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The Systematic Failure to Interpret Article IV of the Internantional Covenant on Civil and Political Rights: Is There a Public Emergency in Nigeria?

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THE SYSTEMATIC FAILURE TO INTERPRET ARTICLE IV OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: IS THERE A PUBLIC EMERGENCY IN NIGERIA?

SCOTT DOLEZAL*

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INTRODUCTION

On May 29, 1999, Nigeria inaugurated former General Olsegun Obasanjo,¹ the first civilian head of State after fifteen years of military rule.² The elections marked the beginning of a series of democratic changes that swept the country.³ Many scholars hoped that

1. See Scott Powers, *Wilberforce Will Honor Presidential Board Member*, COLUMBUS DISPATCH, Oct. 24, 1999 at B1 (noting that General Olsegun Obasanjo ruled Nigeria as a military leader from 1976-79, and oversaw the country's transition to democracy, stepping down to an elected civilian leader).

2. See *Nigerian Envoy Touts Election*, NEW ORLEANS TIMES -PICAYUNE, Oct. 10, 1998, at C1 (noting that the elections were the first free elections held in nearly thirty years); see also David Orr, *Nigeria Moving to Civilian Rule*, THE SCOTSMAN, July 21, 1998, at 8 (reporting that General Sani Achaba annulled the last presidential elections and subsequently jailed the presumed winner, Chief Abiola); see also Karl Vick, *Albright Hails Restoration of Democracy in Nigeria*, WASH. POST, Oct. 21, 1999, at A21 (reporting past occurrences of democratic initiatives in Nigeria)

3. See Margaret Bald, *Obasanjo Cleans House*, WORLD PRESS REVIEW, Aug. 1, 1999, available in 1999 WL 19036300 (describing the democratic changes instituted after Obasanjo's election). Shortly after taking office, Obasanjo committed himself to increased dialogue with those in the Niger Delta and established a panel to review human rights violations committed by his military predecessors. See *id.* But see MOSOP Urges Caution Over "Democratic Progress", AFRICA NEWS SERV., Oct. 20, 1999, available in 1999 WL 25951075 (reporting police had held

these changes would serve as a model to the rest of Africa by encouraging economic development and democratic initiatives.⁴

As part of his commitment to democratic reform, President Obasanjo offered the people in the oil-producing Niger Delta⁵ a greater share of the revenue derived from the region.⁶ For years, government officials mismanaged and misdirected government money⁷ at the expense of social services and economic development.⁸ Despite assurances that this would change, however, government neglect and hu-

Jerry Needam, editor of the Ogoni Star, since October 11, 1999 without charge). The Movement for the Survival of the Ogoni People ("MOSOP"), a Nigerian human rights and environmental group, also learned the Nigerian army is intending to remove indigenes from the Delta, a move usually seen immediately prior to a military crackdown. *See id.*

4. *See* Barbara Slavin, *Three Hot Spots of the New Millennium*, USA TODAY, Nov. 1, 1999, at A11 (arguing that the events in Nigeria have international effects in part because it is the largest oil producer and the most populous country in Africa).

5. *See generally* *Niger Delta Project Comes Under Fire*, INTER PRESS SERV., Sept. 22, 1999, available in 1999 WL 27374168 (listing Rivers, Delta, and Bayelsa States as the three core oil producing States). The surrounding States of Cross River, Abia, Imo, Akwa Ibom, and Endo also contribute to the region's oil production. *See id.*

6. *See Nigeria: An Encouraging Start*, BUSINESS AFRICA, June 16, 1999, available in 1999 WL 2041358 (recounting President Obasanjo's early accomplishments in office and noting that he promised to increase the amount of oil revenue returned to oil-producing States); *see also* NIG. CONST., ch. 6, pt. 1 sec. C (requiring that the government return at least 13% of the oil revenue to the State from which it is derived, an increase from the former three per cent constitutional requirement).

7. *See Today in the Nigeria Newspaper*, AFRICA NEWS SERV., Oct. 21, 1999, available in 1999 WL 25951337 (reporting Nigerian investigators are in negotiations with the wife of former head of State General Sani Abacha to recover large sums of money stashed in foreign banks); *see also* *U.S. Leaders Write Albright on Nigeria*, AFRICA NEWS SERV., Oct. 19, 1999, available in 1999 WL 25950673 at *1 (noting in a letter from the Leadership Commission on the Nigerian Transition to Secretary of State Madeline Albright that "for over 40 years the oil companies and successive military dictators have taken billions of dollars worth of oil annually from the Niger Delta and returned nothing to the local communities except poverty, pollution, and repression").

8. *See* BRONWEN MANBY, HUMAN RIGHTS WATCH, *THE PRICE OF OIL 95-96* (1999) (detailing the social and economic conditions in the oil producing regions). Only 20-25 % of those in rural communities have access to safe drinking water, less than 25 % have proper sanitation, and there is no city-wide sewage system in the area's largest city of Port Harcourt. *See id.*

man rights abuses initiated by the military⁹ continue to be a fixture in the region.¹⁰

For this reason, natives of the Delta complained¹¹ to both the Nigerian government and oil-producing companies about the misallocation of resources and environmental destruction that has occurred as a result of oil spills and flares.¹² The government and oil producers, however, have responded unsympathetically to these complaints.¹³ In response, indigenous people have resorted to a variety of acts of sabotage.¹⁴ Recently, tensions escalated as the people in the region grew increasingly frustrated and began kidnapping oil company employees and holding them for ransom.¹⁵

9. See *infra* notes 223-33 (discussing the government's response to the Kaiama Declaration). See generally B. O. NWABUEZE, *MILITARY RULE AND SOCIAL JUSTICE IN NIGERIA* (1993) for a discussion of the effects of military rule on social justice.

10. See *MOSOP Urges Caution Over "Democratic Progress"*, *supra* note 3 (reporting that police and military personnel in the Niger Delta are continuing to commit human rights abuses).

11. See MANBY, *supra* note 8, at 131-134 (providing examples of arbitrary detentions and arrests when citizens have complained to government officials or protested oil company activities). The primary goals of the indigenous people are to receive a larger share of the profits derived from the region and to thereby exercise control over the mineral resources in the region. See *infra* notes 204 and 217-22 and accompanying text (discussing the provision in the Ogoni Bill of Rights and the Kaiama Declaration demanding increased control over mineral resources). Tribal leaders also seek compensation for the injuries oil production has caused to both indigenous people and the environment. See *id.*

12. See Shell Oil, *Information Resource* (visited Mar. 3, 2000) <<http://www.shell.com/search/browse/global/>> (defining a gas flare as the release of burning natural gas into the atmosphere during the process of collecting oil and noting that efforts to collect flared gas will take years to develop at a substantial cost).

13. See Norimitsu Onishi, *Nigeria Combustible as South's Oil Enriches North*, N.Y. Times on the Web (visited Mar. 3, 2000) <<http://www.nytimes.com/search>> (quoting a Shell executive who stated that communities need development, but the development needed is beyond the capacity of the oil industry and so the government should take the lead).

14. See MANBY, *supra* note 8, at 82-87 (describing the sabotage methods employed and their cumulative effects). In 1997, Shell reported that almost 80 per cent of the 80,412 barrels of oil spilled in the Niger Delta was the result of sabotage. See *id.* at 82. In 1995, that figure was only 60 per cent. See *id.*

15. See U.S. Dept. of State, *Nigeria - Travel Warning* (last updated Apr. 29, 1999) <http://travel.state.gov/nigeria_warning.html> (replacing the travel warning

Consequently, oil company representatives complained to the government,¹⁶ which relies heavily on oil production revenue.¹⁷ The government, in turn, responded traditionally by cracking down on citizen's rights guaranteed by the International Covenant on Civil and Political Rights ("ICCPR" or "Covenant"),¹⁸ including the rights to freedom of expression, association, and peaceful assembly.¹⁹ The government also violated rights relating to criminal procedures, including the right to freedom from arbitrary arrest and detention, and the right to be informed of pending charges and trial without undue delay.²⁰

The purpose of the ICCPR is to expand and clarify the United Na-

dated May 27, 1998 to note increases of kidnapping for ransom and warning that this particularly applies to those associated with the petroleum sector in the south-east region of the country); *see also* Onishi, *supra* note 13 (stating that members of the Ijaw ethnic group cut Nigeria's oil production by a third by seizing approximately twenty oil stations owned by Shell and Chevron in the weeks prior to November 22, 1998).

16. *See, e.g.*, John Darnton, *Shell Makes a Big Oil Discovery Off Nigeria*, N.Y. TIMES, March 12, 1996, at A8 (reporting that at the request of Shell, the government sent in military troops to battle sabotage attempts, resulting in the death of two thousand people).

17. *See* International Monetary Fund, *Nigeria: Selected Issues and Statistical Appendix*, Report No. 98/78 at 6-11 (Aug. 1998) (finding petroleum revenues and expenditures account for 96 per cent of exports and comprises more than 40 per cent of Nigeria's gross domestic product).

18. *See* International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force on Mar. 23, 1976) [hereinafter ICCPR]. Nigeria, as a signatory to the Covenant, is obligated to guarantee the rights contained in the Covenant; *see also* United Nations, *International Covenant on Civil and Political Rights* (visited Mar. 8, 2000) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_booviv_booviv_4.html> (noting Nigeria acceded to the Covenant on July 23, 1993) [hereinafter ICCPR website].

19. *See* ICCPR *supra* note 18, at 178 (enumerating the rights to freedom of expression, association, and peaceful assembly); *see also infra* notes 223-33 and accompanying text (discussing the government's response to the Kaiama Declaration).

20. *See Nigerian Government Denies Holding Newspaper Editor*, AGENCE FRANCE-PRESSE, Nov. 4, 1999, available in 1999 WL 25138002 (reporting that police detained Jerry Needham, editor of the Ogoni Star, a newspaper which promotes the interests of MOSOP, for approximately three weeks before releasing him on bail).

tions' ("U.N.") Human Rights Declaration²¹ and to give it the full force of a treaty.²² Article IV of the ICCPR allows governments to suspend enumerated rights only "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."²³ The treaty fails, however, to define the meaning of "public emergency." This has resulted in a situation whereby a signatory's invocation of the ICCPR's Article IV exemption²⁴ is not always clearly warranted.²⁵ As a result, government leaders from a variety of countries have, arguably, abused the exemption and invoked Article IV at times other than when the life of the nation has been threatened.²⁶

This Comment argues that it is necessary to adopt uniform stan-

21. *Universal Declaration on Human Rights*, G.A. Res. 217(III)(A), U.N. GAOR 3d Sess., 183d Plen. Mtg., at 71, U.N. Doc. A/810 (1948).

22. See ICCPR, *supra* note 18, at 173 (drawing on provisions of the Universal Declaration of Human Rights to guarantee civil and political freedom and freedom from fear and want). The authors of the treaty felt that the only way to ensure that every citizen enjoyed the rights guaranteed by the Universal Declaration was to guarantee civil and political rights. See *id.*

23. See *infra* note 24, at 174 (providing the full text of Art. IV).

24. See ICCPR, *supra* note 18, at 174. The entire article provides:

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.

3. Any State Party to the present Covenant availing itself of the right of derogations 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.

25. See *id.* (limiting the extent of derogation measures rather than defining the circumstances in which they are appropriate).

26. See International Commission of Jurists, *STATE OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS* i (1983) (characterizing unjustified invocation of the Article IV exemption as an unfortunate tendency).

dards when applying Article IV. It uses the current political situation in Nigeria to demonstrate both the need for such a test and the abuse that results from the lack of uniform interpretive standards.²⁷ Part I considers the relevant provisions and guarantees of the ICCPR. It then examines the views adopted by the Human Rights Committee, the agency charged with monitoring and enforcing ICCPR provisions. This section argues that the ICCPR's derogation provision is unclear and in need of further interpretation to allow for government confidence in invoking and defending derogation measures employed when faced with a public emergency.

Part II details the decisions of both the European Human Rights Commission²⁸ and the Court of Human Rights²⁹ interpreting the public emergency exemption of a treaty provision that closely resembles the ICCPR's derogation provision. It then considers the Siracusa Principles³⁰ and the Paris Minimum Standards,³¹ which represent attempts by the international community to identify circumstances in which the invocation of the public emergency exemption is justified.

