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A FRAMEWORK FOR THE EXAMINATION OF STATES OF EMERGENCY UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS

Claudio Grossman*

INTRODUCTION

The role that the law can play in the regulation of states of emergency is of enormous consequence to the Western hemisphere. The importance of these emergency situations, also referred to as states of exception or states of siege,¹ lies in both the frequency with which American states resort to them and in the dangers that they pose to the exercise of human rights. Because serious human rights violations ordinarily accompany emergency situations, the declaration of a state of siege has come to be a warning signal for those who seek to protect those human rights. Such protection often depends heavily on international law.

A number of international treaties establish guidelines regulating emergency situations.² A regional treaty, the American Convention on Human Rights, provides a legal framework for states of siege within the Western hemisphere.³ This treaty regulates the assertion of emergency powers by any state party to it. Since the adoption of the convention, however, there has been no comprehensive analysis of its provision on states of emergency. After a general consideration of the significance and effects of emergency situations and an analysis of the role that international law can play in their regulation, this article will examine emergency situations under the American Convention's actual language, its drafting history, and the extensive body of jurisprudence

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1. These three terms are used interchangeably throughout this article.

2. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, *done* Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.

3. American Convention on Human Rights, *done* Nov. 22, 1969, O.A.S.T.S. No. 36 at 1, OEA/Ser.L./V/II.23, doc.2, rev.6, OASOR OEA/Ser.K/XVI/I.1, doc.65, rev.1, corr.2 (Jan. 7, 1970), *reprinted in* 9 I.L.M. 673 (1970) [hereinafter cited as Convention].

developed by the Inter-American Commission on Human Rights, a major supervisory organ for all state members of the O.A.S.⁴ Systematic criteria will be proposed to assess the validity of states of siege under the American Convention. This article will outline tests which states must satisfy, first in declaring states of emergency, and second in placing restrictions on human rights during such emergencies. Finally, it will offer suggestions for further enhancing the supervisory role of the Inter-American Commission on Human Rights in states of emergency.

I. SIGNIFICANCE AND EFFECTS OF STATES OF EMERGENCY

A state of siege is governmental action taken during an extraordinary national crisis that usually entails broad restrictions on human rights in order to resolve the crisis. In theory the restrictions are limited in time; once the crisis has been resolved the country would return to full respect for universally recognized human rights. In a conflict between survival of the nation and strict enforcement of human rights, international law doctrine supports national survival. In practice, however, restrictions on human rights have been more extreme and longer lasting than necessary for national survival. In recent decades, the American States have endured numerous states of emergency. The historical record is a bleak one with regard to human rights violations: states of emergency frequently are accompanied by disappearances, summary executions, detentions without due process, torture, and other forms of cruel and degrading treatment. Moreover, states of siege generally have profound negative effects on national political systems. During states of emergency, governments often eliminate educational and artistic pluralism, restrict the ability to distribute and receive information, and limit the freedom of political organization and unionization—actions which impede the peaceful accommodation and integration of diverse social groups in the national polity. The search for political solutions through negotiation and consensus gives way to reliance on the military for settling disputes with opposition groups. The increased concentration of governmental power, along with the destruction of societal checks and balances, creates and perpetuates entrenched authoritarian systems.⁵

4. Convention, *supra* note 3, at art. 41.

5. INT'L COMM'N OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS 417-24 (1983) [hereinafter cited as INT'L COMM'N OF JURISTS].

The present article does not refer to the declaration of states of emergency by reason of natural disasters. See N. Questraiux, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency,

States of emergency have primarily been a means through which ruling minorities safeguard their own threatened power by instituting a permanent system of restrictions on human rights.⁶ During emergencies, persons in the government who are attracted by the exercise of total and permanent power often emerge; the population becomes frightened and resentful. The very same emergency powers which were originally invoked for the salvation of the nation and the continuation of its existence as an organized community paradoxically become the vehicle for repressing the nation. In the end, the nation has to be saved from its own saviours.

In the Western hemisphere, the preceding scenario has been followed in all but a very few instances. It has been the rare exception when those who proclaimed the state of emergency peacefully returned to full respect for human rights. In practice, an emergency situation is not easily ended; states of emergency are readily transformed from temporary situations into permanent ones. Indeed, the majority of cases of states of emergency in the hemisphere indicate that the probability of complete restoration of human rights by those who declared the original states of emergency is inversely proportional to the magnitude of human rights violations perpetrated during the emergencies.⁷

U.N. Doc. E/CN.4/Sub.2/1982/15 (July 27, 1982) at 8-10 (discussing the different causes or reasons for declaring states of exception).

6. *Id.* at 415-16.

7. An analysis of the countries that have been the object of reports by the Inter-American Commission on Human Rights confirms this hypothesis. From the entry into force of the American Convention on Human Rights on July 18, 1978, the Inter-American Commission has issued reports on the following State Parties to the Convention: Bolivia, OEA/Ser.L/V/II.53 doc.6 (July 1, 1981) (Original in Spanish); Colombia, OEA/Ser.L/V/II.53, doc.22 (June 30, 1981) (Original in Spanish); Guatemala (2 reports), OEA/Ser.L/V/II.53, doc.22, rev.2 (Oct. 13, 1981) (Original in Spanish), OEA/Ser.L/V/II.61, doc.47, rev.1 (Oct. 5, 1983) (Original in Spanish); Haiti, OEA/Ser.L/V/II.46, doc.66, rev.1 (Dec. 13, 1979) (Original in French); Nicaragua (2 reports), OEA/Ser.L/V/II.53, doc.25 (June 30, 1981) (Original in Spanish), OEA/Ser.L/V/II.62, doc.10, rev.3 (Nov. 29, 1983) (Original in Spanish).

In addition, the Commission issued reports on Nicaragua, OEA/Ser.L/V/II.45, doc.16, rev.1 (Nov. 17, 1978) (Original in Spanish), and Panama, OEA/Ser.L/V/II.44, doc.38, rev.1 (June 22, 1978) (Original in Spanish), shortly before the Convention entered into force for those countries. The report on El Salvador, although it was published just after the Convention entered into force, did not make specific reference to it. OEA/Ser.L/V/II.46, doc.23, rev.1 (Nov. 17, 1978) (Original in Spanish).

