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Preserving Criminal Justice during a State of Emergency: Derogations from Fair Trial and Due Process Rights under the ICCPR, ECHR and the ACHR

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Abstract

Due to threats to national security in past decades, many states, including well-established democracies, have resorted to the use of emergency powers either by declaring a state of emergency and derogating from human rights obligations, or by adopting counter-terrorism legislation having an effect similar to derogation. Due process (the right to liberty and security of a person) and fair trial rights of individuals suspected or accused of terrorism are particularly targeted by such measures. During the fight against terrorism, international judicial human rights bodies have been trying to balance these fundamental values against the national security interest. However, in doing so, they rely on a traditional approach of giving states a certain level of discretion when dealing with emergencies.

The aim of this paper is to assess the level of deference given to States in cases of derogation from the right to a fair trial and due process and suggest that international judicial and quasi-judicial bodies should develop and apply a stricter scrutiny when examine alleged violations. It will argue that, if such a scrutiny is clearly established, *ex officio* application of the derogation clause by human rights bodies might be beneficial for upholding the principles of criminal justice, which are often altered by counter-terrorism legislation. Comparative analysis will be provided based on three multilateral human rights treaties - the International Covenant on Civil and Political Rights, Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights. The paper focuses on derogations due to the threat of terrorism in particular, and does not address states of emergency declared on other grounds.

Introduction

The issue of limitations on the States' power to derogate from human rights obligations has attracted a lot of attention since declaration of the "war on terror". Due to the increasing amount of attacks, a number of jurisdictions have invoked the emergency powers. The use of such powers, however, is not confined to declaration of a state of emergency and derogations from fundamental human rights and freedoms. Rather, enacting counterterrorism legislation within the ordinary law has also become a common practice.

In her latest report on human rights and counterterrorism,[1] the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Fionnuala Ní Aoláin outlined the problems regarding declared and *de facto* emergencies. Firstly, she reported that "states of emergency have long been correlated with extensive and wide-ranging human rights violations".[2] However, another important problem that seems to be of an increasing importance is the states' unwillingness to declare the state of emergency and derogate from their human rights obligations in accordance with the formal procedures prescribed by the human rights treaties. Instead, without formally acknowledging the existence of a state of emergency, a tendency is to "hide"[3] expansive counterterrorism laws within ordinary legislation,[4] which results in "normalization"[5] of exceptional measures.

[1] UN Human Rights Council, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report on the Human Rights Challenge of States of Emergency in the Context Of Countering Terrorism, Advance Unedited Version, 27 February 2018, A/HRC/37/52, available at: http://www.ohchr.org/Documents/Issues/Terrorism/A_HRC_37_52.pdf [accessed 4 April 2018] [hereinafter, the "Report on the Human Rights Challenge of States of Emergency in the Context Of Countering Terrorism"].
[2] *Ibid*, p. 1.
[3] *Ibid*, para. 30.
[4] *Ibid*, para. 36; *See also* Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*,2nd revised edition, (Kehl: N. P. Engel Verlad, 2005), 84.
[5] Report on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism, *supra* note 1, para. 36; *See also* Oren Gross, Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006).

These findings point to the necessity to increase the control not only over declared emergencies, when states are formally derogating from their human rights obligations, but also extend monitoring to situations where States are enacting emergency legislation without satisfying the requirements of notification and derogation. This paper suggests that doing so might be possible by applying a higher level of scrutiny to the cases of specific human rights violations, which are most frequently violated in the context of emergencies and counterterrorism. Even though this approach might not be confined to the rights under consideration, this paper will address the extent of allowed derogations from the right to a fair trial and due process (the right to liberty and security of a person).[6]

The reason it is particularly useful to start applying strict scrutiny regarding the guarantees of criminal defendants is that firstly, these rights are highly likely to be violated in states of emergency and even more so, when the case concerns suspected terrorists. However, a more important reason is that the special nature of these rights might give international human rights bodies more "courage" to start developing a new approach with a stricter standard, which might, in principle, be extended to qualified rights.[7] Whereas it is clear that no derogation is allowed from articles enlisted in derogation clauses of the three treaties, the right to a fair trial and due process are not absolute. However, certain guarantees which have to be preserved even in states of emergency might reasonably justify the application of strict scrutiny to measures invoked in emergency situations, - whether the existence of emergency is declared or not.

[6] For the purposes of this paper, the terms "the right to liberty and security of a person" and "due process" are used interchangeably.

[7] "Qualified rights" are those rights that might be subjected to proportionate restrictions when protection of one of the legitimate aims listed in limitation clauses so requires. For example, rights protected under Articles 8-11 of the ECHR are qualified rights.

The jurisprudence of international judicial and quasi-judicial bodies regarding derogations in a state of emergency predominantly concern the violation of the right to liberty and security of a person, however frequent violations of the right to a fair trial in states of emergency have also been "well-documented"[8] by leading studies conducted in this field. For the purposes of this paper, it is important to address both of said rights together, since not only is there a strong connection between them, but both of them are "'strong' rights, coming after absolute rights in the hierarchy".[9] They do not have general limitation clauses, as opposed to such rights as the freedom of expression or the right to privacy (except the right to a public trial, which is the only qualified element of the right to a fair trial). It will be demonstrated that the bodies entrusted with application of the treaties under consideration have not been failing to find violations of these rights in cases of emergency and terrorism. However, even though the view is shared on that some aspects of these rights are of absolute nature (e.g. *habeas corpus* and the access to courts), the jurisprudence does not indicate that the cases of alleged violations of the right to a fair trial and due process shall entirely be treated with strict scrutiny.

One of the reasons this paper focuses on international human rights bodies is that the emergency powers bear an inherent risk to be abused by national authorities. Accordingly, the responsibility of international bodies to protect the rights of all individuals increases. The first Chapter of this paper will discuss general problems appearing in the context of emergencies and counterterrorism and address the role of national authorities, including the judicial branch, in protecting human rights in such cases. It will suggest that international judicial bodies should increase the standard for protection of the rights of defendants when they are subjected to restrictions either by

[8] Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: Paris Minimum Standards of Human Rights Norms in a State of Emergency*, (London: Pinter Publishers, 1989) p. 205.
[9] Andrew Legg, *The Margin of Appreciation in International Human Rights Law*, (Oxford: Oxford University Press, 2012), p. 210.

derogations or by expansive counterterrorism legislation enacted within regular laws. It will argue that treating declared and *de facto* emergencies in a similar way, as well as increasing monitoring over prolonged emergencies serves the purpose of prevention of the threat of permanently overruling the principles of modern criminal justice.

The second Chapter intends to compare the fair trial and due process principles established by the Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights. It does not intend to encompass all the aspects of these rights, but will merely point out some similarities and significant differences which are relevant in the context of emergency situations and counterterrorism measures. In addition, the Chapter will outline the non-derogable aspects of these two rights and consider whether there are any differences in treatment of these aspects by the UN Human Rights Committee (hereinafter, the "HRC"), the European Court of Human Rights (hereinafter, here "ECtHR"), and the Inter-American Court (hereinafter, the "IACtHR") and Commission (hereinafter, the "IACHR") of Human Rights

The third Chapter will firstly provide a general framework for declaration of a state of emergency and derogation from human rights. Further, it will address the case-law of the HRC, ECtHR and IACtHR, in particular, with respect to derogations from the right to a fair trial and the due process in cases of declared states of emergency. Lastly, it will point out certain areas that might need to be improved in order to heighten the standard of protection of human rights in emergencies.

The paper relies on the jurisprudence of the HRC, ECtHR, IACtHR, as well as major studies undertaken in the field of human rights and emergency powers. A novel approach suggested in this paper is that international human rights bodies use the unqualified character of the right to a fair trial and due process for revisiting the traditional approach of deference in emergencies and

set forth the criteria for applying strict scrutiny in the subsequent jurisprudence. This approach can also be extended to other rights, that are frequently violated in a state of emergency.

Chapter 1 – Identifying the Dangers Posed by Emergency Powers

Throughout the past years, the issue of emergency powers in the context of counter-terrorism measures has attracted a lot of attention. In February 2018, Ms. Ní Aoláin, - a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, issued an advance unedited version of her report on the human rights challenge of states of emergency in the context of countering terrorism,[10] where she distinguished the situations of *de facto* and declared states of emergency. The Special Rapporteur observed that even in cases when no declaration of a state of emergency and therefore no derogation from human rights obligations is made, States are enacting antiterrorism legislation, which, by nature, is "emergency regulation".[11] She also noted that alternations of regular guarantees afforded to persons accused of or charged with a criminal offence have become particularly common. [12]

In the light of this report, the present Chapter will address the problems existing in emergencies created due to threats of terrorism and counterterrorism measures. It will analyze the approach of national authorities, including domestic courts, in protecting the rights of suspected terrorists. The

[10] Report on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism, *supra* note 1.

[11] *Ibid*, para. 4. The Special Rapporteur pointed out that "not all counter-terrorism legislation constitute emergency regulation. For example, when counter-terrorism norms regulate hitherto unregulated areas – such as terrorist financing post 9/11, - there is no specific emergency effect necessarily implicated. However, where counter-terrorism laws directly and substantially impinge on the full enjoyment of human rights, premised on the experience or threat of terrorist acts or actors, then both restrictions on rights and emergency laws are implicated". She also added that "it is not only the title of the legislation that confers emergency status, but also the scope, impact and rights-limiting nature of the legislation which gives it an "emergency" characteristic", - *See ibid*, para. 30.

[12] *See e.g.* Ben Saul, *Criminality and Terrorism*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, p. 163, - observing that "some common alternations [to criminal trial procedures], particularly since 9/11, have included extended periods of pre-charge or pre-trial detention; limited access to legal representation; suspension or limitation of habeas corpus; the use of special or military courts; restrictions on disclosure of and access to classified evidence; increased reliance on coerced confessions; the lowering of evidentiary standard; the use of anonymous witnesses; and limitations on appeal rights".

last section will link judicial deferentialism to the concept of "militant democracy" and address the role of international judicial bodies in protecting the rights of suspected terrorists.

1.1. A Modern State of Emergency and its Impact on Human Rights

Studies suggest that there is a strong correlation between the wide-spread and grave violations of human rights and states of emergency.[13] Contemporary emergencies seem to be corroborating these findings, - whereas the patters of the abuse of emergency powers were observed as early as during the Roman Republic,[14] the states' current attempts to achieve efficient results in combating terrorism (whether domestic or international) point to two major issues, which create new problems that are specific to the context of counterterrorism: first is the declaration of a state of emergency and derogation from human rights obligations in accordance with state's treaty obligations,[15] which might not always be problematic *per se*. However, given that terrorism does not have a "natural resting point",[16] states might prolong states of emergency in violation of the

[13] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, p. 3, available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf [accessed 8 December 2017]; Chowdhury, *supra* note 8; Nicole Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, UN Doc.E/CN.4/Sub.2/1982/15, 27 July 1982, available at: http://hrlibrary.umn.edu/Implications%20for%20human%20rights%20siege%20or%20emergency_Questiaux.pdf [accessed 6 April 2018]; *See also* Jaime Oraá, *Human Rights in State of Emergency in International Law* (Oxford: Clarendon Press, 1992), 1; Joan F. Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, Human Rights Quarterly, Vol. 7, No. 1 (Feb., 1985), pp. 89-131, at 91, available at: http://www.jstor.org/stable/762039; Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*, (University of Philadelphia Press, 1994); Parvez Sattar, *Human Rights and Three Special Aspects of the Rule Of Law in the Modern Society*, Thesis submitted for the degree of Doctor of Philosophy at the University of Leicester, (Ann Arbor: UMI Dissertation Publishing, May 1998), p. 168;

[14] *See* Clinton L. Rossiter, *Constitutional Dictatorship – Crisis Government in the Modern Democracies*, Princeton: Princeton University Press, 2008, at 70-71.

[15] While terrorism can sometimes serve as grounds for declaring a state of emergency, the threat of terrorism does not always amount to a threat to "life of nation" and therefore, does not entitle the states to declare emergency and/or derogate from human rights obligations. *See e.g.* Claudia Martin, The Role of Military Courts in a Counter-Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, p. 700; *See also infra* Chapter 3.

[16] David Luban, *The War on Terrorism and the End of Human Rights*, in "The Constitution in Wartime: Beyond Alarmism and Complacency", ed. Mark Tushnet (Duke University Press, 2005), p. 228; *See also* Michael Head,

basic principles enshrined in derogation clauses, - most importantly, of the requirement that emergency measures be temporary. A second problem, which was also addressed by the Special Rapporteur, is the cases of *de faco* emergency, i.e. "situations of emergency that are frequently hidden by the exercise of restrictive powers without formal acknowledgement of the existence of an emergency".[17]

Both, - prolonging the state of emergency and "infecting" ordinary statutes with emergency regulations results in weakening the human rights guarantees applicable during normal times, since "temporary" is treated as "permanent" and the "exceptional" is being treated as "normal".[18] For these reasons, it is important to monitor every declaration of a state of emergency, its extension and derogations as well as other emergency and/or counterterrorism measures (including the cases of non-derogation) adopted within the course of a state of emergency – whether *de facto* or declared. Special Rapporteur Ní Aoláin pointed out that "hesitancy of human rights treaty bodies to confront troubling derogation practices from the outset stems from a historic deference to the State's assessment of threat"[19] and advised that this "culture of accommodation" be revised.[20]

This paper suggests that international judicial bodies will find it easier to start formulating criteria for applying a stricter standard of scrutiny in cases of alleged violations the right to a fair trial and the right to liberty and security of a person in the context of emergencies, primarily, due to the special nature of these rights and the high likelihood of their violation. Establishing clear

Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt, New York: Routledge – Taylor & Francis Group, 2017, p. 6.

[17] Report on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism, *supra* note 1, para. 30; *See ibid*, paras. 30-39.

[18] *See also* César Landa, *Executive Power and the Use of the State of Emergency*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, pp. 205-206.

[19] Report on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism, *supra* note 1, para. 26.

[20] *Ibid*, 26.

jurisprudence on the applicability of strict scrutiny might also open the doors for narrowing down the margin of appreciation in cases concerning other rights as well. However, in any event, alleged violations of the rights under consideration shall always be assessed with strict scrutiny in a state of emergency – whether declared or *de facto*.

One reason is that, while qualified rights might be subjected to restrictions even outside the context of emergencies, the texts of the ICCPR, the ECHR and the ACHR provisions guaranteeing the right to a fair trial and due process cannot be interpreted in a way that would allow something other than genuine emergency to be used as a justification for their restriction, - under all three treaties, the only element with limitation clause is the right to a public hearing. In addition, customary international law affirms that some aspects of these rights are of an absolute nature and cannot be derogated from even in emergency (See *infra* Chapter 2.3). The fact that wide-spread violations of said rights have been reported by a number of major studies conducted in the field of human rights in emergency situations[21] speaks of high likelihood of violation of these right, which shall lead the courts towards applying a strict scrutiny.

[21] *See e.g.* International Commission of Jurists (ICJ), *States of Emergency: Their Impact on Human Rights*, 1983; The ICJ identified "11 elements of the right to a fair trial are often suspended" during the state of emergency: "Essential guarantees of independence and impartiality in military courts in which security offences are tried; Sentences passed upon confessions obtained as a result of coercion or torture; Sentences passed based upon evidence of a witness who is not identified and does not appear at the trial, but whose testimony is summarized for the court by law enforcement officers; The right to be informed promptly of charges; The right to counsel one's own choice; The right to have adequate time for the preparation of one's own defence; The right to be tried without delay; The right to a public trial; The right to appeal; The right not to be retried after a final judgment; Non-retroactivity of criminal laws", - *See* Chowdhury *supra* note 8, p. 205; *See also* UN Commission on Human Rights, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, 10th annual report and list of States which, since 1 January 1985 have proclaimed, extended or terminated a state of emergency, presented by Special Rapporteur Mr. Leandro Despouy, , E/CN.4/Sub.2/1997/19 23 June 1997, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/128/79/PDF/G9712879.pdf?OpenElement [accessed 5 April 2018]; and Alfred de Zayas, *The United Nations and the Guarantees of a Fair Trial in the Internationa Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, in "The Right to a Fair Trial", eds. David Weissbrodt and Rudiger Wolfrum, Berlin, 1997, pp. 669-696, available at: http://hrlibrary.umn.edu/fairtrial/wrft-zay.htm

Judicial control over effective protection of the right to a fair trial and due process is crucial in the context of emergencies and counterterrorism measures, which often lea[d] to "open-ended detentions of suspected terrorists".[22] Some scholars claim that the latter should have no or very few guarantees in criminal proceedings against them. For example, Richard Posner argued that, due to the *sui generis* nature of terrorist threat, "it requires a tailored regime, the one that gives terrorist suspects fewer constitutional rights"[23] and that "national emergencies in general, or the threat of modern terrorism in particular, justify *any* curtailment of the civil liberties that were accepted on the eve of the emergency" (emphasis in original).[24] At the heart of this argument lies an assumption that curtailing civil liberties will make the counterterrorism activities work.[25] However, "while there are often difficult trade-offs to be made between liberty and security, it does not follow that sacrificing liberties will always, or even generally, promote security".[26] Nevertheless, the states seem to be reluctant to the "rule of law difficulties"[27] that counterterrorism measures and the use of emergency powers might bring about.

Certainly, national authorities should be able to exercise exceptional powers whenever the nation is facing a crisis that cannot be confronted by ordinary means. This is why emergency provisions can be found in most of modern constitutions.[28] Provisions attempting to regulate emergency

[22] Norman Dorsen, Michael Rosenfeld, András Sajó, Susanne Baer, Susanna Mancini, *"Comparative Constitutionalism: Cases and Materials"*, 3rd Edition, American Casebook Series, West Academic Publishing, 2016, p. 1622 [hereinafter, "Dorsen et. al"].
[23] Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006), p. 11.
[24] *Ibid*, 41.
[25] David Cole, James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (New York: The New Press, 2006), p. 240.
[26] *Ibid*.
[27] César Landa, *Executive Power and the Use of the State of Emergency*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White (New York: Oxford University Press), 2012, pp. 205-206.
[28] Christian Bjørnskov, Stefan Voigt, *Why do governments call a state of emergency? On the Determinants of Using Emergency Constitutions*, European Journal of Political Economy, 2017, 1-14, p. 1; *See* Christian Bjørnskov, Stefan Voigt, *The Architecture of Emergency Constitutions*, 2016, pp. 14-15 and p. 41, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798558. Even though the authors refrain from attributing the

usually specify which branch of the government shall take over the situation and might regulate various aspects, including prerequisites for situation to qualify as an emergency and acceptable measures that can be invoked.[29] However, as pointed out by Victor Ramraj, "emergencies, especially violent emergencies, challenge the state's commitment to govern through law".[30] The fact that the state of emergency "put[s] legality to its greatest test"[31] is hardly objectionable. Indeed, as one author put it, "once law has been established to maintain social order, emergency remains law's nemesis, the unruly force that would overturn the rules and regimes so carefully constructed by the principles and practices of legality".[32]

Is goes without saying that attempts to regulate emergencies based solely on the exercise of the executive power without sufficient safeguards against the abuse is very well capable of leading to dictatorships and grave human rights violations. In this regard, the Weimar Constitution has been criticized for the lack of sufficient checks on emergency powers, "which ultimately contributed to the rise of Hitler's dictatorship through constitutional means".[33] Of course, not every leader is likely to become a Nazi dictator upon declaration of state of emergency, however, as Elkins, Ginsburg and Melton argue, "sometimes, executives are induced to seek more power because of external shocks that render it prohibitively costly to work within constitutional limits conceived

increase of executive powers to 9/11 attacks, the statistics demonstrate that, in the context of new constitutions, the allocation of vast discretionary powers within executive coincides with the aftermath of 9/11.

