Mensenrechten en staatsveiligheid: verenigbare grootheden? : Opschorting en beperking van mensenrechtenbescherming

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Summary

HUMAN RIGHTS AND NATIONAL SECURITY: COMPATIBLE ENTITIES? Derogation and restriction of human rights during states of emergency and other situations that threaten national security

1 INTRODUCTION AND PROBLEM DEFINITION

As its title indicates, the central question of this study is whether human rights and national security are compatible entities. This question touches upon a highly relevant subject in the international (legal) community of today. International State practice shows that particularly in cases where governments act to protect national security and sometimes proclaim a state of emergency, the human rights and fundamental freedoms of individuals are at the highest risk of being abused. The relevance of international law concerning human rights and national security has increased because of the "battle against terrorism" launched after the terrorist atrocities in the United States on September 11, 2001. As part of this battle, many states have developed new legislation, allowing police and security authorities to take measures that infringe on certain human rights or even derogate from these rights.

In order to answer the central question, this study analyses those clauses in international human rights law – in particular in the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) – that are directly related to national security situations: limitation clauses in which the protection of national security is specified as a legitimate ground for restricting the enjoyment of certain human rights, and derogation clauses that allow states to suspend the full protection of certain fundamental rights during states of emergency.

In this summary, I point out the main conclusions that can be drawn from my research. I discuss the most important legal developments concerning the limitation and derogation of human rights during crises and other situations that threaten national security. Furthermore, I develop some views on the post-September 11, 2001 relevance to society of the norms concerning human rights protection during crises, and focus on the functioning of the international human rights protection mechanisms during crises (not only on the institutional organisation of the control mechanisms, but also on the scrutiny used by the European Court of Human Rights (ECrtHR) and the UN Human Rights Commit-

tee (HRC) when assessing the measures taken by states with regard to national security).

At the outset of this study it was noted that protecting national security and fighting against terrorism is not just a question of taking repressive measures that interfere with the enjoyment of certain human rights. The protection of national security can and should also be served by international (development) cooperation in order to prevent the existence and further development of political, economic and social circumstances in certain parts of the world that could form a breeding ground for terrorist activities and the recruitment of terrorists. In the words of UN Secretary General Kofi Annan (in his recent report *In larger freedom: towards development, security and human rights for all*, UN *Doc. A/59/2005, § 16*):

> "Not only are development, security and human rights all imperative; they also reinforce each other. This relationship has only been strengthened in our era of rapid technological advances, increasing economic interdependence, globalization and dramatic geopolitical change. While poverty and denial of human rights may not be said to 'cause' civil war, terrorism or organized crime, they all greatly increase the risk of instability and violence. (…)
> Accordingly, we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights. Unless all these causes are advanced, none will succeed."

2 THE DEVELOPMENT OF THEORIES AND LEGISLATION CONCERNING HUMAN RIGHTS AND NATIONAL SECURITY

In chapter 2 it becomes clear that from time immemorial states and comparable entities have tried to come to an organised response to crises in the form of emergency rules. The solution has often been found in assigning special powers to the (head of the) Executive, in appointing a special official to cope with the emergency situation (e.g. the Roman dictatorship) or in transferring civil powers to military authorities (e.g. the British martial law and the French *état de siège*). History shows that from the earliest development of emergency regimes for crises that impel deviation from regular law (even during the times of the dictatorship in the Roman republic), those regimes provide for the infringement of the rights and freedoms of citizens: at first mainly the infringement of property rights and the deviation from the normal system of justice, later also the infringement of other rights. The way the dictatorship in the Roman republic was organised has long been taken as an example of a good set of rules for states of emergency because of its fairly strictly formalised, controlled and time-limited nature.

In addition, history shows that the emergency powers are often abused and used in situations for which they were not intended. This abuse often led to abolishment of the emergency powers (for example, in the case of the Roman

dictatorship) or to their restriction by the Legislature (as was the case in England with the Petition of Right). Finally, however, during the nineteenth century almost all European states developed national legislation in which a special legal regime is created for situations of war, threat of war or internal disturbances that threaten the internal or external security of the state. Remarkably, it is in countries where a repressive government, after a revolution, had to make way for a new regime, and where the rights and freedoms of citizens were guaranteed in new constitutions, that the most dramatic regulations for states of emergency and derogations from fundamental rights as guaranteed under normal circumstances occur. The clearest example of this is France.

Although the emergency legislation that was developed in many countries during the nineteenth century sometimes offered ample possibilities for the deviation from regular law, it definitely was an improvement in the protection of the rights and freedoms of citizens, notably because the general rules promoted legal security and formed a barrier against arbitrary actions by the authorities. The circumstances under which certain emergency powers might be used were specified (war and disturbances) and were assigned a number of characteristics with regard to their content (imminent peril for public safety). The fundamental rights and other constitutional clauses from which deviation was permitted, were specifically detailed. The establishment of extra-ordinary (military) courts was provided for, as was a certain measure of accountability to the people's representative body (parliament) concerning both the proclamation of a state of emergency and the use of emergency provisions or the taking of certain emergency measures.

After the First World War, the character of legal regimes governing (national) emergencies in The Netherlands, as well as in several other European states, changed slightly. This meant that the purport of the emergency regime became less legalistic. The legal thinking of that time made it possible to acknowledge the existence of extra-constitutional executive emergency power, aside from the emergency power laid down in the laws. An important reason for this was the changing character of warfare. This change of character meant that not all possible emergency situations could be foreseen and contained in written emergency legislation. On the other hand, despite this acknowledgement of an extra-constitutional executive emergency power, written emergency legislation was expanded tremendously, not only in The Netherlands, but also in other countries. The guiding principle for the expansion of the written emergency legislation was the incorporation of as many guarantees as possible for input from the representative bodies (for instance, with regard to the decision-making process about proclaiming a state of emergency) and the continuance of the normal constitutional order and structures as far and for as long as possible.

Compared to the nineteenth century, in the twentieth century, the function of the written emergency legislation changes from the limitative summing up of events and the corresponding powers, to offering a guideline for the govern-

ment in case of *foreseen* or *foreseeable* extraordinary circumstances. Thus, the special emergency laws offer guidelines for civilian and military authorities and provide for a certain degree of legal security for citizens who are confronted with measures based on these emergency laws. In addition, creating a basis in domestic law for the use emergency powers in legislation ensures a democratic legitimisation of the measures to be taken. Thus, the representative bodies are involved in the weighing of interests that is the basis of the execution of the emergency powers.

That the involvement of representative bodies in formulating the rules concerning emergency powers is no sufficient guarantee to prevent the unbridled use (and thereby abuse) of those rules is evident from the functioning of the emergency rules incorporated in the *Weimarer Reichsverfassung*. The very generous according of emergency powers to the government in this constitution offered the Nazi regime of *Reichskanzler* Hitler the opportunity to eliminate the political system of Germany in the 1930's in a more or less "constitutional" manner and to replace it by a racist dictatorship. The bad experiences of the Weimar Republic period were the reason for much apprehension regarding the development of emergency regimes after the Second World War, in Germany as well as in other countries. They furthermore had the result that, also in regard to the observation of the rules and principles regarding states of emergency, international standardisation and forms of international supervision by political or (semi)judicial authorities were pursued, especially focusing on the protection of fundamental rights and freedoms of citizens.

In the second part of chapter 2 an effort has been made to give a general overview of the different theories and discourses that have been used over the centuries to justify or oppose the existence of written emergency legislation derogating from the "normal" written legislation. A few themes can be distinguished.

A first theme can be seen in Greek and Roman antiquity, when the religious-cultural organisation of the *polis* or city-state was considered an essential condition for the full development of human virtue and righteousness. This thought can later be found in the works of Machiavelli and Hegel. From that line of argument follows the view of the state as the "necessary" creator of order, as an organisation that takes care of the protection of peace and security so that people can develop themselves in tranquillity and can peacefully live together with others. The natural necessity of the state as a form of organisation means that the state needs to have a blank mandate to do whatever is necessary to ensure the survival of the state, even when this includes infringement on the rights of its own subjects.

