HUMAN RIGHTS

IN SITUATIONS OF COUNTER-TERRORISM

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HUMR 5503

Human Rights and Counter-Terrorism: Striking a Balance?

http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/

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Contact

With any questions regarding Lectures 2 & 3, or any related issues, you are welcomed and encouraged to contact the instructor:

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Assignment

Read and consider the materials in this handout. Be sure to also read the notes, as well as the corresponding pages in the Duffy textbook (there will be class discussion of portions of the Duffy text). In class we will discuss the major issues and your questions in a Socratic method of discussion in which the instructor's role will be to ask questions and moderate debate. The class time will *not* be used to simply synthesize the material presented in this handout. The seminar time is intended to be value-added so come to class prepared, having read the assigned pages.

Lecture 2, 9 September 2009

Read sections 1, 2, and 3 of this handout (42 pages).

Students assigned to particularly prepare these cases:

Caldas v. Uruguay: ______________________________________

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Vuolanne v. Finland: ______________________________________

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Lecture 3, 16 September 2009

Read sections 4 and 5 of this handout (33 pages).

Students assigned to particularly prepare these cases:

Compulsory Membership Case: ______________________________________

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Sohn v. Korea: ______________________________________

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1. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND COUNTER-TERRORISM

See also the textbook, Helen Duffy, *The 'War on Terror,'* pp. 274-289, 301-331

A. The Freedom from Terrorism

UNIVERSAL DECLARATION OF HUMAN RIGHTS
UN General Assembly Resolution 217 (A) (III) (1948), Article 3

Everyone has the right to life, liberty and security of person.

COVENANT ON CIVIL AND POLITICAL RIGHTS
Entered into force on 23 March 1976, Articles 6 & 9

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

[…]

Article 9

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.

[…]

DELGADO PAEZ V. COLOMBIA
1985 HRC 195 (12 July 1990), para. 5.5

The first sentence of article 9 does not stand as a separate paragraph. Its location as a part of paragraph one could lead to the view that the right to security arises only in the context of arrest and detention. The *travaux préparatoires* indicate that the discussions of the first sentence did indeed focus on matters dealt with in the other provisions of article 9. The Universal Declaration of Human Rights, in article 3, refers to the right to life, the right to liberty and the right to security of the person. These elements have been dealt with in separate clauses in the Covenant. Although in the Covenant the only reference to the right of security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. At the same time, States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that

he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.

NOTES

1. The Committee on the Eliminations of Discrimination against Women has, under CEDAW (the "women's convention"), determined that a government is obliged to provide security to women against third parties. "The Committee [has] recommend[ed] that better care be taken of all women and girls who are victims of terrorist violence." UN Doc. A/54/38 (1995), para. 78.
2. A number of judicial and quasi-judicial bodies have held that States have both a right and a duty to ***take measures*** to guarantee security and life:
   - CCPR/HRC: *Preliminary Observations on the Report of Peru* (25 July 1996); *Concluding Observations on the Report of Peru* (6 Nov. 1996)
   - COE Guidelines, Principle 1
   - IACtHR: *Velasquez Rodriguez v. Honduras*, (29 July 1988), s. 154; *Castillo Petruzzi v. Peru* (30 May 1999), s. 89.
   - ECHR: *Osman v. UK* (28 Oct 1998), s. 115.
3. In the Inter-American system, it has been reasoned that "[t]he State's national and international obligation to confront individuals or groups who use violent methods to create terror among the populace, and to investigate, try, and punish those who commit such acts means that it must punish all the guilty […]." *Asencios Lindo*, et. al., Case 11.82, Report No. 49/00 (1999), para. 58.
4. In the European system, Article 2 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that "[e]veryone's right to life shall be protected by law." The European Court of Human Rights has interpreted this provision accordingly: "The Court recalls that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction […]. This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual […]." *Kilic v. Turkey*, ECHR (28 Mar 2000), para. 62.
5. In the European system, the European Commission has opined that the obligation to "take measures" is an obligation of *conduct*, not an obligation of *result. W. v. UK*, EComHR (28 Feb. 1983).
6. The UN General Assembly has also resolved that State obligations toward security and life derive from human rights: See, *inter alia*, UNGA Res 56/160 (19 Dec 2001); UNGA Res 2003/37 (23 Apr. 2003).

B. Balancing Competing Human Rights

COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
Entered into force on 3 January 1976, Article 5

CONVENTION ON CIVIL AND POLITICAL RIGHTS
Entered into force on 23 March 1976, Article 5

1. 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.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

THINKING OF DICK CHENEY AS CICERO
By David R. Carlin
Professor of Sociology and Philosophy at the Community College of Rhode Island
History News Service (25 May 2009), http://hnn.us/articles/86349.html

Everybody agrees that some prisoners held at Guantanamo received a certain amount of rough treatment. Those on the American political left call this treatment "torture." They say it was criminal conduct, and they want somebody held accountable for this wrongdoing. Above all, they'd love to see former Vice President Dick Cheney branded a criminal.

Those on the right, by contrast, call the rough treatment at Guantanamo "enhanced interrogation," and they hold that valuable national security information was obtained as a result of these not-very-gentle sessions.

Now, for the sake of argument, let's assume that the left is correct when they say that it was in fact torture, a violation of U.S. and/or international law. And let's make the further assumption that the right is correct when they say that this "torture" elicited information helpful to national security. In that case, what do we do with Cheney? Should he be stigmatized as a criminal, either formally by a court or informally by a non-judicial "truth commission"? Or should he be applauded as a patriot?

Look at an analogous case, that of Marcus Tullius Cicero, the great orator, politician and philosopher of ancient Rome. It was the year 63 B.C. and Cicero was Roman consul. In that office he had to deal with Catiline -- a talented, ruthless and ambitious Roman senator from an old patrician family, who was plotting to seize power.

Catiline hoped to do what Sulla had done before him and Caesar would do

after, that is, make himself sole ruler of the city and the Roman Republic. Catiline had confederates at key places throughout Italy, including Rome itself. One of his men headed an army assembling near what is now the city of Florence. In Rome the plan was to throw the city into a state of panic by means of widespread arson and assassination, including the murder of Cicero. With the city in chaos, the army from Florence would attack, power would be seized and Catiline would become dictator.

Cicero, however, foiled the plot. By adroit detective work he learned what was happening, arrested a number of key conspirators and revealed the plot to the Senate. The Senate, convinced that strong measures were urgently needed, passed what is known as "the Ultimate Decree" -- that is, a resolution that urged the consul to take whatever steps might be needed "for the safety of the republic." That was a euphemistic way of saying: "Put the conspirators to death -- without trial." To the mind of the Senate, the need for Roman security did not leave room for the niceties of due process (an attitude similar to Cheney's).

So Cicero, following the Senate's advice, put the prisoners to death. Strictly speaking, the executions were illegal (as we are supposing Cheney's actions to have been), since Roman law did not permit the execution of a citizen without trial. And the fact that the Senate had authorized the executions didn't make them legal, for the Senate was neither a legislative nor a judicial body. It was simply an extraordinarily influential advisory body.

Cicero (like Cheney) was faced with a choice: Do I break the law, or do I let Catiline and his friends carry out a coup d'etat? When Cicero saved the republic by breaking the law, he had every reason to believe that he would never face prosecution for his deed. The traditional Roman attitude had been to look the other way when some savior of the city cut legal corners. It was a sign that traditional Roman politics was coming to an end when, a few years after the execution of the Catilinians, a left-wing political enemy of Cicero -- a reprobate named Publius Clodius -- indicted the ex-consul for the illegal executions and briefly exiled him.

There was a time when Americans were politically savvy enough, like traditional Romans, to look the other way when the nation's leaders cut legal corners for the good of the republic (think of Lincoln and his unconstitutional suspension of habeas corpus in 1861). But this wisdom has now deserted many of us, in particular those on the American left. Imitating Publius Clodius, they want to prosecute Cheney for protecting America by illegal means.

The ancient Roman left should not have attempted to punish Cicero for his patriotic illegalities, and neither, I submit, should the present-day American left attempt to punish Dick Cheney for his patriotic illegalities.

NOTES

1. What is your view of David Carlin's opinions? Should there be times when "patriotic illegalities" are allowed and praised? How would one determine when leaders should be allowed to "cut legal corners for the good of the republic?" Is "wisdom" enough? Where does this leave the so-called rule of law?
2. How does David Carlin's opinions compare to common article 5 of the CESCR and CCPR?
3. How does David Carlin's opinions compare to the International Law Commission, Responsibility of States for Internationally Wrongful Acts, Article 25:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
   (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   (a) The international obligation in question excludes the possibility of invoking necessity; or
   (b) The State has contributed to the situation of necessity.

4. Is the right to life and the right to security of the person (the 'freedom from terrorism') the most important rights for which states must prioritize their fulfilment, even at the expense of other rights? Consider the following two quotations from individuals who are often referred to as cornerstones of political thought: (a) Aristotle said that the stability of a state depended on, "the most important thing is for [the people] to think that they owe their safety to the government." Aristotle, *Politics*, Book V, Section 1315a; and (b) Marcus Tullius Cicero counselled the maxim *salus populi suprema lex esto*, or, "Let the safety of the people be the supreme law." Marcus Tullius Cicero, *De Legibus*, Book 3, Section iii. Do you think that other human rights, or even potentially conflicting laws, should be subservient to security?

STATEMENT OF THE SECRETARY-GENERAL TO THE UN SECURITY COUNCIL
By Kofi Annan
(18 Jan 2002)

We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism. While we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities—such as human rights in the process.

NOTES

1. Compare the position of Dick Cheney, as portrayed by David Carlin (above), and that of Kofi Annan. Are these opposing viewpoints? If so, how?
2. What do you think of Kofi Annan's assertion that adhering to human rights will reduce terrorism? Do you *believe* this assertion? Is there any empirical evidence to support this assertion?

UN SECURITY COUNCIL RESOLUTION 1456
(20 Jan 2003), para. 6

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.

NOTES

1. Note that Security Council Resolution 1373 also mentioned human rights, although not as forcefully reaffirming human rights obligations. It called upon States to "take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts." The resolution's preamble also reaffirms the need to combat by all means, "in accordance with the Charter of the United Nations," threats to international peace and security caused by terrorist acts.
2. Resolution 1373 established the Counter Terrorism Committee (CTC). While the CTC now has specific human rights directives, its initial approach denied any human rights role for the CTC. Its initial policy was expressed by its first Chairman in a briefing to the Security Council on 18 January 2002: "The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums."
3. Regional courts have also had the opportunity to address the continued role of human rights obligations while States are combating terrorism. In the Inter-American Court, in *Castillo Petruzzi v. Peru*, , No. 41 (Ser. C) (4 Sep 1998), p. 204: "the state does not have a license to exercise unbridled power or to use any means to achieve its ends, without regard for law or morals. The primacy of human rights is widely recognised. It is a primacy that the State can neither ignore or abridge." In the European Court, in *Klass v. Germany,* 1971 ECtHR 5029 (6 Sep 1978), p. 49*:* *"*The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against […] terrorism, adopt whatever measures they deem appropriate."
4. The Inter-American Commission on Human Rights has issued a comprehensive report that examines the legal obligations of states to uphold international human rights in countering terrorism. See Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights* (Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 Oct 2002).

As the remaining portions of this handout will explore, human rights are designed to be a flexible standard of protection with built-in mechanisms to enable states to combat terrorism. Outside of these mechanisms, is the so-called 'maximum interpretation' of human rights, where state obligations are to the full extent of the treaty articles. When utilizing these mechanisms (derogations and limitations), the so-called 'minimum interpretation' of human rights applies, where state obligations may be reduced to minimum guarantees.

In a joint statement following 11 September, the UN High Commissioner for Human Rights, the Secretary General of the Council of Europe, and the Director of the Organization for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights, called upon government to ensure that counter terrorism measures did not lead to an erosion of human rights. The statement asserted that the human rights regime had the flexibility to fight terrorism; that it was not an either-or proposition between human rights and countering terrorism, but that both could and must be pursued: "While we recognise that the threat of terrorism requires specific measures, we

call on all governments to refrain from excessive measures which would violate fundamental freedoms and undermine legitimate dissent. In pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms."

As you study the succeeding sections, make your own evaluation of the flexibility of the human rights system and whether terrorism can effectively be combated within the constraints of the human rights regime. Are human rights and counter terrorism complementary or contradictory regimes? **Is it possible to strike a balance between them?**

2. THE DEROGATION REGIME OF CCPR, ARTICLE 4

See also the textbook, Helen Duffy, *The 'War on Terror,'* pp. 290-300, 344-347

Article 4 of the CCPR allows state parties to derogate from treaty obligations under certain circumstances. It provides:

> "In times 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."

The Human Rights Committee has enunciated the burden of proof on issues involving derogations. In *Weinberger v. Uruguay*, 28 HRC 1978, it stated the view that derogations from the CCPR were only allowed in "strictly defined circumstances" and the government has the burden to make "submissions of fact or law to justify such derogation."

States have a burden of demonstrating that a derogation is valid at all times. According to General Comment 3, para. 3, even during wartime, derogations are allowed only for a "threat to the life of the Nation." Likewise, General Comment 31 states that the CCPR applies "also in situations of armed conflicts to which the rules of international humanitarian law are applicable." While the General Comments to the CCPR are simply views of the Human Rights Committee, non-binding on the state parties, the International Court of Justice has recently had the opportunity to address this issue. In the *Wall Decision*, para. 106, it stated in its advisory opinion that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the [CCPR]."

Thus, in any terrorism-related emergency, whether it be a declared war or some lesser label of emergency, the rights in the CCPR are applicable unless a reason for derogation has been established. As General Comment 29, para. 4, summarizes, in practice, these conditions "will ensure that no provision of (a human rights treaty), however validly derogated from, will be entirely inapplicable to the behavior of a State Party."

A. Non-derogable Rights

Article 4 (2) articulates certain rights from which no derogation can be made. These include: the freedom from arbitrary deprivation of life (CCPR, Art. 6); the freedom from torture and other cruel, inhuman or degrading treatment or punishment (Art. 7); the freedom from slavery and servitude (Art. 8 (1) & (2)); freedom from imprisonment for debts (Art. 11); freedom from ex post facto prosecution and sentencing (Art. 15); the

right to recognition as a person before the law (Art. 16); and the freedom of thought, conscience and religion (Art. 18).

States that are parties to the Second Optional Protocol of the CCPR may not derogate from the right to life in its fullest capacity, distinguished from CCPR, Art. 6 in that the Second Optional Protocol abolishes the death penalty in all circumstances without derogation.

The Human Rights Committee has reasoned that additional rights are non-derogable, based on the object and purpose of the CCPR:

GENERAL COMMENT 29, STATES OF EMERGENCY (ARTICLE 4)
Human Rights Committee
(U.N. Doc. CCPR/C/21/Rev.1/Add.11, 2001)

[…]

11. The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

12. In assessing the scope of legitimate derogation from the Covenant, one criterion can be found in the definition of certain human rights violations as crimes against humanity. If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct. Therefore, the recent codification of crimes against humanity, for jurisdictional purposes, in the Rome Statute of the International Criminal Court is of relevance in the interpretation of article 4 of the Covenant.

13. In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below.

(a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the

Covenant, is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10.

(b) The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.

(c) The Committee is of the opinion that the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances. This is reflected in the prohibition against genocide in international law, in the inclusion of a non-discrimination clause in article 4 itself (paragraph 1), as well as in the non-derogable nature of article 18.

(d) As confirmed by the Rome Statute of the International Criminal Court, deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, constitutes a crime against humanity. The legitimate right to derogate from article 12 of the Covenant during a state of emergency can never be accepted as justifying such measures.

(e) No declaration of a state of emergency made pursuant to article 4, paragraph 1, may be invoked as justification for a State party to engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

14. Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

15. It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, 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 articles 14 and 15.

16. Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the

principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.

[…]

NOTES

1. For most states, CCPR, Article 24 is also non-derogable (rights of children). This is because that provision is nearly identical to the Convention on the Rights of the Child, Article 38 which explicitly is non-derogable under the CRC. All but two states are parties to the CRC so for most of the world CCPR, Art. 24 is *de facto* non-derogable.
2. In *Polay Campos v. Peru*, 1994 HRC 577 (1997), the Human Rights Committee examined a case where the victim had been detained in relation to alleged terrorist activities. The focus of the decision was whether there was a non-derogable aspect of human dignity:

8.4 The author claims that Victor Polay Campos was detained incommunicado from the time of his arrival at the prison in Yanamayo until his transfer to the Callao Naval Base detention centre. The State party has not refuted this allegation; nor has it denied that Mr. Polay Campos was not allowed to speak or to write to anyone during that time, which also implies that he would have been unable to talk to a legal representative, or that he was kept in his unlit cell for 23 and a half hours a day in freezing temperatures. In the Committee's opinion, these conditions amounted to a violation of article 10, paragraph 1, of the Covenant.

[…]

8.6 As to the detention of Victor Polay Campos at Callao, it transpires from the file that he was denied visits by family and relatives for one year following his conviction, i.e. until 3 April 1994. Furthermore, he was unable to receive and to send correspondence. The latter information is corroborated by a letter dated 14 September 1993 from the International Committee of the Red Cross to the author, which indicates that letters from Mr. Polay Campos' family could not be delivered by Red Cross delegates during a visit to him on 22 July 1993, since delivery and exchange of correspondence were still prohibited. In the Committee's opinion, this total isolation of Mr. Polay Campos for a period of a year and the restrictions placed on correspondence between him and his family constitute inhuman treatment within the meaning of article 7 and are inconsistent with the standards of human treatment required under article 10, paragraph 1, of the Covenant.

