Göttingen Journal of International Law 1 (2009) 1, 29-44

The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights

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doi: 10.3249/1868-1581-1-1-schmid

Abstract

Contrary to what is often asserted in debates on the "war on terror", international law provides specific rules on what is allowed in bringing suspected terrorists to trial. This article suggests a method to identify the minimum fair trial rights which have to be provided to every accused, irrespective of his or her status in international law and irrespective of whether the situation amounts to an armed conflict or not. This essay proceeds from the assertion that human rights law applies in peacetime as well as in times of emergency, including in armed conflict. Because the International Covenant on Civil and Political Rights prohibits any derogation measures inconsistent with the State's other obligations under international law, the so-called principle of consistency lends itself as the tool to identify which aspects of Article 14 of the Covenant must be considered non-derogable. The article concludes that those aspects of fair trial which are common to the legal regimes dealing with both types of armed conflict – international and non-international – are also part of customary international law and provide the minimum yardstick from which no reduction is permissible.

A. Introduction

This article suggests a methodology of how the non-derogable aspects of the right to a fair trial can be identified. It provides a recommendation as to how to compile the list of judicial safeguards which have to be provided to every accused, irrespective of his or her status in international law and irrespective of whether the situation amounts to an armed conflict or not. The main point of the present essay is that current legal discussions about the applicable law in the "war on terror" do not sufficiently recognize that a minimum level of due process must be provided to all accused; regardless of whether humanitarian treaty law applies or not.

This minimum level of due process is identified with the help of the so-called principle of consistency. The principle of consistency is the prohibition of derogation measures "inconsistent with [a State party's] other obligations under international law".[1] This essay focuses on the reasons why

[1] International Covenant on Civil and Political Rights, 16 December 1966, Art. 4(1), 999 U.N.T.S. 171 [ICCPR].

I suggest the principle of consistency as the most adequate tool for identifying the minimum, non-derogable, judicial guarantees.

Derogations under exceptional circumstances allow a State to temporarily curtail some human rights. The effect of a valid derogation is to allow a State to take measures that would normally be a violation of its obligations. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) is the Covenant's Article dealing with fair trial. It is not listed among the categorically non-derogable rights such as the prohibition of torture or slavery.[2] But recognizing that Article 14 in principle is derogable does not imply that States facing an emergency can depart from the right to a fair trial as they see fit. Because the Covenant does not specify which of the aspects of fair trial can never be dispensed with,[3] this article suggests that the non-derogable aspects of Article 14 can and should be identified with the help of the principle of consistency.

If this logic is accepted, arguments on the qualification of an act of terrorism as an armed conflict or the legal status of detainees become less important because an elaborate list of fair trial guarantees has to be provided in all circumstances and to all individuals by virtue of their nature as non-derogable safeguards. This framework provides a strong contention against arguments that certain individuals are situated in legal gray zones between human rights law and international humanitarian law. Whether and which parts of humanitarian treaty law apply to a detainee caught in the "war on terror"[4] is, of course, not irrelevant. However, it is crucial to acknowledge that a considerable number of judicial guarantees can never be dispensed with.

The article proceeds as follows: Section A explains why the ICCPR is the right instrument to start the analysis as to which minimum judicial standards are applicable in times of terrorism, and indeed, any other circumstances. Section B outlines the criteria of valid derogations, in particular the prohibition of derogations inconsistent with the State's other obligations under international law. Section C suggests applying the principle of consistency to the administration of justice and explains how

2 Id., Article 4(2).

3 The exception is the prohibition of retroactive criminal laws which is explicitly non-derogable. Id., Article 4(2).

4 I employ the term "war on terror" to designate the current strategies, activities and doctrines employed to counter terrorism. I do, however, reject the idea that all counter-terrorist measures automatically take place in the framework of armed conflict.

the non-derogable aspects of Article 14 of the ICCPR can be derived by reference to those rights common to both types of armed conflict and part of customary international law. A cursory discussion of recent developments reveals both the legal and practical benefits of enhancing attention to the derogation regime (Section D).

The article will conclude that the principle of consistency is a useful tool to identify the non-derogable judicial safeguards which are – at the very minimum – applicable in times of terrorism.