Starting in the late Middle Ages, a second theme develops. In this period, it is not so much the image of the state as creator of order necessary for human existence that plays the central role. Instead, another view of the purpose and reason of the existence of the institution of the state is advanced, a view in

which the welfare of the community – rather than the personal interests of the ruler – is the guiding principle for the state and its actions. In the seventeenth and eighteenth centuries, particularly under the influence of the theories of Locke, Montesquieu and, some time later, Kant, the welfare of the community (or: the general interest) is explained in such a way that it consists of the protection of individual rights and freedoms of citizens. This determines the task of the state.

A third theme, that is more or less contrary to the second, is that from the end of the eighteenth century the idea of general interest is broadened, so that from then on the protection of the fundamental rights and freedoms of citizens is only a part of the general interest. This means that fundamental rights can also be limited if this is needed to promote the interests of the community as a whole. As the general interest encompasses more and more issues and the number of state objectives increases, so to speak, the protection of fundamental rights becomes de-emphasised. As a consequence, the "general interest" as state objective loses its normative value and is reduced to a formal and meaningless term, also because there is a tendency to equate the general interest with that of the majority.

More or less in response to excesses that are a consequence of this formal interpretation, a fourth theme develops in constitutional thought that, apart from majority decision, emphasizes the need for a material social-ethical basis for government action. This social-ethical basis means that the state, although partly the creator of legislation, is nonetheless also bound to observe a number of fundamental principles of law, including fundamental human rights. The state is there for the sake of the people. Only a state that can show such a social-ethical basis, a democratic state under the Rule of Law, has the right to resist invasion of its (territorial) integrity by arming itself against attack from the outside and against violations of the legal order from within the state itself. When compelled by necessity, this power of the state may entail the limitation or derogation of the rights and freedoms of citizens and deviation from the written law. This deviation can even go so far as deviating from written emergency law, since the latter will usually be limited to certain well-defined situations that are underlain by warrants. It can, however, in no way be equated with a deterioration into violence or the abuse of power, immoral acts or injustice. The state emergency does not justify just any form of government action. Government action in times of emergency is always in some way limited. One of the limits is that the action of the state during emergencies should have a basis in "the will of the community". This action should somehow be democratically legitimized.

This need for democratic legitimization has two consequences. The first is that is it recommended to let this "will" be expressed as much as possible through the normal constitutional organs created for that purpose, in other words, by drafting written emergency legislation. The second consequence is that, on those occasions when written emergency law falls short, deviation

from written law (including written *emergency* law) seems called for and the will of the community cannot be expressed in the usual manner, emergency measures can only be reckoned to enjoy the consent of the community on two conditions: (1) The emergency rules do not infringe on the reasonable order desired by the community (in which the individual rights and freedoms of citizens are respected and protected as far as this is possible). (2) A mechanism is provided for to test those emergency measures as quickly as possible against the reasonable order (by the legislature or the judiciary). For this purpose, a framework for consideration can be derived from the ideas of Rawls. In his view, every individual has "an inviolability founded on justice", that is not subordinate to the welfare of the community as a whole. The freedom for the individual – in the sense of the protection of fundamental rights – that follows from this assumption can only be subordinate to freedom itself. Therefore, "national security" or "the life of the state" can only be referred to as grounds for the limitation or derogation of individual freedoms if there is a serious threat to the interests of the *entire* community of citizens and to the basic principle of "equal freedom for all." Such a threat can be said to exist if the functioning of the civil service or the government organisation that serves the community interests and individual freedoms is made impossible to a considerable extent, but not if there is only a threat to the power of a certain group or elite.

3 Principles concerning limitation and derogation of human rights in order to protect national security

3.1 Some principles from a historical and philosophical perspective

Both the history of constitutional regimes governing states of emergency and the development of constitutional and political theories concerning constitutional emergencies make clear that the social acceptance of emergency regimes that deviate from the ordinary legal system and also derogate from the ordinary level of human rights protection depends on a number of conditions.

The first of these is the *temporary nature* of the emergency regime: to avert imminent peril, it may be necessary to temporarily give up elementary warrants and to derogate from certain human rights. The emergency regime, however, may be employed no longer than is strictly necessary. The second condition concerns the *purpose* of the emergency measures: a derogation of rights has to serve the purpose of protecting the democratic and constitutional system and thereby the rights of people. This democratic constitutional system then has to aim to create an order of liberty in which equal freedom for all is central. A more limited individual freedom can only be accepted if it serves to reinforce the total system of freedom that is shared by all.

A third condition is *checks to prevent abuse*. To truly fulfil the first two conditions, the use of emergency measures, especially when they entail deviation from the "ordinary" protection of fundamental and human rights, should satisfy a third condition. A system of checks has to be provided for, under which: (a) authorities can be prevented from using the emergency measures for purposes other than those for which they were intended or otherwise abusing them (for instance because emergency measures are taken that are far more drastic than necessary) or (b) possible abuse can be redressed afterwards if necessary. These checks can take several forms. Because of the necessity for democratic legitimization, much importance should be attached to the approval of the emergency measures or the proclamation of a special legal situation by the legislator or a representative body. To prevent majority decisions that unjustifiably infringe on the rights of minorities or individuals, checks by national judges and international norms and the consequent forms of supervision by international (judicial or semi-judicial) bodies play an important supplementary role.

3.2 Some principles derived from general international law

From chapter 3 onwards, attention is paid to the way in which in current positive law, rules are formulated about deviation from the normal system of law to protect human rights during crises that seriously threaten state security. When important norms regarding the protection of fundamental rights and freedoms of citizens have been laid down in international treaties, it is important to know whether the obligations that follow from these norms can be derogated from during crises, on the basis of general rules of international law. In chapter three I examine if and to what extent the Vienna Convention on the Law of Treaties (VCLT) and the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the ILC offer possibilities for derogation. It turns out that only two options could possibly be used for derogating treaty obligations under the human rights treaties. One could invoke the applicability of *a fundamental change of circumstances* (Articles 62 and 65 VCLT) or of *necessity* (Article 25 of the ILC Articles). Of these two, reference to *a fundamental change of circumstances* is not suitable for the derogation of treaty obligations under the human rights treaties in times of emergency, because the form requirements attached to such reference by Article 65 VCLT require a deviation to be announced in writing to the other signatories to the treaty. Furthermore, the state in question has to give the other signatories to the treaty three months' time to respond positively. Therefore, this instrument cannot be applied with the speed required in emergency situations. So, practically, only the reference to *necessity* is relevant in the present discussion.

For a justified reference to *necessity*, it is necessary that an "essential interest" of the state was seriously threatened. Whether this was truly the case

will depend on the circumstances. There needs to have been a "grave and imminent peril". The serious threat itself has to be objectively ascertained; a mere possibility of a threat does not suffice. In addition, the serious threat will have to have been current or at least "imminent", in the sense of here and now.

In addition, non-compliance by the state with the international obligations in question (usually treaty obligations) must have been the only means to protect the essential state interest. Thus, there must have been no other option for the state to escape the threat – even if that option were, for example, much more expensive – without coming into conflict with its international obligations. In other words, a very strict principle of *necessity* must be met.

Furthermore, the ILC Article on *necessity* contains a principle of *proportionality*: non-compliance with certain international obligations cannot be such that it infringes on an essential interest of states with which the international obligations were entered into, or on an essential interest of the international community as a whole. The interest that is subordinated to the necessity has to be of lesser importance than the interest the state is trying to protect by doing so. This principle of *proportionality* also entails that the deviation from the treaty obligations needs to end as soon as the crisis situation has been overcome. Finally, the ILC Article on *necessity* emphasizes that the state that makes reference to *necessity* may not itself have contributed to the arising of the emergency situation.