Since 1962, the Commission has also issued the following reports on countries not party to the American Convention: Cuba (8 reports), OEA/Ser.L/V/II.4, doc.30 (May 1, 1962) (Original in Spanish), OEA/Ser.L/V/II.7, doc.4 (May 17, 1963) (Original in Spanish), OEA/Ser.L/V/II.17, doc.4, rev.1 (Apr. 27, 1967) (Original in Spanish), OEA/Ser.L/V/II.23, doc.6, rev.1 (Nov. 17, 1970) (Original in Spanish), OEA/Ser.L/V/II.35, doc.10 (Apr. 18, 1975) (Original in Spanish), OEA/Ser.L/V/II.37, doc.4 (Feb. 25, 1976) (Original in Spanish), OEA/Ser.L/V/II.48, doc.7 (Dec. 14, 1979) (Original in Spanish), OEA/Ser.L/V/II.61, doc.29, rev.1 (Oct. 4, 1983);

The grave effects of states of emergency and their natural tendency to create chronic problems in the hemisphere present great challenges. What role can law, particularly international law, play in addressing these challenges? At the outset, it must be acknowledged that because the problem is not solely juridical, neither is its solution. Moreover, international law lacks powerful mechanisms for enforcement of its own doctrine. Nevertheless, real possibilities do exist for international law to play a role. First, at a minimum, international law can deny legitimacy to those government acts that violate human rights, since international law permits review of state action above the municipal level. Without the existence of international norms, the legality of a given action would only be contingent upon the standards applicable in the domestic realm. By establishing a superior level of review, international law both strengthens those who seek its compliance and weakens those who embark upon its violations, thereby affecting their legitimacy.

Second, international law is not only an expression of an ideal duty, but is also, in great measure, a reflection of what the populations of the hemisphere consider just.⁸ Hence, it has become increasingly difficult to exercise power, especially in the case of states of emergency, when such exercise of power is combined with gross and systematic violations of human rights. Such violations are more a confession of weakness than a show of strength. Respect for human rights norms is therefore increasingly more than a moral imperative; it is also a condition for the stable

Dominican Republic (5 reports), OEA/Ser.L/V/II.4, doc.32 (May 22, 1962) (Original in Spanish), OEA/Ser.L/V/II.9, doc.6 (Apr. 1, 1964) (Original in Spanish), OEA/Ser.L/V/II.12, doc.2, rev. (June 23, 1965) (Original in Spanish), OEA/Ser.L/V/II.13, doc.14, rev. (Oct. 15, 1965) (Original in Spanish), OEA/Ser.L/V/II.15, doc.6, rev.28 (Oct. 28, 1966) (Original in Spanish); Haiti, OEA/Ser.L/V/II.8, doc.5 (Oct. 21, 1963) (Original in Spanish); Argentina, OEA/Ser.L/V/II.49, doc.19 (Apr. 11, 1980) (Original in Spanish); Chile (3 reports), OEA/Ser.L/V/II.34, doc.21, corr.1 (Oct. 25, 1974) (Original in Spanish), OEA/Ser.L/V/II.37, doc.19, corr.1 (June 28, 1976) (Original in Spanish), OEA/Ser.L/V/II.40, doc.10 (Feb. 11, 1977) (Original in Spanish); Uruguay, OEA/Ser.L/V/II.43, doc.19, corr.1 (Jan. 31, 1978) (Original in Spanish); Paraguay, OEA/Ser.L/V/II.43, doc.13, corr.1 (Jan. 31, 1978) (Original in Spanish); El Salvador and Honduras, OEA/Ser.L/V/II.23, doc.9, rev. (Sept. 17, 1970) (Original in Spanish); Suriname (2 reports), OEA/Ser.L/V/II.61, doc.6, rev.1 (Oct. 5, 1983) (Original in English), OEA/Ser.L/V/II.66, doc.21, rev.1 (Oct. 2, 1985) (Original in English).

8. See, e.g., *Preface* to the American Declaration of the Rights and Duties of Man: "The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that judicial and political institutions . . . have as their principle aim the protection of the essential rights of man . . ." American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth Int'l Conf. of Am. States (Mar. 30-May 2, 1948) in Bogota, OASOR OEA/Ser.L/V/I.4, rev. (1965).

exercise of power.

II. CRITERIA NECESSARY TO DECLARE STATES OF EMERGENCY

Article 27 of the American Convention on Human Rights regulates the suspension of human rights guarantees during states of emergency. Paragraph 1 of that article provides:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.⁹

9. Convention, *supra* note 3, at art. 27, para. 1. This provision was the product of an extensive process of investigation, discussion, and juridical formulation performed by the Inter-American Commission on Human Rights. In effect, the Commission began consideration of the subject of states of emergency early, beginning with the inclusion of Part 4 in its General Work Program adopted October 9, 1962, proposing:

[t]o examine the history and the current use of the institution of the State of Siege (estado de sitio, estado de emergencia, suspension de garantias, etc.) in order to ascertain whether and in what manner its practice derogates from the respect for human rights, and to determine whether the institution of the State of Siege can or should be subject to codification and definition of principles which could be observed throughout the Hemisphere, considering, furthermore, whether and in what manner the imposition of and practices under the State of Siege could be considered in the international field.

Inter-American Comm'n on Human Rights, Report on the Work Accomplished During Its Fifth Session, September 24 to October 26, 1962, OEA/Ser.L/V/II.5, doc.40 (Feb. 18, 1963) at 19-21 [hereinafter cited as Inter-American Comm'n on Human Rights].

