; see also *infra* text accompanying notes 246–258.

human rights to claim a state of emergency in many situations; that are ill fitted to the language and intent of the international human rights treaties. The elasticity of what now jurisprudentially constitutes a “state of emergency” has provided a veneer of legality to specious claims by governments and has undermined the normativity of the law.

In attempting to address these difficulties in recent decades, there has been no shortage of prescriptive solutions provided by scholarly projects in IHRL.¹¹ These however have tended to be highly formalist—calling essentially for more and stricter rules—and based on unrealistic reform proposals of the human rights implementation machinery. More recently, the terrorist attacks of September 11 and the subsequent “war on terror” brought a renewed interest in emergencies in political theory and constitutional law scholarship.¹² That scholarship has debated many of the key underlying themes of states of emergency but has failed to grapple meaningfully with the regimes of derogation contained in the human rights treaties and the particular perspective of international law.

This Article demonstrates that the problems concerning states of emergency under IHRL require a more nuanced understanding of and solution to the problem. The relevant treaties provide a conception of law that does not fully account for underlying issues of theory and politics. This conception is based heavily on a rule-of-law model, as opposed to a sovereignty model, and on the legal dichotomy of normality and exception although without the necessary implementation superstructure to support

11. See, e.g., General Comment No. 29, *supra* note 2; The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, in Permanent Rep. of the Neth. to the U.N., Note verbale dated Aug. 24, 1984 from the Permanent Rep. of the Neth. to the U.N. Office at Geneva addressed to the Secretary-General, annex, U.N. Doc. No. E/CN.4/1985/4 (Sept. 28, 1984) [hereinafter Siracusa Principles]; Workshop on the Norms and Procedures in Times of Public Emergency or Internal Violence, Oslo, Nor., June 15–17, 1987, *Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence*, U.N. Doc. E/CN.4/Sub.2/1987/31, reprinted in TURKO INST. FOR HUMAN RIGHTS, DECLARATION OF MINIMUM HUMANITARIAN STANDARDS (1991); INT’L LAW ASS’N, REPORT OF THE SIXTY-FOURTH CONFERENCE 12–13, 232–36 (1990), reprinted in 85 AM. J. INT’L L. 716 (1991); INT’L LAW ASS’N, REPORT OF THE SIXTY-FIRST CONFERENCE 56–97 (1984) [hereinafter PARIS MINIMUM STANDARDS], reprinted in 79 AM. J. INT’L L. 1072 (1985). For a fuller discussion of these studies, see generally JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY 66–81 (1994).

12. See, e.g., GIORGIO AGAMBEN, THE STATE OF EXCEPTION (Kevin Attell trans., Univ. of Chi. Press 2005) (2003); DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY (2006); OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006); David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753 (2004); John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210 (2004); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1021–24 (2003); Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 MOD. L. REV. 655 (2005); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004); William E. Scheuerman, *Emergency Powers and the Rule of Law After 9/11*, 14 J. POL. PHIL. 61 (2006).

such important legal assumptions. The jurisprudence has also failed to grapple with other key challenges of principle including the role of the separation of powers, emergencies based on ongoing terrorist threats, democracy as a check on emergency powers, and issues of government causation of emergencies. In this regard, the jurisprudential evasions and work-arounds developed over time can be seen as unsurprising reactions to deeper forces at work.

This Article seeks to provide an enriched account and reconceptualization of the IHRL on states of emergency. Based on a holistic review of the theory, legal doctrine, and politics, it proposes a new interpretive approach to the key legal questions concerning states of emergency. The objective is a more coherent and intellectually honest account of the relevant international human rights treaties, and one that will restore greater normativity to the law. This Article argues that the most effective solution is to reconceive the traditional *substantive* question of the existence of a public emergency. This is done by understanding it as subsumed firstly into the *procedural* question of notification and secondly into the substantive question of proportionality of measures. This therefore does not mean the traditional legal assessment and threshold of a public emergency is irrelevant. The assessment and threshold will form an inherent and integral part of the proportionality assessment of the measures of derogation as compared to the nature of the public emergency. This reinterpretation will obviate the false assumption that the existence of a public emergency—that is, the distinction between exception and normality—is an objective and stand-alone legal question under IHRL. The redistribution of the formal competence to determine a public emergency (that is, from the courts or tribunals to the government) reinstates a concept of separation of powers to states of emergency and IHRL. Making the existence of public emergencies formally a *political* question, not a *legal* one, is a necessary concession to the highly sensitive nature of such emergencies that better reflects constitutional and political theory and also general legal principles. The proposed approach does not require significant changes in the IHRL implementation machinery, nor even changes in the essence of determinations of international courts or treaty bodies. Rather, it requires an implicit acceptance of broader theoretical and political influences, but in a way that enhances the normativity of IHRL. Most importantly, this reinterpretation makes clear that it is not necessary for courts and tribunals to determine a public emergency and therefore constantly affirm, both directly and indirectly, the specious assertions of states.

This Article sets out a thesis for a new interpretation of states of emergency under IHRL in four main parts. First, it briefly reviews the background of the theory and law on states of emergency, highlighting the key themes from the historical and conceptual basis of international human rights treaties. Second, the Article describes the practice and problems concerning states of emergency, using examples from the Arab Spring countries, and considers the limits of the IHRL implementation machinery. Third, it reviews the problems with the current conception of the two

central legal questions for states of emergency by analyzing European and U.N. jurisprudence and the key challenges mentioned in this introduction. Finally, it sets out and explains a new interpretative approach that harmonizes the theory, legal doctrine, and current practice in the unsettled but important area of protecting human rights in emergency situations.

I. BACKGROUND: THEORY AND LAW

A. *Historical Origins and Use*

It is necessary to begin with a brief sketch of the historical origins and use of states of emergency. The legal regime of states of emergency is a relatively modern development with origins in the French Revolution and that gained a place in most national legal systems by the mid-twentieth century.¹³ In a general sense, it involves “governmental action taken during an extraordinary national crisis that usually entails broad restrictions on human rights in order to resolve the crisis.”¹⁴

The concept has historical roots that stretch as far back as Roman times in the practice of nominating a “dictator” in exceptional circumstances of external attack or internal rebellion.¹⁵ It was not until the eighteenth and nineteenth centuries that “European constitutions . . . tentatively began to elaborate the idea of a constitutional state of emergency,” although they typically left the important details to separate legislation.¹⁶

The modern concept of the state of emergency began with a 1789 decree of the French Constituent Assembly. This distinguished a “state of peace” from a “state of siege,” where under the latter, “all the functions entrusted to the civilian authority for maintaining order and internal policing pass to the military commander, who exercises them under his exclusive responsibility.”¹⁷ After the French Revolution of 1848, the Constitution of the Second French Republic included a new article that prescribed that the occasions, forms, and effects of the “state of siege” were to be elaborated in law.¹⁸

13. World War I corresponded with a permanent state of exception in most of the warring states. For a useful overview of the history of states of exception, see AGAMBEN, *supra* note 12, at 11–22; see also Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben’s State of Exception*, 17 EUR. J. INT’L L. 677, 677–78 (2006) (book review).

14. Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 AM. U. J. INT’L L. & POL’Y 35, 36 (1986).

15. JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 7 (1992); Nigel S. Rodley, Book Review, 42 INT’L & COMP. L.Q. 732, 732–33 (1993) (reviewing ORAA, *supra*).

16. Scheppele, *supra* note 12, at 1006–07 (discussing the experiences of France and Germany).

17. AGAMBEN, *supra* note 12, at 5 (quoting THEODOR REINACH, DE L’ÉTAT DE SIÈGE: ÉTUDE HISTORIQUE ET JURIDIQUE 109 (1885)).

18. *Id.* at 12.

Around the same time, the concept also became relevant in North America, particularly in U.S. constitutional law and practice. During the American Civil War, President Lincoln suspended the writ of habeas corpus guaranteed by Article I of the Constitution where it was deemed necessary; he also imposed censorship of the mail and authorized the arrest and detention of those suspected of “disloyal and treasonable practices.”¹⁹ In a speech to Congress in 1861 at the start of the war, the President justified his actions by declaring “[w]hether strictly legal or not” the measures adopted were taken “under what appeared to be a popular demand and a *public necessity*.”²⁰

The key formative experience for states of emergency prior to the founding of the United Nations and the drafting of the International Bill of Rights was that in Germany. The Weimar Constitution written after World War I “tried harder than most constitutions to ensure that constitutional failure in a time of emergency [would] not occur.”²¹ Article 48 of that constitution provided the President extraordinary powers to cope with exceptional threats to the system, with “measures necessary to re-establish law and order, if necessary using armed force and including the suspension of a particular and limited set of rights.”²² During the thirteen years that the Weimar Constitution was in effect, Article 48 was invoked no less than two hundred and fifty times.²³ Almost immediately after taking power in Germany, and in the midst of the Great Depression, Adolf Hitler and the Nazi government “proclaimed the Decree for the Protection of the People and the State, which suspended the articles of the Weimar Constitution concerning personal liberties.”²⁴ This decree was not repealed, and so, as Agamben notes, “from a juridical standpoint the entire Third Reich can be an exception that lasted twelve years.”²⁵

During the course of World War II, democratic regimes were also transformed by the expansion of emergency executive powers.²⁶ A notorious example is the U.S. government’s domestic internment during World War II of 110,000 people of Japanese descent, 70,000 of whom were U.S. citizens.²⁷ The significant impact of emergency situations on U.S. demo-

19. *Id.* at 20.

20. *Id.* at 20 (emphasis added) (quoting Abraham Lincoln).

21. Scheppele, *supra* note 12, at 1007.

22. *Id.*; see *The Reich Constitution of August 11th 1919 (Weimar Constitution) with Modifications*, PSM DATA, http://www.zum.de/psm/weimar/weimar_vve.php (last visited Apr. 2, 2013).

23. Scheppele, *supra* note 12, at 1008.

24. AGAMBEN, *supra* note 12, at 3; see *Translation: Decree of the Reich President for the Protection of the People and the State*, U.S. HOLOCAUST MEM’L MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007889> (last updated May 11, 2012).

25. AGAMBEN, *supra* note 12, at 3.

26. *Id.* at 6.

27. *Id.* at 22.

cratic governance was also felt during the Cold War.²⁸ President Truman first declared a state of emergency in response to the conflict in Korea and 'communist imperialism' in 1950, a state of emergency that lasted nearly a quarter of a century.²⁹ The declaration of emergency was used over time to justify a number of U.S. actions in the fight against communism.³⁰ Scheppele notes that "[b]etween the 1930s and 1970s, Congress passed about 470 statutes that empowered the executive branch to act under emergency powers."³¹ As this necessarily brief historical sketch demonstrates, declarations of states of emergency have generally taken place in the context of exceptional threats, including situations of war, and where the nation was or was perceived to be fighting for survival.³²

B. Conceptual Basis

The issue of states of emergency has been the subject of significant scholarly work. Not only has it been studied from the IHRL perspective,³³ but also more in-depth from the constitutional law perspective as demonstrated by the respective U.S. studies during the Cold War by Clinton Rossiter and Carl Friedrich.³⁴ It also has a conceptual foundation in political

28. See Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 4, 181; Scheppele, *supra* note 12, at 1015.

29. Scheppele, *supra* note 12, at 1017; Harry S. Truman, President of the United States, Proclamation 2914—Proclaiming the Existence of a National Emergency (Dec. 16, 1950), available at <http://www.presidency.ucsb.edu/ws/?pid=13684>; see National Emergencies Act 1976, Pub. L. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601-1651 (2011)) (terminating the National Emergency of Dec. 16, 1950 on Sept. 14, 1978).

30. For examples of rights abuses justified by emergency declarations to combat communism, see Scheppele, *supra* note 12, at 1018-19.

31. *Id.* at 1019; see also SPECIAL COMM. ON THE TERMINATION OF THE NAT'L EMERGENCY, EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW NOW IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY, S. REP. NO. 93-549, AT III (1ST SESS. 1973); JULES LOBEL, EMERGENCY POWER and the Decline of Liberalism, 98 YALE L.J. 1385, 1408 (1989).

32. See AGAMBEN, *supra* note 12, at 15-19.

33. See U.N. Secretary-General, *supra* note 7, ch. V, ¶¶ 35-47; *id.* ch. VI, ¶ 53; FITZPATRICK, *supra* note 11; ORAA, *supra* note 15; ANNA-LENA SVENSSON-McCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION: WITH SPECIAL REFERENCE TO THE TRAVAUX PRÉPARATOIRES AND CASE-LAW OF THE INTERNATIONAL MONITORING ORGANS (1998); L.C. Green, *Derogation of Human Rights in Emergency Situations*, 16 CAN. Y.B. INT'L L. 92 (1978); Oren Gross, "Once More unto the Breach": *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437 (1998); Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT'L L.J. 1, 2 (1981); Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281 (1976); Susan Marks, *Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights*, 15 OXFORD J. LEGAL STUD. 69, 84-94 (1995); Dominic McGoldrick, *The Interface Between Public Emergency Powers and International Law*, 2 INT'L J. CONST. L. 380 (2004).

34. C.J. FRIEDRICH, CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER (1957); CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948).

theory and philosophy, reaching as far back as Aristotle,³⁵ and has more recently been addressed in the twentieth-century writings of Carl Schmitt in Germany.³⁶

The conceptual rationale for states of emergency is relatively clear and is rooted in the nature of the *exceptional*. As Rossiter suggests, in times of crisis a government must “temporarily be altered to whatever degree is necessary to overcome the peril and restore normal conditions.”³⁷ A major research study of the International Commission of Jurists (ICJ) on states of emergency that involved fifteen international experts and various national studies has suggested that the “state of emergency is the counterpart in international law of self-defence in penal law.”³⁸ This idea of an exceptional situation and a state’s need to defend itself is underpinned by an unusual balance between the collective’s interests (for example, the life of the nation) and the interests of the individual, in particular, in human rights and civil liberties. The existence of mechanisms such as derogation is often seen as a concession to the inevitability of exceptional state measures in times of emergency, and also as a means to control these measures.³⁹ Derogations are based on the balancing of human rights with collective goals such as public order and national security, terms that are not easily defined by law.⁴⁰

This balancing is not unique to derogation and emergencies, but rather is a part of the general corpus of IHRL in which limitations are often an inherent feature. As McGoldrick states, the “idea of limitations is based on the recognition that most human rights are not absolute but rather reflect a balance between individual and community interests.”⁴¹

35. See Scheppelle, *supra* note 12, at 1004–05 (discussing Aristotle, Machiavelli, and Bodin).

36. The main work on this issue was CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., Univ. Chi. Press 2005) (1922).

37. ROSSITER, *supra* note 34, at 5.

38. INT’L COMM’N OF JURISTS [ICJ], *STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS*, at iii, 413 (1983) [hereafter ICJ STUDY]; see also MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 84 (2d rev. ed. 2005) (“[I]t offers a State’s democratically legitimate, supreme constitutional organs a basis for avoiding exceptional, irreparable damages to the general public . . .”).

39. Hickman, *supra* note 12, at 657; Humphreys, *supra* note 13, at 678.

40. Eur. Comm’n for Democracy Through Law [Venice Comm’n], *Opinion on the Protection of Human Rights in Emergency Situations*, ¶ 36, 66th Plenary Sess., Opinion No. 359/2005 (Apr. 4, 2006) (“A balance has to be found between national security, public safety and public order, on the one hand, and the enjoyment of fundamental rights and freedoms, on the other hand.”); SVENSSON-McCARTHY, *supra* note 33, at 188–91; see also Hartman, *supra* note 33, at 2.

41. McGoldrick, *supra* note 33, at 383. This is reflected in the structure of the Universal Declaration of Human Rights, which has a general limitations provision in Article 29. See Universal Declaration of Human Rights, G.A. Res 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); see also Special Rapporteur of the Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *The Individual’s Duties to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of*

Derogation of human rights in times of emergency “raises, in an especially acute way, issues of the scope” of IHRL and its “relationship with the concept of state sovereignty.”⁴² There tends to be an overlap between the limitations and derogations of IHRL, with many of the same principles applicable (for example, proportionality, nondiscrimination).⁴³ However, inherent in the state of exception concept is the need to restore *normalcy* in which the full range of human rights can be respected.⁴⁴ The derogation concept is a product of a key distinction between *normalcy*, which is the general state of affairs, and *emergency* (for example, the French “state of siege”), which is the state of exception.⁴⁵ That said, however, a clear distinction in practice between normalcy and exception is obviously recognized as somewhat artificial.⁴⁶ As *Abi-Saab* suggests, we should refute a *clear dichotomy* between ordinary limitations and extraordinary derogations, as they “partake of the same nature and constitute a legal continuum.”⁴⁷

C. Two Schools: Sovereignty and Legality

Generally speaking, there are two broad schools of thought on legality during a state of exception. At the theoretical level, there is a divide in scholarship between those who favour a *rule-of-law* approach (constitutional or legislative) for the state of exception, and others who “criticize the pretense of regulating by law what by definition” they say cannot be reduced to legal norms.⁴⁸ The latter “understands the state of exception to be ‘essentially extrajudicial’, something prior to or other than law.”⁴⁹ The supporters of this view—which can be called the *sovereignty* approach—

Human Rights, U.N. Doc. E/CN.4/Sub.2/432/Rev.2 (1983) (by Erica-Irene A. Daes); Higgins, *supra* note 33, at 283. Not all scholars agree with this view. See, e.g., Aileen McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 MOD. L. REV. 671, 672 (1999) (“There is thus something of a paradox in a legal scheme which is supposed to protect the individual against the collective, itself sanctioning limitations to rights on collective interest grounds.”).

42. McGoldrick, *supra* note 33, at 388. See generally A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* 847–81 (2001) (discussing the development of Article 15 of the ECHR and early invocations of the article).

43. McGoldrick, *supra* note 33, at 383–84.

44. See, e.g., General Comment No. 29, *supra* note 2, ¶¶ 1–2 (“The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant.”).

45. Oren Gross & Fionnuala Ní Aoláin, *Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625, 644 (2001); Gross, *supra* note 33, at 439–40.

46. Georges Abi-Saab, *Foreword* to SVENSSON-McCARTHY, *supra* note 33, at v, vi.

47. *Id.* at vi.

48. AGAMBEN, *supra* note 12, at 10.

49. Humphreys, *supra* note 13, at 678.

believe that it is neither possible nor desirable to control executive action in times of emergency using standard juridical accountability mechanisms.⁵⁰ Carl Schmitt, writing in the interwar period in Germany, and probably the most well-known proponent of this approach, stated:

The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all. The most guidance the constitution can provide is to indicate who can act in such a case.⁵¹

Underlying Schmitt's thesis is the idea that rule of law constraints may prevent a polity from defending itself in a serious crisis, and that the capacity of a ruler to maintain the existence of the liberal state may depend on not being bound by the law. As Scheppele indicates, the "state of exception is, as a result, the means for restoring the order necessary for legality to exist."⁵² Schmitt's thesis has been somewhat supported by various authors in the context of the post-September 11 legal debates on U.S. constitutional law.⁵³ Giorgio Agamben, a key recent writer in this area, does not accept Schmitt's thesis but still concludes similarly that the state of exception is "a *fiction iuris* par excellence, which claims to maintain the law in its very suspension as force-of-law."⁵⁴ Central to this Article is the premise that the sovereignty perspective is informed by a pragmatic view of the law's inability to regulate executive action in a national crisis. Such a pragmatic view is evident in the examples mentioned above, such as when President Lincoln justified the suspension of habeas corpus as necessary to ending the war, "whether strictly legal or not."

For many scholars though, the Schmitt sovereignty thesis and its modern equivalents are unacceptable. The contrary view, dominant in IHRL, is that even in a state of emergency the rule of law must still prevail,⁵⁵ or

50. See Gross, *supra* note 12, at 1021–24; Hickman, *supra* note 12, at 658.

51. SCHMITT, *supra* note 36, at 6–7.

52. Scheppele, *supra* note 12, at 1011.

53. See sources cited *supra* note 12.

54. AGAMBEN, *supra* note 12, at 59.

55. This is well reflected in the third paragraph of the preamble of the Universal Declaration of Human Rights: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . ." Universal Declaration of Human Rights, *supra* note 41, pmb.; see also Special Rapporteur's Tenth Report, *supra* note 1, ¶ 47 ("[T]he very fact that it is an extreme legal remedy means that it cannot lie outside the rules and principles of law."). The Inter-American Court of Human Rights, Advisory Opinion OC-8/87, states that the suspension of human rights does not imply "a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard for the principle of legality by which they are bound at all times." Habeas Corpus in Emergency Situations (Arts. 27(2) and

as some call it “the principle of legality.”⁵⁶ From a theoretical perspective, commentators such as Agamben hold the view that the state of exception is “an integral part of positive law because the necessity that grounds it acts as an autonomous source of law.”⁵⁷ As much as Schmitt’s and others’ similar perspectives are rooted in *realpolitik*, so too are criticisms of their approaches. The recognition that fictitious states of exception provide a vehicle for abusive state action goes back as far as 1885.⁵⁸ The risk, as Claudio Grossman puts it, is that “[t]he increased concentration of governmental power, along with the destruction of societal checks and balances, creates and perpetuates entrenched authoritarian systems.”⁵⁹ Therefore the *legal* supervision of states of emergency becomes of primary importance since the gravest violations of human rights may occur where states use their power unfettered by the rule of law. Furthermore, as Cole argues in the context of the post-September 11 debate on U.S. constitutional law, those who call for suspension of the rule of law in times of emergency have failed to provide support for why this sovereignty approach is more acceptable or more likely to ensure the security of the population in the long term.⁶⁰

Apart from the sovereignty argument offered by Schmitt and others, the rule-of-law approach faces another challenge that is grounded in constitutional and political theory rather than international law: separation of powers. Under this concept, the rule-of-law approach presents a challenge to the balance of powers between the branches and may endanger the domestic legitimacy of the courts. The IHRL scholarship on states of emergency and derogations has referred very little to the separation of powers.⁶¹ Yet as one commentator notes, the balancing of human rights and the public interest is “the area in which the political or value-laden nature of the choices facing [a] court is most obvious, raising questions as to the legitimacy of judicial rather than democratic decision-making.”⁶² For some, particularly the general public, the comprehensive rule-of-law approach may raise the objection that judges are inappropriately substituting their own views on a state of emergency for those of the democratically elected public representatives. While this argument is a challenge generally for the law, it is naturally more acute in crisis situations where the life of the nation may be at stake.