Applying the principle of *necessity* or one of the other general international rules and principles that offer a possibility to deviate from treaty obligations, however, can only be done if a state deviated from obligations under a certain human rights treaty that itself does not contain any provision on derogation in emergency situations. The most important reasons for this are:

- the special, non-reciprocal character of the treaty obligations under the human rights treaties and the fact that at least a part of the obligations under the human rights treaties can be held to be obligations *erga omnes*. This makes many of these general rules and principles not easily applicable to the multilateral human rights treaties;
- the central role that the treaty organs play in determining the application, purport and interpretation of treaty provisions and the determining nature of the mechanisms for the supervision of human rights treaties (which is why in case of the ECHR one can even speak of a "self-contained regime"); and most of all
- the fact that the existence of a specific derogation provision in many human rights treaties implicitly – but unmistakably in view of the object and purpose of the treaties and of the generally accepted impermissibility of deviation of non-derogable obligations under the human rights treaties – excludes the evasion of treaty obligations under the human rights treaties on the basis of some other "evasion clause" in general international law.

Deviation or derogation from obligations under human rights treaties, therefore, is a subject that is governed in the first place by provisions within these treaties themselves. Only if the treaties themselves do not provide for this subject, can general rules and principles of international law come into play.

3.3 The relationship with general rules and concepts concerning the character and limitation of state obligations under the main human rights treaties

It is a fact that not every human rights treaty contains a special derogation clause. In chapter 4 I examine, *inter alia*, the question why this should be so and show that it is related to the differences in character of the different human rights treaties. Those treaties from which follow obligations that are binding and immediately enforceable, usually contain a derogation clause (see the ECHR, ICCPR and ACHR), but those that leave room for a gradual and progressive implementation of the treaty obligations do not. The latter are usually treaties on economic, social and cultural rights.

Nevertheless, the development of the doctrine regarding the character of treaty obligations under treaties concerning economic, social and cultural rights is such that the minimum core content of these rights could be said to be non-derogable. Even during grave crises, the core content of these rights has to be guaranteed by the state – an obligation that is reinforced by the rules of international humanitarian law and international criminal law, which forbid certain actions even in war or other crises if those actions can be seen as an infringement on the core content of, for instance, the right to food or health care.

Furthermore, in chapter 4 the question is discussed which general rules and concepts apply regarding the limitation of the content or purport of the rights and the limitation of the enjoyment of the rights enumerated in the human rights treaties, especially those treaties that impose obligations with a more imperative character on the states that are signatory to the treaty (the ECHR, ICCPR and ACHR). In this discussion, attention is paid to the interpretation clauses contained in some treaty articles and the interpretation by supervising organs that exerts influence on the scope of certain rights. In this regard, I point to the relevance of the fact that the European Commission on Human Rights (ECommHR) and the European Court of Human Rights (ECrtHR) have labelled the ECHR "a living instrument." This means that a government action that at a certain time and under certain circumstances is not considered to be an interference in any fundamental right, may possibly considered to be so at another time and under different circumstances.

Next, I examined the general limitation clauses contained in almost all general human rights treaties, especially the clause prohibiting the abuse of rights: the rule that the enjoyment of the protected rights does not give groups

or persons the right to engage in activities or perform acts aimed at the destruction of any of the protected rights. This clause can play an important role during crises that are caused by persons or (totalitarian) groups that threaten the unobstructed functioning of the democratic bodies of a state. However, from the Strasbourg case law on this clause it can be deduced that such persons or groups can indeed be denied the enjoyment of certain political rights and freedoms of expression, but that the prohibition of abuse of rights clause has no meaning regarding, for instance, the right to a fair trial or the safeguards for persons deprived of their liberty. Even terrorists who have committed acts that infringe on the rights of others can claim the protection of these rights.

Of course, in addition to general limitation clauses, attention is also paid to the particular limitation clauses contained in several articles of the ECHR, ICCPR and ACHR. These indicate the manner in which, to what purpose and to which extent the enjoyment of the right concerned can be limited. (Semi-) Judicial control of these limitation clauses is a central part of the activities of the international supervisory bodies. The particular limitation clauses contain a number of elements. First, the possibility for limitation has to be provided for by law (the principle of legality). This means that the limitation must be based on a rule that fulfils certain quality requirements: that of "accessibility" and that of "foreseeability". Second, the limitation has to be necessary in consideration of certain interests worthy of protection (legitimate aims). Third, the limitation must be necessary in a democratic society (the code of behaviour). This code itself contains three elements: the infringement on the right in question must meet a pressing social need (the *principle of necessity*), it must be relevant and sufficient to reach the goal set (the *principle of pertinence*) and, finally, it must not be such that the content of the right is undermined; the extent of the infringement and the legitimate aim by it have to be in reasonable proportion (the *principle of proportionality*). An important observation regarding the behavioural code is that, when testing the principles contained in this code, the ECommHR and the ECrtHR take the position that national authorities are entitled a margin of appreciation with regard to the necessity and proportionality of the limitation of fundamental rights, but that the UN Human Rights Committee and the Inter-American Court of Human Rights (IACHR), on the contrary, reject such a margin-of-appreciation doctrine.

At the end of chapter 4, I examine the most drastic ways for states to evade the treaty obligations under the human rights treaties, e.g. to terminate these treaties or to state reservations. The conclusion is that, from the perspective of a crisis situation and the related (possible) wish for states to shirk certain obligations under the human rights treaties on very short notice, the instrument of terminating a treaty offers no solace: either because the term for termination itself provides for a waiting period of six or twelve months before the termination can take effect (as in the case of the ECHR) or because the treaty itself does not provide for termination. The UN Human Rights Committee in *General*

Comment No. 26 indicates that the lack of a termination clause should be interpreted as an indication that termination of this treaty is indeed impermissible.

The instrument of reservation is also not suitable for deviating from certain treaty obligations under the human rights treaties at short notice. For, on the basis of Article 19 VCLT, as well as on the basis of the human rights treaties themselves (in so far as they contain provisions about this), making reservations is only permitted at the moment of entering into or acceding to the treaty, not, therefore, once the state is already bound by it. In so far as a signatory to the treaty, at the time of acceding to a certain human rights treaty, "as a precaution" would wish to make a reservation concerning certain treaty obligations because these would impede state action too much in case of a possible emergency, Article 9 (c) VCLT states that making a reservation is not permitted if this is not consistent with the object and purpose of the treaty concerned. In chapter 4, I endorse the view of, for instance, the IACHR, that posits that it also follows from this rule that it is not permitted to make reservations regarding the non-derogable rights in the human rights treaties. These rights are so much part of the core of the human rights treaties that reservations about them conflict with the object and purpose of those treaties. It is established that, for instance, the US, at accession to the ICCPR, nonetheless stated reservations regarding certain non-derogable rights. Trinidad and Tobago and France also stated reservations regarding the derogation clauses of the ICCPR and the ECHR. Although these do not concern reservations to the non-derogable rights themselves, the effect of a reservation regarding a derogation clause can in some cases be the same. I conclude, therefore, that these reservations also exceed the limits of the permissible.

4 Developments in international human rights law regarding the protection of national security

4.1 Limitation of human rights in order to protect national security

In chapter 5 the focus is on one of the legitimate aims contained in many of the particular limitation clauses, that is, the protection of national security. It was noted that during the establishment of the ECHR and the ICCPR, little attention was in fact paid to the precise meaning of the term "national security". During the development of both treaties, much more attention was paid to, and much more discussion took place about the term "public order" (*ordre public*), which also occurs as a legitimate aim in the particular limitation clauses. It is somewhat difficult to make very precise statements about "national security" as ground for limitation, because in the international case law state action that limits fundamental rights is seldom or never judged solely from the perspective of just this one limitation ground. The state usually makes

reference to several grounds for limitation and the supervising organs do not distinguish strictly between the different grounds that can be found in the particular limitation clauses.