8.7 As to Mr. Polay Campos' general conditions of detention at Callao, the Committee has noted the State party's detailed information about the medical treatment Mr. Polay Campos has received and continues to receive, as well as his entitlements to recreation and sanitation, personal hygiene, access to reading material and ability to correspond with relatives. No information has been provided by the State party on the claim that Mr. Polay

Campos continues to be kept in solitary confinement in a cell measuring two metres by two, and that apart from his daily recreation, he cannot see the light of day for more than 10 minutes a day. The Committee expresses serious concern over the latter aspects of Mr. Polay Campos' detention. The Committee finds that the conditions of Mr. Polay Campos' detention, especially his isolation for 23 hours a day in a small cell and the fact that he cannot have more than 10 minutes' sunlight a day, constitute treatment contrary to article 7 and article 10, paragraph 1, of the Covenant.

Similar decisions have been reached by regional human rights courts. See, inter alia, *Suarez Rosero Case*, Inter-American Court of Human Rights (12 Nov 1997), paras. 90-91; *Ocalan v. Turkey*, ECtHR (12 Mar 2003), paras. 231-32.

B. "Existence of Which is Officially Proclaimed"

Aritcle 4 (3) of the CCPR is clear that any derogation must be preceded by notice to the other State Parties to the Covenant by informing the Secretary-General of the United Nations of a state of emergency. It is the view of the Human Rights Committee that the notice requirement is not merely a procedural requirement. To the contrary, legally sufficient notice requires specific substantive details to substantiate a derogation under CCPR, Article 4.

ADRIEN MUNDYO BUSYO, THOMAS OSTHUDI WONGODI, RENÉ SIBU MATUBUKA ET AL. V. DEMOCRATIC REPUBLIC OF THE CONGO
Human Rights Committee, Communication No. 933/2000
(UN Doc. CCPR/C/78/D/933/2000, 31 July 2003)

1. The authors are Adrien Mundyo Busyo, Thomas Osthudi Wongodi and René Sibu Matubuka, citizens of the Democratic Republic of the Congo, acting on their own behalf and on behalf of 68 judges who were subjected to a dismissal measure. They claim to be the victims of a violation by the Democratic Republic of the Congo of articles 9, 14, 19, 20 and 21 of the International Covenant on Civil and Political Rights. The communication also appears to raise questions under article 25 (c) of the Covenant.

2.1 Under Presidential Decree No. 144 of 6 November 1998, 315 judges and public prosecutors, including the above-mentioned authors, were dismissed on the following grounds:

The President of the Republic;

Having regard to Constitutional Decree-Law No. 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of Congo, as subsequently amended and completed;

Having regard to articles 37, 41 and 42 of Ordinance-Law No. 88-056 of 29 September 1988 on the status of judges;

Given that the reports by the various commissions which were set up by the Ministry of Justice and covered the whole country show that the above-mentioned judges are immoral, corrupt, deserters or recognized to be

incompetent, contrary to their obligations as judges and to the honour and dignity of their functions;

Considering that the conduct in question has discredited the judiciary, tarnished the image of the system of justice and hampered its functioning;

Having regard to urgency, necessity and appropriateness;

On the proposals of the Minister of Justice;

Hereby decrees:

Article 1:

The following individuals are dismissed from their functions as judges …".

[…]

5.2 […] Furthermore, the Committee considers that the circumstances referred to in Presidential Decree No. 144 could not be accepted by it in this specific case as grounds justifying the fact that the dismissal measures were in conformity with the law and, in particular, with article 4 of the Covenant. The Presidential Decree merely refers to specific circumstances without, however, specifying the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and without demonstrating that these derogations are strictly required and how long they are to last. Moreover, the Committee notes that the Democratic Republic of the Congo failed to inform the international community that it had availed itself of the right of derogation, as stipulated in article 4, paragraph 3, of the Covenant. […]

[…]

JORGE LANDINELLI SILVA V. URUGUAY
Human Rights Committee, Communication No. R.8/34
(U.N. Doc. No. A/36/40 at 130, 1981)

[…]

2. The facts of the present communication are undisputed. The authors of the communication were all candidates for elective office on the lists of certain political groups for the 1966 and 1971 elections and which groups were later declared illegal through a decree issued by the new Government of the country in November 1973. In this capacity, Institutional Act No. 4 of 1 September 1976 (art. 1 (a)) a/ has deprived the authors of the communication of the right to engage in any activity of a political nature, including the right to vote for a term of 15 years.

[…]

6. On 10 July 1980, the State party submitted its observations under article 4 (2) of the Optional Protocol. Essentially, it invoked article 4 of the Covenant in the following terms:

"The Government of Uruguay wishes to inform the Committee that it has availed itself of the right of derogation provided for in article 4 (3) of the International Covenant on Civil and Political Rights. The Secretary-General of the United Nations was informed of this decision and, through him, notes were sent to the States parties containing the notification of the Uruguayan State. Nevertheless, the Government of Uruguay wishes to state that it reiterates the information given on that occasion, namely that the

requirements of article 4(2) of the Covenant are being strictly complied with - requirements whose purpose is precisely to ensure the real, effective and lasting defence of human rights, the enjoyment and promotion of which constitute the basis of our existence as an independent, sovereign nation. Article 25, on which the authors of the communication argue their case, is not mentioned in the text of article 4 (2). Accordingly, the Government of Uruguay, as it has a right to do, has temporarily derogated from some provisions relating to political parties. Nevertheless, as is stated in the third preambular paragraph of Act No. 4, dated 1 September 1976, it is the firm intention of the authorities to restore political life."

7. The Committee has considered the present communication in the light of all information made available to it by the parties, as provided for in article 5 (1) of the Optional Protocol.

8.1 Although the Government of Uruguay, in its submission of 10 July 1980, has invoked article 4 of the Covenant in order to Justify the ban imposed on the authors of the communication, the Human Rights Committee feels unable to accept that the requirements set forth in article 4 (1) of the Covenant have been met.

8.2 According to article 4 (1) of the Covenant, the States parties may take measures derogating from their obligations under that instrument in a situation of public emergency which threatens the life of the nation and the existence of which has been formally proclaimed. Even in such circumstances, derogations are only permissible to the extent strictly required by the exigencies of the situation. In its note of 28 June 1979 to the Secretary-Genera of the United Nations (reproduced in document CCPR/C/2/Add. 3, p. 4), which was designed to comply with the formal requirements laid down in article 4 (3) of the Covenant, the Government of Uruguay has made reference to an emergency situation in the country which was legally acknowledged in a number of "Institutional Acts". However, no factual details were given at that time. The note confined itself to stating that the existence of the emergency situation was "a matter of universal knowledge"; no attempt was made to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant, or to show that such derogations were strictly necessary. Instead, the Government of Uruguay declared that more information would be provided in connexion with the submission of the country's report under article 40 of the Covenant. To date neither has this report been received, nor the information by which it was to be supplemented.

8.3 Although the sovereign right of a State party to declare a state of emergency is not questioned, yet, in the specific context of the present communications the Human Rights Committee is of the opinion that a State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant. Although the substantive right to the derogatory measures may not depend on a formal notification being made pursuant to article 4 (3) of the Covenants the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4 (1) of the Covenant in proceedings under the Optional Protocol. It is the function of the Human Rights Committees acting under the Optional Protocols to see to it that States Parties live up to their commitments under the Covenant. In

order to discharge this function and to assess whether a situation of the kind described in article 4 (1) of the Covenant exists in the country concerned, it needs full and comprehensive information. If the respondent Government does not furnish the required Justification itself, as it is required to do under article 4 (2) of the Optional Protocol and article 4 (3) of the Covenant, the Human Rights Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal regime prescribed by the Covenant.

[…]

NOTES

1. Despite its statement in *Silva v. Uruguay*, supra, that "the substantive right to the derogatory measures may not depend on a formal notification," the Human Rights Committee has been highly critical of such procedural shortcomings. In CCPR/C/79/Add.78, para. 10 (1997), the Committee "deplored" failure to observe the notification requirements. In two other concluding observations, the Committee "regretted" that the state had not notified. See CCPR/C/79/Add.62, para. 11 (1996); CCPR/C/79/Add.33, para. 7 (1994).
2. In its Concluding Observation on Nepal in 1994 (UN Doc. CCPR/C/79/Add.42, 10 Nov 1994), the HRC "deplore[d] the lack of clarity of the legal provisions governing the introduction and administration of a state of emergency, particularly article 115 of the Constitution, which would permit derogations contravening the State party's obligations under article 4, paragraph 2, of the Covenant."
3. See also HRC, General Comment 29, para. 17.
4. The Committee has also considered the existence of a *de facto* state of emergency even when one had not been formally declared. In CCPR/C/79/Add.109, para. 12 (1999), the Committee examined the facts and noted that the population had been subjected to derogations by—for example—control points that impeded the freedom of movement. In such a situation, a state must comply with all derogation requirements, even though an emergency was not declared.

C. "Public Emergency Threatening the Life of the Nation"

THE GREEK CASE
European Commission on Human Rights
Yearbook ECHR, Vol. 12, No. 1 (1969)

"A 'public emergency threatening the life of the nation' has been described by the European Court of Human Rights in the Lawless Case as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed." It will be noticed that the notion of 'imminent' danger, which is represented in the French but not directly in the English text of the judgment, must be given weight because it is the French text which is authentic.

Such a public emergency may then be seen to have, in particular, the following characteristics: (1) It must be actual or imminent; (2) Its effects must involve the whole nation; (3) The continuance of the organised life of the community must be threatened; (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of

public safety, health and order, are plainly inadequate.

The Sub-Commission considers that in the present case the burden lies upon the respondent Government to show that the conditions justifying measures of derogation under Article 15 have been and continue to be met, due regard being had to the 'margin of appreciation' which, according to the constant jurisprudence of the Commission, the Government has in judging the situation in Greece as from the moment it assumed power on 21st April, 1967.

In its notice of derogation of 3rd May, 1967, the respondent Government referred to "internal dangers which threaten public order and the security of the State." According to the Government, there was on 21st April, 1967, "no question of an external danger, that is of war."

As regards the internal situation, the Sub-Commission finds it established beyond dispute that, following the political crisis of July 1965, there has been a period in Greece of political instability and tension, of an expansion of the activities of the Communists and their allies, and of some public disorder. It is also plain that these three factors, which have been already reviewed, were always linked and interacting.

The task of the Sub-Commission is to examine whether, on the evidence before it, the three factors described were together of such scope and intensity as to create a public emergency threatening the life of the Greek nation, This examination is itself limited by the criteria of what constitutes a public emergency for the purpose of Article 15, set out in paragraph 113 above. In particular, the criterion of actuality or imminence imposes a limitation in time. Thus the justification under Article 15 of the measures of derogation adopted by the respondent Government on 21st April, 1967, depends upon there being a public emergency, actual or imminent, at that date.

[…]

The Sub-Commission has not found that the evidence adduced by the respondent Government shows that a displacement of the lawful Government by force of arms by the Communists and their allies was imminent on 21st April, 1967; indeed, there is evidence indicating that it was neither planned at that time, nor seriously anticipated by either the military or police authorities. […]

The Sub-Commission further does not accept the suggestion of the respondent Government that the street demonstration, strikes and work stoppages in the first months of 1967 attained the magnitude of a public emergency. Though the street demonstrations, as anywhere, created anxiety for person and property in Athens and Salonica, the record does not show the police forces to have been at or even near the limit of their capacity to cope with demonstrations and disorder, and they acted without need of assistance from the armed services. In particular, they cleared the University buildings in Salonica of its illegal occupants "in a few minutes" on 11th April, 1967. The order prohibiting the "Marathon March," to be held on 16th April, 1967, and the obedience to it, is further indication that the Government was in effective control of the situation.

The picture of strikes and work stoppages does not differ markedly from that in many other countries in Europe over a similar period; indeed, as regards the length of strikes and stoppages it is more favourable than in some. There is

certainly no indication that there was any serious disorganisation, let alone one involving the whole nation, of vital supplies, utilities or services, as a result of strikes.

[…]

The Sub-Commission has then to consider whether there was on 21st April, 1967, an imminent threat to the organised life of the community. […]

The concrete question before the Sub-Commission is whether, on 21st April, 1967, there was a threat, imminent in that it would be realised before or soon after the May elections, of such political instability and disorder that the organised life of the community could not be carried on. The Sub-Commission gives a negative answer to this question for two reasons: (1) if it is said that the possibility of the formation of a "Popular Front" government, with its probable consequence of a Communist take-over of government, constituted in itself a public emergency threatening the life of the nation, the Sub-Commission does not consider that it has been shown, from the state of the parties or the political situation generally, that the formation of a "Popular Front" government after the May elections was certain or even likely; and (2) On the other hand, there was no indication on 21st April, 1967, that, either before or after the May elections, public disorder would be fomented and organised to a point beyond the powers of the police to control: on the contrary, the speed with which a large number of Communists and their allies were themselves "neutralises" on 21st April, 1967, suggests that, for all their supposed plans, they were incapable of any organised action in a crisis.

In sum, the respondent Government has not satisfied the Sub-Commission by the evidence it has adduced that there was on 21st April, 1967, a public emergency threatening the life of the Greek nation.

NOTES

1. Although the European Commission found in the *Greek Case* that a public emergency did not exist, the European Court has articulated the judicial test as one that gives broad discretion to the opinion of the executive branch.
   In *Brannigan and McBride v. United Kingdom*, 17 EHRR 539 (1993), it held:

   > "[I]t 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."

   The decision reaffirmed a nearly identical statement in *Ireland v. United Kingdom*, Series A. No. 35 (1978).
2. Consider Machiavelli's advice: "disregard ordinary constraints of morality when the survival of the state depends on disregarding them." Terence Irwin, The *Development of Ethics: From Socrates to the Reformation* (Oxford University Press, 2007), p. 739.

PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY
American Journal of International Law (Vol. 79, 1985), p. 1072

(A) (1) (b). The expression “public emergency” means an exceptional situation of crisis or public danger, actual or imminent, which affect the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed […].

(A) (4). The declaration of a state of emergency may cover the entire territory of the state or any part thereof, depending upon the areas actually affected by the circumstances motivating the declaration. This will not prevent the extension of emergency measures to other parts of the country whenever necessary nor the exclusion of those parts where such circumstances no longer prevail.

SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION OF PROVISIONS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (UN Doc E/CN.4/1984/4, 1984)

39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

(a) affects the whole of the population and either the whole or part of the territory of the State, and

(b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.

41. Economic difficulties per se cannot justify derogation measures.

[…]

54. […] Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIAL, AND COMMENTARY
By Saray Joseph, Jenny Schultz, and Melissa Castan
(Oxford University Press, 2005), p. 827

[Siracusa] Principle 54 is controversial, as it purports to prohibit derogations designed to diminish perceived future threats. Many such clampdowns […] simply constitute clampdowns by oppressive governments of legitimate political opposition, or gross overreactions to perceived subversive elements. However, a question must arise as to how "imminent" a danger must be before derogations are permitted, as it is arguably best to prevent the occurrence of a public emergency, rather than to "cure" a public emergency after it has erupted. General comment 29 does not address this issue.

As the CCPR, Art. 4 (1) states, any derogation from human rights obligations must be in response to a "public emergency." *The Greek Case,* based on the European Convention on Human Rights, as well as the international, expert-based Paris Standards and Siracusa Principles, explain that public emergency means an "actual or imminent" public danger. The question then becomes, what is an *imminent* danger to the life of the nation? Particularly since the terrorist attacks in 2001, there has been a parallel debate on the international law of self-defense. That issue involves the relations and legal duties between states and whether one state can lawfully take action against or within another state. In contrast, the human rights derogation issue is whether one state can take action against someone within that state. Despite these distinctions, both issues revolve around the definition of imminent harm.

Following is an excerpt from a journal article that discusses the international law of self-defense. Pay particular attention to the National Security Strategy of the United States and the definition of imminent. Consider whether this argument could be applied to human rights in order to justify the existence of a derogation because of a public emergency.