In April 1964, the Secretariat of the Commission adopted its first study, Preliminary Study of the State of Siege and the Protection of Human Rights in the Americas, OEA/Ser.L/V/II.8, doc.6 (Apr. 1964). In that study, the Commission named one of its members, Dr. Daniel Hugo Martins, as rapporteur on the topic of the state of siege. Dr. Martins compiled two reports. The first report took into account the preliminary study of the Secretariat. The Protection of Human Rights in Connection with the Suspension of Constitutional Guarantees, OEA/Ser.L/V/II.9, doc.14 (Apr. 13, 1964) [hereinafter cited as 1964 Martins Report]. The second report, published in August 1967, OEA/Ser.L/V/II.15, doc.12 (Aug. 15, 1967), considered the observations and commentaries of the Secretariat to the first report and the opinions of the Commission, OEA/Ser.L/V/II.10, doc.7 (Oct. 1, 1964), in addition to the preliminary study.

In light of the second report, the Commission approved a Resolution on the Protection of Human Rights in Connection with the Suspension of Constitutional Guarantees or State of Siege, in May 1968. OEA/Ser.L/V/II.19, doc.32 (May 16, 1968). The resolution, after more than four years of work, set forth its opinions on the state of emergency. These opinions are of fundamental importance since, in conjunction with the OAS Council resolution of June 12, 1968, OEA/Ser.G/IV/C-i-837, rev.3, they requested that the Commission write a revised and complete text of a draft of the Convention. That draft, OEA/Ser.L/V/II.19, doc.53, at 5-56 (Mar. 21, 1969), was later adopted by the Council on October 2, 1968, OEA/Ser.G/IV/C-i-858, rev.3, as working papers for the specialized conference in which the American Convention was

A careful examination of article 27 suggests the existence of five concurrent but distinct elements, each required in order to validate the declaration and maintenance of a state of emergency. These are: (1) subject; (2) object; (3) cause; (4) proper notice; and (5) conduct. As a preliminary matter, any analysis of these diverse requirements must take into account that the fundamental purpose of the American Convention is the protection of human rights. From this it follows that any norms by which the Convention permits restrictions on and suspensions of these rights must be narrowly interpreted.¹⁰

A. SUBJECT

The "subject" of a declaration of exception is that legal person or entity possessing the juridical capacity to declare the state of emergency. Article 27 of the American Convention refers simply to the "State Party" in this regard. The Convention does not explicitly indicate which organ of the state party has the competence to issue such a declaration. From the point of view of general international law, one can argue that those who have the capacity to generate international responsibility on behalf of the state party also have the capacity to represent the state in resorting to human rights derogations.

The assumption of international obligations by a state can originate in the executive, legislative or judicial branches. Clearly, supervision of the application of emergency measures is an appropriate function for the judiciary. Indeed, article 27 specifically gives the courts a significant role in ensuring that several basic rights are not violated even during a state of emergency.¹¹ On the other hand, in the Western hemisphere the principle of separation of powers generally renders the judiciary incapable of declaring an emergency or passing on the valid-

adopted. OEA/Ser.K/XVI/I.1, doc.13 (Sept. 1969) at 1-22. Article 24 of the draft, which previously referred to the state of emergency and reflected the opinions of the Commission, later became article 27 of the American Convention. Article 24 was modified only insofar as article 27(1) added the term public danger to the list of occasions warranting emergency action; article 27(2) mentioned articles as establishing nonderogable rights, expanding the list of such rights to include those provided for in articles 6, 9, 17, 18, 19, 20, and 23; lastly, article 27(2) modified the original reference to protection against arbitrary detention by affirming the non-derogability of judicial guarantees.

10. See Convention, *supra* note 3, at art. 29 (establishing restrictive rules of construction for the Convention); see also Van Hoof, *The Protection of Human Rights and the Impact of Emergency Situations under International Law with Special Reference to the Present Situation in Chile*, 10 HUMAN RIGHTS J. 220-26, 233-35 (1977) (noting emergency situations in which restrictions on human rights are permitted must be interpreted narrowly because individual rights have primacy in international law).

11. Convention, *supra* note 3, at art. 27, para. 2.

ity of such a declaration. In the alternative, to grant the executive branch exclusive jurisdiction in this area presents the grave danger of accumulation of power and the possibility of massive violations of human rights. The tendency in international human rights law is, therefore, to assign substantial power to the legislature in the declaration of states of emergency.

In its 1968 Resolution on the Protection of Human Rights in Connection with the Suspension of Constitutional Guarantees or State of Siege, the Inter-American Commission on Human Rights indicated that a declaration of a state of emergency may not presuppose any restriction of the rule of law or provisions of the constitution, or any alteration of the scope of the branches of government.¹² In the same spirit, in article 29, with reference to rules of construction, the Convention forbids the interpretation of any provision in such a way as to exclude rights or guarantees that are "derived from representative democracy as a form of government."¹³ In a representative democracy, an important role is usually conferred upon the legislature, either to provide authorization prior to the declaration of an emergency situation or to ratify post facto a declaration made by the executive when it was not possible for the legislature to convene in order to consider the declaration.

B. OBJECT

The "object" of the declaration of emergency is that which will be affected by the declaration itself, namely the state's obligation to fully protect and promote each of the rights guaranteed by the Convention. For the object to be valid, a state declaring an emergency should comply with all of the necessary requirements, namely competent subject, valid cause, proper notice, and conduct.¹⁴

C. CAUSE

The "cause" of a declaration of a state of emergency is the particular fact pattern that compels the "subject" to derogate temporarily from certain of its peace-time human rights obligations. Article 27 of

12. Inter-American Comm'n on Human Rights, Resolution on the Protection of Human Rights in Connection with the Suspension of Constitutional Guarantees or State of Siege, OEA/Ser.L/V/II.19, doc.32 (May 16, 1968). For English version, see Report on the Work Accomplished during its Eighteenth Session, OEA/Ser.L/V/II.19, doc.30 (Sept. 12, 1968) at 45.