7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 24 (Jan. 30, 1987).

56. See *id.*; Special Rapporteur’s Tenth Report, *supra* note 1, ¶ 50.

57. AGAMBEN, *supra* note 12, at 23.

58. *Id.* at 3.

59. Grossman, *supra* note 14, at 36; see also ICJ STUDY, *supra* note 38, at 417–24.

60. Cole, *supra* note 12, at 1757.

61. Humphreys notes this about Agamben’s otherwise instructive book. Humphreys, *supra* note 13, at 684.

62. One aspect is described as “the legitimacy of allowing unelected judges to decide whether particular policies are justified in the public interest and whether it is necessary for these to defer to individuals rights or *vice versa*.” McHarg, *supra* note 41, at 672, 695.

D. Democratic and Nondemocratic States

A somewhat overlooked but underlying issue in this debate is the democratic or nondemocratic nature of the state. Agamben notes that “it is important not to forget that the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one.”⁶³ It is not surprising therefore that many perspectives on states of emergency are based on an assumption of a democratic state. Rossiter, for example, indicates that “the problem of elaborating systems of crisis government arises *only* within states that have previously achieved some level of democracy and retain at least a symbolic, if not real, attachment to its preservation.”⁶⁴ Underlying this is a suggestion that the democratic nature of government provides a better foundation for strong executive powers in an emergency and, therefore, for the limitation of human rights. Scheppele argues that “[f]or an executive to seize power and suspend rights under a democratic constitutional government is an entirely different matter, normatively speaking, than for a monarch (even a constitutional monarch) to do so.”⁶⁵ This view plays into the rationale and legitimacy of government as the people’s democratically elected representative to act potentially beyond the strict confines of the rule of law, and it also resonates with the theory of separation of powers. It implicitly suggests that a pluralistic democracy will better safeguard the rights of its citizens in time of emergency, with rights such as freedom of religion, association and assembly, freedom of expression, and a free press.

This issue of democratic and nondemocratic states is seldom referred to as a factor in IHRL scholarship. This is perhaps not surprising as it is not part of the law as positively expressed in the IHRL treaties. However, Anna-Lena Svensson-McCarthy raises it in the historical context of World War II in her major study on states of emergency and human rights:

There was, on the other hand, a fundamental difference in the way that autocratic methods of government were used by the democracies and the dictatorships [in World War II]: they were used for *entirely different purposes*. The former made *temporary* use of exceptional powers to enable them to defend themselves efficiently and to *return fully* after the war to their democratic constitutional order, wherein their peoples could again enjoy their rights and freedoms. The latter countries did so for *offensive motives*, namely, in order to maintain and expand *permanently* oppressive and racist governments under which individuals would not have been able to be truly free.⁶⁶

63. AGAMBEN, *supra* note 12, at 5.

64. FITZPATRICK, *supra* note 11, at 23. In Rossiter’s view, altering government as necessary to overcome the peril and restore normal conditions during crisis is predicated on “a democratic, constitutional government.” See ROSSITER, *supra* note 34, at 5.

65. Scheppele, *supra* note 12, at 1005; *see also* NOWAK, *supra* note 38, at 84 (justifying a state of emergency based on a democratically legitimate state).

66. SVENSSON-McCARTHY, *supra* note 33, at 2–3 (footnote omitted).

Svensson-McCarthy's general view of states of emergency, which is further elaborated below, not surprisingly relies heavily on democracy.⁶⁷ An implicit point is that democratic government and society can be a constraint on exceptional powers in times of emergency, a constraint that is separate from the law and judiciary. This is an important point that will be taken up further below, but whether or not the point is correct, it appears predicated on a *truly* existential threat to the nation (for example, as faced by many Western European democracies in World War II). In more recent times, the idea of democratic governance and society as a constraint on executive power seems to have permeated the European jurisprudence. For example, the European Commission for Democracy Through Law, the Council of Europe's advisory body on constitutional matters (also known as the Venice Commission), provided the following opinion on human rights in emergency situations: "[t]he security of the State and its *democratic institutions*, and the safety of its officials and its population, are vital public and private interests that deserve protection, *if necessary at high costs*."⁶⁸ This suggests a balancing of interests between the state and civil and political rights in favor of the former "if necessary."

There are various problems with fully endorsing this "democracy as constraint" perspective for IHRL and states of emergency. It is necessary to acknowledge, as Svensson-McCarthy does, that "excesses and abuses" did and do occur in democracies.⁶⁹ As examples above demonstrate, such as U.S. internment of Japanese residents during World War II, democracies are not immune to abuse of states of emergency. It is true that modern practice shows the abuse of states of emergency is most serious in relation to governments that are not truly democratic or responsive to the will of their people. However, while the violations of true democracies may not be of the same magnitude as the violations of nondemocracies, they are human rights violations nonetheless and cannot be easily dismissed or rationalized. Measures put in place in an emergency may also subvert many of the rights that are central to democracy, such as freedom of expression, assembly, and association. Moreover, what is or is not a democracy and whether this distinction may justify differential treatment are difficult questions. The definition of a modern "democracy" is no longer an easy one, and today's international landscape is characterized by great variation of state regimes that possess an equally varied array of human rights challenges. Furthermore, as actors in the international system, no states are immune from self-interested claims and assertions including for states of emergency.

The point of this brief summary is to sketch, rather than elaborate and resolve, some of the underlying themes relating to states of emergency.

67. *Id.* at 4–6. Svensson-McCarthy makes it one of three pillars of her arguments in her book. *See id.* at 4–5. *See generally id.* ch. 4.

68. Venice Comm'n, *supra* note 40, ¶ 5 (emphasis added). Article 15 on derogations in the ECHR also refers to "measures necessary in a democratic society," which is not found in Article 4 of the ICCPR. *Id.* ¶ 7.

69. SVENSSON-McCARTHY, *supra* note 33, at 2.

These general themes are important for placing the international human rights treaty law and practice in its proper context, and for the thesis that is articulated in this Article.

The modern origins of the state of emergency as a legal concept came from nineteenth-century Western Europe and from the liberal democratic tradition. States of emergency are built on the somewhat artificial dichotomy of norm and exception, which endorses a bifurcated approach to balancing the interests of the collective (for example, national security) and the individual (that is, human rights). “State of emergency” is therefore a label that may provide instant legitimacy to the greater limitation of human rights by government. Yet the concept is not conducive to clear definition; as one political theorist notes, it is an “ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political.”⁷⁰ Many scholars have also predicated their analysis of emergency measures on a democratic form of government. A distinction between democracies and nondemocracies would be difficult to apply in practice, and, in any event, democratic governments are not immune to abuses of states of emergency.

On the question of the two broad schools of thought—*rule of law* and *sovereignty*—and their associated variations, it is not necessary to take a view here on the better approach. This is not an easily resolved issue; as one scholar writing recently on states of emergency has said, “the question of the limits of the rule of law is the central question of jurisprudence.”⁷¹ There are various attempts to find an intellectual middle ground, but these may not yet provide a convincing solution.⁷² Rather the point is that there are different views, and these different views are important for understanding the nature of the doctrinal law on states of emergency, including its contested interpretation and application in practice, as will be shown below.

E. Treaty Regimes and Law

The general shape and development of the treaty regimes provides an interesting comparison to the underlying themes identified above. The first instrument of the International Bill of Rights, the 1948 Universal Declaration of Human Rights (UDHR),⁷³ did not even include a specific regime for states of emergency. The UDHR reflected the balance of individual rights and public interest in a general clause on the permissible limitations on the exercise of rights.⁷⁴ Article 29 recognized the individual’s “duties to the community in which alone the free and full development of his personality is possible” and that in exercising rights and freedoms everyone shall be subject only to limitations for the purpose of securing re-

70. AGAMBEN, *supra* note 12, at 1 (quoting Alessandro Fontana, *Du droit de resistance au devoir d'insurrection*, in *LE DROIT DE RESISTANCE* 16 (Jean-Claude Zancarini ed., 1999)).

71. DYZENHAUS, *supra* note 12, at 7.

72. See, e.g., AGAMBEN, *supra* note 12; Humphreys, *supra* note 13.

73. Universal Declaration of Human Rights, *supra* note 41.

74. *Id.* art. 29.

spect for the rights of others and "of meeting the just requirements of morality, public order and the general welfare in a democratic society."⁷⁵

In the negotiation of the two international human rights covenants, it was the United Kingdom that proposed in 1947 a specific derogation regime for states of emergency.⁷⁶ The British proposal was promoted on the basis that it was necessary to guard against states being forced to suspend human rights *in toto* in time of war.⁷⁷ The U.K. argument drew on British wartime experiences, but there was also a view among commentators that the argument was connected to the frequent use of emergency rule in the British colonies during this period.⁷⁸ The central debate concerning the British proposal was whether a limitations clause, as was already contained in the UDHR, was preferable to a derogations clause. The United Kingdom and others argued that "time of war" and other "extraordinary peril or crisis" situations would not fall within the scope of the limitations provided for in the various articles of the Covenant, nor could they be adequately covered by a general limitations clause.⁷⁹ In the end, Article 4 of the Covenant as agreed to by the Commission was very close to the British draft language. The Commission's final text received only minor amendments in the Third (Human Rights) Committee of the General Assembly, and its final adoption occasioned no great problems.⁸⁰ Article 4 provided:

1. In time of *public emergency which threatens the life of the nation* and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant *to the extent strictly required by the exigencies of the situation*, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

75. *Id.*

76. See Rep. of U.K. to the U.N. Human Rights Comm'n, Letter from Lord Dukeston, the United Kingdom Representative on the Human Rights Commission, to the Secretary-General of the United Nations, annex 1, art. 4(1), U.N. Doc. E/CN.4/AC.1/4 (June 5, 1947). For the drafting history, see FITZPATRICK, *supra* note 11, at 38-40; NOWAK, *supra* note 38, at 88.

77. SVENSSON-McCARTHY, *supra* note 33, at 202 n.12.

78. SVENSSON-McCARTHY, *supra* note 33, at 213; see, e.g., FITZPATRICK, *supra* note 11, at 16.

79. U.N. Secretary-General, *supra* note 7, ch. 5, ¶ 37; see also FITZPATRICK, *supra* note 11, at 52-53 (discussing drafting history).

80. See Rep. of the Comm'n on Human Rights, 10th Sess., Feb. 23-Apr. 16, 1954, annex I(B), art. 4, U.N. Doc. E/CN.4/705 (Apr. 1954); Higgins, *supra* note 33, at 286.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.⁸¹

The essence of the derogations regime in Article 4 is a system allowing states parties to adjust their obligations temporarily under the Covenant in times of public emergency threatening the life of the nation. As demonstrated by the text, the key elements of the new derogation regime included: (i) a threshold of severity cause, (ii) the requirement of national proclamation and international notification to the treaty depositary, (iii) the consistency of the derogation with the state's other international obligations; (iv) the proportionality of the measures to the situation, (v) non-discrimination in applying the measures, and (vi) the protection of nonderogable rights.⁸² Article 4 is therefore a mechanism that permits states to temporarily limit and modify the rights and obligations set out in the ICCPR, with the exception of the extent to which those rights are nonderogable.

The Covenant's text thus aimed at striking a balance between the protection of individual rights and the protection of national needs in times of emergency by placing reasonable limits on emergency powers.⁸³ The 1955 report on the drafting of the two covenants by the U.N. Secretary-General spelled out this rationale:

It was also important that States parties should not be left free to decide for themselves when and how they would exercise emergency powers because it was necessary to guard against States abusing their obligations under the covenant. Reference was made to the history of the past epoch during which emergency powers had been invoked to suppress human rights and to set up dictatorial regimes.⁸⁴

The Covenant's drafters believed that the obligation to report publicly any recourse to emergency powers would be an effective deterrent to un-

81. ICCPR, *supra* note 2, art. 4 (emphasis added).

82. FITZPATRICK, *supra* note 11, at 55. The other international obligations may include law of armed conflict, which begins to apply when the relevant thresholds are met, for example, and noninternational armed conflict within the state. See Special Rapporteur's Tenth Report, *supra* note 1, ¶ 38.

83. See Hartman, *supra* note 33, at 11.

84. U.N. Secretary-General, *supra* note 7, ch. V, ¶ 37.

warranted derogation.⁸⁵ While the derogation regime won out over a general limitations clause, this obviously did not remove other rights-specific limitations from the scope of the Covenant and the individual rights it protected. A large number of individual articles on specific human rights, such as the freedoms of religion and association and the rights to liberty of movement and peaceful assembly, still included the language of general limitations.⁸⁶

The European Convention on Human Rights and the Inter-American Convention on Human Rights also included derogations articles based on similar, though not identical, principles as Article 4 of the Covenant.⁸⁷ While the European Convention was concluded in 1950, sixteen years earlier than the Covenant, the negotiation of the Covenant's article on derogation was well developed by that time, and the European article on derogation was also the result of a British initiative.⁸⁸ In contrast, the African Charter on Human and Peoples Rights of 1981 did not regulate states of emergency, nor did it contain a derogations provision. The African Charter relied on a general limitations clause similar in nature to that of the UDHR.⁸⁹ The Arab Charter on Human Rights of 2004 included a derogation regime.⁹⁰ Accordingly, states may be subject to different emergency derogation regimes depending on the treaties and instruments to which they are party, particularly as the list of nonderogable rights varies from treaty to treaty. The Covenant's derogations article, for example, provides for more nonderogable rights than the correlative article of the European Convention.

As indicated above, there are difficult issues concerning the legal dichotomy between normality and exception, as well as what justifies the derogation as opposed to limitation of human rights. The primary example given of derogation in the Covenant negotiations was the instance of "war."⁹¹ Yet, unlike the European Convention, which refers to "war or

85. For example, see the view of Rene Cassin, representative of France in the Committee charged with drafting the Covenant. Comm'n on Human Rights, Summary Record of the 127th Meeting, 5th Sess., June 14, 1949, 7-8, U.N. Doc E/CN.4/SR.127 (June 17, 1949).

86. See ICCPR, *supra* note 2, arts. 18(3), 19(3), 22(2), 12(3), 21.

87. See American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter IACHR]; European Convention on Human Rights art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. For the drafting history of the IACHR, see FITZPATRICK, *supra* note 11, at 42-43.

88. FITZPATRICK, *supra* note 11, at 40-41; Higgins, *supra* note 33, at 289.

89. Compare African Charter on Human and Peoples' Rights art. 27(2), June 27, 1981, OAU Doc. CAB/LEG/67/3 ("The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."), with Universal Declaration of Human Rights, *supra* note 41, art. 29(2) ("In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.").

90. Arab Charter on Human Rights, League of Arab States, art. 4, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005).

91. See U.N. Secretary-General, *supra* note 7, ch. V, ¶¶ 38-39.

other public emergency,”⁹² or the American Convention, which refers to “war, public danger, or other emergency,”⁹³

the Covenant makes no reference to “war.” The [Covenant’s] *travaux préparatoires* indicate that the omission was intentional and that it was motivated by an important symbolic concern. “While it was recognized that one of the most important public emergencies was the outbreak of war, it was felt that the covenant should not envisage, even by implication, the possibility of war, as the United Nations was established with the object of preventing war.”⁹⁴

It would seem unlikely though that this was the sole reason for all states negotiating the Covenant. Certainly those seeking a broader interpretation of the right of derogation might have been aided by the exclusion of war from the article. Yet, as Buergenthal pointed out, the omission clearly did not exclude war, as it was the most dramatic public emergency that may “threaten the life of the nation.”⁹⁵ The scope of public emergency also seemed to include “natural catastrophes as well as . . . internal disturbances and strife.”⁹⁶ There was thus an overarching thread concerning the magnitude of emergency that Bossuyt, in his work analysing the Covenant’s negotiation, described as follows:

The main concern was to provide for a qualification of the kind of public emergency in which a State would be entitled to make derogations from the rights contained in the covenant which would not be open to abuse. The . . . wording is based on the view that *the public emergency should be of such a magnitude as to threaten the life of the nation as a whole.*⁹⁷

This key trigger of Article 4—a public emergency threatening the life of the nation—reflected the idea that a state of emergency only existed *in extremis*, “when the state [faced] a challenge so severe that it [had to] violate its own principles to save itself.”⁹⁸ The vagueness of this concept of public emergency, however, was criticized in the U.N. Commission on

92. ECHR, *supra* note 87, art. 15.

93. IACHR, *supra* note 87, art. 27.

94. Thomas Buergenthal, *To Respect and Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72, 79 (Louis Henkin ed., 1981) (quoting U.N. Secretary-General, *supra* note 7, ¶ 39); see also Special Rapporteur’s Tenth Report, *supra* note 1, ¶ 35.

95. Buergenthal, *supra* note 94, at 79.

96. *Id.*; Special Rapporteur’s Tenth Report, *supra* note 1, ¶ 35; NOWAK, *supra* note 38, at 79 (referring to serious natural or environmental catastrophes, such as earthquakes, floods, cyclones, or nuclear accidents).

97. MARC J. BOSSUYT, *GUIDE TO THE “TRAVEAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 85–86 (1987) (emphasis added).

98. Scheppele, *supra* note 12, at 1004.

Human Rights.⁹⁹ There was an awareness of the potential for abuse and the negative experiences prior to drafting of the Covenant, particularly in Germany. Those who supported the wording of draft Article 4 made comments on its interpretation that were underpinned by fine, though perhaps not clear or realistic, distinctions. As one state commented, while “it was difficult to give a precise definition to the life of the nation,” it “was significant that the text did not relate to the life of the government or of the state.”¹⁰⁰

This brief review of the background and treaties provides some context to understanding the orientation of the international human rights treaties. The treaties incorporated the artificial dichotomy of norm and exception by introducing a specific derogation regime based on the concept of a public emergency threatening the life of the nation. States of emergency under IHRL are also firmly predicated on the rule-of-law approach (that is, legal and judicial control) for state powers during a time of emergency. There appeared to be no concession in the treaties to the theories of Schmitt and others on the extralegal nature of emergencies and therefore little recognition of the “point of imbalance between public law and political fact”¹⁰¹ for states of emergency. The Covenant, European Convention, and Inter-American Convention also do not differentiate legally between democracies and nondemocracies. In sum, the treaty law is more reflective of one side of the various debates identified above (for example, the dichotomy of norm and exception, the rule of law rather than extralegal measures, the nonrole of democracy); as will be shown below, this has impacted the application, interpretation, and effectiveness of IHRL.

II. PRACTICE AND PROBLEMS

A. Overview of Practice and Problems

State practice in invoking public emergencies and derogating from human rights obligations has been widespread. A large number of states have been in regular and constant states of emergency.¹⁰² The reasons most often claimed by states for invoking a state of emergency have been civil war and cases of serious internal unrest.¹⁰³ As indicated above, over the period of 1985–1997 about half of the states in the world were re-

99. See SVENSSON-McCARTHY, *supra* note 33, at 215.

100. *Id.* at 211 (quoting the representative from Chile).

101. See *infra* note 322.

102. In a 1983 study of the ICJ, it was estimated that thirty states were in some form of emergency. ICJ STUDY, *supra* note 38, at 413. By 1986, the number of states estimated to be in an emergency had increased to about seventy. See FITZPATRICK, *supra* note 11, at 3–4; see also Daniel O’Donnell, *States of Exception*, INT’L COMMISSION JURISTS REV., Dec. 1978, at 52, 53. Over the twelve-year period of 1985 to 1997, the U.N. Special Rapporteur for States of Emergency reported that about ninety-five states were subject to a *de jure* or *de facto* state of emergency. Special Rapporteur’s Final Report, *supra* note 5, ¶ 6.