Part III examines the current political environment in Nigeria. It details the close relationship between oil companies and the government and the human rights violations that have occurred as a result of that relationship, emphasizing acts that violate the ICCPR. It then considers the Ogoni affair, the most successful series of protests re-

27. See generally *Curfew Lifted in Nigeria's Troubled Region*, PANAFRICAN NEWS AGENCY, Jan. 5, 1999, available in 1999 WL 7543294 (noting the government imposed a week-long state of emergency in response to the Kaiama Declaration); see e.g., MANBY, *supra* note 8, at 187 (stating that the Nigerian government has not made any formal attempts to invoke the Article IV exemption, but that at least one human rights group has expressed concern that this may occur).

28. See *infra* note 95, 96 and accompanying text (arguing the European Human Rights Commission's decisions have contributed to determining whether a derogation is legal).

29. See *infra* note 142 and accompanying text (arguing that the European Court of Human Rights' methods for determining whether a derogation is legal is insightful to an interpretation of the ICCPR).

30. See *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 HUM. RTS. Q. 1 (1985) [hereinafter *Siracusa Principles*].

31. See *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072 (1985) [hereinafter *Paris Minimum Standards*].

sulting in a prolonged disruption of oil production. This is followed by an examination of the Kaiama Declaration,³² a statement issued by a tribe in the Niger Delta expressing its determination to regain control of the region, by force if necessary.

Part IV applies the common ideology developed from the European interpretative bodies, the Siracusa Principles, and the Paris Minimum Standards to the Nigerian situation, demonstrating the difficulty in determining whether invocation of Article IV is appropriate. It then argues that an attempt by the Nigerian government to invoke the exception would not be legally justified.

Part V recommends a clear set of guidelines that should be adopted by the Human Rights Committee to assist countries when faced with an emergency in determining whether implementation of Article IV is appropriate. It then suggests a methodology for monitoring derogations to ensure that the reach of the ICCPR is not violated and to hold States accountable for official acts taken during a state of emergency. Finally, it recommends appropriate governmental measures designed to bring an effective resolution to the current crisis facing the Delta region.

I. BACKGROUND

A. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The ICCPR seeks to codify, and hold States obligated to, the principles found in the United Nations Charter.³³ The preamble indicates that the rights found in the Covenant are legal rights rather than moral principles.³⁴ The ICCPR recognizes that civil and political rights are derived from the inherent dignity of human beings.³⁵ It is

32. See generally Ijaw Youths of the Niger Delta, *The Kaiama Declaration*, reprinted in *Recent Documents in the Delta Region*, AFRICA NEWS SERV., Dec. 30, 1998, available in 1998 WL 21358935 [hereinafter *Kaiama Declaration*].

33. See ICCPR, *supra* note 18, at 171 (according the principles in the Covenant to those in the Charter of the United Nations).

34. See LOUIS HENKIN, *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* (1981) (asserting that the Covenant's provisions are not merely moral postulates, but have an element of legal obligation).

35. See ICCPR, *supra* note 18, at 172 (recognizing the inherent dignity and equal and inalienable rights of all people).

premised upon the concept that freedom from fear and want can only be achieved by granting civil and political rights.³⁶

The ICCPR guarantees certain rights, including self-determination,³⁷ non-discrimination under the law,³⁸ freedom of movement,³⁹ and the right to life.⁴⁰ Furthermore, it provides that no one shall be subjected to torture,⁴¹ slavery,⁴² or arbitrary arrest.⁴³ The Covenant obligates signatory States to guarantee these rights and any others contained in the Covenant.⁴⁴

Derogations⁴⁵ from the Covenant's obligations are permissible under Article IV.⁴⁶ Section 1 allows States to derogate from treaty pro-

36. *See id.* at 173 (noting these ideals can be achieved if everyone enjoys civil and political rights).

37. *See id.* (proclaiming the right to self-determination and creating the right to determine one's own political status and the ability to freely pursue economic, social and cultural development).

38. *See id.* (imposing an obligation on States to respect the rights of the Covenant "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

39. *See id.* at 176 (creating the freedom to choose one's own residence and to leave any country, including one's own).

40. *See id.* at 174 (providing that no one shall be arbitrarily killed).

41. *See* ICCPR, *supra* note 18, at 175 (listing the methods of torture as including cruel, inhuman, or degrading treatment, particularly non-consensual medical or scientific experimentation).

42. *See id.* at 175-76 (prohibiting slavery and slave-trade in all its forms).

43. *See id.* (ensuring the right to liberty and security of person and requiring prompt notification of charges to anyone who is arrested).

44. *See* HENKIN, *supra* note 34, at 77 (discussing the character of a State's obligations under the ICCPR). Article II (1) requires States "to respect" and "to ensure" the rights contained in the Covenant. *See id.* The respect prong requires only that a State not violate the Covenant's provisions. *See id.* Ensuring these rights, however, is a broader concept. It creates affirmative obligations to take all reasonable measures to ensure individuals are able to enjoy these rights fully and freely, including the removal of any conflicting national laws. *See id.*

45. *See* HUMAN RIGHTS TERMINOLOGY IN INTERNATIONAL LAW: A THESAURUS 44 (1988) (defining a derogation as a "suspension of certain guaranteed rights which are not 'nonstandsfest' during states of emergency").

46. *See* ICCPR, *supra* note 18, at 174 (stating the circumstances when a derogation is appropriate). When such circumstances exist, States "may take measures derogating from their obligations under the present Covenants to the extent strictly required by the exigencies of the situation provided such measures are not incon-

visions when confronted with public emergencies that threaten the life of the nation.⁴⁷ The purpose of this section is to ensure that countries are able to adequately protect themselves when faced with an unforeseen crisis.⁴⁸ In times of public emergency, a State may derogate from most of the Covenant's provisions, including freedom of movement, peaceful assembly, and association.⁴⁹

The Covenant, however, does reserve particular rights as non-derogable.⁵⁰ These rights reflect both principles of international law and notions that suspension of particular rights is never an adequate response to a public emergency.⁵¹ Section 2 of Article IV prohibits

sistent with their obligations under international law. . . ." *See id.* When taking measures that constitute a derogation, States may not discriminate "solely on the ground of race, colour, sex, language, religion or social origin." *See id.*

Derogation clauses generally reflect a tension between the desire to protect human rights and the protection of national sovereignty. *See* Joan F. Hartman, *Derogations 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) [hereinafter Hartman, *Derogations from Human Rights Treaties in Public Emergencies*]. When faced with a State that wishes to derogate, international bodies are hesitant to enforce derogation provisions stringently. They do not want to appear indifferent to legitimate State interests, and the causes of national crises are often too complex for an outside body to fully understand. *See id.* There is a general fear that if States do not feel that their concerns have been appropriately acknowledged, they will lose respect for, and refuse to comply with, international law. *See id.* As a result, attempts by the international community to ensure State concerns do not dominate individual rights have been largely unsuccessful. *See id.*

47. *See infra* notes 100-137 and accompanying text (discussing how the European Court of Human Rights has interpreted a similar provision in the European Convention).

48. *See* Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 2 (arguing derogation clauses reflect a compromise between protection of individual rights and national needs).

49. *See* ICCPR, *supra* note 18, at 176, 178 (corresponding to Articles 12, 21, and 22, respectively).

50. *See id.* at 174 (enumerating provisions exempted from Article IV (1)). The Covenant, however, does not expressly state why these rights are non-derogable. *See* HENKIN, *supra* note 34, at 83.

51. *See* HENKIN, *supra* note 34, at 83 (presuming some rights, such as the right to life, are too important to permit derogations). According to international law, rights that have risen to the level of *jus cogens* may never be abridged. *See id.* Derogations from other rights, such as the prohibition on imprisonment for non-compliance with contractual obligations, would never be "strictly required" in a

derogations from an individual's right to life, freedom from torture and slavery, imprisonment for failure to fulfill a contractual obligation, and imprisonment for acts not previously legislated as a crime.⁵² Individuals are also guaranteed the right to recognition as a person before the law and freedom of thought, conscience, and religion.⁵³

The procedures for a legal derogation are contained in Section 3.⁵⁴ A primary purpose of this section is to require States to acknowledge their use of derogating measures and to deter attempts to apply these powers retroactively.⁵⁵ It requires any State seeking to invoke Article IV(1) to immediately notify other parties to the Covenant of the derogation, and to inform them of the provisions to which the derogation applies and the reasons for the measures employed.⁵⁶ The derogating State is likewise required to inform the other parties of when derogation measures are terminated.⁵⁷ To comply with the immediate notification provision, notice of the derogation should be sent to the U.N. Secretary-General simultaneously with the proclamation of a public emergency.⁵⁸

state of emergency. *See id.*

52. *See* ICCPR, *supra* note 18, at 174-75, 176, 177 (corresponding to Articles VI, VII, VIII, IX, and XV, respectively).

53. *See id.* at 177-78 (corresponding to Articles XVI and XVIII, respectively).

54. *See id.* at 174 (mandating that a State, when invoking a state of emergency, must inform the other parties of the provision to which the derogation applies and provide reasons for its application). States are likewise required to notify involved parties upon the termination of a state of emergency. *See id.*

55. *See* Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 18 (arguing the ICCPR's notice requirement serves to control derogations).

56. *See* ICCPR, *supra* note 18, at 174 (establishing derogation notification procedures).

57. *See id.* (requiring States to notify other parties of the termination of derogation measures).

58. *See* HENKIN, *supra* note 34, at 84 (stating that the treaty language was intended to circumvent longer delays permissible under similar treaties). The notice requirement is an attempt to control derogations. *See* Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 18. Requiring a State to make immediate notification, for example, deters States from attempting to make a retroactive claim to justify previous repressive action. *See id.* It is also reasonable to expect a State to hesitate more when it is naming the rights it is suspending than when simply applying legislative and executive measures. *See id.* at 20.

Acceptable derogation measures include, for instance, prolonging detention without a trial and banning political organizations.⁵⁹ A key weakness of Article IV(3), however, is that it fails to require States to report the specific derogation measures taken.⁶⁰ The international community is not cognizant of the extent derogation measures were utilized or how many people were affected unless an enforcement action is taken.⁶¹ The failure to impose such a requirement has made it difficult to decipher whether actions taken in derogation were “strictly necessary,” as required by Section 1.⁶²

B. THE HUMAN RIGHTS COMMITTEE AND ARTICLE IV

Part IV of the ICCPR establishes the Human Rights Committee (“Committee” or “HRC”) and charges it with monitoring State compliance with the provisions of the Covenant.⁶³ Article XL requires States to submit reports to the Committee, detailing measures it has adopted to ensure recognition of treaty rights.⁶⁴ Additionally, Article XL requires that States report on the progress achieved in granting those rights.⁶⁵ This includes any factors or difficulties the State experienced in implementing any portion of the Covenant.⁶⁶ Each State is required to submit such a report one year after committing to the ob-

59. See ICCPR, *supra* note 18, at 174 (permitting derogation measures strictly required by the exigencies of the situation giving rise to the state of emergency).

60. See generally HENKIN, *supra* note 34, at 85 (proposing that the article, read as a whole, suggests that a State must provide information regarding the measures it proposes to take, notwithstanding the absence of specific language to that end); see also Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 21 (noting the absence of an automatic review process in the ICCPR and characterizing it as a “serious deficiency”).

61. See Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 20-21 (enumerating the possible shortcomings of this omission).

62. See HENKIN, *supra* note 34, at 85 (proposing derogating measures be stipulated so that they may be scrutinized by international bodies).

63. See ICCPR, *supra* note 18, at 179-84 (establishing the Human Rights Committee, providing for the election of its members, and enumerating its responsibilities).

64. See *id.* at 181 (imposing on State parties the obligation to submit reports).

65. See *id.* (providing the general content of the reports).

66. See *id.* at 181 (requiring States to include factors and difficulties affecting the implementation of the covenant in their reports).

ligations of the treaty and thereafter as requested by the HRC.⁶⁷

The Committee is responsible for examining the contents of the report and offering general commentary.⁶⁸ Although not required by the terms of the Covenant, in practice, States have sent representatives to the Committee's hearings when its report is under consideration.⁶⁹ This practice has allowed Committee members to question the representative on the contents of the report, including any missing, inadequate, or contradictory information.⁷⁰ The Committee has, however, maintained a policy of not criticizing States for their failure to fully implement the provisions of the treaty.⁷¹

Under Article XL(3) of the Covenant, the HRC has the authority to transmit its reports and general comments to State parties.⁷² After intense debate over whether these general comments should be directed at an individual State report, the Committee decided to use general comments to address all State reports comprehensively rather

67. See *id.* at 182 (imposing a duty on the Committee to study a State's report). The duty to "study" rather than "monitor," "enforce," or "ensure" is indicative of a trade off—strong human rights treaties accompanied by weak enforcement bodies. See Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for Demarginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211, 214-16 (1998).

