The Emergence of Diversity: Differences in Human Rights Jurisprudence

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Abstract

This Article documents the patterns of judicial divergence in the area of non-derogable rights. It examines the increased conservatism of the European Court of Human Rights relative to other international bodies in one specific area; the interpretation and protection of human rights violations in situations of emergency. This Article explores the responses of international courts and tribunals to situations where states have limited the exercise of their citizens’ rights as a result of political crisis. These limitations are examined in relation to the agreed obligations of states to protect rights when they sign human rights treaties. Part I looks at the pivotal role of the European Court and Commission of Human Rights. Case by case analysis reveals that both institutions have developed state focused doctrines at the expense of protecting individual rights. Part II recounts how the Inter-American Court, in its short history, has shown greater willingness to confront state violations of rights in situations of political instability where the state argues that it is justified by the crisis in limiting its international obligations. Part II also examines the multi-layered thinking of the Court, its mechanisms for interlinking different rights as a means of compounding protection for the individual citizen. Part III looks at the Human Rights Committee of the United Nations. Part III suggests that, despite its burden of inter-state political wrangling and its disadvantages of limited procedural accessibility, it has functioned reasonably well in confronting state obligations in situations of emergency. This Article concludes that more attention must be paid to the similarities and differences in jurisprudence emerging from different international tribunals. Equally, it strongly re-enforces the dangers of failing to pay due regard to the political leanings of judges monitoring state obligations in international courts. Ultimately, it points to the danger of assuming that a vision of universal human rights goals will be realized without active oversight of the judicial branch.
THE EMERGENCE OF DIVERSITY:
DIFFERENCES IN HUMAN RIGHTS JURISPRUDENCE

Fionnuala Ni Aolain*

INTRODUCTION

There is substantial evidence that significant divergence has emerged in the standards and application of certain fundamental human rights norms by international courts and tribunals. Such divergence in standards is problematic on a number of levels. The standardization of human rights norms is central to the vision of universalized rights, valid across borders, and despite cultural differences. The focus of this Article is not the textual differences in defining rights between the different regional human rights treaties and the International Bill of Rights. Rather, the scrutiny is on an emerging conceptual, as well as a practical, divergence between the different international courts and tribunals adjudicating human rights violations.

Judicial interpretation of regional and international human rights standards is central to the articulation and understanding of the rights contained therein. As a practical matter, human

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rights treaties become meaningful when they are interpreted by judges providing remedies to states and individuals.

In the areas of derogation from enunciated rights in international treaties and the protection of non-derogable rights, international judicial approaches demonstrate a lack of coherence and common vision. Derogation refers to the legally mandated right of states to allow suspension of certain international obligations protecting individual rights in circumstances of emergency or war.\(^3\) Non-derogable rights are those specially protected rights under treaty law that cannot be limited or suspended, notwithstanding any political crisis that the state faces.\(^4\) Disparity in judicial decision-making by international courts can result in confusion as to the scope and meaning of particular rights, with a corresponding lessening of protection when violations occur. Disparity may undermine the consensus of the international community as to what constitutes a particular violation, and the appropriate measures to be taken by the state to remedy a grievance.

This Article documents the patterns of judicial divergence in the area of non-derogable rights. It examines the increased conservatism of the European Court of Human Rights relative to other international bodies in one specific area; the interpreta-

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4. European Convention, supra note 2, art. 15(2), 215 U.N.T.S. at 232, Europ. T.S. No. 5, at 7. Article 15(2) of the European Convention illustrates how this protection for particular rights prohibits reservations to specifically elevated rights:
   
   No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

Id.

The American Convention makes an interesting comparison, as the selection of non-derogable rights is more wide-reaching and expansive than its European counterpart. American Convention, supra note 2, art. 27(2), O.A.S.T.S. No. 36, at 1, 9 I.L.M. at 683. Article 27(2) provides:

The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right of Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

Id.
tion and protection of human rights violations in situations of emergency. A state of emergency refers to those exceptional circumstances resulting from temporary factors of a political nature, which, to varying degrees, involve extreme and imminent danger that threaten the organized existence of the state and the population contained therein.

Varied approaches to fundamental rights by similarly situated international courts are problematic for the world rights community. The European Court of Human Rights shoulders a heavy duty in this respect. As the oldest and most accessible forum responsible for the examination of individual rights violations, the European Court is a standard bearer for the creation of regional rights enforcement instruments, and effective implementation mechanisms. The Court and Commission are viewed


6. See Study on the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, supra note 5, at 8. The definition is oversimplified and is less sharply defined than the descriptions outlined in some European Court decisions, specifically the test established in Lawless v. Ireland. See Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A) at 55 (1961) [hereinafter Lawless]. The definition is intended to indicate the broad parameters within which the concept of emergency lies. The term “emergency” varies according to the judicial system being examined. The following terms equally describe the phenomena: state of siege, situation of exigency, state of alert, situation of internal war, martial law, special powers and suspension of guarantees. Situations of emergency can arise for various reasons, including: (a) serious political crisis (internal armed conflict of a scale that threatens political governance), (b) force majeure (natural and other disasters of various kinds), and (c) economic circumstances (specifically chronic underdevelopment).

7. European Convention, supra note 2, art. 25, 213 U.N.T.S. at 236-38, Europ. T.S. No. 5, at 8-9. Article 25 of the Convention confers a broad right of individual petition:

(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.
as the models of regional rights enforcement procedures. They offer the possibility of effective redress to the victims of state human rights abuses and place direct responsibility on the state to ensure enforcement of consensually entered international obligations.

The new world envisioned in the creation of the European Convention is being diminished by political expediency and judicial unwillingness to take democratic states to task for rights violations in situations of political crisis. This fact is most apparent when rights violations are balanced against issues of state security and the sovereignty premise inherent in maintaining the political status quo. Combined with this state-centered dogma is an approach to interpretation, characterized by dodging the clarification of rights, usually to minimize their content, when competing interests create difficulties of adherence for member states to the Convention.

Judicial power in the European system has a tangible existence. This power is in part created by the nature of the European Convention itself. It is a generally framed document, leaving ample scope for judges to apply, manipulate, and creatively interpret its provisions. The judges themselves recognize this fact. The Tyrer case, which concerned the infliction of

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11. See Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 17 (1975) [hereinafter Golder]. The birching violation concerned the refusal of the prison governor, in the prison that held the applicant, to allow the applicant to write to his Member of Parliament in the United Kingdom or to consult with his legal representative. Golder, 18 Eur.
birching as a form of corporal punishment on a fifteen-year old schoolboy, illustrates the point. The European Court of Human Rights confirmed that "the Convention is a living instrument which... must be interpreted in the light of the present-day conditions."

Judicial power poses two distinct problems in the context of emergency situations. First, the Court fails to remember that it is the defender of rights, not of governments. Exacting standards of human rights enforcement send a direct signal to governments and the world community that violation is intolerable, and that exceptions that allow coercive state action are limited and closely monitored. The alternative signal, if high standards of application are missing, is that signing a human rights convention is a window dressing exercise. In such a case, the state is given a wide measure of tolerance in its behavior towards its citizens. Second, the fluidity of the interpretative process, leaves an indeterminate power with the judicial branch. This power has

Ct. H.R. (ser. A) at 8-9. A violation of Article 6(1) of the Convention was alleged. Id. The Court's manipulation of language is evident. The majority opinion found that while Article 6(1) "does not state a right of access to the courts or tribunals in express terms," the language of the article had to be interpreted in light of the "rule of law" mentioned in both the preamble to the Convention, and the Statute of the Council of Europe. Id. at 13. Golder also confirms that the majority of the court sought to construct the Convention in a manner that filled the gaps, which those who negotiated the Convention could not have intended or envisaged. Id. at 17-18. The dynamic element of judicial response is best illustrated by the manner in which the Court has responded to changing European social and moral norms. See also Marckx v. Belgium, 29 Eur. Ct. H.R. (ser. A) (1980) [hereinafter Marckx]. The case concerned the application of Article 8 of the Convention to a case alleging discrimination against an illegitimate child. Marckx, 29 Eur. Ct. H.R. (ser. A) at 42. Though Article 8(1) explicitly states that the Convention ensures respect for everyone's private and family life, the Court rightly decided that the concept of family life encompassed the relationship between an illegitimate child and its natural relatives. Id. at 84. The court also recognized that the Convention binds the signatory European states together in a manner that is quite unique. Id. In the dissenting opinion of Wemhoff v. Federal Republic of Germany, 6 Eur. Ct. H.R. (ser. A) (1968) [hereinafter Wemhoff], Judge Zekia from Cyprus recognized that European countries are "likeminded and have a common heritage of political traditions, ideals, freedom and rule of law." Wemhoff, 1 Eur. 6 Eur. Ct. H.R. (ser. A) at 38 (quoting Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948)). The case concerned the delay in the determination of criminal charges, an alleged violation of Article 6(1). Id. at 6. This early recognition of the commonality of laws and practices binding European states set the stage for the Court to later transcend the particular limitations imposed by national legal regimes.

14. Id. at 10.
been insufficiently exercised in favor of limiting state prerogatives in opposition to strengthening individual protection in situations of exigency.