103. NOWAK, *supra* note 38, at 90.

ported as subject to a de jure or de facto state of emergency.¹⁰⁴ Even more troubling was that many countries in this period had extended or reintroduced their states of emergencies.¹⁰⁵ At the time of the Special Rapporteur's final report in 1997, for example, his annual list suggested that thirty states were in a situation "in which exceptional measures had been in force for some time."¹⁰⁶

In addition to this practice, the constitutional and legal provision for states of emergency has become almost universal, with one study indicating that over 145 states had constitutional provisions of this nature by 1996.¹⁰⁷ Yet, there has been a problem concerning the consistency of many such provisions with IHRL.¹⁰⁸ As the U.N. Human Rights Committee has observed, "[o]n a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4."¹⁰⁹

There unfortunately has been a correlation between emergency situations and grave violations of human rights. Even those human rights from which derogation is not permitted are often affected.¹¹⁰ This bleak record has included states of emergency frequently accompanied by arbitrary detentions without due process, disappearances, summary executions, torture, and other forms of ill treatment.¹¹¹ Freedom from arbitrary

104. Special Rapporteur's Final Report, *supra* note 5. For the typology of the International Law Association, see FITZPATRICK, *supra* note 11, at 3–21 (detailing the types and examples of emergency).

105. See Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 128, 180. See generally Special Rapporteur's Final Report, *supra* note 5 (listing the countries that have been in, extended, or reintroduced a state of emergency).

106. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 128; see also Special Rapporteur's Final Report, *supra* note 5, at 2–16. The Final Report contains the tenth annual list of the Special Rapporteur, which comprised countries and territories that he considered, based on various sources of information, to be: (i) countries and territories in which an emergency is in force and (ii) countries and territories in which emergency regimes in various forms have been in force during the period from January 1985 to May 1997.

107. Linda Camp Keith & Steven C. Poe, *Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration*, 26 HUM. RTS. Q. 1071, 1080 tbl.1 (2004); see also NOWAK, *supra* note 38, at 84.

108. The U.N. Human Rights Committee, for example, has not been restrained in telling states their constitutions are not consistent with Article 4. See FITZPATRICK, *supra* note 11, at 85–86; McGoldrick, *supra* note 33, at 386–87; see also Special Rapporteur's Tenth Report, *supra* note 1, ¶ 184.

109. General Comment No. 29, *supra* note 2, ¶ 3.

110. A high incidence of grave human rights abuses, particularly of nonderogable rights, will accompany an emergency. Amnesty Int'l, *Torture and Violations of the Right to Life Under States of Emergency*, AI Index POL 30/02/88 (July 1988) (prepared for submission to the U.N. Special Rapporteur for States of Emergency, Leandro Despouy); FITZPATRICK, *supra* note 11, at 35; Special Rapporteur's Tenth Report, *supra* note 1, ¶ 169.

111. Grossman, *supra* note 14, at 36. U.N. Special Rapporteur Despouy writes that the rights engaged include the right to liberty and security of the person, right to liberty of movement and freedom of residence, right to freedom from interference for home and correspondence, right to freedom of opinion and expression, and the right to strike. See Special

detention and fair trial are human rights particularly affected by emergencies.¹¹² The U.N. Working Group on Arbitrary Detention, for example, has described states of emergency as a “root cause” of arbitrary detention.¹¹³ States of emergency can impact economic, social, and cultural rights as well as civil and political rights.¹¹⁴ Vulnerable groups may be the most affected by human rights violations, especially minorities and refugees, as well as journalists and human rights workers.¹¹⁵ There is a disturbing tendency, observed in the ICJ’s study, for states of emergency to become perpetual or to effect far-reaching authoritarian changes in the ordinary legal system.¹¹⁶ Such semipermanent states of emergency lead to risks of *institutionalizing* the limitations on human rights. This is evidenced by the shift of offending laws from emergency legislation to permanent internal security laws.¹¹⁷ This idea of “institutionalizing the emergency” is well summed up by the U.N. Special Rapporteur for States of Emergency, Mr. Leandro Despouy:

[T]he normal legal order subsists although, parallel to it, a special, para-constitutional legal order begins to take shape . . . allowing the authorities to invoke, according to the needs of the moment, either the normal legal system or the special system, although in

Rapporteur’s Tenth Report, *supra* note 1, ¶ 158; *see also* FITZPATRICK, *supra* note 11, at 36–37; NOWAK, *supra* note 38, at 95.

112. *See* FITZPATRICK, *supra* note 11, at 38 n.44.

113. Chairperson-Rapporteur of the Working Group on Arbitrary Detention, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, ¶ 64, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008) (by Leila Zerrougui).

114. Special Rapporteur’s Tenth Report, *supra* note 1, ¶ 172. The 1983 ICJ study focused on fifteen states and analysed in-depth the human rights issues and violations. The ICJ study revealed the very broad impact on a society of states of emergency that it described as affecting not only freedom from arbitrary detention and the right to a fair trial, but also

trade union rights, freedom of opinion, freedom of expression, freedom of association, the right of access to information and ideas, the right to an education, the right to participate in public affairs . . . not only individual rights but also collective rights and rights of peoples, such as the right to development and the right to self-determination.

ICJ STUDY, *supra* note 38, at 417; *see also* Grossman, *supra* note 14, at 36.

115. Special Rapporteur’s Tenth Report, *supra* note 1, ¶¶ 173, 175.

116. *See* ICJ STUDY, *supra* note 38, at 415; Special Rapporteur’s Tenth Report, *supra* note 1, ¶ 127. FITZPATRICK, *supra* note 11, refers to Brunei, Egypt, Turkey, Paraguay, the Occupied Palestinian Territory (at 4–5), the United Kingdom (at 6–7), Chile (at 10), and Malaysia (at 17); NOWAK, *supra* note 38, at 91, refers to Paraguay, Haiti, Brazil, Uruguay, Colombia, Cameroon, Zaire, Syria, Thailand, South Korea, Malaysia, Chile, Egypt, Peru, El Salvador, Northern Ireland and the United Kingdom, and Israel.

117. *See, e.g.*, FITZPATRICK, *supra* note 11, at 17–18 (discussing Malaysia); Sri Lankan Introduces New ‘Anti-Terror’ Legislation, BBC NEWS (Aug. 31, 2001), <http://www.bbc.co.uk/news/world-south-asia-14735405> (discussing Sri Lanka); *supra* text accompanying notes 131–137 (discussing Syria).

practice the former is clearly relinquished in favour of the latter.¹¹⁸

Israel, for example, has a large volume of legislation that has been developed as a consequence of its state of emergency and has become an inherent part of its ordinary legal system.¹¹⁹ Israel even stated to the U.N. Human Rights Committee that certain of its fundamental laws, orders, and regulations depend on the existence of a state of emergency and would need to be revised before lifting the emergency so as not to leave crucial matters unregulated.¹²⁰

States of emergency can become a tool to protect a government or leader by limiting freedom of expression, political assembly, and association and other civil and political rights. “[T]he most serious human rights violations tend to occur in situations of tension when those in power are, or think they are, threatened by forces which challenge their authority” or which they perceive to be a threat.¹²¹ There is a tendency for some governments to regard a challenge to their authority, even if peaceful, as a threat to the life of the nation, and this is particularly so for governments that provide no lawful means for transfer of power.¹²² As further discussed below, such governments can be quick to use disproportionate force against peaceful protestors, particularly in nondemocracies, and then utilise the resulting violence as a pretext to justify a state of emergency.

Terrorism has also posed a special problem for the law on states of emergency. States, including democratic ones, have used terrorist threats to justify a number of emergencies lasting decades.¹²³ States of emer-

118. Special Rapporteur’s Tenth Report, *supra* note 1, ¶¶ 131, 132.

119. MENACHEM HOFNUNG, *DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL* 49–50 (1996).

120. Human Rights Comm., *Second Periodic Report of the Government of Israel*, ¶ 72, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001).

121. ICJ STUDY, *supra* note 38, at i, 274–75. One reason for this is the underlying situation, as the ICJ study comments:

[I]t is the acute social conflicts that arise and will inevitably continue to arise in societies founded on deep-seated disparities that are at the root of various states of exception. . . .

The civil or military groups that rule in this type of society have a tendency to use states of exception as a means of perpetuating situations that are inherently volatile and explosive.

Id. at 274–75.

122. *Id.* The Special Rapporteur for States of Emergency in his report refers to “legal instrument[s] used by many dictators to suppress the human rights of most of the population and to crush any form of political opposition,” Special Rapporteur’s Tenth Report, *supra* note 1, ¶ 5. Fitzpatrick refers to excessive use of force against demonstrators, clandestine murders by security or others, summary execution and torture, and secret trial. FITZPATRICK, *supra* note 11, at 35.

123. See, e.g., ICJ STUDY, *supra* note 38, at 83; *supra* text accompanying notes 131–137 (discussing Syria); *supra* text accompanying notes 138–146 (discussing Egypt); *supra* text accompanying notes 223–230, 239–245 (discussing the United Kingdom and Ireland).

gency, coupled with broad-reaching and vague antiterrorism laws, can provide extraordinary powers for governance above the law. Antiterrorism legislation is also a key vehicle for shifting human rights limitations from emergency to ordinary legal systems.¹²⁴ Furthermore, as terrorism often is perceived by a state's population as an external threat (for example, from foreigners or minorities), the democratic majority may also support a government's crisis mentality for further-reaching but less human rights-compliant measures against the perceived threat.¹²⁵

In a state of emergency, separation of powers is impacted as executive control can become more dominant, often leading to human rights violations.¹²⁶ The judiciary and its work can suffer in the conditions that surround these emergencies. A state of emergency can also lead to mass dismissal of judges, to special or military courts, and to the restriction or suspension of judicial review.¹²⁷ As former U.N. Special Rapporteur Despouy stated, emergencies and their impact on institutions can "replace the concept of the separation and independence of powers with that of a hierarchy of powers."¹²⁸

The problems in the practice of states of emergency are many and varied and combine to create a powerful and severe impact on human rights protection. These problems include the inconsistency of constitutional provisions and IHRL on derogations; the broad range of human rights that are negatively affected, including the rights of minorities; the fact that governments use self-preservation as a pretext for violent repression of peaceful opposition; the institutionalizing of emergency provisions in the normal legal system; terrorism as an ongoing emergency; and distorted separation of powers, which leads to the undermining of judicial review.

124. There are also examples where states of emergency have ended and the emergency laws in question have simply shifted or blurred into antiterrorism legislation. For example, the Terrorism Act 2000 rolled back some long-standing emergency powers in Northern Ireland but consolidated many of the measures as permanent features of British antiterrorism law. See Terrorism Act 2000, c. 11 (U.K.).

125. As Gross and Ní Aoláin comment, violent crises, of which September 11 is a good example, often precipitate a reaction that "legal niceties may be cast aside as luxuries to be enjoyed only in times of peace and tranquility" and a consequent "tranquilizing effect on the public's critical approach toward emergency regimes." See GROSS & NÍ AOLÁIN, *supra* note 12, at 7, 236. Gross and Ní Aoláin also note the surprise that gripped the United Kingdom when the 7/7 bombers were identified as British born and therefore not "outsiders." *Id.* at 224. Israel has reported to the U.N. Human Rights Committee that police searches and other invasions of privacy were accepted by the public itself. See H.R. Comm., Summary Record of the 1675th Meeting, 63d Sess., July 15, 1998, ¶ 50, U.N. Doc. CCPR/C/SR.1675 (July 21, 1998).

126. FITZPATRICK, *supra* note 11, at 30–31.

127. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 149.

128. *Id.* ¶ 150.

B. *The Arab Spring—Syria and Egypt*

It is easy to underestimate how problematic states of emergency have been in countries with serious and continuing violations of human rights. The states most central to the Arab Spring—Tunisia, Egypt, Libya, Syria, Bahrain, and Yemen—have all invoked states of emergency to justify repressive actions.¹²⁹ International human rights treaty-monitoring bodies have repeatedly questioned Algeria, Egypt, and Syria, for example, about the need to maintain their emergency laws.¹³⁰ As these states' respective emergency laws have been inextricably entwined with repressive political regimes, the repeal of the state of emergency has been a central demand of the popular Arab citizen uprisings. In this regard, the integral role of states of emergency in institutionalizing human rights violations is well illustrated by a closer examination of the cases of Syria and Egypt respectively.

Syria has been subject to forty-eight years of emergency governance under the Ba'athist regime currently led by President Assad. A 1963 emergency decree vested almost total power in the President and the state's military-security apparatus.¹³¹ The Constitution of Syria adopted in 1973 states that "laws enacted prior to the declaration of the Constitution remain in force until they undergo amendments which conform to the Constitution."¹³² The emergency laws accordingly remain valid while being *prima facie* unconstitutional and therefore in a sense override the constitution. The U.N. Human Rights Committee criticized Syria in 1978 for failing to provide notification of its state of emergency,¹³³ and subsequently the Committee noted that the Syrian government's laws and actions had put Syria under a "quasi-permanent state of emergency, thereby jeopardizing the guarantees of article 4 of the Covenant."¹³⁴ The Committee also noted that the public emergency was continued "without any convincing explanations being given as to the relevance of these derogations to the

129. See, e.g., Noura Erakat, *Emergency Laws, the Arab Spring, and the Struggle Against "Human Rights,"* JADALIYYA (Aug. 10, 2011), <http://www.jadaliyya.com/pages/index/2051/emergency-laws-the-arab-spring-and-the-struggle-ag>. In Bahrain, for example, it has been estimated that the government's emergency response to predominantly peaceful demonstrators led to forty killed, 1600 arrested and detained and many of those held incommunicado for weeks and even months, and more than 300 convicted and sentenced including some instances of the death penalty. See Human Rights Watch, *World Report (2011)*, Bahrain, available at <http://www.hrw.org/world-report-2012/world-report-2012-bahrain>.

130. See H.R. Comm., *Concluding Observations of the Human Rights Committee: Egypt*, ¶ 6, U.N. Doc. CCPR/CO/76/EGY (Nov. 28, 2002) [hereinafter H.R. Comm., *Egypt*] (questioning Egypt); H.R. Comm., *Concluding Observations of the Human Rights Committee: Syrian Arab Republic*, ¶ 6, U.N. Doc. CCPR/CO/71/SYR (Apr. 24, 2001) [hereinafter H.R. Comm., *Syria 2001*] (questioning Syria).

131. H.R. Comm., *Syria 2001*, *supra* note 130, ¶ 6.

132. ALKARAMA, *THE PERMANENT STATE OF EMERGENCY—A BREEDING GROUND FOR TORTURE* 1, 5 (2010) (report submitted to the Committee Against Torture in the context of the review of the Initial Periodic Report of the Syrian Arab Republic).

133. Rep. of the H.R. Comm., 7th Sess., July 30–Aug. 17, 1979, ¶ 293, U.N. Doc. A/34/40 (Sept. 27, 1979); GAOR, 34th Sess., Supp. No. 40 (1979).

134. H.R. Comm., *Syria 2001*, *supra* note 130, ¶ 6.

conflict with Israel and the necessity for these derogations to meet the exigencies of the situation claimed to have been created by the conflict.”¹³⁵

Syria well illustrates the institutionalization of emergency by the transfer of emergency laws into mainstream security laws. The government lifted the state of emergency laws in April 2011 but little seemed to change in practice.¹³⁶ This is partly due to general laws having been passed to “entrench the state of emergency,” such as “criminalizing expression of opposition to ‘the aims of the revolution’”; legally “establish[ing] the State Security apparatus, granting it sweeping powers of arrest and detention, as well as effective impunity for human rights abuses”; and providing officials immunity from prosecution for offenses committed in carrying out their duties.¹³⁷

Egypt demonstrates many of the same issues and problems as Syria. Egypt has been under a state of emergency for most of its modern existence in both its colonial and independence periods. The U.N. Human Rights Committee has criticized Egypt’s state of emergency as “semi-permanent.”¹³⁸ The Egyptian Emergency Law of 1958 was invoked after the assassination of President Anwar Sadat in 1981. The law summarily abrogated provisions of the constitution, drastically curbed freedom of expression and association, and institutionalized a parallel justice system comprising specially constituted emergency courts and the trial of civilians by military courts.¹³⁹ Decree 1/1981, as amended in 2004, was adopted based on the Emergency Law of 1958 and referred a variety of ordinary crimes to state security courts, including “crimes” concerning state security, public incitement (including by newspapers), and public demonstrations and gatherings.¹⁴⁰ The Egyptian state of emergency has been used inter alia to detain people administratively without charge or trial; try people before emergency or military courts (the procedures of which do not satisfy international standards of due process); prosecute journalists and

135. H.R. Comm., *Concluding Observations of the Human Rights Committee: Syrian Arab Republic*, ¶ 6, U.N. Doc. CCPR/CO/84/SYR (Aug. 9, 2005).

136. See *Syria Protests: Assad to Lift State of Emergency*, BBC NEWS (Apr. 20, 2011), <http://www.bbc.co.uk/news/world-middle-east-13134322>; see also HUMAN RIGHTS WATCH, WE’VE NEVER SEEN SUCH HORROR: CRIMES AGAINST HUMANITY BY SYRIAN SECURITY FORCES 1–11 (2011).

137. AMNESTY INT’L, END HUMAN RIGHTS VIOLATIONS IN SYRIA 1, 3–4 (2011) (prepared for submission to the U.N. Universal Periodic Review, Oct. 2011).

138. H.R. Comm., *Egypt*, *supra* note 130, ¶ 6. It has also been referred to as “endless” and “permanent.” Sadiq Reza, *Endless Emergency: The Case of Egypt*, 10 NEW CRIM. L. REV 532, 534–35, 543 (2007); see also HUMAN RIGHTS WATCH, ELECTIONS IN EGYPT: STATE OF PERMANENT EMERGENCY INCOMPATIBLE WITH FREE AND FAIR VOTE 28 (2010).

139. Martial law was first declared by the British rule in 1914 and martial law or emergency rule, as it was later called, was declared periodically until 1981. See ICJ, ICJ SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF EGYPT 1 n.1, 2, 4 (2009).

140. See ICJ, *supra* note 139, at 1–4.

other government critics under criminal defamation legislation; and strictly control freedom of expression, association, and assembly.¹⁴¹

Egypt also evidences an *institutionalization* of the state of emergency. The state of emergency was subject to periodic review and renewal by the Egyptian People's Assembly, but this in practice was little more than a pro forma exercise.¹⁴² The Emergency Law was renewed every two years with the result that Egypt was under a state of emergency for the past thirty years.¹⁴³ In 2007, amendments were made to the constitution that effectively rendered certain aspects of the emergency laws immune from judicial review.¹⁴⁴ Amnesty International described these amendments as the "most serious undermining of human rights safeguards in Egypt since the state of emergency was re-imposed in 1981."¹⁴⁵ The amendments also provided the government with permanent emergency-style powers in national security laws so that "when it then bows at last to international criticism and lifts the state of emergency the impact will be no more than cosmetic."¹⁴⁶

The Egyptian government has long asserted that its emergency laws are required to combat terrorist threats.¹⁴⁷ While Egypt faced high levels of terrorist attacks between the 1970s and the 2000s,¹⁴⁸ more recently this level of terrorism has declined. The Egyptian authorities are still involved in policies aimed at combating the resurgence of terrorism and dismantling alleged terrorist cells. However, the relevant Egyptian law does not limit acts of terrorism to political armed violence; it broadly concerns "any threat or intimidation" used in order to "disturb . . . peace or jeopardiz[e] the safety and security of society."¹⁴⁹ After the overthrow of President Mubarak in 2011, the Supreme Council of the Armed Forces indicated

141. See HUMAN RIGHTS WATCH, *supra* note 138, at 1.

142. See INT'L FED'N FOR HUMAN RIGHTS, EGYPT: COUNTER-TERRORISM AGAINST THE BACKGROUND OF AN ENDLESS STATE OF EMERGENCY 5 (2010); Reza, *supra* note 138, at 536–38.

143. INT'L FED'N FOR HUMAN RIGHTS, *supra* note 142, at 5.

144. See, e.g., NATHAN J. BROWN ET AL., CARNEGIE ENDOWMENT FOR INT'L PEACE, EGYPT'S CONTROVERSIAL CONSTITUTIONAL AMENDMENTS 2 (2007), available at <http://www.constitutionnet.org/files/Egypt%20Constitution.pdf>.

145. Press Release, Amnesty Int'l, Egypt: Proposed Constitutional Amendments Greatest Erosion of Human Rights in Twenty-Six Years (Mar. 18, 2007) [hereinafter 2007 Egypt Press Release], available at <http://www.amnesty.org/en/library/asset/MDE12/008/2007/en/c74b5428-d3a5-11dd-a329-2f46302a8cc6/mde120082007en.pdf>.

146. Reza, *supra* note 138, at 543; 2007 Egypt Press Release, *supra* note 145.

147. See Michael Slackman, *Egyptian Emergency Law is Extended for Two Years*, N.Y. TIMES (May 11, 2010), <http://www.nytimes.com/2010/05/12/world/middleeast/12egypt.html>.