68. See *id.* (permitting the Human Rights Committee ("HRC") to make general comments as it deems appropriate).

69. See Dana Fischer, *International Reporting Procedures*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 169 (Hurst Hannum, ed. 1984) (noting the HRC adopted the practice of allowing a representative to present the State report and permitting the representative to answer questions from the Committee).

70. See DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 78 (1991) (reporting members of the HRC have generally accepted that the ICCPR does not prohibit the use of outside sources in the consideration of State reports). Committee members generally do not disclose the source of this additional information. See *id.*

71. See wa Mutua, *supra* note 67, at 227 (noting the HRC utilizes methods aimed at encouraging and persuading States to honor their obligations rather than harassing or ridiculing States into compliance). The Committee did, however, deviate from this practice when considering Iraq's report shortly after the Gulf War. See *Report of the Human Rights Committee*, U.N. GAOR, 46th Sess., Supp. No. 40, at 157-58, U.N. Doc. A/46/40 (1991) (evaluating Iraq's third periodic report).

72. See ICCPR, *supra* note 18, at 181 (authorizing the release of State reports to State parties).

than a single State report.⁷³ The intent of the general comments is to promote interstate cooperation in the implementation of the Covenant's provisions, to summarize the activities of the HCR in its consideration of State reports, and to urge the improvement of State reporting.⁷⁴

Recently, the scope of these comments expanded to include the explication of individual State's interpretation of the treaty's provisions.⁷⁵ Whereas previous general comments only repeated the provisions of the ICCPR and were, therefore, of little use in guiding State practice, since 1992, general comments have been increasingly useful to States.⁷⁶

The HRC issued its only general comment on Article IV in 1981.⁷⁷ It began by recognizing the provision posed problems in the consideration of State reports.⁷⁸ The HRC summarized the contents of the derogation provision and examined State reports that indicated the mechanisms employed in declaring a public emergency as well as the respective governing laws.⁷⁹ In determining its view of Article IV measures, the Committee pronounced that any derogation measures taken must be exceptional and temporary, and may last only for as

73. See Torkel Opsahl, *The Human Rights Committee, in UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 408-09 (Philip Alston, ed. 1992) (reporting on the divergent viewpoints of the Committee members on the use of general comments). Since 1992, the Committee has included collective comments at the end of each State report. See *wa Mutua, supra* note 67, at 225. These comments specifically address the State report and make recommendations. See *id.*

74. See *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, Annex IV, at 101, U.N. Doc. A/36/40 (1981) (expressing the Commission's intended use of general comments to define obligations under Article XL).

75. See, e.g., *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, Annex V, at 93-96, U.N. Doc. A/37/40 (1982) (addressing the right to life and right to personal security).

76. See *wa Mutua, supra* note 67, at 231 (noting that the higher quality of general comments has been increasingly useful to States seeking better guidelines under the ICCPR).

77. See *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, Annex VII, General Comment 5/13, at 110, U.N. Doc. A/36/40 (1981) (analyzing the Committee's position on Article IV derogation measures).

78. See *id.* (noting Article IV measures posed problems for the Committee).

79. See *id.* (reporting that States have informed the Committee on the mechanisms for declaring a state of emergency).

long as the life of the nation is threatened.⁸⁰ It then expressed that in cases of derogation, the protection of human rights is particularly important.⁸¹ The Committee emphasized the importance of the notification requirement as well as the inclusion of the nature and extent of each right from which the State has derogated in its report.⁸² The Committee did not, however, express a view on the circumstances that would justify invoking such measures.⁸³

II. DETERMINING WHETHER A PUBLIC EMERGENCY EXISTS

Meaningful interpretations of Article IV provision are limited.⁸⁴ Examination of various sources and the standards defined by the international community attempting to interpret derogation provisions, however, reveals a general consensus on whether, and under what circumstances, a State may derogate from treaty obligations when faced with a public emergency.⁸⁵ Applying the common standards and principles that have emerged from different approaches to derogation provisions clarifies the circumstances in which an Article IV

80. *See id.* (noting that derogation measures should only occur in extraordinary circumstances and be of temporary duration).

81. *See id.* (expressing particular concern for citizen's rights during a state of emergency, particularly so for core human rights).

82. *See Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, Annex VII, General Comment 5/13, at 110, U.N. Doc. A/36/40 (1981) (setting forth the notification and reporting requirements of the provision).

83. *See id.* (emphasizing the nature of derogation measures permissible under the provision rather than the circumstances which may give rise to those measures).

84. *See* INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY, at 1 (stating many governments regard any challenge to their authority as a threat to national security and invoke Article IV exceptions, leaving Article IV open to abuse). The Human Rights Committee has little authority under Article XL to determine standards for derogations or to ensure compliance with Article IV. *See generally* ICCPR, *supra* note 18, at 181-82 (endowing the Human Rights Committee with the responsibility to receive and study reports submitted by derogating States).

85. *See* Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 16-18 (discussing the essential criteria for a legitimate derogation under the ICCPR and the European Convention).

derogation is appropriate.⁸⁶

A. THE EUROPEAN HUMAN RIGHTS CONVENTION

Both the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention")⁸⁷ and the ICCPR are rooted in the U.N. Charter and Declaration of Human Rights.⁸⁸ Both recognize the importance of granting political rights as a means of establishing freedom and justice in the world.⁸⁹ Each treaty guarantees essentially identical rights,⁹⁰ and the derogation articles of the European Convention and the ICCPR are similar.⁹¹ Arti-

86. *See generally infra* notes 234-79 and accompanying text (arguing that when the standards for derogation articulated in international agreements are applied to the current political situation in Nigeria, the derogation measures implemented become legally unjustifiable).

87. Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221 [hereinafter European Convention].

88. *See* ICCPR, *supra* note 18, at 173 (incorporating the ideal of freedom in the Universal Declaration of Human Rights and the obligations of the United Nations Charter into the agreement); *see also* European Convention, *supra* note 87, at 222-24 (attempting to establish among the European nations collective enforcement of the Universal Declaration of Human Rights).

89. *See* ICCPR, *supra* note 18 (noting the ideal that freedom can only be achieved if everyone can enjoy his or her civil, political, economic, social and cultural rights); *see also* European Convention, *supra* note 87, at 222 (maintaining that the foundation of peace and justice is an effective political democracy that preserves human rights).

90. *Compare* ICCPR, *supra* note 18, at 171, *with* European Convention, *supra* note 87, at 221 (guaranteeing almost identical civil and political rights).

91. *Compare* ICCPR, *supra* note 18, at 174, *with* European Convention *supra* note 87, at 232-234 (allowing derogation in times of public emergency). The full text of the European Convention's derogation provision reads:

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogations from Article 2, except in respect of deaths resulting from lawful acts of war, or from articles 3 [prohibition against torture], 4 (paragraph 1) [prohibition against slavery] and 7 [prohibition against being convicted of a crime which did not constitute a crime at the time the act occurred] shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall

cle 15 of the European Convention allows signatories to derogate "in time of war or other public emergency that threatens the life of a nation."⁹² Like the ICCPR, Article 15 also enumerates rights that may not be derogated.⁹³ The ICCPR, however, expands the list of non-derogable rights.⁹⁴

Section II of the European Convention establishes a permanent Court of Human Rights to ensure signatories guarantee the rights contained in the European Covenant.⁹⁵ Given the similarities between the two treaties, the Court's interpretation of the relevant article of the European Convention serves as a useful guide to the determination of the ICCPR's conception of a national emergency.⁹⁶ The following instances of the Court's interpretation of the European Convention provide insight for a legally recognized methodology to bring clarity to the ICCPR.⁹⁷ Furthermore, the actions taken by the European Commission are demonstrative of a determination regard-

keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully enforced.

European Convention, *supra* note 87, at 232-34.

92. *Id.*

93. *See id.* (listing non-derogable rights).

94. *See*, ICCPR, *supra* note 18, at 174 (including prohibition against imprisonment for failing to fulfill contractual obligations, revocation of recognition before the law, and interference with freedom of thought, conscience, and religion).

95. *See* European Convention, *supra* note 87, at 234 (establishing that the European Commission of Human Rights and the European Court of Human Rights ("Court") ensure observance of the provisions of the European Convention). The Court has considered Article 15 derogation challenges four times since its establishment. *See* Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 23.

96. *See* HENKIN, *supra* note 34, at 78, *citing* ROSALYN HIGGINS, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281, 286-88 (1976-77) (arguing that due to the similarities between the derogation clauses, the interpretations given to the European Covenant by the European Commission and Court of Human Rights provides a useful jurisprudence for interpreting Article IV of the ICCPR).

97. *See generally supra* notes 99-137 and accompanying text (discussing the interpretation of the European Covenant's derogation provision and arguing it is applicable to the ICCPR's derogation provision).

ing the relevant circumstances constituting a state of emergency.⁹⁸

1. *The Lawless Case*

In *Lawless v. Republic of Ireland* (“*The Lawless Case*”),⁹⁹ the European Commission (“Commission”) had the opportunity to interpret the Article 15 derogation provision.¹⁰⁰ The Commission’s report came in 1960, just seven years after the Convention took effect.¹⁰¹ The case involved the five-month detention of a twenty-two year-old Irish national for suspicion of being a member of the Irish Republican Army (“IRA”).¹⁰² Authorities detained him without charge or trial in an internment camp pursuant to an Order¹⁰³ issued by the Minister of Justice.¹⁰⁴ By a vote of 9-5, the Commission determined a state of emergency existed in Ireland at the time the Convention’s provisions were violated and the derogation measures were therefore justified.¹⁰⁵

The Commission used the opportunity to define the standard of review it would apply when considering instances of derogation under the European Convention.¹⁰⁶ It held that in determining whether a state of emergency existed, a “public emergency threatening the life

98. See generally *id.* and accompanying text (discussing the relevant cases to the interpretation of the European Convention and applying it to the ICCPR).

99. *The Lawless Case*, Eur. Ct. H.R. (ser. B) at 9 (Eur. Comm’n on H.R.), *aff’d* 1961 Y.B. Eur. Conv. H.R. 438 (Eur. Ct. on H.R.).

100. See European Convention, *supra* note 87, at 234-42 (establishing the European Commission on Human Rights to ensure observance of the provisions of the European Convention).

101. See *id.* at 222 (entering into force Sept. 3, 1953).

102. See generally *The Lawless Case*, Eur. Ct. H.R. (ser. B) at 17-22 (providing a detailed account of the facts).

103. See *id.* at 18, *citing* Offenses Against the State Act, 1939 (Ireland) (setting out the relevant provisions of the Act).

104. See *id.* (providing the legal basis for the government’s action). Lawless claimed such a detention violated his right to liberty and security of person and the right to a speedy trial. See *id.*

105. See *id.* at 56, 183 (summarizing the issues and holding of the court).

106. See Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 24 (indicating that *The Lawless Case* was the Commission’s first public discussion of standards of review under Article 15 of the European Convention).

of a nation”¹⁰⁷ should be considered in its “natural and ordinary meaning.”¹⁰⁸ Applying this standard, the Commission determined that a state of emergency is an exceptional and imminent crisis affecting the general public, as opposed to particular groups, which threatens the organized life of the community.¹⁰⁹

The Commission further noted that when making this determination, the government declaring the state of emergency deserves a margin of appreciation.¹¹⁰ Ultimately, the Commission concluded that the IRA’s existence as an illegal organization dedicated to the use of violence and the threat the IRA posed to the Republic of Ireland justified the government’s derogation claim.¹¹¹

Citing the existence of the IRA, the threat to foreign relations, and an increase in terrorist activities, the European Court of Human Rights (“Court”) similarly determined the Irish government was justified in invoking derogation measures.¹¹² It agreed with the Commission’s determinations that Article 15 of the European Convention should be interpreted in light of its natural and customary meaning,¹¹³ and that the entire population and organized life of the community must be threatened to establish such an emergency.¹¹⁴ The Court did

107. The Lawless Case, Eur. Ct. H.R. (ser. B) at 82.

108. *Id.*

109. *See id.* (defining further the “natural and ordinary meaning” of “a public emergency threatening the life of a nation”).