[29] For statistical data and a cross-country comparison of the powers allocated within different political actors in emergency situations, *see* Christian Bjørnskov, Stefan Voigt, *The Architecture of Emergency Constitutions*, 2016, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798558 [accessed 22 March 2018].

[30] Victor V. Ramraj, *No Doctrine More Pernicious? Emergencies and the Limits of Legality*, in "Emergencies and the Limits of Legality", ed. Victor V. Ramraj (New York: Cambridge University Press, 2008), p. 4.

[31] Austin Sarat, *Introduction: Toward New Conceptions of the Relationship of Law and Sovereignty under the Conditions of Emergency*, in "Sovereignty, Emergency, Legality", ed. Austin Sarat (New York: Cambridge University Press: 2010), p. 1.

[32] *Ibid*, p. 4.

[33] Zachary Elkins, Tom Ginsburg, James Melton, *Endurance of National Constitutions*, New York: Cambridge University Press, 2009, pp. 18-19 [hereinafter, "Elkins et. al"]; *See also* Dorsen, et. al. *supra* note 22, p. 1595.

under more stable conditions",[34] one of such examples being military crisis, "which often tempts the executive to pursue security and stability at the expense of individual rights".[35]

To sum up, trusting the executive's enthusiasm in protecting civil rights and liberties in emergencies might not be very wise. As to the legislature, which is a political branch, representing the people – it might sometimes have the constitutional power to review or approve emergency decrees.[36] However, it is not a reliable guarantor of the rights of terrorist suspects either, for two reasons. Firstly, organization of a state and separation of powers, as well as constitutional allocation of emergency powers would not always permit such a legislative control;[37] it always varies across the states. Secondly, even if the legislative branch in a particular country has some level of control over emergencies, it is still not guaranteed that this political branch will be willing to interfere within rights-restricting counter-terrorism measures invoked by the executive. As observed by Bruce Ackerman, "[in order to] maintain popular support, serious politicians will not

[34] *Ibid*, 73-74; *See also* David Dyzenhaus, *The Compulsion of Legality*, in "Emergenices and the Limits of Legality", ed. Victor V. Ramraj (New York: Cambridge University Press, 2008), p. 55, - pointing out that, "even in ordinary times, the executive is prone to try to carve out exceptions for itself, so that it can act largely unconstrained by the rule of law"; *See also* Bruce Ackerman, *The Emergency Constitution*, Law Faculty Scholarship Series, Paper 121, The Yale Law Journal, Vol. 113, 2004, 1029–1091, p. 1047, - pointing out, in particular, that "European nations have had a long and unhappy historical experience with explicit emergency regimes [whereby] these regimes have tended to give executives far too much unfettered power, both to declare emergencies and to continue then for lengthy periods".

[35] *See* Elkins et. al, *supra* note 33, - pointing to the examples such as "Lincoln's suspension of *habeas corpus* during the civil war, the relaxing of privacy constraints on law enforcement investigations in the post-9/11 environment, or Indira Ghandi's suspension of elections in India during her period of emergency rule in 1975-1977".

[36] *See* Dorsen et. al *supra* note 22, p. 1599: "In the American separation-of-powers system Congress has very little authority to review the actions of the executive [however] in a parliamentary system, Parliament may review executive action taken in emergency". As an example of legislative control of emergency powers in a presidential regime, *see Constitution of Plurinational State of Bolivia*, 2009, Articles 138, 139, 161 (6); For statistical data and a cross-country comparison of the powers allocated within different political actors in emergency situations, *see* Christian Bjørnskov, Stefan Voigt, *The Architecture of Emergency Constitutions*, 2016, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798558 [accessed 22 March 2018].

[37] For instance, the legislative branch may even be dissolved in emergency situations by the executive. *See* Fitzpatrick *supra* note 13, p. 28 and *ibid*, footnote 1.

hesitate before sacrificing right to the war against terrorism [since] they will only gain popular applause by brushing civil libertarian objections aside as quixotic".[38]

Therefore, it is unlikely that tasking the legislative branch with protection of human rights in emergencies will guarantee their due process and fair trial rights for suspected terrorists. From all of this, it follows that the solution has to be sought for in the third – judicial branch, which is anti-majoritarian by nature and hence "least dangerous"[39] for individual rights. The next section will assess the capacity or, - in some cases, - willingness of national judiciaries to protect terrorist suspects against deprivation of constitutional guarantees by political branches of the government.

1.2. Deference of the Domestic Judiciary and "Normalization" of a State of Exception

As firstly framed by the federalists, and further reiterated by many, one of the primary tasks of the judiciary branch is to protect fundamental rights and liberties of citizens. Under the principle of checks and balances, judicial interference is required whenever unjustified restriction of rights occur. However, when it comes to emergencies, effective exercise of this function might be hindered.[40] Three possible scenarios of how this occurs are described below.

Some constitutions might bar the judiciary from reviewing executive decrees after the state of emergency is declared. For example, under Article 148 Constitution of Turkey, "decrees having the force of law issued during a state of emergency, martial law or in time of war shall not be

[38] Ackerman, *supra* note 34, p. 1030; The second argument regarding inefficiency of the legislative branch with respect to prevention of executive actions is made due to the absence of Professor Ackerman's *"supermajoritarian escalator"* (*see ibid*, pp. 1047-1049) in the constitutions.
[39] *The Federalist Papers,* No. 78: Hamilton, New York: Signet Classics, 2003, p. 464.
[40] Some of the most prominent authors in the area of emergency regimes "have evaluated *ex post* judicial control as a rather toothless instrument to constrain government" – *See* Christian Bjørnskov, Stefan Voigt, *Why do governments call a state of emergency? On the Determinants of Using Emergency Constitutions*, European Journal of Political Economy, 2017, 1-14, p. 4 (referring to Bruce Ackerman and David Dyzenhaus); *See*, in general: Ackerman, *supra* note 34 and David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge: Cambridge University Press, 2006.

brought before the Constitutional Court alleging their unconstitutionality as to form or substance."[41] This type of provisions are problematic firstly because they put the principle of separation of powers at risk, thereby making the protection of human rights dependent merely upon the "generosity" of the political branches. Secondly, constitutional prohibition of the review of emergency decrees, *ipso facto*, represents a "blank check"[42] for the executive, making the latter, in principle, omnipotent and paving the way for dictatorships.

Such provisions are, however, exceptional. Therefore, we might move to the second scenario, where initially the Courts do have jurisdiction over executive decrees, but political branches of the government initiate constitutional amendments to narrow it down or to make the emergency-related matters non-justiciable. India can serve as an example of such a scenario: during the emergency rule, Indira Gandhi managed to "[pass] amendments restricting emergency declarations from judicial purview".[43] In this case, by invoking the basic structure of the Constitution, the Supreme Court of India had the opportunity to rule on the constitutionality of the amendments and declare them incompatible with the basic structure of the constitution. Regardless, this does not serve as a guarantee that domestic courts will retain power to the extent that they will be able to control the legality of limitations imposed on human rights and "check" whether the executive is abusing her emergency powers. The reason is that the concept of basic structure is exceptional in constitutions of states and in most cases, will not effectively bar the political branches from reducing the powers of judiciary.

[41] *Constitution of Turkey*, as amended on July 23, 1995 by Act No. 4121, Article 148, available at: https://global.tbmm.gov.tr/docs/constitution_en.pdf [accessed 30 January 2018].
[42] *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, at 536; Youngstown Sheet & Tube Co. v. Sawyer, 72 S.Ct. 863, at 587.
[43] Elkins et. al, *supra* note 33, p. 155.

The third scenario is the case where there is neither a constitutional prohibition, nor an attempt to deprive the judiciary of jurisdiction, but rather the voluntary choice of judges to be deferential. During peacetime, in general, they do stand by the idea that protection of individuals from arbitrary interference by the State is one of the main goals of the judicial branch and they make more effort to "check" other branches' unconstitutional actions. Given the high risk of the abuse of emergency powers, one could think that courts would be more active in these cases and scrutinize the "national security measures" even with a more cautious approach. However, when it comes to counterterrorism or[44] emergencies such as war, there is a tendency within the judiciary to be more tolerant of intrusive measures.[45]

Stemming from a formalistic interpretation of separation of powers[46] and based on the justification that, presumably, the executive has a better understanding of the threat and can competently act in accordance with the interests of national security, some jurisdictions have developed a broader understanding of the "political question doctrine", whereby the courts leave more space for the political branches, *inter alia*, to undertake certain measures limiting human rights. A former

[44] Nowhere in this paper are the terms "war" and "terrorism/counterterrorism" used interchangeably. For the discussion surrounding the application of the laws of armed conflict to terrorism, *See* Jelena Pejic, *Armed Conflict and Terrorism: There is a (Big) Difference*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, (New York: Oxford University Press, 2012), pp. 171-205; Interesting questions regarding applicability of Geneva Conventions to the detention of a suspected terrorist (Osama Bin Laden's driver) arose in the US Supreme Court case *Hamdan v. Rumsfeld.* For the discussion, *see*, among others: C.L. Lim, *Inter Arma Silent Leges? Black Hole Theories of the Laws of War*, in in "Emergencies and the Limits of Legality", ed. Victor V. Ramraj, (New York: Cambridge University Press, 2008), pp. 387-396; *See also* Inter-American Commission on Human Rights [the "IACHR"], *Report on Terrorism and Human Rights*,22 December 2002, OEA/Ser.L/V/II.116, paras. 19 and 73, available at: http://www.cidh.org/terrorism/eng/toc.htm [accessed 23 March 2018], - stating that "the classification of an act or situation as one of terrorism in and of itself does not affect the application of a regime of international law where, in the circumstance, the conditions for the application of that regime are satisfied" and that "[a]lthough terrorist or counter-terrorist action may give rise to or occur in the context of situations of armed conflict, it must be recalled that the concepts of terrorism and war are distinct. […] In all circumstances, the specific international humanitarian law norms applicable to terrorist violence will vary depending upon whether they give rise to or take place in the context of a conflict of an international or non-international nature".

[45] *See* David Dyzenhaus, *supra* npte 39, pp. 17-19; David Dyzenhaus, *Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication od National Security*, Australian Journal of Legal Philosophy, Vol. 28 (2003).

[46] Dyzenhaus, Humpty Dumpty Rules or the Rule of Law, *supra* note 44.

President of the Supreme Court of Israel, Aharon Barak criticizes this type of approach, in particular, in the context of the "war on terror" and stresses that the role of the judiciary is to be loyal to their role as a judge, irrespective of whether the country is in the state of emergency.[47] Similar to the opinion voiced by Lord Atkin in his famous dissent on *Liversidge v. Anderson*,[48] he rejects the maxim *silent enim leges inter arma*, stating that laws are most needed in times of war.[49]

Although, it is also true that judges, like other public officials, share the sentiments of the society and "are [similarly] susceptible to the pressures of events".[50] This does not mean that the courts are fully deprived of the ability to protect fundamental rights and liberties in emergency situations; rather, they might not be as active in preserving the values that they would generally advocate for during peacetime.[51] Judicial deference of such manner might inspire the government to invoke the

[47] Aharon Barak, *Human Rights in Times of Terror: A Judicial Point of View.*
[48] *See* Dissenting Opinion of Lord Atkin in *Liversidge v. Anderson*, cited in *Dorsen et. al supra* note 22, pp. 1598-1599:

> "In [this country], amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. […] I protest, even if I do it alone, against a strained construction put upon words, with the effects of giving an uncontrolled power of imprisonment to the Minister. To recapitulate, the words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them. […]. I know of only one authority which might justify the suggested method of constructions. 'When I use a word,' [said Humpty Dumpty], 'it means what I choose it to mean, neither more nor less'. [Alice said]: 'The question is [whether] you can make words mean different things'. 'The question is,' said Humpty Dumpy, 'which is to be master – that's all.' (Alice though the Looking Glass, cvi)".

[49] Aharon Barak, *supra* note 47; *See also* David Dyzenhaus, *supra* note 39, p. 4, - challenging Schmittean approach that the rule of law does not apply to emergencies by arguing that "judges have a constitutional duty to uphold the rule of law, even, perhaps especially, in the face of indications from the legislature or the executive that they are trying to withdraw from the rule-of-law project".
[50] Mark Tushnet, "*Emergencies and the Idea of Constitutionalism"* in *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet, London: Duke University Press, 2005, 39-55, at 41; *See also* Bruce Ackerman, *supra* note 34, p. 1072.
[51] Judicial deference in emergencies is *not* a new tendency. *See e.g* Fitzpatrick, *supra* note 13, p. 24; *See also* Rossiter, *supra* note 14, pp. 70-71.

emergency powers more frequently, which will weaken the human rights guarantees in ordinary times as well.

What is regrettable is that, whereas by the virtue of their functions judges are supposed to be actively opposing expansive emergency regulations that infringe upon human rights, they might now tend to become the warriors of "militant democracy", whenever political branches establish that the right of *the nation* is threatened. The notion of militant democracy will be addressed in the following section. It will also be suggested that, when, for any reason, domestic judges cannot or do not ensure the equal protection of human rights, the obligation to provide such protection increases judges for domestic judicial bodies.[52] This premise applies at all times, in general, but needs to be particularly underlined in the context of counterterrorism, due to the domestic judiciary's unwillingness or inability to intervene.

1.3. Militant Democracy, De Facto Emergencies and the Role of International Judicial Bodies in Protecting Human Rights in Emergencies

The concept of militant democracy, which was first termed in the 1930ies, used to be centered around the idea of banning political parties that were perceives as a threat to democratic order.[53] However, it has regained its importance in the context of combating terrorism,[54] and today, the

[52] *See in general*, Evan Fox-Decent, Evan J. Criddle, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford University Press, 2016).

[53] Carlo Invernizzi Accetti, Ian Zuckerman, *What's Wrong with Militant Democracy?*, Political Studies2017, Vol. 65(1S) 182-199, p. 183. The term was first introduced by Karl Lowenstein in 1937 (*See* Karl Loewenstein, *Militant Democracy and Fundamental Rights*, American Political Science Review Vol. 31, No. 3 (Jun., 1937), pp. 417-432, available at: https://www.jstor.org/stable/1948164 [accessed 23 March 2018]) and was "understood primarily as a means for banning political parties whose commitment to democratic values was judged either insufficient or unreliable, militant democracy has recently expanded to cover a broader range of political actors judged dangerous for existing democratic regimes", - *see* Carlo Invernizzi Accetti, Ian Zuckerman, p. 184.

[54] The new meaning of militant democracy was introduced by Professor András Sajó in his article *"From Militant Democracy to the Preventive State?"*, where he "analyze[d] the potential systematic institutional effects that a total and protracted war on terror with increasing restrictions on civil liberties would bring about", - *see* Stephen G. Breyer, *Symposium on Terrorism, Globalization and the Rule of Law: An Introduction*, Cardozo Law Review, Vol. 27, No. 5, 2006, pp. 1981-1985, available at: http://cardozolawreview.com/Joomla1.5/content/27-

biggest amount of scholarly pieces on militant democracy has been dedicated to the "the use of executive authority and emergency powers".[55] Current practices of restricting the rights of suspected terrorists reflect the ideas of militant democracy, [56] which renders the regular human rights guarantees vulnerable in the context of counter-terrorism.

When states to fail to respect the rights of all individuals under their jurisdiction, potential victims might seek for remedies before international bodies that have jurisdiction over violations occurred in a given state. In order to assess the level of such protection enjoyed by suspected terrorists, it might be interesting to explore whether "militant democracy" provisions can be found in international human rights treaties and consider what effect do they have on the right of suspected terrorists to invoke, in particular, fair trial and due process rights.

On the international level, the concept of militant democracy was first reflected in Article 30 of the Universal Declaration of Human Rights, which provides that "nothing in [the] Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein".[57] All

5/BREYER.WEBSITE.pdf [accessed 31 January 2018]; *See* András Sajó, *From militant democracy to the preventive state?*, Cardozo Law Review, Vol. 27, No. 5, 2006, pp. 2255–2294, p. 2269, available at: http://cardozolawreview.com/Joomla1.5/content/27-5/SAJO.WEBSITE.pdf, pp. 2255–2294.

[55] Kathleen Cavanaugh, Edel Hughes, *Rethinking What is Necessary in a Democratic Society: Militant Democracy and the Turkish State*, Human Rights Quarterly, Vol. 38, No. 3, August 2016, 623-654, p. 626.

[56] *See* András Sajó, *supra* note 54, p. 2269], - explaining that "[t]he counter-terror state, following the logic of militant democracy, intends to protect certain fundamental rights and values by denying those rights to some people who are believed to abuse the system. The logic runs the risk of singling out certain groups of people as potential abusers of the opportunities that democracy and human rights have to offer".

[57] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 30; *See* Rory O'Connel, *Militant Democracy and Human Rights Principles*, Constitutional Law Review (2009), p. 3, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561002 [accessed 20 March 2018]. Reflecting a similar approach, Articles 29 of the Declaration provides:

> (1) […]
>
> (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the

three treaties under consideration – the ICCPR, the ECHR and the ACHR - contain a similar provision.[58] However, the ECHR which deserves a special attention in this regard, since it is the European Commission on Human Rights who first established the limits of militant democracy provision of the Convention, - Article 17, which stipulates that

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction

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> rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
>
> (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

[58] *See* Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 [hereinafter, the "ECHR"]:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Article 29 [hereinafter, the "ACHR"]:

> No provision of this 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;
>
> b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
>
> c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
>
> d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 5 (1) [hereinafter, the "ICCPR"]:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

> of any of the rights and 14 15 freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

This Article has been invoked on several occasions, where the Court and the European Commission on Human Rights were asked to declare that the individuals alleging violation of their rights under the ECHR were prevented from invoking the Convention, since their actions were aimed at destroying the values protected under the Convention.[59]

Both, - the Court and the Commission have relied on Article 17 in the context of banning political parties, - for example the Commission had ruled that the *German Communist Party* could not invoke Articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of assembly) Convention, since "those rights, if extended to the Communist Party, would have enabled it to engage in the very activities referred to in Article 17".[60] However, it reached the opposite conclusion in case of *Lawless v. Ireland*,[61] where it had to determine whether a suspected terrorist could invoke Articles 5 (right to liberty and security), 6 (right to a fair trial) and 7 (no punishment without the law) of the Convention.

The Commission did not provide much explanation with respect to the reasons of making a distinction between the cases of *German Communist Party* and *Lawless*. It did however, state that

> even if G. R. Lawless was personally engaged in IRA activities at the time of his arrest, Article 17 (art. 17) did not preclude him from claiming the protection of Articles 5 and 6 (art. 5, art. 6) of the Convention nor absolve the Irish Government from observing the provisions of those Articles, which protect every person against arbitrary arrest and detention without trial.[62]

[59] *See e. g. Refah Partisi (The Welfare Party) And Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003; *United Communist Party of Turkey and Others V. Turkey* no. 19392/92, 30 January 1998; *Lawless v. Ireland (No. 3)*, no. 332/57, 1 July 1961.
[60] *German Communist Party v. Germany*, no. 250/57, European Commission of Human Rights (Decision on the admissibility), 20 July 1957.
[61] *Lawless v. Ireland (No. 3)*, no. 332/57, 1 July 1961.
[62] *Lawless supra* note 59, para. 6.

In the light of this finding, as well as the subsequent case-law, it will be reasonable to suggest that the one of the most important reasons was the nature of rights alleged to be violated. As will be demonstrated in Chapter 3, international judicial bodies are not failing to find the states in breach of unqualified rights in cases of suspected terrorists. Of course, it would be wrong to say that international courts are not subjected to a political pressure. Even though they do not face the threat of jurisdiction-stripping (unlike domestic courts),[63] they can still avoid making decisions on certain cases, mostly by declaring applications inadmissible. For instance, most recently, the ECtHR has been strongly criticized[64] for dismissing claims against Turkey, [65] launched within several months after declaration of a state of emergency. [66] However, in its two most recent judgment on the matter,

[63] In this case, possible withdrawal from the Convention might be one of the concerns of the Court when making important decisions against Member States. This issue, together with non-implementation of decisions are, certainly, important topics. However, it is not for this paper to address them.