148. See CARYLE MURPHY, PASSION FOR ISLAM: SHAPING THE MODERN MIDDLE EAST: THE EGYPTIAN EXPERIENCE 4, 57, 82–83 (2002).

149. See Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Rep. on Mission to Egypt*, ¶ 11, U.N. Doc. A/HRC/13/37/Add.2 (Oct. 14, 2009) (by Martin Scheinin) (discussing Article 86 of the Law Amending Some Provisions of the Penal Code, the Criminal Procedure Code, the Law Establishing State Security Courts, the Law on Secrecy of Bank Accounts, and the Law on Weapons and Ammunition adopted in 1992).

that it would repeal the emergency laws.¹⁵⁰ The Supreme Council initially approved an additional emergency law, prompting fears over the intractability of a mechanism so entrenched in the Egyptian legal and political systems.¹⁵¹ In May 2012, when the emergency laws were up for biannual renewal, the Supreme Council permitted them to expire.¹⁵² This expiry, however, has been accompanied by new draft legislation from the Interior Ministry for “safeguarding the gains of the revolution.”¹⁵³ The draft legislation includes emergency-type measures relating to “protect[ing] state supplies,” “criminaliz[ing] hindering of work flow and attacking public and private buildings,” “protect[ing] places of worship,” and “regulat[ing] protests in public streets,” as well as a “proposal for a legal authority to help the president pass laws.”¹⁵⁴ As the Cairo Institute for Human Rights Studies points out, the proposed laws “seek to codify repression by law and enshrine exceptional measures . . . into the ordinary legal code” and suggest that the government may be trying “to find a permanent alternative to the infamous emergency law.”¹⁵⁵

C. Implementation, Monitoring, and Enforcement

As recognized above, the legal supervision of states of emergency is of primary importance, as grave human rights violations often occur in this context and states may use the power of derogation as a pretext or to a larger extent than is justified.¹⁵⁶ In this regard, the Covenant’s drafters

150. *Egypt Army in Emergency Law Pledge*, AL JAZEERA (Aug. 10, 2011), <http://www.aljazeera.com/news/middleeast/2011/02/201121161511674298.html>.

151. See OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, REPORT OF THE OHCHR MISSION TO EGYPT: 27 MARCH – 4 APRIL 2011, ¶¶ 7, 12, 13, 26, 42 (2011), available at http://www.ohchr.org/Documents/Countries/EG/OHCHR_MissiontoEgypt27March_4April.pdf; Press Release, Amnesty Int’l, Egypt: Emergency Law Biggest Threat to Rights Since ‘25 January Revolution’ (Sept. 16, 2011), available at <https://www.amnesty.org/en/for-media/press-releases/egypt-emergency-law-biggest-threat-rights-%E2%80%9925-january-revolution%E2%80%99-2011-09-1>.

152. See *Egypt State of Emergency Lifted After Thirty-Seven Years*, BBC NEWS (May 31, 2012), <http://www.bbc.co.uk/news/world-middle-east-18283635>; *Egypt’s Infamous Emergency Law Expires*, AL JAZEERA (May 31, 2012), <http://www.aljazeera.com/news/middleeast/2012/05/2012531134021732460.html>.

153. See Heba Afify, *The New Faces of the Emergency Law*, EGYPT INDEP. (Oct. 22, 2012), <http://www.egyptindependent.com/news/new-faces-emergency-law>; see also MOHAMED EL ANSARI & MOHAMED AHMED ZAREE, CAIRO INST. FOR HUMAN RIGHTS STUD., SUMMARY OF THE REPORT: CRIMINALIZING THE EGYPTIAN REVOLUTION 3–4 (2012), available at <http://www.cihrs.org/wp-content/uploads/2012/11/Report-Summary-commentary-on-5-draft-laws-egypt-oct2012-final.pdf>; Lina El-Wardani, *Interior Ministry Aims to Recreate Mubarak-Era Emergency Law: Rights Activists*, AHRAM ONLINE (Oct. 22, 2012), <http://english.ahram.org.eg/NewsContent/1/64/56117/Egypt/Politics-/Interior-ministry-aims-to-recreate-Mubarak-era-emer.aspx>.

154. El-Wardani, *supra* note 153.

155. EL ANSARI & ZAREE, *supra* note 153, at 5.

156. VENICE COMM’N, SCI. AND TECHNIQUE OF DEMOCRACY, NO. 12: EMERGENCY POWERS (1995); VENICE COMM’N, SCIENCE AND TECHNIQUE OF DEMOCRACY, NO. 17: HUMAN RIGHTS AND THE FUNCTIONING OF THE DEMOCRATIC INSTITUTIONS IN EMERGENCY SITUATIONS (1996).

devoted as much time to discussing measures of implementation as to the substantive provisions on derogations.¹⁵⁷ Where states of emergency are abused and subvert the rule of law and human rights, the recourse to international review and comment may be the only remedy available. It is therefore worthwhile to reflect a little on the general nature of international monitoring and enforcement for states of emergency.

The ICJ's study, which focused in-depth on around fifteen countries, noted that the efforts to apply international norms "met with a degree of success" in five of those countries.¹⁵⁸ As will be discussed below, it is clear that in practice international human rights law can have a positive impact, though that impact may sometimes be quite limited. Within the current architecture of the international system, there are four main ways in which obligations concerning states of emergency and derogation are monitored and enforced: (a) through general supervisory powers of bodies entrusted with reviewing the implementation of treaty obligations; (b) individual complaints to the treaty bodies, where a state's consent has been provided for this jurisdiction; (c) interstate complaints to treaty bodies where jurisdiction is consented to; and (d) through what may be best described as political processes in bodies of more general human rights and other competence.¹⁵⁹

The treaty bodies perform the central role in reviewing the implementation of states of emergency by state parties to the relevant treaties. Early on, the U.N. Human Rights Committee asserted its competence to review notifications under Article 4(3); while this was initially controversial, it is now well established.¹⁶⁰ The treaty bodies can help stimulate international pressure through national and international publicity, and their reports carry more weight than human rights NGOs. The state parties to the Covenant are required under Article 40 to submit periodic written reports on the implementation of all their obligations under the ICCPR, and the Committee has provided detailed periodic reporting guidelines in respect of Article 4.¹⁶¹ The periodicity of this reporting process may be every five

157. FITZPATRICK, *supra* note 11, at 82.

158. ICJ STUDY, *supra* note 38, at 442. The country studies focused on Argentina, Canada, Colombia, Eastern Europe, Ghana, Greece, India, Malaysia, Northern Ireland, Peru, Syria, Thailand, Turkey, Uruguay, and Zaire. For review of the five positive case studies, see *id.* at 442–53.

159. *Id.* at 441–42 (referring to the articles on page 442).

160. See NOWAK, *supra* note 38, at 101–02; Buergenthal, *supra* note 94, at 85; Hartman, *supra* note 33, at 29.

161. The reporting guidelines state the following requirement: "In the light of article 4 and general comment No. 29 (2001), provide information on the date, extent of, effect of, and procedures for imposing and for lifting any derogation under article 4. Full explanations should be provided in relation to every article of the Covenant affected by the derogation." H.R. Comm., *Guidelines for the Treaty-Specific Document to Be Submitted by States Parties Under Article 40 of the International Covenant on Civil and Political Rights*, ¶ 39, U.N. Doc. CCPR/C/2009/1 (Nov. 22, 2010) [hereinafter *Revised Reporting Guidelines*]. The guidelines go on to request information about national arrangements and institutional procedures for states of emergency, as well as specific and detailed information on any states of emergency that are declared. See *id.* ¶¶ 40–44. The reporting guidelines have not always included refer-

years or more.¹⁶² The U.N. Human Rights Committee has adopted two general comments¹⁶³ on the interpretation and implementation of Article 4 on states of emergency; the most recent in 2001 provided a detailed review of the article's requirements.¹⁶⁴ The Committee has often identified derogations as a matter of concern in its concluding observations on national reports.¹⁶⁵ The European treaty body system, by contrast, has neither a periodic reporting function nor a mechanism such as general comments.

The periodic reporting by states to the U.N. Human Rights Committee allows the Committee to comment on specific states of emergency. However, there are serious weaknesses in periodic reporting on states of emergency under the Covenant. The Committee places the duty to provide information on the state resorting to Article 4,¹⁶⁶ a duty not spelled out in the Covenant and that the Committee has few means to enforce. Despite the reporting guidelines, many states' notices of derogation simply do not provide the necessary information.¹⁶⁷ Uruguay, for example, provided a notification to the Covenant's depositary effectively three years after it was obligated to do so, and when questioned by the Committee concerning the lack of information provided (such as from which articles the state sought to derogate), the government stated that the emergency was "a matter of universal knowledge" and any substantive justification

ence to derogations. See Buergethal, *supra* note 94, at 84–85; McGoldrick, *supra* note 33, at 390.

162. See, e.g., *Revised Reporting Guidelines*, *supra* note 161, ¶ 12. There is not a set periodicity per se, but the Committee adopts a practice of stating at the end of its concluding observations a date by which the following periodic report should be submitted. The Committee requires the periodic reports usually every five years. This is a matter of practice that can be changed. See H.R. Comm., *Consolidated Guidelines for State Reports Under the International Covenant on Civil and Political Rights*, ¶ B, U.N. Doc. CCPR/C/66/GUI/Rev.2 (Feb. 26, 2001).

163. General comments are a practice developed primarily by U.N. human rights treaty bodies. While not a formally binding interpretation of the treaty law, in practice they are often influential. Philip Alston has described the General Comment as the "means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement." Philip Alston, *The Historical Origins of 'General Comments' in Human Rights Law*, in *THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY* 763, 764 (Laurence Boisson de Chazournes & Vera Gowlland-Debbas eds., 2001).

164. See generally Sarah Joseph, *Human Rights Committee: General Comment 29*, 2 *HUM. RTS. L. REV.* 81 (2002); McGoldrick, *supra* note 33, at 425 n.271.

165. See, e.g., H.R. Comm., *Concluding Observations of the Human Rights Committee: Israel*, ¶ 12, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) (concerning the "sweeping nature of measures" for Israel's state of emergency in 2003). Other examples include Ecuador in respect of an economic emergency and Guatemala in respect of a prison escape. With respect to the Covenant, the Committee has referred generally in its reporting to a large number of states in connection with states of emergency. See McGoldrick, *supra* note 33, at 393–94 (providing examples of Committee reporting).

166. See *id.* at 399.

167. FITZPATRICK, *supra* note 11, at 92; see also *infra* note 281 and accompanying text.

would be “superfluous.”¹⁶⁸ For this reason, the Committee has made clear in General Comment 29 that the “duty of the Committee to monitor the law and practice of a State party for compliance with article 4 does not depend on whether that State party has submitted a notification.”¹⁶⁹

Moreover, the process of a state’s periodic reporting before the Committee on implementation of its ICCPR obligations may also occur a year or two or more after the actual state of emergency has finished.¹⁷⁰ While the Committee has a general power under its rules of procedure to request a supplementary Article 40 report “at any other time the Committee may deem appropriate,” states may challenge the legal authority of the Committee to do this, and the power has not been utilized in cases of states of emergency.¹⁷¹ States would naturally argue that their reporting obligations, at least in the short to medium term, do not extend beyond the notification requirements of Article 4. The Committee records in its annual reports those states that have formally reported a derogation, but this is merely a formality, as the Committee provides no substantive comments on the actual or purported derogation.¹⁷²

Although not designed with states of emergency in mind, the ability of individuals to file complaints against states with the relevant treaty bodies has become an important mechanism for reviewing the implementation of treaty provisions on states of emergency.¹⁷³ This is the case, for example, for state parties to the First Optional Protocol to the ICCPR, which provides consent to the individual-complaints mechanism of the U.N. Human Rights Committee.¹⁷⁴

A number of complaints have concerned state action in not only *de jure* but also *de facto* states of emergency. This reflects that, as discussed below concerning *de facto* emergencies, on many occasions the relevant state party has not formally derogated under Article 4. While the Commit-

168. NOWAK, *supra* note 38, at 103 n.119.

169. General Comment No. 29, *supra* note 2, ¶ 17; *see also* Joseph, *supra* note 164, at 96 (stating that this means notification is not a substantive requirement).

170. Poland’s declaration of a state of emergency is such an example. *See* McGoldrick, *supra* note 33, at 391.

171. H.R. Comm., Rules of Procedure of the Human Rights Committee, r. 66(2), U.N. Doc. CCPR/C/3/Rev.9 (Jan. 13, 2011). U.N. Special Rapporteur Despouy in his report noted that the Committee’s Rules of Procedure may permit a request report from a government on a state of emergency. *See* Special Rapporteur’s Tenth Report, *supra* note 1, ¶ 186. This authority appears to be found in Article 40(1)(b) of the Covenant on further requests for information, and the Committee has discussed the idea of additional or supplementary reports for this purpose. *See* FITZPATRICK, *supra* note 11, at 92–95.

172. *See, e.g.*, Rep. of the H.R. Comm., 97th–99th Sess., Oct. 12–30, 2009, Mar. 8–26, 2010, July 12–30, 2010, ¶¶ 20–27, U.N. Doc. A/65/40; GAOR, 65th Sess., Supp. No. 40 (2010).

173. The system of individual petitions under the Optional Protocol to the Covenant has been used to address issues under Article 4. *See* McGoldrick, *supra* note 33, at 382. As McGoldrick notes, the Committee has determined that notwithstanding the derogation, the state party has violated its obligations. *Id.* at 382.

174. OPTIONAL PROTOCOL to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302.

tee has little ability to enforce its decisions, the European system and its review of decisions by the Committee of Ministers provide a stronger enforcement mechanism.¹⁷⁵ Again, however, there is a real problem of timeliness and immediacy, as an ex post facto review several years afterward often may do little to actually protect human rights during the emergency situation. Furthermore, even if there is access to an individual complaints mechanism, the consideration by the treaty body relies on a case being brought, rather than on an automatic review of the derogation and state of emergency and its compliance with the treaty law.

Interstate complaints concerning states of emergency are permissible under both the Covenant and European system but are exceptionally rare.¹⁷⁶ The few cases in the European system of interstate complaints have been instances of complaints against Greece by various countries during the Greek military dictatorship in the 1960s, against Turkey in the 1980s, and complaints by the Irish to the European Court of Human Rights concerning U.K. emergency measures in Northern Ireland.¹⁷⁷ It is not expected that such processes will be used very much in future, mostly due to the political disincentives and diplomatic ramifications of one state putting another one "in the dock" for human rights issues.

There are also a wide range of relevant political processes and general bodies with a role in reviewing implementation of the relevant treaties. The Universal Periodic Review of the U.N. Human Rights Council is a process that has included a focus on the implementation of Article 4 of the Covenant.¹⁷⁸ The Special Procedures of the U.N. Human Rights Council, which include human rights' special rapporteurs and working groups, have addressed states of emergency.¹⁷⁹ Various other bodies and commissions

175. The Committee of Ministers oversees the states' changes to domestic law to achieve compatibility with the Convention or individual measures taken by the contracting state to redress violations. The European Court's decisions are usually complied with by the states. For general information on the Committee, see *About the Committee of Ministers, COUNCIL EUR.*, http://www.coe.int/t/cm/aboutcm_en.asp (last visited Apr. 2, 2013). For an academic discussion, see generally Philip Leach, *The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights*, 3 PUB. L. 443 (2006).

176. For provisions on interstate complaints, see, for example, ICCPR, *supra* note 2, art. 41; ECHR, *supra* note 87, art. 33.

177. The Greek Case, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm'n on H.R.).

178. The U.N. General Assembly in resolution 60/251 (2006) mandated the Council to "[u]ndertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States." G.A. Res. 60/251, ¶ 5, U.N. Doc. A/RES/60/251 (Mar. 15, 2006) (emphasis added). References to concerns about states of emergencies have already featured in a number of Universal Periodic Review reports.

179. Special Rapporteur Despouy, in his annual report, suggested that other special rapporteurs and the Working Group on Arbitrary Detention pay attention to the issue. See Special Rapporteur's Tenth Report, *supra* note 1, ¶ 192. For references to states of emergency in the Working Group on Arbitrary Detention's reports, see Chairperson-Rapporteur of the Working Grp. on Arbitrary Det., *Rep. of the Working Group on Arbitrary Detention*,

of inquiry, both connected to the United Nations and otherwise, have referred to derogations and states of emergency.¹⁸⁰

From 1985 to 1997 there was a Special Rapporteur for States of Emergency mandated by the U.N. Human Rights Commission.¹⁸¹ The details of the mandate are worth explaining, as it had a significant impact on the implementation of Article 4 of the Covenant.¹⁸² The mandate in practice included inter alia drawing up an annual list of countries under a state of emergency, examining issues of compliance in an annual report, drawing up guidelines for development of legislation on the issue, and providing technical assistance.¹⁸³ The Special Rapporteur began an annual practice of publishing a list of the countries subject to a state of emergency, which was not limited to parties to the Covenant.¹⁸⁴ The publication of an annual list was a very important tool for transparency under the auspices of the United Nations. The Special Rapporteur was also active in approaching states and requesting information on actual or potential derogations and

¶ 72, U.N. Doc. A/HRC/13/30 (Jan. 18, 2010) (by El Hadji Malick Sow) [hereinafter *Rep. of the Working Group on Arbitrary Detention*]; Chairperson-Rapporteur of the Working Grp. on Arbitrary Det., *supra* note 113, ¶ 64; Chairperson-Rapporteur of the Working Grp. on Arbitrary Det., *Civil and Political Rights, Including the Questions of Torture and Detention*, ¶ 59, U.N. Doc. E/CN.4/2004/3 (Dec. 15, 2003) (by Leïla Zerrougui); Working Grp. on Arbitrary Det., *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, ¶ 38, U.N. Doc. E/CN.4/1995/31 (Dec. 21, 1994). There is also currently a U.N. Special Rapporteur for Human Rights in Counter-Terrorism. See Human Rights Res. 2005/80, ¶ 14, U.N. Doc. E/CN.4/RES/2005/80 (Apr. 21, 2005).

180. Office of the U.N. High Comm'r for Human Rights, *Rep. of the International Commission of Inquiry on Libya*, ¶ 16, U.N. Doc. A/HRC/19/68 (Mar. 2, 2012); OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 151; Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, ¶¶ 186–187 (Mar. 31, 2011), http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf; *UN Human Rights Chief Welcomes Sri Lanka Report, Urges Further Investigation into Conduct of Final Stages of the War*, OFF. U.N. HIGH COMMISSIONER FOR HUM. RTS. (Apr. 26, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10962&LangID=E>. The U.N. Committee Against Torture, the Committee on Freedom of Association of the International Labour Organization, the Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union, and the International Court of Justice have all dealt with these issues. See Special Rapporteur's Tenth Report, *supra* note 1, ¶ 23.

181. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 13.

182. The genesis for the special rapporteurship was a request of the now defunct expert body the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities. See *id.* ¶ 12.

183. *Id.* ¶¶ 13, 14; see also Special Rapporteur for States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, annex I, U.N. Doc. E/CN.4/Sub.2/1991/28 (June 24, 1991) (by Leandro Despouy).

184. The first list of states was presented to the U.N. Sub-Commission in 1987. U.N. Special Rapporteur, *The Administration of Justice and the Human Rights of Detainees*, ¶¶ 7–8, U.N. Doc. E/CN.4/Sub.2/1987/19/Rev.1 (Jan. 5, 1988) (by Leandro Despouy). The fourth annual list, presented to the U.N. Sub-Commission in 1991, included sixty-one states in formal and de facto emergencies since 1985. Special Rapporteur for States of Emergency, *supra* note 183, ¶ 11. Even this list was likely to be incomplete. See FITZPATRICK, *supra* note 11, at 170–71.

met with a good level of cooperation, perhaps not surprisingly in light of the annual list.¹⁸⁵ This role naturally suffered like many U.N. special rapporteurs, however, from a lack of resources that inhibited the mandate holder's ability to gather and analyze information.¹⁸⁶

The Special Rapporteur's thematic annual reports were important for setting out issues and making recommendations. The Special Rapporteur's final report in 1997, at the mandate's conclusion, highlighted the serious problems and need to prioritize the issue of human rights and states of emergency. It is regrettable that this mandate has not since been renewed.¹⁸⁷ The final report in 1997 included a recommendation for an updated General Comment, which was taken up and adopted by the Committee in 2001.¹⁸⁸ It is fair to say that the Special Rapporteurs' collective research and work on states of emergency moved the conceptual debate forward and provided significant foundations for the updated U.N. Human Rights Committee general comment.

There are a few key problems with monitoring and enforcement that exist both because of and despite the current implementation architecture. The implementation of the Article 4 obligation to declare a state of emergency and notify the Secretary-General as treaty depositary has been seriously deficient. The ICJ's study posits that this is for two main reasons.¹⁸⁹ First, there is no effective or permanent procedural mechanism established to deal specifically and systematically with derogations as they arise.¹⁹⁰ None of the human rights treaty bodies provide for any substantive action once a notice of derogation is received. In this regard, the U.N. Special Rapporteurs for States of Emergency recommended there be permanent monitoring of states of emergencies and derogations, including a mechanism enabling the Committee to maintain under consideration those countries of relevance.¹⁹¹

185. In preparing reports, the Special Rapporteur made requests of states for information, which to some extent reflected an "adversary procedure" that may develop into public debate. The practice was to send a note verbale to states requesting the fullest possible information and, generally speaking, governments responded positively to the requests. See Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 18, 64–66.

186. The Special Rapporteur noted the substantial resources required for the thorough discharge of his mandate in his third annual list of states provided to the U.N. Sub-Commission. See Special Rapporteur for States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, ¶¶ 24–26, U.N. Doc. E/CN.4/Sub.2/1989/30 (Aug. 16, 1989) (by Leandro Despouy).

187. The Special Rapporteur's work concluded in a final report in 1997. He proposed to the Sub-Commission that it "[m]aintain the study of the question of human rights and states of emergency as one of the highest priority items on its agenda." Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 16, 190.