110. *See id.* (finding that while the concept of a public emergency in its “natural and ordinary meaning” is clear, it is difficult to determine whether a situation falls into the public emergency definition, and therefore a certain level of discretion should be left to the government declaring the emergency).

111. *See id.* at 83-90 (examining each claim in detail and determining a state of emergency existed). *But see id.* at 90 (Mr. Eustahiades, dissenting) (emphasizing the requirement that a national emergency affect the entire population of a nation rather than one segment of the nation’s population).

112. *See The Lawless Case*, 1961 Y.B. Eur. Conv. On H.R. at 470-74 (Eur. Ct. on H.R.) (determining the existence of a public emergency threatening the life of the nation).

113. *See id.* at 474 (referencing the European Commission’s conception of “public emergency”).

114. *See id.* at 470-74 (finding that “public emergency threatening the life of the nation” refers to situations that affect the whole population and threaten the organized life of the community).

not determine, however, the amount of deference it would grant to a State's national emergency determination.¹¹⁵

The result of *The Lawless Case*, therefore, defined an Article 15 state of emergency as an exceptional situation that affects the entire population and threatens the nation's organized life.¹¹⁶ The amount of deference that should be granted to a State government declaring a state of emergency, however, was left in doubt.¹¹⁷

2. *The Greek Case*

In 1967, the Greek military replaced the existing government, declared martial law, suspended several articles of the Greek Constitution, and imprisoned opposition leaders.¹¹⁸ The military then declared a state of emergency, claiming it could derogate from its obligations under the European Convention.¹¹⁹ In *The Greek Case*,¹²⁰ the Commission constructed a precise definition of a public emergency.¹²¹ It defined four criteria that a government invoking the exception must meet in order to conclude that a state of emergency exists: (1) the emergency must be actual or imminent;¹²² (2) its effects must involve

115. *See id.* at 54-62 (omitting discussion of the deference States should be afforded in declaring a state of emergency).

116. *See generally supra* notes 99-115 and accompanying text (examining the facts and holding of *The Lawless Case*).

117. *See supra* note 110 and accompanying text (discussing the margin of appreciation).

118. *See* H. PETZOLD, EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, CASES AND MATERIALS: A READER FOR STUDENTS OF THE INTERNATIONAL LAW OF HUMAN RIGHTS pt. XIV-1, at 1 (3d ed., International Institute of Human Rights 1979) (detailing the facts of *The Greek Case*).

119. *See id.* at 1 (stating Denmark, Norway, Sweden, and The Netherlands brought complaints before the European Commission claiming Greece violated its Convention obligations).

120. *See id.* at 8 (enumerating the characteristics of a state of emergency); *see also* *Greek Case*, 12 Y.B. COV. H.R. 1, 186 (1969) (Commission Report).

121. *See* Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 27 (maintaining the significance of *The Greek Case* because it defined a public emergency precisely and stringently).

122. *See generally* Daniel O'Donnell, *Commentary on the Rapporteur on Derogation*, 7 HUM. RTS. Q. 23, at 24 (noting that it is not permissible to use a state of emergency declaration as a preventative measure).

the nation as a whole rather than a segment of it;¹²³ (3) the emergency must threaten the organized life of the community;¹²⁴ and (4) it must be exceptional, so that measures and restrictions permitted by the European Convention are inadequate.¹²⁵ The Commission made only slight mention of the margin of appreciation, indicating its significance in the determination of a state of emergency was minimal.¹²⁶

The Commission then applied the four criteria to each of the three elements cited by the Greek military government to justify invoking Article 15. These elements were: (1) the communist threat; (2) the constitutional government crisis; and (3) the threat to public order.¹²⁷ The Commission determined that anxiety about the government's future stability did not constitute such a threat, even if that anxiety was widespread.¹²⁸ The Commission then found there was no actual or imminent emergency threatening the country.¹²⁹

3. *Ireland v. United Kingdom*

In *Ireland v. United Kingdom*,¹³⁰ the European Commission and Court again considered the margin of appreciation previously con-

123. *But cf.* Thomas Buergenthal, *To Respect and Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* (Louis Henkin, ed. 1981) (stating that a "public emergency threatening the life of a nation" could exist in a limited geographic location within a nation).

124. *See generally* O'Donnell, *supra* note 122, at 24 (asserting that in order to qualify as a threat to the life of a nation, the threat must adversely affect the basic functioning of indispensable institutions and not just any public institution).

125. *See* Buergenthal, *supra* note 123, at 79-80, (explaining that in The Greek Case the European Commission identified four characteristics of a public emergency that qualify as a threat to the life of a nation).

126. *See* Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 27 (stating that the Commission weighed the conflicting evidence before it with little regard for the Greek military government's outlook).

127. *See id.* (discussing the Commission's observation that the communists were arrested quickly and efficiently and therefore were not really a threat).

128. *See id.* (commenting on the Commission's determination that the Greek population's concerns about its government's future did not amount to a constitutional crisis).

129. *See id.* at 28 (noting the Commission's conclusion that normal measures could control the situation in Greece).

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

sidered in *The Lawless Case*.¹³¹ The case involved a 1976 challenge by Ireland to the methods used by the authorities in Northern Ireland to respond to the criminal activities of the IRA.¹³² In this case, both Ireland and the United Kingdom agreed a state of emergency existed as a result of increasing violence in Northern Ireland.¹³³ As a result, neither the Commission nor the Court performed an independent examination of whether a state of emergency actually existed,¹³⁴ indicating it granted a great deal of deference to a State's determination of the existence of a national emergency.¹³⁵

4. A Refined Definition

The result of these cases indicates that when the legitimacy of a derogation to Article 15 of the European Convention is questioned, the European Commission and Court of Human Rights will apply the four criteria enumerated in *The Greek Case*.¹³⁶ The level of deference given to a government in declaring a public emergency, formerly left open in *The Lawless Case*, has shifted from a minimal level in *The Greek Case*, to a much higher level as a result of *Ireland v. United Kingdom*.¹³⁷

Although the European Convention and the decisions of the Euro-

131. See Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 34 (claiming the European Court made its most extreme statement on Article 15's "margin of appreciation" in *Ireland v. United Kingdom*).

132. See *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) at 398-400 (1976) (setting forth introductory observations of the techniques used by authorities in Northern Ireland). These methods include "hooding, wall-standing, noise, [and] deprivation of food, water, and sleep." See *id.*

133. See Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 32 (noting that the issue in *Ireland v. United Kingdom* was not the existence of an emergency, but the necessity of taking emergency measures in response).

134. See *id.* (stating that the European Court found States were in a better position to choose the remedies to resolve an emergency).

135. See *id.* at 27-28 (noting the European Court accorded a great deal of deference to States in determining whether a state of emergency existed).

136. See *supra* notes 12-29 and accompanying text (discussing the applicable criteria arising from *The Greek Case*).

137. See *supra* notes 110 and 135 and accompanying text (discussing the margin of appreciation granted in *The Lawless Case* and *Ireland v. United Kingdom*, respectively).

pean Court and Commission are not binding on non-signatory States,¹³⁸ their determinations should be granted deference. The ICCPR and the European Convention share a common origin,¹³⁹ and the principles each seek to uphold are nearly identical.¹⁴⁰ Furthermore, the textual language of the derogation provisions is similar,¹⁴¹ and the European Convention's interpretive body's tendency to examine Article 15's derogation provisions in its natural and common meaning make their findings easily transferable and applicable to the ICCPR.¹⁴²

B. STANDARDS AND PRINCIPLES PROPOSED BY THE INTERNATIONAL COMMUNITY

There have been several attempts by leaders in the international community to interpret the derogation provision of the ICCPR.¹⁴³ Such efforts have culminated in the development of principles and standards that are a relevant guide to determining whether a derogation is legal.¹⁴⁴

International customary law recognizes the work of legal scholars and authors when determining whether an international norm exists.¹⁴⁵ The lack of interpretation of Article IV by the Human Rights

138. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 26, 20.4.5(a)(i), 1155 U.N.T.S. 331, 339 (stating treaties are binding only on the parties to it and obligations must be carried out in good faith).

139. See *supra* note 88 and accompanying text (discussing both treaties' roots in the United Nations Charter and the Universal Declaration of Human Rights).

140. See ICCPR, *supra* note 18; European Convention, *supra* note 87 (providing the full citation to each of the documents).

141. See *supra* notes 24 and 91 (providing the text of each provision).

142. See HENKIN, *supra* note 34, at 78 (arguing that the interpretation of Article 15 of the European Convention by both the European Human Rights Commission and the European Court is a useful guide to interpreting the ICCPR's derogation clause).

143. See *e.g.*, HENKIN, *supra* note 34, at 126 (drawing on other sources to develop an interpretation of the ICCPR's derogation clause).

144. See *infra* notes 151-70 (discussing the Siracusa Principles and Paris Minimum Standards).

145. See BARRY CARTER & PHILLIP TIMBLE, INTERNATIONAL LAW 64-67 (Aspen Law & Business 3d ed. 1999) (discussing the role of scholarly writings in the development of international law).

Committee¹⁴⁶ makes turning to outside interpretive bodies both necessary and relevant.¹⁴⁷ Until the Human Rights Committee establishes clear, enforceable guidelines, the international community has few other sources to turn to for direction.¹⁴⁸ Consequently, as long as the following principles and standards are consistent with international law, they provide a useful guide to establish a framework for identifying circumstances that constitute a state of emergency.¹⁴⁹ The Siracusa Principles and the Paris Minimum Standards are two sources consistent with international law that provide insight into when Article IV measures are appropriate.¹⁵⁰

1. *The Siracusa Principles*

In 1984, thirty-one international law experts from seventeen countries met in Siracusa, Italy, to consider the ICCPR's limitation and derogation provisions.¹⁵¹ The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights ("Siracusa Principles" or "Principles")¹⁵² reflect a need for the examination of particular circumstances war-

146. See ICCPR, *supra* note 18, at 179-84 (creating the Human Rights Committee and defining its responsibilities).

147. See generally Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 29-30 (noting the Human Rights Committee's difficulty in implementing Article IV).

148. See *supra* notes 77-85 and accompanying text (noting the HRC has not adopted uniform guidelines for the application of Article IV).

149. See *infra* note 154, 168 and accompanying text (determining that each work is consistent with the rules of international law).

150. See *id.* (noting that both of these works are consistent with international law); see also Paris Minimum Standards, *supra* note 31, at 1073 (providing that the Standards may assist governments, international monitoring bodies, and nongovernment organizations in determining the nature of a State's obligations when faced with a public emergency).

151. See Siracusa Principles, *supra* note 30, Introduction (providing general information about the participants to the conference). The International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Studies convened the experts. See *id.*

152. Siracusa Principles, *supra* note 30.

granting a derogation to effectively implement the rule of law.¹⁵³ The Principles are consistent with the rules of international law.¹⁵⁴

Part II of the Principles deals exclusively with derogations during a public emergency.¹⁵⁵ The Principles characterize a public emergency as a threat to the life of a nation that is 1) actual or imminent; 2) affects an entire population and some part of its territory; and 3) affects a population's physical integrity,¹⁵⁶ political independence or territorial integrity,¹⁵⁷ or the existence or function of indispensable institutions¹⁵⁸ designed to protect human rights.¹⁵⁹ The Principles specifically note that internal conflict and unrest do not satisfy these conditions and that economic difficulties are not a per se justification for invoking Article IV of the ICCPR.¹⁶⁰ In determining whether these criteria are met, the Principles grant no margin of appreciation to the government seeking to invoke derogation measures.¹⁶¹

This conception reflects the belief that Article IV should only be used in response to extreme measures rather than addressing chronic

153. *See id.* (noting a consensus among participants). In examining derogations, the conference participants recognized a need to identify legitimate objectives, general principles of interpretation, and main features of a derogation. *See id.* at 1.

154. *See id.*, at 2 (noting the Principles are consistent with the current state of international law).

155. *See generally id.*, at 7-14 (developing principles applicable to Article IV of the ICCPR).

156. *See generally* JEAN-BERNARD MARIE, GLOSSARY OF HUMAN RIGHTS: BASIC TERMS IN UNIVERSAL AND REGIONAL INSTRUMENTS 254 (Editions de la Maison des sciences de l'homme 1981) (defining integrity as the right to have one's physical, mental and moral integrity respected).