This Article explores the responses of international courts and tribunals to situations where states have limited the exercise of their citizens' rights as a result of political crisis. These limitations are examined in relation to the agreed obligations of states to protect rights when they sign human rights treaties. Part I looks at the pivotal role of the European Court and Commission of Human Rights. Case by case analysis reveals that both institutions have developed state focused doctrines at the expense of protecting individual rights. Part II recounts how the Inter-American Court, in its short history, has shown greater willingness to confront state violations of rights in situations of political instability where the state argues that it is justified by the crisis in limiting its international obligations. Part II also examines the multi-layered thinking of the Court, its mechanisms for interlinking different rights as a means of compounding protection for the individual citizen. Part III looks at the Human Rights Committee of the United Nations. Part III suggests that, despite its burden of inter-state political wrangling and its disadvantages of limited procedural accessibility, it has functioned reasonably well in confronting state obligations in situations of emergency. This Article concludes that more attention must be paid to the similarities and differences in jurisprudence emerging from different international tribunals. Equally, it strongly re-enforces the dangers of failing to pay due regard to the political leanings of judges monitoring state obligations in international courts. Ultimately, it points to the danger of assuming that a vision of universal human rights goals will be realized without active oversight of the judicial branch.

I. SITUATIONS OF EMERGENCY

Situations of emergency are a clear starting point for the discussion of the role of international courts. In recent decades, many states have been faced with situations of internal disorder and crisis. Internal political strife poses immense problems for

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15. See Remember, Remember 17 November, Observer, Mar. 13, 1994, at 40 (reporting twentieth anniversary of Greek terrorist organization that was formed following Greek coup); Celestine Bohlen, Mafia's Foes Fear Rome is Faltering, N.Y. Times, Apr. 28, 1995, at
constitutional and democratic order.\textsuperscript{16} Human rights conventions have recognized the burden imposed upon the state by threats to its stability. This is practically manifested by the derogation articles incorporated into the European Convention,\textsuperscript{17} the American Convention,\textsuperscript{18} and the Covenant on Civil and Political Rights.\textsuperscript{19} These derogations allow states to limit the exercise of some rights protected by the instruments, within strict limits for precise and definite ends.\textsuperscript{20} Derogations are not limitless nor are they open-ended. Some fundamental rights cannot be derogated from in any circumstances.\textsuperscript{21} These rights are considered so basic and fundamental that no crisis justifies their removal or restriction. In the circumstances where derogation is permitted, the Human Rights Conventions,\textsuperscript{22} in theory, impose

\textsuperscript{A8} (reporting organized crime’s undermining impact on Italian government); \textit{Separate Quebec Illegal, Canadian Leader Says}, \textit{Orlando Sentinel}, Dec. 21, 1994, at A20 (reporting active secessionist movement in Quebec, Canada); \textit{Inside Story: The Retreat of Terror}, \textit{Guardian}, May 13, 1995, at 32 (discussing extensive history of European terrorism).

16. \textit{See} Hartman, \textit{supra} note 5, at 2. Joan Hartman characterized this problem as an “uneasy compromise” between the protection of individual rights and the protection of “national needs” in times of crisis.” \textit{Id}.


18. American Convention, \textit{supra} note 2, art. 27, O.A.S.T.S. No. 36, at 9, 9 I.L.M. at 683.


20. \textit{See} Lawless, 1 Eur. Ct. H.R. (ser. A) at 55. In its report on the case, the Commission stated: “The burden lies upon the state concerned to satisfy the Commission that a measure derogating from the Convention was one strictly required by the exigencies of the emergency at the time when the measure was imposed.” \textit{Id} at 114 (quoting commission decision).

21. European Convention, \textit{supra} note 2, art. 15(2), 213 U.N.T.S. at 232, Europ. T.S. No. 5, at 7 (prohibiting derogation from Articles 2 (right to life), 3 (freedom from slavery), and 7 (retrospective effect of penal legislation)); International Covenant on Civil and Political Rights, \textit{supra} note 2, art. 4(2), 999 U.N.T.S. at 174, 1977 Gr. Brit. T.S. No. 6, at 23 (prohibiting derogation from Articles 6 (right to life), 7 (prohibition on torture), 8 (prohibition of slavery and servitude), 11 (imprisonment for failure to fulfill contractual obligation), 15 (prohibition on retrospective criminal offence), 16 (protection and guarantee of legal personality), and 18 (freedom of thought, conscience and religion); American Convention, \textit{supra} note 2, art. 27, O.A.S.T.S. No. 36, at 9, 9 I.L.M. at 683 (prohibiting suspension of Articles 3 (right to juridical personality), 4 (right to life), 5 (right to humane treatment), 6 (freedom from slavery), 9 (freedom from \textit{ex-post facto} laws), 12 (freedom of conscience and religion), 17 (right of the family), 18 (right to name), 19 (right of child), 20 (right to nationality), and 23 (right to participate in government)).

22. \textit{See} \textit{supra} note 2 (setting forth several human rights conventions).
both procedural and substantive requirements upon the state. These requirements were envisaged as the \textit{sine quo non} for accommodating the state need to deviate from the protection of rights prescribed in the Conventions.\footnote{European Convention, \textit{supra} note 2, art. 15(3), 213 U.N.T.S. at 234, Europ. T.S. No. 5, at 7. Article 15(3) of the European Convention requires that:

\begin{quote}
Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. 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 executed.
\end{quote}

\textit{Id.} Article 27(3) of the American Convention provides that:

\begin{quote}
Any State Party availing itself of the right of suspension shall immediately inform the other State Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.
\end{quote}

American Convention, \textit{supra} note 2, art. 27(3), O.A.S.T.S. No. 36, at 9, 9 I.L.M. at 688. Additionally, Article 4(3) of the International Covenant on Civil and Political Rights requires the following procedural action by a derogating state party:

\begin{quote}
Any State Party to the present Convention availing itself of the right of derogation shall immediately inform the other State 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.
\end{quote}


The protection of rights becomes most significant when the normal political order is threatened. When it is most difficult for the state to protect rights, state adherence to external standards is most meaningful. Political turmoil exacerbates the fragility of protecting the individual against the actions of the state. At this crucial moment, the role of international courts and tribunals is pivotal. The history of the European Court in this respect has not been heroic, with less political context justification than the Human Rights Committee or the Inter-American Court and Commission.

\textbf{A. The European Response to Exigency}

The European Convention system has been vaunted as the most progressive, accessible, and developed human rights mech-
anism created since World War II.\textsuperscript{24} This theme has pervaded much of the commentary on the system, notwithstanding the critiques of individual decisions handed down by the Court and Commission.\textsuperscript{25} Yet, its limitations are central to understanding why the Court has performed so poorly in the area of rights protection in situations of emergency.

The limitations of the European system have been obscured for two primary reasons. First, the sophisticated and relatively efficient individual complaint mechanism has focused attention on access rather than outcome in the protection of certain rights.\textsuperscript{26} Second, the Court and Commission developed a comprehensive jurisprudence marked by judicial fortitude, in areas such as: (1) the relationship between the state and the private life of the individual (non-interference);\textsuperscript{27} (2) the well-maintained due-process protection involving non-exigency situations;\textsuperscript{28} and (3) the disapproved and judicially sidestepped limi-

\textsuperscript{24} See supra note 9 and accompanying text (citing favorable writings on European enforcement procedures).


tations on procedural access and unnecessary obstacles to effective remedies.29

B. Legitimizing Scrutiny - The Lawless Case

The European Court and Commission have been faced with issues surrounding political emergencies in Convention states on numerous occasions.30 In the Lawless Case, the first case before the Court, the bench was asked to examine the validity of derogation by the Government of the Irish Republic, resulting in the detention without trial of the petitioner.31 Gerard Lawless was arrested on July 11, 1957, in the Republic of Ireland. An Irish citizen, he was arrested as a suspected member of the illegal Irish Republican Army. Subsequent to his arrest, he was held from July 13 to December 11 in an internment camp.32 During his detention, Lawless filed a complaint with the Commission alleging violation of his rights under Article 5 (individual freedom and security), Article 6 (fair trial) and Article 7 (proscribing retroactive convictions) of the European Convention. The Irish Government relied primarily on its right to derogate under Article 15 of the Convention, as the basis for justifying its prolonged detention of the applicant.33

While upholding the legality of the detention and confirming the validity of the derogation, the Court paid close attention to the need for a thorough procedural and substantive examination.
tion of the claim before it. The Court stated categorically, "it is for the court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled . . . ." The Court refused to relegate review of the decision to derogate solely to the political discretion of the state. The Court validated its right to examine. It expounded a definitive "right to scrutiny" doctrine in *Lawless*, notwithstanding the strong state claim that the evaluation of an emergency was within the "sole discretion of the Government concerned."*55

*Lawless* was the first case before the Court examining a sensitive issue, and its outcome should not be characterized as a complete failure. Despite a validation of the declared emergency,*56 *Lawless* went some way towards developing criteria to factually evaluate whether a situation of emergency could be said to exist or not.*57 *The Lawless Case* has similarities with the U.S. Supreme Court ruling in *Marbury v. Madison*, where the Court asserted its right of review but did not find the Government in breach.*58 *The majority Court view, in Lawless, expanded the general criteria of Article 15(1), allowing derogation in circumstances including "other public emergency threatening the life of the nation."

84. *Id.* at 55.
87. *Id.* In their report, the Commission determined that:

The natural and ordinary meaning of "a public emergency threatening the life of the nation" is, we think, a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organized life of the community which composes the State in question.

88. *See Marbury v. Madison*, 5 U.S. (1 Cranch) (1803) (establishing that Court has right of review, but not without first obtaining jurisdiction). *See also* Thomas A. O’Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474, 494-95 (1982). O’Donnell argues that the *Lawless Case* must be viewed as a product of the uncertainties facing a Court making its first decision, without the aid of earlier precedents and unsure if the state party would follow its ruling. *Id.*
of which the state is composed.”

