



Nadia Kornioti/Karsten Nowrot

**Looking Back to Learn
for the Future?:
The Work of the ILA
on the Issue of
Human Rights in Times of
Emergency in the 1980s**

Rechtswissenschaftliche
Beiträge der
Hamburger Sozialökonomie

Heft 28

Nadia Kornioti/Karsten Nowrot

**Looking Back to Learn
for the Future?:
The Work of the ILA
on the Issue of
Human Rights in Times of
Emergency in the 1980s**

Rechtswissenschaftliche
Beiträge der
Hamburger Sozialökonomie

Heft 28

Ms. Nadia Kornioti, LL.M. (UCL, London) is a PhD student at the University of Central Lancashire, based at the Cyprus Campus of the university, where she also holds the position of Associate Lecturer. She is a qualified non-practicing lawyer in Cyprus and before embarking on a PhD programme, she worked with a number of organizations in Cyprus and abroad. Her research interests are in the areas of public international law and legal history (with a particular focus on international humanitarian law), migration and asylum, and interdisciplinary legal studies.

Professor Dr. Karsten Nowrot, LL.M. (Indiana) is Professor of Public Law, European Law and International Economic Law at the School of Socio-Economics of the Faculty of Business, Economics and Social Sciences at the University of Hamburg, Germany. He is also an affiliated professor at the Faculty of Law at the University of Hamburg and serves as Deputy Director of the Master Programme “European and European Legal Studies” at the Institute for European Integration of the Europa-Kolleg in Hamburg.

Impressum

Kai-Oliver Knops, Marita Körner, Karsten Nowrot (Hrsg.)
Rechtswissenschaftliche Beiträge der Hamburger Sozialökonomie

Nadia Kornioti/Karsten Nowrot
Looking Back to Learn for the Future?: The Work of the ILA on the
Issue of Human Rights in Times of Emergency in the 1980s
Heft 28, Oktober 2019

Bibliografische Information der Deutschen Bibliothek
Die Deutsche Bibliothek verzeichnet diese Publikations in der
Deutschen Nationalbibliografie;
detaillierte bibliografische Daten sind im Internet unter
<http://dnb.dnb.de> abrufbar.
ISSN 2366-0260 (print)
ISSN 2365-4112 (online)

Reihengestaltung: Ina Kwon
Produktion: UHH Druckerei, Hamburg
Schutzgebühr: Euro 5,-

Die Hefte der Schriftenreihe „Rechtswissenschaftliche Beiträge der
Hamburger Sozialökonomie“ finden sich zum Download auf der
Website des Fachgebiets Rechtswissenschaft am Fachbereich
Sozialökonomie unter der Adresse:

[https://www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/
koerner/fiwa/publikationsreihe.html](https://www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/koerner/fiwa/publikationsreihe.html)

Fachgebiet Rechtswissenschaft
Fachbereich Sozialökonomie
Fakultät für Wirtschafts- und Sozialwissenschaften
Universität Hamburg
Von-Melle-Park 9
20146 Hamburg

Tel.: 040 / 42838 - 3521
E-Mail: Beate.Hartmann@uni-hamburg.de

Contents

A.	Introduction and Background	5
	I. Legal Regimes and Extraordinary Circumstances: An Eternal Challenge	5
	II. The Positivist Approach in Public International Law: Exception Clauses and International Treaty-Making	7
	III. International Human Rights and States of Emergency: How It All Began	8
B.	Phase One: From Manila 1978 to Paris 1984 – Towards the Paris Minimum Standards	14
	I. 1980 ILA Conference in Belgrade	15
	II. 1982 ILA Conference in Montreal	17
	III. 1984 ILA Conference in Paris	20
C.	Phase Two: From Paris 1984 to Queensland 1990 – Adopting the Queensland Guidelines	20
	I. 1986 ILA Conference in Seoul	21
	II. 1988 ILA Conference in Warsaw	24
	1. Type 1: “Good” <i>De Jure</i> Emergency	25
	2. Type 2: “Bad” <i>De Jure</i> Emergency	26
	3. Type 3: “Classic” <i>De Facto</i> Emergency	26
	4. Type 4: “Ambiguous or Potential” <i>De Facto</i> Emergency	27
	5. Type 5: “Institutionalized” <i>De Facto</i> Emergency	28
	III. 1990 ILA Conference in Broadbeach, Queensland	30
D.	What Remains? Some Thoughts on the Continued Relevance of the ILA’s Previous Work on Human Rights in Times of Emergency in the 1980s	32
	References	35

A. Introduction and Background*

The work of the current ILA Committee on Human Rights in Times of Emergency, established in May 2017,¹ is not without precedent in the history of this organization. Already in the period between 1979 and 1990 the ILA has officially focused quite intensively – and productively – on this issue within the institutional framework of the former International Committee on Human Rights (1979 to 1982) and the Committee on the Enforcement of Human Rights Law (1982 to 1990), thereby adopting a substantive law and an enforcement/monitoring perspective. This bifocal approach resulted in the drafting and approval of two notable documents: The 1984 “Paris Minimum Standards of Human Rights Norms in a State of Emergency” and the 1990 “Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency”. However, neither the finding that this association has already previously occupied itself rather prolifically with the legal questions arising from the protection of human rights in times of emergency, nor the fact that it has more recently decided to take up this topic anew should come as a surprise, as the issue of human rights application in times of emergency remains of high concern.

I. Legal Regimes and Extraordinary Circumstances: An Eternal Challenge

In order to illustrate this perception, it seems appropriate and useful to recall, from a rather abstract and overarching perspective, that securing an adequate and acceptable observance of legal obligations in extraordinary situations, in particular under conditions of distress or emergencies, presents itself as an in principle age-old, fairly complex and difficult challenge faced by all legal systems, may they be domestic or transboundary in character. This holds true with regard to the position of, and legitimate options available to, individuals; for example as far as questions of self-defense, necessity, duress or ultimately also of resistance against oppressive regimes and tyrannical rulers² are concerned. However, it most certainly also applies – in theory as well as practice – to states and other political communities as a whole, in particular in situations where – for various possible reasons – the viability of the political system or even the existence of the organized society in total is in danger.³

Addressing these scenarios from a legal perspective in a suitable manner is far from an easy undertaking. On the one hand, it is well-known and incontrovertible that the possibility to invoke such extraordinary circumstances as justifications or excuses for otherwise unlawful acts is – in the case of individuals and of governmental actors – unfortunately open to abuses

* The contribution is based on a presentation given by the authors at the Inter-Sessional Meeting of the ILA Committee on Human Rights in Times of Emergency at the Scuola Superiore Sant’Anna in Pisa/Italy on 24/25 July 2019.

1 On the composition and activities of the current ILA Committee on Human Rights in Times of Emergency see in particular the information provided under: <<http://www.ila-hq.org/index.php/committees>> (last accessed 17 August 2019).

2 On this aspect see also, e.g., the respective statement in the preamble of the Universal Declaration of Human Rights, UN Doc. GA-Res. 217 A (III) of 10 December 1948 (“Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, [...]”).