B. Armed Conflict, States of Emergency and the "War on Terror"

The argument of this paper is that the principle of consistency can be used to determine the implicitly non-derogable aspects of Article 14 of the ICCPR. Before I explore the use of obligations under customary law to review whether anti-terrorist measures are consistent with a State's other obligations under international law, this section affirms that the ICCPR is the right instrument to identify the criteria of valid derogations. Because human rights law continues to apply in times of armed conflict and other situations of emergency, the derogation regime of the ICCPR is the most relevant place to start our inquiry. The system of the derogation clause – Article 4 of the ICCPR – was put in place to safeguard the rule of law in times of extraordinary challenges. Recent case-law has confirmed that while acts of terrorism may be such an extraordinary challenge, terrorism does not warrant a re-interpretation of the extent of possible derogations.[5] Also

[5] See for instance: *A and Others v. Secretary of State for the Home Department*, Appellate Committee of the House of Lords, UKHL 56 (2004). The UK court was asked to consider whether the Anti-Terrorism, Crime and Security Act of 2001 were in breach of the UK Human Rights Act giving effect to the European Convention on Human Rights (ECHR). On appeal, the judges by a majority upheld the possibility of derogation but decided that the provisions in the Anti-Terrorism Act were in breach of the Convention because of their discriminatory nature and because the measures were not held to be "strictly required by the exigencies of the situation". While the court does not interpret the derogation regime of the ICCPR, but the one of the ECHR, the case illustrates that courts have deemed it adequate to apply the established rules of the game with regard to derogations. See also: *Public Committee Against Torture in Israel v. the State of Israel*, Supreme Court of Israel, HCJ 769/02 (2005). Upholding the non-derogability of the prohibition of torture and cruel, inhuman or degrading treatment or punishment, the court rejected the Government's arguments on possible

according to the Venice Commission of the Council of Europe, terrorism does not justify a departure from the framework of international law in general and the derogation regimes in particular.[6]

As confirmed by the International Court of Justice (ICJ), if an armed conflict is found to exist, human rights law does not cease to apply. The derogation regime determines if a partial departure from human rights law is acceptable. Whether or not – or under which circumstances – international terrorism amounts to an armed conflict, and if so, what type, is hotly debated. But since the derogation regime was designed to deal with *all* "public emergencies which threaten the life of the nation",[7] the consideration of the principle of consistency can be made for all states of emergency, irrespective of whether the specific emergency amounts to an armed conflict. This is precisely why the recourse to Article 4 of the ICCPR is a convenient tool to identify the minimum safeguards applicable in all circumstances. At the same time, it must be stressed that this paper does not address which higher standards simultaneously apply to authorities in bringing suspected terrorists to trial, especially in light of the fact that since September 11, 2001, no State except the United Kingdom has notified a derogation, and the UK derogation refers to Article 9 and not Article 14 of the Covenant.[8]

C. The Applicability of Human Rights Law

The Bush Administration originally attempted to argue that the "war on terror" was "something completely different from anything that States had to deal with before".[9] By considering the war on terror as a *sui generis*

justifications for the employment of physical means during the interrogation of individuals suspected of hostile terrorist activities.

6 European Commission for Democracy Through Law, Opinion on the Protection of Human Rights in Emergency Situations Adopted by the Venice Commission at its 66th Plenary Session, Venice, 17-18 March 2006, CDL-AD(2006)015, para. 30.

7 ICCPR, Art. 4(1) (*supra* note 1). While the United States of America did not invoke a derogation after September 11, 2001, the 9/11 attacks would probably have qualified as an "emergency threatening the life of the nation". It, however, remains doubtful whether the Human Rights Committee would accept claims that such an emergency exists today in the USA or whether allied States such as the United Kingdom could benefit from the derogation provision.

8 Declaration contained in a Note Verbale from the Permanent Representation of the United Kingdom, dated 18 December 2001, *available at* http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (last visited 27 September 2008).