188. *Id.* ¶ 187.

189. ICJ STUDY, *supra* note 38, at 454.

190. *Id.*; see also Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 263 (2003).

191. Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 12, 187.

In 1982, the Dutch delegation to the Covenant's meetings of state parties suggested inter alia empowering the Human Rights Committee to institute special proceedings in the event of a state of emergency.¹⁹² The Dutch suggestion was met with a procedural objection from the Soviet Union delegate, and the suggestion was not taken any further.¹⁹³ In 1982 and 1983, Human Rights Committee member Torkel Opsahl of Norway proposed an Article 40(1)(b) special report for states that would be triggered by a state of emergency's declaration.¹⁹⁴ This proposal was rejected in the Committee on the basis of differing views on the Committee's authority and competence.¹⁹⁵ The first Special Rapporteur, Mrs. Nicole Questiaux, also proposed that the powers of the U.N. Secretary-General as the Covenant's depositary be extended to "seek[ing] 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."¹⁹⁶ This would, however, require a substantive monitoring role for the Secretary-General, who would need to make a judgment that the information provided by the derogating state was insufficient and more was required. This proposal is a large political step forward from current practice that would be strongly resisted by many states.

Second, the notice-of-derogation requirement is often disregarded by states without any real consequences. De facto states of emergency, essentially where states fail to notify at the international level, are a common problem to which the treaty bodies have drawn attention.¹⁹⁷ It has been suggested that from 1985 to 1997 at least twenty countries were in a de facto state of emergency.¹⁹⁸ The United States, for example, did not submit a notification of derogation under the Covenant after 9/11 "despite the official national proclamation of an emergency and the imposition of a wide range of legislative and executive policies derogating in practice from the rights protected under the Covenant."¹⁹⁹ The general problem of

192. NOWAK, *supra* note 38, at 86.

193. *Id.*

194. See FITZPATRICK, *supra* note 11, at 93 (citing Torkel Opsahl, *Emergency Derogation from Human Rights*, 5 *NORD. J. HUM. RTS.* at 4 (1987)).

195. Opsahl, *supra* note 194, at 4.

196. ICJ STUDY, *supra* note 38, at 454. The U.N. Working Group on Arbitrary Detention, for example, has recommended that as soon as it is informed of such a declaration, or a state invokes an emergency situation, an emergency mission by one of the U.N. special procedures should take place to verify on the ground whether the state of emergency meets the criteria. See *Rep. of the Working Group on Arbitrary Detention*, *supra* note 179, ¶ 98.

197. For a significant list of U.N. Human Rights Committee reports noting the non-reporting of states of emergency, see FITZPATRICK, *supra* note 11, at 91. The Special Rapporteur has also noted this. See Special Rapporteur's Tenth Report, *supra* note 1, ¶ 118.

198. *Id.* ¶ 119.

199. See Fitzpatrick, *supra* note 190, at 263; Frederic L. Kirgis, *Alleged Secret Detentions of Terrorism Suspects*, 10 *AM. SOC'Y INT'L L. INSIGHTS* (2006), available at <http://www.asil.org/insights060214.cfm>. The United States denies that Article 4 was applicable. See *Second and Third Periodic Report of the United States of American to the UN Committee on Human*

states failing to provide the required notification makes it very difficult at the international level to obtain the information necessary to complete a meaningful review of the lawfulness of states of emergency and derogations. The lack of information, or any international institutional *trigger*, seriously weakens the efforts to address states of emergency in international fora and bodies.²⁰⁰

In summary, this review of practice demonstrates that the use and abuse of states of emergency is widespread and incongruent with its “exceptional” nature. States of emergency are central to serious human rights violations as illustrated by the cases of Syria and Egypt. States of emergency not only lead to violations of human rights during emergencies, but also can be a tool to institutionalize illegitimate measures to protect a state or government against dissent. As the Special Rapporteur has suggested, “in many cases states of emergency merely became the legal means of ‘legalizing’ the worst abuses.”²⁰¹ Further, in a democracy, emergency measures that violate the human rights of minorities, for example antiterrorism measures, are often tolerated in part because they enjoy the support of the democratic majority.

There are serious limits to the enforcement of international human rights obligations concerning states of emergency. The power to derogate is recognized in the international human rights treaties, but that power is not easily protected against abuse. The usual challenges for enforcement of IHRL are compounded by the intensity of emergency situations and the lack of timeliness for international monitoring and review. For the treaty bodies, there is no automatic reaction consequent to a state’s formal notification of derogation, which may be based on specious assertions and insufficient information. It can be years before the situation is properly scrutinized for its consistency with the treaty obligations. This deficiency is compounded by the fact that many states do not even bother to formally derogate as they are required to do. Dubious assertions of states of emergency therefore are often not seriously challenged, other than by human rights NGOs, despite the fact that they are often closely connected to serious human rights violations.

III. PROBLEMS WITH BIFURCATING THE LEGAL QUESTION: PUBLIC EMERGENCY AND PROPORTIONAL MEASURES

It is a foundational principle, accepted at least since 1955, that there are two key legal questions for a state of emergency.²⁰² The first asks

Rights Concerning the International Covenant on Civil and Political Rights, U.S. DEP’T ST. (Oct. 21, 2005), <http://www.state.gov/j/drl/rls/55504.htm>. The U.S. position, though, is partly driven by its refusal to accept that the Covenant’s obligations may apply extraterritorially. *See id.* ¶¶ 468–469.

200. *See* ICJ STUDY, *supra* note 38, at 455.

201. *See* Special Rapporteur’s Tenth Report, *supra* note 1, ¶ 3.

202. The U.N. Human Rights Committee confirmed this in its General Comment 29. General Comment No. 29, *supra* note 2, ¶¶ 2, 4; *see also* Gross & Ní Aoláin, *supra* note 45, at 630; Colin Warbrick, *States of Emergency—Their Impact on Human Rights: A Comparative*

whether the emergency is of sufficient intensity to justify a derogation of human rights; and the second examines the proportionality of the measures of derogation in response to the threat posed by the emergency situation. These foundations have not been questioned in the literature, and it is also widely accepted that there is a conditional and temporal relationship between these two basic legal questions. As McGoldrick states, the “existence of a situation amounting to a public emergency that threatens the life of the nation is a fundamental condition *that must be met before* a state can invoke article 4.”²⁰³

A. Overview of Jurisprudential Interpretation

The U.N. Human Rights Committee has dealt with only a limited number of complaints under the Optional Protocol that concerned Article 4 of the Covenant (complaints to the Committee are also known as communications). A high proportion of those complaints came from South America, in particular Uruguay during the 1970s and 1980s. While acknowledging a state’s sovereign right to declare a state of emergency, the U.N. Human Rights Committee is generally said to assert “a measure of international supervision over that national determination.”²⁰⁴ In practice, it is more accurate to suggest that in communications before it, the Committee will rarely undertake an assessment of whether the emergency situation exists but will instead focus on the measures and alleged violations of the Covenant regardless of any derogation.²⁰⁵

Landinelli Silva v. Uruguay is one of the key communications that arose from the time of Uruguay’s military dictatorship and state of emergency.²⁰⁶ The complainants had been effectively banned by an emergency law from running for political office for fifteen years, in contravention of Article 25 of the ICCPR. The Uruguayan government had provided no significant information in its derogation notice on the nature of the public emergency or measures taken to address the emergency. The Committee did not find it necessary to clearly determine the existence of a state of emergency. It found that, even based on “*the assumption* that there exists a situation of emergency in Uruguay,” the measures in question were not

Study by the International Commission of Jurists, 33 INT’L & COMP. L.Q. 233, 234 (1984) (book review) (“It has long been accepted there are two major kinds of decision involved. One is the existence of a situation of sufficient intensity to justify derogation at all; the other is the proportionality of the extent of the derogation made by a government in response to the measure of the threat posed by the emergency.”).

203. McGoldrick, *supra* note 33, at 392 (emphasis added); *see also* Special Rapporteur’s Tenth Report, *supra* note 1, ¶ 34.

204. McGoldrick, *supra* note 33, at 399–400, 400 n.128. To support this, McGoldrick refers to a number of communications concerning balancing of rights with national security, but none that focused on Article 4. *Id.*

205. FITZPATRICK, *supra* note 11, at 101.

206. *Silva v. Uruguay*, Commc’n No. 34/1978, H.R. Comm., ¶¶ 2, 3.1, U.N. Doc. CCPR/C/12/D/34/1978 (Apr. 8, 1981).

“necessary.”²⁰⁷ In essence, the legal assessment of the public emergency’s existence was replaced by an assumption in favor of the state’s assertion. Furthermore, in its relatively short decision, the Committee, while saying that Uruguay could not evade the obligations of the ICCPR, further implied its deference on the public emergency by emphasizing that “the sovereign right of a State to declare a state of emergency is not questioned.”²⁰⁸

In the *Consuelo Salgar de Montejo v. Colombia* communication, the Colombian government submitted a notice of derogation to the treaty depositary in 1980 that made reference to the existence of a state of emergency in place since 1976.²⁰⁹ The government asserted that this emergency “decree was issued because of the social situation created by the activities of subversive organizations which were disturbing public order with a view to undermining the democratic system in force in Colombia.”²¹⁰ In reaching a decision, the Committee again did not determine whether or not there was a public emergency, but instead focused primarily on the government having notified derogation of the incorrect ICCPR articles and substantive rights affected by the derogation.²¹¹ While the government had referred to “temporary measures” that limited Articles 19(2) and 21 of the Covenant (freedom of expression, right of peaceful assembly), the Committee found in substance a violation of Article 14(5) on the right of appeal “because Mrs. Consuelo Salgar de Montejo was denied the right to review of her conviction by a higher tribunal.”²¹² The Committee therefore failed again to address the existence of a state of emergency.

A similar approach to *Landinelli Silva* and *Consuelo Salgar de Montejo* has been employed in other communications before the Commit-

207. See *id.* ¶ 8.4 (emphasis added). The Committee found that there was “no attempt . . . to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant, or to show that such derogations were strictly necessary.” *Id.* ¶ 8.2. Rather, it found that the measures against the authors “unreasonably restricted their rights under article 25 of the Covenant.” *Id.* ¶ 9. This case has been seen by some, such as Fitzpatrick and Ghandi, as asserting the “principle of objective reviewability.” See FITZPATRICK, *supra* note 11, at 98–100. She notes the Committee’s avoidance of the emergency question, and refers to the Uruguay communications as a “missed opportunity” by the Commission. *Id.*

208. *Silva*, U.N. Doc. CCPR/C/12/D/34/1978, ¶ 8.3.

209. *de Montejo v. Colombia*, Commc’n No. R.15/64, H.R. Comm., ¶ 1.2 (Dec. 18, 1979), in Rep. of the H.R. Comm., 14th–16th Sess., Oct. 19–30, 1981, Mar. 22–Apr. 9, 1982, July 12–30, 1982, annex XV, U.N. Doc A/37/40 (Sept. 22, 1982); GAOR, 37th Sess., Supp. No. 40 (1982).

210. *Id.* ¶ 7.2.

211. See *id.* ¶ 10.3. General Comment 29 does not provide that notification of the substantive articles derogated is a requirement of notification. However, the U.N. Human Rights Committee’s guidelines for Article 40 periodic reports provide that for Article 4, “[f]ull explanations should be provided in relation to every article of the Covenant affected by the derogation.” H.R. Comm., *Guidelines for the Treaty-Specific Document to Be Submitted by States Parties Under Article 40 of the International Covenant on Civil and Political Rights*, ¶ 39, U.N. Doc. CCPR/C/2009/1 (Oct. 4, 2010).

212. *de Montejo*, U.N. Doc. A/37/40, annex XV, ¶¶ 10.2, 11.

tee.²¹³ Additionally, states of emergency have been used by states to engage in violations of rights that are nonderogable under the ICCPR (such as Article 7's prohibition against torture), meaning that the purported derogation itself is irrelevant.²¹⁴ In some instances, individual Committee members have expressed concerns as to the justification for a particular public emergency, while in other instances some members have "suggested that Article 4 allows states considerable latitude in deciding when a public emergency justify[es] derogation and that the determination concerning the emergency situation [is] a sovereign act."²¹⁵ While the Committee has formally preserved its ability to engage in reviewing states of emergency, in actual fact has been reluctant to do so and has dealt with decisions in other ways.

The main general statement on the Committee's interpretation of Article 4 is found in its General Comment 29 of 2001.²¹⁶ This superseded an earlier and more limited general comment that was adopted in 1981 in the context of state reports and communications from Chile, Syria, Colombia, and Uruguay.²¹⁷ The more recent General Comment addresses a wide range of issues, which for present purposes are not central to this Article. In terms of what constitutes a public emergency, the Committee tried to grapple with this issue but struggled to go much beyond the general principles already articulated in Article 4. The Committee did not attempt to provide a comprehensive definition for a public emergency (unlike in the *Greek Case* in European Convention jurisprudence, which is described below). However, some of the characteristics of a public emergency that threatens the life of the nation were described, including "armed conflict," "a natural catastrophe, a mass demonstration including instances of violence [and] a major industrial accident."²¹⁸ The Committee restated that

213. See, e.g., *Motta v. Uruguay*, Commc'n No. R.2/11, H.R. Comm., ¶ 15 (Apr. 25, 1977), in Rep. of the H.R. Comm., 8th–10th Sess., Oct. 15–26, 1979, Mar. 17–Apr. 3, 1980, Aug. 1–July 14, 1980, annex X, U.N. Doc. A/35/40 (Sept. 18, 1980); GAOR, 35th Sess., Supp. No. 40 (1980) (stating that the government had not "made any submissions of fact or law to [j]ustify" derogations under Article 4); see also *de Guerrero v. Columbia*, Commc'n No. 45/1979, H.R. Comm., ¶ 3.2, U.N. Doc. CCPR/C/15/D/45/1979 (Mar. 31, 1982); *Touron v. Uruguay*, Commc'n No. 32/1978, H.R. Comm., ¶ 10 (Mar. 31, 1981), reprinted in H.R. COMM., SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL, at 61, U.N. Doc. CCPR/C/OP/1, U.N. Sales No. E.84.XIV.2 (1985); *de Bouton v. Uruguay*, Commc'n No. 37/1978, H.R. Comm., ¶ 7 (Mar. 27, 1981), reprinted in H.R. COMM., *supra*, at 72.

214. *de Guerrero*, U.N. Doc. CCPR/C/15/D/45/1979, ¶ 12.2; *Silva v. Uruguay*, Commc'n No. 34/1978, H.R. Comm., ¶ 17, U.N. Doc. CCPR/C/12/D/34/1978 (Apr. 8, 1981). The Colombian cases of state-of-emergency decrees often involved nonderogable rights, so the Committee saw no need to analyze Article 4.

215. See McGoldrick, *supra* note 33, at 401.

216. See generally Joseph, *supra* note 164 (providing a detailed review of General Comment 29).

217. H.R. Comm., General Comment 5: Article 4 (Derogations) (1981), reprinted in United Nations, *International Human Rights Instruments*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008); NOWAK, *supra* note 38, at 86, 88.

218. General Comment No. 29, *supra* note 2, ¶¶ 3–5.

the emergency must threaten “the life of the nation” but did not elaborate further on the meaning of this central phrase.

The Committee’s key statement on the proportionality test was that “the extent strictly required by the exigencies of the situation” concerns the “*duration, geographical coverage and material scope of the state of emergency* and any measures of derogation resorted to because of the emergency.”²¹⁹ Importantly, this statement clarifies that the question of proportionality includes an assessment of the nature of the public-emergency situation.

The General Comment’s overall effect in elaborating the public-emergency question is more modest than is at first apparent, especially compared to the rest of the General Comment, which is quite progressive. The Committee’s general statements also reflected much of what had been developed in the various codification and progressive development projects in IHRL. However, the Committee’s limited further elaboration of public emergency has not featured centrally in any subsequent communications. In the absence of a well-developed interpretation of the exact definition of a public emergency, the General Comment’s restatement of general principles on public emergency provided little further clarity and left significant discretion.

In contrast, the jurisprudence of the European system is more developed as a result of a number of cases on derogations under Article 15 of the European Convention. As indicated above, the Convention text is quite similar to the Covenant. The first derogations issues before the European Commission of Human Rights were the *Cyprus* cases, which concerned two interstate applications by Greece brought against the United Kingdom in 1956 that alleged mistreatment of prisoners.²²⁰ The Commission declared itself competent to review the derogation and found in favor of the United Kingdom, holding that “the Government should be able to exercise *a certain measure of discretion* in assessing the extent [of measures] strictly required by the exigencies of the situation.”²²¹ The Commission’s measure of discretion, which was not argued by the parties, applied only to the secondary legal question concerning proportionality, *not* to the existence of the public emergency.²²²

Lawless v. Ireland was the next Article 15 case, and it concerned the government’s extrajudicial detention of Irish Republican Army members

219. *Id.* ¶ 4 (emphasis added). The impact of the emergency can clearly be geographically contained, which is implicit in the Committee’s indication that emergency measures can be limited in geographic coverage. *See* Joseph, *supra* note 164, at 83.

220. Greece argued that the alleged mistreatment of prisoners in Cyprus related to obligations that could not be derogated from under Article 15. *Greece v. United Kingdom (First Cyprus)*, App. No. 176/56, 1958–1959 Y.B. Eur. Conv. on H.R. 174, 174 (Eur. Comm’n on H.R.).

221. *Id.* at 176 (emphasis added); *see also* Higgins, *supra* note 33, at 296–97.

222. Gross & Ní Aoláin, *supra* note 45, at 631.

in Ireland (and not in Northern Ireland, a part of the United Kingdom).²²³ The majority of the Commission members in the report had accepted that a “certain discretion—a *certain margin of appreciation*—must be left to the [Irish] Government” in determining a public emergency that threatens the life of the nation (that is, an extension of the measure of discretion from the *Cyprus* cases to the public-emergency question).²²⁴ The minority of members, however, did not support this new “margin of appreciation” concept, and argued either that the situation in Ireland did not reach the threshold of a public emergency, or that there was no need legally for such a determination.²²⁵

After it was heard by the Commission, the *Lawless* case was then considered in the European Court of Human Rights. The Court’s decision in *Lawless* made clear that “it is for the Court to determine” if a government has complied with Article 15.²²⁶ It indicated that the “natural and customary meaning” of the words of Article 15(1) were sufficiently clear as “they refer to an *exceptional situation of crisis or emergency* which affects the *whole population* and constitutes a *threat to the organised life of the community* of which the State is composed.”²²⁷ The Court did not refer specifically to the margin of appreciation, although it upheld the Irish government’s position even though its emergency measures would have otherwise violated the Convention. The Court’s reasoning was that terrorist activity in Northern Ireland (that is, in the United Kingdom) was an exceptional crisis threatening the life of Ireland as a nation.²²⁸ There are

223. Both the Commission and Court found a violation of Article 5 of the right to liberty and security, which therefore raised the question of applicability of Article 15 on derogations. See *Lawless v. Ireland* (No. 3), App. No. 332/57, 1961 Y.B. Eur. Conv. on H.R. 438, ¶¶ 15, 20 (Eur. Ct. H.R.); *Lawless v. Ireland*, App. No. 332/57, Eur. Ct. H.R. (ser. B) at 66 (Eur. Comm’n on H.R. 1960–1961).

224. *Lawless*, Eur. Ct. H.R. (ser. B) at 82, 90 (emphasis added).

225. *Id.* at 93–94, 98, 99, 101–02.

226. *Lawless*, 1961 Y.B. Eur. Conv. on H.R. ¶ 22.

227. *Id.* ¶ 28 (emphasis added). The Commission’s President also raised the margin of appreciation with the Court in the hearing. See *Lawless*, Eur. Ct. H.R. (ser. B) at 408. The French version of this statement, which was the authoritative judgment, included the word that corresponded with “imminence.” *Lawless*, 1961 Y.B. Eur. Conv. on H.R. ¶ 28.

228. The Court found the emergency was

reasonably deduced by the Irish government from a combination of several factors, namely: in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957

Id. ¶ 28. In terms of the measures’ proportionality, the Court concluded that the administrative detention “of individuals suspected of intending to take part in terrorist activities, appeared, despite its gravity, to be a measure required by the circumstances” for five key reasons: (i) the ordinary law was unable to check the “growing danger,” (ii) ordinary courts did not “suffice to restore peace and order,” (iii) the gathering of evidence was meeting with

various commentators who argue (quite reasonably) that terrorism in Northern Ireland did not constitute an actual or imminent serious threat to Ireland.²²⁹ As one commentator noted, despite not referring to the margin of appreciation the Court's "whole approach to the matter was consistent with that of the Commission."²³⁰

The *Greek Case* followed and were concerned with the suspension of aspects of the Greek Constitution and rule by martial law after a military coup in 1967.²³¹ The Commission was faced with the unusual situation that a military government had seized power by force. The Commission expressly acknowledged the margin of appreciation concept under Article 15 after it was pleaded by Greece.²³² This was before Greece eventually withdrew from the Convention's jurisdiction, and the case was able to be heard by the European Court. In a key statement of principle from the *Greek Case*, the Commission, after quoting the *Lawless* definition of public emergency, declared that a public emergency must have the following characteristics:

- (1) It must be actual or imminent.
- (2) Its effects must involve the whole nation.
- (3) The continuance of the organised life of the community must be threatened.
- (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.²³³

The Greek military government argued that the "revolution" (that is, the military coup) was necessary to protect the state from communists and their allies, and that the threat from these groups had brought about the state of emergency and the need for derogation. While the Commission found "it established beyond dispute" that Greece had experienced political instability, tension, and public disorder,²³⁴ it rejected the military gov-

great difficulties, (iv) the raids were carried out in Northern Ireland but prepared in Ireland, and (v) sealing the border would have serious and disproportionate consequences. *See id.* ¶ 36.