3 See in this connection the perception of *van Hoof*, *Human Rights Journal* 10 (1977), 213 (215) (“a problem that has existed from the moment people started living in organised communities”); *Scheppele*, *University of Pennsylvania Journal of Constitutional Law* 6 (2004), 1001 (1002) (“political theory [...] has wrestled for centuries with the question of what to do with a shock to a political system that is so great that normal rules seem no longer to apply”).

and thus, entails the destructive and undesirable potential to threaten the overall stability and effectiveness of the legal order at stake. Already in light of this finding, it becomes obvious that recognizing the undeniable conceivability, and not infrequent occurrence, of such emergency scenarios should not just lead to the conclusion that their appropriate remedy lies in the extra-legal realm or in the invocation of an allegedly higher natural law;⁴ with the consequence that for example “every government, when driven to the wall by a rebellion, will [and is in fact also entitled to] trample down a constitution before it will allow itself to be destroyed”.⁵ That said, it is well-known that respective approaches were indeed also advocated for, admittedly in all likelihood not always devoid of good intentions, by a rather diverse “club” of prominent and politically active jurists comprising, among others, of *Alexander Hamilton*,⁶ *Thomas Jefferson*,⁷ *Abraham Lincoln*,⁸ *Theobald von Bethmann Hollweg*⁹ and *Carl Schmitt*¹⁰ with their views still as of today occasionally echoing through the ages.¹¹

On the other hand, it seems to be at least equally obvious that any legal system, domestic or international, that disregards or even explicitly denies the existence and the need for a special and differentiated normative treatment of such extraordinary situations of distress or emergency is in clear and present danger of forfeiting its overall acceptance and steering capacity among the intended addressees of its rules of behavior,¹² with equally disastrous consequences

- 4 From the perspective of general international law see on this finding, with particular reference to the Latin maxim *necessitas non habet legem*, more recently for example *Paddeu*, *Justification and Excuse in International Law*, 335 (“It is not the case that necessity generates the right to engage in certain conduct, or that necessity, literally, opens the door to non-legality.”).
- 5 *Fisher*, *Political Science Quarterly* 3 (1888), 454 (485) (“So every government, when driven to the wall by a rebellion, will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional law, but it is fact.”).
- 6 The *Federalist* No. 23 (*Alexander Hamilton*), 18 December 1787, reprinted in: *The Federalist Papers* by Alexander Hamilton, James Madison and John Jay, with an Introduction and Commentary by Garry Wills, 1982, 111 (112) (“These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”) (emphasis in the original).
- 7 Letter to John B. Colvin, 20 September 1810, reprinted in: *The Writings of Thomas Jefferson*, collected and edited by Paul Leicester Ford, Volume IX, 1898, 279 (“The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law, is easy of solution in principle, but sometimes embarrassing in practice. A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.”) (emphases in the original).
- 8 On the respective statements see for example the analysis by *Rossiter*, *Constitutional Dictatorship – Crisis Government in the Modern Democracies*, 11 and 223 *et seq.*
- 9 See the respective statement included in the speech in the German Parliament by the Chancellor *von Bethmann Hollweg* on 4 August 1914, cited in: *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, Report presented to the Preliminary Peace Conference, 29 March 1919, *American Journal of International Law* 14 (1920), 95 (111) (“Necessity knows no law.”).
- 10 *Schmitt*, *Political Theology – Four Chapters on the Concept of Sovereignty*, 12 (“What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes.”).
- 11 See, e.g., the „extra-legal measures model“ argued for by *Gross*, *Yale Law Journal* 112 (2003), 1011 (1096 *et seq.*); see thereto also *Gross/Ni Aoláin*, *Law in Times of Crises – Emergency Powers in Theory and Practice*, 110 *et seq.*, with additional references.
- 12 See for example in the present context the observations by *Sottiaux*, in: van Dijk/van Hoof/van Rijn/Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, 1063 (1064) (“The principled rejection of emergency powers has not prevented *de facto* derogation from human rights standards under the pressure of circumstances. It has been argued that a human rights regime with no provisions for emergency derogations leaves political decision-makers and courts with no other choice but to circumvent human rights norms or the legal order as whole. Such systems fail to constrain the state’s response to war and emergency situations altogether.”); and *MacDonald*, *Columbia Journal of Transnational Law* 36 (1997), 225 (232) (“Without it, states could and would derogate from the Convention in

for the (in-)ability of this normative order to provide for the necessary predictability and legal security.

The truth, and thus the most adequate regulatory solution to this central issue probably lies, as it is not infrequently the case, somewhere in the middle. In order to prove its resilience by preserving and protecting its steering capacity also in the face of direct, fundamental and potentially destructive challenges posed by such exceptional scenarios, the normative order itself must recognize and stipulate its own exception clauses in the form of justifications or excuses;¹³ exemptions being legally established in the realm of positive law and thus also subject to positively stipulated conditions and constraints¹⁴ that are – at least ideally – combined with and supplemented by suitable monitoring and review mechanisms. This steering technique is thus based on the ordering idea that extraordinary situations like private or public emergencies¹⁵ can only be adequately addressed by attempting to accommodate, within the legal system in question, the underlying needs and security issues.

II. The Positivist Approach in Public International Law: Exception Clauses and International Treaty-Making

And indeed, it is well-known and fortunate, that such a positivist approach to these challenges also characterizes already for quite some time the dominant understanding of public international law. Respective indications and manifestations are provided, among others, by the recognition in principle, mostly under customary international law, of necessity as a circumstance precluding wrongfulness¹⁶ as well as by the explicit incorporation of related exception clauses in international agreements. Comparatively early examples are the right of individual and collective self-defense enshrined in Article 51 of the 1945 Charter of the United Nations, the security exception stipulated in Article XXI lit. b of the 1947 General Agreement on Tariffs and Trade¹⁷ as well as in bilateral agreements, such as the security and national emergency exception incorporated in Article XXIV (1) lit. e of the 1948 Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic.

emergencies, but without supervision and with greater risk of abuse.”).

- 13 Generally on the distinction between justifications and excuses specifically in the realm of public international law see, e.g., *Paddeu*, *Justification and Excuse in International Law*, 27 *et seq.*, with further references.
- 14 See specifically in the present context for example *McGoldrick*, *International Journal of Constitutional Law* 2 (2004), 380 (389) (“Rather than approach the matter from the basis that exceptional situations cannot be the subject of legal regulation, international human rights law accepts the idea of derogations but then overlays it with an integral set of principles that constrain their scope and operation – necessity, proportionality, nondiscrimination, and consistency with other obligations under international law.”).
- 15 This approach obviously presupposes the possibility to distinguish in principle between ordinary and extraordinary situation; an underlying proposition that is occasionally questioned also in the legal literature, see thereto for example *Gross*, *Yale Journal of International Law* 23 (1998), 437 (454 *et seq.*, 499 *et seq.*); *Gross*, *Yale Law Journal* 112 (2003), 1011 (1069 *et seq.*).
- 16 On the state of necessity as a recognized justification for the deviation from international legal obligations, see for example Article 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts with the respective commentary, reprinted in: *Yearbook of the International Law Commission* 2001, Volume II, Part Two, UN Doc. A/CN.4/SER.A/2001/Add. 1 (Part 2), p. 80 *et seq.*; *Sykes*, *American Journal of International Law* 109 (2015), 296 (308 *et seq.*); *Paddeu*, *Justification and Excuse in International Law*, 334 *et seq.*, each with numerous references to relevant state practice and decisions of international courts and tribunals.
- 17 On the question, for a long time quite controversially debated, as to the competence of GATT/WTO panels and the WTO Appellate Body to judicially review the invocation of this provisions (that was subsequently also incorporated in the 1995 WTO legal order) by a WTO member in the course of WTO dispute settlement proceedings see now affirmatively WTO, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, Report of the Panel of 5 April 2019, paras. 7.53 *et seq.*

In particular with regard to the last-mentioned approach of explicitly incorporating exception clauses referring, *inter alia*, to essential security interests and national emergencies, there is a rather broad consensus among social science and legal scholars as to the considerable advantages associated with such a regulatory technique in the realm of international treaty-making. Introducing an element of flexibility in the implementation processes and their underlying normative expectations, these provisions enable the contracting parties to address and better cope with the issue of uncertainty, concerning their ability to comply with the obligations arising under the treaty regime in the future, in particular also under changing – and potentially more challenging – conditions and circumstances. By signalling to states the option, legally granted to them, of at least temporarily deviating from certain treaty obligations under codified and specified extraordinary circumstances, incorporating this type of provisions facilitates and promotes, on the side of the potential contracting parties, the willingness to abstain from potentially more far-reaching reservations, to enter into deeper and broader contractual commitments or even to participate at all in the treaty regime in the first place. Moreover, bearing in mind that they allow states to derogate from their obligations without being forced to consider violating their contractual commitments – possibly compromising or endangering the integrity of the international legal regime as a whole – or withdrawing from the entire treaty, exception clauses are in sum frequently perceived as notably contributing to the overall acceptance, stability and sustainability of the international agreement at issue.¹⁸

Despite these and other advantages often associated with what is referred to here as a positivist approach to addressing and accommodating emergencies as well as other extraordinary scenarios, it cannot be denied – and should not be left unmentioned – that also with regard to the stipulation of exception clauses in international agreements, the old saying unfortunately holds true that the devil is in the details¹⁹ and (one might be tempted to add) in implementation and monitoring in practice.