13. Convention, *supra* note 3, at art. 29(c).

14. See *infra* notes 58-70 and accompanying text (discussing the necessary requirements for declaring a state of emergency).

the American Convention refers to the existence of "war, public danger or other emergency that threatens the independence or security of a State Party" as legitimate grounds for such extreme action.¹⁵ From the very nature of these examples, it becomes apparent that a purported crisis situation must satisfy at least three requirements in order to constitute a legitimate cause.

i) The first requirement is that the cause be a *real or imminent event*. Mere potential dangers, latent or speculative in nature, do not warrant the proclamation of emergency conditions. In one of its earliest examinations of this question, the Secretariat of the Inter-American Commission on Human Rights expressed its concern regarding the declaration of "fictitious states of siege," which it described as those instances in which the events alleged to justify the emergency declaration had not actually occurred.¹⁶

The Commission has been obliged to address violations of the requirement of a real or imminent event committed by a number of American states. Examining the situations in Argentina, Bolivia, Colombia, Chile, Grenada, El Salvador, Haiti, Nicaragua, Paraguay and Uruguay in its 1980-81 annual report, the Commission critically observed that in many instances the state party had declared an emergency without complying with the above mentioned requirement, simply resorting to emergency powers as a device to garner broad powers which the government otherwise lacked. "These exceptional measures," the Commission emphasized, "may only be justified in the face of real threats to the public order or the security of the state."¹⁷

ii) To constitute valid cause, the situation must also be one of *exceptional gravity*. The Convention notes that the emergency must threaten the independence or the security of the state party.¹⁸ Even the actual existence of war may not necessarily constitute such a threat. For ex-

15. Convention, *supra* note 3, art. 27, para. 1.

16. Preliminary Study of the State of Siege and the Protection of Human Rights in the Americas, *supra* note 9, at 20-21.

17. Annual Report of the Inter-American Commission on Human Rights 1980-81, OEA/Ser.L/V/II.54, doc.9, rev.1 (Oct. 16, 1981) (Original in Spanish) at 115. See also O'Donnell, *Legitimidad de los Estados de Excepcion a la Luz de los Instrumentos de Derechos Humanos* (presented to the Inter-American Institute of Human Rights at the Second Regional Reunion, Aug. 22-26, 1983; copy on file at the AM. U.J. INT'L L. & POL'Y editorial offices) at 1 (discussing external military threats and internal security disturbances as types of actual emergencies).

18. Convention, *supra* note 3, at art. 29(a). The International Covenant on Civil and Political Rights, *supra* note 2, and the European Convention, *supra* note 2, each use the term "threat to the life of the nation." See generally O'Donnell, "States of Exception", 21 THE REVIEW 54-55 (1978) (discussing the different circumstances under which nations have invoked the "threat to the life of the nation" requirement of the public emergency exception).

ample, a war may take place at a great distance from the territory of a country and not necessarily affect the normal life of a nation. Similarly, simple declarations of war may not always be accompanied by belligerent acts. As with all other public dangers, if a national government can confront a war with its ordinary powers, it cannot use the war to declare a state of emergency and thereby expand those powers.

Additionally, it is important to note that with one exception,¹⁹ all American States took part in the unanimous approval of the International Covenant on Civil and Political Rights by the General Assembly of the United Nations on December 16, 1966. The Covenant requires no less than a threat to the life of the nation as a prerequisite to a declaration of a state of exception.²⁰ Prior to the completion of the American Convention on Human Rights, the Council of the Organization of American States called for co-existence, compatibility and coordination of that document with the International Covenant.²¹ In light of these facts, it is clear that the criteria necessary for declaring situations of emergency in the case of the American Convention are no less strict than those in the universal instrument.²²

Moreover, in its Preliminary Study of the State of Siege and the

19. The Peruvian delegate was absent at the time of the General Assembly vote on the International Covenant on Civil and Political Rights.

20. International Covenant on Civil and Political Rights, *supra* note 2, at art. 4. As noted previously, terminology similar to that of the International Covenant on Civil and Political Rights is used in article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Under the latter Convention, the meaning of the term "threat to the life of the nation" is defined, first in the Lawless Case, 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 438 (Eur. Comm'n on Human Rights) (merits), and later in the Greek Case, 1959 Y.B. EUR. CONV. ON HUMAN RIGHTS 72 (Eur. Comm'n on Human Rights).

21. Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights and of the Draft Inter-American Conventions on Human Rights, OEA/Ser.L/V/II.19, doc.18 (June 24, 1968) (Original in Spanish).

22. See Comparative Study of the International Covenants on Human Rights, the Optional Protocol to the International Covenant on Civil and Political Rights Adopted by the United Nations (December 1966), the Draft Convention on Human Rights of the Inter-American Council of Jurists (IACJ) (4th meeting, 1959), and the text of the amendments to the IACJ Draft adopted by the Inter-American Commission on Human Rights (October 1966 and January 1967), OEA/Ser.L/V/II.19, doc.4, rev.1 (Apr. 18, 1968) (Original in Spanish) at 5-7 (noting that International Covenant and IACJ draft were "all but identical"). The Secretariat indicated, however, that there were some differences between the Covenant and IACJ draft. First, the Covenant required that any suspension of human rights be strictly limited to emergency situations and also remain consistent with international law obligations. The IACJ draft mentioned only the emergency situation requirement. Second, only the Covenant demanded that emergencies be of a nature that "puts the life of the nation in danger." Finally, only the Covenant allowed for the suspension of life, integrity of the person, liberty, and due process of law. *Id.* at 7-8.

Protection of Human Rights in the Americas, the Secretariat of the Inter-American Commission on Human Rights made it clear that innumerable abuses had been committed under states of siege behind a facade of guarding the security of the state.²³ The Secretariat asserted that facades will not do; only unusually serious cases warrant the proclamation of a state of exception under the American Convention. In this respect, it is noteworthy that Chile, Uruguay, and the Inter-American Council of Jurists had each submitted drafts of the American Convention that would have made the standard for judging the gravity of a situation dependent on the internal law of the country involved. The acceptance of these proposals obviously would have diminished the significance of the "cause" requirement. The San Jose Conference rejected the proposals and reaffirmed the position of the Commission, which emphasized the extraordinary and grave character of situations of emergency, and which assessed the level of gravity by more objective international standards.