SELF-DEFENCE, ANTICIPATORY SELF-DEFENCE AND PRE-EMPTION: INTERNATIONAL LAW'S RESPONSE TO TERRORISM
By Niaz A. Shah
Journal of Conflict & Security Law (Vol 12, No. 1, 2007), p. 95

[…]

[T]he proliferation of atomic, biological, and chemical weapons and their diffusion into the hands of non-state actors has given impetus to a new claim of 'pre-emptive' self-defence.[1] The arch proponent, besides Israel, of the pre-emptive doctrine is the United States and its lawyers. Soon after the September 11 attacks, the United States spelled out its National Security Strategy (2002) stating that 'the war against terrorists of global reach is a global enterprise of uncertain duration' and 'as a matter of common sense and self-defence, America will act against such emerging threats before they are fully formed.' The United States clarified its position on the relationship between

terrorists and those who support terrorism: 'we make no distinction between terrorists and those who knowingly harbour or provide aid to them'. We will disrupt and destroy terrorist organisations:

> By direct and continuous action is using all the elements of national and international power . . . defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country, and denying further sponsorship, support, and sanctuary to terrorists by convincing or compelling states to accept their sovereign responsibilities.[2]

The United States offers an interpretation of the right to self-defence and the reasons to strike pre-emptively:

> For centuries, international law recognised that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. . . Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilisation of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction.[3]

The United States justifies the notion of pre-emptive action in the following words:

> Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first . . . The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.[4]

The legal advisor of the State Department of the United States says:

> In the end, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it. While nations must not use preemption as a pre-text for aggression, to be for or against preemption in the abstract is a mistake. The use of force preemptively is sometimes lawful and sometimes not.[5]

Professor Wedgwood strongly argues that 'deterrence and containment were the core doctrines of the Cold War. These do not translate easily to a brave new world of non-state terror networks . . . To a strategist; September 11 thus teaches that the keystone doctrines of the Cold War confrontation . . . have ceased to be reliable. Rather, one must consider acting against terrorist

capability before it is employed and, better yet, before it is acquired'.[6] Professor Yoo (a former Bush appointee) believes that the emergence of rogue states, international terrorism and the easy availability of weapons of mass destruction have placed enormous strain on the bright line rules of the Charter system. He makes a strong argument that: 'a more flexible standard should govern the use of force in self-defence, one that focuses less on temporal imminence and more on the magnitude of the potential harm and the probability of an armed attack'.[7]

The test for determining whether a threat is sufficiently 'imminent' to render the use of force necessary at a particular point has become more nuanced than Secretary Webster's nineteenth-century formulation. Factors to be considered should now include the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a limited window of opportunity; whether diplomatic alternatives are practical; and the magnitude of the harm that could result from the threat. If a state instead were obligated to wait until the threat were truly imminent in the temporal sense envisioned by Secretary Webster, there is a substantial danger of missing a limited window of opportunity to prevent widespread harm to civilians.[7]

[…]

[1] See Reisman, loc. cit., fn. 36.
[2] United States' National Security Strategy 2002 (revised in 2006).
[3] Ibid., p. 15.
[4] W. Taft and A. Buchwald, "Pre-emption, Iraq and International Law," American Journal of International Law (Vol. 97, 2003), pp. 557-563, 557.
[5] R. Wedgwood, "The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defence," American Journal of International Law (Vol. 97, 2003), pp. 576-585.
[6] J. Yoo, "Using Force," The University of Chicago Law Review 729–797 at 730 (Vol. 73, No. 3, 2003)

D. "Strictly Required by the Exigencies"

GENERAL COMMENT 29, STATES OF EMERGENCY (ARTICLE 4)
Human Rights Committee,
(U.N. Doc. CCPR/C/21/Rev.1/Add.11, 2001)

4. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant.[2] Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is

common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party. When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.

5. The issues of when rights can be derogated from, and to what extent, cannot be separated from the provision in article 4, paragraph 1, of the Covenant according to which any measures derogating from a State party's obligations under the Covenant must be limited "to the extent strictly required by the exigencies of the situation". This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.

6. The fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists. The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIAL, AND COMMENTARY
By Saray Joseph, Jenny Schultz, and Melissa Castan
(Oxford University Press, 2005), p. 827

Given the fairly broad permissible limits to most Covenant rights, such as enumerated qualifications to Article 12 or 19, or the tolerability of non-arbitrary prohibitions on the right to privacy in article 17, or the reasonable limits permitted to the right of political participation in article 25 and the right of non-discrimination in article 26, it is difficult to see how measures beyond those allowable limits would ever satisfy a strict test of proportionality, even in the most serious emergency. For example, how could it ever be proportionate to require restriction on freedom of movement beyond those permitted

under article 12 (3), i.e., those "necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others?" Similarly, it is not easy to envisage how "arbitrary" interferences with privacy (a breach of article 17 (1) could ever be deemed proportionate considering that the evaluation of whether a measure is "arbitrary" involves application of a test of proportionality."

NOTES

1. Based on the reasoning in Joseph, Schultz and Castan, supra, is the derogation regime simply a redundant legal mechanism? Can any state action that interferes with a right in the CCPR pass the proportionality test of Article 4 (1) after having failed the restriction test of Article 19 (3), the arbitrary test of article 17 (1), or the reasonableness test of article 25?

THE PROPORTIONALITY PRINCIPLE IN THE CONTEXT OF ANTI-TERRORISM LAWS: AN INQUIRY INTO THE BOUNDARIES BETWEEN HUMAN RIGHTS LAW AND PUBLIC POLICY

By Chistopher Michaelsen

In Gani & Mathew, *Fresh Perspectives on the 'War on Terror'* (Australian National University, 2008), Chapter 7, p. 109-110

A key question in the political and academic discourse on the legislative response to the threat of international terrorism has been the question of proportionality. While some have argued that the laws enacted to counter terrorism strike the right balance between national security imperatives and concerns for civil liberties and human rights, others have regarded them as disproportionate and as an overreaction. What both sides have in common, however, is that they generally approach the question of proportionality without examining the nature and quality of the terrorist threat and by accepting the executive's assertion that the threat may warrant a range of comprehensive counter-measures.

I would argue that this approach is logically flawed. What proportionality generally requires is that there is a reasonable relationship between the means employed and the aims sought to be achieved. Essentially proportionality requires one to determine whether a measure of interference, which is aimed at promoting a legitimate public policy, is either unacceptably broad in its application or has imposed an excessive or unreasonable burden on certain individuals. A decision that takes into account proportionality principles should, inter alia, impair the right in question as little as possible, be carefully designed to meet the objectives in question, and not be arbitrary, unfair or based on irrational considerations.

In order to establish whether counter-terrorism laws and measures meet the objectives in question it is imperative to identify clearly what those objectives are. The objective of anti-terrorism laws is, in most cases, the reduction of the threat of terrorist attacks or activities. Thus it is logically necessary for a thorough proportionality analysis to consider or assess the quality and nature of the threat. I would argue that in the absence of such analysis, any proportionality assessment is incomplete.

Nonetheless, both the European Court of Human Rights (ECrtHR) and national

courts, most recently the House of Lords, have taken a deferential approach and granted national authorities a wide 'discretionary area of judgment', or, in the terminology of the ECrtHR, a 'wide margin of appreciation' with regard to the existence and analysis of the threat of terrorism that may constitute a so-called 'public emergency'. One rationale behind this deferential approach, especially in common law countries, seems to be that in terms of both constitutional competence and expertise in the area of national security it is for government (and perhaps Parliament) rather than the courts to assess whether a public emergency exists.

While not addressing the constitutional implications of this position, I […] argue that in the context of international terrorism this rationale is flawed in its logic. Courts can and should be in a position to assess the nature and size of the terrorist threat without necessarily having to have access to specific intelligence. This is not to say that courts should not have access to specific intelligence or classified information held by the government. On the contrary, access to such information may be essential to fulfil fair trial requirements in proceedings against persons accused of terrorism offences. […] The argument I am trying to make […] is that in spite of any access to specific intelligence information, courts can and should submit general policy decisions about the threat of terrorism to judicial scrutiny.

NOTES

1. Michaelsen argues that the judicial branch is competent to judge whether a government measure is strictly required. He mentions that both the European Court of Human Rights and national courts have taken a deferential approach whether a public emergency exists. However, in *McCann and Others v. United Kingdom*, 21 EHRR 97 (1995), the European Court has found that the analysis of whether government measures are proportional to a public danger is very strict; "the force used must be *strictly proportionate* to the achievement of the aims." (Emphasis added.)

E. "Conformity with International Law"

GENERAL COMMENT 29, STATES OF EMERGENCY (ARTICLE 4)
Human Rights Committee,
(U.N. Doc. CCPR/C/21/Rev.1/Add.11, 2001)

9. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that

the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

10. Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. Therefore, when invoking article 4, paragraph 1, or when reporting under article 40 on the legal framework related to emergencies, States parties should present information on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency. In this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations.

NOTES

1. Note the reference by the Human Rights Committee to "other international laws." This could include the laws of armed conflict (including the Geneva Conventions) and, potentially, other human rights treaties.

F. "Do Not Involve Discrimination"

GENERAL COMMENT 29, STATES OF EMERGENCY (ARTICLE 4)
Human Rights Committee,
(U.N. Doc. CCPR/C/21/Rev.1/Add.11, 2001)

8. According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.

NOTES

1. Compare the non-discrimination clauses in CCPR, Article 2 (1) and Article 4 (1):

 Article 2 (1): "[…] without distinction of any kind, such as race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status.

> Article 4 (1): "[…] do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

How do you interpret the word "solely" in Article 4? What are the ramifications of certain group being included in Article 2, but left out of Article 4? What is the effect of the absence of a clause "or other status" in Article 4?

3. DEROGATIONS AND THE FREEDOM FROM ARBITRARY DETENTION, RIGHTS IN CUSTODY, AND FAIR TRIAL

See also the textbook, Helen Duffy, *The 'War on Terror,'* pp. 332-343

While the focus of discussion in the following cases is whether the derogation was lawful, you should also take note of the various human rights standards that apply to individuals who are arrested, detained, and subject to prosecution. For a full description of these standards, see Rhona Smith, *Textbook on International Human Rights* (Oxford University Press, 2007), pp. 221-253; or Amnesty International's *Fair Trial Manual*, available online at: http://www.amnesty.org/en/library/info/POL30/002/1998; or the Max Planck *Manual on Fair Trial Standards in the Afghan Constitution*, available at: http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/maxplanckfairtrialmanual2edengl.pdf.

ADOLFO DRESCHER CALDAS V. URUGUAY
Human Rights Committee, Communication No. 43/1979,
(U.N. Doc. CCPR/C/OP/2 at 80, 1990)

1. The author of the communication (initial letter dated 11 January 1979 and further submissions dated 19 September 1979 and 3 May 1983) is a Uruguayan national, residing at present in Mexico. She submitted the communication on behalf of her husband, Adolfo Drescher Caldas, a 44-year-old Uruguayan national at present imprisoned in Uruguay.

2.1. The author states that her husband, who has been an official of the trade union corresponding to his occupation (the Bank Employees' Association of Uruguay), was arrested in Montevideo, Uruguay, on 3 October 1978 by officials who did not identify themselves or produce any judicial warrant and who apparently belonged to the Navy. She adds that the reasons for his arrest were not stated and are still unknown to his family. The author believes that her husband was arrested because of his trade-union activities. She alleges that he was held incommunicado for two months and his whereabouts were not revealed to his relatives. At the beginning of December 1978, he was transferred to Libertad prison, where his father was allowed to visit him. At the beginning of January 1979, however, he was removed from that prison and the family was again unable to find out his whereabouts.

2.2. The author claims that there were no local remedies to be exhausted, habeas corpus being inoperative under the regime of prompt security measures.

2.3. By her initial communication of 11 January 1979, the author requests that a medical examination should be permitted by doctors indicated by her husband's family.

2.4. In her initial communication of I1 January 1979, the author claims that her husband is a victim of violations of articles 2 (3) (a) and (b); 3; 9 (1), (2), (3) and (4); 10 (3); 12 (1), (2) and (3); 15 (1); 17; 18 (1); 19 (1) and (2); 22; 25; 26 and possibly of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights.

3. By its decision of 23 April 1979, the Human Rights Committee held that the author of the communication was justified by reason of close family connection in acting on behalf of the alleged victim. By that same decision, the Human Rights Committee transmitted the communication under rule 91 of its provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication. The Committee further drew the State party's attention to the concern expressed by the author with regard to the state of health and whereabouts of her husband; and it requested the State party to furnish information thereon to the Committee.

4. In its submission under rule 91 of the provisional rules of procedure dated 13 July 1979, the State party states that Adolfo Drescher Caldas was arrested on 28 September 1978 in conformity with the prompt security measures for his alleged involvement in subversive activities. He was charged on 7 November 1978 before a Military Examining Judge with violations of article 60 (V) of the Military Criminal Code and articles 340 (theft), 237 (forgery or alteration of an official document by a private individual) and 54 (accumulation of offences) of the Ordinary Criminal Code. He had a defending counsel appointed by the court, a colonel of the army. The State party argues that domestic remedies have not been exhausted as no complaint or petition whatsoever was submitted to any Uruguayan authorities. The State party further

(a) rejects the contention that Adolfo Drescher Caldas was illegally held incommunicado, since the state of incommunicado was terminated by the Military Examining Judge in the warrant for commitment;

(b) denies that his whereabouts were not revealed to his relatives;

(c) asserts that at the time of his arrest he was informed that he was being arrested in conformity with the prompt security measures.

The State party informs the Committee that Adolfo Drescher Caldas is being held in Military Detention Establishment No. 1, which has its own permanent and emergency medical service and that medical inspections are carried out daily.

5.1. In a further letter of 19 September 1979, the author commented on the State party's submission under rule 91 of the Committee's provisional rules of procedure.

5.2. With respect to the State party's argument that domestic remedies had not been exhausted in the case of Adolfo Drescher Caldas, the author argues that the State party completely ignored the Committee's request for information as to any specific remedy that might have been available in this particular case.

5.3. The author further contests the State party's submission as to the substance of her allegations. She maintains her allegation that her husband was held incommunicado at the beginning of his detention and that his relatives did not know his whereabouts. She argues that the State party admitted this fact when it declared that the state of incommunicado was lifted by the Military Examining Judge in the warrant of commitment after it had stated that he was charged on 7 November 1978 before the Military Examining Judge. The author concludes that the State party admits that Adolfo Drescher Caldas was held incommunicado from his arrest until 7

November 1978, i.e., for about six weeks. The author further contests the State party's affirmation that her husband was informed of the reason for his arrest at the time of his arrest, because he was told that he had been arrested under the prompt security measures. The author argues that this explanation amounted exactly to the same thing as giving no reason at all, for the power of arrest was said to be entirely discretionary under this "regime". The author also claims that her husband had no counsel of his own choosing because he only could choose between two court-appointed defence counsels. She alleges that he was "tried by a Colonel and defended by a Colonel and charged with theft and forgery in a clumsy attempt to disguise political persecution".

6. The Human Rights Committee, after having considered the State party's as well as the author's submissions with regard to the question of exhaustion of domestic remedies and on the basis of the information before it, found that it was not precluded by article 5 (2) (b) of the Optional Protocol from considering the communication. The Committee was also unable to conclude that, in the circumstances of this case, the communication was inadmissible under article 5 (2) (a) of the Optional Protocol.

7. On 24 October 1979, the Human Rights Committee therefore decided:

(a) That the communication was admissible;

(b) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(c) That the State party be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must relate primarily to the substance of the matter under consideration. The Committee stressed that, in order to perform its responsibilities, it required specific responses to the allegations which had been made by the author of the communication and the State party's explanations of the actions taken by it. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

8. In its submission under article 4 (2) of the Optional Protocol dated 16 June 1980, the State party stated that the case of Mr. Drescher Caldas had been before the Inter-American Commission on Human Rights (case No. 3439) since 25 October 1978, i.e., before Mrs. de Drescher made her submission to the Committee.

9. By a letter of 18 August 1981, the secretariat of the Human Rights Committee was informed by the secretariat of the Inter-American Commission on Human Rights that case No. 3439 was submitted by a letter of 25 October 1978 by a close family member of Adolfo Drescher Caldas, but that the complaint had been withdrawn from IACHR by a letter sent to the Commission in September 1979.

10. In her submission of 3 May 1983, under rule 93 (3) of the provisional rules of procedure, the author confirms that she withdrew the case of her husband from IACHR. She alleges that he continues to be imprisoned under the same conditions as previously denounced.

11. The Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol.

12.1. The Committee decides to base its views on the following facts which have either been essentially confirmed by the State party or are uncontested except for denials of a general character offering no particular information or explanation.

12.2. Adolfo Drescher Caldas, a former trade union official, was arrested in Montevideo, Uruguay, on 28 September 1978, by officials who did not identify themselves or produce any judicial warrant and who apparently belonged to the Navy. He was informed that he was arrested under the prompt security measures, but not, it appears, more specifically of the reasons for his arrest. During the first six weeks of his detention, he was kept incommunicado and his relatives did not know his whereabouts. Recourse to habeas corpus was not' available to him. On 7 November 1978, he was charged before the Military Examining Judge with violations of article 60 (V) of the Military Criminal Code and article 340 (theft), 237 (forgery or alteration of an official document by a private individual) and 54 (accumulation of offences) of the Ordinary Criminal Code. He had a defending counsel appointed by the court, Colonel Alfredo Ramirez, and in July 1979 his case was before the Military Court of the fourth sitting. In December 1978, he was brought to Libertad prison, the Military Detention Establishment No. 1, where he continues to be detained.

13.1. In formulating its views, the Human Rights Committee also takes into account the following considerations.

13.2. With regard to the author's contention that her husband was not duly informed of the reasons for his arrest, the Committee is of the opinion that article 9 (2) of the Covenant requires that anyone who is arrested shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded. It is the view of the Committee that it was not sufficient simply to inform Adolfo Drescher Caldas that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him.

13.3. The Committee observes that the detention incommunicado of a detainee for six weeks after his arrest is not only incompatible with the standard of humane treatment required by article 10 (1) of the Covenant, but also deprives him, at a critical stage, of the possibility of communicating with counsel of his own choosing as required by article 14 (3) (b) and, therefore, of one of the most important facilities for the preparation of his defence.

13.4. In operative paragraph 3 of its decision of 24 October 1979, the Committee requested the State party to submit copies of any court orders or decisions of relevance to the matter under consideration. The Committee notes with regret that it has not been furnished with any of the relevant documents or with any information about the outcome of the criminal proceedings commenced against Adolfo Drescher Caldas in 1978. It must be concluded that he has not been tried without undue delay as required by article 14 (3) (c) of the Covenant.

14. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the

view that the facts as found by the Committee disclose violations of the International Covenant on Civil and Political Rights, particularly of:

Article 9 (2), because, at the time of his arrest, Adolfo Drescher Caldas was not sufficiently informed of the reasons for his arrest;

Article 9 (4), because recourse to habeas corpus was not available to him;

Article 10 (1), because he was kept incommunicado for six weeks after his arrest;

Article 14 (3) (b), because he was unable, particularly while kept incommunicado, to communicate with counsel of his own choosing;

Article 14 (3) (c), because he was not tried without undue delay.

15. The Committee, accordingly, is of the view that the State party is under an obligation to take immediate steps (a) to ensure strict observance of the provisions of the Covenant and provide effective remedies to the victim; (b) to transmit a copy of these views to Adolfo Drescher Caldas; (c) to take steps to ensure that similar violations do not occur in the future.

ANTTI VUOLANNE V. FINLAND
Human Rights Committee, Communication No. 265/1987
(U.N. Doc. A/44/40 at 311, 1989)

1. The author of the communication (initial letter dated 31 October 1987; further submission dated 25 February 1989) is Antti Vuolanne, a Finnish citizen, 21 years of age, resident in Pori, Finland. He claims to be the victim of a violation by the Government of Finland of articles 2, paragraphs 1 to 3, 7 and 9, paragraph 4, of the International Covenant on Civil and Political Rights. He is represented by counsel.

2.1 The author states that he started his military service on 9 June 1987. Service duty allegedly caused him severe mental stress and, upon his return from a military hospital early in July 1987, he realized that he could not continue with his service as an infantryman. Unable to discuss the situation with the head of his unit, he decided, on 3 July, to leave his garrison without permission. He alleges to have been greatly preoccupied by the fate of his brother who, about a year earlier, had committed suicide in a similar situation. The author's weekend off duty would have begun on 4 July at noon, ending on 5 July at midnight. On 5 July, he returned to the military hospital and asked to speak with a doctor, but was advised to return to his company, where he registered and left again without permission. Upon advice of an army chaplain he returned on 7 July to his unit , where he spoke to a doctor and was taken to the military hospital. Later on, he sought and obtained a transfer to unarmed service inside the military.

2.2 On 14 July, in a disciplinary procedure, he was sanctioned with 10 days of close arrest, i. e., confinement in the guardhouse without service duties. He claims that he was not heard at all, and that the punishment was immediately enforced. At this stage he was not told that he could have availed himself of a remedy. In the guardhouse, he learned that the Law on Military Disciplinary Procedure provided for the possibility to have the punishment

reviewed by a higher military officer through a so-called "request for review". This request was filed on the same day (although the author states that it was documented to have been made a day later, on 15 July) and based on the argument that the punishment was unreasonably severe, taking into account that the author was punished for departing without permission for more than four days, despite the fact that 36 hours overlapped with his weekend off duty, that his brief return to the garrison was considered as an aggravating circumstance and that the motive for his decision to depart was not taken into consideration.
2.3 The author states that after his written request to the supervising military officer the punishment was upheld by decision of 17 July 1987 without a hearing. According to the author, Finnish law provides no other domestic remedies, because section 34 of the Law on Military Disciplinary Procedure specifically prohibits an appeal against the decision of the supervising military officer.

2.4 The author furnishes a detailed account of the military disciplinary procedure under Finnish law, which is governed by chapter 45 of the Criminal Code of 1983. Punishment for absence without leave is either of a disciplinary nature or may entail imprisonment of up to six months. Military confinement (close arrest)is the most severe type of disciplinary punishment. The maximum length of arrest imposable in a disciplinary procedure is 15 days and nights. Only the head of a unit or a higher officer has the authority to impose the punishment of close arrest, and only a commander of a body of troops can impose arrest for more than 10 days and nights.

2.5 If an arrest is imposed by disciplinary procedure, there is no possibility of appeal outside the military. The prohibition of appeal in section 34, paragraph 1, of the above-mentioned law covers both civil courts (the Supreme Court in the last instance) and administrative courts (the Supreme Administrative Court in the last instance). Thus, the lawfulness of the punishment cannot be reviewed by a court or any other judicial body. The only remedy available is the request for review made to a superior military officer. It is claimed that complaints either to a still higher military authority, or to the Parliamentary Ombudsman do not constitute effectiveremedies in the case at issue, because the Ombudsman has no power to order the E release of a person whose arrest is being enforced, even if a complaint reached him in time and if he considered the detention to be unlawful.

2.6 Concerning his military confinement, the author considers it "evident that Finnish military confinement in the form of close arrest imposed in a disciplinary procedure is a deprivation of liberty covered by the concepts 'arrest or detention' in article 9, paragraph 4, of the Covenant". He states that his punishment was enforced in two parts, during which he was locked in a cell of 2 x 3 metres with a tiny window, furnished only with a camp bed, a small table, a chair and a dim electric light. He was only allowed out of his cell for purposes of eating, going to the toilet and to take fresh air for half an hour daily. He was prohibited from talking to other detained persons and from making any noise in his cell. He claims that the isolation was almost total. He also states that in order to lessen his distress, he wrote Personal notes about his relations with persons close to him, and that these notes were taken away from him one night by the guards, who read them to each other. Only after he asked for a meeting with various officials were his papers returned to him.

2.7 Finally, the author considers that the 10 days of close confinement constituted an unreasonably severe punishment in relation to the offence. In particular, he objects to the fact that no relevance was attached to the motives of his temporary absence, although, as he claims, the Finnish Criminal . Code provides for the consideration of special circumstances. In his opinion, the availability of an appeal to a court or other independent body would have had a real effect, since there would have been a possibility to have the punishment reduced.

3. By its decision of 15 March 1988, the Working Group of the Human Rights Committee transmitted the communication to the State party, requesting it, under rule 91 of the provisional rules of procedure, to provide information and observations relevant to the question of admissibility.

4. In its submission under rule 91, dated 28 June 1988, the State party did not raise any objections to the admissibility of the communication and stated, in particular, that the author had exhausted all domestic remedies available to him by filing his request for review (tarkastuspyyntö) pursuant to the Act on Military Discipline. Under section 34, paragraph 1, of the Act, decisions made pursuant to such a request are not appealable.

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules Of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. In this connection the Committee noted that the State Party did not object to the admissibility of the communication.

5.2 On 18 July 1988 the Committee decided that the communication was admissible. In accordance with article 4, paragraph 2, of the Optional Protocol the State party was requested to submit to the Committee, within six months of the date of transmittal to it of the decision on admissibility, written explanations or statements clarifying the matter and the measures that may have been taken by it.

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party first elucidates the relevant legislation as follows:

"Provisions on the military disciplinary procedure followed in the Finnish Defence Forces are contained in the Law on Military Disciplinary Procedure (331/83), adopted on 25 March 1983, and in the relevant ordinance (969/83), adopted on 16 December 1983, both in force as of 1 January 1984. The above laws contain detailed provisions on disciplinary sanctions in military disciplinary procedure, on disciplinary competence, on the processing of a disciplinary matter, and on the appellate procedure.

"The most severe sanction in a military disciplinary procedure is close arrest, to be put into effect in the guardhouse or other place Of solitary confinement, usually without service duty. Close arrest, may be imposed by a head of unit for a maximum of 5 days and nights, by a commander of unit for a maximum of 10 days and nights, and by a commander of a body of troops for a maximum of 15 days nights. Prior to imposing a disciplinary punishment, the superior military officer responsible must submit his decision to the military legal advisor for a statement.

"The victim may submit, within three days, a 'request for review' concerning the decision on the disciplinary sanction. A request which concerns the decision of a head of a unit or commander of a

unit may be submitted to a commander of a body of troops, and one that concerns the decision made by a commander of a body of troops may be appealed upon to the commander of the military county or a superior disciplinary Officer. If the request for review is processed by a disciplinary officer superior to a commander, the matter must be presented by a legal advisor.

"Close confinement can be put into effect only after the period for submitting an appeal has expired, or after the request submitted has been considered, unless the person concerned has agreed to immediate enforcement in a written declaration or in case the commander of a body of troops has ordered the close arrest to be enforced immediately because he finds it absolutely necessary in order to maintain discipline, order and security amongst the troops."

6.2 With regard to the factual background of the case, the State Party submits that:

"Mr . Vuolanne was heard in preliminary investigations on 8 July 1987 concerning his absence from his unit from 3 to 7 July 1987. The military legal advisor of the military county of Southwestern Finland submitted his written statement to the superior disciplinary officer on 10 July 1987. The decision of the commander of the unit was made on 13 July 1987, stating that Mr. Vuolanne had been found guilty of continued absence without leave (Criminal Code 45: 4.1 and 7: 2) and sanctioning him with 10 days and nights of close confinement.

"Mr. Vuolanne was informed of the decision on 14 July 1987. When signing the acknowledgement of receipt, he had in the same connection indicated in writing that he agreed to an immediate enforcement of the punishment. Consequently, the close arrest was put into effect on the very same day, 14 July 1987. As Mr. Vuolanne was informed of the decision, he also received a copy of it, carrying clear and unambiguous instructions on how the decision could be appealed against by submitting a request for review. The request submitted by Mr. Vuolanne on 15 July 1987 was considered by the commander of the body of troops I without delay, and he decided that there was no need to change the disciplinary sanction imposed.

"In their basic training all conscripts receive information on legal remedies relating to the disciplinary procedure, including the request for review. Relevant information is also contained in a book distributed to all conscripts at the end of the basic training period."

6.3 With regard to the applicability of article 9, paragraph 4, of the Covenant to the facts of this case, the State party submits:
"It is not open for somebody detained on the basis of military disciplinary procedure, as outlined above, to take proceedings in a court. The only relief is granted by the system of request for review. In other words, it has been the view of Finnish authorities that article 9, paragraph 4, of the Covenant on Civil and Political Rights does not apply to detention in military procedure . . .

"In its General Comment 8 (16)of 27 July 1982, regarding article 9, the Committee had occasion to single out what types of detention were covered by article 9, paragraph 4. It listed detentions on grounds such as 'mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. '. Significantly, the Committee omitted deprivation of liberty in military disciplinary procedure from this list. What is common to the forms of

detention listed by the Committee is that they involve the possibility of prolonged, unlimited detention. Also in most cases these forms of detention are not strictly regulated but the manner of detention is made dependent on its purpose (cure of illness, for example)and engages a wide degree of discretion on the part of the detaining authority. However, this is in striking contrast with the process of detention in military disciplinary procedure, where the grounds for detention, the length of detention and the manner of conducting the detention are clearly laid down in military law. In the event that the military authorities overstep the boundaries set by the law, the normal ways of judicial appeal are open. In other words, it might be that the Committee did not include military disciplinary process in its list of different kinds of 'detention' because it realized the material difference between it and those other forms of detention from the point of view of an individual's need of protection.

"It is clearly the case that an official -a commander -is acting in a judicial or at least quasi-judicial capacity as he, under military disciplinary procedure, orders detention. Likewise, the consideration of a request for review is comparable to judicial scrutiny of an appeal. As explained, the conditions and manner of carrying out military disciplinary detention are clearly set down by law. The discretion they imply is significantly less than discretion in some of the cases listed by the Committee. In this respect, too, the need to judicial control, if not strictly superfluous, is significantly less in military disciplinary procedure than in detention on, say, rounds of mental illness."

Notwithstanding these considerations concerning the non-applicability of article 9, paragraph 4, to Mr. Vuolanne's case, the State party notes that preparations are under way for amending the law on military disciplinary procedure so as to allow recourse to a court for detention in such procedure.

6.4 With regard to the author's allegations concerning a violation of article 7 of the Covenant, the State party notes:

"Mr. Vuolanne claims that his treatment was degrading because it was 'unreasonably severe in relation to the offence'. He contends that the commanding officer did not take adequately into account Finnish laws concerning mitigating circumstances and the measurement of sentences. However, this is not a matter on which the Committee is competent to pronounce, as it has itself acknowledged, namely that it is not a 'fourth instance' entitled to review the conformity of the acts or decisions by national authorities with national law. The State party further observes that 10 days arrest in close confinement does not per se constitute the sort of Punishment prohibited by article 7; it does not amount to 'cruel, inhuman or degrading treatment or punishment'.

"It is generally held that the terms 'torture', 'inhuman treatment' and 'degrading treatment' in article 7 imply a sliding scale from the most serious violations ('torture')to the least serious - but nevertheless serious -ones ('degrading treatment'). What constitutes 'degrading treatment' (or 'degrading punishment') is nowhere clearly defined. In practice, cases which have been deemed to constitute 'degrading treatment' have usually involved some sort of corporal punishment. Mr. Vuolanne does not claim that he was subjected to such punishment . . . The question still remains whether Mr. Vuolanne's confinement can be interpreted as ,the kind of incommunicado detention which, as implied in General Comment 7 (16) by

the Committee, amounts to a violation of article 7. The matter, as the Committee saw it, was to be determined on the basis of contextual appraisal. In the present case, the relevant contextual criteria go clearly against holding the detention of Mr. Vuolanne as 'degrading treatment or punishment'. In the first place, the detention of Mr. Vuolanne lasted only a relatively short period (10 days and nights)and even that was divided into a period of 8 and a further separate period of 2 days. Secondly, his confinement was not total. He was taken out for meals and for a short exercise daily -though he was not allowed to communicate with other detainees. Thirdly, there was no official hindrance to his correspondence; the fact that the guards on duty may have violated their duties by reading his letters does not involve a violation by the Government of Finland. Of course, it would have been open to Mr. Vuolanne to complain of his treatment by his guards. He appears to have made no formal complaint. In short, the context of Mr. Vuolanne's detention cannot be regarded as amounting to 'degrading treatment'(or 'degrading punishment') within the meaning of article 7 of the Covenant."

7.1 In his comments, dated 25 February 1989, author's counsel submits, inter alia, that if the Committee considers the evidence presented by Mr. Vuolanne insufficient for finding a violation under article 7, article 10 might become relevant. He further contends that the State party is incorrect in implying that the behaviour of Mr. Vuolanne's guards would not come within its responsibility. He points out that the guards were "persons acting in an official capacity" within the meaning of article 2, paragraph 3 (a)of the Covenant. He further argues:

"it is true that Mr. Vuolanne could have instituted a civil charge against the guards in question. In the communication their behaviour is not, however, presented as a separate violation of the Covenant, but only as one part of the evidence showing the enforcement of military arrest to be humiliating or degrading. Also the State party seems to have accepted this line of argument: had the Government regarded the behaviour of Mr. Vuolanne's guards as something exceptional, it would surely have presented in its submission information on some kind of an inquiry into the concrete facts of the case. However, no measures concerning the behaviour of Mr. Vuolanne's guards have been taken."

7.2 With respect to article 9, paragraph 4, the author comments on the State party's reference to the Committee's General Comment No. 8 (16) on article 9, and notes that the State party does not mention that, according to the General Comment, article 9, paragraph 4, "applies to all persons deprived of their liberty by arrest or detention". He further submits:

"military confinement is a punishment that can be ordered either by a court or in military disciplinary procedure. The duration of the punishment is comparable to the shortest prison sentences under normal criminal law (14 days is the Finnish minimum) and exceeds the length of pre-trial detention acceptable in the light of the Covenant. This shows that there is no substantial difference between these forms of detention from the point of view of an individual's need of protection. It is true that the last sentence of paragraph 1 of the Committee's General Comment in question is somewhat ambiguous. This might be the basis for the State party's opinion that military confinement is not covered by article 9, paragraph 4. However, article 2, paragraph 3, would remain applicable " even in this case."

The author then offers the following comments in order to show that the Finnish military disciplinary procedure does not correspond to the requirements of article 2, paragraph 3, either:

" (a) According to the State party, 'the normal ways of judicial appeal are open in case the military authorities overstep the boundaries set by the law'. This statement is misleading. There is no way a person punished with military confinement can bring the legality of the punishment before a court. What can in principle be challenged is the behaviour of the military authorities in question. This would mean instituting a civil charge in court, not any kind of an 'appeal'. This kind of a procedure is in no way 'normal' and even if the procedure was instituted, the court could not order the release of the victim;

"(b)Also some other statements are misleading. An official ordering detention and another officer considering the request for review are not acting in a 'judicial or at least quasi-judicial capacity'. The officers have no legal education. The procedure lacks even the most elementary requirements of a judicial process: the applicant is not heard and the final decision is made by a person who is not independent, but has been consulted already before ordering the punishment. It also is stated that Mr. Vuolanne, when informed of the decision to punish him with close confinement, indicated in writing that he agreed to an immediate enforcement of the punishment. This statement is somewhat misleading, because Mr. Vuolanne only signed the acknowledgement of receipt on a blank form. It is true that on this blank form there is a part printed with small letters, where one accepts the immediate enforcement by signing the acknowledgement itself."

7.3 With respect to the proposed amendment to the law (see para. 6.3 above), Mr. Vuolanne notes that a proposed model would possibly remedy the situation in relation to article 9, paragraph 4, but not in relation to article 7. He submits that the only proposal acceptable in this respect would be to amend the Law on military disciplinary procedure so that only a part (up to 8 or 10 days)of the punishment would be enforced as close confinement and the rest as light arrest (e. g., with service duties).

8. The Human Rights Committee has considered the present communication in the light of all written information made available to it by the parties as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

9.1 The author of the communication claims that there have been breaches of article 2, paragraphs 1 and 3, article 7, article 9, paragraph 4, and article 10 of the Covenant.