[64] Emre Turkut, *Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?*, EJIL:*Talk!*, 28 December 2016, available at: https://www.ejiltalk.org/has-the-european-court-of-human-rights-turned-a-blind-eye-to-alleged-rights-abuses-in-turkey/ [accessed 5 April 2018]; *See also* Michael O'Boyle, *Can the ECtHR provide an effective remedy following the coup d'état and declaration of emergency in Turkey?*, EJIL:*Talk!*, 19 March 2018, available at: https://www.ejiltalk.org/can-the-ecthr-provide-an-effective-remedy-following-the-coup-detat-and-declaration-of-emergency-in-turkey/ [accessed 5 April 2018].

[65] Turkey has become a subject of criticism from international human rights organizations and supervisory bodies primarily because of the declaration of state of emergency after a failed coup attempt in 2016 and its subsequent events, followed by derogation from certain obligations under the ECHR and ICCPR and arrests of thousands of people without a proper procedure. *See* Başak Bağlayan, *The Turkish State of Emergency under Turkish Constitutional Law and International Human Rights Law*, American Society of International Law, Vol. 21, Issue 1, 3 January 2017, available at: https://www.asil.org/insights/volume/21/issue/1/turkish-state-emergency-under-turkish-constitutional-law-and [accessed 26 January 2018]; Amnesty International, *Turkey: Human rights in grave danger following coup attempt and subsequent crackdown*, 18 July 2016, 17:58 UTC; European Commission For Democracy Through Law (Venice Commission), *Turkey - Opinion No. 865 / 2016 On Emergency Decree Laws Nos. 667-676 Adopted Following The Failed Coup Of 15 July 2016*, 109th Plenary Session, 12 December 2016, CDL-AD(2016)037, pp. 33-39; available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e [accessed 5 April 2018]; *See also Right to a fair trial is at risk in Turkey: Constitutional Court report*, Hürriyet Daily News, 14 February 2018, 13:25:11, available at: http://www.hurriyetdailynews.com/right-to-a-fair-trial-is-at-risk-in-turkey-constitutional-court-report-127302?utm_content=buffer9e940&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer [accessed 5 April 2018], - reporting that the Constitutional of Court of Turkey received 80,756 applications alleging the violation of the right to a fair trial in 2016, - a year of the coup attempt, whereas this number was 1,342 in year 2012, and 40,530 – in 2017. The ECtHR rejected, *inter alia* the following claims (available only in French): *Zihni c. Turquie*, no. 59061/16, 8 Décembre 2016, available at: https://hudoc.echr.coe.int/eng#{"fulltext":["Zihni"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER","DECISIONS"],"itemid":["001-169704"]} [accessed 5 April 2018]; *Mercan c. Turquie*, no. 56511/16, 17 Novembre 2016, available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-169094"]} [accessed 5 April 2018].

[66] In January 2018, Turkey extended the state of emergency for the 6th time and continues to be under the rule of emergency decrees until now. Venice Commission issued several opinions regarding these events, where it

involving Turkish journalists, - *Mehmet Hasan Altan v. Turkey*[67] and *Şahin Alpay v. Turkey*,[68] both decided on 20 March 2018, - the Court did eventually declare the applications partially[69] admissible and found Turkey in breach of Article 5 (1) of the Convention in both cases.

Partial criticism of these judgments will be provided in Chapter 3. However, the purpose of this section is to demonstrate that, as established by the European Commission, individuals shall not be denied their right to a fair trial and due process because of their alleged involvement in terrorist activities, even in cases where a state of emergency has been lawfully declared in the country. Furthermore, the obligation to protect human rights, including those of suspected terrorists, rests on international bodies,[70] and, specifically, on international human rights courts, when states fail to provide such protection. This duty of international bodies increases in cases of emergencies, which have long correlated with human rights violations, and the violations of the right to a fair trial and due process, in particular.

As discussed above, the Special Rapporteur observed that many states are now resorting to emergency powers, which, due to prolonged or permanent nature, [71] create the risk of lowering the standards for protection of human rights not only in genuine emergencies, but it peacetime as well.

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expressed its concerns, inter alia, with respect to the possibility of specific measures obtaining a permanent character. *See Turkey extends state of emergency for a sixth time*, Euronews, 9 January 2018, available at: http://www.euronews.com/2018/01/09/turkey-extends-state-of-emergency-for-a-sixth-time [accessed 5 April 2018] and Venice Commission *supra* note 65, paras 78-90.

[67] *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018.

[68] *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018.

[69] In *Mehment Hasan Altan*, the Court declared the claims under Article 5 (3), 5 (4) and 5 (5) inadmissible; in *Sahin Alpay*, the complaint under Article 5 (5) was also declared inadmissible.

[70] The author agrees that international bodies are to be regarded as "fiduciaries of humanity" and, in this regard, relies on the work of Evan Fox-Decent and Evan J. Criddle, *supra* note 52.

[71] Even though the HRC and the IACtHR consistently maintain emergencies, as well as derogations shall last for a limited amount of time only, the ECtHR's case-law has not suggested that non-temporary nature of derogations makes them unlawful. In fact, in *A. and Others v. United Kingdom*, the Court ruled that it is possible for a "public emergency" within the meaning of Article 15 to continue for many years. The Court does not consider that derogating measures put in place in the immediate aftermath of the al-Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not 'temporary'". *See infra* Section 3.2.

The recent state practice reflected in the report increases the necessity to strengthen international control over emergency measures, since, as argued previously, domestic authorities might not be reliable guarantors of the rights of all individuals in emergency situations and in the context of combating terrorism. However, in any event, strict scrutiny should have always applied in emergencies, predominantly because of high likelihood of human rights violations in emergencies.

As will further be demonstrated, the HRC, the ECtHR and the IACtHR have not been failing to find violations in individual cases, where specific emergency measures were deemed to be in compatible with the requirements set forth by derogation clauses. However, they have not explicitly stated that derogations have to be scrutinized strictly. Due to the reasons stated above, this paper suggests that a new, stricter standard should *explicitly* be applied *at least* in cases of alleged violations of the right to a fair trial and the right to liberty and security in emergencies.

Certainly, there are other rights that are likely to be suspended in emergencies and, hence, deserve special protection. This paper does not suggest that the two rights under consideration are more important than the rest. However, they should *a priori* trigger the strict scrutiny, since, as opposed to qualified rights, they have been recognized to contain guarantees that are essential for protection of absolute rights, from which no derogation is permitted.

It is important that the judgments *explicitly* mention that a different test applies in cases of emergency, since this would give the courts a reason for identifying *de facto* emergencies and examining them under strict scrutiny, similar to declared emergencies. As pointed out by Ms. Ní Aoláin, instead of derogating in accordance with the formal procedures prescribed by the human rights treaties, many states are using ordinary law to set forth the counterterrorism measures,

thereby "normalizing the exception".[72] An option suggested here is one of the ways in which *de facto* emergencies can be brought under international monitoring, since currently there are no mechanisms for addressing them and ensuring that emergency measures hidden within ordinary law do not become permanent. For instance, if a state of emergency is not declared and no derogation is officially made, the states do not have to provide international monitoring bodies with information regarding the measures adopted, the length of the period, *etc*.

Ensuring that emergency provisions are not incorporated into ordinary laws permanently is even more important with respect to the rights afforded to criminal defendants, since history suggests that this area is particularly targeted by counterterrorism measures. Examples of emergency regulations having a permanent effect can also be found with respect to these rights. For instance, while the right to remain silent was regarded as one of foundations of the English criminal justice system, it was abolished precisely because of adoption of the security measures, aiming to "bolster [the United Kingdom's] powers needed to wage a comprehensive war on terrorism in Northern Ireland".[73] Before the adoption of such measures, the proponents, including various public officials, were giving assurances that the curtailment of this would only be applicable in cases of suspected terrorists, within a limited geographical area. However, "the restrictions [on] the right to silence were not limited to those suspected of serious crimes related to terrorism, but were expanded and interpreted as relating to every criminal suspect or defendant in Northern Ireland".[74]

This example shows that the lack of control over emergency powers and the proper enactment of emergency provisions might threaten to permanently curtail not only the rights of those suspected

[72] Report on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism, *supra* note 1, para. 27.
[73] Oren Gross, Fionnuala Ní Aoláin, *supra* note 5, p. 184 and pp. 186-187.
[74] *Ibid*, pp. 184-185.

in terrorism, but of everyone suspected or accused of a crime. Furthermore, even in cases of declared emergencies, if a temporary nature of derogations is not subjected to strict control, the measures adopted in the context of emergency might last long enough to become a normal part of the domestic legislation. On one hand, the primary obligation of international judicial and quasi-judicial bodies under consideration is to provide remedies for the victims of human rights violation and not to monitor the legislation of states, as such. However, constantly emphasizing the incompatibility of certain emergency regulations with a State's human rights obligations might also have a deterrent effect on the spread of such emergency provisions.

Even if a standard of scrutiny suggested here is not applied to all rights, in any event, the right to a fair trial and the right to liberty and security shall be subjected to strict scrutiny in emergencies, - whether declared or *de facto*. The next Chapter will demonstrate that, although there is some agreement as to how to treat the rights of criminal defendants in case of emergency and counterterrorism, the approach of international human rights bodies are not identical. It will provide an overview of derogable as well as non-derogable the elements of the right to a fair trial and due process that are frequently curtailed in emergencies and will outline some differences existing in the jurisprudence of the HRC, the ECtHR and the IACtHR.

Chapter 2 – The Right to a Fair Trial and Due Process under the ICCPR, the ECHR and the ACHR

> *Today, the characters of Kafka and Camus are dispersed and forgotten in prisons of all continents. Many of the detainees are innocent, and those who are not, having been aggressors, become new victims. Their survival no longer has a spatial dimension, and the temporal one is what they may, perhaps, fathom in the hidden depths of their inner life.*[75]

The right to liberty and security of a person is one of the oldest rights[76] and is traceable back to the *Magna Charta Liberatum*.[77] The primary objection against arbitrary detention was the desire to avoid arbitrary government, since detention has been characterized as a "favorite and most formidable instrument of tyranny".[78] One of the most important reasons the right to be free from arbitrary detention lies at the heart of democracy is that it precludes those in power from imprisoning political opponents. From this standpoint, protection of due process guarantees becomes more important in states of emergency, where governments might assume broader powers

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[75] *Tibi v. Ecuador*, Inter-American Court of Human Rights (IACtHR), Judgment of September 07, 2004, Separate Opinion of Judge Cançado Trindade, para. 12, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_114_ing.pdf [accessed 27 January 2018]; *See also Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639, Separate Opinion of Judge Cançado Trindade, at 772, available at: http://www.icj-cij.org/files/case-related/103/103-20101130-JUD-01-05-EN.pdf [accessed 27 January 2018].

[76] Claire Macken, *Counter-terrorism and the Detention of Suspected Terrorists: Preventive Detention and International Human Rights Law*, New York: Routledge, 2011, p. 34.

[77] *Ibid*; *See* Manfred Nowak, *supra* note 4, p. 159; *See also* Haji N. A. Noor Muhammad, *Due Process of Law for Persons Accused of Crime*, in The International Bill of Rights: The Covenant on Civil and Political Rights, ed. Louis Henkin, New York: Columbia University Press, 1981, p. 138.

[78] Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, Harvard International Law Journal, 2003, Vol. 44, p. 507; *See also* Claire Macken, *supra* note 76, p. 66; *See also* Blackstone, *Commentaries on the Laws of England Book the Fourth*, reprint in 1992 Chapter the Eighteenth Book IV, p. 438:

> "To bereave a man of life …. without accusation or trial, would be so gross and notorious act of despotism, as must at once convey the alarm of tyranny … but confinement of a person, by secretly hurrying him to jail … is a less public, a less striking, and therefore a more dangerous engine of arbitrary government".

Cited in Macken, *supra* note 76, p. 34.

in order to suppress human rights[79] or weaken the opposition.[80] Besides the fact that that the due process guarantees "are precious for their own sake",[81] the right to liberty and security of a person is considered to be "inseparable from the right to humane treatment",[82] which is a peremptory norm. For these reasons, the right to liberty and security is regarded to be of the "highest importance 'in a democratic society'".[83]

The right to a fair trial, "is no less vital"[84] than the guarantees of due process. Its importance is highlighted by the fact that all four Geneva Conventions, as well as Additional Protocols establish an obligation to observe the fair trial guarantees.[85] Common Article 3 of the Geneva Conventions,

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[79] *See* UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, p. 3, available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf [accessed 8 December 2017];

[80] *See*, for example: Christian Bjørnskov, Stefan Voigt, Why Do Governments Call A State Of Emergency? On the Determinants of Using Emergency Constitutions, European Journal of Political Economy, 2017, 1-14, pp. 2-3, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2988014 [accessed 2 April 2018], - pointing out that "government[s] might also declare a state of emergency because it is eager to use the additional powers connected to a state of emergency in its own favor, for example to weaken its political opposition" and that "states of emergency may be called for reasons not associated with actual emergencies, but as a tool to improve the chances of remaining in office or to implement policies that would otherwise be blocked".

[81] UN Human Rights Committee (HRC), *General Comment No. 35: Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, para. 2 [hereinafter, "General Comment 35"].

[82] Chowdhury, *supra* note 8, p. 172; *See also* UN Human Rights Committee (HRC), General comment 35, *supra* note 81, para. 56 – stressing that "[a]rbitrary detention creates risks of torture and ill-treatment, and several of the procedural guarantees in article 9 serve to reduce the likelihood of such risks. Prolonged incommunicado detention violates article 9 and would generally be regarded as a violation of article 7." *See also* 1782/2008, *Aboufaied* v. *Libya*, paras. 7.4 and 7.6; 440/1990, *El-Megreisi* v. *Libyan Arab Jamahiriya*, para. 5.4; and Oraá, *supra* note 13, p. 106; *See also* Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, paras. 30-33.

[83] *See*, among other sources, *Medvedyev and Others v. France* [GC], no. 3394/03, 29 March 2010, para. 76, - citing *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12, and *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33. *See ibid*.

[84] UN Commission on Human Rights, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities: Erica-Irene A. Daes, *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: A Contribution to the Freedom of the Individual under Law*, 1983, E/CN.4/Sub.2/432/Rev.2, p. 135, para. 387, available at: https://digitallibrary.un.org/record/52410/files/E_CN.4_Sub.2_432_Rev.2-EN.pdf [accessed 17 March 2018].

[85] ICRC, Customary IHL Database, Rule 100: Fair Trial Guarantees, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100#Fn_2751A976_00003 [accessed 2 April 2018]; *See ibid*, footnote 2: "First Geneva Convention, Article 49, fourth paragraph; Second Geneva Convention, Article 50, fourth paragraph; Third Geneva Convention, Articles 102–108; Fourth Geneva Convention, Articles 5 and 66–75; Additional Protocol I, Article 75(4) (adopted by consensus); Additional Protocol II, Article 6(2) (adopted by consensus). The principle of the right to fair trial is also provided for in Article 17(2) of the Second Protocol to the Hague Convention for the Protection of Cultural Property".

which is recognized as a norm of customary humanitarian law, prohibits "the passing of sentences […] without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".[86] Furthermore, deprivation of the right to a fair trial is considered to be a war crime under statutes of international criminal courts and tribunals.[87] Given that minimum guarantees prescribed by Geneva Conventions apply during armed conflicts, they should *a fortiori* be applicable at all times, since it would make little sense if the standards for protection of human rights were higher during a war than in peacetime or lesser threats to the life of nation.[88] In addition, the right to a fair trial and access to courts, in particular, serve as necessary means for protecting other rights, such as the right to privacy in cases of unauthorized surveillance or similar excessive measures.

Together, the right to a fair trial and due process serve the goal to preserve criminal justice. They are inseparable in the sense that only protection guaranteed by both of these rights cumulatively can ensure respect for dignity and proper treatment of the suspects and defendants. These rights are so closely connected that some of the guarantees apply in the same manner to the right to liberty and security of a person as to the fair trial. For instance, impartiality and independence of the court

[86] International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, Article 3; International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, Article 3; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Article 3; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Article 3.

[87] ICRC, *supra* note 85; *ibid*, footnote 5: "ICC Statute, Article 8(2)(a)(vi) and (c)(iv); ICTY Statute, Article 2(f); ICTR Statute, Article 4(g); Statute of the Special Court for Sierra Leone, Article 3(g)".

[88] Chowdhury, *supra* note 8, pp. 89-101; *Ibid*, p. 211, footnote 529: "Dr. Jimenez de Arechaga (former president of the International Court of Justice): Final Recapitulation, Inter-American Seminar on State Security, Human Rights and Humanitarian Law, Inter-American Institute of Human Rights, San Jose, 1982. *See also* ILA Paris report (1984), 84-5; *See also* Oraá, *supra* note 13, p. 114 and pp. 107-108, - pointing out that "the standards formulated in the [Geneva] Conventions, together with their Protocols, could serve as indicators of the feasible standards applicable in the gravest situations and *therefore* at all times" (emphasis added); *See also* Questiaux, *supra* note 13, para. 68; *See also* Fitzpatrick *supra* note 13, pp. 51-52.

(reviewing the legality of detention)[89] and the right to counsel[90] are applicable not only in the course of trial, but on a pre-trial stage as well. Furthermore, as pointed out by the HRC, "some forms of conduct amount independently to a violation of article 9 and another article, such as delays in bringing a detained criminal defendant to trial, which may violate both paragraph 3 of article 9 and paragraph 3 (c) of article 14".[91] In addition, the Committee recognized that whenever arrest or detention occurs, "the procedural requirements of paragraphs 2 to 5 of article 9 apply in connection with proceedings falling within the scope of article 14".[92] Accordingly, in order to understand the human rights guarantees applicable to criminal proceedings (including the initial stage before the charges are brought as well as the trial itself), it is important to address both of these rights.

This Chapter will firstly review the elements of the right to liberty and security of a person the right to fair trial that are commonly infringed in states of emergency or counterterrorism and compare the guarantees envisaged in Articles 5 and 6 of the ECHR, Articles 9 and 14 of the ICCPR and Articles 7 and 8 of the IACHR, as well as other relevant provision of the treaties. The comparison of relevant paragraphs of these provisions will be analyzed separately in the light of the jurisprudence of bodies entrusted with their application. Where no substantial differences are

[89] *See* General Comment 35, *supra* note 81, para. 45, - pointing out that "paragraph 4 [of Article 9] entitles the individual to take proceedings before "a court," which should ordinarily be a court within the judiciary. Exceptionally, for some forms of detention, legislation may provide for proceedings before a specialized tribunal, which must be established by law and must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature".

[90] General Comment 35, *supra* note81, para. 46; *See also* Council of Europe, *The right to liberty and security of the person: A guide to the implementation of Article 5 of the European Convention on Human Rights*, December 2004, Human rights handbooks, No. 5 [hereinafter, the "Guide to Article 5"], para. 207, - stating that "equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention (Ovsjannikov v. Estonia, § 72; Fodale v. Italy, § 41; Korneykova v. Ukraine, § 68). It may also be essential that the individual concerned should not only have the opportunity to be heard in person but that he should also have the effective assistance of his lawyer (Cernák v. Slovakia, § 78)."

[91] General Comment 35, *supra* note 81, para. 53.

[92] *Ibid*, para. 61; *See ibid*, footnote 172: "263/1987, González del Río v. Peru, para. 5.1; 1758/2008, Jessop v. New Zealand, paras. 7.9–7.10".

found between the three treaties, the chapter will predominantly rely on the Human Rights Committee's interpretation of the ICCPR, which has been ratified by the overwhelming majority of the UN member states.[93] Considerations that are not directly relevant for the purposes of this thesis, such as specificities related to the arrest and detention of minors or detention for medical purposes will intentionally be omitted.