229. *See, e.g.,* FITZPATRICK, *supra* note 11, at 197; SVENSSON-McCARTHY, *supra* note 33, at 293-94.

230. A.H. Robertson, *Lawless v. the Government of Ireland (Second Phase)*, 37 BRIT. Y.B. INT'L L. 536, 544 (1961). The weakness of the Court's reasoning becomes clearer reviewing the votes of the Commission, in which five out of fourteen members concluded the special powers were not justified by Article 15(1). *Lawless*, Eur. Ct. H.R. (ser. B) at 81.

231. The Greek Case, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm'n on H.R.).

232. *Id.* ¶ 152 (quoting *Lawless*, 1961 Y.B. Eur. Conv. on H.R. ¶ 28).

233. *Id.* ¶ 153.

234. *Id.* ¶¶ 59, 156.

ernment's arguments.²³⁵ The conclusion adopted by ten of fifteen Commission members was that there was no public emergency.²³⁶ Therefore, the Commission applied similar principles as it and the Court applied in the *Lawless* case, although it reached the opposite result. As Svensson-McCarthy points out, though, as "compared to the *Lawless* case, the Greek situation was . . . marked by much more violence and unrest within the national borders."²³⁷ In addressing the "public emergency" in Greece, the Commission effectively "lifted the veil" by considering the *causation* of the public emergency. This point was recognized by the dissenting opinion of Judge Ermacora, who observed that there was a public emergency as defined by the Convention, but that it seemed "incompatible" for the government to have resort to Article 15 since it was the government itself that was responsible for the situation.²³⁸

There have been various European cases since the *Lawless* and *Greek* cases that have built on the jurisprudential foundations of these early cases.²³⁹ *Ireland v. United Kingdom* is one worth explaining, as it sheds some further light on the test of proportionality. This was an interstate case concerning various measures adopted in Northern Ireland by the British government. The two state parties had agreed there was a state of emergency, and the Court found that the "degree of violence, with bombing, shooting and rioting was on a scale far beyond what could be called minor civil disorder."²⁴⁰ In this case, the Commission and Court modified one aspect of their prior reasoning by accepting that the emergency was limited to Northern Ireland and therefore did not need to affect the entire nation (as set out in the *Greek Case*).

The Court in *Ireland* then developed the discussion on proportionality in such a way as to demonstrate the close connection between the public-emergency situation and the emergency measures. It stated that in view of the "massive wave of violence and intimidation," the government was "reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for."²⁴¹ At the same time as considering the measures in light of the public emergency, the Court stated that it was not its "function to substitute for the British Government's assessment any

235. The Commission did not find that there was a real risk of a creation of a communist government at the pending elections, nor that there would be public disorder beyond the capability of the powers of police to control. *See id.* ¶¶ 159, 164.

236. *Id.* ¶ 165 n.290.

237. SVENSSON-McCARTHY, *supra* note 33, at 305.

238. *The Greek Case*, 1969 Y.B. Eur. Conv. on H.R. ¶¶ 213–215 (dissenting opinion of Mr. Ermacora).

239. *E.g.*, *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260; *Brannigan v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) at 30 (1993); *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

240. *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) at 117 (1976).

241. *Ireland*, 25 Eur. Ct. H.R. (ser. A) at 81.

other assessment of what might be the most prudent or most expedient policy to combat terrorism.”²⁴² The Court concluded that “the limits of the margin of appreciation left to the Contracting States by Article 15 § 1 were not overstepped by the United Kingdom when it formed the opinion that extrajudicial deprivation of liberty was necessary from August 1971 to March 1975.”²⁴³ The Court accordingly left no doubt concerning the degree of its deference to the derogating state.²⁴⁴ In subsequent cases, the Court has continued to provide only cursory analysis of the factual basis for the state of emergency and has not overruled any government’s assertion of a public emergency.²⁴⁵

The Court’s decision in 2009 in *A & Others v. United Kingdom*, the Belmarsh Detainees case, was therefore eagerly awaited as an opportunity to settle the jurisprudence. It was the Court’s first pronouncement for some time on Article 15, including after the September 11 terrorist attacks, and also ultimately resulted in a unanimous decision of the Grand Chamber (the highest level within the Court). The case concerned legislation providing for indefinite detention without trial of foreign nationals suspected of terrorism that the United Kingdom was unable to deport. The detention framework had been established pursuant to an Article 15 derogation by the United Kingdom. In the House of Lords’ decision of 2004, it was held that the existence of the public emergency was a “political question” not for the court, but that the proposed measures would not

242. *Id.* at 82.

243. *Id.*

244. The Court stated:

It falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 . . . leaves those authorities a wide margin of appreciation.

Id. at 78–79. Yet as a claw back, although perhaps not a convincing one, the Court added that states “do not enjoy an unlimited power in this respect,” and the “domestic margin of appreciation is . . . accompanied by a European supervision.” See *id.* For discussion, see FITZPATRICK, *supra* note 11, at 198.

245. For example, the full treatment of the situation of emergency issues was as follows in the Aksoy case: “The Court considers, in light of all the material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a ‘public emergency threatening the life of the nation.’” See *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260, ¶ 70. In other cases such as *Brannigan*, the Court has noted generally that it “must give appropriate weight to such relevant factors as the nature of the rights affected by the emergency derogation, the circumstances leading to, and the duration of, the emergency situation.” *Brannigan v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) at 50, ¶ 43 (1993). This is applied questionably in practice. See SVENSSON-McCARTHY, *supra* note 33, at 591.

be proportionate and therefore were a violation.²⁴⁶ There was a vocal dissenting judgment by Lord Hoffman asserting that the terrorist threat was indeed a question for the court and did not amount to a threat to the life of the nation. In Hoffman's view, "[t]errorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community."²⁴⁷

The European Court of Human Rights dealt with the case in a quite different way from the House of Lords. It endorsed a general position for a wide *margin of appreciation*, both on existence of the emergency and the proportionality of measures. It stated:

The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the *presence of such an emergency* and on the *nature and scope of the derogations necessary* to avert it. Accordingly, in this matter a *wide margin of appreciation* should be left to the national authorities.²⁴⁸

The European Court was deferential to, rather than concerned by, the fact that the United Kingdom was the only European government that felt it necessary to derogate under the Convention post-9/11.²⁴⁹ The Court dismissed the dissenting opinion of Lord Hoffman, relied on by the applicant, by stating that Hoffman had "interpreted the words as requiring a threat

246. See *A & Others v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68, ¶¶ 29, 43 (appeal taken from Eng.).

247. *Id.* ¶ 96. Lord Hoffman stated:

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. . . . The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.

Id. ¶¶ 96, 97.

248. *A & Others v. United Kingdom*, App. No. 3455/05, ¶ 173 (Eur. Ct. H.R. 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403> (emphasis added); see also *id.* ¶ 184.

249. *Id.* ¶ 180. The Court said:

While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al'Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them.

to the organised life of the community which went beyond *a threat of serious physical damage and loss of life*.”²⁵⁰ The Court said it had in the past concluded emergency situations existed even though “the institutions of the State did not appear to be imperilled to the extent envisaged by Lord Hoffman.”²⁵¹ However, the Court said little regarding the interpretation of its own threshold (that is, “a threat of serious physical damage and loss of life”) and merely referred to taking into account a “broader range of factors” than Hoffman.²⁵²

This acceptance of a state of emergency in the United Kingdom before any actual terrorist attack by Al Qaeda or its sympathizers provided a broad precedent for the applicable threshold in many other situations. The public emergency did not threaten the United Kingdom’s institutions, but rather it seemed (judging from Hoffman’s dissent and the fact that the court did not reject this point) based in substance on a threat to the safety of the British people. Most concerning, however, was the Court’s conclusion that it “accordingly shares the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation.”²⁵³ This assessment was simply incorrect. The House of Lords had made it clear that it deferred to the British executive and legislature as the public emergency was a political question of “relative institutional competence,” rather than applying a margin of appreciation and retaining the ultimate power to judicially review (as the European Court did).²⁵⁴

The European Court agreed with the House of Lords (accurately this time) that “the question of proportionality is ultimately a judicial decision,”²⁵⁵ though for the Court this was complemented by a professed *wide* margin of appreciation.²⁵⁶ This is reflected in the threshold the Court erected for interfering with the national determination of the public emergency: “the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had *misinterpreted or misapplied* Article 15 or the Court’s jurisprudence under that Article or reached a conclusion which was *manifestly unreasonable*.”²⁵⁷

Id. The Court also indicated that the House of Lords is part of the “national authorities” for the purposes of the margin of appreciation and takes the position of being deferential to the House of Lord’s decision. *Id.* ¶ 174.

250. *Id.* ¶ 179 (emphasis added).

251. *Id.*

252. *Id.*

253. *Id.* ¶ 181.

254. *A & Others v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56, [2005] 2 A.C. 68, ¶ 29 (appeal taken from Eng.); *see also infra* note 330 (quoting Lord Bingham of Cornwall).

255. *A & Others*, App. No. 3455/05, ¶ 184.

256. *Id.*

257. *Id.* ¶ 174 (emphasis added). To add to the conceptual confusion, the Court states that for a “fundamental right,” such as the right to liberty, the Court will consider whether it is a “genuine response to the emergency situation,” to ensure is the measures are “*fully justified* by the special circumstances of the emergency,” and whether “adequate safeguards were provided against abuse.” *Id.* ¶ 184 (emphasis added). The right to liberty has been engaged in

This regrettably suggested that misinterpretation, misapplication, or manifest abuse were the real standards by which the Grand Chamber would set aside the deferential margin of appreciation, rather than measures that cannot be shown as “strictly required by the exigencies of the situation” (that is, the wording of Article 15). Finally, the Court also rejected the U.N. Human Rights Committee’s view that measures must be exceptional and temporary in nature. The Court stated that it “has never, to date, explicitly incorporated the requirement that the emergency be temporary, although the questions of proportionality of the response may be linked to the duration of the emergency.”²⁵⁸

The unanimous decision by the Grand Chamber of the European Court in *A & Others* served only to consolidate the problems in the European jurisprudence on Article 15. The case stands for general principles that simply do not work, are not able to protect human rights during an emergency, and are internally inconsistent. It provided a weak threshold for both the emergency situation and proportionality of measures, including by expressly endorsing a wide margin of appreciation on both legal questions—public emergency and proportionality of measures. However, the foundations of the Grand Chamber’s reasoning in *A & Others*, including on margin of appreciation, are not rock solid, due to a feeling that perhaps the Court would have reasoned differently if there had been no House of Lords decision to rely on. Even if so, the judicial reasoning is hardly satisfying.

In summation, a review of the European jurisprudence evidences a pattern of caution and deference in which the Court has failed to impose strict and objective standards for derogations.²⁵⁹ Since *Lawless*, the margin of appreciation has featured in all cases before the Commission and the Court on derogations, and more recently it has usually been a *wide* margin of appreciation. Aside from the *Greek Case*, the Commission and Court have consistently adopted a deferential approach to governments’ assertions of a public emergency.²⁶⁰ The European judiciary “chose to defer to the ‘better position’ of the national authorities both to determine the

nearly all the Article 15 cases, and these tests and principles if applied would be inconsistent with any margin of appreciation.

258. *Id.* ¶ 178. The U.N. Human Rights Committee by contrast states that the “[m]easures derogating from the provisions of the Covenant must be exceptional and *temporary* in nature.” See General Comment No. 29, *supra* note 2, ¶ 2 (emphasis added).

259. As Svensson-McCarthy comments on the European jurisprudence, “[c]onsiderable uncertainty also surrounds the question of the burden of proof and the level of evidence required to show the existence of a public emergency.” SVENSSON-McCARTHY, *supra* note 33, at 324, 618. The ostensibly robust standards discussed above—that is, “strictly required by the exigencies of the situation,” see ECHR, *supra* note 87, art. 15, “the crisis or danger must be exceptional,” The *Greek Case*, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 1, ¶ 153 (Eur. Comm’n on H.R.)—have fallen by the wayside. Hartman states that the use of the margin of appreciation has “prevented interpretation of ‘strictly required’ meaning essential or indispensable.” Hartman, *supra* note 33, at 31, 32, 35.

260. See FITZPATRICK, *supra* note 11, at 197.

existence of an emergency and to select measures.”²⁶¹ This makes it difficult to see how the Convention can protect human rights in an emergency in Europe, or more importantly to see how people may be protected from abuse by governments in a state of emergency. Furthermore, with the Grand Chamber decision in *A & Others*, it is now settled case law that a wide margin of appreciation applies to both the determination of an emergency and proportionality of measures.

B. Conceptual Challenges in the Jurisprudence

The U.N. and European jurisprudence on states of emergency and derogations reveal a number of key themes and issues that challenge the effective interpretation and application of IHRL. There are three particular issues that engage conceptual problems and that may also concern the underlying theoretical debates mentioned above in Part I. These issues will each be discussed in turn below: (a) the margin of appreciation, (b) terrorism as a public emergency, and (c) causation and protection of the government from opposition.

1. Margin of Appreciation

The margin of appreciation is commonly explained as the idea that each European society is “entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or different moral convictions.”²⁶² The margin of appreciation is the central conceptual problem of the European jurisprudence on states of emergency. While not mentioned in the *travaux préparatoires* of the European Convention,²⁶³ it has become integral to the cases and has also been endorsed in the Venice Commission opinion concerning the protection of

261. *Id.* at 201 (referring to the *Lawless* and *Ireland* cases).

262. Benvenisti, *supra* note 8, at 843–44; see also Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 115–16 (2005); Lord Lester, *The European Convention on Human Rights in the New Architecture of Europe: General Report*, in 8th International Colloquy on the European Convention on Human Rights, Budapest, Hung., Sept. 20–23, 1995, at 227, 237. Its supporters “endors[e] the doctrine as a realistic and appropriate tool by which an international court facilitates its dialogue concerning sensitive matters with national legal and political systems and with their unique values and particular needs, . . . reflect[ing] the twin aspects of subsidiarity and cultural diversity.” Gross & Ní Aoláin, *supra* note 45, at 627. It has been seen as balancing the *sovereignty* of states with the need to ensure the observance of the human rights obligations in the Convention. See R. St. J. Macdonald, *The Margin of Appreciation*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83, 123 (R. St. J. Macdonald et al. eds., 1993).

263. See, e.g., HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 14 (1996); see also Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 INT’L & COMP. L.Q. 638, 639 (1999); Nicholas Lavender, *The Problem of the Margin of Appreciation*, 4 EUR. HUM. RTS. L. REV. 380, 381 (1997); McHarg, *supra* note 41.

human rights in emergency situations.²⁶⁴ By contrast, the U.N. Human Rights Committee has rejected the margin of appreciation for interpretation of the Covenant.²⁶⁵ While the concept is used now in a range of ways in European Convention cases,²⁶⁶ its genesis was the *Cyprus, Lawless*, and *Greek* cases concerning states of emergency. A key second and subsequent use of the concept has been to apply a margin of appreciation to the different social values in Europe in cases on freedom of expression and religion. This use may be seen as advancing judicial self-restraint on difficult issues.²⁶⁷ It is also said to be closely connected to the *democratic* nature and processes of the states parties to the Convention.²⁶⁸ This rationale engages some of the more theoretical debates in Part I above, such as separation of powers and democracy as a check on emergency powers.

While the margin of appreciation is now a well-established part of European jurisprudence, its “exact ambit and role are far from being fully developed.”²⁶⁹ As evidenced above, in the *A & Others* case, the margin of appreciation and Article 15’s requirements are *prima facie* not easily reconciled despite the desire for them to be perceived as such. The Venice Commission unfortunately succumbed to these inherent contradictions when it stated that “[a]lthough the state authorities enjoy a margin of appreciation, *they must not go beyond* what is necessary or proportionate.”²⁷⁰ There is strong inconsistency in the application of this concept,

264. Venice Comm’n, *supra* note 40, ¶ 19 (“Nonetheless, Contracting States are allowed a ‘margin of appreciation’ being the latitude or discretion allowed to a State in its laws and how it enforces them. This margin of appreciation extends to the choice of means to be used by the authorities to ensure that lawful demonstrations take place peacefully and to what extent interference is necessary.”).

265. This is the case even though express reference to this doctrine was made during the early discussions the Third (Human Rights) Committee in 1963. See Rep. of the 3d Comm., *Draft International Covenants on Human Rights*, ¶ 49, U.N. Doc. A/5655 (Dec. 10, 1963) (by Refslund Thomsen); YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE EHCR 17 (2002).

266. Examples include for the protection of public morals and children’s literature. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 28 (1976). For an extensive list of the cases, issues, and articles, see *The Margin of Appreciation*, COUNCIL EUR., http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp (last visited Apr. 2, 2013).

267. See *Higgins*, *supra* note 33, at 313. *But see* Gross & Ní Aoláin, *supra* note 45, at 628.

268. Gross & Ní Aoláin, *supra* note 45, at 628. “James Fawcett has suggested that the margin of appreciation occupies a middle position between what a democratic State considers necessary and what is objectively necessary to attain a permitted end.” *Higgins*, *supra* note 33, at 313; see also SVENSSON-McCARTHY, *supra* note 33, at 305.

269. SVENSSON-McCARTHY, *supra* note 33, at 318. It has also frustrated attempts at universal standards. See Benvenisti, *supra* note 8, at 845; see also Gross & Ní Aoláin, *supra* note 45, at 635 (“There are few cases, relatively speaking, in which the Court has made any real effort to delineate the criteria and parameters that are taken into consideration when deciding the actual use of the doctrine in a given case.”).

270. Venice Comm’n, *supra* note 40, ¶ 39 (emphasis added) (speaking in the context of freedom of assembly).

and the results range from an objective examination of the limitations of the margin to a total abdication by the courts and tribunals of their role in assessing states' compliance. The heart of the problem is the subjectivity and elasticity of the margin of appreciation concept, which is further compounded by invoking either a *wide* or *narrow* margin.

The margin of appreciation concept has become a tool that provides an easy way out for the European Court when faced with difficult state-of-emergency cases. As Svensson-McCarthy accurately sums it up:

[W]hen the Court emphasises the limits of its powers of review under Art. 15 at the same time as it grants a "wide" margin of discretion to the High Contracting Parties, it inevitably conveys the impression of wanting to avoid having to make rulings against governments except in manifestly abusive cases.²⁷¹

In this regard, the Court "essentially reverts difficult policy questions back to national institutions, in complete disregard of their weaknesses."²⁷² The margin of appreciation's inherent deference to states to resolve difficult political and moral decisions is in part justified by the liberal democratic nature of the states, and thus an inherent faith by the courts in the legitimacy and lawfulness of their decisions rooted in liberal democratic theory. Yet the context in which the margin is most frequently applied illustrates an inherent contradiction between this rationale and another inherent aspect of liberal democracy: the role of the judicial branch and the law in safeguarding the minority against a "tyranny of the majority." Thus, as Eyal Benvenisti points out, a doctrine grounded in the legitimacy of democratic decision making is inappropriate where the conflict concerns treatment of the minority by the majority—a province of the judiciary in liberal democratic theory.²⁷³ Nearly all the European cases on states of emergency can be cast as involving treatment of minorities by majorities (for example, Northern Ireland and Catholics, Turkey and the Kurds, the United Kingdom and foreigners of Arab origins).

271. SVENSSON-McCARTHY, *supra* note 33, at 314–15; *see also* Benvenisti, *supra* note 8, at 844 ("Inconsistent applications in seemingly similar cases due to different margins allowed by the court might raise concerns about judicial double standards."). As the ICJ report states, there is potential for a "'double standard' or a reluctance to scrutinize closely the actions of a country enjoying a generally positive image with regard to human rights practices." *See* ICJ STUDY, *supra* note 38, at 455. Gross and Ní Aoláin in their major study suggested that the "deep reasons for the [European jurisprudence] according the widest margin of appreciation . . . are not explicitly stated in the Court's judgments." Gross & Ní Aoláin, *supra* note 45, at 637. These seem to include the difficulty in replicating the conditions for the decision that the government faced at the time, the "considerations of the Court's own legitimacy particularly as a supranational body seeming to intervene in matters so close to 'raw' nerves of national sovereignty," and the "realization that proper functioning of the Convention system depends on the cooperation of states in the absence of meaningful enforcement mechanisms." *Id.*

272. Benvenisti, *supra* note 8, at 853.

273. *See id.* at 853–54.