The requirement of extreme gravity imposes upon the state of siege a strictly subsidiary character. Within the framework of the American Convention, state parties may legitimately restrict the exercise of certain rights without resorting to the more drastic and sweeping action involved in declaring a state of siege. Those articles of the Convention dealing with the freedoms of thought and expression,²⁴ assembly,²⁵ association,²⁶ and movement and residence²⁷ each permit governments to restrict the exercise of these rights if expressly authorized by law and "if necessary in a democratic society . . . to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others."²⁸ The above mentioned provisions are designed to enable the state to resolve most problems of public order. It is only when the means to which the state can resort to maintain peace and security—including legal restriction of certain selected rights—have

23. Inter-American Comm'n on Human Rights, *supra* note 9, at 4. The pretext of raising the security of the state in order to justify restrictions on human rights began to be a major problem during the 1960's with the growth of the doctrine of national security that would inspire several Latin American dictators to commit massive and systematic violations of human rights under its guise. See Senese, *The State of National Security in Uruguay, International Law and the Rights of Peoples to Self-Determination*, in COLLOQUIUM ON THE POLICY OF INSTITUTIONALIZATION OF THE STATE OF EXCEPTION AND ITS REJECTION BY THE URUGUAYAN PEOPLE 32-36 (1981); INT'L COMM'N OF JURISTS, *supra* note 5, at 416-17.

24. Convention, *supra* note 3, art. 2.

25. *Id.* at art. 15.

26. *Id.* at art. 16, para. 2.

27. *Id.* at art. 22, para. 3.

28. *Id.*

failed that the state may resort to emergency powers. The Commission has concurred with this general proposition. In its commentaries on a major report prepared at its request by Dr. Daniel Hugo Martins, it noted that a state of emergency can be declared only when ordinary legislation is not sufficient.²⁹

In its practice, the Commission has repeatedly emphasized that a situation must be extraordinarily serious to constitute legitimate cause for a state party to proclaim an emergency. In its 1981 report on Colombia, for instance, the Commission indicated that constitutional provisions on the state of siege were applicable only in exceptionally grave cases.³⁰ Later that year, the Commission listed certain requirements for the use of emergency measures by state parties and concluded that the new government of Bolivia had violated the "gravity of the situation" requirement.³¹ Finally, in its 1983 report on Nicaragua, the Commission firmly reiterated that the mere existence of armed conflict or other national difficulty does not necessarily constitute valid cause for a declaration of a state of emergency:

With respect to the first requisite of paragraph 1 of article 27, i.e., that there be a state of war, public danger, or other emergency that threatens the independence or security of the state, the doctrine generally accepts the propriety of suspension of obligations in terms of human rights only when there are extremely serious circumstances.³²

iii) For the cause of an emergency declaration to be sufficient, the Convention requires that the emergency *affect the continued viability of the organized community as a whole*. It is important to note that article 27, paragraph 1, of the American Convention refers only to the *state party* and not to the government of that state party. The Inter-American Commission, referring to this provision, has given notice that "in interpreting the first part of paragraph 1 of article 27 of the American Convention, . . . the emergency should be of a serious nature, created by an exceptional situation that truly represents a *threat to the organized life of the state*."³³ Commission Rapporteur Dr. Martins indicated in an early report on the subject that valid cause for the declaration of a state of siege includes only "serious cases that threaten the integrity or existence of the three constitutional elements of the state—people, territory, and legal order."³⁴

29. Inter-American Comm'n on Human Rights, *supra* note 9 at 19-21.

30. Report on Colombia, *supra* note 7, at 221.

31. Report on Bolivia, *supra* note 7, at 23.

32. 1983 Report on Nicaragua, *supra* note 7, at 121-22.

33. *Id.*

34. 1964 Martins Report, *supra* note 9. See generally Norris & Reiton, *The Sus-*

Accordingly, two points of qualification are in order. First, a threat to the government of the state party does not suffice as peaceful circumstances such as elections can threaten the continued existence of a government. Moreover, the government of a state can itself be a threat to the organized life of the country, and in such situations it cannot legitimately rely on emergency powers to maintain itself in power. In its 1978 report on Nicaragua, for example, the Inter-American Commission concluded that the Somoza government, by violating essential rights in a serious and consistent manner, had adversely affected all segments of the Nicaraguan population.³⁵

The second point concerns the legal order of the state party. If at one determined moment of its history, a state party has a legal order, the application of which produces massive and systematic violations of internationally recognized human rights, the authorities of that state cannot validly declare a state of siege and exercise emergency powers in order to protect the existing legal system. The Convention justifies this assertion. Article 1 of the Convention establishes an obligation of the state to respect the human rights recognized in the Convention and to ensure free and full exercise of these rights by all persons subject to its jurisdiction without discrimination of any kind.³⁶ Article 2 of the Convention establishes the duty of a state party to adopt domestic law provisions permitting the exercise of these rights and freedoms if they were not already ensured by legislative or other provisions.³⁷ Other articles of the Convention indicate an entire group of rights that state parties must respect under any circumstances.³⁸ In addition, article 29, regarding rules of interpretation, bars the construction of any provision of the Convention in such a way as to permit a state party, group or individual to suppress the enjoyment or exercise of rights recognized by the Convention, or to restrict the freedoms guaranteed by the American Declaration on the Rights and Duties of Man or by other treaties to which the state may be a party.³⁹ Similarly, one may not read the Con-

pension of Guarantees: A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the States Parties, 30 AM. U.L. REV. 189, 191-98 (1980) (discussing circumstances under which individual guarantees may be suspended).

35. 1978 Report on Nicaragua, *supra* note 7, at 78. The Somoza Government had done this in so egregious a manner, the Commission determined, as to have "awakened in a very forceful way, an intense and general feeling among the Nicaraguan people for the establishment of a system which will guarantee the observance of human rights." *Id.*

36. Convention, *supra* note 3, at art. 1, para. 1.

37. *Id.* at art. 2.

38. *Id.* at arts. 3-6, 9, 12, 17-20, 23.