The last section of this chapter will outline the non-derogable aspects of these rights by relying not only on the jurisprudence of the HRC, the ECtHR and the IACtHR, but also on other sources that serve as "subsidiary means"[94] for interpreting international human rights law.

2.1. Elements of Due Process of Law

The first noticeable feature that distinguishes the ECHR from the two other treaties is that it enumerates the grounds for detention.[95] The drafting history the ICCPR reveals that there were proposals to include either twelve specific grounds of detention or an expanded list composed of forty grounds for restriction that would encompass all cases of lawful deprivation of liberty.[96] However, it was considered that the "Covenant should not give the impression of being a catalogue of restrictions to rights which it sets forth",[97] and hence, the proposals were rejected. The Inter-American Convention followed the steps of the Covenant.

[93] *See* Interactive Dashboard on Status of Ratifications, *International Covenant on Civil and Political Rights*, Web-site of the UN High Commissioner on Human Rights, available at: http://indicators.ohchr.org/ [accessed 6 pril 2018].
[94] United Nations, Statute of the International Court of Justice, 18 April 1946, Article 38 (1) (d).
[95] For a detailed overview of standards established by case-law of the ECtHR with respect to each of the grounds envisaged in Article 5 (1), *see* Guide to Article 5, *supra* note 89.
[96] Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff Publishers, 1987, p. 193 and pp. 187-192.
[97] *Ibid*, p. 193.

Prohibition of arbitrary deprivation of liberty, which is one of the core aspects of the right to liberty and security is provided in the following provisions:

Paragraph 1 of Article 9 of the ICCPR:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Paragraph 1of Article 5 of the ECHR:

> 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 noncompliance with the lawful order of a court or in order to secure the fulfilment 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;
>
> (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 unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Paragraphs 1-3 of Article 7 of the ACHR

> 1. Every person has the right to personal liberty and security.
>
> 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
>
> 3. No one shall be subject to arbitrary arrest or imprisonment.

Whereas the ICCPR and ECHR refer to the "liberty and security of a person",[98] the ACHR uses the words "personal liberty and security".[99] However, as far as the scope of the right is concerned, there is no practical difference.[100] In particular, the word "liberty" refers to the "freedom from confinement of the body, not a general freedom of action".[101] Furthermore, this right is narrower than the freedom of movement,[102] however, its application is not limited to the cases of detention.[103]

Definition of the words "arbitrary" and "prescribed by law"

Two out of 30 Articles of the Universal Declaration on Human Rights – Article 3[104] and Article 9[105] – reaffirmed the guarantees envisaged in Article 9 (1) of the Covenant.[106] Article 9 of the

[98] Article 9 of the ICCPR and Article 5 of the ECHR.
[99] Article 7 of the IACHR.
[100] IACHR, *Report on Terrorism and Human Rights*, *supra* note 44, paras. 119-120.
[101] General Comment 35, supra note 81, para. 3; *See* UN Human Rights Committee (HRC), *Wackenheim v. France*, Communication No. 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002), para. 6.3; Council of Europe, European Court of Human Rights, *Guide to Article 5 of the Convention*, 2014, para. 1.
[102] General Comment 35, *supra* note 81 para. 5, clarifying that "Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12".
[103] *Ibid*, para. 6: According to the HRC,

> "[e]xamples of deprivation of liberty include police custody, arraigo, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported. They also include certain further restrictions on a person who is already detained, for example, solitary confinement or the use of physical restraining devices. During a period of military service, restrictions that would amount to deprivation of liberty for a civilian may not amount to deprivation of liberty if they do not exceed the exigencies of normal military service or deviate from the normal conditions of life within the armed forces of the State party concerned".

See also Guide to Article 5, *supra* note 89, para. 3; *Guzzardi v. Italy*, no. 7367/76, 6 November 1980, para. 95.

[104] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 3: "Everyone has the right to life, liberty and security of person". *Comp*. with the first sentence of Article 9 (1) of the ICCPR: "Everyone has the right to liberty and security of person".
[105] *Ibid*, Article 9: "No one shall be subjected to arb itrary arrest, detention or exile". Comp. with the second sentence of Article 9 of the ICCPR: "No one shall be subjected to arbitrary arrest or detention".
[106] *See* Macken *supra* note 76, p. 37; *See also* UN Human Rights Committee (HRC), *General Comment No. 35: Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, para. 2.

UDHR provides that "no one shall be subjected to arbitrary arrest, detention or exile". The last word is omitted from the Covenant, however, the rest of the text is identical with the second sentence of Article 9 (1) of the ICCPR. During the drafting process of the Universal Declaration, the word "arbitrary" was considered to be the "key word in the text of Article 9".[107]

As expressed in the course of preparatory works, "the meaning of the general restrictive clause, incorporated in the second and third sentences of paragraph 1, seem[ed] to depend largely on the interpretation to be given to the word 'arbitrary".[108] In its General Comment on Article 9, the HRC clarified that the notion of "arbitrariness' is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality".[109] Similarly, the ECtHR found that "a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention".[110]

In addition to prohibition of arbitrariness, all three treaties require that the arrest be "prescribed by law", which affirms the principle *nullum crimen sine lege*.[111] This means that the grounds for detention prescribed by domestic legislation should be sufficiently clear.[112] The HRC further

[107] Macken *supra* note76, p. 37; *See* Laurent Marcoux Jr., *Protection from Arbitrary Arrest and Detention Under International Law*, Boston College International and Comparative Law Review, Vol. 5 (2), 1982, p. 354, p. 363, footnote. 124.
[108] Bossuyt, *supra* note 95, pp. 196-197; *See* A/2929, Chapt. VI, para. 29.
[109] General Comment 35, *supra* note 81, para. 12; *See ibid*, footnote 24: "1134/2002, Gorji-Dinka v. Cameroon, para. 5.1; 305/1988, Van Alphen v. Netherlands, para. 5.8."
[110] Guide to Article 5, *supra* note 89, para. 31.
[111] Macken *supra* note 76, p. 39.
[112] General Comment 35, *supra* note 81, para. 22; *ibid*, footnote 63: "*See* Concluding Observations: Philippines (CCPR/CO/79/PHL, 2003), para. 14 (vagrancy law vague), Mauritius (CCPR/CO/83/MUS, 2005), para. 12 (terrorism law), Russian Federation (CCPR/C/RUS/CO/6, 2009), para. 24 ("extremist activity"), and Honduras (CCPR/C/HND/CO/1, 2006), para. 13 ("unlawful association")"; *See also Clifford McLawrence v. Jamaica*, no. 702/1996, 26 April 1996,, CCPR/C/60/D/702/1996, para. 5.5, - stating that "violation of the principle of legality would occur in cases where the grounds of arrest or detention are not clearly established in domestic legislation"; *See also* Guide to Article 5, *supra* note 89, para. 22; "See, among others: Del Río Prada v. Spain [GC], § 125 and Medvedyev and Others v. France [GC], § 79; Toniolo v. San Marino and Italy, § 46", - ibid; *See also* Guide to Article 5, *supra* note 89, para. 26, - stating that

clarifies that under Article 9 of the Covenant, states are obliged to establish specific procedures for arrest and detention of individuals and to ensure that these rules are complied with by authorities exercising relevant power.[113] However, the breach of procedural rules under the domestic law does automatically amount to violation of Article 9.[114]

Accordingly, under the principles of international human rights law, every deprivation of liberty shall be free from arbitrariness and shall be conducted in accordance with the previously prescribed law, which satisfies the requirement of legal certainty.

Preventive detention

The question of preventive detention of suspected terrorists requires a separate and more substantial work than the present paper.[115] However, for the HRC's answer as to whether such practice is compatible with the prohibition of arbitrary detention, one could refer to the Committee's General Comment 35, where it stated that "such detention *presents severe risks of*

> "where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of 'lawfulness' set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".

[113] General Comment 35, *supra* note 81, para. 23. General Comment 35 further enumerates additional requirements of Article 9 of the Covenant, - *see ibid*:

> - "compliance with domestic rules that define the procedure for arrest by identifying the officials authorized to arrest specifying when a warrant is required
> - compliance with domestic rules that define when authorization to continue detention must be obtained from a judge or other officer, where individuals may be detained, when the detained person must be brought to court and legal limits on the duration of detention
> - compliance with domestic rules providing important safeguards for detained persons, such as making a record of an arrest and permitting access to counsel".

[114] *Ibid.*

[115] On this issue, *See, in general*, Macken *supra* note 76.

arbitrary deprivation of liberty. [and] would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available"[116] (emphasis added). The HRC also stated that the States bear the burden to demonstrate that an arrested person poses "a present, direct and imperative threat [which] cannot be addressed by alternative measures, and that burden increases with the length of the detention".[117]

Under the ECHR, one of the grounds for deprivation of liberty is "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority […] when it is reasonably considered necessary to prevent his committing an offence […]".[118] In *O'Hara v. The United Kingdom*,[119] even though no violation of this particular provision was found, the Court established that "exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the safeguard secured by Article 5 § 1 (c) is impaired".[120] Even if the requirement of "reasonableness" is satisfied at the time of initial arrest, Article 5 does not allow for such a detention to last indefinitely.[121]

Similarly, following the ECHR's standard of "reasonable suspicion", the IACtHR has ruled that the suspicion "must be based on specific facts, expressed in words; that is, not on mere conjectures or abstract intuitions".[122] The Court has also established that Article 7 "imposes temporal limits

[116] General Comment 35, *supra* note X, para. 15.
[117] *Ibid*. The Committee added that "States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken". *See ibid.*
[118] ECHR, Article 5 (1) (c).
[119] *O'Hara v. The United Kingdom*, no. 37555/97, 16 October 2001.
[120] *Ibid*, para. 35; *See also* , Fox, Campbell and Hartley, *supra* note X, paras. 32-34.
[121] *See e.g. A. and Others v. The United Kingdom*, *supra* note 275, para. 172.
[122] *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 21, 2007. Series C No. 170, paras. 101-103. *See* Inter-American Commission on Human Rights, *Report on the Use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II, Doc. 46/13, 30 December 2013, p.

on the duration of pre-trial detention and, consequently, on the State's power to protect the purpose of the proceedings by using this type of precautionary measure".[123] In addition, in its report on *The Use of Pretrial Detention in the Americas*,[124] the Commission pointed out, *inter alia*, the following principles applied by the Inter-American bodies:

> (1) pretrial detention should be the exception, not the rule;
>
> (2) the legitimate and permissible purposes of pretrial detention should be of a procedural nature, such as to avoid risk of flight or hampering of the course of proceedings;
>
> (3) consequently, the existence of probable cause of criminal acts is insufficient grounds to order the pretrial detention of a person;
>
> (4) even when there are procedural purposes for it, pretrial detention must be absolutely necessary and proportional […]
>
> (5) […]
>
> (6) pretrial detention must be issued for the length of time strictly necessary to fulfill the procedural purpose […] [125]

Hence, even though the treaties under consideration do not prohibit preventive detention *per se*, such a measure should be compatible with the requirements established by monitoring bodies in order not to constitute the arbitrary deprivation of liberty.

The right to be informed of charges

The right to be informed of charges in another important element of due process, which is often violated due to non-disclosure of relevant information in cases of suspected terrorists. The

76 and *ibid*, footnote 272, available at: http://www.oas.org/en/iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf [accessed 6 April 2018] [hereinafter, the "IACHR Report on Pretrial Detention"].

[123] Barreto Leiva v. Venezuela, Merits, Reparations, and Costs, Judgment of November 17, 2009, Series C No. 206, para. 119; I/A Court H.R., Case of Bayarri v. Argentina. Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 30, 2008, Series C No. 187, para. 70; *See* IACHR Report on Pretrial Detention *supra* note 122, p. 68 and *ibid*, footnote 232.

[124] IACHR Report on Pretrial Detention, *supra* note 122.

[125] *Ibid*, para. 21.

obligation of national authorities to provide information regarding the reasons of arrest and criminal charges against a person is envisaged in the following provisions:

Paragraph 2 of Article 9 of the ICCPR

> Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

Paragraph 2 of Article 5 of the ECHR

> Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

Paragraph 4 of Article 7 of the ACHR

> Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

The texts of these provisions suggest that emphasis was intended to be put on the obligation of national authorities to enforce the right to be informed of the reasons of arrest and relevant charges. During preparatory works of the ICCPR, a proposal has been made to rephrase paragraph 2 of Article 9 "in such manner as to set forth the right of the individual rather than the duties of authorities, the purpose of the Covenant being to guarantee rights and not to emphasize the duties".[126] However, it was rejected on the grounds that "paragraph 2 should not only be concerned with the right but should also contain the more important guarantee that the authorities were under an obligation to make it effective".[127] Drafter of the two other treaties appear to have taken the similar approach.

The right enshrined in the provisions listed above is closely tied to *habeas corpus*, since knowing the reasons of arrest makes it possible for the arrested persons to challenge the conduct of

[126] Bossuyt, *supra* note 96, p. 204.
[127] *Ibid*; *See* A/4045, para. 50.

authorities and seek remedies for unlawful deprivation of liberty.[128] Providing information of a general character, such as mere indication of legal basis of arrest will not be deemed sufficient for these purposes, - the reasons given by national authorities have to be specific enough to enable the effective exercise of the rights of the arrestee.[129]

Articles 9, 5 and 7 distinguish between two requirements – 1) notification regarding the reasons of arrest/detention; and 2) notification regarding the charges brought against a person. The difference between these requirements is the time within which the relevant information has to be communicated. The HRC noted that "information [regarding the reasons of arrest] must be provided *immediately* upon arrest"[130] (emphasis added). However, it also recognized that "in exceptional circumstances, such immediate communication may not be possible. For example, a delay may be required before an interpreter can be present, but any such delay must be kept to the absolute minimum necessary".[131] As to the second requirement of informing a person of criminal charges, - such information shall be provided "promptly".[132] Accordingly, whereas the first

[128] General Comment 35, *supra* note 81, para. 25; Campbell v. Jamaica, Communication No. 248/1987, U.N. Doc CCPR/C/44/D/248/1987, (30 March 1992) para. 6.3; *See also* Guide to Article 5, *supra* note 89, para. 114; and *Fox, Campbell and Hartley v. The United Kingdom*, nos. 12244/86; 12245/86; 12383/86, 30 August 1990, para. 40.
[129] General Comment 35, *supra* note 81, para. 25, - pointing out that "the reasons must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim"; *See* Willy Wenga Ilombe and Nsii Luanda Shandwe v. Democratic Republic of the Congo, Communication No. 1177/2003, U.N. Doc. CCPR/C/86/D/1177/2003 (2006), para. 6.2"; *See also* Guide to Article 5, *supra* note X, para. 122, - stating that "a bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 § 2". *See also Fox, Campbell and Hartley v. The United Kingdom*, nos. 12244/86; 12245/86; 12383/86, 30 August 1990, para. 40, - clarifying that "[a]rrested persons must be told, in simple, non-technical language that they can understand, the essential legal and factual grounds for the arrest, so as to be able, if they see fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4"; ibid, para. 41, - noting that "[o]n being taken into custody, Mr Fox, Ms Campbell and Mr Hartley were simply told by the arresting officer that they were being arrested under section 11 (1) of the 1978 Act on suspicion of being terrorists, [however] this bare indication of the legal basis for the arrest, taken on its own, [was deemed] insufficient for the purposes of Article 5 § 2 (art. 5-2)"; *See also Murray v. The United Kingdom* [GC], no. 14310/88, 28 October 1994, para. 76.
[130] General Comment 35, *supra* note 81, para. 27.
[131] *Ibid*; *See also* Michael and Brian Hill v. Spain, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (2 April 1997), para. 12.2.
[132] ICCPR Article 9 (1).

requirement has to be performed immediately, - at the time of arrest, the second one may be fulfilled "a few hours"[133] later.[134]

A minor difference between ECHR on one hand and ICCPR and ACHR on the other is that the former requires that information be provided in a language that the arrested/detained person understands. However, even though not explicitly mentioned, such a requirement is implicit in two other treaties as well.[135]

The right to be brought before a judge promptly

The requirement to bring an arrested or detained person before the judicial authority is also present in all three articles, which provide:

Paragraph 3 of Article 9 of the ICCPR

> Anyone arrested or detained on a criminal charge 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. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

Paragraph 3 of Article 5 of the ECHR

> 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 authorised 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 for trial.

[133] *Fox, Campbell and Hartley v. The United Kingdom*, nos. 12244/86; 12245/86; 12383/86, 30 August 1990, para. 42.
[134] *Ibid*; *See* General Comment 35, *supra* note 81, para. 30 and Guide to Article 5, *supra* note 89, para. 118.
[135] *See e.g*. Bossuyt, *supra* note 96, p. 205. During preparatory works, the Netherlands made a proposal to amend paragraph 2 of Article 9 of the ICCPR so that it required to deliver the reasons of arrest and the charges in a "language that [one] understands", which was supported "as an important safeguard for foreign residents and for persons using different languages in a country". (*See* A/4045, para. 53; A/C.3/SR.863, para. 1 (NL), para. 31 (B); A/C.3/SR.864, para. 3 (IND), para. 34 (PL). The amendment, in principle, raised no opposition, however, "it was felt that the amendment was implicit in the existing text, and that, in any case, the draft Covenant provided that its articles were to be applied without any discrimination" (*See* A/4045, para. 53; A/C.3/SR.865, para. 28 (TN). Accordingly, the amendment was rejected.

Paragraph 5 of Article 5 of the ACHR

> Any person detained 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 be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

An obligation to bring a person before "a judge or other officer authorized by law to exercise judicial power"[136] shall be fulfilled *promptly*. Even though the meaning of "promptness" might vary depending on circumstances of the case,[137] it does not allow much flexibility.[138] According to the HRC, any time exceeding 48 hours "must remain absolutely exceptional and be justified under the circumstances",[139] since the lack of judicial control over custody increases the risk of ill-treatment.[140] Another safeguard against the prohibition of torture and ill-treatment is that a person "must be brought to *appear physically* before the judge or other officer authorized by law to exercise judicial power"[141] (emphasis added). Given its crucial significance, the requirement to bring detained persons before a judge or other relevant authority promptly exists "in all cases without exception"[142] and it is irrelevant whether the detrained individual asserted his or her right.[143]

[136] ICCPR, Article 9 (3); ECHR, Article 5 (3); ACHR, Article 5 (5).
[137] General Comment 35, *supra* note 81, para. 33.
[138] *Medvedyev and Others v. France*, *supra* note 83, para. 121.
[139] General Comment 35, *supra* note 81, para. 33.
[140] *Ibid*, para. 33; *See* UN Human Rights Committee: *Concluding Observations: Hungary*, 19 April 2002, CCPR/CO/74/HUN, para. 8; *See also* Guide to Article 5, *supra* note 89, para. 129*;* and *Ladent v. Poland*, no. 11036/03, 18 March 2008, para. 72; *See also* Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), OC-8/87, Inter-American Court of Human Rights (IACrtHR), 30 January 1987, paras. 12 and 35.
[141] General Comment 35, *supra* note 81, para. 34; *See also* UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment : resolution / adopted by the General Assembly*, 9 December 1988, A/RES/43/173, principle 37, available at: http://www.un.org/documents/ga/res/43/a43r173.htm [accessed 2 April 2018]; *Medvedyev and Others v. France*, *supra* note 83, para. 121.
[142] General Comment 35, *supra* note 81, para. 32.
[143] *Ibid*; *See also* Guide to Article 5, *supra* note 89, paras. 132: "Article 5 § 3 does not provide for any possible exceptions from the requirement that a person be brought promptly before a judge or other judicial officer after his

Guarantees of impartiality (both – subjective[144] and objective) and independence of the court envisaged in the right to fair trial apply at this stage as well.[145] In addition, prolonged pretrial detention might also result in violation of the presumption of innocence, which is an element of the right to a fair trial.[146] The HRC added that "the States parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention".[147] Another element of the right to a fair trial which is also applicable here is that "in the hearing that ensues, and in subsequent hearings at which the judge assesses the legality or necessity of the detention, the individual is entitled to legal assistance, which should in principle be by counsel of choice".[148]

Habeas corpus

Depriving suspected terrorists to challenge the legality of their detention is definitely not unprecedented.[149] This remedy is enshrined in the following provisions:

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or her arrest or detention, not even on grounds of prior judicial involvement. […] The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3".