III. International Human Rights and States of Emergency: How It All Began

With the recognition of human rights within the international legal order and the first serious efforts aimed at codifying these individual entitlements in the form of treaties from the second half of the 1940s onwards, this general issue of how best to secure an adequate and acceptable observance of legal obligations under extraordinary circumstances immediately, and in principle most naturally, also presented itself as a “crucial problem”²⁰ and regulatory challenge in this new field of public international law. Thereby, in the course and as result of this endeavor,

18 For this perception and a discussion of the respective arguments in an international discourse which, in particular as far as social science scholars are concerned, often focusses primarily on international trade and investment agreements, see for example *Dam*, *The GATT: Law and International Economic Organization*, 99; *Rosendorff/Miller*, *International Organization* 55 (2001), 829 (850 *et seq.*); *Sykes*, *University of Chicago Law Review* 58 (1991), 255 (259, 273, 278 *et seq.*); *Sykes*, *American Journal of International Law* 109 (2015), 296 (305 *et seq.*); *Kucik/Reinhardt*, *International Organization* 62 (2008), 477 *et seq.*; *van Aaken*, *Journal of International Economic Law* 12 (2009), 507 (509); *Pelc*, *Making and Bending International Rules: The Design of Exceptions and Escape Clauses in Trade Law*, 18 *et seq.*, with additional references.

19 Generally on this perception see, from the perspective of political science, for example also the summary finding by *Pelc*, *International Studies Quarterly* 53 (2009), 349-350 (“On the one hand, an overly rigid agreement sets high barriers to entry for new members, and risks the abrogation of the agreement at the first exogenous shock. On the other hand, an overly flexible agreement, while immune to exogenous shocks, is prone to abuse by its members, to the point where it loses its credibility and becomes irrelevant.”).

20 See, with regard to the overarching question of the limitations to be imposed on human rights, already *Lauterpacht*, *An International Bill of Rights of Man*, 183 (“The Article gives expression to the crucial problem of the Bill of Rights.”).

it was first and foremost also the question how to deal with and legally accommodate states of emergency, previously confined to the realm of domestic (constitutional) law, that was transferred – as vividly phrased by *Hersch Lauterpacht* – “to a higher plane” in the form of the international legal order.²¹

The by now well-known positivist approach of normatively addressing the challenges posed by states of emergency on the basis of incorporating explicit derogation clauses, that bear a certain and notable resemblance to the above mentioned doctrine of necessity,²² in human rights treaties was apparently first proposed by the United Kingdom during the work of the Drafting Committee of the United Nations Commission on Human Rights in June 1947.²³ Although far from uncontroversial and at times even subject to quite polarized debates with some members of the Commission on Human Rights, *inter alia*, “fearing the arbitrary suppression of human rights on the plea of a national emergency”,²⁴ this regulatory technique subsequently found its well-known manifestation in provisions like Article 15 of the 1950 European Convention on Human Rights, Article 4 of the 1966 International Covenant on Civil and Political Rights and Article 27 of the 1969 American Convention on Human Rights.

This last-mentioned finding from the realm of treaty practice might very well be interpreted as an indication for the need and advantages of incorporating this type of exception clauses also in those international agreements that are primarily intended to benefit and protect non-party actors. And indeed, many of the reasons mentioned above that have been brought forward to support the stipulation of such “escape clauses” in international agreements in general, have also been advanced – by state representatives during the negotiations as well as in scholarly contributions – to justify and promote the inclusion of derogation clauses into

- 21 *Lauterpacht*, *International Law and Human Rights*, 371 (“In political science and jurisprudence the question of State emergency and of the suspension of constitutional guarantees has been discussed in the past largely as a problem between the executive and the legislature. The Bill of Rights will transfer the problem to a higher plane. It will henceforth become a problem of reconciling the supremacy of the highest power within the State with the paramountcy of the international order safeguarding the rights of man against the State itself.”).
- 22 On this perception see also, e.g., Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (178 and 183); *Hartman*, *Harvard International Law Journal* 22 (1981), 1 (12) (“there are some striking resemblances between the derogation clauses and the customary doctrine of necessity”). On the relationship between these derogation clauses and the doctrine of self-defence see for example International Commission of Jurists, *States of Emergency – Their Impact on Human Rights*, 1983, 413; United Nations Economic and Social Council, Commission on Human Rights, Question of the Human Rights of Persons Subjected to any Form of Detention and Imprisonment, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, prepared by Nicole Questiaux, UN Doc. E/CN.4/Sub.2/1982/15 of 27 July 1982, para. 60.
- 23 United Nations Economic and Social Council, Commission on Human Rights, Drafting Committee, Text of Letter from *Lord Dukeston*, the United Kingdom Representative on the Human Rights Commission, to the Secretary-General of the United Nations, UN Doc. E/CN.4/AC.1/4 of 5 June 1947, p. 7. For the subsequent discussion on this provision in the Commission on Human Rights, see, e.g., United Nations Economic and Social Council, Commission on Human Rights, Second Session, Summary Record of the Forty-Second Meeting, UN Doc. E/CN.4/SR/42 of 16 December 1947, p. 4 *et seq.* See also for the position of the United Kingdom in the subsequent, and in part parallel, negotiations on the European Convention on Human Rights for example the statement made by *Sir Ronald Ross* during the first session of the Consultative Assembly in Strasbourg on 19 August 1949, reprinted in: *Collected Edition of the “Travaux Préparatoires”*, Vol. I, 1975, 152 (“It is defined in every declaration of human rights that in times of emergency the safety of the community is of first concern.”).
- 24 See the statement by *René Cassin* summarizing the previous position of the French delegation, reprinted in: United Nations Economic and Social Council, Commission on Human Rights, Fifth Session, Summary Record of the One Hundred and Twenty-Seventh Meeting, UN Doc. E/CN.4/SR 127 of 17 June 1949, p. 7. For a more in-depth account of the early debates and negotiations on the suitability and advisability of including derogation clauses in international human rights treaties see, e.g., *Svensson-McCarthy*, *The International Law of Human Rights and States of Exception*, 200 *et seq.*; *Krieger*, in: *Dörr/Grote/Maruhn* (eds.), *EMRK/GG, Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, Vol. I, 417 (418 *et seq.*); Office of the High Commissioner for Human Rights/International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 2003, Chapter 16, 816 *et seq.*

human rights treaties. They have been, and continue to be, said to mirror the recognition of the drafters, that “fundamental rights of the individual must in certain cases yield to the vital necessities of the State”,²⁵ thus giving expression to the need to establish an appropriate balance between the protection of the individual’s legally protected interests on the one hand and “the overriding inclusive interests of all community members”,²⁶ on the other. By providing for a certain flexibility in the operation of the agreement, derogation clauses are aimed at reducing uncertainty for the contracting (state) parties and thus promote the broad acceptance and resilience of the human rights treaty even under exceptional circumstances.²⁷ In line with the findings made already above with regard to such provisions in international agreements in general, the advantages of derogation clauses in human rights treaties have been for example succinctly stated already a number of decades ago by *Christoph Schreuer*:

“The underlying policy is to provide for limited non-compliance in order to obviate the need for more far-reaching limitations of human rights. In the absence of such a legal safety valve, states might hesitate to join the Convention or might attach more significant reservations to their accession. Moreover, in situations of actual emergency, such as war, civil strife, or revolution, national elites may regard compliance as a low priority and may resort to broader claims of derogation like ‘necessity’ or may even denounce the Convention altogether. While a reservation to accession permits partial, uncontrolled, and permanent limitations and a denunciation allows a complete and uncontrolled termination, a derogation clause, such as article 15 of the European Convention, allows only for partial, controlled, and temporary limitations. Derogation clauses, therefore, offer undeniable advantages.”²⁸

While quite accurately summarizing some of the main benefits of derogation clauses in human rights treaties, in particular also by favorably contrasting them with reservations, a small “disclaimer” appears to be warranted, considering the fact that treaty practice, in principle already many decades ago, also bore witness to the rather remarkable – and most certainly quite disputed – approach of combining these two regulatory approaches by formulating more or less far-reaching reservations to specific derogation clauses.²⁹

25 *Lauterpacht*, *International Law and Human Rights*, 366. On this perception see also for example *International Commission of Jurists, States of Emergency – Their Impact on Human Rights*, 1983, 413 (“That it may be necessary to suspend respect for certain human rights in order to prevent the nation from falling into chaos is universally admitted.”); *Cridde*, *Netherlands Yearbook of International Law* 45 (2014), 197 (200).