Despite the problems with the margin of appreciation, even some of its strongest critics do not advocate that it be done away with entirely, but rather applied restrictively.²⁷⁴ Higgins, for example, criticizes the concept but suggests that the margin of appreciation applies to the existence of the state of emergency *only* and not to the proportionality of measures.²⁷⁵ The challenge to this suggestion is determining whether the two questions—public emergency and proportionality of measures—are sufficiently mutually exclusive to apply the margin of appreciation to one and not the other. As demonstrated above, the judicial assessment of proportionality requires the “exigencies of the situation” to be the yardstick against which the proportionality of any measures are considered. Where there is judicial deference (that is, through the margin of appreciation) or avoidance in assessing the emergency situation, there is a risk that the proportionality assessment takes place in the context of a government’s inaccurate and unsubstantiated assertion of a public emergency. In other words, a court may need to consider the proportionality of measures that might be justified by a legitimate public emergency, but in a context where the court has already deferred to a government’s unjustified assertion of public emergency. This can lead to a substantive deference to the government’s assessment, which in turn corrupts the juridical assessment of proportionality since in reality the threshold of public emergency has not even been met.

Svensson-McCarthy is the sole commentator of IHRL who has begun to grapple with this complex issue and recognizes the symbiotic relationship between the two legal questions. She notes in the *Ireland v. United Kingdom* context that the reasoning “contains a fundamental contradiction, which follows from the fact that the Court expressly declined to make its own assessment of the strict necessity of the emergency measures on the ground that its task was limited to reviewing the ‘lawfulness’ of the derogatory measures under the Convention.”²⁷⁶ The problem with Higgins’s and others’ suggestion is that it does provide some logical support for the *A & Others* finding by the European Court that the margin of appreciation is applied to both questions, since it is not really possible to apply it only to the public-emergency question.

2. Terrorism: Threat, Duration, and Imminence

Terrorism poses a significant conceptual challenge to avoiding the abuse of states of emergency. In interpreting the ICCPR, the U.N. Human Rights Committee’s General Comment 29 does not even mention terrorism as one of the frequent bases invoked for a state of emergency. However, while not discussed at the time of the negotiations of the Covenant

274. See, e.g., Gross & Ní Aoláin, *supra* note 45, at 648–49 (“Only the narrowest of margins should be accorded the derogating government.”).

275. See Higgins, *supra* note 33, at 299–300 (“This writer believes that there are good reasons for not embracing the notion of margin of appreciation in regard to the existence of a public emergency, if that phrase amounts to anymore more than a mere reminder to the Commission that it may be difficult for it to verify all its facts.”).

276. SVENSSON-McCARTHY, *supra* note 33, at 600.

and European Convention, terrorism has become frequently invoked by states as the basis of an emergency and is the mainstay of the relevant cases in the European system. As is well known, the meaning of terrorism is controversial and it is not a clearly defined term under international law.²⁷⁷ The distinction between “terrorists” and “freedom fighters” was contentious in the context of colonial oppression and states of emergency and still is today in situations such as the Occupied Palestinian Territories, the Kurds in Turkey, and the Tamils in Sri Lanka.

While opposing views exist,²⁷⁸ it is not controversial to accept that terrorism may form the basis of a state of emergency. Terrorism may be viewed as a threat to the life of the nation, where “life of the nation” may refer to the physical population, the state’s territorial integrity, or the function of the organs of the state.²⁷⁹ It is very likely there are points in the history of Northern Ireland and Israel, for example, where terrorism has provided sufficient justification for the derogation of human rights under the relevant treaties. The robust focus of states on combating terrorism is well justified, but it has become mixed up with other issues, and whether or not it forms a justified basis of derogation in any particular situation is often problematic. The heart of the problem is that most terrorism is targeted at creating ongoing fear in the civilian population, and, as such, it often may not threaten the institutions of state and governance, nor be exceptional or temporary in nature. The point at which the threat of terrorism reaches the threshold necessary to satisfy a public emergency that requires derogation of human rights obligations is unclear.

In *A & Others*, the European Court of Human Rights drew a parallel between Northern Ireland and the British situation post-9/11 to justify the argument that terrorism may constitute a state of emergency. In making the comparison, the Court, quoting from *Ireland v. United Kingdom*, referred to “a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom.”²⁸⁰ The British notice of derogation post-9/11 used the terminology of a “terrorist threat” and “national security” to describe the public emergency but did not go beyond this to identify the nature or impact of the threat. Additionally, the derogation was at a time prior to any attacks on the United Kingdom.²⁸¹ As mentioned above, Lord Hoffman provided a dissenting opinion and focused on the lack of threat to “our institutions of government or our existence as a civil

277. See, e.g., Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/1/AC/R176bis, at 3 (Special Trib. for Leb. Feb. 16, 2011).

278. See, e.g., Sub-Comm’n on the Promotion and Protection of Human Rights, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-terrorism*, ¶ 37, U.N. Doc. A/HRC/Sub.1/58/30 (Aug. 3, 2006) (by Kalliopi K. Koufa) (“In general, only certain mercenary groups, not terrorist groups, have the capacity to threaten the existence of a State, and then only a small or poorly defended one.”).

279. See Siracusa Principles, *supra* note 11, princ. 39(b).

280. *A & Others v. United Kingdom*, App. No. 3455/05, ¶ 184 (Eur. Ct. H.R. 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403>.

281. The U.K. government states in its derogation order that

community.”²⁸² The European Court in *A & Others* rejected his argument and indicated that there was an “urgent need to protect the population of the United Kingdom from terrorist attack.”²⁸³ While there were similarities in the *Ireland* and *A & Others* cases, there were also great differences, particularly in the material impact that the Irish Republican Army had on the U.K. nation and its people as compared to the nascent Al Qaeda threat at that time.

The *level* of threat also needs to be considered alongside the *nature* of the threat in the context of proportionality of measures directed at that threat. The *A & Others* case, for example, illustrates a misconception by the United Kingdom of the threat forming the basis of its derogation. The British derogation identified “foreign nationals” in particular as the threat, and they were the target of the measures complained of and ultimately found in violation of the Convention. The Grand Chamber in *A & Others* referred to the 2005 London bombings, four years after the British derogation, to demonstrate that the public emergency was real and justified.²⁸⁴ What the Chamber did not acknowledge was that the bombers were all British nationals and therefore not subject to the derogation actually in question (as the derogation addressed foreigners only). These finer but important points tend to get lost in the rhetoric of the “war on terror,” which is used to justify extensive recourse by government to emergency powers.²⁸⁵

The principle that proportionality in part relies on the imminence of the threat posed by the public emergency, which has its origins in the *Greek Case*, has been repeatedly endorsed by commentators, including in scholarly IHRL projects. The Siracusa Principles ON THE LIMITATION AND

[t]here exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being member of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.

Human Rights Act 1998 (Designated Derogation) Order 2001, S.I. 2001/3644 (U.K.), available at <http://www.legislation.gov.uk/uksi/2001/3644/made>. The United Kingdom also justified its state of emergency by referring to U.N. Security Council resolutions 1368 and 1373, where the attacks were explicitly recognized as a “threat to international peace and security” and a “serious challenge and threat to international security.” *Id.* art. 2, ¶ 2 (referring to S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) and S.C. Res. 1373, ¶ 4, U.N. Doc. S/RES/1373 (Sept. 28, 2001)).

282. *A & Others v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56, [2005] 2 A.C. 68, ¶ 96 (appeal taken from Eng.).

283. *A & Others*, App. No. 3455/05, ¶ 216.

284. *See id.* ¶ 177.

285. This point has been the subject of significant literature. *See, e.g.*, AGAMBEN, *supra* note 12, at 15–19; Fitzpatrick, *supra* note 190, at 252; Humphreys, *supra* note 13, at 679–80.

DEROGATION OF PROVISIONS IN THE ICCPR,²⁸⁶ for example, provide that “[e]ach measure shall be directed to an actual, clear, present or *imminent* danger and may not be imposed merely because of an apprehension of *potential* danger.”²⁸⁷ The juridical application of this principle and the precise and somewhat arbitrary distinction between imminence and potentiality is fraught. There is no example of a case involving terrorism where a treaty body has dealt seriously with this imminence issue, although it has featured in dissenting opinions. In the *Lawless* case, for example, five European Commission on Human Rights members dissented against the finding that the terrorist threat was a public emergency. Four of the members effectively suggested that the situation had not reached the threshold of public emergency, as it had persisted in a virtually unchanged form for years, and that the Commission had been overly deferential to the Irish Government’s assertion.²⁸⁸ The other Commission member adopted a similar position, but also indicated that he was not convinced it was necessary as a general matter to even make a legal determination of a public emergency.²⁸⁹

The essentially temporary nature of a state of emergency is part of its philosophical heritage and is also a confirmed principle in the literature.²⁹⁰ The U.N. Human Rights Committee stated in General Comment 29 that “[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured must be the *predominant objective* of a State party derogating from the Covenant.”²⁹¹ As discussed above in Part II

286. Siracusa Principles, *supra* note 11, ¶ (i). The Siracusa Principles were the output of a group of thirty-one experts in international law, convened in 1984 by the ICJ, the International Association of Penal Law, the American Association for the ICJ, and the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences. *Id.*

287. *Id.* ¶ 54 (emphasis added). Svensson-McCarthy, for example, defines an imminent threat as one “on the verge of breaking out at any moment.” SVENSSON-McCARTHY, *supra* note 33, at 299 (emphasis omitted); *see also id.* at 3, 292. Grossman states: “[T]he cause must be a real or imminent event. Mere potential dangers, latent or speculative in nature, do not warrant the proclamation of emergency conditions.” Grossman, *supra* note 14, at 42. Oraá, for example, considers “imminent” to exclude any crisis situations that, however dangerous, are still only *potentially* so serious as to actually threaten the life of the nation. ORAA, *supra* note 15, at 27.

288. *Lawless v. Ireland*, App. No. 332/57, Eur. Ct. H.R. (ser. B) at 94–102 (Eur. Comm’n on H.R. 1960–1961).

289. *Id.* at 93.

290. Special Rapporteur’s Tenth Report, *supra* note 1, ¶ 69; Special Rapporteur of the Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment*, ¶ 69, U.N. Doc. E/CN.4/Sub.2/1982/15 (July 27, 1982) (by N. Questiaux); SUBRATA ROY CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY: THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY* 5 (1989); *PARIS MINIMUM STANDARDS*, *supra* note 11, ¶ 3(a); ORAA, *supra* note 15, at 30.

291. General Comment No. 29, *supra* note 2, ¶ 1 (emphasis added). Special Rapporteur Questiaux had stated something similar: “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 others. The right of derogation can be justified solely by the

concerning practice and problems, this suggestion has been honored in the breach, particularly for public emergencies based on terrorist threats. The European jurisprudence, for example, has focused mostly on the United Kingdom and Turkey and their respective terrorist emergencies.²⁹² Northern Ireland was subject to an entrenched terrorist emergency for nearly thirty years, and Turkey was engaged in a similar conflict for most of the time between 1970 and 1987, including almost the entirety of the seven years from 1980 to 1987.

More recently, the temporality issue has become important since 9/11, Al Qaeda, and the “war on terror.”²⁹³ The war against terrorism has risked becoming an entrenched state of emergency or “the permanent emergency.”²⁹⁴ As Fitzpatrick commented, “[n]o territory is contested; no peace talks are conceivable; progress is measured by the absence of attacks, and success in applying control measures (arrests, intercepted communications, interrogations, and asset seizures). The duration of ‘hostilities’ is measured by the persistence of fear that the enemy retains the capacity to strike.”²⁹⁵ In this regard, with a semiperpetual nature and the difficulty of threat assessment, terrorism poses a great problem for juridical assessment based on the agreed principles for states of emergency. Terrorism can become a form of entrenched public emergency that breaks down the theoretical distinction between the normal and the exceptional or even stretches the exceptional to become the norm.²⁹⁶ The justification offered to the U.N. Human Rights Committee by Israel in 1998 on its state of emergency demonstrates the point well:

[O]n the one hand, the State and its citizens have been subjected without cease to a grimly real existential threat, to an ongoing state of war with some of its neighbours whose policies still aim at Israel’s destabilization or destruction, to campaigns of political violence which continue to exact a dreadful toll, and to full-scale armed conflict six times in nearly 50 years. On the other hand, aside from those periods of all-out war, Israel’s civil and governmental institutions generally function uninterruptedly in normal fashion in the midst of the continuing conflict. As a matter of political reality, Israel’s needs for a formal state of emergency will

concern to return to normality.” Special Rapporteur of the Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *supra* note 290, ¶ 69.

292. See the examples provided by Gross & Ní Aoláin, *supra* note 45, at 645–46.

293. As pointed out, 9/11 and the “war on terror” were not new for issues of state emergency; rather, as Dyzenhaus says, “all that is new is the prevalence of the claim that this emergency has no foreseeable end and so is permanent.” DYZENHAUS, *supra* note 12, at 2.

294. Fitzpatrick, *supra* note 190, at 251.

295. *Id.*

296. See Gross & Ní Aoláin, *supra* note 45, at 645.

abate when it succeeds in concluding and implementing formal peace arrangements in the region.²⁹⁷

For entrenched states of emergency, in particular ones founded on threats of terrorism, time limits are often mentioned as a tool of mitigation. The U.N. Sub-Commission's updated *Preliminary Framework Draft of Principles and Guidelines on Human Rights and Terrorism* provided that "[g]reat care should be taken to ensure that exceptions and derogations that might have been justified because of an act of terrorism meet strict time limits and do not become perpetual features of national law or action."²⁹⁸ This conflicts obviously with the Israeli government's arguments set out above. The idea of limited duration for states of emergency is reflected in many states' legal systems,²⁹⁹ but as has been the case in Egypt, the United Kingdom, Sri Lanka, and other states, this is not an effective constraint, as often the emergency measures continue to be periodically renewed without much difficulty. The slippery slope from exception to norm illustrated by the use of terrorism to justify a state of emergency has also provided many states with a strong pretext for entrenched, institutionalized, and unjustified states of emergency. While it is a comfort that normal laws can address new terrorist threats, it has also meant that antiterrorism laws have in some cases become a safe haven for de facto emergency laws.³⁰⁰

3. Causation and Protection of the Government

The literature and jurisprudence on states of emergency does not focus on the issue of causation of the state of emergency. To the extent that a government is responsible for a violent crackdown on generally peaceful protests, triggering a state of emergency, there may be an inherent problem with causation of the public emergency. The U.N. Commission on Human Rights' debates in the 1950s recognized that it was difficult to give a precise definition to "the life of the nation" but it "was significant that

297. H.R. Comm., *Initial Report of States Parties Due in 1993: Israel*, ¶ 123, U.N. Doc. CCPR/C/81/Add.13 (June 2, 1998).

298. See Sub-Comm'n on the Promotion and Protection of Human Rights, *supra* note 278, ¶¶ 24, 37(b), 42.

299. See, e.g., 1958 CONST. art. 16 (Fr.) (permitting referral of the emergency after thirty days to the Constitutional Council, the President of the Senate, sixty Members of the National Assembly, or sixty Senators, and requiring a decision by them after sixty days on the continuance of the state of emergency); Emergencies Act, R.S.C. 1985, c. 22 (Can.) (referring to "special temporary measures"); Emergency Act 67 of 1977 § 2(1)(a) (S. Afr.) ("The President may . . . make such regulations as are necessary or expedient to restore peace and order and to make adequate provision for terminating the state of emergency.").

300. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 213, 115 Stat. 272, 285-86 (2001) (outlining the Act's "sneak and peak" provisions); Anti-Terrorism, Crime and Security Act, 2001, c. 24, §§ 24-31 (Eng.) (prescribing special immigration procedures for suspected terrorists), considered in case cited *supra* note 246.

the text did not relate to the life of the government or of the state.”³⁰¹ This feeds into the point made by some commentators that a state of emergency cannot be invoked merely to defend a government against its political opponents.³⁰² While the *Greek Case* is a key example, the causation issue (that is, the military coup or revolution) was only raised in a few of the dissenting opinions of the European Commission members.³⁰³ Similarly, the U.N. Human Rights Committee has only once recognized the causation issue, and then only impliedly, when in 1979 it examined Chile’s continuing state of emergency and implied that the cause of the emergency was the military junta itself.³⁰⁴

In practice, the suppression of political dissent is unfortunately a rather common use of emergency measures, as demonstrated to varying degrees by Arab Spring countries such as Syria and Egypt. A government can use force to create a situation of violence that it utilizes as a pretext for derogating human rights. An even broader issue is that a government may use states of emergency to entrench control over a population that does not support its leaders. U.N. Special Rapporteur for States of Emergency Despouy, in his final report and after reviewing twelve years of practice on states of emergency, referred to “a growing tendency [by governments] to invoke ethnic issues and/or internal disturbances caused by social tensions due to economic factors linked to poverty, impoverishment or the loss of social benefits by significant sectors of the population.”³⁰⁵ The extensive report of the recent Bahrain Independent Commission of Inquiry also well demonstrates the nexus between longer-term social problems, government repression, and the existence of a state of emergency.³⁰⁶

C. *Enlarging the Scope of States of Emergency*

There is clearly a disconnect between the principles cited by international treaty bodies in the relevant international cases, periodic reviews, and general comments and those same bodies’ actual practice in determin-

301. Comm’n on H.R., Summary Record of the 330th Meeting, 8th Sess., June 10, 1952, at 4, U.N. Doc. E/CN.4/SR.330 (July 1, 1952).

302. Svensson-McCarthy states that “the concept of public emergency cannot be invoked merely to defend the government in power at the price of muzzling political opponents.” SVENSSON-McCARTHY, *supra* note 33, at 240. Nowak refers to “dictatorships” that “misuse the tool of emergencies to maintain their own positions of power.” NOWAK, *supra* note 38, at 84.

303. *E.g.*, The Greek Case, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 1, ¶ 214 (Eur. Comm’n on H.R.) (dissenting opinion of Mr. Ermacora) (observing that there was a public emergency as defined by the ECHR, but that it seemed “incompatible” for the Greek government to have resort to Article 15 since it was the government itself that was responsible for the situation).

304. Rep. of the H.R. Comm., *supra* note 133, ¶ 78.

305. Special Rapporteur’s Tenth Report, *supra* note 1, ¶ 36.

306. *See generally* BHR. INDEP. COMM’N OF INQUIRY, REPORT OF THE BAHRAIN INDEPENDENT COMMISSION OF INQUIRY ch. II (2011), available at <http://www.bici.org/bh/BICReportEN.pdf> (discussing the historical background).

ing a state of emergency and assessing the proportionality of emergency measures. Almost every complaint and case of the international treaty bodies has implicitly accepted the government assertion of a state of emergency. This cannot reflect reality. As Green comments, “a critical onlooker would be justified in concluding that the chances of a state being found guilty of wrongly declaring an emergency are somewhat remote.”³⁰⁷ The fine distinctions in the law—for example, imminence versus potentiality, temporality versus normality—are not upheld in practice. The problem is well summed up by Svensson-McCarthy, who notes that “[a]lthough the notion of a public emergency might be defined in the abstract with relative ease, the application *in concreto* of such definition gives rise to numerous legal problems to which, so far, either only partial solutions have been found, or none at all.”³⁰⁸

The judicial reluctance or indifference to assess *de novo* the state of emergency, while retaining the formal legal authority to do so, has contributed to a dilution of the law’s normativity.³⁰⁹ Each time a court or treaty body only enters into an assessment on proportionality, even if it comments very little on the state of emergency, it often implicitly concedes the government’s position and contributes to the enlargement of the scope of what may be deemed a public emergency. As demonstrated above, this is reflected in state practice and arguments. It leads to a body of jurisprudence under which probably a significant portion of the world’s states at any given time could plausibly, but unjustifiably, assert a state of emergency—in relation to terrorist threats, for example—and derogate from their human rights obligations. Moreover, this approach also opens itself to deeper criticisms concerning the role of law in an emergency, which is linked to the theoretical debates in Part I. As Dyzenhaus comments after analysing the case law, “[t]he judicial record largely support[s] Schmitt’s claims, albeit not through the idea that the rule of law has no place in an emergency, but through the idea that only a formal or wholly procedural conception of the rule of law is appropriate for emergencies.”³¹⁰

IV. RECONCEPTUALIZING THE LEGAL DOCTRINE

It is clear that the current state of the jurisprudence and practice is not acceptable from the standpoint of a defensible articulation of international treaty obligations and the protection of human rights. There is a need to reduce the normative expansionism and abuse of states of emergency. As discussed above, there are ideas for improving the implementation mechanisms, but there is little immediate prospect of significant change in this

307. Green, *supra* note 33, at 100.

308. SVENSSON-McCARTHY, *supra* note 33, at 195.

309. FITZPATRICK, *supra* note 11, at 197 (recognizing that the tendency of courts to shrink from assessing government emergency is a key factor in the violations).

310. DYZENHAUS, *supra* note 12, at 35. The latter, according to Dyzenhaus, allow a government “to have its cake and eat it too” and are “worse than grey holes,” as they give official lawlessness “the facade of legality,” and in substance they are black holes. *Id.* at 42; see also *id.* at 59.

area. The majority of commentators state that the treaty bodies should apply a more restrictive approach. They should be “critical,” not “deferential,” should adopt a “scrupulous judicial attitude,” and should subject state governments’ claims to “rigorous analysis.”³¹¹ The calls for a stricter approach overarch many commentators’ proposals for progress and reform, including those such as clarifying the threshold of severity for an emergency,³¹² eliminating the margin of appreciation,³¹³ clarifying the “temporal element” (that is, imminence),³¹⁴ and “developing phases” within the emergency, each with differentiated measures,³¹⁵ and so on.