In an otherwise limited judgement, Lawless gave some indication of the factual elements that externally validate governmental resort to a state of emergency. These included: the existence of an armed and illegal organization (in this case the Irish Republican Army); the violent activities being carried out by the subversive organization; and the threat of increased violent activities within and outside the state.

In many ways, this case represents a high point of judicial activism in this area. Nonetheless, it has been subjected to criticism. While the moral high-ground was occupied on the issue of the courts being allowed to scrutinize, the substance of the examination was made meaningless by the majority’s unstated use of the “margin of appreciation” doctrine. Though the Court did not specifically refer to the phrase, it emphasized its significance by noting that the Irish Government “reasonably deduced” the existence of a public emergency. Ultimately, judicial deference to the states’ assessment of risk (here the Republic of Ireland), was the stumbling block created and followed with only one exception in subsequent derogation cases. The sole exception was the examination by the Commission of the case brought by the Governments of Denmark, Sweden, Norway and the Netherlands against the state of Greece, on October 2, 1967.

After Lawless, the Court and Commission had created the

41. Id.
42. Hartman, supra note 5, at 24-27. Hartman concludes that the “majority’s stress on the margin of appreciation underplayed the article 15 necessity of a threat to the ‘life of the nation’.” Id. at 24 (referencing commission’s decision). She further concludes that the “Court’s terse opinion makes little use of the competing standards of scrutiny.” Id. at 26.
43. The origin of the margin of appreciation doctrine is found in the Cyprus Case. Cyprus Case, 1958 Y.B. Eur. Conv. on H.R. 174-76 (Eur. Comm’n on H.R.). After declaring the application by Greece, admissible with respect to actions of deportation and detention taken by the United Kingdom Government in Cyprus, the Commission noted its willingness to extend to the derogating state “a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation.” Id. at 176. This doctrine has been subject to robust criticism. See Cora S. Feingold, Margin of Appreciation in Human Rights Law, in Revue des Droits de l’Homme 263 (1973).
44. See Chowdhury, supra note 5, at 32 (discussing Court’s consideration of Irish Government’s reliance on multiple factors to conclude existence of public emergency).
45. See supra note 28 and accompanying text (citing cases deciding issues surrounding political emergencies in Convention states).
platform of legitimate interest for scrutiny in emergency situations. They were in the position to secure a mechanism of accountability in extreme situations where external neutral examination could prove crucial to the protection of rights. The Greek Case that followed close on the heels of Lawless gave some hope that such a policy was indeed being pursued. The application brought by the four member states alleged that measures taken by the Greek military government were in violation of the Convention.

On April 21, 1967, a group of military officers carried out a successful coup d'etat in Greece. In the name of "The National Revolution," constitutional guarantees protecting human rights were suspended. Mass arrests, purges of the intellectual and political community, censorship, and martial law followed. Glorified as a response to communism, the revolutionary government created a military dictatorship. In May 1967, the Secretary-General of the Council of Europe was informed that Article 15 of the Convention was being invoked by military rulers to allow for the suspension of certain constitutional rights.

Once applications were made, the Commission was faced with making a factual evaluation based on the standards of allowable derogation under Article 15 as to whether a state of emergency actually existed in Greek territory. The Commission acknowledged the margin of appreciation doctrine, but rejected the Government's contention, declaring that invoking an emergency was not justified. The Commission approach was staunch in its assessment of the factors that may justify the calling of an emergency. This approach was strengthened by the emphasis on independent fact-finding.

51. See Hartman, supra note 5, at 37 ("The Commission has displayed an impressive capacity to handle large numbers of witnesses and massive amounts of conflicting evidence in derogation cases."). Article 28(a) of the Convention authorizes the mechanism. European Convention, supra note 2, art. 28(a), 213 U.N.T.S. at 299, Europ. T.S. No. 5, at 9. In the Greek Case, thirty-two witnesses testified on Article 15 issues. Hartman, supra note 5, at 37.
port is characterized by objective assessment, non-deference to state justification, and streamlining of categories within which to assess state action.\textsuperscript{52} The \textit{Greek Case} represents the sole deviation from the norm of non-interference.

The Greek application did not come before the Court.\textsuperscript{53} Nonetheless, the case is the second peak in assessing the responses of Convention mechanisms to Article 15 derogation. The downhill slide quickly followed. In retrospect, the approach of the Commission has been contextualized as a response to the anti-democratic character of the Greek Government.\textsuperscript{54} The clear signal was that the use of the Convention and its processes to legitimate usurping the democratic order was intolerable. In the generally litigated area of democratic governments' resort to emergency powers, the Commission and Court's response have proved less robust.

\textbf{C. Abdication of Responsibility}

Where ostensibly democratic states have engaged in the suspension of certain rights guaranteed under the Convention, the Commission and Court are less exacting in their requirements. The leeway given to such states has been noticeably different. Subjective political rationale are often deemed sufficient to satisfy the Convention mechanisms that derogation was justifiable.\textsuperscript{55}

\begin{itemize}
  \item \textsuperscript{52} Beckett, \textit{supra} note 47, at 107-17.
  \item \textsuperscript{53} The Commission transmitted its findings to the Committee of Ministers in November, 1968. The Committee of Ministers adopted a resolution to make the report on Greece public. Subsequently, in December 1969, the Greek government denounced the Convention. Under Convention procedure, such a denunciation operated to release Greece from its membership of the Convention as of 1970. Greece, however, re ratified the Convention in 1974.
  \item \textsuperscript{54} Beckett, \textit{supra} note 47, at 118; \textit{see} Hartman, \textit{supra} note 5, at 29. "It was probably the Commission's distrust of the motivations of the Greek military government and revulsion against its anti-democratic character that explained the difference in the majority opinions in the \textit{Greek} and \textit{Lawless} cases." \textit{Id.} (citations omitted). \textit{Chowdhury, \textit{supra} note 5}, at 88-89 (exploring relationship between legitimacy of government asserting derogation and subsequent validity of derogation itself).
  \item \textsuperscript{55} \textit{See} Brendan Mangan, \textit{Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform}, 10 HUM. RTS. Q. 372, 383 (1988). Mangan notes that "a democratic government that is reputed to make good faith efforts to preserve human rights will be given a wider margin of appreciation than will a government with a lesser human rights reputation." \textit{Id.} Other commentators have argued that when a government is known to be sympathetic to democratic principles and the rule of law, greater weight is given to their assessment that a situation requiring Article
The margin of appreciation doctrine has been a crucial aspect of the retreat from substantive scrutiny. Allowing significant discretion to the derogating state has been the hallmark of this concept, with the result that responses to emergency are state focused, to the detriment of individual rights. One commentator argues that the approach of the Court in respect to the doctrine is a striking illustration of judicial self-restraint.\textsuperscript{56} It is difficult to envisage the margin of appreciation as such in respect to its employment in emergency related derogations. As the ensuing case discussion will reveal, there is ample evidence of an abdication by the Court of its duties to guard against states' undue resort to exigency. Equally evident is a failure to confront the practice of state parties introducing temporary legislation limiting rights protection to confront finite phenomena, thereby allowing such legislation to become entrenched and survive as integral components of state legal regulation.\textsuperscript{57}

The consistent approach taken by the Court and Commission to frequent derogation by the United Kingdom is the prime example to illustrate this point.\textsuperscript{58} In \textit{Ireland v. United Kingdom},\textsuperscript{59} a complex series of detention measures applied in Northern Ireland to hundreds of detained persons were at issue before the

\begin{thebibliography}{9}
\bibitem{15} Derogation exists. FRED CASTBERG, \textit{THE EUROPEAN CONVENTION ON HUMAN RIGHTS} 169 (Torkel Opsahl & Thomas Ouchterlony eds., 1974).

\bibitem{56} See Paul Mahoney, \textit{Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin}, 11 \textit{HUM. RTS. L. J.} 57 (1990). Mahoney argues that the doctrine operates as due deference to the elected representative body underpinning the legal structure of the Convention. \textit{Id.} at 58. It should be noted that the author's discussion of the doctrine is linked to non-emergency cases, involving the limitations on rights related to the cultural or social structure of member states. \textit{Id.} at 76-85. Some argue, however, that the margin of appreciation doctrine, at least with respect to these types of cases, is moving into a domain for which it was not intended and for which it is ill-suited. \textit{Id.} at 83-85.

\bibitem{57} The Prevention of Terrorism (Temporary Provisions) Act 1974, 48 Halsbury Stat. 972 (3d ed., 1978) (Eng.), is the classic example of this phenomena. The provisions establishing a seven day detention power are currently in force, notwithstanding the one year military ceasefire by paramilitary organizations in Northern Ireland. \textit{Id.} South Africa's incorporation in 1986 of emergency law provisions into ordinary legislation also illustrates the problem. FITZPATRICK, \textit{supra} note 5, at 19.


Court and Commission. The issues before the Court were whether the scale of arrests and the selection of detainees were within the parameters of Article 15, and whether allegations of mistreatment of those detained would be sustained. The Irish Government, while not disputing the existence of an emergency, questioned the strict necessity for the detention and interrogation techniques employed by the United Kingdom in the detention centers of Northern Ireland. The fundamental issue for the applicant state was whether some of the techniques employed as regular interrogation practices amounted to the use of torture under Article 3 of the Convention.

Two points should be emphasized. First, neither Court nor Commission paid significant attention to their obligation to examine whether, in fact, a situation of emergency existed, as opposed to examining whether the specific measures in question were "strictly required" by the situation. Their approach in this respect was characterized by passivity and indicated a retreat from the "right to scrutiny" doctrine of Lawless.