157. *See id.*

158. *See* O'Donnell, *supra* note 122, at 23-25 (discussing the particular language employed and noting its significance). The drafters substituted language referencing the concept of the organized life of the community with a reference to indispensable institutions. The substitution emphasizes that derogations may only be used to protect human rights and may not be used for other means. *See id.*

159. *See Siracusa Principles, supra* note 30, at 7-8 (defining a public emergency that threatens the life of a nation).

160. *See id.* at 8 (providing examples of circumstances that fail to meet the criteria necessary for a public emergency declaration under the Siracusa Principles).

161. *See* O'Donnell, *supra* note 122, at 29 (determining that a good faith requirement applies, but rejecting the margin of appreciation).

tensions.¹⁶² As a way of further restricting unjustified governmental action, the emergency must threaten the nation as a whole, affect its ability to function,¹⁶³ and the threat must be actual or imminent rather than speculative.¹⁶⁴ As a result, derogations are only permitted when they are used to protect democratic institutions and aim to restore their full operation.¹⁶⁵

2. *Paris Minimum Standards*

In 1985, The Sixty-first Conference of the International Law Association adopted a set of minimum standards that should govern the declaration and administration of a state of emergency.¹⁶⁶ The Paris Minimum Standards of Human Rights Norms In a State of Emergency are intended to ensure that even when a government declares a bona fide declaration of a state of emergency, the basic human rights guaranteed under Article IV will continue to be observed and respected.¹⁶⁷ The International Law Association hoped the standards would serve as a guide to both governments and non-governmental organizations when a nation is seized by a state of emergency.¹⁶⁸

The document defines a public emergency as “an exceptional situation of crisis or public danger, actual or imminent, which affects

162. See Joan F. Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, 7 HUM. RTS. Q. 89, 91 (1985) [hereinafter Hartman, *Working Paper*] (emphasizing that Article IV should only be used in extreme circumstances and not as a matter of habit).

163. See *id.* (stressing that the emergency must imperil the nation as a whole and its ability to function as a democratic polity).

164. See *id.* (underscoring the need that the threat not be speculative, potential, latent or lingering).

165. See *id.* at 90, citing Nicole Questiaux, *Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities: “Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as a State of Siege or Emergency,”* U.N. Doc. E/CN.4/Sub.2/1982/15 (July 27, 1982) (concluding the circumstances for a legal derogation from the ICCPR are extremely limited).

166. *Paris Minimum Standards*, *supra* note 31.

167. See *id.* (attempting to ensure human rights remain respected even in a state of emergency).

168. See *id.* at 1073 (expressing the hope that those concerned with the meaning, scope and effect of treaty obligations will find the Paris Standards of considerable help).

the whole population or the whole population of an area to which the declaration applies and constitutes a threat to the organized life of the community of which the State is composed."¹⁶⁹ It specifically allows derogation from human rights obligations, but excepts those rights enumerated in international treaties as "nonsuspendable."¹⁷⁰

C. A COMMON INTERPRETATION

The European Commission and Court of Human Rights, the Siracusa Principles, and the Paris Minimum Standards share three common criteria for determining whether a state of emergency exists.¹⁷¹ First, the emergency must be an extreme circumstance that is actual or imminent, as opposed to threatened, perceived, or persistent.¹⁷² The emergency must threaten the organized life of the community.¹⁷³ Finally, the emergency must affect the entire population of the country or the entire population in the area in which the derogating measures apply.¹⁷⁴

III. CASE STUDY: SHOULD NIGERIA INVOKE THE ARTICLE IV DEROGATION PROVISION?

Although the Nigerian government has not formally sought to invoke the Article IV exception, it has warned it would declare a state of emergency in any part of the country where violence breaks out.¹⁷⁵

169. *See id.* (establishing a working definition of a state of emergency).

170. *See id.* at 1074 (prohibiting derogations from internationally prescribed rights). The document delineates which rights and freedoms are non-derogable, including the right to legal personality, freedom from servitude and slavery, the right to life, freedom from torture, freedom of thought, conscience and religion, and freedom from imprisonment for the inability to fulfill a contractual obligation. *See id.*

171. *See generally infra* notes 172-74 (establishing the requirements for a legal derogation).

172. *See supra* notes 122, 159, 169 and accompanying text (establishing this as a requirement for a legal derogation).

173. *See supra* notes 124, 159, 169 and accompanying text (establishing this as a requirement for a legal derogation).

174. *See supra* notes 123, 159, 169 and accompanying text (establishing this as a requirement for a legal derogation).

175. *See* Paul Ejime, *Vice-President Warns Nigerians to Stop Violence*, AFRICA NEWS SERV., Nov. 10, 1999, available in 1999 WL 25954413 (reporting that the

On December 30, 1998, for example, the government declared a state of emergency in the Delta in response to threats of violence and interference with oil production.¹⁷⁶ Subsequent states of emergency in the Delta have been proclaimed or threatened as a result of ethnic tensions.¹⁷⁷ These actions have led at least one human rights organization to speculate that the Nigerian government may attempt to argue that protest and interference with oil production threatens national security.¹⁷⁸ Examination of the political situation in the Delta, however, reveals that such an argument would be legally unjustified.¹⁷⁹

A. GOVERNMENT RELATIONSHIP WITH THE OIL INDUSTRY

The Nigerian government, owner of all mineral resources in the country, is responsible for negotiating production terms¹⁸⁰ with mul-

Nigerian government warned it would declare a state of emergency in any area where violence exists); *see also* Cameron Duodu, *Confounding the Prophets of Doom*, WORLD TODAY, Feb. 1, 1999, available in 1999 WL 12485388 (characterizing the government's habit of sending troops to enforce strict states of emergency in response to protests against oil companies as a "knee jerk reaction").

176. *See Curfew Imposed on Troubled Nigerian State*, AFRICA NEWS SERV., July 17, 1999, available in 1998 WL 21358835 (reporting the imposition of a state of emergency in the Delta region following protests associated with the Kaiama Declaration).

177. *See generally* Okafor Ofiebor, *State of Emergency Declared in Warri*, AFRICA NEWS SERV., June 8, 1999, available in 1999 WL 19530037 (noting the government declared a state of emergency in response to ethnic rivalries and that soldiers were authorized to shoot on sight anyone violating the curfew that was imposed); *see also* *Nigeria Exports Face New Threat*, THE OIL DAILY, Nov. 19, 1999, available in 1999 WL 10015531 (reporting that growing anarchy and an increase in ethnic clashes, attacks on oil companies, and demands for money led President Obasanjo to consider imposing a state of emergency); *see e.g.*, *Update of Events in West Africa*, AFRICA NEWS SERV., Feb. 2, 2000, available in 2000 WL 12887635 (reporting that President Obasanjo threatened to declare a state of emergency in one of the states in the Delta region if officials did not stop the threats to security).

178. *See* MANBY, *supra* note 8, at 187 (noting that the Nigerian government may argue that protests in the areas around oil installations pose a threat to national security).

179. *See infra* notes 239-79 and accompanying text (applying the criteria for the invocation of the Article IV exception and arguing the circumstances in Nigeria fail to satisfy such criteria).

180. *See* MANBY, *supra* note 8, at 26-27 (stating that because Nigeria lacks suf-

tinational oil companies.¹⁸¹ A series of ordinances in the 1960's forced all companies operating in Nigeria to become Nigerian corporations¹⁸² and steadily increased government control of the oil industry.¹⁸³ Throughout the 1970's, the government partially took control over the industry¹⁸⁴ and by 1979, it owned at least a 55 per cent stake in each oil company operating within its borders.¹⁸⁵

Disagreements over government funding of the joint ventures dominated exploration and production concerns throughout the 1990s.¹⁸⁶ The government has failed to provide oil companies with both the funding it has requested and the funding it has promised.¹⁸⁷

ficient expertise to develop its oil reserves, the government must negotiate with international oil companies on the country's behalf).

181. *See id.* (placing the responsibility of managing government-owned resources in the National Assembly).

182. *See id.* at 27 (referencing the 1968 Companies Decree).

183. *See id.* (citing the 1969 Petroleum Decree, which formed the basis for the regulatory system currently in effect).

184. *See id.* at 27-28 (stating that the government took an equity stake in the oil industry). In 1971, the government's participation was 35 per cent. Three years later, that figure rose to 55 per cent). *See id.*

185. *See* MANBY, *supra* note 8, at 28-29 (detailing the stake that the government has in each oil company). There are currently six multinational oil companies operating in Nigeria under these joint ventures: 1) Shell Petroleum Development Company of Nigeria Limited ("SPDC") is owned by the Nigerian National Petroleum Corporation ("NNPC") (55%), Shell (30%), Elf (10%), and Agip (5%). *See id.* The joint venture accounts for approximately 40 % of total Nigerian oil production; 2) Chevron Nigeria Limited ("CNL") is owned by the NNPC (60%) and Chevron (40%). *See id.* CNL is expected to increase its oil production by 200,000 bpd; 3) Mobil Producing Nigeria Unlimited ("MPNU") is owned by the NNPC (60%) and Mobil (40%). *See id.* Mobil is expected to increase its total production to 900,000 within the next five years, thereby replacing Shell as the largest oil producer in the country; 4) Nigerian Agip Oil Company Limited ("NAOC") is owned by the NNPC (60%), Agip (20%), and Phillips Petroleum (20%). *See id.* at 29-30. Its current production is approximately 150,000 bpd; 5) Elf Petroleum Nigeria Limited ("EPNL") is owned by the NNPC (60%) and Elf (40%) and produces approximately 125,000 bpd; 6) Texaco Overseas Petroleum Company of Nigeria Unlimited ("TOPCON") is owned by the NNPC (60%), Texaco (20%) and Chevron (20%) and currently produces 60,000 bpd. *See id.* at 30. Currently, the six foreign owned corporations operating joint ventures with the government mine approximately 2,730,000 barrels of oil per day ("bpd"). *See id.*

186. *See id.* at 31 (claiming exploration and other investment has been reduced as a result of below-budgeted funding levels).

187. *See id.* (reporting that oil companies considered borrowing on international

Because the government has not applied these cuts uniformly, however, companies have fought one another for limited resources.¹⁸⁸ In attempts to receive essential government funding, oil companies increased their attempts to curry favor with government officials.¹⁸⁹ As a result, the government has been able to protect its interest in the oil industry¹⁹⁰ and has avoided the crippling effects of a threatened United States oil embargo.¹⁹¹

In an effort to protect its oil investment from internal threats, the Nigerian government has entered into security agreements with the oil companies.¹⁹² Under these agreements, the government trains and recruits a supernumerary police force¹⁹³ specifically for the protection of oil equipment and holdings.¹⁹⁴ The companies pay for this service, compensating the force substantially better than compensation received by State-sponsored police forces.¹⁹⁵

capital markets to make up for the government's shortfall.) In 1998, the amount allocated to international oil companies by the government was \$1 billion below the amount requested. *See id.*

188. *See id.* (stating that the government's actions have exacerbated the companies' usual efforts in vying for political goodwill).

189. *See id.* (reporting that oil companies believe it is important to be seen in a favorable light to key players in the military government). Efforts have included attempts by Chevron and Mobil in lobbying the United States government to fight off international sanctions. *See id.* at 31-32. Elf drilled an offshore oil site in an attempt to show it sided with Nigeria on territorial and mineral resource disputes. *See id.* at 32.

190. *See* MANBY, *supra* note 8, at 28-29 (detailing the relative interest the government has in each oil company).

191. *See id.* (reporting Mobil lobbied the U.S. government when it threatened an oil embargo).

192. *See id.* at 115-122 (detailing the security arrangements used by Shell and Chevron based on written correspondence with each company).

193. *See id.* at 115-116 (discussing the roles and functions of the police force in protecting oil company property). The supernumerary police are also known as "spy police," and may be dressed in plainclothes while conducting investigations. *See id.*

194. *See* Police Act, Decree No. 41, sec.14(1), 87 OFFICIAL GAZETTE A 189 (Supp. 1967) (Nig.) (1967) (providing for the appointment of supernumerary police at the request of "any person who desires to avail himself of the services of one or more officers for the protection of property owned or controlled by him").