26 *McDougal/Lasswell/Chen*, *American Journal of International Law* 63 (1969), 237 (267); see also, e.g., *McDougal*, *Virginia Journal of International Law* 14 (1974), 387 (390 *et seq.*); *Stein*, in: Maier (ed.), *Europäischer Menschenrechtsschutz*, 135-136; *Higgins*, *British Yearbook of International Law* 48 (1976-77), 281-282.

27 Explicitly on these aspects, albeit in the context of reservations to human rights treaties, see for example already *Imbert*, in: Maier (ed.), *Europäischer Menschenrechtsschutz*, 95 (99-100); *Kadelbach/Roth-Isigkeit*, *Nordic Journal of International Law* 86 (2017), 275 (301) (“even exceptional circumstances can be captured by human rights law”).

28 *Schreuer*, *Yale Journal of World Public Order* 9 (1982), 113 (115-116). See in this connection also, e.g., *Report of the Committee on the Enforcement of Human Rights*, reprinted in: *Report of the Sixty-Third ILA Conference in Warsaw in August 1988*, 1988, 129 (178) (“Overcoming initial opposition, the drafters decided that derogation clauses would impose some constraints on emergency-declaring governments, which would otherwise simply assume that ‘necessity knows no law’.”); the respective summary of a statement by *Lord Dukeston* (United Kingdom), reprinted in: *United Nations Economic and Social Council, Commission on Human Rights, Second Session, Summary Record of the Forty-Second Meeting*, UN Doc. E/CN.4/SR/42 of 16 December 1947, p. 5 (“He felt that, if such a provision were not included, in time of war it might leave the way open for a State to suspend the provisions of the Convention. His Government thought it most important that steps should be taken to guard against such an eventuality.”); *Hafner-Burton/Helfer/Fariss*, *International Organization* 65 (2011), 673 (674 *et seq.*); *Sottiaux*, in: van Dijk/van Hoof/van Rijn/Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, 1063 (1064); *Hartman*, *Harvard International Law Journal* 22 (1981), 1 (3) (“The treaties’ drafters sought to avoid rigidity that would discourage genuine state adherence and could invite outright repudiation in crises, while they used the content of the treaties to impose binding international obligations.”); as well as specifically on the perception of derogation clauses as a “mechanism for the avoidance of reservations” also *Giegerich*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 55 (1995), 713 (739 *et seq.*).

29 On the approach of making reservations in the context of derogation clauses stipulated in human rights treaties see, e.g.,

In addition, and aside from possible restraining effects attributed to these provisions from the perspective of domestic politics,³⁰ two other aspects, not being addressed in the statement just cited, seem worth of briefly being drawn attention to in the present context. First, in the same way as the – at first sight potentially surprising – fact that liberal democracies generally have made more, not fewer, reservations and declarations when signing and ratifying human rights treaties than authoritarian regimes might very well, and is indeed not infrequently, considered to be an indication that they take their international human rights commitments entered into more seriously,³¹ the stipulation of clauses permitting contracting parties to derogate from their human rights obligations under certain extraordinary circumstances could potentially, with all due caution, also be interpreted as a rather encouraging sign signaling the readiness and aspiration of the respective states to seriously strive for the accommodation of other public interest concerns and thus, to establish in earnest a workable, effective and viable international legal framework for the protection of human rights. Second, it is precisely the approach of derogation clauses that allows for the explicit stipulation of substantive and rights-based counter-exceptions in the form of non-derogable rights and obligations and thus, for the normative explication of important additional material limitations to the powers enjoyed by governments even in times of emergency; a regulatory option that, albeit with regard to its practicability not at all times undisputed,³² was famously made use of in all three of the above-mentioned treaty regimes; namely, Article 4 (2) of the 1966 International Covenant on Civil and Political Rights, Article 27 (2) of the 1969 American Convention on Human Rights, as well as Article 15 (2) of the 1950 European Convention on Human Rights and a number of additional protocols to this treaty.

Nevertheless, the mere fact that the 1950s and 1960s bore witness to the incorporation of respective derogation clauses in some key international human rights treaties has most certainly, and most expectedly, neither solved all problems, nor answered all questions arising in connection with the issue of human rights in times of emergency. In particular, the finding introduced already above in connection with exception and escape provisions in international agreements in general, that the devil is, figuratively speaking, in the details as well as in implementation and monitoring in practice, surely first and foremost also applies to derogation clauses in the contractual realm of international human rights law. Moreover, and at least equally important, it is well-known that by far not all human rights agreements provide for respective provisions, giving rise to the challenge how to appropriately address situations of emergencies under such treaty regimes in the absence of derogation clauses.

Furthermore, to mention but one additional aspect worth taking into account, neither the legal recognition of human rights in international agreements in general, nor the incorporation of derogation clauses therein, stipulating substantive and procedural requirements and thus being intended to provide limits to the policy space enjoyed the contracting parties in times of emergencies, resulted, in subsequent years and decades, in a decreasing number of states

Nowak, UN Covenant on Civil and Political Rights, Article 4 CCPR, paras. 44 *et seq.*, with further references.

30 See thereto already for example Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (179) (“Indeed, the existence of these treaty restraints may even assist a democratic government to deflect pressures upon it from extremist factions to impose draconian emergency measures during a perceived crisis.”).

31 On this finding see, e.g., *Neumayer*, *Journal of Legal Studies* 36 (2007), 397 (401 *et seq.*), with further references.

32 For a more cautious view see for example *Lauterpacht*, *International Law and Human Rights*, 371 fn. 31 (“So long as that power [of review] is vested in an international agency, it is not necessary – and it is impracticable – to enumerate rights and freedoms which must not in any case be suspended. No instrument or enactment can foresee in advance the extent and nature of possible emergencies.”).

of emergency being formally declared or *de facto* taken recourse to³³ by governments in the international system. Quite to the contrary, the instances in which states resorted to emergency powers actually increased in the 1950s, 1960s and 1970s,³⁴ with “large parts of the world’s population hav[ing] lived under regimes of exception, often for lengthy periods”;³⁵ admittedly also a result of the overall rise in the number of (newly) independent countries during the heydays of the processes of decolonization, whose champions were not always entirely immune to the temptation of securing their power base by way of emergency laws.³⁶ At the same time, however, it became increasingly clear and acknowledged that it is precisely those states of emergency that pose in practice one of the most fundamental threats to the effective protection and promotion of human rights in the respective countries at issue.³⁷ To mention but one example, the UN General Assembly, in its Resolution 31/124 of 16 December 1976 dealing with the protection of human rights in Chile, called upon “the Chilean authorities” to “cease using the state of siege or emergency for the purpose of violating human rights and fundamental freedoms and, [...], to re-examine the basis on which the state of siege or emergency is applied with a view to its termination”.³⁸

In light of these findings, and most certainly also inspired by the first related cases arising initially from the second half of the 1950s onwards in particular under the review regime of the European Commission of Human Rights and the European Court of Human Rights established by the European Convention on Human Rights,³⁹ scholarly attention was increasingly devoted to the question of human rights in times of emergency; a growing prominence that first and foremost also found its manifestation in a rising number of publications by legal academics

33 Concerning the distinction between formally declared *de jure* states of emergency and *de facto* emergencies see *infra* under C.II.

34 On the prevalence of states of emergency during this time period see, e.g., International Commission of Jurists, *States of Emergency – Their Impact on Human Rights*, 1983, 413 (“States of emergency are encountered with surprising frequency throughout the world. [...] It is probably no exaggeration to say that at any given time in recent history a considerable part of humanity has been living under a state of emergency.”).

35 *O’Donnell*, *International Commission of Jurists Review* 21 (December 1978), 52 (53) (“In recent times, large parts of the world’s population have lived under regimes of exception, often for lengthy periods.”); see also, e.g., Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (90).