Second, the examination of the specific measures was characterized by the manipulation of categories as a tool to avoid specific scrutiny of the net effect of the techniques used. Practi-

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62. *Ireland v. United Kingdom*, 1976 Y.B. Eur. Conv. on H.R. at 542 (Eur. Comm'n H.R.) (report of the Commission). The Commission found that "both parties agree on the existence of an emergency situation within the meaning of Art. 15 during the period material to the application." *Id.* at 542-44.

63. *Id.* at 516-18. Article 3 of the European Convention provides that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention, *supra* note 2, art. 3, 213 U.N.T.S. at 224, Europ. T.S. No. 5, at 3.


65. Hartman, *supra* note 5, at 33 (emphasizing fact that "Commission in *Ireland v. United Kingdom* gave little consideration to proportionality and hardly explored possible alternatives").
cally, this meant looking at the effect of each technique employed separately, adducing whether each individually amounted to the standard of torture. Two results ensued. The combined effect of utilizing more than one technique on detainees was lost, thus avoiding the conclusion that the end product for each individual detainee could amount to the level of torture. Further, the legal quibbling on the distinction between torture and inhuman or degrading treatment can arguably be said to result in setting a lower standard overall in protecting this fundamental, non-derogable right.

Another problematic area studiously avoided by the Commission and Court was the issue of discrimination. As one commentator cogently argues, "[o]ne of the most serious flaws of the Commission's analysis is its failure to tie the fact of discrimination directly to the question of whether the measures were strictly required." Finally, the margin of appreciation doctrine found a strong advocate in the majority opinion of the Court. The doctrine moved from the mere recognition of the state need for discretion, to a statement that the discretion extended to elevating the vantage point of the state as the body in the "better position" to choose the methods necessary to deal with exigency. The keynote seems to be abdication of scrutiny, or at best, the power to stamp a state decision with the legitimacy of the Convention's seal of approval.

D. The Clear Emergence of State Focused Doctrine

Ireland v. United Kingdom started the trend on the retreat

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66. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 5. In its final decision, the Court did not take into account the argument made by the Irish Government that the detention procedure was not provided with sufficient safeguards or review procedures to prevent abuse. Id. This presents a further retreat from the Court's approach in both the Lawless and Klass cases. See Lawless, 1 Eur. Ct. H.R. (ser. A) at 27; Klass v. Germany, 28 Eur. Ct. H.R. (ser. A) at 5 (1978) [hereinafter Klass]. In Lawless and Klass, the bench suggested that parliamentary control should generally be substituted to guard against the abuse of special executive powers. Lawless, 1 Eur. Ct. H.R. (ser. A) at 27; Klass, 28 Eur. Ct. H.R. (ser. A) at 20-28.

67. KEVIN BOYLE ET AL., TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE (1980). Despite extensive civil disorder in the Protestant community following the introduction of the army into Northern Ireland in 1969, no detention orders were issued against Protestants; civil disobedience in the Protestant community was left entirely to the ordinary criminal process to contain. Id.

68. See Hartman, supra note 5, at 34.

from scrutiny. The Brogan and Others v. United Kingdom judgment and the recent Brannigan and McBride v. United Kingdom decision follow the same pattern.\textsuperscript{70} Both of these cases concerned the alleged violation of Article 5, which protects due process rights under the Convention.

The Court in Brogan, while concluding that a breach of the Convention had occurred, posited the opinion that such a breach could be contextualized in relation to the ongoing terrorist campaign in Northern Ireland.\textsuperscript{71} The case concerned the arrest and detention of four applicants under Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984.\textsuperscript{72} All were held in detention centers for periods ranging from four to six days.\textsuperscript{73} All were subsequently released without criminal charge.

Though the Court specifically recognized that the United Kingdom Government had withdrawn its notice of derogation to the Secretary-General of the Council of Europe, and thus derogation could not be considered as relevant, some aspects of the Court's approach are problematic.\textsuperscript{74} Despite the strong finding that there was a breach of Article 5(3)\textsuperscript{75} with respect to all four


\textsuperscript{71} Brogan, 145B Eur. Ct. H.R. (ser. A) at 27.


\textsuperscript{73} Brogan, 145B Eur. Ct. H.R. (ser. A) at 19-21. Terence Patrick Brogan was held for a period of detention of five days and eleven hours; Dermot Coyle was held for six days and sixteen and a half hours; William McFadden was held in custody for four days and six hours; Michael Tracey's period of detention was four days and six hours. \textit{Id.} All four applicants were informed by their arresting officer that they were being arrested under Section 12 of the 1984 Prevention of Terrorism Act. \textit{Id.} at 21. On the day following their arrests, each applicant was informed by police officers that the Secretary of State for Northern Ireland had agreed to extend their detention for a further five days under Section 12(4) of the 1984 Act. \textit{Id.} None of the applicants were brought before a judge or other judicial power. \textit{Id.; see} Prevention of Terrorism Act 1974, 48 Halsbury Stat. 972, ¶ 12 (3d ed., 1978) (Eng.).


\textsuperscript{75} European Convention, \textit{supra} note 2, art. 5(3), 215 U.N.T.S. at 226, Europ. T.S. No. 5, at 4.

Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within
applicants, contextualization of the findings gives sight to the Court's view of where the balance between institutional interest in maintaining democratic structures and the protection of individual rights should be struck. This is a prime example of the Court finding that a democratic government is making a good faith effort to preserve human rights, and de facto giving the state a wider margin of appreciation than those states with a lesser reputation for rights enforcement.\textsuperscript{76} Setting the balance of discretion in favor of democratic states is directly aided by the use of context justification. The context is the subjective assessment of a terrorist or other political threat, imported into the core of the judicial argument that becomes the base-line from which legal justifications follow.\textsuperscript{77} The sub-text of this justification is an unwillingness to impute to democratic states the negation that regularly occurs in respect to rights, in situations where the government perceives threats to the democratic structure or to public order.

The inverse effect of this pro-state balance is seen in \textit{Brogan} with respect to the majority opinion's approach to the alleged breach of Article 5(1).\textsuperscript{78} Standing outside the framework of der-

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\textsuperscript{76} Mangan, \textit{supra} note 55, at 383; Castberg, \textit{supra} note 55, at 169.

\textsuperscript{77} \textit{Brannigan and McBride}, 258 Eur. Ct. H.R. (ser. A) at 91. The opening sequence to the \textit{Brannigan} judgment, under the heading "Relevant Domestic Law and Practice," is a six paragraph expose of the terrorist threat in Northern Ireland. \textit{Id.} at 38. Thus, the tone is set from the outset. Any consideration of the proportionality of measures employed by the state is subsequent to the pre-accepted context.

\textsuperscript{78} European Convention, \textit{supra} note 2, art. 5(1), 213 U.N.T.S. at 226, Europ. T.S. No. 5, at 3-4. Article 5(1) stipulates:

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
ogation, consensually removed by the respondent Government, the Court was not undertaking an innovative nor inspirational approach. Rather, the Court was left to follow its own logic, as set in previous cases, with respect of the breach of Article 5(3).

The applicants argued that their arrest failed to comply with Article 5(1)(c) of the Convention on the grounds that they were not arrested on suspicion of responsibility for a specific offense. Empirical and testimonial evidence before the Court demonstrated strongly that arrests under Section 12 of the Prevention of Terrorism Act served information-gathering and counter-insurgency purposes for the state. The Court again demonstrated its reluctance to critically address the Government's assessment of fact. In this case, its avoidance mechanism was to move from a discussion of the concrete to a discussion of the abstract. The abstract discussion was grounded in a discussion of the validity of results. The Court stated that outcome per se did not determine the legitimacy of the arrest procedure. The Court's inability to respond to the general trend

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Id.

79. See de Jong, Baljet, and van den Brink, 77 Eur. Ct. H.R. (ser. A) at 21-22. It should also be noted that the Court’s finding on Article 5(3) follows logically from the precedent set by the Court in a number of previous applications. X v. The Netherlands, 1966 Y.B. Eur. Conv. on H.R. 564, 568 (finding that “Contracting parties are given a certain margin of appreciation when interpreting and applying the requirement as to promptitude laid down in Article 5, paragraph (3)”); X v. Belgium, App. No. 7960/71, 42 COLLECTION OF DECISIONS 54, 55 (1973).


[T]he applicants maintained that their arrest and detention were grounded on suspicion, not of having committed a specific offence, but rather of involvement in unspecified acts of terrorism, something which did not constitute a breach of the criminal law in Northern Ireland and could not be regarded as an ‘offence’ under Article 5(1)(c).

Id.