9 The quotation referring to the distinct nature of terrorism is from: *Jeffrey Kovar*, (Legal Adviser, US Mission to the United Nations), "US Views on International

category in international law, the application of the rules of international humanitarian law as well as the derogation clauses has been denied. The claim that the Geneva Conventions were generally inadequate in the various situations related to the "war on terror" was vehemently challenged by the US. Its current view towards international humanitarian law now rather focuses on the argument that humanitarian law supplants human rights law in the circumstances under review.[10] It is argued that while the ICCPR and its derogation provision are irrelevant, the detainees do not qualify for specific protections under international humanitarian law.[11] This interpretation of the *lex specialis* doctrine is however inconsistent with treaty law as well as with judicial decisions and the teachings of highly qualified publicists.[12] The wording of Article 4 of the Covenant refers to a

Humanitarian Law and the War on Terror", Lecture delivered at the Graduate Institute of International Studies, *Point d'Actualité HEI*, Geneva, 15 May 2007. Although not speaking on the legal qualification of terrorism but on the issue of self-defense against non-state actors, President Bush emphasized that "new threats also require new thinking": *George Bush*, "Remarks by the President at 2002 Graduation Exercise of the United States Military Academy in Westpoint", 1 June 2002, *available at* http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html (last visited 11 November 2008).

10 Claiming that the Inter-American Commission acted without basis in requesting precautionary measures in the case of detainees in Guantánamo, the United States argued that it is humanitarian law, and not human rights law, that governs the treatment of the detainees and that the Commission did not have the competence to apply international humanitarian law. See Response of the United States to Request for Precautionary Measures - Detainees in Guantánamo Bay, International Legal Materials 41 (2002), 1015. See also Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantánamo Bay, Cuba, 10 March 2006, 22-24, *available at* http://www.asil.org/pdfs/ilib0603212.pdf (last visited 29 September 2008).

11 *Jay S. Bybee*, US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (7 February 2002), reprinted in *Karen J. Greenberg & Joshua L. Dratel* (eds), The Torture Papers: The Road to Abu Ghraib (2005), 136-143. For an outline of US arguments on international humanitarian law after September 11, see *David Forsythe*, The United States and International Humanitarian Law, Journal of Human Rights 7 (2008) 1, 29.

12 See for instance *Theodor Meron*, Human Rights in Time of Peace and in Time of Armed Strife: Selected Problems, in *Thomas Buergenthal* (ed.), Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn, (1984), 1-21. *Louise Doswald-Beck & Sylvain Vité*, International Humanitarian Law and Human Rights Law, International Review of the Red Cross 293 (1993), 94-119. *William A. Schabas*, Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, Israel Law Review 40 (2007) 2, 592-613.

"public emergency which threatens the life of the nation" and it seems difficult to claim that situations of armed conflict or terrorism were not included in the ordinary meaning of these terms. Indeed, armed conflict and terrorist violence were specifically discussed by the drafters of the Covenant when they negotiated the wording of Article 4.[13]

The ICJ has ruled several times on the application of human rights law in armed conflict. It held that the question whether a human rights provision applies during armed conflict should be answered by looking at the derogation regimes. The ICJ confirmed in the *Nuclear Weapons Opinion*,[14] as well as in the *Wall Opinion*[15] that as long as a State has not validly derogated from a provision, the norm applies irrespective of the existence of an emergency. The ICJ affirmed the simultaneous application of international humanitarian law and human rights law in the *Democratic Republic of the Congo (DRC) v. Uganda* case and concluded that international humanitarian law and human rights obligations were binding on the Ugandan troops occupying the DRC.[16]

In his separate opinion in the *DRC v. Uganda* case, Bruno Simma noted that "no gaps exist in the law that would deprive the affected persons of any legal protection".[17] Judge Simma stressed that the victims of the attacks by Congolese soldiers at the Kinshasa airport in 1998 remained legally protected against maltreatment, irrespective of their nationality, by international human rights and international humanitarian law. Furthermore, according to him, Uganda would have had standing to raise these violations before the ICJ, because such minimum protections were obligations owed *erga omnes*.[18]

In short, given that human rights law continues to apply in times of emergency, the protections of the ICCPR remain applicable. Following from

13 *David Weissbrodt*, The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Chapter 4 (2001).

14 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J.Reports 1996, 226-267, 240 (para. 25).

15 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, 134-203, 178 (para. 106).