[144] Guide to Article 5, *supra* note 89, para. 144; *See e.g. Hood v. The United Kingdom*, no. 27267/95, 18 February 1999, para. 57; and *Medvedyev and Others v. France*, *supra* note 83, *supra* note 83, para. 122; *See* General Comment 35, *supra* note 81, para. 35; *See* UN Human Rights Committee (HRC), *General Comment No. 32, Article 14: Right To Equality Before Courts And Tribunals And To A Fair Trial*, 23 August 2007, CCPR/C/GC/32 paras. 32, 34 and 38 [hereinafter, "General Comment 32"], para. 21, - the Committee clarified that "the requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the
particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial". *See also* Karttunen v. Finland, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989 (1992), para. 7.2

[145] General Comment 35, *supra* note 81, para. 32; *See also Vladimir Kulomin v. Hungary*, Communication No. 521/1992, U.N. Doc. CCPR/C/50/D/521/1992 (1996), para. 11.3, - finding that "a public prosecutor cannot be considered as an officer exercising judicial power under paragraph 3". *See also* Guide to Article 5, *supra* note 89, paras. 141-142; *See Schiesser v. Switzerland*, no. 7710/76, 4 December 1979, para. 31; and *Medvedyev and Others v. France*, *supra* note 83, para. 123.

[146] General Comment 35, *supra* note 81, para. 37; *See* Geniuval M. Cagas, Wilson Butin and Julio Astillero v. The Philippines, Communication No. 788/1997 (17 September 1996), CCPR/C/73/D/788/1997, para. 7.3; IACHR, *Report on Terrorism and Human Rights*, *supra* note 44, para. 233; *Suárez Rosero*, para. 77.

[147] General Comment 35, *supra* note 132 paras. 32, 34 and 38.

[148] General Comment 35, *supra* note 81, para. 34; *See also* WGAD, *supra* note 141, principle 11.

[149] *See Shafiq Rasul, et al. v. Bush, President of the United States, et al.; Fawzi Khalid Abdullah Fahad Al Odah, et al. v. United States et al.*, 542 U. S. 466 (2004), United States Supreme Court, 28 June 2004.

Paragraph 4 of Article 9 of the ICCPR

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Paragraph 4 of Article 5 of the ECHR

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Paragraph 6 of Article 7 the ACHR

> Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

These provisions reflect the English writ of *habeas corpus*.[150] A remedy which they prescribe differs from compensation for unlawful detention, in that the former refers specifically to "release

[150] Macken *supra* note 76, p. 38; Haji N. A. Noor Muhammad, *Due Process of Law for Persons Accused of Crime*, in The International Bill of Rights: The Covenant on Civil and Political Rights, ed. Louis Henkin, New York: Columbia University Press, 1981, p. 144; *See* General Comment 35, *supra* note 81, para. 39; *See also Maksim Gavrilin v. Belarus*, Communication No. 1342/2005, U.N. Doc. CCPR/C/89/D/1342/2005 (2007).para. 7.4; Guide to Article 5, *supra* note 89, para. 188; *ibid*, para. 192, - pointing out that "under the ECHR, It is not excluded that a system of automatic periodic review of the lawfulness of detention by a court may ensure compliance with the requirements of Article 5 § 4. However, where automatic review has been instituted, the decisions on the lawfulness of detention must follow at "reasonable intervals (*Abdulkhanov v. Russia*, §§ 209 and 212-14, for a summary of the case-law in the context of detention under sub-paragraphs (a), (c), (e) and (f) of Article 5 § 1)." *See also* Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), OC-8/87, Inter-American Court of Human Rights (IACrtHR), 30 January 1987, paras. 33-34.
See also comparison of the writs of *habeas corpus* and *amparo*, in Sattar, *supra* note 13, p. 119:

> Whereas *habeas corpus* is a specific remedy guaranteeing the right to challenge the detention and seek release, "[t]he writ of *amparo* is a Latin American writ enabling a claimant to seek protection from any governmental infringement of rights and duties. The scope of *amparo* is thus much wider than that of the *habeas corpus*. While *amparo* can be used to challenge illegal detention, like the writ of *habeas corpus*, it can also be used as a remedy against violation of other basic rights and freedoms. In other words, the writ of *amparo* includes *habeas corpus* as one of its components, although in some cases *habeas corpus* functions as an independent remedy".

(either unconditional or conditional) from ongoing unlawful detention",[151] and not the financial compensation.[152] Hence, the purposes of this remedy, it is essential that the reviewing court[153] have the power to order release of a person who had been unlawfully detained.[154] In addition, the review of the legality of the detention shall be conducted in "speedily", [155] or, in case of the ICCPR and the ACHR, - without undue delay.

An important feature that distinguishes the ACHR from the two other conventions is that it explicitly prohibits the restriction or abolition or this remedy. Even though this specific provision is not included in the list of absolute rights under the Convention, the prohibition of derogation from habeas corpus is implied in the derogation clause. This was confirmed by the IACtHR in two of its advisory opinions, which will be addressed in the last section of this Chapter.

As stated above, *habeas corpus* is infringed when the defendants do not have an access to the evidence brought against them by the prosecutor. Where non-disclosure of sensitive material is necessary due to national security or other legitimate purpose, it is crucial that the defendants still have sufficient information to be able to challenge the legality of their detention. In addition,

[151] General Comment 35, *supra* note 81, para. 41; *ibid*, para. 44, - clarifying that The Committee clarified that "[u]nlawful' detention includes both detention that violates domestic law and detention that is incompatible with the requirements of article 9, paragraph 1, or with any other relevant provision of the Covenant".
[152] Guide to Article 5, *supra* note 89, para. 229.
[153] Guide to Article 5, *supra* note 89, para. 198: The "court" to which the detained person has access for the purposes of Article 5 § 4 does not have to be a court of law of the classical kind integrated within the standard judicial machinery of the country (Weeks v. The United Kingdom, § 61). It must however be a body of "judicial character" offering certain procedural guarantees. Thus the "court" must be independent both of the executive and of the parties to the case (Stephens v. Malta (no. 1), § 95)." *See also ibid*, para. 202: "The 'court' must have the power to order release if it finds that the detention is unlawful; *a mere power of recommendation is insufficient* (Benjamin and Wilson v. the United Kingdom, §§ 33-34)." (emphasis added).
[154] *Ibid*, para. 44; *See* Guide to Article 5, para. 151; *see also*, among other cases, *McKay v. The United Kingdom* [GC], no. 543/03, 3 October 2006, para. 40; *See also* Guide to Article 5, *supra* note 89, para. 45; *Weeks v. The United Kingdom*, no. 9787/82, 2 March 1987, para. 61.
[155] *See* Guide to Article 5, *supra* note 89, para. 207: "The question whether the right to a speedy decision has been respected must be determined in the light of the circumstances of each case (Rehbock v. Slovenia, § 84)." *See also ibid*, para. 214: "The term "speedily" cannot be defined in the abstract. As with the "reasonable time" stipulations in Article 5 § 3 and Article 6 § 1 it must be determined in the light of the circumstances of the individual case (R.M.D. v. Switzerland, § 42)."

according to the case-law developed by the ECtHR, the states shall offer adequate "counterbalancing mechanisms",[156] such as special advocates or special counsels, who will have an access to classified information and will be able to rely on them in the closed proceedings before national courts. However, in order for such special lawyers to "perform this function in any useful way […] detainee [shall be] provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate".[157] Hence, the matter is treated on a case-by-case basis[158] and the outcome will depend on whether the disclosed information was sufficient for the purposes of the right to challenge the legality of detention.

Compensation for unlawful detention

Besides *habeas corpus*, the treaties under consideration also provide another remedy for victims of unlawful deprivation of liberty, which is prescribed by the provisions below:

Paragraph 5 of Article 9 of the ICCPR

> Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Paragraph 5 of Article 6 of the ECHR

> Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 63 (1) of the ACHR

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

[156] *See e.g. A. and Others v. United Kindgom*, no. 3455/05 , 19 February 2009, para. 209.
[157] *Ibid*, para. 220.
[158] *Ibid*.

Even though Article 7 of the ACHR does not contain a separate paragraph regarding compensation, the Convention contains a general provision on compensation, - Article 63 - which has been relied upon by the Court in order to award damages, *inter alia*, in cases of unlawful deprivation of liberty.[159] A distinction between *habeas corpus* and the right to compensation is drawn by the two other treaties as well.[160] Both the HRC and the ECHR have maintained that effective enforceability of this remedy has to be ensured, - a mere existence of the right to receive financial compensation is insufficient.[161] The right to compensation might be triggered when arrest or detention are unlawful either under domestic law or international human rights law.[162]

With respect to general guarantees of the right to liberty and security of a person, no substantial contradictions are found either in the texts of the treaties under consideration, or in interpretations adopted by relevant bodies. Non-derogability of certain elements will be addressed in the last section of this chapter.

2.2. Elements of the Right to a Fair Trial

Similar to the right to liberty and security of a person, the right to a fair trial, as prescribed by all three treaties under consideration, does not have general limitation clauses. The only element

[159] *See* Matt Pollard, Panel Presentation: *Scope of Remedies upon a Successful Challenge to the Lawfulness of Detention*, UN Working Group on Arbitrary Detention Global Consultation on the Right to Challenge the Lawfulness of Detention, Panel 1: Framework, scope and content of the right to court review of detention 1-2 September 2014, p. 1, footnote 1: "See also Inter-American Court of Human Rights, Velásquez Rodríguez v Honduras, Series C no 7 (21 July 1989), para. 25; and Vélez Loor v Panama, Series C no 218 (23 Nov 2010), para. 255, where the Court reiterated, in a case involving arbitrary detention of an irregular immigrant, that the right to remedy and compensation under article 63 of the American Convention 'reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on a State's responsibility." available at: http://www.ohchr.org/Documents/Issues/Detention/Consultation2014/MatthewPollard.pdf [accessed 2 April 2018].
[160] General Comment 35, *supra* note 81 para. 49; Guide to Article 5, *supra* note 89, para. 224.
[161] *Ibid*, para. 50, - pointing out that "the remedy must not exist merely in theory, but must operate effectively and payment must be made within a reasonable period of time"; *See also* Guide to Article 5, *supra* note 89, para. 227, stating that "the effective enjoyment of the right to compensation must be ensured with a sufficient degree of certainty (*see*, for example, Ciulla v. Italy, § 44; Sakık and Others v. Turkey, § 60). Compensation must be available both in theory (Dubovik v. Ukraine, § 74) and practice (Chitayev and Chitayev v. Russia, § 195)".
[162] General Comment 35, *supra* note 81, para. 51.

subjected to limitations on specified grounds is the right to a public trial. With respect to other aspects and acceptable limitations, the opinions of the HRC, ECtHR and the IACtHR are less uniform as compared to the right to liberty and security of a person, addressed in the previous section. These differences are most noticeable in the context of emergencies and national security measures invoked in the course of counter-terrorism activities. This section will outline the general requirements of the fair trial and review the differences existing in interpretation and application of treaties under consideration. Special focus will be on those aspects that are of particular importance in the context of countering terrorism, - trial of civilians by military tribunals, the use of "faceless judges", presumption of innocence and the equality of arms.

Paragraph 1 of Article 14 of the ICCPR:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Paragraph 1 of Article 6 of the ECHR:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Paragraphs 1 and 5 of Article 8 of the ACHR:

> 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
>
> 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

The principle of equality before courts is enshrined in all three treaties and requires that "similar cases are dealt with in similar proceedings". [163] Provisions listed above apply to criminal, as well as civil cases, however, defendants in criminal cases are entitled to stronger guarantees. The words "criminal charges" primarily refer to conduct which is subjected to criminal sanctions under national criminal legislation. However, it might also encompass acts which are "criminal in nature, […] regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity".[164]

All three treaties prescribe the requirements of independence and impartiality of the tribunals; whereas ICCPR and ACHR also require that the tribunal be "competent", this notion is omitted form the ECHR. It is widely accepted that such a "tribunal" within the meaning of Articles 14, 6 and 8 have to enjoy institutional independence from executive and legislative branches, as well as autonomy in the process of adjudication.[165] As to the second common requirement, - a tribunal has

[163] General Comment 32, *supra* note 144, para. 14.
[164] *Ibid*, para. 15.
[165] *Ibid*, para. 18; *See also ibid*, para. 19, - the Committee clarified that "the requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. (Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), para.

to be impartial both objectively and subjectively,[166] meaning that if the doubts regarding its impartiality are justified, the requirement of independence and impartiality of the tribunal is not met.

Faceless Judges

A specific problem with special tribunals is the use of anonymous, - so-called "faceless judges", commonly invoked in the context of counter-terrorism.[167] Whereas the ECtHR as not dealt with this issue, the HRC and IACtHR assessed whether such composition of the court complies with the requirements of Articles 14 and 8.

In its General Comment 32, the HRC pointed out that trials conducted by anonymous judges are often accompanied with various "irregularities, such as exclusion of the public or even the accused or their representatives from the proceedings; restrictions of the right to a lawyer of their own choice; severe restrictions or denial of the right to communicate with their lawyers, particularly when held incommunicado; threats to the lawyers [etc]."[168] Without establishing whether the use of "faceless judges" *ipso facto* amounts to the breach of Article 9 of the Covenant, the HRC stated that whenever said "irregularities" occur, the requirements of independence and impartiality are not met by the tribunal, "with or without faceless judges".[169]

On the other hand, the human rights bodies of the Inter-American system explicitly denounce such practices. The IACtHR has held that anonymity of judges makes it impossible to assess and

18.) A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal (Communication No. 468/1991, Oló Bahamonde v. Equatorial Guinea, para. 9.4.)".

[166] *See* footnote 132 and accompanying text.

[167] General Comment 32, *supra* note 144, para. 23.

[168] *Ibid.*.

[169] *Ibid.*

challenge the competence of judges.[170] The use of "faceless judges" was deemed incompatible with the right to be tried by a competent, independent and impartial tribunal "principally because the anonymity of the prosecutors, judges and witnesses deprives the defendant of the basic guarantees of justice".[171] Such a strict approach is dictated by a wide-spread practice of the use of anonymous judges during the fight against domestic terrorism in the region. In this regard, the efforts of the IACtHR to preserve the guarantees of criminal justice, in general, have to be regarded as particularly efficient.

Trial of civilians by military tribunals

Another important issue which has come up in the context of counter-terrorism and emergencies, is the trial of civilians by military tribunals. The HRC addressed this point in its General Comment 32 and considered the trying civilians in military courts does not violate the Covenant. However, in each individual case, the trial must comply with guarantees envisaged in Article 14, which "cannot be limited or modified because of the military or special character of the court concerned".[172]

[170] *Lori Berenson- Mejía v. Peru*, Judgment of November 25, 2004 (Merits, Reparations and Costs), para. 147; *Castillo Petruzzi*, para. 133; *See also* César Landa, *Executive Power and the Use of the State of Emergency*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, pp. 221-222.

[171] *See* IACHR, *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102 doc. 9 rev. 1, 26 February 1999, paras. 121-127; available at: http://www.cidh.org/countryrep/colom99en/chapter-5.htm [accessed 23 March 2018];

[172] General Comment 32, *supra* note 144, para. 22; In this regard, the Committee has expressed serious concerns and noted that "Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials". With respect to the development of HRC's standards regarding civilian trials by military tribunals, *See* Claudia Martin, *supra* note 15, pp. 690-693 and p. 963, - pointing out that in General Comment 32, the Committee "appears to have refined the ambiguous standard of 'unavoidable' in *[Madani v. Algeria]* to the equally ambiguous one of the existence of 'objective and serious reasons". The author criticizing such an approach for leaving the "substantive content rather vague" and argues that "such poor delineation has proven to be particularly prejudicial in debates regarding the military trials of suspected terrorists". *See ibid.*

Similarly, the ECtHR, which has dealt with military courts and their composition in a number of cases, has never found that trial of civilians before such tribunals is *a priori* in breach of Article 6. The case law points to three different issues[173] in connection with military courts. Firstly, it establishes that "Article 6 does not prohibit the use of military trials to try service personnel accused of a criminal charge,[174] [so long as the] requirements of independence and impartiality [are met]".[175] Further, the Court "has developed an extensive body of jurisprudence regarding the use of special courts or national security courts comprised, in part, of active military members that have tried civilians in the context of counter-terrorism policy".[176] Even in cases where states have created certain safeguards,[177] the court did not hesitate to find a violation of Article 6 if the tribunals did not appear to be impartial for the neutral observer. In assessing impartiality, the Court takes into account, among other considerations, whether the rules of military discipline apply to members of military tribunals, whether their promotion depended in any manner on their activities as judges, and who had the power to appoint and dismiss these judges.[178]

With respect to impartiality and independence of military tribunals, the Court held that a decisive issue is whether "the doubts [of the accused regarding independence and impartiality of such courts] can be held to be objectively justified".[179] Even though the Court the court assesses military

[173] *See* Claudia Martin, *supra* note 15, pp. 703-705.
[174] *Morris v. United Kingdom*, no. 38784/97, 26 February 2002, para. 59; *Cooper v. United Kingdom*, no. 48843/99, 16 December 2003, para. 106.
[175] Claudia Martin, *supra* note 15, p. 703.
[176] *Ibid*, p. 704, - "These cases primarily evolved from the national security court system set up in Turkey to confront alleged terrorist threats posed against the integrity of the state (Incal v. Turkey, Karatas v. Turkey, Baskaya v. Turkey) which were made up of three judges, one of whom was an active member of the military (Incal v. Turkey, para. 66)".
[177] *See ibid*, - "[for instance], the military judges received the same professional training, and enjoyed the same constitutional safeguards, as their civilian counterparts; sat in the courts as individuals and not as representatives of the armed forces (*Incal* para. 67); according to the Turkish Constitution were independent and received no instructions from public authorities with regard to the cases in which they were involved (*Incal* para. 67); and, with certain exceptions, were not subject to removal or early retirement (*Gerger v. Turkey*, para. 60)".
[178] *See* Claudia Martin *supra* note 15, p. 704, *Incal*, para. 68.
[179] *Incal v. Turkey*, no. 41/1997/825/1031, 9 June 1998, para. 71

tribunals on a case by case basis, its jurisprudence suggests that "the presence of an active military member in the composition of the court trying a civilian for a security crime objectively creates sufficient concern for the accused regarding its independence and impartiality"[180] and therefore, violates the requirements set forth in Article 6 of the Convention. As to the tribunals comprised only of members of the army, - the Court held that trial of civilians by such tribunals will only be compatible with the Convention in "very exceptional circumstances".[181]

In contrast the ECtHR and the HRC, the IACtHR has developed an "unequivocal jurisprudence" [182] of finding the civilians' trials before military courts incompatible with the Convention. Interestingly, instead of focusing only on independence and impartiality of the tribunal, the Court has consistently referred to the competence of the tribunal. It ruled that "since military courts were set up to try crimes and misdemeanors relating to the discipline of the military service, the transfer of jurisdiction from ordinary courts to military ones for trying civilians suspected for terrorism constitutes a breach of the defendant's right to a competent court established by law."[183]

Relying on the jurisprudence of the Court, the Inter-American Commission also condemned the trial of civilians by military courts in its 2002 Report on Terrorism and Human Rights were it stated that

> [such tribunals] by their very nature do not satisfy the requirements of independence and impartial courts applicable to the trial of civilians, because they are not a part of the

[180] Öcalan v. Turkey, no. 46221/99, 12 May 2005, para. 113.
[181] *Ergin v. Turkey (No. 6)*, no. 47533/99, 4 May 2006, para. 44.
[182] Claudia Martin, p. 711; *See ibid*, footnote 151, - "It does not, however, prohibit the use of military courts to try military personnel, for, for example, crimes associated with military service. See, for example, *Case of Las Palmeras v. Colombia* (Judgment on the Merits), IACtHR Series C No 90 (6 December 2001), paras 51-2, 231; *Case of the 19 Merchants v. Colombia* (Judgment on the Merits, Reparations, and Costs), IACtHR Series C No 109 (5 July 2004) para. 165".
[183] Claudia Martin, *supra* note 15, p. 716; *See ibid*, footnote 179: *Castillo Petruzzi and others*, paras. 128-132; *Cantoral Benavides* para. 112; *Lori Berenson v. Peru*, para. 141; *See also* Claudia Martin, *supra* note 15, pp. 711-712; *See also* IACHR, *Second Report on the Situation on Human Rights in Peru*, OEA/Ser.L/V/II.106 (2 June 2000), para. 155.