36 See thereto for example Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (152) (“The period of decolonization saw many emerging nations reject the colonial yoke while embracing the tools of repression which had been used by the British colonial authorities against nationalist leaders, many of whom assumed power in the new nations. This pattern is profoundly ironic.”); as well as the remark by *Fitzpatrick*, *Human Rights in Crisis – The International System for Protecting Rights during States of Emergency*, 16 (“One legacy of the British Empire was a complex of internal security laws, designed to cope with external threats and internal subversion, including struggles for decolonization. It is a familiar story repeated throughout the world that when those liberation struggles succeeded, the new leaders embraced the same tools of repression that had been used by the colonial masters.”).

37 On this perception see, e.g., *O’Donnell*, *International Commission of Jurists Review* 21 (December 1978), 52; *Oraá*, *Human Rights in States of Emergency in International Law*, 1 (“in the last decades the gravest violations of fundamental human rights have occurred in the context of states of emergency”); *Grossman*, *American University Journal of International Law and Policy* 1 (1986), 35 (36); *Criddle/Fox-Decent*, *Human Rights Quarterly* 34 (2012), 39 (40); *Sheeran*, *Michigan Journal of International Law* 34 (2013), 491 (“States of emergency are today one of the most serious challenges to the implementation of international human rights law (IHRL).”).

38 UN GA Res. 31/124 of 16 December 1976, para. 2 (a).

39 For an overview of the early case-law under the European Convention on Human Rights, prominently among it for example the case of *Lawless v. Ireland*, see, e.g., *Weil*, *The European Convention on Human Rights – Background, Development and Prospects*, 72 *et seq.*; *Robertson*, *Human Rights in Europe*, 111 *et seq.*; *Schreuer*, *Yale Journal of World Public Order* 9 (1982), 113 (116 *et seq.*); *Gross*, *Yale Journal of International Law* 23 (1998), 437 (460 *et seq.*).

on this topic in the 1960s⁴⁰ and 1970s,⁴¹ with the respective contributions most naturally first and foremost also addressing, and not infrequently critically evaluating the implementation in practice of, the “uneasy compromise”⁴² between conflicting public interests, as embodied in the said derogation clauses.

It was against this background and in this context that the ILA decided to take up the challenges arising for the protection of human rights in a state of emergency in the end of the 1970s. The remaining parts of this contribution are intended to describe and evaluate the efforts undertaken in this regard under the framework of the ILA. Thereby, the undertaking of the present authors is first and foremost envisioned to assist the members of the present ILA Committee on Human Rights in Times of Emergency, established in May 2017, in their decision whether, and in the affirmative to what extent, the work previously done by this association in the 1980s is still relevant to, and thus worth taking into account in the course of, their current and future research activities. For this purpose, the following assessment is divided into three main parts. As a first step, we will provide a structured overview of – what might be referred to as – the first phase of the efforts undertaken by the ILA to address, and provide answers to, a number of substantive law questions arising in connection with the issue of human rights in times of emergency; efforts that resulted in the adoption of the Paris Minimum Standards of Human Rights Norms in a State of Emergency in 1984 (B.). The subsequent second section will deal with the second, and in many ways quite different, phase of the ILA’s work in the 1980s, in particular the processes and evaluations that were based on an enforcement/monitoring perspective and ultimately led to the approval of the 1990 Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency (C.). Against this background, the third and final part of this paper is devoted to an attempt to provide some thoughts on the continued relevance and usefulness of the ILA’s previous work on this topic for the current and future efforts undertaken by the present ILA Committee on Human Rights in Times of Emergency (D.).

40 For related scholarly contribution from this decade see for example *Weil*, *The European Convention on Human Rights – Background, Development and Prospects*, 70 *et seq.*; *Wurst*, *Die völkerrechtliche Sicherung der Menschenrechte in Zeiten staatlichen Notstandes – Artikel 15 der Europäischen Menschenrechtskonvention*, 1967; *Schwelb*, in: Eide/Schou (eds.), *International Protection of Human Rights*, 103 (115 *et seq.*); *Fawcett*, *The Application of the European Convention on Human Rights*, 245 *et seq.*

41 With regard to respective publications that appeared in the 1970s, see for example *Partsch*, *Israel Yearbook on Human Rights* 1 (1971), 327 *et seq.*; *Castberg*, *The European Convention on Human Rights*, 165 *et seq.*; *Jacobs*, *The European Convention on Human Rights*, 204 *et seq.*; *Higgins*, *British Yearbook of International Law* 48 (1976-77), 281 *et seq.*; *O’Boyle*, *Northern Ireland Legal Quarterly* 28 (1977), 160 (178 *et seq.*); *O’Boyle*, *American Journal of International Law* 71 (1977), 674 *et seq.*; *Robertson*, *Human Rights in Europe*, 110 *et seq.*; *van Hoof*, *Human Rights Journal* 10 (1977), 213 *et seq.*; *O’Donnell*, *International Commission of Jurists Review* 21 (December 1978), 52 *et seq.*; *Dinstein*, in: Stein (ed.), *Menschenrechte in Israel und Deutschland*, 63 *et seq.*; *Green*, *Canadian Yearbook of International Law* 16 (1978), 92 *et seq.*; *Warbrick*, in: Dowrick (ed.), *Human Rights – Problems, Perspectives and Texts*, 89 *et seq.* See also from the beginning of the 1980s for example *Norris/Desio Reiton*, *American University Law Review* 30 (1980), 189 *et seq.*; *Buergenthal*, in: Henkin (ed.), *The International Bill of Rights*, 72 *et seq.*

42 *Hartman*, *Harvard International Law Journal* 22 (1981), 1 (2); see also for example more recently *Mariniello*, *German Law Journal* 20 (2019), 46 (47) (“difficult compromise”).

B. Phase One: From Manila 1978 to Paris 1984 – Towards the Paris Minimum Standards

Considering the importance of the question how to appropriately secure the protection of human rights in extraordinary situations like public emergencies, it is hardly surprising that this issue has most certainly also been identified and addressed in reports and discussions of the ILA prior to the end of the 1970s.

For example, the report of the Rapporteur of the former International Committee on Human Rights, *John Humphrey*, on the developments in the field of human rights presented at the ILA Madrid Conference in August/September 1976 draws – in the wake of the entering into force of the International Covenant on Civil and Political Rights in March 1976 – briefly attention to the interpretatory challenges associated with its Article 4;⁴³ a topic that was also addressed in the discussions on this report during the Conference.⁴⁴ Furthermore, it is in particular the deliberations during the next ILA Conference, taking place in Manila in August/September 1978, that foreshadowed the subsequent prominence of this issue in the work of the International Committee on Human Rights. Admittedly, the first preliminary report of the new Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, that was established in 1976 and began its work in October 1977, and the revised outline of the issues to be examined by this body as annexed to this report do not specifically mention the derogation of human rights in times of emergency.⁴⁵ Nevertheless, the statement made by the Chairman of this Sub-Committee, *Subrata Roy Chowdhury*, during the discussions at the 1978 ILA Conference already clearly indicates the importance he attaches to this topic for the work of this body.⁴⁶ Moreover, and at least equally noteworthy in the present context,⁴⁷ the Resolution on Human Rights, adopted at the 1978 ILA Conference at the initiative of the Committee, urges countries, among others, to “refrain from suspension, even in situations where a *bona fide* proclamation of emergency has been made, of those rights which were recognized as non-suspendable, by Article 4 of the U.N. Covenant on Civil and Political Rights”.⁴⁸

43 See Report by Professor *John Humphrey*, reprinted in: Report of the Fifty-Seventh ILA Conference in Madrid in August/September 1976, 1978, 507 (516).

44 See, e.g., the respective statements by *Subrata Roy Chowdhury* and *Stephen J. Roth*, reprinted in: Report of the Fifty-Seventh ILA Conference in Madrid in August/September 1976, 1978, 478 *et seq.*, 486 *et seq.*

45 The report and the preliminary working program are reprinted in: Report of the Fifty-Eighth ILA Conference in Manila in August/September 1978, 1980, 108 *et seq.* Curiously, the later (Co-)Rapporteur to the subsequent ILA Committee on the Enforcement of Human Rights, *Joan Fitzpatrick*, who played a prominent role in the drafting of the 1990 Queensland Guidelines, states in her book on this topic that *Chowdhury* presented a report on state of emergencies already to the 1978 ILA Conference in Manila, see *Fitzpatrick*, *Human Rights in Crisis – The International System for Protecting Rights during States of Emergency*, 3 fn. 7. We couldn't find any support for this statement in the respective ILA Report on the Manila Conference.