Particularly ECHR case law on the "protection of national security" as a ground for limitation of rights makes clear that the application of this ground is not limited to emergency or crisis situations in which the threat to national security is such that the life of the state is at stake. "National security" as a ground for limitation can also be used for government action that, while still under "normal" circumstances, aims at a more "permanent" and "preventive" protection of consequential interests that are essential to the security of a democratic society. Protection of the territorial integrity – i.e. protection of the national borders against attacks from outside and protection against domestic groups that pursue the separation of a part of the state territory – are certainly part of the concept of "national security." For national security to be at stake, however, there is no requirement of a threat of violence. Government actions reinforcing the integrity of the civil service (see the ECHR judgments *Klass/FRG*, *Leander/Sweden*, *Vogt/FRG*, *Grande Oriente/Italy*, *Rekvenyi/Hungary*) or discipline within the military (*Engel a.o./Netherlands*, *Grigoriades/Greece*) are also considered actions aimed at protecting the national security. From several cases concerning espionage and spying by intelligence services (*M/France*, *Klass/FRG* en *Leander/Sweden*) can be deduced that government action that limits fundamental rights to protect national security is considered justified without national security having been (proven to be) actually affected. On the basis of "national security" as ground for limitation, preventive action is already permitted in order to prevent the occurrence of a situation that could endanger national security. This is especially true of infringements on privacy. For the enjoyment of so-called political freedom rights, like freedom of speech, freedom of association and freedom of assembly, a stricter test is used. In those cases there is a requirement of a considerable danger to national security caused by the enjoyment of these constitutional rights for the government's actions that infringe on them to be "covered" by "national security" as a ground for limitation. In jurisprudence, such an extent of danger is only considered present if the enjoyment of these fundamental rights is accompanied by violence or the incitement of others to use violence. Thus, for example, in the eyes of the ECrtHR, solely advocating the separation of a part of the state's territory to form an independent state is insufficient for a limitation of fundamental rights in the interest of national security to be deemed necessary and proportional (see the many cases against Turkey concerning publications on the "Kurdisch question").

In many of the Strasbourg judgments discussed in chapter 5, it is emphasized that states that are signatory to a treaty have to be allowed a wide *margin of appreciation* in matters regarding "national security." The case law also contains indications that for legislation concerning the protection of national security, less strict requirements apply regarding the foreseeability

of infringements on privacy, that (may) follow from it. Nonetheless, deeming "national security" applicable as grounds for limitation does not *automatically* mean that the supervising bodies allow the treaty states a very wide margin of appreciation and, consequently, apply a "more reserved" test against the principles of *necessity* and *proportionality*. Other factors also play a role:

a the type of threat to national security – especially in case of a threat in the form of violence, of utterances that incite others to use violence, of actions like espionage or of the (threatened) revelation of state secrets, a wide margin of appreciation applies;
b the presence of national mechanisms to control government actions aimed at protecting national security that limit fundamental rights – if there is no or hardly any control at the national level, international supervision is more intrusive;
c the specific fundamental right concerned and the gravity of the infringement(s) of that right.

This last point is illustrated on the one hand by the case *Leander/Sweden*, which posits that the state should be allowed a wide margin of appreciation because the case involves both a not very grave infringement of the right to privacy and a measure for the protection of national security. On the other hand, the point is illustrated by several Turkish cases on the prohibition of political parties, in which the Strasbourg organs sometimes refer to a wide margin of appreciation that the states are granted in matters of national security, but subsequently emphasize that a very strict test of the criteria of *necessity* and *proportionality* is applicable to such serious infringements of the freedom of association of political parties. Also, there are several Strasbourg judgments that did not constitute a test against the criterion of "national security" as ground for limitation, but that did involve government action in matters touching upon national security. An example is the *McCann* case dealing with the shooting and killing of IRA terrorists in Gibraltar in which the applicants invoked the right to life of Article 2 ECHR. In these judgments, because of the gravity of the infringement of a very fundamental right, the Court did not hesitate to perform a very scrutinizing test even though they concerned the – for the state concerned – very sensitive issue of fighting terrorism. In the cases of *Chahal/United Kingdom*, *Inçal/Turkey* and *Al-Nashif/Bulgaria* as well, the states are granted no or hardly any margin of appreciation, and a very scrutinizing test is conducted against the fundamental right at issue.

All in all, the case law I examined concerning judicial control of the principles of *necessity* and *proportionality*, and the margin of appreciation the state is allowed in that process, did not show clear differences between limitations based on the protection of national security and limitations based on other legitimate aims. Even with regard to the principle of legality and the requirement of foreeability that is part of it, more recent ECHR case law (e.g. in *Amann/*

Switzerland and *Rotaru/Romania*) has made clear that the fact that the purpose of a government's actions was to protect national security does not automatically mean that this requirement should be applied less strictly.

4.2 Derogation of human rights when the life of the nation is at stake

In chapters 6 and 7 it became clear that both the history of the drafting of the derogation clauses in the human rights treaties and the later case law on those clauses indicate that these clauses make it possible for states that are signatory to the treaty to derogate treaty obligations in a crisis situation that threatens the life of the nation, but that this possibility is certainly not meant to create a situation in which international law places no limits whatsoever on government actions. Assuming that human rights are inherent to human dignity, the states that are signatory to a treaty can only derogate the obligation to protect certain human rights, but not the rights themselves (even though this is usually, as in this study, referred to as "derogation of human rights"). Regarding the possibility of derogation of the obligation to protect human rights, moreover, there are two conditions. First, this possibility can only be used if and to the degree that the human rights treaties themselves leave room for it. Second, the possibility of derogation in all other aspects must also subject to the rules of international law. In chapter 6 it was established that there are valid grounds to assert that the material aspects of the norms contained in the derogation clauses of the ECHR and the ICCPR – Article 15 ECHR and Article 4 ICCPR – are in this regard more than just treaty rules. They can also be considered rules of international customary law. This is important because then parties that are not signatory to the treaties are also bound by these norms.

Regarding the conditions and limits that Article 15 of the ECHR and Article 4 of the ICCPR place on the use of measures that derogate fundamental rights, chapters 6 through 9 discuss seven conditions:

1 Proclaiming a state of emergency in which fundamental rights are derogated is only allowed in a crisis situation that is so grave that the life of the nation is threatened (the principle of *exceptional threat*).
2 The state of emergency in which fundamental rights are derogated must be officially proclaimed.
3 Emergency measures that derogate fundamental rights are only justified if they are strictly necessary and are in reasonable proportion to the purpose they serve, i.e. overcoming the crisis situation.
4 Emergency measures that derogate fundamental rights may not be taken on arbitrary or discriminatory grounds.
5 Certain fundamental rights – the non-derogable rights – can never be derogated and may therefore under no circumstance be limited any further

than is permitted on the basis of the normal limitation clause (if such a clause is contained in the particular treaty article).

6 Derogation of certain fundamental rights may not lead to the violation of other obligations under international law by which the state is bound.

7 Derogation of certain fundamental rights is only allowed after international notification.

It would, I think, go too far to try and summarize in this summary *all* the developments and conclusions concerning these requirements that are described in chapters 6 through 9. I will only highlight a few points that I think merit special attention.

4.2.1 The principle of exceptional threat

Because of the multitude of factors and circumstances that can make a situation a "public emergency threatening the life of the nation," it is very difficult to give a more specific interpretation or definition of the *principle of exceptional threat*. The formulation "threatening the life of the nation" was specifically chosen at the time of the drafting of the derogation clauses to prevent abuse of the power to derogate. So far, especially the ECrtHR (in the *Lawless* judgment) and the ECommHR (in the *Greek* case) have attempted in their jurisprudence to further specify the degree of seriousness that an emergency situation must meet, if that situation is to be considered a "public emergency."