39. *Id.* at art. 29(a), (b), and (d).

vention as precluding any rights and guarantees that are "inherent in the human personality or derived from representative democracy as a form of government."⁴⁰

Accordingly, a national legal order which contravenes these fundamental principles is incompatible with the requirements of the American Convention. The case of Nicaragua under Somoza is again instructive. Referring to the legal order and the norms then in force in that country with respect to states of siege, the Commission pointed out that they:

create in the socio-political reality of the country, a legal structure from the formal point of view, but from the material point of view, this turns into a legal abnormality, since it lends itself to a systematic and generalized violation of human rights⁴¹

Furthermore, as the Inter-American Commission on Human Rights stressed in the Resolution on the Protection of Human Rights in Connection with the Suspension of Constitutional Guarantees or the State of Siege, the norms of the Convention bearing on emergency situations only permit the defense of democratic regimes respectful of human rights.⁴²

D. PROPER NOTICE

The declaration of emergency provisions derogating certain obligations imposed by the Convention must satisfy certain requirements of proper notice.⁴³ In the first place, in order to be valid the emergency provisions must provide the country's inhabitants a reasonable guide for conduct. To accomplish this, it is necessary that the emergency provisions be published in sufficient detail. Consequently, secret norms or illegal actions by the authorities will not satisfy those standards which permit the suspension of guarantees.⁴⁴

A second requirement of proper notice is the immediate notification of all other state parties to the Convention by means of a communica-

40. *Id.* at art. 29(c).

41. 1978 Report on Nicaragua, *supra* note 7, at 30; *see also* 1979 Report on Haiti, *supra* note 7, at 87 (the Government of Haiti's suspension of individual guarantees leaves insufficient protection for the rights outlined in the American Declaration of the Rights and Duties of Man); Report on Bolivia, *supra* note 7, at 113 (the Government of Bolivia's suspension of political rights violates the American Convention on Human Rights).

42. Annual Report of the Inter-American Comm'n on Human Rights 1980-81, *supra* note 17, at 2-3.

43. 1983 Report on Nicaragua, *supra* note 7, at 113-22; Report on Bolivia, *supra* note 7, at 22-23.

44. Report on Bolivia, *supra* note 7, at 22, 63-64.

tion to the Secretary General of the Organization of American States.⁴⁵ The communication must meet certain conditions established in article 27 of the American Convention in order to be valid: (1) it must explicitly designate those rights guaranteed by the Convention which the state is suspending; (2) it must state the circumstances that require the suspension; and (3) it must set an exact date for the termination of such suspension.⁴⁶ The purpose of these conditions is to permit the relevant OAS organs and the other state parties to execute their supervisory responsibilities in monitoring compliance with the Convention. This is especially important in emergency situations, when respect for human rights is most often in danger. To achieve this purpose, it is necessary that the derogating party provide detailed information concerning the suspension of rights, in order that the OAS and these other states may form a complete opinion regarding the derogating party's degree of conformance with its international obligations.⁴⁷

E. CONDUCT

The requirement of "conduct" suggests that the state party declaring the emergency situation must behave in accordance with the Convention. While this may seem obvious, it is critical to identify conduct as a distinct element because it is the concrete behavior of government authorities that ultimately determines the lawfulness of a state of emergency.

The conduct that is required of the authorities during states of emergency is that enunciated in the first paragraph of article 1 of the Convention, i.e., to respect the recognized rights and freedoms and to ensure their exercise without any discrimination.⁴⁸ Even in an emergency situation, according to the Convention, a state party may not interpret any of its emergency provisions as permitting it to suppress or limit the enjoyment of rights beyond certain prescribed limits.⁴⁹ At a minimum,

45. Convention, *supra* note 3, at art. 27, para. 3.

46. *Id.*

47. 1983 Report on Nicaragua, *supra* note 7, at 121. The Inter-American Commission recently has shown interest in analyzing whether the conditions necessary to declare a state of siege are present or not, even when the respective state party has not observed the formal requisites that Article 27(3) establishes. *Id.* A variety of factors may have influenced the Commission. First, in the case of Nicaragua, the Commission felt that clearly a state of emergency had been communicated. Further, in the opinion of the Commission, the declaration of a state of exception in this particular case could have prevented the creation of a climate of unfounded terror which was provoked by a lack of knowledge of the goals that the government wanted to achieve. *Id.*

48. Convention, *supra* note 3, at art. 1.

49. *Id.* art. 29.

then, disrespect and disregard for human rights, or discrimination in their protection, cannot accompany the invocation of emergency powers. Moreover, the requirement of conduct extends to both actions and failure to act. The Convention imposes an affirmative responsibility on states to prevent or quell violations of the Convention. Because states of siege create the danger that certain rights might be violated, the duty in article 1 to respect and ensure rights gives rise to the correlative duty to do all that is necessary to prevent abuses. State parties can fulfill this obligation by ensuring that each emergency measure which suspends or limits some provision of the Convention is accompanied by a second measure that: (1) inhibits possible abuses which may be more likely to occur as a consequence of the suspension⁵⁰ and (2) guarantees the investigation and punishment of those responsible for the violation of human rights.⁵¹

III. CRITERIA FOR THE SUSPENSION OF RIGHTS DURING A STATE OF EMERGENCY

When all of the aforementioned criteria for the valid declaration of a state of emergency have been satisfied, the actual suspension of certain human rights guarantees may become lawful under the American Convention. The state party, however, does not receive *carte blanche* to suspend human rights protections; the Convention carefully restricts the nature and extent of permissible derogations.

A. ABSOLUTE RIGHTS

Even during a proclaimed emergency, the state may restrict only certain specified individual freedoms. The American Convention establishes a system comprising two distinct categories of human rights: nonderogable rights which a state party may never suspend regardless of the gravity of the circumstances, and those rights which it may restrict to a limited degree. Article 27 of the Convention enumerates the following rights as absolute and nonderogable: rights to life, to a name and nationality, to legal personality, to humane treatment while in custody, to freedom from slavery and from *ex post facto* laws, rights of the child and of the family, freedom of conscience and religion, and the

50. See Annual Report of the Inter-American Commission on Human Rights 1980-81, *supra* note 17 at 119, 121-23 (referring to the need to adopt measures in order to avoid abuses with respect to detentions without due process, expulsion of nationals, freedom of expression and information and political rights).