195. *See id.* (making the employer responsible for uniform costs and compensation). Whether these forces are armed remains a dispute between the companies

As the largest industry in the country,¹⁹⁶ the government cannot afford to neglect its oil investment.¹⁹⁷ Statements released by the police in one State, for example, warned that “the command will deal ruthlessly with anyone caught” in connection with sabotage operations.¹⁹⁸ Emphasizing the government’s relationship with its joint venture partners, former Minister of Petroleum Resources, Dan Etete, stressed that any destruction of oil company property was identical to destroying government property.¹⁹⁹ Similarly, a Nigerian Navy Lieutenant stated that the Navy would deal with anyone involved in attacks on offshore oil rigs as an “economic saboteur” who would be “decisively dealt with.”²⁰⁰

B. THE Ogoni AFFAIR

In 1993, the Movement for the Survival of the Ogoni People (“MOSOP”)²⁰¹ organized protests that ultimately led to a decision by

and the local people who claim that most guards are armed. See MANBY, *supra* note 8, at 115-117 (noting observations that supernumerary police are equipped with weapons). In 1996, newspapers reported Shell was in negotiations to import weapons for supernumerary police use. See generally *A Call to End the Shelling of Nigeria*, MULTINATIONAL MONITOR, July 17, 1996, available in 1996 WL 13094245.

196. See International Monetary Fund, *Nigeria: Selected Issues and Statistical Appendix*, *supra* note 17, at 6-11 (analyzing the importance of oil to the Nigerian government). Nigeria is the fifth largest producer of oil in OPEC. See Manby, *supra* note 8, at 6.

197. See MANBY, *supra* note 8, at 28-30 (discussing the government’s interest in six joint venture operations with multinational oil companies).

198. See *id.* at 121 (reiterating the state’s commitment to deal forcefully with threats to the oil industry).

199. See *id.* (echoing the national policy of dealing with those involved in sabotage activities).

200. See *id.* (stating the military’s stance on the oil production sabotage). The people in the region, however, have not been deterred, and have increased the severity and frequency of attacks on oil installations. See *Energy-Nigeria-Texaco-Lagos*, REUTERS, Sept. 20, 1999 (visited Sept. 20, 1999) <<http://biz.yahoo.com/rf/990920/ep.html>>.

201. See *MOSOP Urges Caution Over “Democratic Progress”*, *supra* note 3 (describing the Movement for the Survival of the Ogoni People (“MOSOP”) as a Nigerian human and environmental rights group serving the needs of the Ogoni people).

Shell Oil Company to stop its oil production activities in the area.²⁰² The movement began in 1990 when the MOSOP wrote an Ogoni Bill of Rights²⁰³ making several political demands on the government.²⁰⁴ In January 1993, the MOSOP held a rally to mark the beginning of the United Nation's International Year of the World's Indigenous Peoples.²⁰⁵ Protests continued throughout the year,²⁰⁶ and by mid-year, Shell decided to cease all production activities in Ogoni territory.²⁰⁷ Since then, threats to the oil industry have been commonplace as other groups tried to duplicate the MOSOP's success.²⁰⁸

C. THE KAIAMA DECLARATION

Following the Ogoni example, youth groups of the Niger Delta organized in an attempt to assert their rights and to express frustration

202. See MANBY, *supra* note 8, at 124-129 (discussing the Ogoni Crisis). In 1990, the Ogoni ethnic group adopted the "Ogoni Bill of Rights" that listed the Ogoni's complaints and demanded greater political autonomy and the creation of a separate Ogoni State. See *id.* at 124. The protests in 1993 coincided with the United Nation's International Year of the Indigenous Peoples and involved more than half of the total Ogoni population. See *id.*

203. See Ogoni Bill of Rights (Nig. 1990), *reprinted in* KEN SARO-WIWA, A MONTH AND A DAY: A DETENTION DIARY at 67-70 (1995).

204. See *id.* (noting specifically the right to representation in the national government, the right to control the affairs of the Ogoni people and freedom of religion).

205. See MANBY, *supra* note 8, at 124 (noting that several hundred thousand people—at least half of the Ogoni population—participated in the rally).

206. See *id.* at 124-129 (detailing these protests and the government's response). Several leaders of the MOSOP, including well-known author Ken Saro-Wiwa were sentenced to death by extra-judicial bodies as a result of their role in the protests. See *id.* Shell received international criticism for its perceived role in the executions. See *id.* at 12-13.

207. See *id.* at 124 (noting that Shell abandoned its operations due to intimidation felt among its employees).

208. See *id.* at 129-131 (detailing attempts by other ethnic groups in the Delta to replicate the MOSOP success). The Movement for the Survival of the Izon Ethnic Nationality in the Niger Delta ("MOSIEND"), the Movement for the Reparation to Ogbia ("MORETO"), and the Ijaw Youths have all presented declarations of rights and grievances to the government. See *id.* at 129-130. The Chikoko Movement was founded in 1997 to unite different ethnic groups in the region for the defense of rights against common oppressors, including the Nigerian government. See *id.* at 130.

at hostile government attitudes.²⁰⁹ Recently, this culminated in the Kaiama Declaration ("Declaration").²¹⁰ The Declaration expressed the Ijaw tribe's frustration with government crackdowns,²¹¹ environmental destruction,²¹² and insufficient corporate initiatives to assist the region.²¹³ The Declaration took effect December 30, 1998.²¹⁴ In many ways, the Declaration reflected a militant attitude toward the Nigerian government, the military, and oil companies.²¹⁵ The Declaration called for ending conflicts with neighboring tribes and offered mutual assistance in the struggle for self-determination.²¹⁶

The Declaration reclaimed all land and minerals within the Ijaw territory,²¹⁷ demanded the withdrawal of the military in the region,²¹⁸ and declared as enemies all oil companies that employed the Nige-

209. See *The Kaiama Declaration*, *supra* note 32, at ¶ 4 (expressing frustration at being labeled saboteurs and terrorists); see generally HUMAN RIGHTS WATCH, NIGERIA: CRACKDOWN IN THE NIGER DELTA at 4 (1999) (discussing the social and economic conditions that precipitated the Declaration).

210. *The Kaiama Declaration*, *supra* note 32.

211. See, e.g., *infra* notes 223-33 and accompanying text (discussing the government's response to the Kaiama Declaration).

212. See generally MANBY, *supra* note 8, at 53-87 (detailing the environmental impact of oil production on the Niger Delta).

213. See *id.* at 95-96 (discussing the dire living conditions that persist in oil producing areas, despite the Niger Delta region's vast wealth).

214. See *The Kaiama Declaration*, *supra* note 32, at ¶ d (observing that the quality of life of the Ijaws is deteriorating as a result of neglect, suppression, and marginalization due to the actions of the government and multinational oil companies). The Declaration also recognized that the crisis in Nigeria is a result of the struggle for oil resources and that despite large revenue contributions from the Niger Delta, the Ijaws experienced ecological devastation and military repression. See *id.*

215. See *id.* at Introduction (reinforcing the collective spirit of the Kaiama Declaration).

216. See *id.* at ¶¶ 5-7 (expressing solidarity with all organizations and ethnicities in Nigeria who are struggling for self-determination and justice, and affirming the Ijaw commitment to a joint struggle with all the people in the Niger Delta). The Kaiama Declaration also expressed the hope that Nigerian oil workers would "see this struggle for freedom as a struggle for humanity." *Id.* at ¶ 7.

217. See *id.* at ¶ 1 (claiming that oil resources are the basis of Ijaw survival and explaining that the land and natural resources belong to the Ijaw people).

218. See *id.* at ¶ 3 (urging family members of military personnel stationed in the region to appeal to their relatives to leave the Ijaw territory alone).

rian armed services.²¹⁹ It also revoked recognition of all undemocratic decrees that served to revoke the Ijaw's right to own and control land resources and affairs.²²⁰ Ijaw clans further threatened to reclaim control of their lives on the day the Declaration took effect.²²¹ The Declaration then advised all oil companies and staff operating within Ijaw territory to withdraw until resource ownership and allocation issues were resolved.²²²

The government's response to the Kaiama Declaration was characteristically brutal.²²³ On December 30, 1998, members of the Ijaw clans and other tribes in the Delta region gathered in several cities for peaceful marches.²²⁴ Protesters in most communities were unarmed.²²⁵ In the city of Yenagoa,²²⁶ the march proceeded peacefully until protestors approached the base of a military administrator.²²⁷ Once at the

219. *See id.* (singling out as enemies of the Ijaw people oil companies who employ the military to protect their operations).

220. *The Kaiama Declaration*, *supra* note 32, at ¶ 1 (citing specifically the Land Use Decree and the Petroleum Decree as examples).

221. *See id.* at ¶ 4 (advising all oil company employees and contractors to withdraw by December 30, 1998).

222. *See id.* (proposing that oil companies make a temporary withdraw from the area). In response to the Kaiama Declaration, Chevron evacuated most of its employees from the region. *See* HUMAN RIGHTS WATCH, NIGERIA: CRACKDOWN IN THE NIGER DELTA, *supra* note 209, at 15 (1999).

223. *See Curfew Imposed on Troubled Nigerian State*, AFRICA NEWS SERV., Dec. 31, 1998, available in 1998 WL 21358835 (reporting that the government declared a state of emergency in response to the Kaiama Declaration). The emergency ceased on January 5, 1999. *See Curfew Lifted in Nigeria's Troubled Region*, *supra* note 27; *see also* HUMAN RIGHTS WATCH, *supra* note 209, at 6 (reporting that soldiers arrived in the Delta in several truckloads and boasted of their intent to attack those who wanted to stop the oil companies).

224. *See* HUMAN RIGHTS WATCH, *supra* note 209, at 6 (stating that several thousand youths gathered in Yenagoa, Bomadi, Olibiri, and other communities to support the Kaiama Declaration and to take part in a traditional dance).

225. *See id.* (reporting eyewitness accounts of unarmed protestors). The Ijaw Youth Council sent letters to all communities in the Delta instructing the youths not to carry weapons or drink alcohol before the demonstrations. *See id.*

226. *See* MANBY, *supra* note 8, at 94 (stating that Yenagoa is the capital of Bayelsa State, but comprises little more than a crossroads, bus terminal and landing stage).

227. *See* HUMAN RIGHTS WATCH, *supra* note 209, at 6 (stating that the procession peacefully passed the local police station and that violence did not ensue until

base, military personnel attacked the crowd and a riot ensued,²²⁸ resulting in the injury of many protestors and the death of two military personnel.²²⁹

Several days later, the military attacked two Ijaw villages using Chevron-owned helicopters and boats.²³⁰ Witnesses reported that they were accustomed to seeing Chevron helicopters in the area and expressed surprised when operators began firing.²³¹ Following the aerial attack, the military entered both villages in boats and burned each to the ground.²³² Chevron refused to condemn the action, claiming that as a result of the joint venture relationship, it had no control over military demands to use its modes of transport.²³³

marchers approached the State House). Protestors also faced military violence in Mbiama, resulting in the death of at least ten youths. *See id.* at 7.

228. *See id.* (reporting that soldiers fired on the demonstrators using tear gas, rifles and machine guns). The local police commissioner later stated that security personnel acted in self-defense when 500 youths forced their way through the gate. *See id.* Participants, however, claimed that soldiers began firing when they were some distance away. *See id.*

229. *See id.* (stating that rumors indicated some soldiers were disarmed, but this could not be confirmed by any eyewitnesses). One of the injured individuals claimed that he was shot in the chest during the confrontation. *See id.* When he regained consciousness, he tried to find a place to hide, but only succeeded in getting the soldier's attention. *See id.* They then shot him in the leg at point blank range, dragged him across the road, and continued to beat and kick him in the head. *See id.* He regained consciousness in the hospital mortuary. *See id.* Terrified, he began to scream, which attracted a soldier, who made another attempt on his life, but was forestalled by nurses. *See id.* His leg was amputated several days later. *See id.*

230. *See id.* at 13-19 (discussing in detail the military attacks on Opia and Ikenyan beginning in early January, 1999).

231. *See id.* at 14 (reporting that local villagers thought nothing of seeing Chevron helicopters in the area until they fired shots).