83. See id. The Court firmly stated:
The court is not required to examine the impugned legislation in abstracto, but must confine itself to the circumstances of the case before it. The fact that the applicants were neither charged nor brought before a court does not
that arrest cases under Section 12 of the Prevention of Terrorism Act manifested in the Northern Ireland jurisdiction, allow the state to avoid scrutiny of the entire detention process.\textsuperscript{84}

Given that derogation was not an issue, and that the claim had been withdrawn by the United Kingdom Government four years previously, the mentioning of derogation, despite its subsequent exclusion, gives sight of the Court positioning its potential permissibility.\textsuperscript{85} The judgment contains pervasive references to the ongoing terrorist campaign in Northern Ireland.\textsuperscript{86} The majority states that despite excluding the examination of derogation, account may be taken of other material and concurrent issues, "[t]his does not, however, preclude proper account being taken of the background circumstances of the case."\textsuperscript{87}

This statement opens the door to the consideration and judicial use of a plethora of context justifications as a means to circumvent the strict applicability of state responsibility for the enforcement of basic rights. Article 5 of the Convention is subject to well-defined limitation clauses.\textsuperscript{88} The inclusion of context justification is an additional "clawback" on Article 5, brought in through the judicial side-door. Despite the positive finding for

\begin{itemize}
\item mean necessarily mean that the purpose of their detention was not in accordance with Article 5(1)(c).
\item Id.
\item 84. Id. (citing cases where criticism does not apply to dissenting opinion of Judges Walsh and Carrillo Salcedo with respect to Article 5(1)).
\item 85. Id. at 28 (emphasis added). The Court majority opinion states at paragraph 48, "[c]onsequently, there is no call in the present proceedings to consider whether any derogation from the United Kingdom's obligations might be permissible under Article 15 by reason of a terrorist campaign in Northern Ireland." Id. The Court itself is thus invoking the potential justification on behalf of the government. Id.
\item 86. Id. at 21-24, 27, 33.
\item 87. Id. at 27 (emphasis added).
\item 88. European Convention, supra note 2, art. 5(3), 213 U.N.T.S. at 226, Europ. T.S. No. 5, at 4. Article 5 (3) reads:
\begin{quote}
Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear to trial.
\end{quote}
Id. The limitation clauses of Article 5 include that no person shall be deprived of their liberty save in six enumerated exceptions, and in accordance with a procedure prescribed by law. Id. art. 5(1), 213 U.N.T.S. at 227, Europ. T.S. No. 5, at 8; see Alexandre Charles Kiss, Permissible Limitation on Rights, in THE INTERNATIONAL BILL OF RIGHTS 290 (Louis Henkin ed., 1981) (examining permissible limitations on human rights as distinguished from "derogation from rights in time of public emergency").
\end{itemize}
the applicants in *Brogan*, the glimmer of alternative limitation in
the guise of contextualizing is a step backwards for rights en-
forcement.89

Following the decision of the European Court of Human
Rights in *Brogan*, on November 29 1988, the United Kingdom
Government, on December 22 1988, issued a further notice of
derogation in respect of Article 5(3).90 There is a cogent argu-
ment that the derogation was issued as a direct response to the
judgment rather than to any upsurge in violence or increased
threat to the security of the state.91

E. Entrenching the Non-Interference Principle

*Brannigan and McBride*, the case which followed *Brogan*, re-
flects a clear failure to examine the possibility that the deroga-
tion was simply a response to an adverse Court decision by the
state.92 The case is a clear manifestation of the conservative
agenda being followed by the Court in respect to emergency sit-
uations. The applicants raise a number of issues concerning the

89. *See Brogan*, 145B Eur. Ct. H.R. (ser. A) at 30. The Court decided that there had
been a breach of Article 5(3) in all four cases. *Id.* at 34. The majority found that,
"[t]he Court thus has to conclude that none of the applicants was either brought
'promptly' before a judicial authority or released 'promptly' following his arrest." *Id.*
The alleged breach of Article 5(4) was rejected. *Id.* at 35. A breach of Article 5(5) was
sustained. *Id.* at 35. An alleged breach of Article 13 (effective remedy) was rejected.
*Id.* at 36.

90. Amicus Brief for Liberty, Interights and the Committee on the Administration

91. *Id.* Note the statement of Douglas Hogg, at the time Under-Secretary of State
for the Home Department to the House of Commons on December 13, 1988:
The case of Brogan and Others has rightly exercised Hon. Members' minds.
The Committee will recall that my Right Hon. Friend the Home Secretary told
the House on 6 December that we shall bring forward our proposals for re-
spending to the judgement in the Brogan case as soon as possible and before
the Bill leaves the House. The matter is complex, and whether we opt for
derogation or some sort of judicial control, the implications are obviously far-
reaching.

92. *Brannigan and McBride*, 258 Eur. Ct. H.R. (ser. A) at 37. Peter Brannigan was
arrested and detained under Section 12(1)(b) of the Prevention of Terrorism (Tempo-
rary Provisions) Act 1984 ("PTA"). *Id.* He was detained for six days, fourteen hours
and thirty minutes. *Id.* His co-applicant Peter McBride was also arrested under Section
12(1)(b) of the PTA. *Id.* He was detained for four days, six hours and twenty-five min-
utes. *Id.* Both were released without charge. *Id.* (indicating that each defendant was
released after their detention periods). Neither were brought before a judicial author-
ity during the course of their detention. *Id.*
validity of the derogation entered by the United Kingdom.\textsuperscript{93} They contend that the derogation was merely the mechanic response taken by the state party to the adverse finding of the \textit{Brogan} decision.\textsuperscript{94} It can be argued that the validity of the emergency was not based on the magnitude of the terrorist threat, but served as a means for the government to avoid reforming detention practices which serve a strong counter-insurgency function in gathering information. The Court and the Commission maintain that while the judgment “triggered off”\textsuperscript{95} the derogation, there was no reason to indicate that the derogation was anything other than a “genuine response.”\textsuperscript{96}

The unwillingness of the Court to examine why, prior to the \textit{Brogan} judgment, the state could function adequately without resort to derogation is a clear manifestation of an unwarranted non-interference principle.\textsuperscript{97} Amicus briefs to the Court stressed that there was empirical evidence to dispute that a truly exceptional situation existed justifying a continued state of emergency.\textsuperscript{98} The case illustrates the danger of the burden of proof shifting silently in favor of the state in a manner inappropriate to achieving the ends envisioned by the Convention’s drafters. The burden must firmly lie with the state to demonstrate why the recourse to emergency provisions is required. It must not lie solely upon those opposed to the derogation provision to prove its unreasonableness or lack of proportionate response.

The state of emergency has been normalized and criminalized as a means of depolitization in Northern Ireland. Thus,

\begin{itemize}
\item \textsuperscript{93} Id. at 48-50.
\item \textsuperscript{94} Id. at 51.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Amicus Brief for Liberty, Interights and the Committee on the Administration of Justice at 49, \textit{Brannigan and McBride}, 258 Eur. Ct. H.R. (ser. A) at 49. Note the final paragraph of the United Kingdom Governments’ Note Verbale to the Secretary-General of August 22, 1984:

\begin{quote}
The United Kingdom Government, taking account of developments in the situation over the period covered by the notices [of derogation] referred to above and in the measures taken to deal with it, have come to the conclusion that it is no longer necessary, in order to comply with its obligations to continue, at the present time, to avail itself of the right of derogation under Article 15 . . . .
\end{quote}

\textit{Id.}
\end{itemize}
there is a need to examine the incompatibility of declaring an emergency externally to satisfy the procedural requirements of treaty obligations, and operating internally in judicial and executive disavowal of a state of exigency. In such a situation the derogating state can have the best of both worlds. Internal political strife is managed by extraordinary means, allowing greater effectiveness with fewer constraints. External obligations are satisfied with cursory monitoring and international legitimization of the approach taken.

The Brannigan and McBride judgment serves to illustrate the particularly problematic approach taken by the Court and Commission in confronting permanent emergencies. The International Law Association and other commentators have stressed that one of the “four basic elements” of an emergency is its provisional and temporary character. The applicants, Brannigan and McBride, stressed that in situations of permanent emergency it was inconsistent for the national authorities to be afforded a wide margin of appreciation. The Court side-stepped the issues of addressing both the status of permanent emergencies and the appropriate measure of latitude to be granted to states in respect of them.

By regarding each derogation case as an exception, the Court ignores the fact that the same respondent government may be appearing frequently before the bench with respect to the same situation of exigency. By refusing to regard the history or frequency of previous derogation as being relevant to the arbitration of the particular derogation before the Court, the issue is never addressed. A quasi-permanent, quasi-emergency must be viewed as a direct contradiction to the purposes of Article 15. The Court indirectly addresses the issue by making reference to the language of permanent emergencies, in stating that it takes judicial note that the applicants and others call for

99. The International Law Association, at its 61st conference, held in Paris from August 26 to September 1, 1984, approved by consensus a set of minimum standards governing the declaration and administration of states of emergency that threaten the life of a nation. The standards were the culmination of six years of study by a subcommittee of the Association, and two additional years of revision by the full Committee on the Enforcement of Human Rights Law.

100. See, CHOWDHURY, supra note 5, at 24-29.

101. See supra note 21 (explaining why quasi-emergency is contrary to purpose of Article 15).
tighter standards of accountability in respect of them. That is, however, as far as the Court goes. The objections are noted, but not examined, nor is the paradox of their co-existence with the legal aims of Article 15 examined.

On the question of whether permanent or quasi-emergency situations require greater scrutiny, the Court employed semantic tactics to avoid directly addressing the issue. Arguably, if a state is to be allowed a margin of appreciation, at all, it should become narrower the more permanent the alleged emergency becomes. The Court refused to examine the issue of proportionality. Instead it took refuge in the safe re-statement of the classic margin of appreciation formula. The majority agreed that:

The Court recalls that it falls to each Contracting State, with its responsibility for “the life of (its) nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency.

Following this restatement a further step was taken. Not only was the Court unwilling to narrow the margin of appreciation given to the state, it actually sought to expand the margin’s scope. Building on the foundation of the Ireland v. U.K case, the Court pressed that, “a wide ‘margin of appreciation’ should be left to the national authorities.”