16 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Jurisdiction of the Court, Judgment, I.C.J. Report 2005, 1-104, 71 (para. 220) [hereinafter *DRC v. Uganda*].

17 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Separate Opinion of Judge Simma, 5 (para. 19).

18 *Id.*, 10 (paras 32-35).

the ICJ's words in the two Advisory Opinions, the derogation regime constitutes the hinge between human rights law and international humanitarian law. Therefore, to determine if a State can validly depart from judicial safeguards contained in Article 14 of the Covenant, we shall have recourse to Article 4 of the ICCPR. Article 4 contains the conditions of valid derogations. The next section in particular introduces the condition of consistency.

D. The Criteria of Valid Derogations from the ICCPR

Derogation clauses safeguard the right of national governments to deal with public emergencies. Article 4(1) stipulates that derogations can only be made in officially proclaimed emergencies which threaten the life of the nation; the measures must be strictly required by the exigencies of the situation; they must be non-discriminatory and must not be inconsistent with the State's other obligations under international law. Article 4(2) lists the articles from which no derogation is ever allowed (such as the prohibition of slavery). Interestingly, the United States' delegation during the drafting of the Covenant originally advocated an inclusion of the entire fair trial provision among the explicitly non-derogable rights.[19] This article does not go as far as to suggest that States do not have any leeway with judicial procedures during emergencies. But it underlines that there is no legally sound argument allowing States in countering terrorism – or in any other situation – to depart from the minimum judicial safeguards that apply even in the worst forms of emergencies.

The last paragraph of Article 4 contains procedural requirements. The disagreement as to whether failure to comply with the notification requirements automatically invalidates the derogation is unresolved.[20] But

[19] UN Doc. E/CN.4/325 (13 June 1949). Proposal of the United States that "[t]he rights and freedoms set forth in […] article 13 [14], article 14 [15] and article 15 [16], of this Covenant shall not be subject to any limitation". U.N. Doc. E/CN.4/SR.195 (29 May 1950), para. 140. The United States were voting in favor of accepting the proposal to include the full fair trial provision among the non-derogable rights. For a summary of the *travaux préparatoires* of Article 4, see *David Weissbrodt*, The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Chapter 4 (2001).

[20] *Sarah Joseph*, Human Rights Committee: General Comment 29, Human Rights Law Review 2 (2002) 1, 81, 95-96; Apart from the United Kingdom, no State notified derogations from the Covenant. UN bodies interpreted the absence of formal derogation from the US and rejected the possibility of a *de facto* derogation; see also:

even if a *de facto* derogation was accepted, the principle of consistency ensures that a number of aspects of fair trial are effectively non-derogable.

E. The Principle of Consistency

My proposition is that the principle of consistency is the central tool to identify the non-derogable aspects of Article 14. A State can only derogate from provisions of the ICCPR insofar as the measures are consistent with all its other obligations under international law,[21] including customary international law.

The drafting history of the principle of consistency supports using it to identify the non-derogable aspects of Article 14. The idea of consistency was first introduced in 1950 by the US delegation. Eleanor Roosevelt mentioned on behalf of her delegation that the conduct of States in emergencies had already been regulated in the 1949 Geneva Conventions.[22] The US delegation thus advocated that the drafters of the Covenant take advantage of this legislation, instead of trying to work out which aspects of due process should be entrenched from derogation. This logic was accepted by consensus.[23] The explanation of the US proposal explicitly referred to the methodology employed throughout this article: "the State's other obligations" such as those due under humanitarian law provide the answer to what aspects of the right to fair trial can not be derogated from. The drafters accordingly intended that reference to humanitarian standards should be made when considering the consistency of a derogation measured against a State's other obligations.

The next section considers what "other obligations under international law" are relevant in determining which aspects of the fair trial provision are non-derogable.

Situation of the Detainees at Guantánamo, UN Doc. E/CN.4/2006/120 (15 February 2006) (prepared by *Leila Zerrougui et al*.).

21 ICCPR, Art. 4(1) (*supra* note 1).

22 *Summary Records of the Commission on Human Rights*, Fifth Session, R. 195, para. 45, UN Doc. E/CN.4/SR. 195 (29 May 1950) (Remarks of *Eleanor Roosevelt*).