51. Convention, *supra* note 3, at art. 41(d); see also *infra* note 72 (discussing art. 41(d) in detail).

right to participate in government.⁵² It also prohibits suspension of the judicial guarantees that are essential for the protection of these rights.⁵³ In addition, article 27, as well as articles 1 and 24 of the Convention establish the absolute right to freedom from any form of discrimination.⁵⁴ In all, approximately one half of the civil and political rights established by the American Convention on Human Rights are not subject to suspension, even during an officially declared state of siege.⁵⁵

The list of absolute rights in the American Convention has two characteristics that distinguish it from analogous provisions in other human rights treaties, such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights. While the three treaties seek to provide many of the same protections, and while each of the treaties prohibits the suspension of certain freedoms even during a national emergency, the array of rights in the nonderogable category is much more comprehensive in the American Convention than in either of the other two instruments.⁵⁶ In addition, only the American Convention explicitly notes that judicial guarantees indispensable for the protection of these absolute rights are not derogable.⁵⁷

B. DEROGABLE RIGHTS

The second category of rights that exist under the Convention are those which a contracting party may legitimately suspend during a state of emergency if it meets the strict requirements of the Convention. Because a national emergency during which recognized rights are actually suspended is the most precarious time for the viability of a democratic system, the Convention establishes a detailed series of re-

52. Convention, *supra* note 3, at art. 27, para. 2.

53. *Id.*

54. *Id.* at art. 1, para. 1.

55. Substantive rights are established by twenty-four different articles of the American Convention. *Id.* arts. 1, and 3-25. The Convention prohibits a state party from derogating from its obligations under twelve of these provisions. *Id.* at arts. 1, 3-6, 9, 12, 17-20, 23.

56. Compare Convention, *supra* note 3, at art. 27, para. 2 (prohibiting suspension of arts. 3-6, 9, 12, 17-20, and 23 during a state emergency) with International Covenant, *supra* note 2, at art. 4, para. 2 (prohibiting derogation from arts. 6-8 (paras. 1-2), 11, 15-16, and 18 during a public emergency) and European Convention, *supra* note 2, at art. 15, para. 2 (prohibiting derogation from arts. 2-4 (para. 1), and 7 during a public emergency).

57. Convention, *supra* note 3, at art. 27, para. 2. See INTER-AMERICAN COMM'N ON HUMAN RIGHTS, TEN YEARS OF ACTIVITIES 1971-1981 327-29 (1982) [hereinafter cited as TEN YEARS OF ACTIVITIES] (discussing judicial guarantees). In addition, the reports on Bolivia, Colombia, Guatemala, Haiti (1981), and Nicaragua, *supra* note 7, contain noteworthy chapters on judicial guarantees.

quirements governing the suspension of derogable rights. These requirements are: (1) necessity; (2) temporality; (3) proportionality; (4) non-discrimination; (5) compatibility with other international obligations; and (6) adherence to domestic law.

1. *Necessity*

The valid proclamation of a state of emergency does not automatically justify a state's derogation from particular human rights obligations. No particular derogation of a given right can be deemed necessary if a less drastic option for state action is available.⁵⁸ The Inter-American Commission has clearly indicated that suspension of a derogable right is "only justifiable in the absence of another alternative for resolving a serious emergency."⁵⁹ Accordingly, a finding of necessity requires an analysis of the general situation of a country—including consideration of possible substitute measures that would not involve suspension of rights—and an assessment of the actual need for each individual derogation.

2. *Temporality*

Temporality refers to the duration of emergency measures. As article 27 points out in its first paragraph, a suspension of rights is valid only "for the time strictly required by the exigencies of the situation."⁶⁰ The requirement of temporality strictly excludes an expansive assessment of the necessary duration of any suspension of rights. Derogation from human rights obligations for an unlimited period of time constitutes a violation of the Convention, as does maintenance of such measures once the circumstances motivating them have ended.⁶¹ The Inter-American Commission has indicated that in order to avoid a violation of the requirement of temporality, it is not sufficient to terminate a derogation; rather, the government must take positive action to restore the enjoyment of rights to persons affected through appropriate actions including provision of adequate compensation where appropriate.⁶²

58. Norris & Reiton, *supra* note 34, at 201.

59. 1983 Report on Nicaragua, *supra* note 7, at 125-26.

60. Convention, *supra* note 3, at art. 27, para. 1.

61. TEN YEARS OF ACTIVITIES, *supra* note 57, at 336-39; 1983 Report on Nicaragua, *supra* note 7, at 124.

62. TEN YEARS OF ACTIVITIES, *supra* note 57, at 323-25; 1983 Report on Nicaragua, *supra* note 7, at 126-27, 140-41.

3. Proportionality

The Convention limits any suspension of the state's obligations contracted under the Convention to the "extent . . . strictly required."⁶³ The requirement of proportionality prohibits unnecessary suspension of specific rights, greater restrictions on those rights than necessary, or the unnecessary extension of the geographical area to which the state of emergency applies. Like the requirements of necessity and temporality, the proportionality standard is a strict one. It does not allow a state party to justify unwarranted abuses of human rights with vague arguments about national security; a derogation which is disproportionate to the situation is one which is illegal.

4. Nondiscrimination

The prohibition against discrimination is of such importance that it is stipulated in article 27 as well as in articles 1 and article 24.⁶⁴ The multiple reference to this prohibition, not unusual in international instruments related to the protection of human rights, serves to codify what is already a fundamental principle of *jus cogens*: the total proscription of any form of discriminatory treatment based on race, religion, sex, ethnic group, political belief or other such quality.⁶⁵ In accordance with this principle, otherwise legitimate suspensions of derogable rights can become invalid if they violate the prohibition against discrimination. The principle of nondiscrimination attaches to each one of the rights enumerated in the American Convention, and also to any restriction which a state party may place on these rights.