9.2 The Committee recalls that article 7 prohibits torture and cruel or other inhuman or degrading treatment. It observes that the assessment of what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim. A thorough examination of the present communication has not disclosed any facts in support of the author's allegations that he is a victim of a violation of his rights set forth in article 7. In no case was severe pain or suffering, whether physical or mental, inflicted upon Antti Vuolanne by or at the instigation of a public official; nor does it appear that the solitary confinement to which the author was subjected, having

regard to its strictness, duration and the end pursued, produced any adverse physical or mental effects on him. Furthermore, it has not been established that Mr. Vuolanne suffered any humiliation or that his dignity was interfered with apart from the embarrassment inherent in the disciplinary measure to which he was subjected. In this connection, the Committee expresses the view that for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty. Furthermore, the Committee finds that the facts before it do not substantiate the allegation that during his detention Mr. Vuolanne was treated without humanity or without respect for the inherent dignity of the Person, as required under article 10, paragraph 1, of the Covenant.

9.3 The Committee has noted the contention of the State party that the case of Mr. Vuolanne does not fall within the ambit of article 9, paragraph 4, of the Covenant. The Committee considers that this question must be answered by reference to the express terms of the Covenant as well as its purpose. It observes that as a general proposition, the Covenant does not contain any provision exempting from its application certain categories of persons. According to article 2, paragraph 1, "each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The all-encompassing character of the terms of this article leaves no room for distinguishing between different categories of persons, such as civilians and members of the military, to the extent of holding the Covenant to be applicable in one case but not in the other. Furthermore, the travaux préparatoires as well as the Committee's general comments indicate that the purpose of the Covenant was to proclaim and define certain human rights for all and to guarantee their enjoyment. It is, therefore, clear that the Covenant is not, and should not be conceived of in terms of whose rights shall be protected but in terms of what rights shall be guaranteed and to what extent. As a consequence the application of article 9, paragraph 4, cannot be excluded in the present case.

9.4 The Committee acknowledges that it is normal for individuals Performing military service to be subjected to restrictions in their freedom of movement. It is self-evident that this does not fall within the purview of article 9, paragraph 4. Furthermore, the Committee agrees that a disciplinary penalty or measure which would be deemed a deprivation of liberty by detention, were it to be applied to a civilian , may not be termed such when imposed upon a serviceman. Nevertheless, such penalty or measure may fall within the scope of application of article 9, paragraph 4, if it takes the form of restrictions that are imposed over and above the exigencies of normal military service and deviate from the normal conditions of life within the armed forces of the State party concerned. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of the execution of the penalty or measure in question.

9.5 In the implementation of the disciplinary measure imposed on him, Mr. Vuolanne was excluded from performing his normal duties and had to spend day and night for a period of 10

days in a cell measuring 2 x 3 metres. He was allowed out of his cell solely for purposes of eating, going to the toilet and taking air for half an hour every day. He was prohibited from talking to other detainees and from making any noise in his cell. His correspondence and personal notes were interfered with. He served a sentence in the same way as a prisoner would. The sentence imposed on the author is of a significant length, approaching that of the shortest prison sentence that may be imposed under Finnish criminal law. In the light of the circumstances, the Committee is of the view that this sort of solitary confinement in a cell for 10 days and nights is in itself outside the usual service and exceeds the normal restrictions that military life entails. The specific disciplinary punishment led to a degree of social isolation normally associated with arrest and detention within the meaning of article 9, paragraph 4. It must, therefore, be considered a deprivation of liberty by detention in the sense of article 9, paragraph 4. In this connection, the Committee recalls its General Comment No. 8 (16)according to which most of the provisions of article 9 apply to all deprivations of liberty, whether in criminal cases or in other cases of detention as for example, for mental illness, vagrancy, drug addiction, educational purposes and immigration control. The Committee cannot accept the State party's contention that because military disciplinary detention is firmly regulated by law, it does not necessitate the legal and procedural safeguards stipulated in article 9, paragraph 4.

9.6 The Committee further notes that whenever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that article 9, paragraph 4, obliges the State party concerned to make available to the person detained the right of recourse to a court of law. In this particular case it matters not whether the court would be civilian or military. The Committee does not accept the contention of the State party that the request for review before a superior military officer according to the Law on Military Disciplinary Procedure, currently in effect in Finland is comparable to judicial scrutiny of an appeal and that the officials ordering detention act in a judicial or quasi-judicial manner. The procedure followed in the case of Mr. Vuolanne did not have a judicial character, the supervisory military officer who upheld the decision of 17 July 1987 against Mr. Vuolanne cannot be deemed to be a "court" within the meaning of article 9, paragraph 41 therefore, the obligations laid down therein have not been complied with by the authorities of the State party.

9.7 The Committee observes that article 2, paragraph 1, represents a general undertaking by States parties in relation to which a specific finding concerning the author of this communication has been made in respect to the obligation in article 9, paragraph 4. Accordingly, no separate determination is required under article 2, paragraph 1.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the communication discloses a violation of article 9, paragraph 4, of the Covenant, because Mr. Vuolanne was unable to challenge his detention before a court.

11. The Committee, accordingly, is of the view that the State party is under an obligation to take effective measures to remedy, in accordance with article 2, paragraph 3 (a), the violation suffered by Mr. Vuolanne and to take steps to ensure that similar violations do not occur in the future.

FAIR TRIALS FOR TERRORISTS?
By Geoffrey Robertson
In Richard Ashby Wilson (ed.), Human Rights in the 'War on Terror' (Cambridge University Press, 2005), p. 169-172 (footnotes omitted)

'Fair Trials for Terrorists?' is oxymoronic. The trial of anyone already labelled a terrorist cannot, by definition, be fair. But the first casualty of war is always logic. The Pentagon's original brand name for its bombing of Afghanistan was 'Operation Infinite Justice,' which makes no sense because human justice is both finite and fallible. It has to be fair, of course, otherwise it is not justice; and it has to be expeditious (see Magna Carta) and it should be effective, even if that today increasingly means 'cost effective.' This chapter argues that the justice we dispense to alleged terrorists cannot exquisitely fair, but need not be rough. Above all, it must be justice that conforms to the definition our inherited Anglo-American traditions have provided; essentially, a genuine adversary process determined by judges who are independent of the prosecuting authority.

The acute problem we face is how to achieve fair trials for men and women who are demonized by the society from which their judges and jurors are drawn. In the United Kingdom, we have been trying terrorists unfairly for centuries, but at least they have been tried in courts. Whatever label is given to the proceedings in Guantanamo Bay, before 'special military commissions,' they do not appear to be taking place in a forum that satisfies the generally agreed definition of a court, although they are proceedings of an adversary nature and are thus far being held in public. They are being hear by men who, for all their personal wish to be fair, are not judges with the quality of independence established by Parliament – yours and ours – in 1641. Until then, judges held office at the King's pleasure; now, the Guantanamo judges hold office at Donald Rumsfeld's.

Special military commissions are preferable, of course, to shooting captured enemy leaders on sight, or making them victim of what Cordell Hull, the wartime U.S. Secretary of State, described as the 'historic accident.' Just suppose that tomorrow, a mosque near Peshawer is surrounded by Pakistani and U.S. troops, and out of it walks Osama Bin Laden – with his hands up. The soldier who develops a sudden uncontrollable itch in his trigger finger causes an 'historic accident.' He will face a court martial at which he will be acquitted, and the world will breathe a sigh of relief. An execution without trial, of course, but can a fair trial for Osama Bin Laden be a prospect any reasonable person could relish?

There can never be a warrant for the cold-blooded execution of a surrendered terrorist. 'If you wish to teach the people to reverence human life,' as John Bright said in 1850, 'you must first show that you reverence it yourself.' Terrorism succeeds if it tempts us to abandon the core values of democratic society, such as due process and rights to a fair trial. But it is vital to understand the arguments in favour of 'historic accidents' and non-curial experiments like special military commissions, because they challenge us to provide a form of justice that can live up to that name but which is also workable, expeditious and effective. The Anglo-American system does not have a good record in trying alleged terrorist, be they Sacco and Vanzetti or the 'Birmingham Six,' and some features from the developing international criminal justice systems might be borrowed to improve

on that record. We may have to reconsider a few of our cherished rights, such as trial by jury. But whatever we do, we must try to try alleged terrorist fairly, simply because the alternatives are impossible to contemplate for any society committed to the rule of law.

The United States and the United Kingdom have a long history of trying terrorists, and some of it is a shared history. I make no apologies for going back to the seventeenth century, because that is where the Supreme Court's majority, in *Rasul v. Bush* (2004), found the map for habeas corpus to travel to the limbo island of Guantanamo. The 1600s began with Jesuit religious terrorism – those Catholic fundamentalists who tried to blow up Parliament. If you want to know how they were treated, go to the Tower of London today and see the racks on which they were stretched until they confessed. You can view Guy Fawkes' signature on his deposition before and after he was put on the rack, and you will notice how the handwriting trails away – at the end, he hardly had the strength to hold the pen.

The Star Chamber of the Stuart Kings was too much for a new breed of religious fundamentals, the Puritans. They left England for New England in their tens of thousands, in search of Winthrop's 'city on a hill.' Many came back in the 1640s to fight the civil war, not only for democracy and the rights of Parliament, but also for an end to prerogative courts like the Star Chamber and an end to the appointment of judges 'at the King's pleasure.' They won, and then they lost, and come the Restoration in 1660, the Puritan leaders were put on trial as terrorist fanatics at the Old Bailey for a crime in 1649 that had much the same emotional impact on Britain as September 11 had on the United States – the execution of Charles I, when 'the world turned upside down.' This crime, said Charles II's Attorney-General, prosecuting at the Old Bailey, was hatched by fundamentalist Puritan preachers in Massachusetts, who sent over to England to carry it out men such as Sir Harry Vane, the state's first governor, and Rev. Hugh Peters, a founder of Harvard University.

Vane and Peters were convicted and publicly disembowelled. That was the penalty for terrorism, or treason as it was called then, but their courage in facing the ordeal was such that public sympathy started to swing behind them. The government's prisons were full of other republicans that it dared not put on trial. So what to do with them? They could not be detained in prison in England indefinitely, because of habeas corpus. So some smart but devious lawyer said, 'Why not put them on an offshore island, where habeas corpus won't reach?', and so they were imprisoned in Castle Orgueil in Jersey and on other island prisons. Thus Charles II provided George Bush II with the precedent for Guantanamo Bay, but as Justice Stevens explains in Rasul, it was such a deplorable precedent at the time that Parliament passed the Habeas Corpus Act of 1679 to endow the great writ with extraterritorial effect, and it applies today to provide the Guantanamo detainees with due process.

What is also important about this period in shared U.S./U.K. history is that during those eleven astonishing years when England was actually a republic, the basic rights of fair trial in the Anglo-American system were established. We owe many of them to a charismatic but incorrigible seditionist called John Lilburne, 'Freeborn John' as he was known and loved by the mob. He was the Michael Moore of his day and he provided every government beyond endurance. He was first imprisoned by the Star Chamber for refusing to answer

its questions, so when the Puritans abolished it, he appealed to the House of Lords which ruled that everyone had the 'right to silence' – he created the rule against self-incrimination. In due course he attacked Cromwell, who had him tried for treason, for the first time before a bench of independent judges and a jury of his peers. In that trial, he established the right to a public hearing – the open justice principle. He then insisted on the right to have the indictment translated into a language he could understand (English, because at that time indictments were in Latin). He then insisted that the prosecution provided him with particulars of the charge and an adjournment to study them. He stopped the practice of prosecutors conferring privately with the judges. He established the right of the defendants to be treated with some respect, to have pen and paper, to sit rather than to stand at the bar, even to relieve themselves when they had to – a chamber pot was brought to him in court for this purpose, and he shared it with his jury.

Above all, his acquittal by the jury, a rare event in treason trials, established in the popular mind, in England and in its colonies, an invincible and almost superstitious belief in the rightness of trial by jury. So much so that when the Stuarts returned with a vengeance in 1660 to disembowel these terrorist fanatics from New England, they could not bring back the Star Chamber, and they could not use Cromwell's special military commissions; instead, they had to afford all defendants trial by jury. For this reason, they had to work out how to rig the trials to ensure convictions, and they hit upon vetting the jury panel for loyalty to the King. They denied lawyers to the accused, they arranged for secret meetings between prosecution and judges, and they devised methods for judicial control of the jury, such as 'summing up' the evidence, that is, saying to the jury, 'well if that isn't treason then I don't know what is.'

The reason I have gone back to this time of a shared Anglo-American legal heritage […] as a reminder of the origins of certain of these non-negotiable fundamentals of a fair trial – for everyone, and especially for terrorists.

4. RESTRICTIONS ON HUMAN RIGHTS

See also the textbook, Helen Duffy, *The 'War on Terror,'* pp. 291

Distinct from the derogation regime is the restriction regime. Certain human rights have built-in exceptions when state obligations toward certain rights can be relaxed in order to achieve specific objectives. Thus, while the derogation regime of CCPR, Article 4 applies to all rights in the CCPR (except for those that are non-derogable), the restriction regime applies only to the right to which it is specifically attached. For example, CCPR Article 12 on the freedom of movement, states in paragraph 3 that "[t]he above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

Other rights in the CCPR have similar restriction regimes, including Article 18 (freedom of thought, conscience and religion), Article 19 (the freedom of expression), Article 21 (freedom of assembly), and Article 22 (freedom of association). Furthermore, the Covenant on Economic, Social and Cultural Rights (CESCR), Article 4 contains a general restriction clause that applies to all rights therein, enabling limitations that are "determined by law," "compatible with the nature of these rights," and "solely for the purpose of promoting the general welfare in a democratic society."

The restriction regime of Article 19 will be the focus of this section, but it should be noted that all restriction clauses in the CCPR are interpreted in the same way with regard to each separate right. See Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, *Human Rights Quarterly* (Vol. 7, No. 3, 1985).

Article 19 (3) establishes the restriction regime in relation to the freedom of expression:

> "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The Human Rights Committee's General Comment 10, para. 4, explains Article 19 (3):

> "Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be

imposed: the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being 'necessary' for that State party for one of those purposes."

1. Provided by Law

While there is little jurisprudence on the "provided by law" provision in Article 19 (3), the Committee has interpreted the phrase in other contexts as requiring that the limitation be sufficiently delineated in a state's law. This can include statutory law, the law as interpreted by any level of the judiciary, and even the law of parliamentary privilege. See *Gauthier v. Canada*, 1995 HRC 63, para. 13.5 (restriction 'arguably' prescribed by law).

ROSS V. CANADA
1997 HRC 736 (2000), paras. 11.3 & 11.4

11.4 While noting the vague criteria of the provisions that were applied in the case against the School Board and which were used to remove the author from his teaching position, the Committee must also take into consideration that the Supreme Court considered all aspects of the case and found that there was sufficient basis in domestic law for the parts of the Order which it reinstated. The Committee also notes that the author was heard in all proceedings and that he had, and availed himself of, the opportunity to appeal the decisions against him. In the circumstances, it is not for the Committee to reevaluate the findings of the Supreme Court on this point, and accordingly it finds that the restriction was provided for by law.

11.5 When assessing whether the restrictions placed on the author's freedom of expression were applied for the purposes recognized by the Covenant, the Committee begins by noting (8) that the rights or reputations of others for the protection of which restrictions may be permitted under article 19, may relate to other persons or to a community as a whole. For instance, and as held in Faurisson v. France, restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in article 20(2) of the Covenant. The Committee notes that both the Board of Inquiry and the Supreme Court found that the author's statements were discriminatory against persons of the Jewish faith and ancestry and that they denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. In view of the findings as to the nature and effect of the author's public statements, the Committee concludes that the restrictions imposed on him were for the purpose of protecting the "rights or reputations" of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance.

2. Necessary (proportionate and legitimate)

In *Faurisson v. France*, 1993 HRC 550 (1996) (Evatt, Medina, Klein, concurring), para. 8, the Committee addressed the meaning of the word 'necessary:'

> "The power given to States parties under article 19, paragraph 3, to place restrictions on freedom of expression, must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive. Much offensive speech may be regarded as speech that impinges on one of the values mentioned in article 19, paragraph 3 (a) or (b) (the rights or reputations of others, national security, ordre public, public health or morals). The Covenant therefore stipulates that the purpose of protecting one of those values is not, of itself, sufficient reason to restrict expression. The restriction must be necessary to protect the given value. This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value. As the Committee stated in its General Comment 10, the restriction must not put the very right itself in jeopardy."

The concurring opinion of Mr. Lallah reiterated the importance of the requirement that a provision in law be proportional to one of the permitted limitations:

> "Recourse to restrictions that are, in principle, permissible under article 19, paragraph 3, bristles with difficulties, tending to destroy the very existence of the right sought to be restricted. The right to freedom of opinion and expression is a most valuable right and may turn out to be too fragile for survival in the face of the too frequently professed necessity for its restriction in the wide range of areas envisaged under paragraphs (a) and (b) of article 19, paragraph 3."

3. Rights and Reputations of Others

With regard to human rights and counter terrorism, the issue on the "rights and reputation of others" revolves around the balancing of the right to security and life with other human rights. This discussion has already been mentioned in the first part of this handout. Consider that material in the context of the restriction in CCPR, Art. 19 (3) (a).

Can the claim that "enhanced interrogations have stopped terrorist attacks" be justified by Art. 19 (3) (a)? What factors do you consider in your answer to this question? Where do you draw the line?