The Court in Brannigan and McBride paid no heed to the numerous derogations entered by the British Government in relation to the suspension of certain rights in Northern Ireland

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102. Brannigan and McBride, 258 Eur. Ct. H.R. (ser. A) at 49. Note in particular the use of language and semantic tactics to not directly address the permanent emergency conundrum. Id. at 49. Liberty, Interrights, and the Committee on the Administration of Justice (Liberty and others) submitted for their part that, if States are to be allowed a margin of appreciation at all, it should be narrower the more permanent the emergency becomes. Id.
103. Id. at 49. The Court heard the applicants argue that a wide margin of appreciation should not be afforded to the state where the “emergency was of a quasi-permanent nature.” Id. The Court recounted amicus briefs that argued that the margin of appreciation should become “narrower the more permanent the emergency becomes.” Id. In drawing its conclusions, the Court failed to mention either permanent emergencies or whether the level of scrutiny by the Court ought to be higher in such cases. Id. at 49-50.
104. Id. at 49.
106. Id.
and the potential relationship between them and its validation of the emergency. The Court paid scant attention to the permanent state of emergency in the jurisdiction, which has existed since its inception in 1922. The concept of an emergency is not a perpetual state of affairs, it is both temporal and limited.¹⁰⁷

When the short-term becomes permanent, international courts examining the application of such provisions should be required to ask whether an emergency is the appropriate standard to apply. The erosion of the Court's interest in asking the question demonstrates its shift in emphasis. As the protection of the state's interest assumes a paramount status, the claims of the individual are diminished. The vestige of accountability exists in the Court hearing and the process of adjudication. The result is meaningless because the adjudication is merely a process of validation for the state and diminished worth for the individual.

II. THE INTER-AMERICAN SYSTEM EXAMINED

Although burdened with a shorter history, the approach of the Inter-American Court has been markedly different than that of the European Court.¹⁰⁸ In a small number of decisions, the Inter-American Court has been forthright in its examination of governmental practices in relation to emergency situations.¹⁰⁹

¹⁰⁷. See JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 11-33 (1992) (discussing definition of emergency by examining its meaning in three primary multilateral treaties).

¹⁰⁸. American Convention, supra note 2, O.A.S.T.S. No. 36, at 1, 9 I.L.M. at 673. The Convention, adopted in 1969, provides for two significant procedural bodies to safeguard the implementation of the rights contained in the Convention. Chapter VII of the Convention outlines the structure of the Commission, while the role and composition of the Court is outlined in Chapter VIII. The Inter-American Court was formally instituted in 1979, and consists of seven judges elected by State Parties to the Convention. American Convention, supra note 2, arts. 52, 53, O.A.S.T.S. No. 36, at 16, 9 I.L.M. at 673. Only State Parties or the Commission may refer cases to the Court. In addition to its responsibility to hear cases, the Court functions in an advisory capacity to the Member States of the O.A.S. Its advisory function is extensive and is not limited solely to the interpretation of the American Convention. See Thomas Buergeanthal, The Inter-American System for the Protection of Human Rights, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 439, 460-70 (Theodore Meron ed., 1984) (outlining powers and jurisdiction of Inter-American Court of Human Rights by virtue of American Convention); see Dinah L. Shelton, The Inter-American System for the Protection of Human Rights: Emergent Law, in INTERNATIONAL HUMAN RIGHTS LAW THEORY AND PRACTICE 369 (Irwin Cotler & F. Pearl Eliadis eds., 1992).

¹⁰⁹. American Convention, supra note 2, O.A.S.T.S. No. 36, at 16, 9 I.L.M. at 673. Derogation under the American Convention is governed by Article 27, which provides:

In time of war, public danger, or other emergency that threatens the indepen-
Because of the historical background of many states in the region and the persistent resort to the emergency concept to justify state negation of rights, the Court has steadfastly stated that the state of emergency is a limited concept to be critically examined.

The Court has stressed that an emergency is a finite concept subject to close examination.\textsuperscript{110} In its advisory opinion on habeas corpus in states of emergency, the transitory nature of the emergency constitution is highlighted.\textsuperscript{111} The case dealt with potential limitations to the right of habeas corpus in times of crisis.\textsuperscript{112} The Court argued that to deprive a detainee of the right to be brought before a judicial authority to prolong detention indefinitely would be "equivalent to attributing uniquely judicial functions to the executive branch."\textsuperscript{113} The Court, in language resonant of the approach of its European counterpart, argued that the limitation imposed by exigency be strictly limited and a proportionate response to the crisis faced.\textsuperscript{114} It uniquely pointed out that abuses can result from the "application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27."\textsuperscript{115} Furthermore, while both Courts use similar language to assess competing claims, there is a distinction that lies in the outcome of their assessment. The Inter-American Court has taken decisions that back up its strong rhetoric, while its European counterpart has been less forthcom-


\textsuperscript{111} Judicial Guarantees, 9 Inter-Am. Ct. H.R. (ser. A) at 40.

\textsuperscript{112} Id. The Court unanimously held that "'essential' judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), amparo, and any other effective remedy before judges or competent tribunals (Art. 25(1))." Id.

\textsuperscript{113} Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), 8 Inter-Am. Ct. H.R. (ser. A) at 33, OEA/ser.L./V/111.17, doc. 15 (1987) [hereinafter Habeas Corpus].

\textsuperscript{114} Habeas Corpus, 8 Inter-Am. Ct. H.R. (ser. A) at 37-39.

\textsuperscript{115} Id.; see supra note 21 (explaining Article 27).
In the Judicial Guarantees decision, the Court in its advisory opinion capacity, examined the extent to which judicial guarantees and remedies could be minimized in a period of emergency in accordance with Article 27 of the Convention. The Court concluded that some fundamental rights may never be excluded and that "judicial guarantees essential for the protection of such rights" are also immune from limitation. The Court held that the due process guarantees of Article 8 of the American Convention cannot be suspended in situations of emergency, insofar as they are prerequisites for the necessary functioning of judicial guarantees.

What is unique about this judgement is the multi-layered approach of the Court. Rights are recognized as being knitted into one another, interdependent and inseparable. Thus, to speak of rights protection in situations of emergency is to link together the rights that guarantee protection rather than to isolate certain non-derogable rights as being sufficient per se to protect the individual against potential excesses by the state in times of crisis. This is an approach that recognizes that the core and penumbra of derogable and non-derogable rights are interlinked and mutually significant to one another.

The Court draws directly from the experience of its hemisphere. It recognizes that the exercise of emergency powers is inherently and historically fraught with abuse and leads to the subversion of the democratic order. The judgment recog-

118. Id.
119. American Convention, supra note 2, art. 8, O.A.S.T.S. No. 36, at 4, 9 I.L.M. at 676. Article 8 protects the right to fair trial. Its provisions include the right to a hearing by a competent, independent tribunal; the right to be presumed innocent; the right to notification of pending criminal charges; the right to counsel of choice; the right to examine witnesses; and the right of appeal to a higher court. Id.
120. Id. at 9.
nizes that the nature, and therefore, the appropriate examination of emergencies can vary. The Court states that "what might be permissible in one type of emergency would not be lawful in another." This distinction illustrates the subtlety and depth needed to judicially address different kinds of crises that are subsumed under the "emergency" label. In contrast, the European Court approach has been to starkly categorize disparate crises as "emergency situations," and, when validated, to leave the appropriate measure of response to the individual assessment of the state. The genesis in this judgment is a multi-layered approach by the Inter-American Court, recognizing the differences in intensity and length of emergency and potentially developing a tailored complex approach to international judicial intervention.

A. The Scope of Advisory Opinions

Though the number of cases considered by the Court in its contentious jurisdiction role have been limited, the approach taken in a number of advisory (non-emergency) opinions illustrates the expansive thinking and the impetus to move further than its European counterpart. In its advisory opinion for Costa Rica relating to the compulsory membership of an association for the purpose of practicing the profession of journalism, the Court established a number of interesting judicial approaches.

The case arose from a request by Costa Rica that the Court consider the compatibility of its domestic legislation regulating the compulsory licensing of journalists with Articles 13 and 29 of the Convention. The domestic legal provisions required all

123. Id. at 99.
125. Compulsory Membership in an Association Prescribed By Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), 5 Inter-Am. Ct. H.R. (ser. A) (1985) [hereinafter Compulsory Membership]. The crux of the Court's decision was grounded in the refusal to accept a distinction between the freedom of expression guaranteed in Article 13 and the practice of journalism as a means of imparting the information upon which the freedom is based. Compulsory Membership, 5 Inter-Am. Ct. H.R. (ser. A) at 90-91.
126. American Convention, supra 2, arts. 13, 29, O.A.S.T.S. No. 36, at 5, 10, 9 I.L.M at 679, 684. Article 13 outlines the protection for freedom of thought and expression in the Convention. Article 13(1) provides the "Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive, and
journalists practicing their profession to be members of a "colegio" or professional association. The Court examined whether rights to free expression and association as guaranteed by the Convention were undermined by the state requirement.

The Court's approach is novel in two respects. First, the Court interprets restrictively the limitations imposed on the right to freedom of expression. Article 29 of the Convention outlines the basis upon which rights may be read restrictively under the Convention. A clear link is made between restrictions and their imposition as necessary to ensure the achievement of a democratic society. Second, the Court explicitly states that Article 13 of the American Convention was intended in its format to be more generous than its European counterpart. Implicit also is the judicial assumption that the Inter-American Court's interpretation is equally intended to be wider and more expansive. The Court states, "[a] comparison ... indicates that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas." This keynote is further expanded in the dicta that the Inter-American Court will use cases decided by the European Court and the Human Rights Committee when their value is to augment rights protection. There is a firm commitment to the non-incorporation of restrictions from other systems.

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impact information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of his choice." Id. art. 13(1), O.A.S.T.S. No. 36, at 5, 9 I.L.M. at 679.