46 See Report of the Fifty-Eighth ILA Conference in Manila in August/September 1978, 1980, 135 (136 *et seq.*).

47 See thereto in retrospective also the statement by the Chairman and Rapporteur of the ILA Committee on the Enforcement of Human Rights in his report to the 1984 ILA Conference in Paris, reprinted in: Report of the Sixty-First ILA Conference in Paris in August/September 1984, 1985, 56 (57) (“The task began when the ILA Manila resolution on human rights affirmed that, even in a situation where a *bona fide* declaration of emergency has been made, [...]”).

48 The resolution is reprinted in: Report of the Fifty-Eighth ILA Conference in Manila in August/September 1978, 1980, 1-2.

I. 1980 ILA Conference in Belgrade

Nevertheless, it was only during a meeting of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights in Oxford on 15/16 March 1979, that the decision was officially taken to explicitly include the “problems of the implementation of human rights which arise from resort to means such as proclamations of emergency” as one of the three main issues on which the activities of the Sub-Committee should focus in the coming years.⁴⁹ Consequently, the chairman of this body, *Chowdhury*, presented the first substantive analysis on the topic of human rights in times of emergency as part of his Sub-Committee report to the 1980 ILA Conference in Belgrade under the heading “Human Rights in a State of Emergency: Proclamations of Emergency, Martial Law, States of Siege”.⁵⁰ The assessment is divided into three main parts.

The first section focusses on the factual situations relating to states of emergency; an exercise primarily intended to illustrate the “paramount importance” to be attached to the task of identifying and specifying the international legal obligations arising for states under the regime for the protection of human rights in times of emergency.⁵¹ The report emphasizes in this regard that respective states of exception “by whatever name called” are not only widespread in many countries, in particular in the regions of Africa, Asia and Latin America. Rather, there seems to be also a “fairly consistent pattern of derogations of basic human rights in a state of exception”, irrespective of the (civil or/and military) type of government involved, that allows for some general or generalizing findings.⁵² Concerning the factual circumstances used by various states to justify a state of emergency, the ILA Sub-Committee identifies – based on a longer list of different grounds brought forward by governments – that “politically activated violence and the existence of subversive organizations, regional guerrilla activities and border warfare, widespread civil disturbances and the inability of civil authorities to maintain public order by normal procedures” are among the reasons most frequently taken recourse to by countries in this regard.⁵³

Respective more generalized findings are, according to the report, also possible with regard to certain patterns of human rights violations regularly occurring during states of emergency, in particular as far as civil and political rights are concerned. Among them are the establishment of an “authoritarian regime through a coup d’etat, violent or peaceful”, summary executions, “permanent ‘disappearance’ of individuals through their covert liquidation”, preventive detentions without observance of minimum safeguards recognized by international standards, the stipulation of “ex post facto criminal laws”, intimidation and harassment of judges and defence lawyers, establishment of extraordinary military tribunals as well as the “continuation of a state of emergency for prolonged periods even after the circumstances which initially prompted the authority to proclaim it had ceased to exist”.⁵⁴

49 See Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89-90.

50 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (90-101).

51 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (91).

52 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (90-91).

53 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (91-92).

54 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (92-94).

In light of this factual background, the ILA Sub-Committee suggests to adopt a “two-dimensional” approach to the issue under consideration, thereby already foreshadowing the basic structure of the later 1984 Paris Minimum Standards. The first dimension, discussed in the second section of this part of the 1980 report, concerns the challenges and legal issues arising in connection with the proclamation as well as the duration of states of emergency.⁵⁵ The Sub-Committee seems to approach these questions initially with a notable focus on the concept of separation of powers. Emphasizing the need for the proclamation to be in compliance with the domestic constitutional and legislative requirements of the country at issue, the report furthermore suggests that – in order to prevent an abuse of this competence by current “powerholders” – only “in urgent cases, when the danger is imminent, the executive should be empowered to make the initial declaration but subject to legislative ratification at the earliest possible opportunity; otherwise the power should always be vested in the legislature”.⁵⁶ Moreover, in order to avoid the in practice not uncommon phenomenon of an almost indefinite continuation of states of emergency, the report stresses the “paramount importance of a continuing control of the duration of emergency by a truly representative Parliament”.⁵⁷

In addition, the Sub-Committee draws attention to a number of related findings made during an international seminar on human rights organized by the United Nations in April/May 1967 in Kingston, Jamaica,⁵⁸ some of which proved, in retrospective, to be quite influential for the formulation of the 1984 Paris Minimum Standards.⁵⁹ This last-mentioned statement, however, does not apply to another and quite controversial conclusion reached at the 1967 Jamaica Human Rights Seminar, namely the perception that declarations of states of emergency should, for a variety of reasons, not be subject to judicial control with legislative supervision being a sufficient safeguard against abuse.⁶⁰ Whereas the members of the Sub-Committee recognized that the trend of early decisions under the European Convention on Human Rights points at a different direction by “firmly establish[ing] the principle that both the existence of a public danger and the extent of permissible measures to meet the situation are justiciable”, they nevertheless stress the difficulties of applying such an approach also in the context of Article 4 of the 1966 International Covenant on Civil and Political Rights, considering the less advanced control mechanisms established by this global regime.⁶¹

The third section, addressing the second operational dimension of the Sub-Committee’s research and policy framework, concerns the protection of the individual and its human rights in times of emergency. The report, again using Article 4 of the 1966 International Covenant on Civil and Political Rights as its primary reference regime, systematically categorizes the respective safeguards against human rights abuses under such extraordinary circumstances by

55 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (95-98).

56 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (95).

57 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (98).

58 Seminar on the Effective Realisation of Civil and Political Rights at the National Level, UN Doc. ST/TAO/HR/29 (1967). Thereto as well as generally on the apparent centrality of Jamaica and respective events taking place in this country in the 1960s for the progressive development of international human rights law see also, e.g., *Jensen, The Making of International Human Rights – The 1960s, Decolonization, and the Reconstruction of Global Values*, 69 *et seq.*

59 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (98).

60 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (95-96).

61 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (95-98).

distinguishing between two sets of legal requirements.⁶² The first one, stipulated in Article 4 (1) of the said Covenant, establishes three main conditions in the form of the requirements of proportionality, non-discrimination and compliance with other applicable obligations under international law; normative limitations that would subsequently be addressed as “general principles” in Section B of the 1984 Paris Minimum Standards. The second type of limitations concerns the recognition of certain non-suspendable human rights; an issue that does not receive an in-depth evaluation in the 1980 report, but would subsequently emerge as one of the central regulatory features of the Paris Minimum Standards.

The content of this report was hardly debated during the working sessions of the International Committee on Human Rights at the 1980 ILA Conference in Belgrade and only, albeit quite harshly, criticized by one member with regard to its general approach towards the issue.⁶³ Nevertheless, and probably also inspired by the adoption of the “Belgrade Minimal Rules of Procedure for International Human Rights Fact-Finding Missions” during the 1980 Conference,⁶⁴ said to be “demonstrating that the Committee’s work can be action-oriented as well as scholarly”,⁶⁵ the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights decided at its meeting in Belgrade on 23 August 1980 that, having regard to its work done on this issue, “it would be appropriate to outline or formulate minimum standards of human rights norms in a State of Exception”.⁶⁶

II. 1982 ILA Conference in Montreal

Against this background, the next report of this Sub-Committee, as presented to the 1982 ILA Conference in Montreal, not only exclusively focused on the issue of human rights in times of emergency but also included already a first draft of the “Minimum Standards of Human Rights Norms in a State of Exception”.⁶⁷ The 1982 report comprises of two sections with the findings made and opinions expressed in the first of them, termed “Background and Issues”, turning out to be in a number of ways quite controversially perceived in the subsequent discussions of the Committee taking place during the Montreal Conference. This applies in particular to two findings.

62 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 89 (99-100).

63 See the statement by *W. Michael Reisman*, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 151 (153-154) (“I am also concerned with the report’s increasing tolerance of so-called suspensions of human rights in a state of emergency. The controls which the report suggests seem to me to be quite evanescent. [...] I would propose a much more stringent set of criteria and would prefer to retain the very special status of states of emergency rather than permit their slow legalization with all the attendant dangers for the international protection of human rights.”).