4. National security and public order

[For the purpose of this course, the focus will be on the national security and public order limitation, ignoring the limitations for public health and public morals. Nevertheless, to facilitate an understanding of these limitations, here is an example of each: restrictions on the advertising of harmful substances such as tobacco would fall under public health; and restrictions on pornography would fall under public morals.]

The following excerpt provides a glimpse into the meaning of the term 'national security.' It synthesizes the *travaux preparatoires* of CCPR, Article 19 (3). The debates in the Commission on Human Rights highlight the relationship between national security and state sovereignty itself with references to "territorial integrity." Notice, too, the disagreement between the United States, which thought that national security and public order had generally-accepted meanings, and the United Kingdom, which worried that the terms were vague and subject to abuse.

THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION
By Anna-Lena Svensson-McCarthy
(The Hague: Martinus Nijhoff Publishers, 1998), p. 153-156 (footnotes omitted)

At the Commission [on Human Rights]' sixth session in 1950, various proposals were circulating as to the working of the future article, and the terms "national security" were contained in the amendments of the United States. The United Kingdom and France. The words "public order" were also inserted in the proposals made by the United States and France, although the United Kingdom preferred the terms for the "prevention of disorder or crime.

The United States modified amendment formed the basis of the subsequent discussion in the Commission, the major part of which turned on the question whether to accept the terms "public order" as suggested therein or the phrase for the "prevention of disorder or crime" proposed by the United Kingdom. In general, various delegates voiced concern about the use of such general notions as "national security" and/or "public order which could all too easily be abused and allow unjustified restrictions on the freedom of expression and information.

To meet this objection France wanted to add the words "in a democratic society," which was intended to "complete and clarify the idea of public order." Which should not be replaced by the term "disorder" which did not correspond to any legal concept." Also the United States preferred "public order" which was used in Art. 29 of the Universal Declaration, and it had "greater objections to the insertion of the words "or crime," which "had no exact meaning in law." With regard to "public order" also Belgium agreed that it "would be very risky to substitute for that exact legal concept vaguer terms which would be incompatible with the tenor of such a

fundamental text as the covenant." France then asked the United Kingdom to reconsider its proposal, since there may be cases not involving "criminal law, crime or disorder, but which nevertheless threatened public order and which might necessitate a restriction on freedom of information."

In the view of Australia, on the other hand neither expression "was entirely satisfactory," and the discussion had failed to determine "the precise meaning of the phrase 'public order;'" "although the word 'disorder' was not entirely clear" either, it was still "the more satisfactory term."

The Commission subsequently unanimously adopted the phrase "of national security, public order, safety, health or morals" as contained in the United States proposal.

During the second reading of the Covenant at the same session, United Kingdom again pointed out that the term "public order" "was subject to extremely wide interpretation" in that "the general understand in the Commission had been that it included everything connected with what were usually known as 'reasons of state,'" thus rendering any guarantee "ineffective." Also Chile "felt that the Commission had evolved no clear interpretation of" this concept, whilst United States "did not believe that" it "was open to misinterpretation."

The Commission's last discussion on the right to freedom of expression took place at the eighth session in 1952, when it adopted the final wording of the relevant article which subsequently only underwent linguistic changes with no bearing on the substance thereof. The United Kingdom now again treid to have the words "public order" replaced by the terms "prevention of disorder and crime," since "they were much narrower in scope." It submitted, correctly, that the deletion of the notion "public order" was in conformity with "the Security-General's declared view that the term was too broad and flexible, and might give legal sanction to grave abuses." France insisted however that "the national community as a whole must be protected against any incitement by the press to violate public order, morals and national security." Lebanon added for its part that the terms "national security," among others, "were perfectly clear and meant more or less the same in all countries," and it was thus against the United Kingdom proposal to add "territorial integrity" to the grounds justifying limitations, since it was already covered by the notion "national security."

Following the criticism, the United Kingdom dropped its proposed reference to "territorial integrity," although unsuccessfully maintaining the suggested reference to the "prevention of disorder," and the words "order" and "public" were eventually adopted in separate votes. When the same provision was discussed in the Third Committee in 1961, the notion of national security did not raise any controversy, but the terms public order were criticised by several delegations. United Kingdom also asked whether the Committee still considered that licensing of broadcasting stations, for instance, was covered by this latter notion, a question to which Canada replied that "the idea of public order was sufficiently broad to eliminate the need for including a clause on the licensing arrangements for radio broadcasting, motion pictures and television." Chile considered that this notion had to be understood to comprise "not only the maintenance of order, but also the legal order which obtained in each State, account being taken of its international commitments and in particular any agreements on, for example, telecommunications which it might have concluded."

After all amendments had been either withdrawn or rejected, the Committee adopted the draft limitation provision submitted by the Commission on Human Rights. The only modification made was the insertion, at the suggestion of Ireland, of the words "ordre public" in parenthesis after the terms "public order" in the English text.

NOTES

1. While other grammatical arrangements were preferred during the drafting of the Covenant, it is worth noting that the United Kingdom's connection of national security to "territorial integrity" was never expressly contradicted.
2. Is there any importance in the use of the word national in "national security?" Would the adjective 'national' imply that restrictions on human rights were only lawful if in the interest of the whole nation, not just for securing the position of a government, regime, or power group. See Alexandre Charles Kiss, "Permissible Limitations on Rights," in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p. 295. Compare this interpretation of 'national' with CESCR, Art. 4: "solely for purpose of promoting the general welfare in a democratic society."
3. What meaning does the word security have in "national security?" Can this logically imply the protection of a state's political independence against the use or threat of use of force, as suggested by the United Nations Charter, Article 2 (4)?
4. The Human Rights Committee has almost no jurisprudence on the definition of public order. Most notable is its Concluding Observation on Guinea in 1993, UN Doc A/48/40 (Part I), para. 547, where it stated the following:

> "The Committee expressed concern at the general character of the provisions of article 22 of the Basic Law which permit it to limit the rights and freedoms of the individual for reasons relating to public order. It fears that implementation of these provisions might lead Guinea to enact laws instituting restrictions on rights and freedoms that go beyond those permitted by the Covenant. The Committee expressed concern at the establishment under the Basic Law of the Supreme Court of Justice which does not seem to it to comply with the requirements of article 14 of the Covenant. Several cases of ill-treatment and torture have been reported and have remained unpunished. There have been arrests and detentions for reasons of a political nature during the period covered by the report. Peaceful demonstrations have ended in bloodshed owing to excessive use of firearms by the police. The Committee is also concerned regarding the implementation of article 27 of the Covenant."

SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION OF PROVISIONS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
UN Doc E/CN.4/1984/4 (1984)

22. The expression "public order (ordre public)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).

23. Public order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.

24. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.
29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively violation or at perpetrating repressive practices against its population.

isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.

32. The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such

5. RESTRICTIONS AND THE FREEDOM OF EXPRESSION

See also the textbook, Helen Duffy, *The 'War on Terror,'* pp. 364-65

While the focus of discussion in the following cases is whether the restriction was lawful, you should also take note of the various human rights standards for the freedom of expression. For a brief synopsis of these standards, see Rhona Smith, *Textbook on International Human Rights* (Oxford University Press, 2007), pp. 267-77.

COMPULSORY MEMBERSHIP IN AN ASSOCIATION PRESCRIBED BY LAW FOR THE PRACTICE OF JOURNALISM
Inter-American Court of Human Rights
Advisory Opinion OC-5/85 (13 Nov 1985)

1. By note of July 8, 1985, the Government of Costa Rica (hereinafter "the Government") submitted to the Inter-American Court of Human Rights (hereinafter "the Court") an advisory opinion request relating to the interpretation of Articles 13 and 29 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") [***]. According to the express declaration of the Government, its request was formulated in fulfillment of a commitment it had made to the Inter-American Press Association (hereinafter "the IAPA").

[***]

11. Invoking Article 64 of the Convention, the Government requested the Court to render an advisory opinion on the interpretation of Articles 13 and 29 of the Convention with respect to the compulsory licensing of journalists, and on the compatibility of Law No. 4420, which establishes such licensing requirements in Costa Rica, with the aforementioned articles of the Convention. The communication presented the request in the following manner:

"The request that is presented to the Inter-American Court, therefore, also includes a specific request for an advisory opinion as to whether there is a conflict or contradiction between the compulsory membership in a professional association as a necessary requirement to practice journalism, in general, and reporting, in particular, - according to the aforementioned articles of Law No. 4420- and the international norms (Articles 13 and 29 of the American Convention on Human Rights.) In this respect, it is necessary to have the opinion of the Inter-American Court regarding the scope and limitations on the right to freedom of expression, of thought and of information and the only permissible limitations contained in Articles 13 and 29 of the American Convention, with an indication as to whether the domestic norms contained in the Organic Law of the Colegio de Periodistas (Law No. 4420) and Articles 13 and 29 are compatible.

Is the compulsory membership of journalists and reporters in an association prescribed by law for the practice of journalism permitted or included among the restrictions or limitations authorized by Articles 13 and 29 of the American Convention on

Human Rights? Is there any incompatibility, conflict or disagreement between those domestic norms and the aforementioned articles of the American Convention?"

[***]

29. Article 13 of the Convention reads as follows:

"Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

The English text of this provision constitutes an erroneous translation of the original Spanish text. The here relevant phrase should read " and be necessary to ensure.... "

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

Article 29 establishes the following rules for the interpretation of the Convention:

Article 29. Restrictions Regarding Interpretation

"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."

30. Article 13 indicates that freedom of thought and expression " includes freedom to seek, receive, and impart information and ideas of all kinds.... " This language establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.

31. In its individual dimension, freedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible. When the Convention proclaims that freedom of thought and expression includes the right to impart information and ideas through " any... medium, " it emphasizes the fact that the expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely. The importance of the legal rules applicable to the press and to the status of those who dedicate themselves professionally to it derives from this concept.

32. In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.

33. The two dimensions mentioned (supra 30) of the right to freedom of expression must be guaranteed simultaneously. One cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor. It is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view.

34. If freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that

are excluded from access to such media, it must be recognized also that such media should, in practice, be true instruments of that freedom and not vehicles for its restriction. It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.

35. The foregoing does not mean that all restrictions on the mass media or on freedom of expression in general, are necessarily a violation of the Convention, whose Article 13(2) reads as follows:

> "Article 13(2) The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> respect for the rights or reputations of others; or
>
> the protection of national security, public order, or public health or morals."

This language indicates that the acts which by law are established as grounds for liability pursuant to the quoted provision constitute restrictions on freedom of expression. It is in that sense that the Court will hereinafter use the term " restriction, " that is, as liabilities imposed by law for the abusive exercise of freedom of expression.

36. The Convention itself recognizes that freedom of thought and expression allows the imposition of certain restrictions whose legitimacy must be measured by reference to the requirements of Article 13 (2). Just as the right to express and to disseminate ideas is indivisible as a concept, so too must it be recognized that the only restrictions that may be placed on the mass media are those that apply to freedom of expression. It results therefrom that in determining the legitimacy of restrictions and, hence, in judging whether the Convention has been violated, it is necessary in each case to decide whether the terms of Article 13 (2) have been respected.

37. These provisions indicate under what conditions a limitation to freedom of expression is compatible with the guarantee of this right as it is recognized by the Convention. Those limitations must meet certain requirements of form, which depend upon the manner in which they are expressed. They must also meet certain substantive conditions, which depend upon the legitimacy of the ends that such restrictions are designed to accomplish.

38. Article 13 (2) of the Convention defines the means by which permissible limitations to freedom of expression may be established. It stipulates, in the first place, that prior censorship is always incompatible with the full enjoyment of the rights listed in Article 13, but for the exception provided for in subparagraph 4 dealing with public entertainments, even if the alleged purpose of such prior censorship is to prevent abuses of freedom of expression. In this area any preventive measure inevitably amounts to an infringement of the freedom guaranteed by the Convention.

39. Abuse of freedom of information thus cannot be controlled by preventive

measures but only through the subsequent imposition of sanctions on those who are guilty of the abuses. But even here, in order for the imposition of such liability to be valid under the Convention, the following requirements must be met:

"a) the existence of previously established grounds for liability;

b) the express and precise definition of these grounds by law;

c) the legitimacy of the ends sought to be achieved;

d) a showing that these grounds of liability are " necessary to ensure " the aforementioned ends."

All of these requirements must be complied with in order to give effect to Article 13(2).

40. Article 13(2) is very precise in specifying that the restrictions on freedom of information must be established by law and only in order to achieve the ends that the Convention itself enumerates. Because the provision deals with restrictions as that concept has been used by the Court (supra 35), the legal definition of the liability must be express and precise.

41. Before analyzing subparagraphs (a) and (b) of Article 13 (2) of the Convention, as they relate to the instant request, the Court will now consider the meaning of the expression " necessary to ensure, " found in the same provision. To do this, the Court must take account of the object and purpose of the treaty, keeping in mind the criteria for its interpretation found in Articles 29 (c) and (d), and 32 (2), which read as follows:

"Article 29. Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

...

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."

"Article 32. Relationship between Duties and Rights [...]

2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."

The Court must also take account of the Preamble of the Convention in which the signatory states reaffirm " their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man. "

42. These articles define the context within which the restrictions permitted under Article 13(2) must be interpreted. It follows from the repeated reference to "democratic institutions", "representative democracy" and "democratic society" that the question whether a restriction on freedom of expression imposed by a state is "necessary to ensure" one of the objectives listed in subparagraphs (a) or (b) must be judged by reference to the legitimate needs of democratic societies and institutions.

43. In relation to this point, the Court believes that it is useful to compare Article 13 of the Convention with Article 10 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter " the European Convention ") and with Article 19 of the International Covenant on Civil and Political Rights (hereinafter " the Covenant "), which read as follows:

"EUROPEAN CONVENTION - ARTICLE 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

"COVENANT - ARTICLE 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

44. It is true that the European Convention uses the expression " necessary in a democratic society, " while Article 13 of the American Convention omits that phrase. This difference in wording loses its significance, however, once it is recognized that the European Convention contains no clause comparable to Article 29 of the American Convention, which lays down guidelines for the interpretation of the Convention and prohibits the interpretation of any provision of the treaty " precluding other rights and guarantees... derived from representative democracy as a form of government. " The Court wishes to emphasize, furthermore, that Article 29(d) bars interpretations of the Convention " excluding or limiting the effect that the American Declaration of the Rights and Duties of Man... may have, " which instrument is recognized as forming part of the normative system for the OAS Member States in Article 1(2) of the Commission's Statute. Article XXVIII of the American Declaration of

the Rights and Duties of Man reads as follows:

"The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy."

The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.

45. The form in which Article 13 of the American Convention is drafted differs very significantly from Article 10 of the European Convention, which is formulated in very general terms. Without the specific reference in the latter to " necessary in a democratic society, " it would have been extremely difficult to delimit the long list of permissible restrictions. As a matter of fact, Article 19 of the Covenant, which served, in part at least, as a model for Article 13 of the American Convention, contains a much shorter list of restrictions than does the European Convention. The Covenant, in turn, is more restrictive than the American Convention, if only because it does not expressly prohibit prior censorship.

46. It is important to note that the European Court of Human Rights, in interpreting Article 10 of the European Convention, concluded that "necessary," while not synonymous with "indispensable," implied "the existence of a 'pressing social need'" and that for a restriction to be "necessary" it is not enough to show that it is "useful," "reasonable" or "desirable." (Eur. Court H. R., The Sunday Times Case, judgment of 26 April 1979, Series A no. 30, para. 59, pp. 35-36.) This conclusion, which is equally applicable to the American Convention, suggests that the "necessity" and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it. (The Sunday Times Case, supra, para. 62, p. 38. See also Eur. Court H. R., Barthold judgment of 25 March 1985, Series A no. 90, para. 59, p. 26.)

47. Article 13(2) must also be interpreted by reference to the provisions of Article 13(3), which is most explicit in prohibiting restrictions on freedom of expression by " indirect methods and means... tending to impede the communication and circulation of ideas and opinions. " Neither the European Convention nor the Covenant contains a comparable clause. It is significant that Article 13(3) was placed immediately after a provision -Article 13(2)- which deals with permissible restrictions on the exercise of freedom of expression. This circumstance suggests a desire to

ensure that the language of Article 13(2) not be misinterpreted in a way that would limit, except to the extent strictly necessary, the full scope of the right to freedom of expression.

48. Article 13(3) does not only deal with indirect governmental restrictions, it also expressly prohibits " private controls " producing the same result. This provision must be read together with the language of Article 1 of the Convention wherein the States Parties " undertake to respect the rights and freedoms recognized (in the Convention)... and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.... " Hence, a violation of the Convention in this area can be the product not only of the fact that the State itself imposes restrictions of an indirect character which tend to impede " the communication and circulation of ideas and opinions, " but the State also has an obligation to ensure that the violation does not result from the " private controls " referred to in paragraph 3 of Article 13.

49. The provisions of Article 13(4) and 13(5) have no direct bearing on the questions before the Court in the instant application and, consequently, do not need to be analyzed at this time.

50. The foregoing analysis of Article 13 shows the extremely high value that the Convention places on freedom of expression. A comparison of Article 13 with the relevant provisions of the European Convention (Article 10) and the Covenant (Article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.

51. With respect to the comparison between the American Convention and the other treaties already mentioned, the Court cannot avoid a comment concerning an interpretation suggested by Costa Rica in the hearing of November 8, 1985. According to this argument, if a right recognized by the American Convention were regulated in a more restrictive way in another international human rights instrument, the interpretation of the American Convention would have to take those additional restrictions into account for the following reasons:

"If it were not so, we would have to accept that what is legal and permissible on the universal plane would constitute a violation in this hemisphere, which cannot obviously be correct. We think rather that with respect to the interpretation of treaties, the criterion can be established that the rules of a treaty or a convention must be interpreted in relation with the provisions that appear in other treaties that cover the same subject. It can also be contended that the provisions of a regional treaty must be interpreted in the light of the concepts and provisions of instruments of a universal character. (Underlining in original text.)"