127. Id. art. 13, O.A.S.T.S. No. 36, at 5, 9 I.L.M. at 679. Article 13 guarantees the right of freedom of expression. Id.

128. Id. art. 29, O.A.S.T.S. No. 36, at 10, 9 I.L.M. at 684. Article 29 mandates that: no provision of the Convention shall be interpreted as:

(a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; ... 

(c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.

Id.

129. Compulsory Membership, supra note 125, 5 Inter-Am. Ct. H.R. (ser. A) at 82.

130. Id. at 84.

131. Id.

132. Id.

133. Id. The Court states that "if in the same situation both the American and
As an aside, the Court is honest in its assessment that limitations such as "public order" and "general welfare" are quickly manipulated by collective state interests against the individual. Though this case is not grounded in an emergency context, it is nonetheless relevant to understanding the views of the Court on the appropriate ambit of limitations on the exercise of rights. Analysis of the case law on limitations is a means of understanding the comparative distinctions in emergency doctrine emerging from international courts.

B. The Inter-American Court’s Distinctive Regional Response

The views expressed by the Inter-American Court on limitations are a solid indicator of its response to restrictions generally. The core manifestation of emergency lies in the restrictions placed on the exercise of rights. When emergency measures are at issue judicially, they arise by virtue of a dispute over the appropriate exercise of limitations or the justification for limitation per se. A symbiotic relationship exists between Court approaches to limitation clauses, generally, and an institutional understanding of the emergency exception. In examining limitations on rights generally, the Inter-American Court has flexed some judicial muscle in remaining strongly protective of the widest interpretation of rights protection even where strong policy reasons are advocated by the state as the reason for the imposition of restrictions. It posits well for the Court’s potential dealing with situations of exception.

Equally, it should be pointed out that the Inter-American Commission, as a body of the O.A.S. Charter, has functioned reasonably well in its dealings with situations of gross and systematic violations of rights occurring in the territory of Member States. Country visits and on-site investigations have been par-

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134. Id.
135. See Clovis Morrison, Margin of Appreciation in Human Rights Law, 4 HUM. RTS. L.J. 263 (1971). A number of commentators have demonstrated how the margin of appreciation, initially employed in respect of the interpretation of Article 15 derogation by states, has been stretched and used in other contexts. Id.; see also Feingold, supra note 49; O’Donnell, supra note 38.
136. See supra note 108 and accompanying text (discussing Inter-American Court and American Convention).
particularly successful in this respect, arguably to the detriment of the individual complaint system. Notwithstanding the latter, the Inter-American system demonstrates some historical and political tenacity in addressing large-scale situations of crisis. Such background creates hope for the political context in which the Inter-American Court will address exigency situations in the region.

Faced with diverse issues ranging from limits on journalistic freedom, writs of habeas corpus, right to life, and due process concerns related to disappearances, the Court has maintained that limitations on rights are to be balanced with safeguards. The philosophy underlying the Convention is that rights are to be guaranteed not suspended. The Court has emphasized its autonomy in stating that governments are stepping outside the bounds prescribed by the instrument that binds them in over-limiting individual rights. In its willingness to hold states accountable at crisis moments, when governments are prone to state that strict accountability hinders the political process, the Court has demonstrated both its integrity and its strength.

The variance of approach by the European Court and Commission reflects diverse elements. The difference demonstrates the symbiotic relationship that the judicial branch has with the Council of Europe and the political networks that underpin the Convention. Situations of emergency are particularly reflective of this. Threats to the democratic order, and institutional responses to them, not only affect the country coping with a crisis, but have consequences for other onlookers. Each state is aware that its own sovereignty and leverage to respond to political disorder can potentially be limited by external scrutiny. Doubtless,

11.46, doc 23 rev.1 (1978). It is important to note that the O.A.S. was focused on the issue of emergency from an early point. When the drafters of the Convention began work in the 1960’s they had the benefit of a significant study on states of emergency. See Fitzpatrick, supra note 5, at 55 (discussing O.A.S. study on states of emergency).

judges sitting on these cases are not unaware of potential side-effects in limiting state actions in response to political crises in their own states. The political sub-culture of the European states is an intrinsic part of the unstated response by the Court to the derogation cases. While a political dynamic is equally apparent in the Inter-American model, the judicial branch has been further prepared to confront states in the areas of systematic and ongoing violations. Possible reasons for the difference include the historical and political forces that have shaped the American hemisphere and a nuanced understanding of the harmful potential of ongoing emergencies. A second possible reading is that the Inter-American Court system is still a fledgling, and that history will shape a path for its judicial outlook which, as yet, remains undefined.

III. THE HUMAN RIGHTS COMMITTEE CONSIDERED

The history of the Human Rights Committee tells another story. From the outset it should be understood that the Committee has not been a paradigm of virtue in respect to its management of situations of exception. In some respects, however, its approach to exigency in a number of individual complaint decisions, where Article 4 of the International Covenant on Civil and Political Rights has been employed by states as a defense to the abridgement of rights, has demonstrated the will to confront inappropriate state action. Further, the generally constrained role of the Committee must be contextualized in relation to a less expansive complaints procedure and the complex political un-

139. Mangan, supra note 55, at 382. Mangan identifies politics, in its widest sense, as a primary shortcoming in the effectiveness of the European system. Id. at 382-83. The Court’s concern in maintaining its legitimacy in the eyes of the State Parties is sharply evident in the derogation cases. Id. Where national interests are at stake, the danger exists that the state might refuse to recognize the compulsory jurisdiction of the Court, enter reservations, or withdraw from the Convention. Id.

140. See The Individual’s Duties to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights, U.N. Sub. Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc E/CN.4/Sub.2/432/Rev. 2 (1989); JOAN FITZGERALD, HUMAN RIGHTS IN CRISIS 82-114 (1994). Chowdhury argues that the deficiencies of the Committee are related to three specific problems. CHOWDHURY, supra note 5, at 82. First, the lack of consensus within the United Nations community as to the function of controls over member states. Id. Second, the lack of independence and impartiality evidenced by members of the Committee. Id. Third, the time constraints on the meeting of the Committee further hindered by lack of infrastructural facilities and resources. Id.
nderpinning of the United Nations structure. The political backdrop of the United Nations has little of the cultural, historical, or social common networks that characterize the European system. It is the commonality and consensus in the European context which creates the expectation that the European Convention is in a better position to provide stronger and more cogent standards for the regulation of emergency situations.

The Committee's creation had a long and tortured history. Its existence was first approved in 1950, after a protracted debate within the Human Rights Commission. It was given the task of drafting the International Bill of Rights by the Economic and Social Council (ECOSOC). The adoption of an Optional Protocol to the International Covenant on Civil and Political Rights guaranteed the right of individual petition to the Committee.

As with the Inter-American Court, the Committee has considered the resort to emergency measures and subsequent derogation from international human rights obligations in few individual cases. This fact is linked to the limited number of state parties that signed the Optional Protocol, limited financial re-

141. Chowdhury, supra note 5, at 131.
142. See Dominic McGoldrick, The Human Rights Committee (1991) (discussing various sessions of Human Rights Committee). It was during its sixth session that the Human Rights Commission gave structural impetus to the notion of implementation. The permanent implementation body created was the Human Rights Committee. Initially, the Committee was approved only to consider inter-state complaints, as opposed to complaints filed by individuals or non-governmental organizations. It was at the ninth session, in 1953, that the Human Rights Commission adopted additional articles concerning the precise make-up of the Human Rights Committee. The General Assembly reviewed the draft Covenants in 1954. Thereafter began a decade of scrutiny. This was primarily undertaken by the Third Committee of the Assembly. Three fundamental additions were proposed and accepted by the Third Committee. Primary of these was the optional provision for the scrutiny of individual complaints. This was ultimately instated as an Optional Protocol to the ICCPR. Finally, the General Assembly adopted Resolution 2200 (XI) and on December 16, 1966 opened for signature both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

144. American Convention, supra note 2, O.A.S.T.S. No. 36, 9 I.L.M. 673. The reporting system of states under Article 40 of the Covenant remains the primary monitoring mechanism of derogation. This is because of the limited number of states who are parties to the Optional Protocol and the smaller number who have accepted the competence of the Committee to adjudicate interstate complaints. Chowdhury, supra note 5, at 74-75. Prior to 1992, the Human Rights Committee received 514 registered cases of which 138 were concluded amicably, 49 were declared admissible, and 92 were pending in the pre-admissibility stage. See Rein Mullerson, The Efficiency of the Individual
sources for applicants, and a myriad of other procedural obstacles.\textsuperscript{145} The fact of emergency has been frequent in the country reports made by states in their reporting duties under Article 40 of the Convention.\textsuperscript{146} The Committee has used the report review sessions as a means of creating and encouraging dialogue with the state parties about the status, validity, and measures taken with respect to emergencies.\textsuperscript{147} The success of state review under Article 4 is highly dependent on the rapport and candor of dialogue with the defaulting state. If such dialogue is constrained, the information gleaned may be limited. Despite suffering from certain drawbacks, the Article 40 review process offers a means to engage in an ongoing relationship with the state about the use of emergency powers. Further, in a general comment concerning derogation under Article 4, the Committee emphasized its particular concerns about problems of notifica-


tion and proclamation with respect to exigency. The Committee confirmed that notification is not simply a technical and dispensable formality of derogation, but absolutely necessary as a means to ensure international supervision. The Committee has also continued to express its concern in this reporting forum over the resort to derogation, particularly where procedural obligations to the Conventions have not been adhered to.