First, there has to be an actual or imminent exceptional crisis; in other words, the crisis does not need to actually occur, but has to be unavoidable and imminent. This excludes a crisis that could *possibly* occur in the future. *Second*, this exceptional crisis has to affect the entire population (and not just a small part of it). *Third*, the crisis has to threaten the public life of the community. This can be the case if the territorial integrity of the country or the physical integrity of the population are threatened, but also if the functioning of state bodies that serve the well-being of the people and the protection of the individual rights and freedoms is so seriously obstructed that it becomes impossible for them to execute their tasks. The second and third aspect of the principle of *exceptional threat*, by the way, do not alter the fact that the crisis can be geographically limited to a part of the country, if it deregulates the functioning of certain state bodies or government services to such an extent that the entire country is affected. *Fourth*, the crisis has to be such that normal possibilities for limiting the enjoyment of fundamental rights leave the authorities insufficient possibility to overcome the crisis.

Regarding this last aspect of the principle of *exceptional threat*, the problem arises that from the case law no clear material limit can be distinguished between the limitation and the derogation of a fundamental right. The question remains where the infringements that are permissible under the regular norms and limitation clauses do end, and where the infringements start that are only

permissible if a state invokes the derogation clause? Actually, the only field in which something can be deduced about these matters is the right to liberty and security of person and the safeguards regarding detention of individuals. From the case law concerning the right of detainees to be brought promptly before a judge or other judicial authority (Article 5(3) ECHR and Article 9(3) ICCPR) it becomes clear that under the normal treaty rules, it is required that this takes place within a maximum of about four days (see the *Brogan* judgment). In case of the derogation of this right, detention without having been brought before a competent judicial authority can be prolonged for periods up to seven days or perhaps a few more (see the judgments *Brannigan and McBride/United Kingdom* and *Nuray Sen/Turkey*). Especially for rights that are provided with a particular limitation clause, it is not clear for which type of infringements invocation of the derogation clause will be *absolutely* necessary. With some prudence it may even be argued that invocation of the derogation clause for rights that are provided with a particular limitation clause is superfluous. For, in case of a serious crisis that threatens the life of the nation, room can already be found (or be claimed by the authorities) for further limitations of the fundamental right in question. This could be done on the basis of the *proportionality* test that takes place when answering the question if a certain infringement is necessary in a democratic society. Reference to a derogation clause would add little to this. The meaning of derogation clauses, therefore, is limited to those cases in which those rights are concerned that are not provided with a particular limitation clause (and, as will be explained below, those rights are largely non-derogable).

A general problem with these aspects of the principle of *exceptional threat* is that although they were formulated fairly strictly by, especially, the Strasbourg bodies, those same bodies apply a very wide margin of appreciation when assessing the question whether a "public emergency threatening the life of the nation" existed.

4.2.2 Strengthening and expansion of the non-derogable rights

The first part of chapter 8 outlines three important developments regarding the non-derogable rights. In the first place, the scope of several non-derogable rights mentioned in the second paragraph of the derogation clauses – especially the right to life and the prohibition of torture – is very broad. In the case law, all kinds of negative and positive obligations are considered inherent in these rights, including the principle of *non-refoulement*, the obligation to provide detainees with enough food and medical aid, the obligation to take adequate precautions to prevent unnecessary victims in case of violent action against terrorist organisations and the obligation to perform a careful and transparent investigation at the national level if there are complaints about violation of the right to life or the prohibition of torture.

In the second place, the protection of several non-derogable rights has been strengthened over de past few decades by the coming into being of certain specific treaties and protocols regarding the prohibition of torture and the prohibition of capital punishment

In the third place, the number of non-derogable rights is no longer limited to the ones contained in the second paragraph of the derogation clauses. In the *Seventh Protocol* of the ECHR, the *ne bis in idem* principle is accorded the status of non-derogability, but, far more importantly, the UN Human Rights Committee in *General Comment No. 29* (2001) came to a "jurisprudential" increase of the number of non-derogable rights. As a basis for considering non-derogable several rights that are not specified as such in Article 4 (2) ICCPR, the Committee gives three lines of reasoning: (a) non-derogability is deduced from the essential interest to, or the close connection with rights that are explicitly specified to be non-derogable in paragraph 2 of Article 4; (b) non-derogability is deduced from the constitutive system or from the internal structure of the ICCPR; (c) non-derogability is deduced from norms of *ius cogens* or humanitarian law of armed conflict. In this last line of reasoning, the Human Rights Committee uses the relatively simple principle that for certain fundamental principles, which on the basis of the rules of humanitarian law may not be deviated from even in times of war or other armed conflicts, it can be assumed that they may also not be deviated from during less serious crises (to which the rules of humanitarian law do not apply).

The most important rights that obtain a "jurisprudential" status of non-derogability are the right to an effective remedy in case of a suspected violation of human rights and, as species of that right, the right of *habeas corpus*, and, additionally, the right to a fair trial in almost all its aspects (only a few aspects of this right can be infringed upon to a certain extent, i.e. the trial being public, the term within which the trial should take place, and the equality of arms during the presentation and examination of witnesses). Using the line of reasoning mentioned under (c) and in view of the current state of international (humanitarian) law with regard to humanitarian aid, the core of a number of social rights – the right to food, housing and medical care – could in my opinion also be deemed to be non-derogable.

Thus far, the ECrtHR in its jurisprudence has not yet explicitly proceeded to recognition of deduced non-derogable rights. This probably has to do with the restraint that the Court in any case exercises in regard to the judicial control of government actions if the state in question has invoked the derogation clause. In theory, the ECrtHR could also open itself up to progressive insights in this field, which would agree with the interpretation of the ECHR as a "living instrument" that is applied by the Court to many domains, including very sensitive ones having to do with state security.

4.2.3 *The central importance of the principle of proportionality*

Very briefly summarized, the greatest threat to the protection of human rights occurring when a government seeks to protect state security and combat terrorism, comes from (emergency) measures that are not proportional to the goals pursued, and from methods to tighten security that are fraught with danger, such as having citizens tried by special – usually military – courts. In addition, respect for human rights comes under a lot of pressure with the apprehension and detention of persons that are considered a danger to state security (such as suspected terrorists). Such persons run a considerable risk of inhumane treatment, or of treatment that does not otherwise comply with international standards. It is therefore logical that in the case law on the derogation clauses the requirement that emergency measures that derogate human rights must pass the test that they be "strictly required by the exigencies of the situation" plays a central role.

From this case law two important points can be deduced. First of all, testing against the "strictly required" principle involves four points of interest:

1 every emergency measure that derogates fundamental rights has to be clearly linked to the facts of the crisis situation and has to be in reasonable proportion to those facts. This means, for instance, that the intrusiveness of the measures has to correspond with the magnitude and gravity of the crisis;
2 apart from the norms in the human rights treaties themselves, norms from other parts of international law– especially international criminal law – may also be relevant in judging the proportionality of measures that derogate fundamental rights (see *General Comment No. 29* of the Human Rights Committee);
3 in the international judicial control over the proportionality of the emergency measures that derogate fundamental rights, the presence of guarantees against abuse at the national level – in the form of checks on the actions of the government by the legislature and/or the judiciary – plays an important role;
4 the measures that derogate fundamental rights should be abolished as soon as possible after the crisis has ended.

Second, especially with regard to the two emergency measures that derogate fundamental rights that earlier were said to be "fraught with danger," it can be established that over the years the case law has left less and less room for interpretation. The supervising bodies seem to use ever-shorter periods within which persons who have been apprehended and detained have to be brought before a judge, even though the states that are signatory to the treaty have derogated their treaty obligations in this area. Trying civilians before a military court or a special court that partly consists of military judges is consistently

considered to be in conflict with the right to an independent and impartial tribunal.