It is true, of course, that it is frequently useful, -and the Court has just done it- to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that approach should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty.

52. The foregoing conclusion clearly follows from the language of Article 29 which sets out the relevant rules for the

interpretation of the Convention. Subparagraph (b) of Article 29 indicates that no provision of the Convention may be interpreted as

> "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."

Hence, if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.

53. Article 13 may be violated under two different circumstances, depending on whether the violation results in the denial of freedom of expression or whether it results from the imposition of restrictions that are not authorized or legitimate.

54. In truth, not every breach of Article 13 of the Convention constitutes an extreme violation of the right to freedom of expression, which occurs when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news. Examples of this type of violation are prior censorship, the seizing or barring of publications and, generally, any procedure that subjects the expression or dissemination of information to governmental control. Here the violation is extreme not only in that it violates the right of each individual to express himself, but also because it impairs the right of each person to be well informed, and thus affects one of the fundamental prerequisites of a democratic society. The Court believes that the compulsory licensing of journalists, as that issue is presented in the instant request, does not fall into this category.

55. Suppression of freedom of expression as described in the preceding paragraph, even though it constitutes the most serious violation possible of Article 13, is not the only way in which that provision can be violated. In effect, any governmental action that involves a restriction of the right to seek, receive and impart information and ideas to a greater extent or by means other than those authorized by the Convention, would also be contrary to it. This is true whether or not such restrictions benefit the government.

56. Furthermore, given the broad scope of the language of the Convention, freedom of expression can also be affected without the direct intervention of the State. This might be the case, for example, when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice " means tending to impede the communication and circulation of ideas and opinions. "

57. As has been indicated in the preceding paragraphs, a restriction of the right to freedom of expression may or may not be a violation of the Convention, depending upon whether it conforms to the terms in which such restrictions are authorized by Article 13(2). It is consequently necessary to analyze the question relating to the

compulsory licensing of journalists in light of this provision of the Convention.

58. The compulsory licensing of journalists can result in the imposition of liability, including penal, for those who are not members of the " colegio " if, by imparting " information and ideas of all kinds... through any... medium of one's choice " they intrude on what, according to the law, is defined as the professional practice of journalism. It follows that this licensing requirement constitutes a restriction on the right of expression for those who are not members of the " colegio. " This conclusion makes it necessary for the Court to determine whether the law is based on considerations that are legitimate under the Convention and, consequently, compatible with it.

59. Accordingly, the question is whether the ends sought to be achieved fall within those authorized by the Convention, that is, whether they are " necessary to ensure: a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals " (Art. 13(2)).

60. The Court observes that the arguments employed to defend the legitimacy of the compulsory licensing of journalists are linked to only some, but not all, of the concepts mentioned in the preceding paragraph. It has been asserted, in the first place, that compulsory licensing is the normal way to organize the practice of the professions in the different countries that have subjected journalism to the same regime. Thus, the Government has pointed out that in Costa Rica

> "there exists an unwritten rule of law, of a structural and constitutive nature, regarding the professions. This rule can be stated in the following terms: each profession must organize itself, by law, into a public corporation called a 'colegio.'"

Similarly, the Commission has indicated that

> "There is no opposition to the supervision and control of the exercise of the professions, either directly by government agencies, or indirectly through an authorization or delegation made for that purpose by a corresponding statute to a professional organization or association, under the vigilance and control of the state, since the former, in performing its mission, must always be subject to the law. Membership in a professional association or the requirement of a card for the exercise of the profession of journalists does not imply restriction of the freedoms of thought and expression, but rather a regulation that the Executive Branch may make on the validation of academic degrees, as well as the inspection of their exercise, as an imperative of social order and a guarantee of a better protection of human rights (Schmidt Case, supra 15)."

The Colegio de Periodistas of Costa Rica also pointed out that " this same requirement (licensing) exists in the organic laws of all professional 'colegios'. " For its part, the Federacion Latinoamericana de Periodistas, in the observations that it submitted to the Court as amicus curiae, stated that some Latin American constitutions stipulate the compulsory licensing for the professions in a manner similar to that prescribed by the here relevant law, and that this stipulation has the same normative rank as does freedom of expression.

61. Second, it has been argued that compulsory licensing seeks to achieve goals, linked with professional ethics and responsibility, that are useful to the community at large. The Government mentioned a decision of the Costa Rican Supreme Court, which stated that

> "it is true that these " colegios " also act in the common interest and in defense of its members, but it is to be noted that in addition to that interest, there is one of a higher authority that justifies establishing compulsory licensing in some professions, namely, those which are generally known as the liberal professions, because in addition to a degree that assures an adequate education, it also requires strict observance of the standards of professional ethics, as much for the type of activity that is carried out by these professionals as for the confidence that is deposited in them by those who require their services. This is all in the public interest and the State delegates to the " colegios " the power to oversee the correct exercise of the profession."

On another occasion the Government said:

> "Something else results from what we could call the practice of journalism as a " liberal profession. " This explains why the same Law of the Colegio de Periodistas of Costa Rica allows a person to become a commentator and even a paid and permanent columnist of a communications medium without having to belong to the Colegio de Periodistas."

The same Government has emphasized that

> "the practice of certain professions involves not only rights but also duties toward the community and the social order. That is what justifies the requirement of special qualifications, regulated by law, for the practice of some professions, such as journalism."

Expressing similar views, a Delegate of the Commission, in the public hearing of November 8, 1985, concluded that

> "compulsory licensing of journalists or the requirement of a professional identification card does not mean that the right to freedom of thought and expression is being denied, nor restricted, nor limited, but only that its practice is regulated so that it fulfills a social function, respects the rights of others and protects the public order, health, morals and national security. Compulsory licensing seeks the control, inspection and oversight of the profession of journalists in order to guarantee ethics, competence and the social betterment of journalists."

In the same vein, the Colegio de Periodistas affirmed that " society has the right, in order to protect the general welfare, to regulate the professional practice of journalism " ; and also that " the handling of the thoughts of others, in their presentation to the public, requires not only a trained professional but also one with professional responsibility and ethics toward society, which is overseen by the Colegio de Periodistas of Costa Rica. "

62. It has also been argued that licensing is a means of guaranteeing the independence of journalists in relation to their employers. The Colegio de Periodistas has stated that rejection of compusory licensing

> "would be the equivalent of granting the objectives of those who establish organs of mass media in Latin America not in the service of society

> but rather to defend personal interests and those of special interest groups. They would prefer to continue to have absolute control over the whole process of social communication, including the employment of individuals as journalists, who appear to have those same interests."

Following the same reasoning, the Federación Latinoamericana de Periodistas stated, inter alia, that such licensing seeks

> "to guarantee to their respective societies the right to freedom of expression of ideas in whose firm defense they have concentrated their struggle.... And with relation to the right of information our unions have always emphasized the need for making democratic the flow of information in the broadcasterlistener relationship so that the citizenry may have access to and receive true and pertinent information, a struggle that has found its principal stumbling block in the egoism and business tactics of the mass news media."

63. The Court, in relating these arguments to the restrictions provided for in Article 13(2) of the Convention, observes that they do not directly involve the idea of justifying the compulsory licensing of journalists as a means of guaranteeing " respect for the rights or reputations of others " or " the protection of national security " or " public health or morals " (Art. 13(2)). Rather, these arguments seek to justify compulsory licensing as a way to ensure public order (Art. 13(2)b)) as a just demand of the general welfare in a democratic society (Art. 32(2)).

64. In fact it is possible, within the framework of the Convention, to understand the meaning of public order as a reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles. In that sense, restrictions on the exercise of certain rights and freedoms can be justified on the ground that they assure public order. The Court interprets the argument to be that compulsory licensing can be seen, structurally, as the way to organize the exercise of the professions in general. This contention would justify the submission of journalists to such a licensing regime on the theory that it is compelled by public order.

65. The concept of general welfare, as articulated in Article 32(2) of the Convention, has been directly invoked to justify the compulsory licensing of journalists. The Court must address this argument since it believes that, even without relying on Article 32(2), it can be said that, in general, the exercise of the rights guaranteed by the Convention must take the general welfare into account. In the opinion of the Court that does not mean, however, that Article 32(2) is automatically and equally applicable to all the rights which the Convention protects, including especially those rights in which the restrictions or limitations that may be legitimately imposed on the exercise of a certain right are specified in the provision itself. Article 32(2) contains a general statement that is designed for those cases in particular in which the Convention, in proclaiming a right, makes no special reference to possible legitimate restrictions.

66. Within the framework of the Convention, it is possible to understand the concept of general welfare as referring to the conditions of social life that allow members of society to reach the highest level of personal development and the optimum achievement of democratic values. In that sense, it is possible to conceive of

the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual as an imperative of the general welfare. It follows therefrom that the arguments that view compulsory licensing as a means of assuring professional responsibility and ethics and, moreover, as a guarantee of the freedom and independence of journalists in relation to their employers, appear to be based on the idea that such licensing is compelled by the demands of the general welfare.

67. The Court must recognize, nevertheless, the difficulty inherent in the attempt of defining with precision the concepts of " public order " and " general welfare. " It also recognizes that both concepts can be used as much to affirm the rights of the individual against the exercise of governmental power as to justify the imposition of limitations on the exercise of those rights in the name of collective interests. In this respect, the Court wishes to emphasize that " public order " or " general welfare " may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content. (See Art. 29(a) of the Convention.) Those concepts, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the " just demands " of " a democratic society, " which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.

68. The Court observes that the organization of professions in general, by means of professional " colegios, " is not per se contrary to the Convention, but that it is a method for regulation and control to ensure that they act in good faith and in accordance with the ethical demands of the profession. If the notion of public order, therefore, is thought of in that sense, that is to say, as the conditions that assure the normal and harmonious functioning of the institutions on the basis of a coherent system of values and principles, it is possible to conclude that the organization of the practice of professions is included in that order.

69. The Court also believes, however, that that same concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard. In this sense, the Court adheres to the ideas expressed by the European Commission of Human Rights when, basing itself on the Preamble of the European Convention, it stated

> "that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but... to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law. (" Austria vs. Italy, " Application No. 788/60, 4 European Yearbook of Human Rights 116, at 138 (1961).)"

It is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.

70. Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a conditio sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.

71. Within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional " colegio. "

72. The argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that Article 13 expressly protects freedom " to seek, receive, and impart information and ideas of all kinds... either orally, in writing, in print.... " The profession of journalism -the thing journalists do- involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees.

73. This is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law and medicine -that is to say, the things that lawyers or physicians do- is not an activity specifically guaranteed by the Convention. It is true that the imposition of certain restrictions on the practice of law would be incompatible with the enjoyment of various rights that the Convention guarantees. For example, a law that prohibited all lawyers from acting as defense counsel in cases involving anti-state activities might be deemed to violate the accused's rights to counsel under Article 8 of the Convention and, hence, be incompatible with it. But no one right guaranteed in the Convention exhaustively embraces or defines the practice of law as does Article 13 when it refers to the exercise of a freedom that encompasses the activity of journalism. The same is true of medicine.

74. It has been argued that what the compulsory licensing of journalists seeks to achieve is to protect a paid occupation and that it is not directed against the exercise of freedom of expression as long as it does not involve remuneration and that, in that sense, it deals with a subject other than that dealt with by Article 13 of the Convention. This argument is based on a distinction between professional journalism and the exercise of freedom of expression that the Court cannot accept. This argument assumes that it is possible to distinguish freedom of expression from the professional practice of journalism, which is not possible. Moreover, it implies serious dangers if carried to its logical conclusion. The practice of professional journalism cannot be differentiated from freedom of expression. On the contrary, both are obviously intertwined, for the professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of

expression in a continuous, regular and paid manner. It should also be noted that the argument that the differentiation is possible could lead to the conclusion the guarantees contained in Article 13 of the Convention do not apply to professional journalists.

75. The argument advanced in the preceding paragraph does not take into account, furthermore, that freedom of expression includes imparting and receiving information and has a double dimension, individual and collective. This fact indicates that the circumstance whether or not that right is exercised as a paid profession cannot be deemed legitimate in determining whether the restriction is contemplated in Article 13(2) of the Convention because, without ignoring the fact that a guild has the right to seek the best working conditions for its members, that is not a good enough reason to deprive society of possible sources of information.

76., The Court concludes, therefore, that reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of the rights that Article 13 of the Convention grants to each individual. Hence, it would violate the basic principles of a democratic public order on which the Convention itself is based.

77. The argument that licensing is a way to guarantee society objective and truthful information by means of codes of professional responsibility and ethics, is based on considerations of general welfare. But, in truth, as has been shown, general welfare requires the greatest possible amount of information, and it is the full exercise of the right of expression that benefits this general welfare. In principle, it would be a contradiction to invoke a restriction to freedom of expression as a means of guaranteeing it. Such an approach would ignore the primary and fundamental character of that right, which belongs to each and every individual as well as the public at large. A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has.

78. It has likewise been suggested that the licensing of journalists is a means of strengthening the guild of professional journalists and, hence, a guarantee of the freedom and independence of those professionals and, as such, required by the demands of the general welfare. The Court recognizes that the free circulation of ideas and news is possible only through a plurality of sources of information and respect for the communications media. But, viewed in this light, it is not enough to guarantee the right to establish and manage organs of mass media; it is also necessary that journalists and, in general, all those who dedicate themselves professionally to the mass media are able to work with sufficient protection for the freedom and independence that the occupation requires. It is a matter, then, of an argument based on a legitimate interest of journalists and the public at large, especially because of the possible and known manipulations of information relating to events by some governmental and private communications media.

79. The Court believes, therefore, that the freedom and independence of journalists is an asset that must be protected and guaranteed. In the terms

of the Convention, however, the restrictions authorized on freedom of expression must be " necessary to ensure " certain legitimate goals, that is to say, it is not enough that the restriction be useful (supra 46) to achieve a goal, that is, that it can be achieved through it. Rather, it must be necessary, which means that it must be shown that it cannot reasonably be achieved through a means less restrictive of a right protected by the Convention. In this sense, the compulsory licensing of journalists does not comply with the requirements of Article 13(2) of the Convention because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting that practice only to a limited group of the community.

80. The Court also recognizes the need for the establishment of a code that would assure the professional responsibility and ethics of journalists and impose penalties for infringements of such a code. The Court also believes that it may be entirely proper for a State to delegate, by law, authority to impose sanctions for infringements of the code of professional responsibility and ethics. But, when dealing with journalists, the restrictions contained in Article 13(2) and the character of the profession, to which reference has been made (supra 72-75), must be taken into account.

81. It follows from what has been said that a law licensing journalists, which does not allow those who are not members of the " colegio " to practice journalism and limits access to the " colegio " to university graduates who have specialized in certain fields, is not compatible with the Convention. Such a law would contain restrictions to freedom of expression that are not authorized by Article 13(2) of the Convention and would consequently be in violation not only the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference.

[***]

"THE COURT IS OF THE OPINION

[***]

By unanimity,

That the compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights if it denies any person access to the full use of the news media as a means of expressing opinions or imparting information.

NOTES

1. Consider the case of *Piermont v. France*, 1989 ECtHR 314 (1995):

At the invitation of leading figures in the local independence movement, Mrs. Piermont, a German national and member of the European Parliament, visited French Polynesia. On her arrival she was suggested to show some discretion in any comments on French internal affairs. During her stay she took part in an independence and anti-nuclear demonstration and spoke during it. When she was about to leave French Polynesia, she was served with an expulsion order made by France's High Commissioner in French Polynesia, which also banned her from re-entering the territory. Continuing her

journey, she travelled to New Caledonia, likewise at the invitation of pro-independence politicians. On arrival at the airport she was taken to the office of the airport and border police because of the risk of confrontation caused by her presence. That same evening France's High Commissioner in New Caledonia made an order excluding the applicant from the island. The applicant complained that these orders infringed her right to freedom of expression and her right to freedom of movement and constituted discrimination.

The Court noted that the expulsion interfered with exercise of the right to freedom of expression. Whether the interference was justified, the Government maintained that the interference in question had not breached Article 10 (freedom of expression) for three reasons: it was in accordance with 'local requirements' within the meaning of Article 63; it came within the ambit of Article 16 (right to restrict political activities of aliens); and it satisfied the restriction requirements of Article 10 (2). According to the Court, however, under Article 63 a tense political atmosphere was not sufficient to interpret the phrase 'local requirements' as justifying the interference. The Court further considered that Article 16 could not be invoked against the applicant, a national of a Member State of the European Union, and, moreover, a member of the European Parliament. Therefore this provision did not authorise the State to restrict the applicant's exercise of the right guaranteed in Article 10. The legal basis for the expulsion order was section 7 of the Act of 3 December 1849 and the interference had as legitimate aim of preventing disorder and maintaining territorial integrity.