However, where the existing norms are not being respected or implemented in practice, the question arises what might be the effect of adopting additional norms of specificity. Fitzpatrick at least recognizes that this higher standard setting for states of emergencies will reach a “threshold of counterproductivity.”³¹⁶ To strengthen and clarify the standards and international supervision is appealing in its simplicity, but it ignores the underlying factors that have driven the jurisprudence to its current parlous state. Other commentators in IHRL scholarship try to develop broader theses. For example, Svensson-McCarthy in her study argues that a state of emergency must be guided by key principles, including the principle of legality and the balance of the notions of national security and public order.³¹⁷ These are the general principles that underpin the jurisprudence, but they do little to resolve the current problems faced. There is a need for a new and broader approach at the level of theory, legal doctrine, and politics that has both prescriptive and descriptive value. The ICJ’s study notes in the context of improving implementation that “[t]his question must be approached with *realism*.”³¹⁸

311. E.g., McGoldrick, *supra* note 33, at 425 (“It was crucially important for the [Human Rights Committee] to take a critical and restrictive approach to the implementation of article 4 . . . in view of its very limited powers both under the reporting and individual communications procedures, [t]he most the implementation bodies can do is to adopt a scrupulous judicial attitude that will influence world opinion by its objectivity and thoroughness.” (quoting Hartman, *supra* note 33, at 49)); see also Fitzpatrick, *supra* note 190, at 263; Joseph, *supra* note 163. There is support for the opposite view, that is, that the Court is best placed to make the decisions on both the existence of an emergency and on the nature and scope of the derogations, being detached from the turmoil and making decisions *ex post facto*. See Gross & Ní Aoláin, *supra* note 45, at 639, 643.

312. FITZPATRICK, *supra* note 11, at 224.

313. E.g., SVENSSON-McCARTHY, *supra* note 33, at 319.

314. Fitzpatrick, *supra* note 190, at 252.

315. In terms of duration of a state of emergency, there is no specific case law, but one commentator suggests that “if the intensity of the danger is of various developing phases or degrees, the measures taken during each phase must vary accordingly.” Aly Mokhtar, *Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights*, 8 INT’L J. HUM. RTS. 65, 71 (2004).

316. FITZPATRICK, *supra* note 11, at 73.

317. SVENSSON-McCARTHY, *supra* note 33, at 93.

318. ICJ STUDY, *supra* note 38, at 439 (emphasis added). Grossman states that “it must be acknowledged that because the problem is not solely juridical, neither is its solution.” Grossman, *supra* note 14, at 38.

On review of the preceding Parts and analysis, this Article proposes that the traditional *substantive* question of a public emergency should be reconceived and subsumed into the *procedural* questions of declaration and notification, both of which are clear requirements of Article 4. The substantive assessment and threshold for a public emergency are not eliminated, however, as they will always form an essential part of the proportionality assessment of the emergency measures vis-à-vis the public emergency. There are a number of reasons that this proposal is sound from theoretical, legal, doctrinal, and political perspectives, each of which are set out below.

The bifurcation of the two traditional legal questions is based on a false assumption that the existence of a state of emergency is an objective and stand-alone legal question. Instruments such as the Paris Minimum Standards perpetuate this assumption: "The existence of a public emergency which threatens the life of the nation, and which is officially proclaimed, *will justify* the declaration of the state of emergency."³¹⁹ In the international human rights treaties, however, the concept of declaring a state of emergency has no independent legal meaning or effect unless it is accompanied by lawful measures of derogation. In other words, the point of declaring a state of emergency is to justify lawful derogations from the human rights treaties, and thus the *real* question is whether a particular derogation is itself justified and thus lawful under the relevant treaty. It therefore may not mean anything to have a lawful state of emergency if the measures are unlawful, and there cannot be an unlawful declaration of a state of emergency in a situation where in substance there is no derogation of human rights obligations. It is also difficult to conceive of an objective and stand-alone threshold (that is, for public emergency) that would justify derogation and could exist entirely independent of any reference to the emergency measures themselves. The emergency measures provide the necessary *context* to the existence and justification for the state of emergency. Furthermore, the borderline between exception and normality is far more complex than suggested by the general and abstract principles articulated by the treaty bodies. While the European jurisprudence tried to develop general standards on a public emergency in the *Greek Case*, these have been honored in the breach. As the analysis of General Comment 29 demonstrated above, the U.N. Human Rights Committee has largely steered clear of articulating any comparable and useful standards. U.N. Special Rapporteur Despouy, who studied such situations closely for many years and engaged in extensive dialogue with states, noted that the arguments provided by governments for their respective emergencies were "highly dissimilar."³²⁰ The idea of some kind of concrete abstract threshold for establishing a state of emergency is alluring but ultimately misleading.

319. PARIS MINIMUM STANDARDS, *supra* note 11, ¶ 1(a) (emphasis added).

320. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 36.

It has to be acknowledged also that the subject matter of a threat to the life of a nation is highly politically charged. As suggested by Schmitt and others, such an assessment can be seen as a value judgment that goes to the very heart of a state's decision-making autonomy and sovereignty. In promoting the margin of appreciation in the *Lawless* case, Sir Humphrey Waldock emphasized the "context of the rather special subject-matter with which it deals: the responsibilities of a Government for maintaining law and order in a time of war or any other public emergency threatening the life of the nation."³²¹ This subject matter has been without doubt difficult for the treaty bodies. Assessment of factual questions as to whether there are emergency conditions that threaten the life of the nation is difficult for international and transnational human rights courts and lawyers. Such issues, for example in the context of war powers and foreign policy, are not typically highly judicialized in most states' national legal systems and also stretch the fact-finding capacities of treaty bodies. It is a reality that governments will have access to entirely different sources of information, including some that are arguably unsuitable for judicial consideration such as classified intelligence information.

While not often mentioned expressly, the concept of separation of powers has a role to play in states of emergency under IHRL. The margin of appreciation, for example, is partly geared toward promoting this separation of powers and avoiding damaging confrontations between the Court and states party to the Convention. It is difficult for judicial or legal review, at least within current IHRL architecture, to make and implement determinations that distinguish between real and fictitious states of emergency. As one author put it, the state of emergency or exception constitutes a "point of imbalance between public law and political fact."³²² As much as this author would prefer not to acknowledge the point, the current situation demonstrates a mismatch of law and politics and of principle and reality, a mismatch that undermines the law's normativity and promotion of human rights. This is reflected in the stronger implementation context of national laws, where the executives and legislatures are usually given the power to declare a state of emergency and judicial review usually pertains to the emergency measures rather than the assessment of the public emergency.³²³ To the extent that the IHRL mechanisms appropriate the right to determine a public emergency, this does not actually replicate the typical allocation of powers at the national level. This is well demon-

321. Gross & Ní Aoláin, *supra* note 45, at 632 (quoting Sir Humphrey Waldock).

322. *E.g.*, Higgins, *supra* note 33, at 299 ("There is a constant counterpoising of two elements, and the balance is not easy. On the one hand, the Commission must not, in the exercise of its functions under Article 15, set itself up as a super-State; on the other hand, it does not suffice that a State acted reasonably in finding that a public emergency exists. The emergency must exist in fact.")

323. The work of the U.N. Special Rapporteur for States of Emergency found that it is often the legislature that declares the emergency, the executive that carries it out, and judiciary that is able to decide the legality of the measures. Only in some countries is the judiciary empowered to review the state of emergency. See Special Rapporteur's Tenth Report, *supra* note 1, ¶¶ 145, 148.

strated by the *A & Others v. Secretary of State for the Home Department* decision of the House of Lords, in which Lord Bingham for the majority wrote on the question of the existence of a state of emergency:

It is perhaps preferable to approach this question as one of demarcation of functions or . . . “relative institutional competence”. The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. . . . *It is the function of the political and not judicial bodies to resolve political questions.* Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum.³²⁴

It is notable that the European Court’s Grand Chamber refused to recognize this position—essentially the political-question doctrine—or to endorse the House of Lords’ reasoning.³²⁵ The European Court associated (incorrectly) the House of Lords’ decision with the margin of appreciation under which the judiciary retains the authority to legally determine the public emergency. With respect to the *A & Others case*, although some commentators sought a more stringent burden on the British government to provide “clear and convincing evidence” of the need for derogation, few questioned the basic principle articulated by the House of Lords of a division of legal responsibility based on separation of powers.³²⁶

The interaction and conflict of governments and treaty bodies is not dissimilar to the constitutionalist dynamic and its constant dialogue of law and power, and of authority and legitimacy.³²⁷ This general dynamic is both relevant to, and perhaps more pronounced for, states of emergency under international human rights law. As the ICJ’s study recognizes, there is a need to evaluate states of emergency with the limitations of international law in mind, including recognition of the lack of adjudicative juris-

324. *A & Others v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56, [2005] 2 A.C. 68, ¶ 29 (appeal taken from Eng.) (emphasis added) (citing Lord Hoffman in *Sec’y of State for the Home Dep’t v. Rehman*, [2001] UKHL 47, [2003] 1 A.C. 153, ¶ 62). Lord Bingham also said: “I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment.” *Id.* ¶ 29.

325. A discussion of this doctrine is a large subject, both in cases and commentary, and is beyond the scope of this present Article.

326. See Hickman, *supra* note 12, at 622–66; Humphreys, *supra* note 13, at 685.

327. This is a very large subject beyond the scope of this Article, but in the U.S. constitutional law context, it is discussed in writings such as ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (1997); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* (2nd ed., 1972); ALPHEUS T. MASON & DONALD G. STEPHENSON, JR., *AMERICAN CONSTITUTIONAL LAW* (8th ed., 1987); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943 (1987).

diction, enforcement mechanisms, and resources.³²⁸ This constitutional-type dialogue takes place against the risk that states will withdraw their effective support from the system.³²⁹ States are also able to leverage a narrative that international lawyers and human rights experts in distant lands try to overrule a government's assessment of whether there is an emergency in their country in order to compel treaty bodies to accept their assessments of internal emergency situations. There is no shortage of states under scrutiny that would wish to discredit and undermine the U.N. Human Rights Committee and its views on human rights in their state.

As indicated above, by insisting on the substantive legal determination of a public emergency, the treaty bodies have inadvertently enlarged the permissible scope of the exception. One way to deal with this is to remove the public-emergency determination from the sphere of legal review. This is an unfortunate but necessary concession addressing a dichotomy of scope and normativity at the very heart of states of emergency. This dichotomy is illustrated by Aileen McHarg's comment in the context of derogations and balancing human rights and national security that "[m]ore pragmatically, courts have to choose between giving strong protection to rights, but with a relatively narrow jurisdiction to hear disputes, or alternatively, a more extensive jurisdiction, but one where rights have to give way in persistent conflicts with public interest goals."³³⁰ The latter could be an apt description of the margin of appreciation and states of emergency. The "extensive jurisdiction" choice can be dangerous, as demonstrated in the European system's desire to defer but ultimately retain the legal review of the public emergency. It is better for courts and treaty bodies to avoid this slippery slope, as the House of Lords did in the *A & Others v. Secretary of State for the Home Department* case, by identifying the public-emergency question as a political one, therefore providing for a clearer separation of powers.

The suggestion that there is no separate legal determination of the existence of a state of emergency should not be taken to indicate that the substantive threshold of public emergency is no longer relevant. This is a very important point. Rather, this threshold is incorporated and protected in the assessment of the emergency measures through the prisms of notification and proportionality. The national declaration and international no-

328. ICJ STUDY, *supra* note 38, at 439.

329. See Higgins, *supra* note 33, at 315.

One is also aware of the fact that, beyond the real difficulties . . . in making judgments on certain issues (difficulties that are probably more real in the national security area than under normal 'ordre public' clauses), the [treaty body] is exposed to the power of member States to renew or not to renew their recognition of [its] competence

Id. at 313.

330. McHarg, *supra* note 41, at 683. As Humphreys also points out, a key criticism is that "[a]ttempts to impose legal controls will merely infect ordinary rights protections with extraordinary elasticity." Humphreys, *supra* note 13, at 679.

tification of a public emergency is still a procedural requirement to be satisfied under the relevant treaties. As identified above, many juridical determinations of proportionality of measures include an assessment, express or implied, of the nature of the public emergency. Despite the questionable ability to actually define by legal means the difference between “normality” and “exception,” there is logic to the concept of a threshold and differentiation. Norm and exception are difficult principles that will always be hard to assess in the absence of the concrete measures. In practice, this Article’s proposal would lead to an implied and contextual definition of a public emergency. A state of emergency would be a situation in which measures of derogation in accordance with the human rights treaty may be justified by that situation. For example, where the treaty body determined that derogations were lawful, there obviously would be a public emergency. Where it ruled that all of the state’s purported derogations were unlawful, the treaty body might provide guidance as to whether the measures could be made lawful and in doing so would implicitly indicate that the situation had reached the level of a public emergency. In essence, this means conceding the (losing) battle of whether or not a public emergency exists and focusing on ensuring that the measures taken to combat the threat are proportionate to any emergency.

This new approach is more defensible and may help to reverse the creeping normative expansion of what justifies a state of emergency. It would help break the cycle of judicial deference in relation to public-emergency questions—or rather the deference to government assertions—which has also led to dilution of the proportionality assessment (for example, as evidenced by the European Court applying a wide margin to both legal questions). Proportionality will also provide better “legal cover” to the judicial function from which to dissect the dubious but highly politically charged assertions of governments. The importance and appeal of this methodology is recognized by McHarg: “As the very stuff of politics, such decisions are bound to be hotly contested. Accordingly, judges need to find a method for resolving conflicts between rights and the public interest which is conceptually defensible and hence allows them to preserve their claim to neutrality.”³³¹ It becomes easier for judges and treaty body members to deal with the lack of information and unclear burdens of proof if there is no stand-alone *legal* determination of the emergency situation, as rather it is incorporated within the proportionality assessment. The pressure on courts to reach precise and factually founded legal determinations whether or not there is a public emergency will simply no longer exist. In reality, as well demonstrated in many of the cases and situations discussed above, treaty bodies have strongly avoided the determination of public emergency anyway but are quite willing to find measures disproportionate.³³² It is probably the case that many findings of emergency mea-

331. McHarg, *supra* note 41, at 672 (emphasis omitted).

332. It should also be noted that, in the case of individual complaints, the proportionality of the measures *in toto* may be assessed, rather than just how they applied to the individual. This approach was spelled out and endorsed by the European Court in *A & Others*. A &

asures that are disproportionate are also underpinned by unstated concerns about the public emergency. This might also change the incentives for states to provide better information at the international level on the nature of the public emergency.

Other commentators have not previously suggested redefining the bifurcation of the legal question as proposed in this Article. Yet there are signs, in trying to grapple with the issues, that others have taken steps down this pathway. The 1990 Copenhagen Document on Human Rights, the product of an interstate process, restated basic principles of IHRL including detailed standards on states of emergency.³³³ The Copenhagen Document provided a description of states of emergency and derogations that included a *procedural* but not *substantive* assessment of the state of emergency.³³⁴ The Paris Minimum Standards, prepared by a group of scholars, provided in significant detail the power and jurisdiction of the judicial function but did not provide within this framework for any assessment of the existence of the state of emergency.³³⁵ This Article's "implied and contextual definition" approach, in which the state of emergency is effectively defined in relation to the proportionality assessment, has also been taken up implicitly by the U.N. Special Rapporteur Despouy:

[T]he competent authority may declare a state of emergency . . . [i]n the event of severe disturbances that endanger the vital interests of the population and constitute a threat to the organized life of the community, *in the face of which* the restrictive measures permitted by the Constitution and laws in ordinary circumstances are clearly inadequate³³⁶

In the context of the cases and specific situations, many courts and treaty bodies' majority judgments or views have skirted the legal determination of the existence of a public emergency, and the dissenting opinions have taken issue with the government assertions. The House of Lords judgment in *A & Others* is consistent with this approach. The most striking recent example supportive of this Article's thesis is the highly substantive, detailed, and focused review by the Bahrain Independent Commission on Inquiry of Bahrain's unrest and state of emergency from March to April 2011. The Commission's otherwise very thorough 513-page report essentially avoids analyzing the legal question of the public emergency and re-

Others v. United Kingdom, App. No. 3455/05, ¶¶ 175–181, 185 (Eur. Ct. H.R. 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403>.

333. Conference on Security and Co-operation in Europe, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* ¶ 25.1–.4 (1990), available at <http://www.osce.org/odihr/19394>.

334. *Id.* ¶ 25.1, 25.3.

335. See PARIS MINIMUM STANDARDS, *supra* note 11, ¶ 7.

336. Special Rapporteur's Tenth Report, *supra* note 1, ¶ 82 (emphasis added).

markably did not even provide or analyze the text of Bahrain's derogation under the Covenant.³³⁷

This Article's proposed reconceptualization of the legal doctrine could help to reverse the trend of enlarging the scope of states of emergency. It would do so by minimizing the number of cases in which there is acceptance, implicit or express, of states' broad or specious assertions of a public emergency threatening the life of the nation. Unlike some of the other suggestions in the literature, it need not cause major implementation problems for courts, treaty bodies, or states. As discussed above, the *substantive* determination of a public emergency cannot have a stand-alone legal effect or consequence in isolation of the emergency measures. The qualitative change in the legal determinations would be that the public emergency must be seen in the context and through the prism of the proportionality of the measures.

The general effect of this reconceptualization is well illustrated by reference to the *A & Others* decision of the European Court. That case currently stands for the idea that there was a state of emergency and so derogations in principle were permitted, but that the actual measures adopted were not proportionate. The British government, after losing in the House of Lords, had legislated to remove the offending measures from its emergency-powers regime.³³⁸ The British government found a way to deal with the issue without invoking Article 15 of the Convention at all. Under the proposed approach in this Article, the ratio decidendi of the European Court decision in *A & Others* would be different; most importantly, it would not have been legally affirmed that there was a state of emergency that was fully justified by the circumstance of a nascent terrorist threat. This was because there was no legal justification under Article 15 for the measures taken in response to the state of emergency that the United Kingdom had declared. This Article's proposed approach would thus also support the general logic that "if possible, states should limit rights rather than derogate from them."³³⁹ A number of countries have not derogated in arguable instances of states of emergency on the basis that limitations, rather than derogations, gave them sufficient scope to deal with the situation.³⁴⁰

337. Bahr. INDEP. COMM'N OF INQUIRY, *supra* note 306, ¶ 105. Other than recanting Article 4, the report's main substantive reference is to state that the violations of the rights of arbitrary detention go beyond what could ever be derogated. *Id.*

338. Sangeeta Shah, *From Westminster to Strasbourg: A and Others v United Kingdom*, 9 HUM. RTS. L. REV. 473, 476 (2009).

339. McGoldrick, *supra* note 33, at 384.

340. See, e.g., H.R. Comm., Rep. of the H.R. Comm., 66th Sess., July 12–30, 1999, ¶ 324, U.N. Doc. A/54/40; GAOR, 54th Sess., Supp. No. 40 (1999); H.R. Comm., Rep. of the H.R. Comm., 42nd Sess., July 8–26, 1991, ¶¶ 618–656, U.N. Doc. A/46/40; GAOR, 46th Sess., Supp. No. 40 (1991); H.R. Comm., Rep. of the H.R. Comm., 10th Sess., July 14–Aug. 11, 1980, ¶ 297, U.N. Doc. A/35/40; GAOR, 35th Sess., Supp. No. 40 (1980); H.R. Comm, *supra* note 133, ¶ 383.

CONCLUSION

This Article has offered an enriched account and reinterpretation of the international human rights law on states of emergency and the derogation of human rights. The need for this account is driven by the serious human rights violations often connected with states of emergency, the significant gap between human rights law and practice, and inconsistent and divergent jurisprudence. A key problem for courts and treaty bodies is that they continue to affirm, either directly or indirectly, unfounded government assertions of a state of emergency, thereby diluting the law's normativity and its positive influence. The analysis of the underlying theory of states of emergency, coupled with the practical limits of implementation under IHRL, provides the context and foundation for a new approach. This Article's more holistic analysis brings to light key themes that act as undercurrents to the treaty law—the legal dichotomy of normality and exception, the role of separation of powers, the rule of law as compared to extralegal measures, democracy as a check on emergency powers, emergencies based on continued terrorist threats, and government causation of emergencies. These key legal themes illustrate that there needs to be a middle course for IHRL that better balances the legitimate position of sovereign states to defend their constitutional order *with* preventing misuse and abuse of emergency powers.³⁴¹

This Article argues the most effective solution is to understand that the traditional *substantive* question of the existence of a public emergency should be reconceived and subsumed into the *procedural* question of declaration and notification. There is no need for an artificial stand-alone legal determination of whether or not there is a public emergency. With this reinterpretation, the substantive concept of a public-emergency precondition and threshold is still preserved, as the proportionality-of-measures assessment will always include the nature and scope of the public emergency. This leads in effect to an implied and contextual definition for public emergency and one that avoids the constant legal reification of states' dubious claims. Finally, this reconceptualization of the legal doctrine for state of emergencies in IHRL, which can be reconciled with both theory and practice, is one important opportunity for tackling the serious problem of human rights abuses in times of emergency.

341. See NOWAK, *supra* note 38, at 85.