4.2.4 The temporary nature of measures that derogate from human rights

If there is one central point in the history of the development of derogation clauses, it is that the use of the possibility to derogate is meant as a *temporary* measure for a limited period of time, and that this measure has to aim to restore the normal functioning of the democratic government of the state, which in turn has to serve the protection of human rights. Temporariness is inherent to the concept of derogation as such. The UN Human Rights Committee explicitly confirmed this once again in *General Comment No. 29* (2001). In discussing the states' reports, the Human Rights Committee often commented critically on the fact that a state of emergency or martial law that derogates fundamental rights continued for many years in some states (Syria, Lebanon, Colombia, Egypt, UK). However, the Committee has never judged a "public emergency" in the sense of Article 4 of the ICCPR to no longer exist and that, therefore, the state in question was no longer allowed to invoke this Article, nor that considering the long lasting effect of the emergency measures, they must be considered disproportional. Expressing such a judgment does not suit the nature of the reports procedure under Article 40 of the ICCPR, in which the "constructive dialogue" between the Committee and the reporting state comes first. With regard to individual complaints procedures, only in the *Landinella Silva* case did the Committee make the specific comment regarding the duration of emergency measures that derogate fundamental rights, namely that derogating all political participation rights of an individual for 15 years is a disproportional measure.

The jurisprudence of the ECommHR and the ECrtHR is much less clear when it comes to the temporary nature of a state of emergency that derogates fundamental rights. It can be deduced from the Commission report on the *De Becker/ Belgium* case that emergency measures that derogate fundamental rights should end as soon as the crisis circumstances have past. Yet such a pronouncement does not prevent the Strasbourg bodies from being prepared to accept the fact of the existence of such crisis circumstances for a long period of time and, as a consequence, to also accept a long lasting derogation of fundamental rights. That this readiness exists is especially evident from the Strasbourg judgment on the British emergency measures based on anti-terrorism legislation that was directed at the situation in Northern Ireland. On the basis of this legislation, an emergency situation that derogated certain human rights was effective for many decades in (parts of) the UK. The fact that this legal situation lasted such a long time did not pose an insurmountable problem for either the Commission or the Court. Both the Commission and the Court seem to attach importance to the fact that the effectiveness of the British emergency legislation had to be prolonged annually by the British government and that,

therefore, national legislative bodies judged periodically whether the circumstances still warranted measures that derogate fundamental rights. In the *Aksoy/Turkey* case and in later cases regarding Turkish notification of derogation, however, the fact that the legislation that was effective in Turkey was not temporary and was, therefore, not reassessed by the legislature was reason to reject the invocation of the derogation clause by the Turkish government. Perhaps this is motivated by the circumstance that in these cases the disproportionality of the Turkish detention measures without any judicial control was so great that it was already clear to the Strasbourg bodies that this constituted a violation of the ECHR.

4.2.5 International notification

The recent case law of both the ECrtRM (*Sakik and others/Turkey*; *Sadak/Turkey*, *Yaman/Turkey*) and the UN Human Rights Committee (*Park/Republic of Korea*; *Mundyo Busyo, Ostundi Wongodi, Sibu Matubuka et al./Democratic Republic of Congo*) contain indications that these authorities take the position that the complete absence of international notification as is required by the third paragraph of the derogation provisions, has the consequence that the state concerned cannot make use of the possibility to derogate and, therefore, remains accountable under the "normal" treaty rules.

5 THE RELEVANCE OF THE HUMAN RIGHTS NORMS TO THE RECENT "BATTLE AGAINST TERRORISM"

In her second progress report (July 2002), Koufa, the UN Special Rapporteurr on terrorism and human rights, made a few comments that touch upon a question I posed in chapter 1. The part of the human rights norms that specifically deals with the limitation and derogation of the protection of human rights as a part of government action in order to protect national security was largely developed in the period prior to September 11, 2001. The question is to what extent the *acquis* of these human rights norms is still relevant in the "changed" world that came about after the terrible attacks in the US, in which the threat and actual execution of large scale terrorist attacks has increased enormously, and, therefore, the need for states to protect themselves against such attacks has increased accordingly. The comments of the Special Rapporteur, in my opinion, indicate the painful discussions that took place within the UN human rights organs. The Rapporteur seems to feel somewhat abandoned:

> Prior to 11 September 2001, the need to respect fully all human rights norms in all responses to terrorism was (...) clear. In the post-11 September 2001 period, there appears to be a waiver of this view, not a few States and scholars suggesting that abrogation of human rights may be necessary to combat terrorism. In this context,

> many areas of responses have become exceptionally contentious, with the result that every issue of response generates heated debate.
> (…)
> In a stunning irony, the new debate on human rights includes some States and some human rights scholars who now advocate curtailing the very human rights the risk of curtailment of which was one of their major concerns that led to this mandate [of the Special Reporter].

Koufa is not the only one to mention this change within the UN organs. In an interview with the New York Times on September 12th, 2002, departing UN High Commissioner for Human Rights Mary Robinson described her experiences during the previous year. She stated that during that year she had seriously addressed several governments concerning the compatibility with human rights of repressive measures and had often received a reply like: "For goodness sake, standards have changed!"

I am inclined to posit that standards of human rights have *not* changed since September 11, 2001, and that there is no reason to adjust those standards either. There are three reasons for this: two practical reasons and one juridical. First of all, in public and political debate the impression is often given that the protection of human rights is (partly) a cause of the terrorist attacks – or at least of the inability to prevent them. The line of reasoning is more or less like this: the terrorists of September 11, 2001 or those of March 11, 2004 have abused "our" free society in order to try and destroy that society. The nature of the attacks in the US and Madrid, however, was such that they could have taken place in countries or societies that were less open or had less regard for the protection of human rights. Second, the deluge of reports produced at the national level (for instance in the US, in Spain, and in the UK) and the international level (UN and EU) show that the most important measures that are suggested by intelligence services and experts in the field of combating terrorism to prevent further terrorist attacks by organisations like Al Qaeda have little or nothing to do with infringements of human rights norms. What is needed is more staff for certain special police and criminal investigation units and the security services in order to improve their "intelligence"-position, international cooperation and exchange of information between national police and intelligence services, better control at airports and ports, and making compatible the digital information systems and databases of police forces and security services. Such measures are indeed only effective or yield results in the longer term, but they are the measures that in the end give the best results in terms of increased security.

In addition to these two arguments that come from security praxis, there is a third, legal argument that is supported by the results of this study: in so far as measures are taken to protect national security that touch on human rights standards, these standards leave states enough room to respond to crises, (threat of) terrorism and other circumstances that affect national security. The fact that certain preconditions apply – in the sense of, among others, a series

of non-derogable rights and a test against the principles of *necessity* and *proportionality* of measures that limit or derogate fundamental rights – is inherent to the limitations that are and should always be set for actions of a government in a constitutional state.

It may be true that the interpretation of and case law on the human rights norms that specifically deal with the room for limitation or derogation of certain rights in order to protect national security have largely been formed in response to abuses in states governed by military regimes or other dictatorial regimes (e.g. Greece, Turkey and the military junta's in Latin America), and something could be said for stricter international supervision, especially in the case of a government that was not democratically elected. However, this is insufficient reason to assume that the developed human rights norms would not be relevant or that observance need not be strictly monitored if certain repressive measures are taken by a regime that *is* democratically legitimate.