23 *Jaime Oraá*, Human Rights in States of Emergency in International Law (1992), 191.

F. "Other Obligations Under International Law": Juxtaposing the two Additional Protocols to the Geneva Conventions and Customary Law

It is possible to identify which aspects of Article 14 of the Covenant must be considered non-derogable by analyzing the customary "other obligations" incumbent on all States. The argument is based on the idea that those guarantees which are non-derogable for both types of armed conflict – the most serious emergencies – must also be considered non-derogable in all other situations of exigency. Those aspects of due process are also part of customary international law. Any derogation from these aspects is inconsistent with "a State's other obligations under international law", and therefore invalid. The characterization of certain obligations as part of the customary international law applicable in both types of armed conflict entails the applicability of those norms to all types of emergency. Because they are part of a "State's other obligations", measures departing from these obligations contravene the principle of consistency in Article 4(1) of the Covenant. From my point of view, if a standard of fair trial applies in both types of armed conflict, there is no good reason that a State should be allowed to provide lower standards if faced with an emergency which does not amount to an armed conflict.

The reader may legitimately ask why this essay emphasizes that certain aspects of Article 14 are non-derogable only to say that these non-derogable aspects are congruent with obligations of States under customary international law. It is true that one could simply point out that, for instance, the US Military Commissions Act violates customary international law. However, given the views held by some that there are gaps in the law and that the existing international legal framework is unsuitable to address challenges posed by terrorism, the derivation of the same results from the machinery of one of the most widely ratified international treaties provides a strong confirmation that certain standards of fair trial can never be dispensed with. After all, the derogation regime was specifically designed to be applicable in times of extraordinary challenges. The suggested method also preventively answers arguments that customary international law may also allow derogations. By analyzing which judicial standards have to be provided even in the worst forms of emergency – those standards common to both types of armed conflict and at the same time part of customary law – the non-derogable aspects of fair trial can be identified. This is the minimum

level of due process applicable in the "war on terror" to all accused individuals under a State's control.

The convergence of the fair trial articles in the two 1977 Additional Protocols to the Geneva Conventions provides a sound basis for an assessment of the customary minimum standard of a fair trial.[24] Additional Protocol I (AP I) regulates international armed conflicts and Additional Protocol II (AP II) extends protection to victims of internal conflicts. Broadly speaking, those judicial standards which are common to both protocols are applicable in both types of armed conflict.[25]

The principle of consistency only refers to the standards of the Geneva Conventions and their protocols in those cases in which the treaties are applicable and to those individuals to which they apply *ratione personae*. An emergency which does not amount to armed conflict does not justify the application of the conventions as treaty law. However, the minimum obligations of humanitarian law are also part of customary international law and, as mentioned above, part of the State's other obligations under international law in all types of emergency. The debate as to the relationship between *opinio juris* and State practice for the creation of custom in the field of human rights and humanitarian law falls outside the scope of this article. I therefore suggest taking advantage of the monumental study on customary international humanitarian law conducted by the International Committee of the Red Cross (ICRC).[26] The study carefully assesses both State practice and *opinio juris* relating to the norms under review. As a subsidiary means for the determination of rules of law,[27] the ICRC study facilitates the task of identifying the judicial standards applicable in all armed conflicts.

24 *Stavros* had the same idea more than a decade ago: *Stephanos Stavros*, The Right to a Fair Trial in Emergency Situations, International and Comparative Law Quarterly 41 (1992) 2, 343-365.

25 A skeptical reader may point out that AP II only covers non-international armed conflicts of a certain intensity. A more detailed discussion of this aspect is beyond the scope of this article, but suffice it to say that in respect of the administration of justice, it seems to be safe to conclude that the judicial safeguards of Article 6 of the second protocol are implied by Common Article 3 to the Geneva Conventions which applies to non-international armed conflicts in general.

26 *Jean-Marie Henckaerts et al.* (eds), Customary International Humanitarian Law, (2003), Volumes 1 – 3.