232. *See* HUMAN RIGHTS WATCH, *supra* note 209 at 6 (claiming soldiers fired indiscriminately, torched villages and destroyed other property). The leader of Ikenyan was killed as he approached the waterside in an attempt to negotiate with the soldiers. *See id.*

233. *See Chevron's Nigeria Commitment* (visited Mar. 8, 2000) <<http://www.chevron.com/newsus/index.html>> (stating that Chevron does not own helicopters or boats, but that the Joint Venture leases boats and helicopters and as a majority partner, the government may make use of the leased equipment when it deems necessary). *See also* MANBY, *supra* note 8, at 28-29 (discussing the particulars of the Joint Venture relationship among the oil companies and the Nigerian government).

IV. APPLICATION OF COMMON INTERPRETIVE PRINCIPLES TO NIGERIA

The Nigerian government's actions violate its obligations under the ICCPR.²³⁴ In its last report, the HRC expressed concern over actions taken by the military regime.²³⁵ Many of these actions, however, are permissible if a public emergency exists in the Delta.²³⁶ Due to the HRC's failure to clearly define the circumstances in which derogation measures are appropriate, it is difficult to determine with certainty whether invoking Article IV is appropriate.²³⁷ Applying the common criteria of the European Commission and Court of Human Rights, the Siracusa Principles, and the Paris Minimum Standards, it becomes clear that such measures are not legally justified.²³⁸

A. EXTREME CIRCUMSTANCE THAT IS ACTUAL OR IMMINENT

Public emergencies that threaten the life of a nation must be a significant disruption rather than a low-level civil disturbance.²³⁹ The current protests in the Delta, however, fall into the latter category.²⁴⁰ Although the people in the region protested regularly throughout the

234. See *Report of the Human Rights Committee*, U.N. GAOR, 51st Sess., Supp. No. 40, U.N. Doc. A/51/40 (1996) (discussing the comments of the HRC in response to the last State report submitted by the Nigerian government).

235. See *id.* at ¶ 270 (expressing concern over Nigeria's compliance with its obligations to guarantee the right to life, freedom from torture and cruelty, liberty and security, and equality before the courts).

236. See ICCPR, *supra* note 18, at 174 (prohibiting derogation from guaranteeing the right to life and freedom from torture and cruelty). Derogations from liberty and equality before the law, however, are permissible. See *id.*

237. See *supra* notes 77-85 and accompanying text (discussing the failure of the HRC to establish the criteria for a legal derogation under Article IV).

238. See *infra* notes 239-79 and accompanying text (applying each of these criteria and arguing that the Nigerian government is not legally justified to invoke Article IV measures).

239. See Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 16 (noting that the plain language of the public emergency exception requires more than a civil disturbance common to most democracies).

240. See *infra* notes 241-50 and accompanying text (supporting this conclusion by examining the current political situation in Nigeria).

last decade,²⁴¹ the largest loss of life from these protests resulted from a clash between demonstrators and police in 1990.²⁴² The subsequent protests, designed to duplicate the success of the Ogonis,²⁴³ were largely unsuccessful.²⁴⁴ Acts of sabotage and kidnappings perpetuated against oil companies simply resulted in temporary or negligible effects on oil production.²⁴⁵ Additionally, activities that have a destructive impact on the environment continue to remain unaddressed.²⁴⁶

Oil revenues, however, continue to reach the billion-dollar mark, and plans by each oil company to increase oil production continue.²⁴⁷ Research and development projects aimed at the extraction of natural gas deposits are underway²⁴⁸ and President Obasanjo recently ap-

241. See generally MANBY, *supra* note 8, at 123-131 (discussing the history of protest and repression in the Niger Delta).

242. See *id.* at 123 (discussing the events that occurred in Umuechem, which resulted in the death of 80 unarmed demonstrators and the destruction of 495 homes). This was the first incident that brought international attention to the situation in the Delta. See *id.* Protestors demanded electricity and water supplies, roads, and compensation for crop losses that occurred as a result of oil pollution. See *id.* When Shell learned of the upcoming protest, it wrote to the Nigerian State police commissioner of an "impending attack" on its facilities and requested assistance from the paramilitary police force. See *id.*

243. See *supra* notes 201-07 (discussing the successes of the MOSOP).

244. See generally *supra* notes 209-33 and accompanying text (using the Kaiama Declaration as an example of a failed attempt at prolonged oil disruption).

245. See, e.g., Norimitsu Onishi, *Deep in the Republic of Chevron* (visited Sept. 21, 1999) <<http://archives.nytimes.com/archives/search/>> (describing a typical hostage situation in which a group of protestors forced officials to stop oil production at one site). That incident resulted in the loss of a few thousand barrels of oil. See *id.* The superintendent of oil production characterized the incident as "not a big deal." See *id.*

246. See Anver Versi, *Another Biafra in the Making?*, AFRICA NEWS SERV., Oct. 1, 1999, available in 1999 WL 11783928 (describing a state of near anarchy in the Delta region). Massive gas flaring in some areas caused acid rain and contamination of the drinking water sources. See *id.* But see Goddy Ikeh, *Nigeria Turns on Oil Giants Over Saro-Wiwa Death*, INDEPENDENT at 19 (Oct. 26, 1999) (reporting the Nigerian government gave multinational oil companies six weeks to develop an environmental clean-up plan for the Delta region).

247. See generally MANBY, *supra* note 8, at 28-29 (discussing plans by the joint venture partners to increase oil production).

248. See, e.g., *Shell Planning to Develop Nigerian Oil Field*, HOUSTON CHRONICLE, Oct. 31, 1999, at 9 (reporting that Shell planned on spending an additional \$1.8 billion to expand capacity at its Nigerian Liquefied Natural Gas plant).

proved the construction of a \$400 million natural gas pipeline through the region.²⁴⁹ The military sought to prevent disruptions to oil production and industrial development rather than respond to actual or imminent harm posed by protest activities.²⁵⁰ Because the protests were carried out over a prolonged period and the military's response to the protests was preventative²⁵¹ rather than responsive to an actual or imminent threat, the Nigerian government would fail the imminence prong.²⁵²

B. THREAT TO THE ORGANIZED LIFE OF THE COMMUNITY

To threaten the organized life of the community, the public emergency must jeopardize the normal functioning of government institutions.²⁵³ A state of emergency declared to protect the Nigerian government's power, therefore, fails to establish a threat to the organized life of the community.²⁵⁴ Governments faced with regional conflict, should necessarily consider the impact on central government institutions.²⁵⁵ Protests in the Delta, however, have not posed such a threat to the Nigerian community at large.²⁵⁶ The Kaiama Declaration,²⁵⁷ the

249. See *Nigeria President Dismisses Criticism of Pipeline Project*, DOW JONES INT'L NEWS SERV., Sept. 24, 1999, at 1, available in 1999 WL DJINSPUS (statement of President Obasanjo) (approving the pipeline construction based on the belief that pumping natural gas for use in other countries is more useful than allowing gas flares).

250. See *supra* notes 241-49 and accompanying text (supporting the conclusion that the military's activities were purely preventative).

251. See Hartman, *Working Paper*, *supra* note 162, at 91 (characterizing prolonged measures to perceived threats as one of the most severe examples of a State abusing the states of emergency declaration).

252. See Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46 (establishing imminence as a necessary requirement for declaring a state of emergency).

253. See *id.* at 91 (emphasizing that an emergency must imperil a nation's ability to operate a polity before that nation acts to suspend fundamental rights).

254. See O'Donnell, *supra* note 122, at 24 (providing examples of permissible and impermissible derogations).

255. See Hartman, *Derogations from Human Rights Treaties in Public Emergencies*, *supra* note 46, at 92 (noting that regional conflicts may justify derogation measures if they impair national institutions).

256. See *infra* notes 257-67 and accompanying text (analyzing the level of threat required to declare a state of emergency and reasoning that Nigeria has not satis-

Ogoni Bill of Rights,²⁵⁸ and similar documents²⁵⁹ have all expressed a willingness and desire that the Niger Delta remain a part of the Nigerian State. Although confrontations often occur at or near military establishments,²⁶⁰ protestors have not specifically targeted government institutions.²⁶¹ The military presence and security in the region has remained despite continued protests.²⁶²

An attempt to invoke Article IV would reflect the Nigerian government's concern in protecting its own authority rather than securing the rights of its people.²⁶³ The indigenous people seek enforcement of their rights guaranteed under the ICCPR.²⁶⁴ They aspire to exercise the right to self-determination²⁶⁵ by increasing their representation in the government.²⁶⁶ Foregoing heightened government participation secures only a future all too familiar to the Delta indigenes; a future of struggling to pursue economic and cultural devel-

fied this requirement).

257. See *The Kaiama Declaration*, *supra* note 32, at ¶ 10 (expressing a willingness to remain part of the Nigerian State).

258. See Ogoni Bill of Rights, *supra* note 203 (demanding greater political autonomy and listing the ways it could be achieved). The Ogoni Bill of Rights sought to draw attention to the plight of the Ogoni people and presented a series of demands to the government. See *id.*

259. See MANBY, *supra* note 8, at 129-31 (discussing attempts by other communities in the oil-producing region to reproduce the success of the MOSOP).

260. See, e.g., *supra* notes 223-33 and accompanying text (discussing the Nigerian government's response to the Kaiama Declaration).

261. See, e.g., *supra* notes 224-33 and accompanying text (discussing marches held in support of the Kaiama Declaration).

262. See Duodu, *Confounding the Prophets of Doom*, *supra* note 175 (characterizing the government's use of the military in response to threats to oil production a "knee jerk reaction").

263. See *infra* notes 264-68 (analyzing the conclusion that the government's superceding concern in calling a state of emergency was its own preservation).

264. See *infra* notes 265-67 (discussing indigenous individuals' efforts to secure rights guaranteed by the ICCPR).

265. See ICCPR, *supra* note 18, at 173 (declaring the right to self-determination for all peoples).

266. See *The Kaiama Declaration*, *supra* note 32, at ¶ 10 (expressing the Ijaw commitment to remain within Nigeria, but committing to work for self-government); see generally *supra* notes 203-04 and accompanying text (discussing the Ogoni Bill of Rights).

opment.²⁶⁷ Addressing such concerns would serve to strengthen the current fragile Nigerian democracy rather than threaten it.²⁶⁸ In light of this analysis, the Nigerian government's enactment of derogation measures would be unjustifiable.²⁶⁹

C. THREAT TO THE ENTIRE POPULATION

Public emergencies must effect the entire population of the country or, if the emergency is confined to a particular region, the entire population of the effected region.²⁷⁰ Thus, a government must distinguish between public emergencies isolated in effect and those that have the capacity to, or do in fact, effect a population at large.²⁷¹

An emergency resulting from a disruption in oil production would have virtually no adverse effect on a substantial portion of the population in the Delta.²⁷² Oil companies have maintained a policy of not employing indigenous people.²⁷³ Moreover, because the government

267. See ICCPR, *supra* note 18, at 173 (stating that because all people have the right to self-determination, they have the right to pursue economic, social and cultural development); see also Ogoni Bill of Rights, *supra* note 203, at 69 (claiming that government policies are threatening Ogoni culture and demanding a larger share of the oil wealth derived from Ogoni territory); THE KAIAMA DECLARATION, *supra* note 32, at ¶ 2 (ceasing to recognize undemocratic decrees that revoke ownership and control of Ijaw lives and resources).

268. See James Rupert, *Unrest Threatens Plans of Nigeria's New Leader*, WASH. POST, June 2, 1999, at A15 (reporting that daily unrest in the Delta threatens President Obasanjo's efforts to establish peace and stability in the country).

269. See *supra* notes 253-68 (analyzing the criteria and supporting the conclusion that derogation measures employed by the Nigerian government would be unjustified).

270. See *Paris Minimum Standards*, *supra* note 31, at 1073 (establishing the requirement that a public emergency must affect a "whole population" or "the whole population of an area").

271. See *The Lawless Case*, 1960 Y.B. Eur. Conv. on H.R. 82 (Eur. Comm'n on H.R.) (Commission report) (defining a public emergency in its natural and ordinary meaning).

272. See *infra* notes 273-79 (providing support for the conclusion that the Delta population would not feel the effects of a disruption to oil production).