> independent civilian judiciary but rather are a part of the Executive Branch, and because their fundamental purpose is to maintain order and discipline by punishing military offences committed by members of the military establishment.[184]

Hence, while the ICCPR and the ECHR do not prohibit trying civilians by military courts as long as they satisfy the criteria of independence and impartiality, the answer of Inter-American human rights bodies is straightforward. The aforementioned principles are applicable in cases of suspected terrorists as well, since none of the supervising judicial and quasi-judicial bodies under consideration has denied the civilian status to individuals engaged in terrorist activities committed outside the context of armed conflict.[185]

Paragraph 2 of Article 14 of the ICCPR

> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Paragraph 2 of Article 6 of the ECHR

> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

First sentence of paragraph 2 of Article 8 of the ACHR

> 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. […].

The presumption of innocence, has been regarded as a general principle of criminal law,[186] which is "fundamental to the protection of human rights, imposes on the prosecution the burden of

[184] IACHR, *Report on Terrorism and Human Rights*, *supra* note 44, para. 231; *See also* Martin, *supra* note 15, pp. 712-713.
[185] *See e.g.* IACHR, *Report on Terrorism and Human Rights*, *supra* note 44, paras. 74-75.
[186] *Ibid*, para. 222.

proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle".[187]

The IACtHR and the HRC have made it clear that deviation the presumption of innocence, is always prohibited,[188] including the cases of suspected terrorists. [189] However, the ECtHR does not seem to share such an approach and might even seem to apply somewhat low standards for the protection of this right. For instance, even though presumption of innocence under the Convention strictly requires that the burden of proof be on the prosecutor, in *Murray v. The United Kingdom*, [190] the Court found that drawing negative inferences from the silence of an individual accused of terrorism does not amount to infringement upon the presumption of innocence.

Paragraphs 3 and 5 of Article 14 of the ICCPR

> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any

[187] General Comment 32, *supra* note 144, para. 30; *See also Allen v. United Kingdom*, no. 25424/09), 12 July 2013, para. 93; Guide to Article 6, para. 200.
[188] General Comment 32, *supra* note 144, para. 6; *See* UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11.
[189] Serjio Garcia Ramirez, *The Inter-American Court of Human Rights' Perspective on Terrorism*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, p. 799; *See Garcia Asto and Ramirez Rajas*, para. 160.
[190] *See Murray v. United Kingdom*, no. 18731/91, 8 February 1996.

case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Paragraph 3 of Article 6 of the ECHR

Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Second sentence of paragraph 2 and paragraph 3 of Article 8 of the ACHR:

[…] During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

(a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

(b) prior notification in detail to the accused of the charges against him;

(c) adequate time and means for the preparation of his defense;

(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

(e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

(f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

(g) the right not to be compelled to be a witness against himself or to plead guilty; and

(h) the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

Guarantees enshrined in these provisions are intended to ensure, *inter alia*, the adversarial nature of the proceedings, and, - in a broader sense, - demonstrate the respect for the dignity of the defendant in a criminal case. Hence, they are of vital importance for achieving the purposes of criminal justice. However, the principle of the equality of arms deserves a special attention in the context of counter-terrorism or other cases concerning national security, where classified material used as evidence is often not being disclosed to the defendants.

The right to have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing is "an important element of the guarantee of a fair trial and an application of the principle of equality of arms".[191] In its General Comment 32, the HRC emphasized that the term "adequate facilities" also includes an "access [to] all materials that the prosecution plans to offer in court against the accused or that are exculpatory".[192]

[191] General Comment 32, *supra* note 144, para. 32; *See also* Michael Sawyers, Michael and Desmond McLean v. Jamaica, Communication No. 256/1987, U.N. Doc. CCPR/C/41/D/256/1987 (1991), para. 13.6.
[192] General Comment 32, *supra* note 144, para. 33; *See also* UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations, Canada*, 20 April 2006, CCPR/C/CAN/CO/5, para. 13, where the

Similarly, in its report on Terrorism and Human Rights, the IACHR has noted that "a defendant must be afforded access to documents and other evidence under the possession and control of the authorities necessary to prepare his or her case".[193]

The ECtHR has also upheld that adversarial nature of criminal proceedings is a fundamental element of the right to a fair trial[194] and that "in a criminal case … both prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party".[195] However, in a number of cases, it ruled that "the entitlement to disclosure of relevant evidence is not an absolute right".[196] With respect to grounds for limitation of the right to access the evidence, the Court stated:

> In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused [...] However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[197]

Committee expressed its concerns with respect to Canada's legislation regarding the "non-disclosure of information in connection with or during the course of proceedings, including criminal proceedings, which could cause injury to international relations, national defence or national security". It suggested that

> "The State party should review the Canada Evidence Act so as to guarantee the right of all persons to a fair trial, and in particular, to ensure that individuals cannot be condemned on the basis of evidence to which they, or those representing them, do not have full access. The State party, bearing in mind the Committee's general comment No. 29 (2001) on states of emergency, should in no case invoke exceptional circumstances as justification for deviating from fundamental principles of fair trial."

[193] IACHR, *Report on Terrorism and Human Rights*, *supra* note 44, para. 238.
[194] *Rowe and Davis v. United Kingdom*, no. 28901/95, 16 February 2000, para. 60.
[195] *Ibid*.
[196] *Ibid*, para. 61; *See* Egbert Myjer, *Human Rights and the Right against Terrorism*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, p. 778.
[197] *Rowe and Davis supra* note 194, para. 61.

Accordingly, the Court will only accept non-disclosure of sensitive material if it is "strictly necessary" and if adequate counterbalancing mechanisms are in place.[198] With respect to such mechanisms, the Court has referred to the "possibility of using special advocates [which] could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings".[199] Such an approach represents a productive effort to balance the guarantees encompassed by the right to a fair trial against the national security interest.

On the other hand, a very careful approach needs to be taken in assessing whether these "counterbalancing" measures are compatible with non-derogable aspects of the rights under consideration. Such elements of the right to a fair trial and the right to liberty and security of a person are addressed in the following section.

2.3. Non-derogable Aspects of Right to a Fair Trial and Due Process

A common feature shared by all three treaties under consideration is that none of them lists the right to fair trial or liberty and security of a person among non-derogable rights. However, preparatory works of ICCPR demonstrate the intention of some States Parties to heighten the standard for protection of these rights and elevate them to the rank of absolute rights.[200] In this regard, it has been suggested to "make a thorough study of the Articles that allowed no derogation",[201] which, included Articles 9 and 14 of the Covenant. Later, in 1993, the Sub-

[198] Egbert Myjer, *Human Rights and the Right against Terrorism*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, pp. 778-779; *See McKeown v. United Kingdom*, Application no. 6684/05, 11 January 2011.
[199] *A. and Others v. United Kingdom*, no. 3455/05, 19 February 2009, paras. 209 and 220.
[200] For example, in the process of drafting Article 4, France and the US proposed to add the rights to personal liberty (in entirety or partially) and specific minimum guarantees of the rule of law to the list on non-derogable rights provided in Article 4. *See* Nowak, *supra* note 4, p. 94.
[201] Bossuyt, *supra* note 96, p. 91.

Commission on Prevention of Discrimination and Protection on Minorities made a proposal to adopt Third Optional Protocol in order to proclaim non-derogability of Articles 9 and 14 of the Covenant, which was not shared by members of the HRC.[202]

The Committee was satisfied with the fact that "States parties generally understand that the right to *habeas corpus* and *amparo* should not be limited in situations of emergency".[203] In its 1994 report to the UN General Assembly, the HRC also noted that the proposed optional protocol would "implicitly invite States parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol".[204] Similar concerns were expressed by the International Committee of the Red Cross.[205] Hence, in order to avoid a possible "undesirable effect of diminishing the protection of detained persons during states of emergency", [206] discussions on adoption of additional protocol have ceased.

Guidance with respect to non-derogable aspects of Article 9 of the ICCPR is found in General Comments No. 35 and 29 of the Human Rights Committee, where it stated that "the procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights".[207] For instance, the right to have the legality of detention reviewed by the court, which is necessary for enforcing, *inter alia*, the

[202] Alfred de Zayas, *The United Nations and the Guarantees of a Fair Trial in the Internationa Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, in "The Right to a Fair Trial", eds. David Weissbrodt and Rudiger Wolfrum, Berlin, 1997, pp. 669-696, at 676; available at: http://hrlibrary.umn.edu/fairtrial/wrft-zay.htm
[203] United Nations Human Rights Committee, *Human Rights Committee Annual Report to the U.N. General Assembly*, U.N. Doc. A/49/40 vol. 1 (1994) , p. 120, para. 23, available at: http://hrlibrary.umn.edu/hrcommittee/hrc-annual94.htm
[204] *Ibid.*
[205] *See* Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Secretary-General: *The Administration of Justice and the Human Rights of Detainees: The Right to a Fair Trial*, 46th session, 13 June 1994, E/CN.4/Sub.2/1994/26, p. 14, para. 2, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/129/62/PDF/G9412962.pdf?OpenElement; *See also* de Zayas, pp. 677-678.
[206] *Ibid.*
[207] General Comment 35, *supra* note 81, para. 67.

prohibitions of arbitrary deprivation of life or torture and ill-treatment, "must not be diminished"[208] by states while derogating from its obligations under the Covenant. Similarly, with respect to Article 14 of the Covenant, the Committee stated that, derogation from the guarantees of fair trial is prohibited, whenever doing so will result in violation of absolute rights.[209] The covenant also prohibits deviations "from fundamental requirements of fair trial",[210] such as the presumption of innocence[211] and the principles of fair trial enshrined in international humanitarian law.[212] Finally, the Committee reiterated that the "requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an *absolute right* that is not subject to any exception"[213] (emphasis added).

General Comments of the HRC reflect the IACtHR's approach it its two of the most important advisory opinions on this matter, - *Habeas Corpus in Emergency Situations*[214] and *Judicial Guarantees in States of Emergency*.[215] The Court established that derogation of *habeas corpus* and *amparo* is directly prohibited by the Convention, since these guarantees "are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by

[208] *Ibid*; *See* UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 16.
[209] General Comment 32, *supra* note 144, para. 6, - here, the Committee clarified: "for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14. Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred"; *See also* General Comment 29, *supra* note 195, para. 11.
[210] General Comment 29, *supra* note 195, para. 16; *See also* General Comment 32, *supra* note 144, para. 6.
[211] General Comment 32, *supra* note 144, para. 6; *See also* General Comment 29, *supra* note 195, para. 16.
[212] General Comment 29, *supra* note 195, para. 16.
[213] General Comment 32, *supra* note 144, para. 19; *See Gonzalez del Rio v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987 (1992). para. 5.2.
[214] *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, OC-8/87, Inter-American Court of Human Rights (IACrtHR), 30 January 1987.
[215] *Judicial Guarantees in States of Emergency*, *supra* note 82.

Article 27 (2) and that serve, moreover, to preserve legality in a democratic society".[216] In addition, the Court considered that suspension of "any other effective remedy before judges or competent tribunal which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention"[217] is also prohibited. The Court stated that "judicial guarantees should be exercised within the framework and the principles of due process of law, expressed in Article 8 of the Convention",[218] which guarantees the right to a fair trial.

The approach of the Court in these advisory opinions was partly based on specificities of the American Convention,[219] which, in some regard, is more advance than the two other treaties.[220] In particular, Article 27, - the derogation clause of the Convention – explicitly prohibits suspension of the "*judicial guarantees essential for the protection of [absolute] rights*"[221] (emphasis added). However, even though no such explicit prohibition can be found in the ICCPR and the ECHR, there is a wide consensus among human rights bodies regarding the non-derogability of the writ of *habeas corpus* as well as other safeguards aiming to prevent the violations of absolute rights.

For instance, the in its *Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court*,[222] the Working Group on Arbitrary Detention stressed

[216] *Habeas Corpus in Emergency Situations*, *supra* note 214, para. 42.
[217] *Judicial Guarantees in States of Emergency*, *supra* note 82, para. 41 (1).
[218] *Ibid*, para. 41 (3); *See also* IACHR, *Report on Terrorism and Human Rights*, *supra* note 44, paras. 245 and 247.
[219] Oraá, *supra* note 13, p. 112.
[220] *Ibid*, *See also* Fitzpatrick *supra* note 13, p. 42.
[221] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Article 27 (2); *See* Oraá, *supra* note 13, 112. The author points out two specificities: "[the advisory opinion] provides a strong response to dreadful violations of the right to life and physical integrity occurring in the area, linked to states of emergency and facilitated by abrogation of the right to habeas corpus" and that "it seems like the States Parties to the ACHR have not explored the possibility of establishing other safeguards or guarantees against the possible abuses of arbitrary detention, outside the framework of this judicial procedure", - *See ibid*.
[222] UN Human Rights Council, *Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, 6 July 2015, A/HRC/30/37, para. 4; available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/149/09/PDF/G1514909.pdf?OpenElement [accessed 6 April 2018].

that international law does not allow derogation from the "right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate and accessible remedies".[223] Other bodies comprised of experts and highly qualified scholars[224] also agree that certain aspects of the right to a fair trial and the right to be free from arbitrary detention shall be respected even in times of emergency. For instance, Paragraph 70 of the *Siracua Principles*,[225] provides:

> Although protections against arbitrary arrest and detention (Art. 9) and the right to a fair and public hearing in the determination of a criminal charge (Art. 14) may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency. Respect for these fundamental rights is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation.[226]

[223] *Ibid*, para. 22; *See also ibid*, footnote 35, - pointing out that "The right to bring such proceedings before court is well enshrined in treaty law and customary international law and constitutes a peremptory norm (jus cogens)".
[224] Even though such sources are not directly binding, they are deemed to be subsidiary means for interpreting rules of international law. *See* the ICJ Statute, *supra* note 94.
[225] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4.
[226] *Ibid*, para. 70. The same paragraph clarifies that:

a) "all arrests and detention and the place of detention shall be recorded, if possible centrally, and make available to the public without delay;
b) no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge;
c) no person shall be held in isolation without communication with his family, friend, or lawyer for longer than a few days, e.g., three to seven days;
d) where persons are detained without charge the need of their continued detention shall be considered periodically by an independent review tribunal;
e) any person charged with an offense shall be entitled to a fair trial by a competent, independent and impartial court established by law;
f) civilians shall normally be tried by the ordinary courts; where it is found strictly necessary to establish military tribunals or special courts to try civilians, their competence, independence and impartiality shall be ensured and the need for them reviewed periodically by the competent authority;
g) any person charged with a criminal offense shall be entitled to the presumption of innocence and to at least the following rights to ensure a fair trial:

- the right to be informed of the charges promptly, in detail and in a language he understands,
- the right to have adequate time and facilities to prepare the defense including the right to communicate confidentially with his lawyer,
- the right to a lawyer of his choice, with free legal assistance if he does not have the means to pay for it,
- the right to be present at the trial,
- the right not to be compelled to testify against himself or to make a confession,
- the right to obtain the attendance and examination of defense witnesses,

Similarly, the necessity to respect these rights was underlined in the *Paris Minimum Standards*,[227] where the International Law Association stated:

> [Even in emergency situations] … the basic components of the right to a fair trial cannot be justifiably suspended. These protections include, in particular, the right to a fair trial by a competent, independent and impartial court for persons charged with criminal offenses, the presumption of innocence, the right to be informed promptly and intelligibly of any criminal charge, the right to adequate time and facilities to prepare a defense, the right to legal assistance of one's choice for free legal counsel where the interests of justice require, the right not to testify against oneself and protection against coerced confessions, the right to attendance of witnesses, the right of appeal, as well as respect for the principle of non-retroactive application of penal laws.[228]

Many other human rights bodies, experts and scholars have been particularly emphasizing the importance of the protection of the right to liberty and security of a person and the right to a fair trial in emergency situations. This is explained by the fact that the lack of respect for these rights renders it impossible to effectively prevent the violation, or provide compensation for violations of all rights, including the *jus cogens* norms.

This section outlined those elements of the right to liberty and security and the right to a fair trial that are accepted to be of the absolute nature. However, in addition to ensuring that these aspects are never subjected to derogations, international bodies shall put a special effort to ensure the preservation of the standards existing in relation to all other aspects of these rights, which gain

- the right to be tried in public save where the court orders otherwise on grounds of security with adequate safeguards to prevent abuse,
- the right to appeal to a higher court;

h) an adequate record of the proceedings shall be kept in all cases; and,

i) no person shall be tried or punished again for an offense for which he has already been convicted or acquitted".

[227] Chowdhury, *supra* note 8.

[228] *Ibid.*

particular significance in declared and *de facto* emergencies. Based on the jurisprudence of the bodies under consideration, the next Chapter will, *inter alia,* evaluate the standards applied in cases of declared emergencies and make suggestions on how the applicable scrutiny might be heightened.

Chapter 3 – Derogations from the Right to a Fair Trial and Due Process

Since international law only allows derogation in a state of emergency, it is necessary for this Chapter to firstly establish when can an emergency be declared and what requirements shall be met in adopting measures intending to deal with such situations. Further, relying on the jurisprudence of the ECtHR, the HRC and IACtHR, it will assess the level of discretion left to the states in derogating from the right to a fair trial and the liberty and security of a person. Lastly, it will suggest that explicitly applying strict scrutiny in such cases might improve international control over the abuse of emergency powers in states of declared and *de facto* emergencies.

3.1. General Requirements for the Validity of Derogations

All of the treaties under consideration allow states to derogate from their human rights obligations under exceptional circumstances. Even though their derogation clauses share significant similarities,[229] the texts are not identical.[230] Some differences are caused by relatively practical

[229] *See* Marko Milanovic, *Extraterritorial Derogations from Human Rights Treaties in Armed Conflict*, in *The Frontiers of Human Rights*, ed. Nehal Bhuta (Oxford: Oxford University Press, 2016, pp. 55-88), p. 59: "That the derogation clauses of the three treaties—Article 4 ICCPR, Article 15 ECHR, and Article 27 ACHR—are in many respects similar should come as no surprise. They address the same problem, the drafting of the ICCPR and the ECHR mostly overlapped in time, and those drafting the ACHR were able to draw inspiration from the older drafting materials and experiences of the two other treaties. They share the same basic structure. The first paragraph of each of the articles sets up the general power to derogate, and the substantive conditions for the exercise thereof. The second paragraph then specifies that some rights are non-derogable even in the gravest of emergencies. The third paragraph then crafts procedural rules regarding the international supervision of any derogation."