27 Statute of the International Court of Justice, Art. 38(1)d, 26 June 1945, 59 Stat. 1031, 3 Bevans 1179.

Article 75 of AP I provides a list of fair trial rights which State parties must afford to everyone affected by the conflict.[28] As treaty law, Article 75 only applies if the Additional Protocol applies as a whole. Even if it is plausible that the vast majority of fair trial guarantees in Article 75 are part of customary law, some might not warrant the same claim. This concern stems from the fact that the laws of non-international armed conflict allow lower standards in some respects. Interestingly, US Legal Advisors previously took the position that the entirety of Article 75 was customary in nature.[29] But as long as there are potentially some aspects of Article 75 which may not be part of customary law, I suggest comparing Article 75 with its sister article, Article 6 of AP II.[30] The list of safeguards which are common to both protocols provides the most authorative source of the customary minimum level of due process from which no derogation is allowed. As outlined above, this is because judicial standards applicable in both types of armed conflict apply to all States by virtue of being part of general international law. The length of this essay precludes the comparison of each sub-paragraph of Article 14 with the two protocols and the results of the ICRC study. Elsewhere, I found at least twelve elements of Article 14 to be effectively non-derogable.[31]

G. Current Developments and Some Thoughts on the Relevance of the Derogation Regime

In reality, however, measures relating to the administration of justice in the context of the "war on terror" continue to disregard non-derogable safeguards and the Guantánamo fiasco may only be the tip of the iceberg.

28 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Art. 75, 1125 U.N.T.S. 3.

29 *Michael Matheson*, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, American University International Law Review 2 (1987), 415, 420 and 427.

30 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, Art. 6, 1125 U.N.T.S. 609.

31 *Evelyne Schmid*, The Right to a Fair Trial in States of Emergencies: Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights, 15 April 2008, *available at* http://fletcher.tufts.edu/research/2008/Schmid.pdf (last visited 29 September 2008).

As recently confirmed by the US Supreme Court in the case of *Boumediene et al. v. Bush*, the American military commissions post *Hamdan v. Rumsfeld*[32] still fall short of domestic constitutional guarantees and a majority of the US Supreme Court held that the prisoners detained in Guantánamo had a right to a review of their detention and that the US Military Commissions Act of 2006 was an unconstitutional suspension of that right.[33] In the concluding paragraph of the Court's opinion, Justice Kennedy emphatically writes that "the laws and the Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law."[34] Although the Court's decision obviously analyzes the Military Commissions Act and the Detainee Treatment Act with reference to the US legal system, the majority's conclusion echoes the idea that some rights are too fundamental to ever be dispensed with. The US "Combatant Status Review Tribunals" are also inconsistent with the non-derogable judicial standards of international law and, in my view, have been counterproductive to the aim of reducing the threat of violence.

Just as the US Supreme Court in *Boumediene et al. v. Bush* mentions how the framers of the Constitution decided that some rights must always be a part of the law,[35] the drafters of the ICCPR spent considerable time and thought on regulating what a government should be allowed to do in difficult situations. Armed conflict and terrorism were very much part of what they understood as "an emergency threatening the life of the nation".[36]

32 *Hamdan v. Rumsfeld*, 548 US 557 (2006), Supreme Court of the United States. The Court is concluding that the military commissions to try Guantánamo detainees violated Common Article 3 of the Geneva Conventions.

33 *Boumediene et al. v. Bush*, 553 US (2008), Supreme Court of the United States, 6.

34 *Id.*, 70.

35 *Id.*, 70.

36 The original proposals of the derogation clause explicitly referred to "the time of war and other public emergency". See UN Doc. E/CN.4/188 (16 May 1949) and UN Doc. E/CN.4/SR.127, 12 (17 June 1949), where the wording was provisionally adopted. Because the UN was established with the aim to prevent war, the delegates later suppressed the mention of war and preferred to adopt a broad term instead (UN Doc. E/CN.4/SR. 330 (1 July 1952). In 1962, a study by the UN Commission on Human Rights summarizes the circumstances which could justify the proclamation of a state of emergency. Even if the list does not contain the word "terrorism", it includes circumstances such as the defense or security of the State or parts of the country, civil war, rebellion, insurrection, subversion, harmful activities of counter-revolutionary elements, disturbances of peace, public order or safety, danger to the constitution and authorities created by it, etc. See *UN Commission on Human Rights*, Study of the

It is therefore not warranted to claim the inappropriateness of international law. Rather, we need to stress the advantages of the framework of the legal regulation of emergency measures.