With respect of the question whether the interference was 'necessary in a democratic society' the Court noted that freedom of expression is one of the essential foundations of democratic society and one of the basic conditions for its progress. The protection extends not only to information and ideas that are favourably received or regarded as a matter of indifference, but also to those that shock or disturb. While freedom of expression is important for everybody, it is especially so for an elected representative of the people. Accordingly, interferences with freedom of expression called for closest scrutiny on the part of the Court. The Court recognised the special impact that the applicant's conduct could have had on the political atmosphere. Nevertheless, the utterances made by Mrs. Piermont had been made during a peaceful authorised demonstration. Her speech had been a contribution to a democratic debate in Polynesia. There had been made no call for violence and the demonstration was not followed by any disorder. In addition, there was nothing to indicate that the measure taken had been purely symbolic. Accordingly, there had been an imbalance between public interest and freedom of expression. There had been a violation of Article 10.

With respect to the measure taken in New Caledonia, the Court accepted that the measure had been prescribed by law. As to the proportionality of the measure, the Court again stressed the importance of freedom of expression. The applicant's behaviour and the fear that she would express her views on sensitive topics on the spot could account for the reasons given for the refusal to let her enter Caledonian territory. Even if the political atmosphere had been tense and Mrs. Piermont's arrival led to a limited demonstration of hostility, the Court discerned no substantial difference in the applicant's position vis-à-vis the two territories. The reasons which had prompted it to hold that the measure taken in French Polynesia had not been justified in the light of the requirements of paragraph 2 of Article 10 led to an identical finding in respect of New Caledonia. In conclusion, there had been a breach of Article 10.

JONG-KYU SOHN V. REPUBLIC OF KOREA
1992 HRC 518 (19 July 1995)

1. The author of the communication is Mr. Jong-Kyu Sohn, a citizen of the Republic of Korea, residing at Kwangju, Republic of Korea. He claims to be a victim of a violation by the Republic of Korea of article 19, paragraph 2, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author:

2.1 The author has been president of the Kumho Company Trade Union since 27 September 1990 and is a founding member of the Solidarity Forum of Large Company Trade Unions. On 8 February 1991, a strike was called at the Daewoo Shipyard Company at Guhjae Island in the province of Kyungsang-Nam-Do. TheGovernment announced that it would send in police troops to break the strike. Following that announcement, the author had a meeting, on 9 February 1991, with other members of the Solidarity Forum, in Seoul, 400 kilometres from the place where the strike took place. At the end of the meeting they issued a statement supporting the strike and condemning the Government's threat to send in troops. That statement was transmitted to the workers at the Daewoo Shipyard by facsimile. The Daewoo Shipyard strike ended peacefully on 13 February 1991.

2.2 On 10 February 1991, the author, together with some 60 other members of the Solidarity Forum, was arrested by the police when leaving the premises where the meeting had been held. On 12 February 1991, he and six others were charged with contravening article 13(2) of the Labour Dispute Adjustment Act (Law No. 1327 of 13 April 1963, amended by Law No. 3967 of 28 November 1987), which prohibits others than the concerned employer, employees or trade union, or persons having legitimate authority attributed to them by law, to intervene in a labour dispute for the purpose of manipulating or influencing the parties concerned. He was also charged with contravening the Act on Assembly and Demonstration (Law No. 4095 of 29 March 1989), but notes that his communication relates only to the Labour Dispute Adjustment Act. One of the author's co-accused later died in detention, according to the author under suspicious circumstances.

2.3 On 9 August 1991, a single judge of the Seoul Criminal District Court found the author guilty as charged and sentenced him to one and a half years' imprisonment and three years' probation. The author's appeal against his conviction was dismissed by the Appeal Section of the same court on 20 December 1991. The Supreme Court rejected his further appeal on 14 April 1992. The author submits that, since the Constitutional Court had declared, on 15 January 1990, that article 13(2) of the Labour Dispute Adjustment Act was compatible with the Constitution, he has exhausted domestic remedies.

2.4 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

The complaint:

3.1 The author argues that article 13(2) of the Labour Dispute Adjustment Act is

used to punish support for the labour movement and to isolate the workers. He argues that the provision has never been used to charge those who take the side of management in a labour dispute. He further claims that the vagueness of the provision, which prohibits any act to influence the parties, violates the principle of legality (**nullum crimen, nulla poena sine lege**).

3.2 The author further argues that the provision was incorporated into the law to deny the right to freedom of expression to supporters of labourers or trade unions. In this respect, he makes reference to the Labour Union Act,which prohibits third party support for the organization of a trade union. He concludes that any support to labourers or trade unions may thus be punished, by the Labour Dispute Adjustment Act at the time of strikes and by the Labour Union Act at other times.

3.3 The author claims that his conviction violates article 19, paragraph 2, of the Covenant. He emphasizes that the way he exercised his freedom of expression did not infringe the rights or reputations of others, nor did it threaten national security or public order, or public health or morals.

[***]

6.2 The Committee noted that the author was arrested, charged and convicted not for any physical support for the strike in progress but for participating in a meeting in which verbal expressions of support were given, and considered that the facts as submitted by the author might raise issues under article 19 of the Covenant which should be examined on the merits. Consequently, the Committee declared the communication admissible.

The State party's observations on the merits and author's comments thereon:

7.1 By submission of 25 November 1994, the State party takes issue with the Committee's consideration when declaring the communication admissible that "the author was arrested, charged and convicted not for any physical support for the strike in progress but for participating in a meeting in which verbal expressions of support were given". The State party emphasizes that the author not only attended the meeting of the Solidarity Forum on 9 February 1991, but also actively participated in distributing propaganda on 10 or 11 February 1991 and, on 11 November 1990, was involved in a violent demonstration, during which Molotov cocktails were thrown.

7.2 The State party submits that because of these offences, the author was charged with and convicted of violating articles 13(2) of the Labour Dispute Adjustment Act and 45(2) of the Act on Assembly and Demonstration.

7.3 The State party explains that the articles of the Labour Dispute Adjustment Act, prohibiting intervention by third parties in a labour dispute, are meant to maintain the independent nature of a labour dispute between employees and employer. It points out that the provision does not prohibit counselling or giving advice to the parties involved.

7.4 The State party invokes article 19, paragraph 3, of the Covenant, which provides that the right to freedom of expression may be subject to certain restrictions *inter alia* for the protection of national security or of public order.

7.5 The State party reiterates that the author's sentence was revoked on 6 March 1993, under a general amnesty.

8.1 In his comments, the author states that, although it is true that he was sentenced for his participation in the demonstration of November 1990 under the Act on Assembly and Demonstration, this does not form part of his complaint. He refers to the judgment of the Seoul Criminal District Court of 9 August 1991, which shows that the author's participation in the November demonstration was a crime punished separately, under the Act on Assembly and Demonstration, from his participation in the activities of the Solidarity Forum and his support for the strike of the Daewoo Shipyard Company in February 1991, which were punished under the Labour Dispute Adjustment Act. The author states that the two incidents are unrelated to each other. He reiterates that his complaint only regards the "prohibition of third party intervention", which he claims is in violation of the Covenant.

8.2 The author argues that the State party's interpretation of the freedom of expression as guaranteed in the Covenant is too narrow. He refers to paragraph 2 of article 19, which includes the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print. The author argues therefore that the distribution of leaflets containing the Solidarity Forum's statements supporting the strike at the Daewoo Shipyard falls squarely within the right to freedom of expression. He adds that he did not distribute the statements himself, but only transmitted them by telefax to the striking workers at the Daewoo Shipyard.

8.3 As regards the State party's argument that his activity threatened national security and public order, the author notes that the State party has not specified what part of the statements of the Solidarity Forum threatened public security and public order and for what reasons. He contends that a general reference to public security and public order does not justify the restriction of his freedom of expression. In this connection he recalls that the statements of the Solidarity Forum contained arguments for the legitimacy of the strike concerned, strong support for the strike and criticism of the employer and of the Government for threatening to break the strike by force.

8.4 The author denies that the statements by the Solidarity Forum posed a threat to the national security and public order of South Korea. It is stated that the author and the other members of the Solidarity Forum are fully awareof the sensitive situation in terms of South Korea's confrontation with North Korea. The author cannot see how the expression of support for the strike and criticism of the employer and the government in handling the matter could threaten national security. In this connection the author notes that none of the participants in the strike was charged with breaching the National Security Law. The author states that in the light of the constitutional right to strike, police intervention by force can be legitimately criticised. Moreover, the author argues that public order was not threatened by the statements given by the Solidarity Forum, but that, on the contrary, the right to express one's opinion freely and peacefully enhances public order in a democratic society.

8.5 The author points out that solidarity among workers is being prohibited and punished in the Republic of Korea, purportedly in order to "maintain the independent nature of a labour dispute", but that intervention in support of the employer to suppress workers' rights is

being encouraged and protected. He adds that the Labour Dispute Adjustment Act was enacted by the Legislative Council for National Security, which was instituted in 1980 by the military government to replace the National Assembly. It is argued that the laws enacted and promulgated by this undemocratic body do not constitute laws within the meaning of the Covenant, enacted in a democratic society.

8.6 The author notes that the Committee of Freedom of Association of the International Labour Organization has recommended that the Government repeal the provision prohibiting the intervention by a third party in labour disputes, because of its incompatibility with the ILO constitution, which guarantees workers' freedom of expression as an essential component of the freedom of association. [294th Report of the Committee on Freedom of Association, June 1994, paragraphs 218 to 274. See also the 297th Report, March- April 1995, paragraph 23.]

8.7 Finally, the author points out that the amnesty has not revoked the guilty judgment against him, nor compensated him for the violations of his Covenant rights, but merely lifted residual restrictions imposed upon him as a result of his sentence, such as the restriction on his right to run for public office.

9.1 By further submission of 20 June 1995, the State party explains that the labour movement in the Republic of Korea can be generally described as being politically oriented and ideologically influenced. In this connection it is stated that labour activists in Korea do not hesitate in leading workers to extreme actions by using force and violence and engaging in illegal strikes in order to fulfil their political aims or carry out their ideological principles. Furthermore, the State party argues that there have been frequent instances where the idea of a proletarian revolution has been implanted in the minds of workers.

9.2 The State party argues that if a third party interferes in a labour dispute to the extent that the third party actually manipulates, instigates or obstructs the decisions of workers, such a dispute is being distorted towards other objectives and goals. The State party explains therefore that, in view of the general nature of the labour movement, it has felt obliged to maintain the law concerning the prohibition of third party intervention.

9.3 Moreover, the State party submits that in the instant case, the written statement distributed in February 1991 to support the Daewoo Shipyard Trade Union was used as a disguise to incite a nation-wide strike of all workers. The State party argues that "in the case where a national strike would take place, in any country, regardless of its security situation, there is considerable reason to believe that the national security and public order of the nation would be threatened."

9.4 As regards the enactment of the Labour Dispute Adjustment Act by the Legislative Council for National Security, the State party argues that, through the revision of the constitution, the effectiveness of the laws enacted by the Council was acknowledged by public consent. The State party moreover argues that the provision concerning the prohibition of the third party intervention is being applied fairly to both the labour and the management side of a dispute. In this connection the State party refers to a case currently before the courts against someone who intervened in a

labour dispute on the side of the employer.

Issues and proceedings before the Committee:

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee has taken note of the State party's argument that the author participated in a violent demonstration in November 1990, for which he was convicted under the Act on Assembly and Demonstration. The Committee has also noted that the author's complaint does not concern this particular conviction, but only his conviction for having issued the statement of the Solidarity Forum in February 1991. The Committee considers that the two convictions concern two different events, which are not related. The issue before the Committee is therefore only whether the author's conviction under article 13, paragraph 2, of the Labour Dispute Adjustment Act for having joined in issuing a statement supporting the strike at the Daewoo Shipyard Company and condemning the Government's threat to send in troops to break the strike violates article 19, paragraph 2, of the Covenant.

10.3 Article 19, paragraph 2, of the Covenant guarantees the right to freedom of expression and includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media". The Committee considers that the author, by joining others in issuing a statement supportingthe strike and criticizing the Government, was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.

10.4 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the State party has stated that the restrictions were justified in order to protect national security and public order and that they were provided for by law, under article 13(2) of the Labour Dispute Adjustment Act, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated. The Committee notes that the State party has invoked national security and public order by reference to the general nature of the labour movement and by alleging that the statement issued by the author in collaboration with others was a disguise for the incitement to a national strike. The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

12. The Committee is of the view that Mr. Sohn is entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression. The Committee further invites the State party to review article 13(2) of the Labour Dispute Adjustment Act. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

NOTES

1. *Sohn v. Korea* seems to have overturned a previous national security case that involved CCPR Article 13, which allowed deportation of lawful aliens for reasons of national security without allowing the alien to submit reasons against his or her expulsion and without review by a competent authority. In *V.M.R.B. v. Canada*, 1987 HRC 236 (1988), para. 6.3, the Committee had adopted the view that it is not its task “to test a sovereign State’s evaluation of an alien’s security rating.” That opinion was strongly criticized by Anna-Lena Svensson-McCarthy in her book, *The International Law of Human Rights and States of Exception* (Martinus Nijhoff Publishers, 1998), p. 162: “[t]he refusal of the Committee to examine the solidity of governmental pleas based on national security, or on any other ground, does not only appear incompatible with the words and spirit of the Covenant but also in contradiction with the intentions of the drafters thereof. The misery and hardship that have been inflicted on aliens for so called national security reasons are too well-known to be ignored. This experience, which helped shape the International Bill of Rights, should make the members of the Committee aware of the need and duty to enter into a careful examination of governments’ alleged needs for limiting the exercise of human rights, including security needs.
2. The standard of review in the European Court of Human Rights is similar to that of *Sohn v. Korea*. In *Autronic AG v. Switzerland*, 1987 ECtHR 12726 (22 May 1990), para 43, the Swiss government intercepted Soviet satellite transmissions for the purpose of “prevention of disorder in telecommunications and the need to prevent the disclosure of confidential information. The Court held that states have a margin of appreciation in assessing the need for interference, but that it decision is subject to a “strict” European supervision in that the “necessity for restricting them must be convincingly established.” In that case, the Court held that the interference was not necessary in a democratic society. Likewise, In the African Commission on Human and Peoples’ Rights, *Amnesty International, et. al. Case*, Communication No. 48/90, 50/91, 52/91, 89/93, Report 1999-2000, paras. 78-80, it was held that “the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law. The Commission has established the principle that where it is necessary to restrict rights, the restriction should be as minimal as possible and not undermine fundamental rights guaranteed under international law. Any restrictions on rights should be the exception. The Government here has imposed a blanket restriction on the freedom of expression. This constitutes a violation of the spirit of Article 9 (2).”
3. In *Mukong v. Cameroon*, 1991 HRC 458, para. 9.7, the Human Rights Committee addressed a claim that ‘national security’ restrictions must “take into account the political context and

situation prevailing in a country at any point in time." Cameroon argued that when a country is newly independent and still politically unstable certain rights have a reduced degree of state obligation. The Committee did not agree with this assertion:

> "The State party has indirectly justified its actions on grounds of national security and7or public order, by arguing that the author's right to freedom of expression was exercised without regard to the country's political context and the continued struggle for unity. While the State party has indicated that the restrictions on the author's freedom of expression were provided by law, it must still be determined whether the measures taken against the author were necessary for the safeguard of national security and/or public order. The Committee considers that is was not necessary to safeguard an alleged vulnerable state of national unity by subjecting the author to arrest, continued detention and treatment in violation of article 7. It further considers that the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this regard, the question of deciding which measures might meet the 'necessity' test in such situations does not arise. In the circumstances of the author's case, the Committee concludes that there has been a violation of article 19 of the Covenant."

4. Note that Committee did not even reach a deliberation on 'national security' in this case. Instead, it held that Cameroon did not even properly raise a national security defense. In other words, the Committee took the view that there was no issue whether the boundaries of the minimalist interpretation of human rights were breached because an unstable political climate always requires the maximalist interpretation of human rights—it is in such circumstances for which human rights are designed. In other words, political instability is never a national security issue. While this case defines what national security is not, can we extrapolate from the decision a concept of what is 'national security'?
5. Consider the European Commission cases of *Le Cour Grandmaison and Fritz v. France*, 1985 ECommHR 11567 & 11568 (6 July 1987)(admissibility ruling) and *Arrowsmith v. United Kingdom*, 1975 ECommHR 7050 (12 Oct 1978). In both cases, the issue of national security (as well as public order) arose in relation to maintaining discipline in the military and the dissemination of information through the distribution of leaflets. In both cases, the Commission held that there were national security implications in the maintenance of discipline and avoidance of dissertions in the armed forces. Ultimately, the Commission held that there was no violation of the freedom of expression because the individuals had already made their expressions and were simply being subsequently punished for "their misuse of the exercise of these freedoms."
6. Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (The Hague: Martinus Nijhoff Publishers, 1998), p. 184, sums up the case law of the European regional human rights system as follows:

> To sum up the European jurisprudence it can be said that, in so far as the notion national security has been used by the Commission and Court, its application is not conditional upon situations involving a real, actual and imminent danger to the very life of the nation as in exceptional crisis situations that may justify derogations under Article 15. The concept national security in the ordinary limitation provisions is rather accepted as having an important role to play in situations of peace or relative peace in order to protect, in a more permanent and preventative way, significant general interests that are instrumental in maintaining the security of a democratic society and, hence, ultimately of course also the very life thereof.
>
> Generally speaking, the case-law reveals that the security of a nation comprises both its external as well as its internal security. With external security is meant the security of a country's borders, or, in other words, its territorial integrity. [***] The internal security may call for restrictive measures which are

usually laid down in criminal law. State may thus be justified to formulate laws penalizing, in particular, acts of desertion, incitement to desertion, espionage, treason and terrorism, provided again, that all the various conditions laid down in the Convention are fulfilled.