A. The Singularity of the Committee's Approach to Situations of Exigency

The Human Rights Committee has demonstrated its willingness to confront state overreaction to perceived internal threats, allegedly undermining public order and security. The Committee confirmed that notification is not simply a technical and dispensable formality of derogation, but absolutely necessary as a means to ensure international supervision. The Committee has also continued to express its concern in this reporting forum over the resort to derogation, particularly where procedural obligations to the Conventions have not been adhered to.


149. Id. The Committee stated that each derogating state must “fulfill their reporting obligations under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation.” Id.


mittee confirmed in the *Landinelli* decision its competence to make an independent determination of whether a specific derogation measure is “strictly required.” The views expressed in the *Camargo de Guerro* decision are also indicative of a bright line drawn at a point where individual protection is the maxim sought and state justifications for limitations are subject to firm scrutiny.

The *de Guerro* case concerned the killing by Colombian police of seven individuals suspected of involvement in the kidnapping of a former Colombian diplomat. On April 13, 1978, the judge of the 77th Military Criminal Court of Investigation, himself a member of the police, ordered a raid to be carried out on a house in the “Contador” district of Bogota in Columbia. The raid was ordered in the belief that the former Columbian Ambassador was being held there. In spite of finding the house unoccupied, the police decided to await the arrival of the “suspected kidnappers.” The police initially suggested that the victims were killed in the course of resisting arrest. The justification for the use of lethal force was proved spurious after forensic examinations revealed no weapons, other than those in police possession, were fired. The author of the communication alleged that the passing of a domestic legislative decree created police immunity to criminal charges with respect to certain

152. *Landinelli*, supra note 151, at 65-66; see O’Donnell, *Commentary by the Rapporteur on Derogation*, 7 HUM. RTS. Q. 23 (1985). The Committee decided that a fifteen year ban on political activity had not been justified as necessary to “deal with the alleged emergency situation and pave the way back to political freedom.” *Landinelli*, supra note 151, at 65-66.


154. Id. at 137-38.
155. Id.
156. Id.
157. Id.
158. Id. at 137. The Committee found that:

[T]he report of the Institute of Forensic Medicine (Report No. 8683, of 17 April 1978), together with the ballistics reports and the results of the paraffin test, showed that none of the victims had fired a shot and that they all had been killed at point-blank range, some of them shot in the back or in the head.

*Id.*

159. *Id.* at 137, 148 (discussing and presenting Colombian Legislative Decree No. 0070 of 1978).
forms of action, relating to the assessment that the national territory was under threat of siege. The applicant further argued that the decree was in violation of Articles 6, 7, 9, 14, and 17 of the Covenant on Civil and Political Rights.

The Committee accepted that the Colombian Government had complied with the formal requirements of notice for derogation in respect of domestic legislative changes to confront the situation of disturbed public order in the jurisdiction. It went on to observe that there were certain provisions of the Covenant that can not be derogated from under any circumstances. The Committee unequivocally concluded that there had been a violation of the right to life protected under Article 6(1). As a matter of law the consensus of the Committee was that: "Inasmuch as the police action was made justifiable as a matter of Colombian law by Legislative Decree No. 0070 of 20 January 1978, the right to life was not adequately protected by the law of Colombia as required by Article 6(1)."

The judgment contains scant discussion of the mechanics of derogation and the weighing of state interest against individual protection. Nonetheless, we can adduce from the strong right to protection of life statement, a commitment to rights protection, irrespective of subjective state analysis of appropriate action in situations of crisis. This decision affirms that the Committee views the non-derogability of certain fundamental rights as self-evident in the context of derogation. The thrust of the decision is that the preeminence and status of the right to life undercuts a judicial balancing approach that would potentially undermine that right.

The Montejo case, also concerning the Colombian Government's recourse to a state of siege, contains a more detailed commentary by the Committee on the procedural and proportionate aspects of derogation. The case concerns the imprisonment of the applicant, a newspaper director, by a military tribunal for the alleged offense of illegally selling a weapon con-

160. Id. at 141.
162. de Guerro, supra note 153, at 146.
163. Id.
164. Id. at 146-47.
165. de Montejo, supra note 151.
The Director was sentenced to one year of imprisonment and through the sole recourse procedure available, the recurso de reposicion, the same judge confirmed her sentence. The Security Statute expressly prohibited review of conviction by a higher tribunal. The applicant contended violation of Article 14(5) of the Covenant, in the denial of right of appeal and violation of Article 14(1), alleging that the military tribunals were not independent or impartial.

The Committee recognized that the Government’s communications consistently alluded to a state of siege, and contained express reference to the application of Article 19, paragraph 2, and Article 21 of the Covenant. The Committee was not prepared to countenance that Article 14(5) of the Convention was derogated from in accordance with Article 4. By refusing to accept that derogation is a general provision creating leeway for any state action in a state of emergency, the Committee was confirming the limited nature of derogation provisions. It stated: “the Committee is of the view that the State party, by merely invoking the existence of a state of siege, cannot evade the obligations which it invokes by ratifying the Covenant.” This case confirms that the Committee takes a strict view that notice of derogation cannot be extended to justify limitations or violations of additional unnotified provisions.

The Committee confirmed that while the right of the state to take derogating measures might not depend on formal notification, the state party was duty bound, when invoking Article 4(1) of the Covenant in proceedings under the Optional Protocol, to satisfy a neutral finding that the situation alleged in fact existed. This case confirms that the burden lies on the derogating state to justify its actions.

166. Id. at 168.
167. Id.
168. Id. at 172.
169. Id. at 169.
170. Id. at 172-73.
171. Id. at 173.
172. Id.
173. Id.
B. The Human Rights Committee Compared

Finally, despite its attenuated powers, the Committee has refused to recognize the legitimacy of curbs on the exercise of rights by states in emergency situations. It has stated that absent “submission of fact or law to justify such derogation,” the seal of international approval will not be forthcoming for state action. The Landinelli decision confirms that state parties cannot evade responsibility for rights enforcement by “merely invoking the existence of exceptional circumstances,” without supplying sufficient information to confirm the necessity of emergency measures.

The language and structure of Human Rights Committee decisions differ substantially from their European and American counterparts. The detail, length, and often used dissent process for European judges gives an apparent vestige of more substantial legal analysis and deeper scrutiny. This looking-glass can be misleading. In substance, the European process reveals a sophisticated procedural mechanism which hides many substantive flaws. Equally, the function of the Human Rights Committee, in terms of individual applications under the Optional Protocol, cannot be disassociated from the country report mechanism that has consistently had to pronounce on the resort to states of emergency. Such discussion points to the wide confrontation which the Committee has sought, in respect of state obligations regarding states of emergency.

As outlined above, it should not be ignored that the Committee is subject to some definite limitations in its examination of emergencies and derogation notification. The most severe of these is the lack of authority to make on-site investigations, to receive and hear witness statements, and finally, to receive varying forms of unwritten evidence. By informal means, the Committee has sought to circumvent these limitations, though what is primarily required is constructive reform of procedure and greater resource allocation to the Committee.

175. See id.
176. Landinelli, supra note 151.
177. See Chowdhury, supra note 5, at 82-83.
178. See McGoldrick, supra note 142, at 53-55.
CONCLUSION

The enjoyment of basic human rights and dignities are particularly limited by situations of emergency. Joan Fitzpatrick has identified three distinct effects: frequent invasion of absolute rights, greater restrictions on other fundamental rights, and concentration of power in the executive arm of government.\(^{179}\) Emergencies are also associated with a high incidence of widespread and systematic human rights abuses. At the apex of such violations are the practices of states in relation to those rights deemed non-derogable, those which supposedly cannot be suspended in any circumstances. The International Commission of Jurists has also observed that the excessive invasions of non-derogable rights fails to reflect the overall effect of emergency laws:

Some writers have emphasized the effects of states of emergency on individual rights, particularly the right to be free from arbitrary deprivation of freedom and the right to a fair trial. This tends to create a somewhat false image of states of emergency, for one of their most fundamental characteristics is precisely the breadth of their impact on society. They typically affect trade union rights, freedom of opinion, freedom of expression, freedom of association, the right of access to information and ideas . . . not only individual rights but also collective rights and rights of peoples, such as the right to development and the right to self-determination.\(^{180}\)

Emerging also is a recognition that temporary legislation employed by states to confront short-term crisis, frequently shift silently into permanency or become incorporated into the ordinary law, thereby institutionalizing the limitation on individual rights. International courts and tribunals are the watchguard for the protection of fundamental rights. They perform this function by the consensual agreement of states themselves. The response of the courts to emergencies, and state action in respect of them, is crucial in determining how meaningful the international protection for fundamental rights actually is.

The distinctions between the various courts and tribunals examined above are important to discern. They tell us that while we seek to standardize the wording of Human Rights In-

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\(^{179}\) Fitzpatrick, supra note 5, at 29.

\(^{180}\) International Commission of Jurists, supra note 5, at 417 (footnote omitted).
Instruments as a means of universalizing rights, we fail to pay sufficient attention to the role of the interpreters of those standards and the structures which enforce them. Without recognizing this potential dichotomy in standards we create an obstacle to the project of normative rationalization of rights protection.

The peril of state over-reaction to situations of crisis is self-evident. The clear and present danger is that the failure of international human rights bodies, given the task of protecting rights, undermines the integrity of the protective system as a whole. The positivist achievements of international human rights law must be equally sustained by creative application and interpretation of the norms prescribing inalienable rights. State resort to the justification of exigency is at the apex of this discussion. This is where protection is most meaningful and required. This is also where divergences in standards are most problematic. To recognize this fact may at least ensure that differences no longer slip by unnoticed.