[230] ICCPR, Article 4:

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

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

considerations. For example, as opposed to Article 15 of the ECHR and Article 27 of the ACHR and the original drafts,[231] Article 4 of the Covenant refers only to the case of *public* emergency ("le cas où un danger public exceptionnel")[232] (emphasis in original). Given that the objective of the UN was to prevent the war, the original reference to war was struck in 1952 "in order to avoid

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

ECHR, Article 15:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2.
3. 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.

4. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe 14 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.

ACHR , Article 27:

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

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to 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.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States 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.

[231] The original draft referred, *inter alia*, to war. *See* Bossuyt, *supra* note 96, pp. 81-86; "The words "threatening the life of the nation" were adopted by 14 votes to 4, with no abstentions (E/CN.4/SR.331, p.5)"; *See ibid*, p. 87.
[232] Nowak, *supra* note 4, p. 89.

emphasizing this possibility".[233] This, however, does not mean that derogation from provisions of ICCPR is not possible during armed conflicts, since war is "a paradigmatic example of a public emergency justifying a derogation".[234] In this regard, it should be pointed out that essential differences exist between terrorism and situations of armed conflict.[235] Moreover, it has been widely recognized that not all acts of terrorism reach a threshold necessary for declaring a state of emergency.[236]

The second difference among these derogation clauses is that "the ICCPR and the ECHR both require a public emergency that threatens, or is threatening, 'the life of the nation', whereas the ACHR requires 'public danger, or other emergency that threatens the independence or security' of the state".[237] While initial draft of Article 27 of the ACHR was based on the texts of two other treaties, "the 'life of the nation' wording was later dropped for unclear reasons, but apparently without the intention of allowing for more expansive recourse to derogation".[238]

Further, the ICCPR and the ACHR contain an explicit prohibition of discrimination in cases of derogation, whereas the ECHR does not.[239] However, the requirement of non-discrimination is implicit in the former. The two other principles which shall be observed in adopting derogating measures are:

[233] Nowak, *supra* note 4, p. 85; *See* A/C.3/SR.1262.
[234] Milanovic, *supra* note 229, p. 63; *See also* Aly Mokhtar, *Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights*, The International Journal of Human Rights, 8:1, 2004, 65-87, pp. 66-67.
[235] IACHR, *Report on Terrorism and Human Rights*, *supra* note 44, para. 73; *See supra* note 44 and accompanying text.
[236] *Ibid*, para. 3.
[237] Milanovic, *supra* note 229, p. 60.
[238] *Ibid*; *See also* Oraá, *supra* note 13, p. 27, pointing out that"[t]he interpretation given to the expression 'public emergency which threatens the independence or security of the State', which caused some anxiety because of its possible low threshold of application, has in fact been interpreted by the ACtHR in a way very similar to the construction of the concept of 'public emergency threatening the life of the nation' within the European and UN systems".
[239] Milanovic, *supra* note 229, pp. 55-88, p. 60.

(1) proportionality, i.e., "the measures must be strictly required by the exigencies of the situation";[240] and

(2) consistency, i.e., "the measures should not be inconsistent with the States' other obligations under international law".[241]

Another crucial limitation which is applicable after the state of emergency is declared the measures adopted due to the state of emergency have to be temporary;[242] this requirement is closely tied to the "necessity" of measures. Even if the state of emergency has been lawfully declared and even if derogation from rights was justified under the international human rights law at the initial stage, those measures will become unlawful as soon as the necessity thereof ceases to exist. While the ACHR directly refers to temporal limitations, this requirement is also implied in the two other treaties.

To conclude the textual comparison, it is worth pointing out that both the ECHR and ACHR have extensively relied on the draft Covenant in framing the derogation clause.[243] On the other hand, as far as jurisprudence of the bodies entrusted with application of these treaties is concerned, - it is the European Commission and Court which "has the longest case law concerning emergencies [and] has had a remarkable influence on the construction of the derogation clause by the other more recent international bodies".[244] Accordingly, since the comparison of jurisprudence

[240] Sattar, *supra* note 13, p. 197.
[241] *Ibid*; For a detailed analysis and comparison of these principles as applied by the HRC, ECtHR and IACtHR, *see* Oraá, *supra* note 13, pp. 140-207.
[242] UN Human Rights Committee (HRC), CCPR General Comment No. 29: *Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 2.
[243] *See, e.g.* Oraá, *supra* note 13, p. 32, stressing that the Covenant "was the inspiration of the derogation clauses of the ECHR and the ACHR". For a more detailed comparison of derogation clauses under these three treaties, *see* Oraá, *supra* note 13, pp. 11-83; *See also* Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With a Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs*, (The Hague: Martinus Nijhoff Publishers, 1998); Fitzpatrick, *supra* note 13, pp. 55-66;
[244] Oraá, *supra* note 13, p. 270; *See ibid* "Although the interpretation of the derogation clause could in theory have been different (due to the differences between the European Convention and the other two treaties), the practice of

regarding derogation clauses *per se* is beyond the purposes of this work, it should suffice to proceed with establishing the general framework on the example of the case law of the ECtHR,[245] which also serves as a source for interpreting derogation clauses under the two other treaties. However, additional details which are specific to the framework established by the two other treaties and make the monitoring essentially different from the European system will be clarified in the subsequent section.

Lawless v. Ireland [246] was the first case where the Court defined Article 15 of the Convention. Relying on this judgment, the Commission further clarified this definition in *Greek Case*,[247] stating that in order for the declared emergency to be justified under Article 15, it has to satisfy the following criteria:

(1) "it must be actual or imminent;[248]

(2) its effects must involve the whole nation;

(3) the continuance of the organized life of the community must be threatened;

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the UN Human Rights Committee and that of the Inter-American Commission and Court show a similar construction of the principles of the derogation clause".

[245] For a more detailed assessment of the width of margin of appreciation in the context of derogations under Article 15 of the ECHR, *See* Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (New York: Intersentia, 2002), pp. 176-189.

[246] *Lawless v. Ireland*, *supra* note 59; *See ibid*, para. 28, - stating that "in the general context of Article 15 (art. 15) of the Convention, the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear" and that they "refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".

[247] Council of Europe, European Commission of Human Rights, *Greek Case* (Denmark v. Greece, Norway v. Greece, Sweden v. Greece and Netherlands v. Greece), nos. 3321/67, 3322/67 3323/67, and 3344/67, Report of the Sub-Commission, Vol. 1, Part 1.

[248] The Commission pointed out that even though this requirement is absent from the English text of the *Lawless* judgment, the Court did make a reference to imminence in French text. The commission considered that "it [was] the French text which [was] authentic" and therefore, it "must [have been] given weight" , *See Greek Case*, p. 69, para. 112:

French text:

> "une situation de crise ou de danger exceptionnel et imminent qui affecte l'ensemble de la population et constitue une menace pour la vie organisée de la communauté composant l'État."

(4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate".[249]

Accordingly, the States are not free to declare an emergency and derogate whenever they please. When selecting appropriate measures necessary for dealing with emergencies, however, - as well as when assessing the existence of emergencies, - national authorities do enjoy a certain level of discretion, framed by the European Commission on Human Rights as the "margin of appreciation". This concept encompasses the "latitude a government enjoys in evaluating factual situations and in applying the provisions enumerated in international human rights treaties".[250] The doctrine "is inherent in, and naturally derived from, the original understanding that the Convention should serve as a system complementary but subsidiary to national systems".[251] Even though it originally emerged in the context of the European human rights law, other international human rights bodies[252] have also relied on the concept of margin of appreciation.

The doctrine of margin of appreciation was first invoked with respect to Article 15 of the Convention. In particular, in its report regarding the emergencies occurred in Cyprus, the Commission considered that the authorities of the United Kingdom "should be able to exercise a

[249] *Ibid*, p. 70, para. 113; *See also* Brian Doolan, *Lawless v. Ireland (157-1961): The First Case Before the International Court of Human Rights. An international Miscarriage of Justice?* (Burlington: Dartmouth Publishing, 2001), pp. 211-213 and p. 252; *See also* Mokhtar *supra* note 234, pp. 67-69.
[250] Arai-Takahashi, *supra* note 245, p. 2.
[251] *Ibid*, p. 3.
[252] *Ibid*, p. 4 and *ibid*, footnotes 9 and 10; *See also* Dominic McGoldrick, *The Interface Between Public Emergency Powers And International Law* (Oxford University Press and New York University School of Law 2004, 380 I.CON, Vol. 2, No. 2, 2004, 380–4,. p. 400, - stating that "the most notable difference in the jurispudential approaches is that the HRC has maintained that it does not use a margin-of-appreciation approach even though express reference to this doctrine was made during the discussions of the UN's Third Committee in 1963". With respect to state discretion under jurisprudence of the Inter-American Court, *See Héctor Faúndez Ledesma, The Inter-American System for the Protection of Human Rights. Institutional and Procedural Aspects,* 3rd edition, Inter-American Institute of Human Rights, (San Jose, 2008), pp. 57-64, available at: https://www.iidh.ed.cr/IIDH/media/1751/interamerican_protection_hr-2008.pdf [accessed 6 April 2018].

certain measure of discretion in asserting the extent strictly required by the exigencies of the situation".[253] Further, in the *Greek Colonels* cases,[254] even though the respondent State's attempt to "plea[d] a margin defense"[255] was unsuccessful,[256] the Commission had "due regard [to the] 'margin of appreciation".[257] The doctrine was subsequently formulated in Commission's report on the *Lawless* case, where it recognized that the respondent State had "a certain discretion – a certain margin of appreciation … in determining whether there exists a public emergency which threatens the life of nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention".[258] By *implicitly*[259] relying on the margin of appreciation, the Court found no violation.

The doctrine of appreciation was first explicitly invoked in *Ireland v. UK*, where the Court granted the national authorities a "wide margin of appreciation"[260] in deciding "both on the presence of

[253] Arai-Takahashi, *supra* note 245, p. 5; *See also Handyside v. United* Kingdom, no. 5493/72, 7 December 1976, para. 48. The Court pointed out that the standard "strictly required by the exigencies of the situation" is different from the words "absolutely necessary" and "strictly necessary" (found in Articles 2 and 6 of the Convention); *See also McCann and Others v. United Kingdom*, no. 18984/91, 27 September 1995, where the Court established that "the use of the term "absolutely necessary" in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether state action is 'necessary in a democratic society' under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2", - *See* Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, (The Hague: Kluwer Law International, 1996), pp. 15-16.

[254] *Denmark v. Greece, Norway v. Greece, Sweden v. Greece, Neterlands v. Greece,* in 12 Yearbook of the European Convention, 1969.

[255] Yourow, *supra* note 247, p. 18.

[256] *See ibid*, p. 19: "The suspension by the Greek government of all constitutional rule of law was manifestly not 'at least on the margin' of the powers which Article 15 confers upon the national authorities, as was put to the Court by Waldock in *Lawless*".

[257] *Ibid*, p. 18.

[258] Arai-Takahashi, *supra* note 245, p. 5; *See also* Brian Doolan, *Lawless v. Ireland (157-1961): The First Case Before the International Court of Human Rights. An international Miscarriage of Justice?* (Burlington: Dartmouth Publishing, 2001), pp. 209-211.

[259] Yourow, *supra* note 247, p. 17; *See ibid*, p. 18, footnote 31: In *Lawless*, "[the Court] did not use the term 'margin of appreciation', but with regard to the question of the existence of a public emergency the Court stated *inter alia* that such emergency 'was reasonably deduced by the Irish Government from a combination of several factors'".

[260] *Ireland v. United Kingdom*, no. 5310/71, 18 January 1978, para. 207.

such an emergency and on the nature and scope of derogations necessary to avert it".[261] Later on, the Court expanded application of the doctrine beyond Article 15 as well[262] and has been relying on it with respect to individual rights of non-absolute nature, including those protected under Articles 5 and 6 of the Convention.[263] However, it is important to point out that, in general, "the nature of the right or the type of case is a factor that affects the width of the margin of appreciation or the amount of deference to be accorded to the state".[264] For example, the difference between Articles 5-6 and 8-11 is that the former "do not 'invite' the state discretionary factor *a fortiori*, as do the Personal Freedoms Articles [since] they do not contain the limitation clauses common to Articles 8-11 (with the Article 6 exception barring press and public from trials).[265]

Adjusting the width or margin of appreciation depending on the nature of right or a type of case (for instance, where the case involves national security, the tribunals generally give states an extended margin of appreciation)[266] is typical primarily to the European context. However, even within the ECtHR, the idea that certain amount of deference shall be allowed in cases of unqualified rights is not shared unanimously. For instance, in their dissenting opinion on *Brogan and Others v. The United Kingdom*, concerning the arrest of suspected terrorists, Judges Walsh and Carrillo Salcedo explicitly stated that "Article 5 [of the ECHR] does not afford to the State *any margin of appreciation*. If the concept of a margin of appreciation were to be read into Article

[261] *Ibid*; *See also* Arai-Takahashi, *supra* note 245, p. 73. Compare the majority opinion with the separate opinion of Judge O'Donoghue, calling upon treating the word "strictly" with "special attention"; *See* Mokhtar *supra* note 234, p.72.
[262] *See Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, *(Belgian Linguistics* case) No.2 (Merits), ECHR, Series A, no 6, 1968.
[263] *See* Arai-Takahashi, *supra* note 245, pp. 6-7.
[264] Legg, *supra* note 9, p. 201; *See ibid*, footnote 1: Here, the "nature of right" refers to the first-order attributes of the right in issue, e.g. life, freedom of expression, etc. The "type of case" refers to groupings of cases that can be within one right or across several rights, e.g. national security (including rights to liberty, fair trial etc.), cases about state surveillance (a subject of privacy rights), etc., which may share some first-order and second-order considerations".
[265] Yourow, *supra* note 247, p. 192.
[266] *Ibid*, p. 153; *See also* Arai-Takahashi, *supra* note 245, p. 21.

5, it would change the whole nature of this all-important provision which would then become subject to executive policy"[267] (emphasis added).

The author shares this view and is of the opinion that the same approach shall be applied with respect to the right to a fair trial. This goes for all cases of alleged violations of these rights. However, increasing the standard of their protection is particularly important in emergency situations, which suffer from "a historic deference to the State's assessment"[268] of the circumstances. Although it is not true that the bodies under consideration are failing to find violation of these rights in cases of emergency, the necessity clearly establish the standards for derogation and explicitly apply strict scrutiny still persists. These issues will be addressed in subsequent sections.

3.2. The Extent of Allowed Derogations from the Fair Trial and Due Process Guarantees: A Proposal to Heighten the Standard

As it has been shown, the European Commission and the Court consider that the States Parties to the Convention shall be given a broad discretion, *inter alia*, in declaring a state of emergency and adopting relevant measures to handle the threat facing the "life of nation". Such an approach stems from a certain level of trust[269] in States, which, as often argued, is present in the European Context. Even though the ECtHR has managed to protect the fair trial and due process rights of suspected

[267] *Brogan and Others v. United Kingdom*, nos. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, 62, Dissenting Opinion of Judges Walsh and Carrillo Salcedo in Respect of Article 5 Para. 1 (c) (Art. 5-1-c).
[268] Report on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism, *supra* note 1, para. 26; *See also* Legg, *supra* note 9, p. 154, - pointing out that, under the jurisprudence of the ECtHR, derogation in states of emergency is one of the issues where states have an expertise,
[269] *See* Evan J. Criddle, *Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference*, College of William & Mary Law School William & Mary Law School Scholarship Repository, Faculty Publications 1840, 2014, p. 218, available at: http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2880&context=facpubs [accessed 6 April 2018];

terrorists, its "margin of appreciation" doctrine, together with other possible considerations[270] might be preventing it from being strict enough in addressing all the relevant aspects of the use of emergency powers.

For instance, it missed an opportunity to establish significant principles applicable during emergencies in case of *Brannigan and McBride v. The United Kingdom*,[271] which was brought before the Court by suspected terrorists, claiming the violation of Article 5. Here, acting as a third party, NGOs - Liberty, Interights and the Committee on the Administration of Justice argued that, "if States are to be allowed a margin of appreciation at all, it should be narrower the more permanent the emergency becomes".[272] In addition, the Amnesty International "maintained that strict scrutiny was required by the Court when examining derogation from fundamental procedural guarantees which were essential for the protection of detainees at all times, but particularly in times of emergency".[273] However, in response to this, citing *Ireland v. The United Kingdom*, the Court reiterated that

> it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.[274]

[270] This paper does not intent to speculate with respect to the Court's political considerations. However, a suggestion that considerations of such nature might play a role in the outcome is not deemed to be groundless.
[271] *Brannigan and McBride v. The United Kingdom*, nos. 14553/89; 14554/89, 25 May 1993.
[272] *Ibid*.
[273] *Ibid*, para. 43; *See also* Mokhtar *supra* note 234, p. 74.
[274] *Ireland v. The United Kingdom*, no. 5310/7, 18 January 1978, para. 207; *Brannigan and McBride v. The United Kingdom*, *supra* note 265, para. 43.

Similarly, in *A and Others v. The United Kingdom*,[275] the Court, contrary to the Applicants' claim,[276] disregarded the requirement that emergency measures shall be limited in time, and asserted that a state of emergency can last for "many years".[277] It "[did] not consider that derogating measures put in place in the immediate aftermath of the al-Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not 'temporary'".[278] Whereas it had an opportunity to emphasize the temporary nature of emergencies in considering the validity of derogations, the ECtHR merely accepted that "the question of the proportionality of the response *may* be linked to the duration of the emergency"[279] (emphasize added). However, it should also be pointed out that the proportionality test applied by the Court in cases of derogation is not strict and "the tendency is rather to stress the margin of appreciation".[280] Respondent States do not bear the burden of demonstrating that less intrusive measures were not available.[281]

Nevertheless, achievements of the Court in this area should not be undermined. For instance, even taking into account the "special features' of terrorism", [282] the Court has ruled the detention in police custody without judicial review for 4 days and 6 hours was beyond "the strict constraints as

[275] *A. and Others v. United Kindgom*, no. 3455/05, 19 February 2009.
[276] *ibid*, para. 110.
[277] *Ibid*, para. 178.
[278] *Ibid*; Nevertheless, the measures adopted by the United Kingdom in this case were deemed to be unlawful due to their discriminatory nature. In this case, the Court also In A and others v. UK, the Respondent State invoked Article 15 of the Convention "in order to derogate from the provisions of Article 5, and the Court found that sufficient evidence existed of a public emergency threatening the life of the nation. However, it rejected the legality of the subsequent measures adopted by UK on the basis that they 'were disproportionate in that they discriminated unjustifiably between national and non-nationals ". *See A. and Others v. UK*, *supra* note 269, para. 190; *See also* Egbert Myjer, *Human Rights and the Right against Terrorism*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White (New York: Oxford University Press, 2012), p. 777.
[279] *A. and Others v. United Kingdom*, *supra* note 186, para. 178.
[280] Arai-Takahashi, *supra* note 245, p. 177.
[281] *Ibid.*
[282] *Ibid*, p. 28; *See Brogan and Others v. United Kingdom*, *supra* note 267, para. 62.

to time"[283] permitted under Article 5 (3).[284] This threshold has been applied in subsequent jurisprudence.[285] In addition, the Court refused to allow the lowering of standards required by Article 5. For example, in *Fox, Campbell, and Hartley v. The United Kingdom*,[286] the applicants suspected of terrorism were arrested on grounds of the officer's "honest suspicion".[287] Since the Convention prescribes a higher standard of "reasonable suspicion", for which the government did not provide sufficient evidence, the Court found the violation of Article 5(1).[288]

Besides the United Kingdom, another State Party to the Convention that has resorted to derogations is Turkey. In case of *Aksoy v. Turkey*, [289] the applicant argued in the proceedings before the Commission that "during the course of his detention, he was not brought before a judge or other authorised officer in violation of Article 5 (3)".[290] The government argued that there was no violation of Article 5, since Turkey had derogated from this right in accordance with Article 15 of the Convention. The Court ruled that, even though the element of "public emergency threatening the life of the nation" was met,, it "[was] not persuaded that the exigencies of the situation necessitated the holding of the applicant on suspicion of involvement in terrorist offences for fourteen days or more in incommunicado detention without access to a judge or other judicial officer".[291] Since the measures were not strictly required by the exigencies of the situation, Turkey was found in breach of Article 5 (3) of the Convention.[292]

[283] *Brogan and Others supra* note 267.
[284] *See* Arai-Takahashi, *supra* note 245, p. 28.
[285] *Ibid*; *See, e.g. Sakik and Others v Turkey*, nos. 87/1996/706/898-903, 26 November 1997, para. 65.
[286] *Fox, Campbell and Hartley v. UK*, nos. 12244/86; 12245/86; 12383/86, 30 August 1990.
[287] *See ibid*, para. 34.
[288] Legg, *supra* note 9, p. 156.
[289] *Aksoy v. Turkey*, no. 21987/93, 18 December 1996.
[290] *Ibid*, para. 34.
[291] *Ibid*, para. 84.
[292] *Ibid*, paras. 86-87.