5. Compatibility with other International Obligations

The restrictions on permissible state action in a time of emergency may extend beyond those explicitly delineated in the American Convention. According to article 27, state action must also be compatible with all other international legal obligations which are binding on the derogating party.⁶⁶ Therefore, this may expand the list of nonderogable rights enumerated earlier.⁶⁷ For example, although a state party to the

63. Convention, *supra* note 3, at art. 27, para. 1.

64. *Id.* arts. 1, 24, and 27. *See generally* Norris & Reiton, *supra* note 34, at 203 (discussing the control of the prohibition against discrimination in the Convention).

65. *See, e.g.*, A.G. ROBLEDÓ, *EL JUS COGENS INTERNACIONAL: ESTUDIO HISTÓRICO CRÍTICO*, 198-204 (1982) (describing various principles of *jus cogens*, including the right to freedom from discrimination).

66. Convention, *supra* note 3, at art. 27, para. 1.

67. *See supra* notes 52-57 and accompanying text (while other international legal

American Convention may legally suspend the right to not be imprisoned for debt if this suspension proves necessary during a state of siege, the International Covenant on Civil and Political Rights characterizes its version of the same freedom as nonderogable. This right therefore acquires nonderogable status under the American Convention for those states which are parties to both treaties.⁶⁸ This requirement of compatibility makes it necessary to conduct an exhaustive review of all obligations that are in force vis-a-vis the respective American state. If these obligations preclude any measure which the American Convention on Human Rights otherwise permits, implementation of that measure will place the state party in violation of article 27 of the American Convention.⁶⁹

6. *Adherence to Domestic Law*

The American Convention does not authorize the disregard of the internal law of the derogating state party during a state of emergency. The Convention specifically precludes any restriction on rights or freedoms—even if the restriction satisfies all other conditions established in the Convention—unless it is applied “in accordance with [the respective state party’s own domestic] laws enacted for reasons of general interest”⁷⁰ The Inter-American Commission has consistently viewed restrictive action by state authorities, at or outside the margin of their own laws, as a violation of the Convention as well.

IV. RECOMMENDATIONS FOR IMPROVED SUPERVISORY ACTIVITIES

As discussed above, precise standards exist for the evaluation of declarations of states of exception and consequent restrictions of human rights by state parties to the American Convention. Application of these standards by the Inter-American Commission have, in some cases, curtailed gross and systematic violations of essential human rights. If properly observed and enforced, the standards governing states of siege will bring greater stability to the countries of this hemisphere and more secure freedoms for their peoples. There is, of course,

obligations may expand the list of nonderogable rights, such obligations may definitely not contract the list.).

68. Of the 21 states party to the American Convention, 16 are also party to the International Covenant: Barbados, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, United States, Uruguay, and Venezuela.

69. 1983 Report on Nicaragua, *supra* note 7, at 125.

70. Convention, *supra* note 3, at art. 30.

room for improvement.

There is a need for standards to increase compatibility between internal law and the norms of the American Convention concerning states of exception. Article 41 empowers the Commission to conduct such studies as it considers advisable and to solicit all pertinent information from national governments. Pursuant to this mandate and with the goal of achieving a greater level of coordination within the Inter-American system, the Commission could prepare, for example, a questionnaire to obtain from all state parties to the American Convention detailed information regarding the internal norms that define the necessary conditions for declaring states of emergency and for restricting the rights of the population. Such studies, as a source of reference and comparison, could provide model guidelines to the states. Together with the final publication of these studies, including the responses of governments, the Commission might seriously consider formulating recommendations and model legislation in order to make national norms compatible with international norms. This model legislation would specify all the valid conditions for states of emergency and the legitimate rights consequences that may stem from them.

There is a need for further systematization of the jurisprudence of the American Convention with respect to states of exception. Additional studies could address, for example, the enumeration of nonderogable judicial guarantees; the list of absolute rights which are derived from sources other than the American Convention; and the applicable norms for collective economic, social and cultural rights.

Because massive and gross violations of human rights are often the immediate product of a declaration of an emergency situation, the Inter-American Commission should take an active supervisory role and communicate with local authorities immediately following such declaration. The Commission should provide a model questionnaire in order to assist the state in the preparation of the specific information required by article 27 of the Convention.⁷¹ To ensure complete information, the Commission should direct a similar questionnaire to non-governmental organizations. This information might then be sent to the government involved, with the request for an appropriate response in accordance with article 41 of the Convention.⁷²

In addition to sending to the state party a model questionnaire, the Commission should strictly monitor countries under states of emergency. On-site visits have been one of the most effective instruments

71. *Id.* at art. 27, para. 3.

72. *Id.* at art. 41(d).

utilized by the Commission;⁷³ negotiations to arrange on-site visits should begin as soon as there are indications that a state of siege is occurring. The Inter-American Commission on Human Rights could also undertake a variety of promotional activities necessary to augment the efficacy of international action.⁷⁴ For example, the Annual Report of the Commission to the General Assembly of the OAS should contain a permanent chapter on states of emergency, providing, at a minimum, data regarding the countries that have declared a state of emergency, the duration of the emergency, the rights affected, and the information required and received. The General Assembly should explicitly discuss each country suspending human rights under a state of siege rather than simply addressing issues in a general fashion, as is currently the case. The rich experience of the Commission and the Secretariat provides a firm basis for optimism regarding the advancement of human rights within the Inter-American system. As noted, international law cannot guarantee its own efficacy. Nevertheless, within the American hemisphere it both reflects and mobilizes the population's abhorrence of the violation of essential rights. Therein lies its strength and its promise.

73. See Norris, *Observations In Loco: Practice and Procedure of the Inter-American Commission on Human Rights*, 15 TEX. INT'L L.J. 46-95 (1980) (providing an in-depth discussion of the Inter-American Commission's on-site visits).

74. J. Hartman, Working Paper Delivered at the Meeting of Experts on Derogation and Limitation Provisions in the International Covenant on Civil and Political Rights in Siricusa, Sicily (April 30—May 4, 1984) (organized by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute of Human Rights, and the Institute of Higher Studies in Criminal Sciences) (copy on file at the AM. U.J. INT'L L. & POL'Y editorial offices); INT'L COMM'N OF JURISTS, *supra* note 5, at 463-64.