273. See MANBY, *supra* note 8, at 101-102 (reporting that multinational oil companies do not employ indigenous people because they do not have the necessary expertise). *But see* Versi, *supra* note 246 (reporting that President Obasanjo proposed creating a job training program for the region to prepare the people for job opportunities in the oil and gas sector).

works in conjunction with multinational corporations, the people receive few benefits from oil production in the region.²⁷⁴ The benefits that are received, however, go into the hands of a select few.²⁷⁵ Furthermore, voluntary corporate initiatives, such as hospital construction, are limited and often of little value,²⁷⁶ making their loss relatively inconsequential.²⁷⁷ The people would, therefore, lose few benefits from a disruption in oil production.²⁷⁸ Since the Nigerian people would experience no adversity from a disruption in oil production, the “entirety” test would fail as a legitimate argument espousing the invocation of derogation measures.²⁷⁹

VI. RECOMMENDATIONS

Nigeria is not the only country facing internal strife.²⁸⁰ Currently, several states have formally invoked the Article IV exception.²⁸¹ Because any signatory to the ICCPR could face a public emergency, the HRC should implement a framework for determining whether derogation measures are appropriate.²⁸² This framework should include a system of monitoring such measures that reflects the HRC’s recog-

274. See *U.S. Leaders Write Albright on Nigeria*, *supra* note 7 (stating that the government accumulated billions from the region and contributed little in return).

275. See *MANBY*, *supra* note 8, at 105 (reporting that much of the money spent on development goes to local contractors or chiefs or to pay off troublemakers).

276. See *generally id.* at 104 (noting hospitals built by oil companies do not have water or electricity). Chevron, under pressure to build a road through a wet area, did so, knowing it would eventually collapse. See, e.g., *Onishi*, *supra* note 245 (noting Chevron’s carelessness).

277. See *supra* notes 273-77 (arguing that oil production has provided few benefits to the local people, making disruptions in oil production inconsequential).

278. See *id.* (analyzing the reasons for the conclusion that disruption in oil production would have an adverse effect on the people).

279. See *Ogoni Bill of Rights*, *supra* note 203, at 67-70 (establishing threats to the entire population as a necessary requirement for a state of emergency).

280. See ICCPR website, *supra* note 18 (noting many countries, including Argentina, Chile, Columbia, Israel, Russia, Sudan, and Great Britain have invoked Article IV).

281. See *id.* (listing the signatories to the ICCPR, their reservations, and instances of derogation).

282. See *supra* notes 77-85 and accompanying text (noting the HRC has not provided a framework for determining when the use of derogations measures is appropriate).

dition that human rights deserve special protection when a State is confronted with a public emergency.²⁸³

A. DEVELOP A COMMON CRITERIA FOR INVOKING ARTICLE IV MEASURES

The HRC should formally adopt the following criteria for determining whether a public emergency exists: (1) the emergency must be actual or imminent; (2) it must threaten the organized life of the community; and (3) the emergency must effect the entire population of the community or the entire population of the region to which the derogating measures apply.²⁸⁴ This conception of a public emergency reflects the work of the European Commission and Court of Human Rights and the work of legal scholars with expertise in this area.²⁸⁵

Adoption of these criteria can occur in one of two ways.²⁸⁶ The most effective method, however, is for the Committee to issue a general comment under its Article XL(3) authority.²⁸⁷ The comment should mandate that countries wishing to invoke Article IV establish each of these criteria prior to the invocation of derogation measures.²⁸⁸ The HRC should use the work of the European Convention's bodies, the Siracusa Principles, and the Paris Minimum Standards to

283. *See Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Annex VII, General Comments 5/13, at 10, U.N. Doc. A/36/40 (1981) (reporting the Committee's view that invocation of Article IV measures increases the importance of human rights protections).

284. *See supra* notes 122-24, 159, 169 and accompanying text (noting that these criteria are rooted in the interpretation of at least three different bodies that have attempted the determination of what constitutes a public emergency).

285. *See id.*

286. *See infra* note 287 and accompanying text (discussing a method of adoption using general comments issued by the HRC). Alternatively, the HRC could adopt these measures by consistently asking State representatives to apply each of the criteria in their presentation to the Committee. *See supra* notes 64-71 (describing the State reporting process).

287. *See ICCPR, supra* note 18, at 181 (authorizing the HRC to issue general comments to State parties); *see also supra* notes 75-76 and accompanying text (noting the HRC has increasingly used general comments to interpret provisions of the ICCPR).

288. *See supra* notes 122-24, 159, 169 and accompanying text (noting the origin and common roots of these criteria).

assist in establishing the authority of the criteria.²⁸⁹ In applying each of the criteria, a margin of appreciation should be granted to a State's determination of the existence of a public emergency.²⁹⁰ While this margin should be persuasive, it should not be determinative.²⁹¹

B. SHORTEN THE PERIODICITY REQUIREMENT

Article IV(3) requires States invoking the derogation provision to inform other State parties of the derogation, the provisions to which the derogation apply, and the reasons for the derogation.²⁹² The HRC subsequently adopted a measure requiring States to indicate the nature and extent of the rights from which it has derogated.²⁹³ Under present HRC guidelines, however, this is the only report the Committee receives until the State submits its next periodic report, up to five years later.²⁹⁴

To avoid this possibility, the HRC should impose a shortened periodicity requirement on States invoking derogation measures.²⁹⁵ This shortened period would allow the HRC to continuously monitor both the measures taken by derogating States and the number of citizens

289. See *wa Mutua*, *supra* note 67, at 231 (asserting that the HRC could improve general comments made by increasing the number of substantial arguments it uses to interpret provisions contained in the Covenant and suggesting references to authorities in the human rights field).

290. See *supra* notes 110, 135, 161 and accompanying text (discussing the margin of appreciation doctrine and the level of appreciation afforded to a government's determination of a state of emergency under the European Convention and the Siracusa Principles).

291. See *id.* (representing a compromise between two differing levels of appreciation granted to governments).

292. See *supra* notes 54-58 and accompanying text (discussing the Article IV(3) requirement in greater detail).

293. See *supra* notes 77-85 and accompanying text (expressing the Committee's view that the reporting requirement contained in Article IV(3) is important, and that it is equally important for parties to include the nature and extent of each right from which it has derogated).

294. See *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, Annex V, para. 2(a), U.N. Doc. A/36/40 (1981) (adopting a periodicity rule requiring States to submit a report once every five years after submission and consideration of its initial report).

295. See ICCPR, *supra* note 18, at 181 (imposing an obligation on parties to the Covenant to submit a State report whenever the Committee requests).

effected to ensure government officials employ only those measures that are strictly necessary by the circumstances of the emergency.²⁹⁶ Shortening the periodicity requirement also allows the Committee to question State representatives and recommend government action so as to limit government infringement of ICCPR provisions.²⁹⁷ Increased dialogue with derogating States would reflect the Committee's special concern for individual rights when States are faced with a public emergency.²⁹⁸

C. REPEAL THE BILL CREATING THE NIGER DELTA DEVELOPMENT COMMISSION

In July 1999, President Obasanjo presented a bill to the Senate and National House of Assembly for the creation of the Niger Delta Development Commission ("NDDC").²⁹⁹ The purpose of the Commission was to accelerate development in the Delta and compensate for previous neglect and environmental degradation.³⁰⁰ Under Obasanjo's plan, the NDDC is responsible for formulating policies and guidelines for development, implementing development projects, and assessing projects carried out under the auspices of the NDDC.³⁰¹ Funding for the NDDC was to come from government oil revenues and from a tax on oil companies.³⁰² After several changes by the Senate and National Assembly, the bill was passed on January 20,

296. See HENKIN, *supra* note 34, at 84-85 (noting that the Committee imposed a requirement on States to report the nature and extent of the measures it has utilized while under a public emergency).

297. See *id.* (reporting Committee members often question State representatives).

298. See HENKIN, *supra* note 34 (discussing the HRC's particular interest in protecting human rights during a state of emergency).

299. See *Obasanjo Proposes New Body to Develop Troubled Niger Delta*, AGENCE FRANCE-PRESSE, July 13, 1999, available in 1999 WL 2637609 (reporting that President Obasanjo presented a bill to the House of Representatives proposing the creation of a Niger Delta Development Commission to oversee development in the oil producing regions).

300. See Ono Ibién, *Rethinking the Niger Delta Commission* (visited Feb. 10, 2000) <<http://www.ngrguardiannews.com/editorial/en763801.htm>> (reporting on the overall objectives of the Niger Delta Development Commission).

301. See *id.* (delineating the responsibilities of the NDDC).

302. See *id.* (detailing the funding sources for the NDDC).

2000.³⁰³ Despite its intended purposes, however, the bill should be repealed.³⁰⁴

Fundamental weaknesses in the bill initially led officials from every State in the Delta to unanimously oppose the creation of the NDDC.³⁰⁵ Officials primarily criticized the bill for not addressing resource allocation issues.³⁰⁶ The bill does not require the NDDC to locate its programs and projects in proportion to the amount of funding received from each State.³⁰⁷ There is further concern the NDDC lacks appropriate oversight.³⁰⁸ The NNDC is responsible for allocating large amounts of financial resources, but there is no provision for feedback from the proposed beneficiaries of the NDDC's projects.³⁰⁹

Because of these flaws, the bill establishing the NDDC should be repealed and resources should be given directly to each State in proportion to the mineral revenue derived from that State.³¹⁰ This system would allow States to address their individual needs without government oversight or interference. States would also not have to

303. See *Nigeria Passes Niger Delta Development Commission Bill*, Dow Jones Energy Serv., Jan. 20, 2000 (reporting that the National Assembly passed the bill, allowing the government to address the problems in the Delta).

304. See *infra* notes 306-11 and accompanying text (discussing the reasons for repealing the bill).

305. See Okafor Ofiebor, *Niger Delta Development Commission: Oil States Move Against Obasanjo*, AFRICAN NEWS SERV., Aug. 2, 1999, available in 1999 WL 22789083 (reporting the oil producing States unanimously rejected the proposed Commission); see also Anthony Okoro, *Youth Condemn Commission*, AFRICA NEWS SERV., Aug. 30, 1999, available in 1999 WL 25943239 (reporting the Niger-Delta Youths heavily criticized the bill).

306. See Ibién, *supra* note 300 (criticizing the bill for not providing constitutionally mandated resources and for failing to tax offshore oil and gas production operations).

307. See Ibién, *supra* note 300 (criticizing the bill for only requiring the NDDC to consider the contributions of each state, but not providing enough protection for proportionality).

308. See *id.* (expressing the fear of mismanagement and the lack of government oversight to prevent it).

309. See *id.* (noting the beneficiaries of the NDDC were not consulted in the drafting process and that there are no built-in provisions for feedback from natives of the Delta).

310. See *infra* notes 314-16 and accompanying text (suggesting a replacement for the bill).

compete with one another for limited resources.³¹¹ This system is consistent with the desire for self-determination expressed in the Kaiama Declaration and declarations of other organizations.³¹² Granting resource control to those who have suffered most from systematic government neglect would allow the people of the Delta an opportunity to decide for themselves the conditions in which they live.³¹³ Under these conditions, there is a decreased need to forcefully assert these rights and a corresponding decrease in the need for responsive government measures that violate Nigeria's obligations under the ICCPR.³¹⁴

CONCLUSION

As the situation in the Niger Delta illustrates, determining whether internal unrest constitutes a public emergency and whether exceptional measures are necessary is problematic. Because of this difficulty, government leaders may be prone to resorting to measures that violate the ICCPR's guarantees even when they are not clearly warranted by the circumstances. To ease this burden, the Human Rights Committee should formally adopt a set of guidelines which justify invoking the Article IV derogation provision. The criteria developed by the European Commission and Court of Human Rights, the Siracusa Principles, and the Paris Minimum Standards are easily applicable to a large variety of situations in which a State may find itself. Their common criteria should, therefore, be applied. These criteria, coupled with increased monitoring throughout a state of emergency, would ensure countries are able both to respond mean-

311. See Ibién, *supra* note 301 (criticizing the Niger Delta Development Commission for not providing for proportional revenue allocation); see also Kenneth Tadaferua, Niger Delta: Let Equality Rule, AFRICA NEWS SERV., May 12, 2000, available in 2000 WL 20072646 (predicting that the rancor that will be created from sharing funds among the oil-producing states will lead to a massive crisis that will be both bloody and destructive).

312. See *id.* (noting resource control was part of the demand for self-determination).

313. See generally *supra* notes 201-33 and accompanying text (describing efforts by natives of the Delta to assert their rights and the corresponding military response).

314. See *id.* (providing for conditions in which protest and repression are not necessary).

ingfully to public emergencies and to honor their obligations under the ICCPR.