For instance, abiding by the derogation regime and strictly safeguarding non-derogable rights would increase the prospects of international law enforcement cooperation much needed in the "war on terror". Other States will be more willing to use evidence gained by foreign authorities in their domestic courts if they are confident that the evidence was gained without involving cruel, inhuman or degrading treatment or even torture. The Hamburg Terror Trials involving suspected organizers of the 9/11 attacks are a good illustration of the importance of transatlantic judicial cooperation. The legal and practical ramifications of the unavailability of the key witness, a detainee in US custody not allowed to travel, and the impossibility of disclosing the interrogation records provided by the CIA most probably impacted the outcome of the proceedings.[37] Had the US notified a derogation shortly after the 9/11 attacks and had that derogation strictly abided by Article 4 of the ICCPR, not all difficulties might have been solved, but most commentators would probably have granted the right to derogate at that time, and the measures would at least have been based on the framework of the rule of law. This may in turn have avoided the series of *ad hoc* policies relating to the trials of foreign terrorist suspects and the damage in terms of reputation and credibility.

Even if negative in tone, derogations are a form of validation for governments invoking emergency powers. This legitimization was however voluntarily conditioned by the drafters of the Covenant. It is problematic for the international rule system that this legitimization model seems to have lost its attraction for the most powerful member and the original force behind the regime in question. The ambiguities surrounding the concept of armed conflict in the "war on terror" emphasize the need for a more rigorous approach on the part of treaty bodies overseeing the validity of the assertion of a state of emergency and the measures taken.[38] Moreover, as underlined by Judge Simma in his separate opinion to the *DRC v. Uganda* case, other States are far too hesitant to assert the community's interest in ensuring that "ongoing attempts to dismantle important elements of these

Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc. E/CN.4/826/Rev.1 (1962), 257.

37 *Timo Kost*, Mounir El Motassadeq – A Missed Chance for Weltinnenpolitik?, German Law Journal 8 (2007) 4, 443-454.

38 *Joan Fitzpatrick*, Speaking Law to Power: The War Against Terrorism and Human Rights, European Journal of International Law, 14 (2003) 2, 252.

branches of international law [human rights and humanitarian law] in the proclaimed 'war' on international terrorism"[39] are addressed.

H. Conclusion

The reactions to the September 11 attacks have renewed the debate on what is permissible in situations of exigency. This article has suggested a methodology to determine the minimum list of fair trial guarantees to be provided to all suspects. It has examined which judicial standards have to be provided in all situations by virtue of customary international law relating to both types of armed conflict and the prohibition of derogation measures which are inconsistent with the minimum humanitarian level of due process. States have voluntarily accepted this minimum level of fair trial rights when they designed the procedures laid out in Article 4 of the ICCPR. This essay has elaborated on the Human Rights Committee's holding that certain fundamental principles of fair trial can never be dispensed with if torture and other explicitly non-derogable rights shall be effectively protected.[40] In its second most recent General Comment, the Human Rights Committee has confirmed that "deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times."[41]

Derogation clauses were included in the ICCPR to allow a State to defend its population from extraordinary threats. At the same time, derogation clauses contain a number of criteria concerning the extent to which the temporary curtailment of rights is tolerable.

The principle of consistency contained in Article 4(1) of the ICCPR requires that derogation measures are consistent with a State's other international legal obligations. Based on the principle of consistency, I have argued that those aspects of fair trial which are common to the legal regimes dealing with international armed conflict on the one hand and internal armed conflicts on the other must be provided in all types of emergency, including in emergencies which fall short of the legal threshold of an armed conflict. Any derogation from these aspects would be inconsistent with the customary law which remains applicable even in the worst cases of emergency, and therefore invalidate the derogation. Applying this

39 *Simma*, 12 (para. 38) (*supra* note 17).

40 Human Rights Committee, *General Comment* 29, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11.

41 Human Rights Committee, *General Comment* 32, UN Doc. CCPR/C/GC/32 (2007), paras 6 and 19.

methodology leads to a list of non-derogable judicial safeguards and a strong contention against all arguments that certain individuals are situated in an unspecified gap between two bodies of law.