64 See the Resolution on Human Rights, reprinted in: Report of the Fifty-Ninth ILA Conference in Belgrade in August 1980, 1982, 1.

65 See the perception expressed by *Richard B. Lillich* in his 1982 Report of the International Committee on Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 87.

66 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 88. See in this connection also again the statement by the new chairman of the ILA International Committee on Human Rights, *Lillich*, in his 1982 Report of the International Committee on Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 87 (“It is hoped that the Committee’s proposed work programme, [...], will result in more such documents of practical use to the international human rights law community.”).

67 See Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 88-100.

First, and despite recognizing that a state of emergency “as a phenomenon is easier to describe than to define”,⁶⁸ the Sub-Committee assumed that this concept not only includes circumstances of war or external aggression and an “internal assault upon the state (rebellion, subversion and so on)”, but also natural catastrophes and indeed might also “arise from economic circumstances alone”.⁶⁹ Consequently, it is – in the opinion of this body – “important to appreciate that a genuine State of Exception may arise from *purely economic or social causes*, e.g., as consequences of serious discrimination between persons on grounds of birth or social origin, extreme poverty, enormous disparities between the rich [*sic*, probably it refers to “the rich”] and the poor, the concentration of wealth in the hands of a few, the neglect of the rural poor, conflicts between feudal interests and tillers of the soil, chronic underemployment, industrial indiscipline in essential services, wide-spread corruption, lack of education and health care and so on”.⁷⁰ Whereas the inclusion of natural catastrophes was only occasionally criticized,⁷¹ it was first and foremost the perception, implied in the last-cited statement, that the existence of economic and social challenges could legitimately give rise to a state of emergency and thus to a justified derogation of civil and political rights, which was met with considerable disagreement in the subsequent discussions.⁷² As a result, the respective description of states of emergency as included in the 1982 draft of the Minimum Standards⁷³ was subsequently, for the purposes of the final 1984 version, replaced by the following general definition: “The expression ‘public emergency’ means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.”⁷⁴ The Comments to the 1984 Minimum Standards emphasize in this regard that it “is neither desirable nor possible to stipulate *in abstracto* what particular type or types of events will automatically constitute a public emergency within the meaning of the term: each case has to be judged on its own merits, taking into account the overriding concern for the continuation of a democratic society”.⁷⁵

The second quite controversial issue addressed in the 1982 report of the Sub-Committee concerned the importance to be attached to the mechanism of judicial control in, and with regard to, a state of emergency. Based on the view that principles dealing with respective

68 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 88 (89).

69 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 88 (90).

70 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 88 (91).

71 See for example the statement by *S. J. Sorabjee*, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 113 (119) (“It is true that natural calamities like an earthquake or floods may require greater restrictions on some fundamental rights like freedom of movement or right to carry on certain business or professional activities. It should be possible to meet those situations by imposing the necessary restrictions by enacting proper laws in that connection. There is no reason why there should be suspension of human rights to meet the difficulties created by such situations.”).

72 See, e.g., the statements by *Daniel O’Donnell*, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 113 (117); by *W. Michael Reisman*, *ibid.*, 120; and by *Thomas M. Franck*, *ibid.*, 121.

73 See Section A Paragraph 1 lit. b Minimum Standards, Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 88 (95) (“A relevant public emergency may arise from circumstances such as war or external aggression, internal assault upon the state (rebellion, subversion and so on) and natural catastrophe. A public emergency also may arise from other circumstances such as economic or social circumstances which seriously threaten the well-being of individuals in the state.”).

74 The final version of the 1984 Paris Minimum Standards of Human Rights Norms in a State of Emergency is for example reprinted in: *Lillich*, *American Journal of International Law* 79 (1985), 1072 (1073-1081).

75 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-First ILA Conference in Paris in August/September 1984, 1985, 56 (59).

control mechanisms “will be of little use unless they are accepted, in particular in relation to developing countries”, the Sub-Committee found that the judicial procedures developed in the European context at the domestic and regional level, although in principle most certainly laudable and noteworthy, are of “limited assistance” for countries where “the judicial and administrative apparatus are nonexistent or insufficiently strong to operate effectively”.⁷⁶ Against this background, the draft Minimum Standards should not attempt to promote international accountability and to concentrate on judicial control, but rather focus on improving “public examination procedures in the national system”. Under this procedures “an executive authority which claims to justify a State of Exceptions for restriction of the right of individuals must state publicly, before the appropriate forum (national or international) and in appropriate form, the circumstances on which such authority bases its claim with a view to securing its acceptance under international law. It is believed that the force of public scrutiny and opinion, both national and international, will, on the one hand, prevent resort to a claim of an exception where adequate facts cannot be publicly stated, and also will restrict the statements of facts for this purpose where the facts are not true”.⁷⁷ The primary reliance on so-called “public examination procedures” and in particular the resulting reluctance to strengthen, and to emphasize the importance of, judicial control at the domestic and transnational level was not approved in the subsequent discussions taking place at the 1982 ILA Conference in Montreal.⁷⁸ Consequently, the element of judicial control and the central relevance of an independent judiciary was later strengthened during the revision of the 1982 Montreal draft that took place in the subsequent two years.

Despite these at times quite controversial debates on some of the findings made by the Sub-Committee in its 1982 report, it should most certainly not be left unmentioned that many, if not most, of the conceptual ideas and in part even formulations included in the Montreal draft of the Minimum Standards⁷⁹ were subsequently included in the final version of 1984. This applies first and foremost also to the “bold and imaginative formulation”⁸⁰ of sixteen non-suspendable human rights and freedoms, among them the right to legal personality, freedom from slavery and servitude, freedom from discrimination, the right to life, the right to liberty, freedom from torture, the right to a fair trial, freedom of thought, conscience and religion, the rights of minorities, the rights of the family, the right to a name, the rights of the child, the right to nationality, the right to participate in government as well as the right to a remedy; a list that undoubtedly constitutes one of the core features of the Minimum Standards.

76 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 88 (91-92).

77 Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 88 (92 and 94).

78 See, e.g., the statements by *Daniel O'Donnell*, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 113 (118); by *S. J. Sorabjee*, *ibid.*, 119-120; by *W. Michael Reisman*, *ibid.*, 120; and by *Thomas M. Franck*, *ibid.*, 121; by *Jochen A. Frowein*, *ibid.*, 122; and by *Kamal Hossain*, *ibid.*, 132.

79 The 1982 Montreal draft of the Minimum Standards can be found in the Report of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 88 (95-100).

80 See the statement by *S. J. Sorabjee*, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 113 (118).

III. 1984 ILA Conference in Paris

Whereas from an institutional perspective, the months following the 1982 ILA Conference in Montreal saw considerable changes with the International Committee on Human Rights and its previous structure based on sub-committees being replaced, on the basis of a decision of the ILA Executive Council of 23 October 1982, by the new ILA Committee on the Enforcement of Human Rights again to be chaired by *Richard B. Lillich*,⁸¹ continuity prevailed with regard to the substantive work of this body, in particular as far as the Draft Minimum Standards were concerned. Following substantial revisions of the draft in the subsequent two years, the Committee presented in its report to the 1984 ILA Conference in Paris the “Minimum Standards of Human Rights Norms in a State of Emergency”, including quite comprehensive comments on the individual standards, for approval by the ILA.⁸² The organization approved these “Paris Minimum Standards of Human Rights Norms in a State of Emergency” by consensus through Resolution No. 1/1984.⁸³

C. Phase Two: From Paris 1984 to Queensland 1990 – Adopting the Queensland Guidelines

It is well-known that the newly established ILA Committee on the Enforcement of Human Rights did not conclude its work on the issue of human rights in times of emergency with the finalization and adoption of the Paris Minimum Standards in August/September 1984. Already during the 1984 ILA Conference in Paris, the Committee adopted a procedural resolution deciding to continue its work by undertaking a further study of the enforcement aspects of the topic; thus agreeing on “a shift in focus away from the formulation of substantive standards to an investigation of the prospects for improving international monitoring of human rights practices under states of emergency”.⁸⁴ This approach was approved at a meeting of the ILA Executive Council on 24 November 1984.⁸⁵

81 See Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-First ILA Conference in Paris in August/September 1984, 1985, 56. See in this regard in principle also already the 1982 Report of the International Committee on Human Rights, reprinted in: Report of the Sixtieth ILA Conference in Montreal in August/September 1982, 1983, 87 (“The present report will be the last to feature separate reports of Sub-committees, the Executive Council having decided that the Committee should operate henceforth as a ‘committee of the whole’”).