In the last decades of the twentieth century there was much agitation against the "national security" doctrine that was used by several Latin American junta's because this doctrine resulted in a "hierarchization of powers in which the ultimate control rests with the military authorities" and led to measures aimed at elimination of "cultural or ideological manifestations of 'non-Western' attitudes," which resulted in several violations of human rights. Current measures, especially in the area of administrative detention and deviations from the right to a fair trial, taken by some countries as part of the "battle against terrorism" do not differ very much from the measures taken by the criticised junta's in the 1970's and 1980's. Now, indeed, the measures do not originate with military dictators but with democratically legitimate governments; with regard to content, however, the (proposed) measures show considerable similarities. Democratic legitimization is no guarantee of just rules. The unjustified detainment of thousands of Americans of Japanese descent during the Second World War (discussed in § 8.5.1) shows that also "authorities in democratic countries that strip civil liberties in times of crisis afterwards often experience shame and remorse."

Authors who consider the democratic process as a sufficient guarantee against the abuse of emergency powers ignore the fact that the emergency powers often strike persons who have no right to vote (especially foreigners). The persons who are probably most affected by the exercise of emergency powers, therefore, usually have no part in the decision-making and the control over these decisions. Especially with regard to the rights of those persons it is important to maintain the human rights standards: "The true test of justice in a democratic society is not how it treats those with a political voice, but how it treats those who have no voice in the democratic process."

Furthermore, if human rights norms are set aside altogether in order to protect national security and combat terrorism, this may well have the contrary effect of encouraging terrorism. The international human rights NGO Human Rights Watch stated in August of 2004: "Each photograph of American soldiers

humiliating a detainee in Iraq could be considered a recruitment poster for al-Qaeda. Indeed, counter-terrorism measures anywhere that are accompanied by systematic or egregious rights abuse risk provoking, in reaction, increased support for violent extremism."

Thus far, the jurisprudence under the ECHR and the ICCPR examined in this study shows no signs that the international supervising bodies are prepared to compromise human rights in the context of the battle against terrorism. It should be observed, however, that the international "jurisprudence" on this matter that has accumulated since "9/11" so far "only" consists of *Concluding Observations* of the UN Human Rights Committee in reaction to states' reports. These *Observations* contain relatively abstract and general comments and no binding legal judgments. In a way, we must await individual complaints to the ECrtHR or the Human Rights Committee about the application of anti-terrorism legislation from countries like the United Kingdom (for example, the Anti-Terrorism, Crime and Security Act). In § 9.3.2.4 I point out that in my opinion the British measures are not in agreement with the requirements of Article 15 of the ECHR and Article 4 of the ICCPR, especially because the threat of terrorism cannot be considered a public emergency in the sense of these articles. However, it was also explained in this paragraph that at the national level those parts of the law in question that allow a form of detention of foreigners without legal checks were already judged to be disproportional and therefore unlawful by an Appeals Chamber of the House of Lords.

A relatively new element in the framework of (international) judicial control in the field of human rights in cases related to national security is that offering security for the population – and therefore the taking of measures to combat terrorism – is argued to be a positive obligation for the state following from, *inter alia*, the protection of the right to life: a fundamental right to security. This is shown in the first Article of the *Guidelines on Human Rights and the Fight against Terrorism* of the Committee of Ministers of the Council of Europe. This offers perspective for a situation in which infringements of certain fundamental rights that are the result of measures taken to protect the national security, find a basis in the fundamental right to security. This means there is a conflict of fundamental rights. Although there is some case law resulting from individual complaints procedures with the ECrtHR, in which the Court finds the state accountable for not taking preventive measures to protect the safety of certain individuals in case of a concrete, real and immediate threat (see § 8.1.3.1), this case law contains no cases of a terrorist threat or of a more general threat to the national security by terrorist organisations. At the moment, therefore, it remains to be seen whether this new element in the parameters of consideration will lead to different judgments of the necessity and proportionality of the measures that limit or derogate fundamental rights that are taken in case of a terrorist threat.

6 International supervision of the protection of human rights during emergencies and other situations threatening security: problems and prospects of improvement

6.1 Level of scrutiny

Despite the fact that from the jurisprudence of the international supervising bodies, especially that of the ECommHR and the ECrtHR, a few important points can be deduced regarding the content of the principle of *exceptional threat* (the most important requirement a state has to meet if it wants to be able to make use of the possibility to derogate certain fundamental rights), the exact content of this principle – the threshold of severity – is not yet altogether clear.

There are several different reasons for this lack of clarity. In chapter 7 it was demonstrated that the first and foremost of these is that the ECommHR and the ECrtHR so far have been inclined to allow states a wide margin of appreciation regarding the question whether the situation is a public emergency in the sense of the derogation clauses. Due to this wide margin of appreciation allowed to national authorities (since the *Ireland/United Kingdom* judgment), the normative clarity and "sharpness" of the elements of the principle of *exceptional threat* as they were formulated in early Strasbourg jurisprudence (the *Lawless* judgment, the *Greek* case) have become watered-down to a considerable degree. In practice it comes down to the Strasbourg bodies having almost without comment gone along with the statements and views about the existence of a crisis that threatens national security as they were stated by the government in question, if they were under the impression that this government acted in good faith. Precisely due to the lack of good faith on the part of the Greek colonel's regime no wide margin of appreciation was allowed in the *Greek* case.

In § 7.1.4.7 I pointed out the possibility that in the first decades of the Strasbourg case law, there may have been reasons for the Commission and the Court to show some reserve with regard to sensitive issues like national security and combating terrorism. It can be argued that at that time, for strategic reasons, these bodies could not issue reports or judgments that ran the risk of states no longer recognizing the jurisdiction of the Court and the right of individual applications, thus undermining the authority of these bodies. When the Eleventh Protocol became effective in 1998, the right of individual applications and the jurisdiction of the Court became mandatory and, therefore, can no longer be revoked "separately." Moreover, in my view the ECrtHR by now has gained such an authoritative position that it needs not fear as much any longer the undermining of its authority by criticism on its judgments on the part one (or more) governments. In other sensitive issues touching on national security, the Court has also not hesitated to at times give "harsh" judgments and conclude to violations of the ECHR. There do not seem

to be any valid reasons for using a less scrutinizing test just because of reference to the derogation clause.

Thus far, compared with that of the Strasbourg bodies, the jurisprudence of the UN Human Rights Committee has not led to greater clarity concerning the content of the principle of *exceptional threat*. To be sure, in the Committee's jurisprudence the concept of a margin of appreciation – let alone a wide margin – is consistently rejected, and in the *Landinella Silva/Uruguay* case, based on the Committee's own assessment of the circumstances, the Committee rejected the Uruguayan government's reference to the existence of a "public emergency" in the sense of the derogation clauses. However, in the other cases in which the Commission had to deal with a derogation of certain rights under the ICCPR, this usually concerned the proclamation of a state of emergency that derogated fundamental rights without a plausible foundation, and this could be dealt with without wasting many words on the matter. Moreover, many of the cases of the Commission related to the derogation clause had to do with violation of non-derogable rights, so that it was not very relevant for a judgement whether the situation was indeed a "public emergency" or not.

In light of the many impulses the Human Rights Committee has been handed over the past 20 years regarding the interpretation of the principle of *exceptional threat*, among others in the *Siracusa Principles* (drawn up under the auspices of the IC), the Paris *Minimum Standards* of the ILA and the *Draft Guidelines for the Development of Legislation on States of Emergency* (drawn up under the auspices of the Special UN Reporter for human rights and states of emergency), it is regrettable that in *General Comment No. 29* of 2001 the Committee have not given a further interpretation of the principle of *exceptional threat* (despite all the positive developments this *General Comment* has produced). The fact is that the lack of real clarity regarding the exact content of the principle of *exceptional threat* poses serious risks for the protection of human rights.