With respect to measures adopted in the aftermath of declaration of a state of emergency in 2016,[293] Turkey was also found in breach of Article 5 (1) of the Convention in two recent cases brought by detained Turkish journalists *Mehmet Hasan Altan v. Turkey*[294]and *Şahin Alpay v. Turkey*,[295] discussed in Chapter 1. In these cases, submissions of third parties – the Council of Europe Commissioner for Human Rights, United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the NGOs[296] demonstrated that the arrest and pre-trial detention of journalists, without sufficient corroborating evidence had become a wide-spread practice in Turkey, in particular, after declaration of a state of emergency.[297] However, the Court missed an opportunity to address such a practice, as well as a prolonged nature of a state of emergency in Turkey.

Even if these finding were not relevant for the outcome of these two specific cases, it is important that the Court treats such reports with due regard. As has been previously mentioned, many applications brought prior to the two judgments have been declared inadmissible.[298] It is not unreasonable to suggest that acknowledging the existence of the wide-spread practice of arbitrary arrests of journalists and questionable efficiency of the domestic remedies could have had an impact on the admissibility of these applications. In particular, admissibility criteria such as the exhaustion of domestic remedies might in such cases be made more flexible, the standard of proof

[293] *See supra* note 65 and accompanying text.
[294] *Mehmet Hasan Altan v. Turkey*, *supra* note 67.
[295] *Şahin Alpay v. Turkey*, *supra* note 68.
[296] The following NGOs made a joint third party submission: ARTICLE 19, the Association of European Journalists, the Committee to Protect Journalists, the European Centre for Press and Media Freedom, the European Federation of Journalists, Human Rights Watch, Index on Censorship, the International Federation of Journalists, the International Press Institute, the International Senior Lawyers Project, PEN International and Reporters Without Borders, - *See Mehmet Hasan Altan v. Turkey*, *supra* note 67, para. 7.
[297] *Mehmet Hasan Altan v. Turkey*, *supra* note 67, paras. 117-119; *Şahin Alpay v. Turkey*, *supra* note 68, paras. 96-98.
[298] *See infra* pp. 16-17; *See also* Turkut, *supra* note 64.

resting upon the petitioner might be lowered, or the burden of proof might entirely be shifted to the Respondent State.

Identifying and taking into account wide-spread human rights violations is a well-established practice in the jurisprudence of the IACtHR, in particular, with respect to non-derogable rights, such as the prohibition of torture.[299] A practical outcome of establishing the existence of such practices is that the Court applies a probabilistic reasoning and requires a lower standard of proof from the applicants to demonstrate that the violation has occurred.[300] It should also be pointed out that, while the ECtHR consistently applies the "margin of appreciation" doctrine, the jurisprudence of the IACtHR suggests that the Court does not leave to much space for the States' discretion and "is reluctant to treat national authorities as altruistic agents for their people during times of crisis".[301] For instance, in its Advisory Opinion on *Habeas Corpus in Emergency Situations*,[302] the Court stated:

> It cannot be denied that under certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a democratic society. The Court cannot, however, ignore the fact that abuses may result from the application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27 [of the American Convention] and the principles contained in other relevant international instruments. This has, in fact, been the experience of our hemisphere.[303]

As to the specific cases regarding the suspension of rights of suspected terrorists, - it is the case of *Castillo Petruzzi et al v. Peru*[304] which is considered to be "the paradigmatic case which brought

[299] *See Loayza-Tamayo v. Peru*, Judgment of September 17, 1997 (Merits).
[300] Álvaro Paúl, *In Search of the Standards of Proof Applied by the Inter-American Court of Human Rights*, Revista Instituto Interamericano de Derechos Humanos, Vol. 55, 2012, p. 84.
[301] Criddle, *supra* note 269, p. 217; *See ibid* footnote 95; Legg, *supra* note 8, p. 31.
[302] *Habeas Corpus in Emergency Situations*, *supra* note 214.
[303] *Ibid*, para. 20; *See also* Criddle, *supra* note 269, p. 17.
[304] *Castillo-Petruzzi et al. v. Peru*, Judgment of May 30, 1999, IACtHR; For the detailed analysis of this and other cases, as well as the overview of counter-terrorism measures which have been adopted in Peru, *see* Ralph Ruebner et al., *The War On Terrorism: Peru's Past And Present, A Legal Analysis*, 2004, available at: https://repository.jmls.edu/cgi/viewcontent.cgi?article=1005&context=whitepapers [accessed 23 March 2018].

about the change in counter-terrorism policy".[305] Here, the Court acknowledged the Respondent State's "*right and the duty* to guarantee its own security"[306] (emphasis added), however, it stressed that

> [this] right and duty [must always be exercised] within limits and according to procedures that preserve both public safety and the fundamental rights of the human person. Obviously, nothing justifies terrorist violence –no matter who the perpetrators- that is harmful to individuals and to society as a whole. Such violence warrants the most vigorous condemnation. The Court's primary function is to safeguard human rights, regardless of the circumstances.[307]

Eventually, considering that "the period of approximately 36 days that elapsed between the time of detention and the date on which the alleged victims were brought before a judicial authority is excessive and contrary to the provisions of the Convention",[308] the Court ruled that Peru was in breach of Article 7 (5) of the Convention.[309] Besides *Castillo-Petruzzi*, the Court delivered many other judgments, where it ruled that the emergency measures adopted for fighting domestic terrorism were not compatible with Articles 7 and 8 of the Convention. However, its approach with respect to non-derogability of certain guarantees envisaged in these Articles is best expressed in its Advisory Opinions.[310]

In *Habeas Corpus in Emergency Situations*, and *Judicial Guarantees in States of Emergency*, which have been addressed in the previous Chapter as well, the Court was very clear in saying that

[305] César Landa, *Executive Power and the Use of the State of Emergency*, in Counter-Terrorism: International Law and Practice, eds. Ana María Salinas de Frías, Katja LH Samuel, Nigel D. White, New York: Oxford University Press, 2012, p. 221, - "[In *Castillo-Petruzzi*] the Court declared not only that the trial was invalid, but also that the penal counter-terrorism legislation was incompatible with the ACHR. In that sense, it ordered that the accused be guaranteed a new trial ensuring full respect of due legal process".
[306] *Castillo-Petruzzi et al. v. Peru*, *supra* note 304, para. 89; *See also Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, para. 154.
[307] *Castillo-Petruzzi et al. v. Peru*, *supra* note 304, para. 89.
[308] *Ibid*, para. 111.
[309] *Ibid*, para. 112.
[310] *Habeas Corpus in Emergency Situations*, *supra* note 214; *Judicial Guarantees in States of Emergency*, *supra* note 82.

even in emergency situations, the rights which are intended to prevent violation of absolute rights (*habeas corpus* and *amparo*) as well as to provide an effective judicial remedy for violations, cannot be suspended. The Court emphasized that in order for such guarantees to exist, it is not enough for the domestic law to prescribe them, - rather, judicial remedies "must be truly effective in establishing whether there has been a violation of human rights and in providing redress".[311] It also specified that such remedies will be deemed "illusory"[312] if, *e.g.* the judiciary does not satisfy the requirements of independence and impartiality, if judicial proceedings are unjustifiably delayed or in any other case where victims cannot access the judicial remedies.[313] The Court has never provided exhaustive list of "judicial remedies" the suspension of which is prohibited,[314] however, it is clear that, even though Articles 7 and 8 are not non-derogable, the Court interpreted the Convention as having the aspects of absolute nature.

Besides the Court, another important actor, in particular, with respect to emergencies in the Inter-American system, is the Inter-American Commission on Human Rights (IACHR). It is a quasi-judicial body, which accepts individual petitions against the States Parties to the Organization of American Stats (OAS), conducts monitoring of human rights in these countries and issues thematic, annual and country reports on human rights in the OAS countries.[315] The IACHR is recognized to be a "very effective fact-finding body [which has] the greatest experience among

[311] *Judicial Guarantees in States of Emergency*, *supra* note 82, para. 24.
[312] *Ibid.*
[313] *Ibid.*
[314] Ladesma, *supra* note 246, p. 111.
[315] *See*, OAS website, *What is the IACHR?*, available at: http://www.oas.org/en/iachr/mandate/what.asp [accessed 6 April 2018]; For detailed information regarding the Commission's competences and activities, *See* Ledesma, *supra* note 246, pp. 133-156.

international bodies in conducting on-site visits during states of emergency".[316] In this regard, the Commission's power to act on its own initiative[317] is of particular significance.

The Commission receives information regarding "violations of human rights in a state of emergency comes mainly from communications or complaints, filed by individuals or groups or associations".[318] As opposed to the HRC, the ACHR's jurisdiction over individual petitions is mandatory for all OAS Member States.[319] In addition, annual reports submitted by the IACHR to the General Assembly of the OAS[320] "have always been one of the main sources of exposure of abuses of human rights".[321] The Commission is a strong monitoring body, which is capable of assessing the situation on the ground not only based on state reports, but most efficient, through its on-site visits. As compared to other monitoring bodies, the IACHR is, hence, better informed of human rights violations in a state of emergency.

The Commission refers a case to the Inter-American Court and participates in the proceedings before it.[322] Given its efficiency in fact-finding, its participation in these proceedings is very useful for the Court, as well as victims, who now have an independent status and are entitled to full participation. Whereas the ECtHR might briefly mention the third party submissions, without substantially relying upon them, a special relationship between the IACtHR and the IACHR have proven to be much more productive. For instance, it was the Commission who requested the advisory opinion on *Habeas Corpus in Emergency Situations*, and, referring to its own annual

[316] Chowdhury, *supra* note 8, pp. 71-72; *See also* Oraá, *supra* note 13, p. 57.
[317] *Ibid*, p. 71.
[318] *Ibid*, p. 73.
[319] ACHR, Article 44; See *also* Chowdhury, *supra* note 8, p. 73.
[320] *Ibid*, Article 41 (g).
[321] Chowdhury, *supra* note 8, p. 72.
[322] For a detailed overview of the IACHR's functions, *See* Ladesma, *supra* note 246, pp. 133-155.

report, asserted that violations of non-derogable rights, including the prohibition of torture, have occurred due to the detainees' inability to benefit from *habeas corpus*.[323]

Here, the Court explicitly relied on the findings of the Commission, shared its views and delivered a groundbreaking opinion which strengthened the protection of the right to liberty and security, as well as laid the grounds for the second advisory opinion on *Judicial Guarantees in States of Emergency*, requested by the government of Uruguay. Even though advisory opinions are formally binding only on the requesting State, they have shown to have an effect on all other States Parties to the Convention.[324] Such a success of was largely possible due to specificities of the Inter-American system of human rights, - in particular, the conventionality control.

Not all supervisory bodies are, however, as effective as the IACHR. Under the ICCPR, the body conducting monitoring of human rights situation in States Parties is the HRC. The Committee receives regular reports from States regarding implementation of the Covenant, to which it responds by concluding observations[325] and makes decisions on individual complaints (communications) launched under the Optional Protocol I.[326] During the 6th annual meeting of the States Parties to the ICCPR, a suggestion has been made to confer the power on the HRC "to institute special proceedings in the event of a state of emergency".[327] However, the Soviet

[323] *Habeas Corpus in Emergency Situations*, *supra* note 214, para. 36.
[324] *See, e.g Solicitada por la República de Costa Rica Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo*, Opinión Consultiva Oc-24/17 De 24 De Noviembre de 2017 (available Only In Spanish). The Court's findings in apply to all States Parties to the ACHR, some of which are already taking steps in order to ensure their compliance with the Opinion.
[325] *See* UN Office of the High Commissioner for Human Rights, CCPR, Human Rights Committee, available at: http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx [accessed 6 April 2018].
[326] UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[327] Nowak, *supra* note 4, pp. 86.

representative objected this proposal on procedural grounds, after which the discussion on the matter ended.[328]

Hence, the HRC cannot be seen as a powerful body which would exercise control over the abuse of emergency powers. Besides the fact that the jurisdiction over communications is optional, the implementation of the Committee's individual communications is not as strong as that of the ECtHR.[329] In addition, the fact-finding capacities of the HRC are not as effective as of those the IACHR. Even though the Committee does constantly express its "concerns" with respect to emergencies in specific States, the reporting procedure under the ICCPR still does not ensure the States' compliance with their obligation to respect the rights of all individuals in emergencies and to act within the strict confines of Article 4 of the Covenant.

In 1984, a group of experts produced the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*,[330] where they intended, *inter alia*, to identify the rules governing derogation under the ICCPR and the ways of conducting monitoring over the use of emergency powers.[331] In Principle 73, they advised the HRC to "develop a procedure for requesting additional reports […] from States parties which have given notification of derogation […], or which are reasonably believed by the Committee to have imposed emergency measures subject to the constraints of Article 4".[332] The second part demonstrates that the dangers posed by *de facto* emergencies, as outlined by the Special Rapporteur Ní Aoláin, were being given consideration even 35 years ago. This was, as it is today, due the obvious failure of "many States to notify the declaration of emergency [or] to proclaim the

[328] *Ibid.*
[329] *See* Oraá, *supra* note 13, p. 48.
[330] *Siracusa Principles*, *supra* note 13.
[331] *Ibid*, p. 3.
[332] *Ibid*, para. 73; *See also* Chowdhury, *supra* note 8, p. 79.

state of emergency even if the situation amounts to a *de facto* state of emergency due to numerous derogations".[333]

For this reason, the Committee has been trying to get more information on general situation in countries by directly asking questions to State representatives.[334] Regrettably, however, the Committee is not well-informed not only on cases of non-declared emergencies, but sufficient information is oftentimes not provided even when States are formally derogating from their obligations under the Covenant. Nevertheless, the HRC has still managed to play its role in upholding the rights of all individuals suspected or accused of crime in emergency situations. In particular, as demonstrated in the previous Chapter, the HRC's General Comments 29, 32 and 35 set limit to a States' power to derogate from the right to a fair trial and due process. In the light of the Committee's limited powers and lack of cooperation from some States,[335] applying higher standards to individual communications concerning these rights in emergencies might not bring about substantial practical changes. However, clearly establishing that alleged violations of said rights have to be treated with a strict scrutiny are likely to have an impact on other international bodies exercising broader judicial powers.

This is due to the fact that, in contrast to some States Parties to the ICCPR, international courts tend to treat the HRC's views with due respect. For instance, even the International Court of Justice ("the ICJ"), which does not generally deal with human rights issues, has relied on the Committee's General Comments in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the*

[333] Oraá, *supra* note 13, p. 50.
[334] *Ibid*.
[335] *See* Oraá, *supra* note 13, p. 21 and p. 48.

Congo)[336] - a case concerning "the arrest, detention and expulsion of an individual".[337] Here, the ICJ stated that "[this Court] *should ascribe great weight* to the interpretation adopted by this independent body that was established specifically to supervise the application of [the ICCPR]"[338] (emphasis added). Other international bodies have also taken into account the Committee's work. Hence, a suggestion for the HRC to establish a higher standard for assessing the violation of fair trial and due process rights in a state of emergency is relevant and necessary.

[336] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010.
[337] *Ibid*, p. 640.
[338] *Ibid*, p. 664, para. 66.

Conclusion

This paper has attempted to address the threats posed by modern states of emergencies in the context of counterterrorism and argued that there is a necessity to heighten monitoring over the abuse of emergency powers. It addressed the weaknesses of the national judiciaries' approach towards protecting human rights of all individuals and in the light of these findings, suggested that the duty of international tribunals to provide such protection increases in states of emergency.

In the second chapter, it compared the fair trial and due process guarantees relevant to the context of counter-terrorism and demonstrated that some differences exist among the standards adopted by the bodies under consideration. It also showed that, even though these rights are not of absolute nature, they have non-derogable aspects that can never be suspended. The last chapter analyzed the framework for declaring a state of emergency and derogating from human rights. In the light of the jurisprudence of the bodies under consideration, it outlined some significant differences regarding the assessment of violations of fair trial and due process rights, as well as monitoring over emergencies in general.

It has been shown that international judicial and quasi-judicial bodies have undertaken significant efforts to preserve the guarantees of criminal justice even in a state of emergency and counterterrorism. However, their jurisprudence does not directly indicate that the rights under consideration are to be assessed with a strict scrutiny. The IACHR and the HRC have explicitly stated that those aspects of the right to a fair trial and due process that are essential for preserving non-derogable rights cannot be suspended. However, this paper suggests that all of the elements of these rights have to be benefiting special protection in states of emergency, given their frequent violation. As it has been pointed out in Chapter 2, an attempt to elevate these two rights to the rank

of non-derogable rights though the additional protocol was not deemed to be beneficial, since it might have given the impression that the States had the power to suspend even those guarantees that are of absolute nature.

Similarly, creating new treaties or additional protocols, establishing a special body authorized to conduct effective monitoring over all cases of emergency, or any similar measure depending on the consent of States is not likely to work for the purposes of decreasing the risk of abuse of emergency powers. Rather, it is the existing organs that should consistently apply well-established principles[339] and to not allow the fight against terrorism to destroy the achievements accomplished in the field of human rights.

Today, explicitly applying strict scrutiny to cases involving alleged violations of the fair trial and due process would amount to changing an approach. A direct effect of doing so will be that the bodies entrusted with application of the treaties under consideration will also have to take into account *de facto* emergencies, where states failed to derogate from their obligations. Jaime Oraá, - the author of one of the most influential studies conducted on states of emergency, has pointed out that *ex officio* application of derogation clauses will weaken the requirement to provide notification regarding derogation measures.[340] Firstly, it has to be pointed out that the study was produced in 1992, - almost a decade before the global "war" on terror, and hence, a wide-spread practice of non-derogation started. Secondly, even though this view is, in general, to be shared, a suggestion made in the present paper relies on the understanding that the beneficial effect of identifying *de facto* emergencies is greater than the possible damage.

[339] *See e.g.* Report on the Human Rights Challenge of States df Emergency in the Context Of Countering Terrorism, para. 9.
[340] Oraá, *supra* note 13, p. 67.

Applying strict scrutiny to derogations and extending this standard to non-declared emergencies would allow international bodies to exercise some type of control over expansive counter-terrorism measures. For instance, whereas the requirement on the temporary nature of derogation measures is recognized under all three treaties considered here, it is not possible to assess counter-terrorism measures in the light of the requirement of temporariness, even if these measures amount, in principle, to derogations. The lack of control over the impact of counter-terrorism legislation on regular criminal legislation bears a significant risk of making emergency regulations permanent. In addition, identifying *de facto* emergencies would allow international bodies to assess their compliance with the principles of proportionality, non-discrimination and consistency, envisaged in derogation clauses of the ICCPR, ECHR and the ACHR.

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