In the first place it should be mentioned in this connection that this lack of clarity has led to situations in which Article 15 ECHR was invoked and this was accepted, while it was very doubtful whether, for instance, the requirement that the functioning of the political organs of the state or the judiciary be seriously threatened, or the requirement that there was no way for the state to protect its security through less drastic means not derogating any ECHR rights were met (*Brannigan and McBride/UK*). Second, we can point to the British notification of derogation of late 2001, described in § 9.3.2.4, in which the British government – without being able to show the British parliament that there was a real threat of terror against the United Kingdom – managed to have legislation passed that entailed a derogation of the treaty obligations under Article 5 of the ECHR and Article 9 of the ICCPR, declaring thereby that the derogation of the treaty obligations was only a formality that was simply necessary to facilitate the measures in question (unlimited detention of foreigners without judicial checks). My thesis is that the Strasbourg "stretching"

of the principle of *exceptional threat* paved the way for the "ease" with which the British have made use of the possibility to derogate and that this makes it too easy for states to switch, as it were, to a less intense level of human rights-related supervision of the necessity and proportionality of measures. In the end, this may be to the detriment of the level of human rights protection in all of Europe. In situations like that of today, with the presence of a certain degree of Islamic terrorist threat (the secret nature of the information causing the national representative bodies or the judiciary to not be able to judge whether this threat is actually present), giving a notification of derogation can reduce the level of protection of human rights to a crisis level without any stringent European check on the necessity and reasons for such a notification.

The jurisprudence of the UN Human Rights Committee does not so far contain any clear judgments on the question whether the present threat of Islamic terrorism can be considered a "public emergency threatening the life of the nation," although from the critical comments of the Committee in the discussion of the British state report in 2001, reproduced in § 9.2.2.3, it could be deduced that the Committee is not easily inclined to consider it as such. In its *Concluding Observations* on states reports submitted after September 11, 2001, the Committee emphasized several times that the legislation that is passed and other measures that states take to fulfil Resolution 1373 of the UN Security Council (which requires states to take measures against terrorism) have to be in agreement with the norms of the ICCPR. In this respect, the Committee is especially concerned about the sometimes very broad definition of terrorism that states use and the infringement of certain non-derogable rights that would result from state action against terrorism. However, as was remarked before, the discussion of state reports is not a very suitable forum for making very firm statements on this point. Until the present day, the Human Rights Committee has not issued any judgments on individual complaints about measures derogating fundamental rights after September 11, 2001.

6.2 Institutional improvements

In part III of this study, I mainly concentrated on the norms contained in the derogation clauses of the ECHR and the ICCPR and the way in which the observance of those norms is supervised by the ECrtHR (and in the past the ECommHR) and the UN Human Rights Committee. Chapter 9 describes how certain factors "delaying" this supervision are inherent in the functioning of both bodies. These factors could perhaps be partly remedied, but never altogether overcome. In § 9.2.2 I discussed several proposed solutions but also concluded that the present procedure of the UN Human Rights Committee reasonably meets the objection of a delaying factor in the reports procedure under Article 40 ICCPR. However, this is only a reduction of a part of the problem. Another important part of the problem for the Human Rights Committee is that many states do

not submit their report under Article 40 in a timely fashion. I also pointed out that the ECrtHR and the UN Human Rights Committee are not able to investigate on their own initiative, and under the present procedures only have a limited fact finding capacity. It may be assumed that by way of the present procedures of individual applications and inter-state applications only a small number of applications about the enforcement of emergency measures that derogate fundamental rights will find their way to the supervising bodies. Furthermore, especially the ECrtHR is reticent to make "structural" judgments or general observations based on individual applications. The capacity of the UN Human Rights Committee and its staff is such that it can discuss, comment on, and make *Concluding Observations* about no more than 15 state reports per year. Finally, at the global level, not nearly all states are signatory to the ICCPR, so that the UN Human Rights Committee cannot supervise the actions of a number of states.

Of the supervory mechanisms currently laid down in the ECHR and the ICCPR, the inter-state procedure is probably the most suitable for situations in which a state makes use of the possibility to derogate certain treaty obligations because of a crisis. The inter-state procedure can be started up more quickly since submitting an inter-state application is not bound by the requirement of the exhaustion of national remedies. In addition, in an inter-state application, the machinery of the government of the applying state or states can be used to gather sufficient information about the actual situation in the country against which the application is made and about the impact of the emergency measures that derogate fundamental rights, so that the application can be substantiated with facts.

As is well-known, however, states indeed have very little political willingness to start such a procedure because of the problems the use of this instrument creates in the international relations. In 55 years, there have been about twenty inter-state applications under the ECHR and none under the ICCPR. Of all the inter-state applications under the ECHR, most did have to do with a crisis situation: emergency measures of the British on Cyprus in the late 1950s, the military coup in Greece in 1967, British emergency measures in Northern Ireland in the first half of the 1970s, the Turkish occupation of the northern part of Cyprus since 1975, and the proclamation of a state of emergency in parts of Turkey in 1978. In many of these cases the inter-state application was submitted by states whose citizens were in some way affected by the crisis and the measures taken to overcome it. Only three cases of inter-state applications were motivated by a desire to act in the general interest so that they took the form of *actio popularis* (the application of the Scandinavian countries and the Netherlands against Greece in 1967; the application of the Scandinavian countries against Greece in 1970, and the application of the Scandinavian countries, France and The Netherlands against Turkey in 1982). In those three cases the inter-state application was submitted after strong pressure by the Parliamentary Assembly of the Council of Europe.

In view of the relatively high effectiveness of the inter-state procedure for cases in which certain fundamental rights are – perhaps wrongfully – derogated in a crisis situation, in order to get around the political unwillingness of governments to make use of this instrument, one could consider granting the right to submit applications with the ECrtHR to bodies like the Parliamentary Assembly or the Commissioner on Human Rights of the Council of Europe. Furthermore, the present text of the ECHR also creates possibilities for another mode of supervision in case of a notification of derogation by one of the states. In fact, Article 52 of the ECHR permits the Secretary-General of the Council of Europe to inquire with the High Contracting Parties how their internal law ensures the effective implementation of the right guaranteed by the ECHR. The text of this Article does not impede the Secretary General to demand an explanatory report from a state after a notification of derogation has been given.

Also with measures like the obligation to report with greater speed to the UN Human Rights Committee, a more active use of the right to inter-state application, granting the right of application to a body like the Parliamentary Assembly of the Council of Europe and a more active use of the possibility to demand reports on the basis of Article 52 of the ECHR, it has to be concluded that the limited capacity of both the UN Human Rights Committee and the ECrtHR makes it physically and financially impossible for these bodies to be "on the ball" in every crisis situation in which measures are taken that limit or derogate fundamental rights. It is therefore necessary that there be supervising mechanism in operation in addition to those of ECHR and the ICCPR that complement these treaty mechanisms. Such complementary mechanisms and supervising bodies are present in fairly large numbers, especially in the UN Their functioning, however, is seriously questioned. This is briefly discussed in § 9.4, without going into a structural examination of all these mechanisms and bodies in this study. Especially regarding government action in crisis situations that constitute a (presumed) threat to national security, the international supervision of human rights falls short, as is argued by, for instance, several NGOs. Two of the reasons for this are the inadequate attention paid to human rights norms in the activities of the Counter-Terrorism Committee of the UN Security Council (CTC) and the declining effectiveness, credibility and professionalism of the UN Commission on Human Rights. Concerning the Commission on Human Rights it now has been recognized at the highest UN level that, increasingly, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others and that a drastic reform of the Commission and of the awareness of human rights in the work of the Security Council is necessary. At present, there is also discussion within the UN about reforming certain mechanisms. UN Secretary-General has proposed to replace the Commission on Human Rights with a smaller standing Human Rights Council, membership of which would be open only to those States that undertake to abide by the

highest human rights standards. He further has appealed to the UN Member States that the UN High Commissioner on Human Rights be given a more active role in the deliberations of the Security Council and the CTC and that a Special Rapporteur be created who would report on the compatibility of counter-terrorism measures with international human rights laws. At this moment, however, it remains to be seen whether the recommendations by the Secretary-General will be followed by the Member States.