82 The Minimum Standards including the comments by the Committee thereto are reprinted in: Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-First ILA Conference in Paris in August/September 1984, 1985, 56 (58-96). The text of the Paris Minimum Standards itself is also to be found, among others, in: *Lillich*, *American Journal of International Law* 79 (1985), 1072 (1073-1081). For a quite comprehensive exegesis of this document subsequently undertaken by the former chairman of the previous ILA Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, see *Chowdhury*, *Rule of Law in a State of Emergency – The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 1989.

83 Resolution No. 1/1984 is reprinted in: Report of the Sixty-First ILA Conference in Paris in August/September 1984, 1985, 1.

84 See Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (110).

85 See Report of the Sixty-First ILA Conference in Paris in August/September 1984, 1985, 97.

I. 1986 ILA Conference in Seoul

The first – and in fact quite lengthy – interim report on this research project, primarily prepared by the new Rapporteur, *Joan F. Hartman*, was presented at the 1986 ILA Conference in Seoul.⁸⁶ The report's main focus concerns the current and potential future role played by, and to be assigned to, international governmental organizations (IOGs) as well as non-governmental organizations (NGOs) in the monitoring of human rights practices under states of emergency.⁸⁷ However, precisely in order to illustrate the important functions exercised by international organizations in this regard, also the first interim report on the enforcement perspective starts off with a brief, but nevertheless quite enlightening and very systematic assessment of some of the central substantive aspects related to states of emergency⁸⁸ that, viewed in retrospect, proved to be of considerable importance for the content of the subsequent second interim report presented in 1988.

The complexity of the concept “state of emergency” and the “unusual” difficulties in defining and adequately addressing it, derives primarily from three different, yet interrelated, aspects. The first among them is the “variation in formal legal aspects”, bearing in mind that not all states of emergency present themselves in the traditional form of “an official proclamation of emergency of limited duration promulgated under procedures laid out formally in the Constitution or basic law”. Rather, in order to fully assess this phenomenon, one also needs to take into account the many “unproclaimed or *de facto* states of emergency” as characterized by features like the “concentration of power in the executive (sometimes following a violent change in government); the suspension or abolition of the legislature; and the imposition of special ‘national security’ laws providing for administration detention (sometimes incommunicado)” as well as the establishment of “special tribunals, often with military judges and limited or no right to appeal”.⁸⁹

The second aspect concerns the variety of underlying causes for states of emergency; a factor that can systematically again be subdivided into three different categories. First, natural disasters that admittedly have “not typically been associated with serious violations of human rights”. Second, circumstances of war that can result in four types of war-related emergencies: “a state of emergency declared in the unoccupied areas of a nation which has been invaded by a foreign power; a martial law regime imposed in the occupied areas of an invaded nation by the occupying power; an emergency declared due to an internal armed conflict; and an emergency declared due to internal armed conflict supported by foreign intervention on behalf of rebel belligerents”. Third, internal strife or disturbance, being “at once the most common and the most problematic event” where “the dangers of excessively oppressive measures and confusion between the life of the nation and the self-preservation of the existing regime are greatest” and that may arise “from political, racial, religious, economic or criminal causes”.

86 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (110-186).

87 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (110).

88 See Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (112-114).

89 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (112-113).

Thereby, the 1986 report – commenting on a discussion undertaken in the first phase of the ILA involvement with states of emergencies in the 1980s⁹⁰ - re-emphasizes that “economic emergencies, including underdevelopment” should in themselves not be considered as a legitimate basis for emergency measures, since such a perception “would challenge the basic concept of an emergency as a situation of limited duration and the principle that civil and political rights must coexist with economic rights”.⁹¹

The third factor contributing to the complexity of states of emergency and their assessment is the “extremely broad range of human rights which may be suspended or limited” with frequently “very grave” consequences for affected individuals as illustrated by the (in-)famous finding that states of emergency “have generated the most massive and heinous violations of human rights in recent years”.⁹²

To the contrary, the respective international norms governing states of emergency as enshrined in human rights treaties are – in principle necessarily – phrased quite abstract and “much simpler than the preceding description of various causes and effects of emergencies”. In order to be applied in an effective way these provisions thus require first and foremost also “reliable and complete knowledge about the actual extent of the threat to the nation, details about the emergency measures and information concerning the actual scope of application of measures, including information about human rights abuses, all in a very politically sensitive context”. It is precisely in light of these succinctly stated circumstances and challenges, that are in principle obviously neither unknown nor surprising, but nevertheless nicely summarized and also in the present context at times worth recalling, that the 1986 report emphasizes the central role played by international organizations in the effective enforcement of the transnational regimes dealing with the human rights aspects of states of emergency, which noticeably includes their “ability and willingness” to determine whether these legal requirements have been adhered to in particular emergencies and, in case of a finding to the contrary, to “bring pressure to bear on governments to moderate or cease abuses of human rights, committed under the rubric of emergency measures”.⁹³

The subsequent – surely not comprehensive but nevertheless, considering the limited timeframe and resources available, quite detailed – evaluation of the organizations and bodies with regard to their past approaches towards human rights issues in states of emergency revealed in the eyes and minds of the report’s authors that, overall, “the present system of monitoring falls far short of success”⁹⁴ and thus allows for, and indeed requires, substantial improvement. Among the evaluated institutions were the respective bodies within the United Nations and its specialized agencies, the International Labour Organization, the Organization of American States, the Council of Europe as well as NGOs in general and the International Committee of the Red Cross in particular.⁹⁵ Thereby, in order to determine the “yardstick” for measuring the respective effectiveness of these organizations, rightly identified as a quite elusive concept, the report specified “effectiveness” as comprising in the present context of at least six aspects,

90 See thereto already *supra* under B.II.

91 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (113). See thereto also *Hartman*, *Human Rights Quarterly* 7 (1985), 89 (95).

92 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (114).

93 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (115).

94 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (112).

95 See Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (115-157).

namely “exposing the fact of human rights abuses; stopping or moderating abuses during the course of an emergency; providing redress to individual victims through findings of violations, compensation, rehabilitation, release from detention, or clarification of the fate of missing persons; securing punishment of violators; terminating a state of emergency; and prevention of possible future abuses or invalid imposition of emergency measures”.⁹⁶

In order to remedy this suboptimal situation and initially, in the sense of an intermediate goal, to improve the functioning of the existing monitoring bodies, quite harshly criticized as “being generally deficient in the rigour with which they have approached the legal analysis” of states of emergency and related human rights violations,⁹⁷ the final part of the report includes some tentative recommendations.⁹⁸ These suggestions primarily focus on the need for more accurate and timely fact-finding, considered to be “the first prerequisite to more effective action”. Among the approaches emphasized in this regard are at first a considerably improved communication and cooperation, in particular at three levels, namely between IOGs, between these actors and NGOs as well as among NGOs themselves.⁹⁹ In addition to the need to establish clear procedures, another important aspect concerns credibility in fact-finding; a factor that requires, among others, the identification and contacting of “credible sources, meaningful on-site visits, [and] aggressive attempts to obtain inaccessible data”, but also “neutral criteria for the initiation of investigative processes and even-handedness in approach to situations”.¹⁰⁰

In the discussions that took place in the working session during the 1986 ILA Conference in Seoul, the interim report and its findings were overall quite favourably, at times even enthusiastically,¹⁰¹ received and assessed.¹⁰² This applied first and foremost also to the above-mentioned idea, again quite vigorously argued for towards the end of the report,¹⁰³ to include in the Committee’s study also the phenomenon of *de facto* states of emergency;¹⁰⁴ a conceptual category that had previously been addressed and analysed for example by *Nicole Questiaux* in her “Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency” presented to the UN Commission on Human Rights in July 1982.¹⁰⁵ The only issues that some participants expressed certain reservations or

96 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (112).

97 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (158); see also *ibid.*, 161.

98 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (159-161).

99 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (159-160).

100 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (160).

101 See in this regard for example the statement by *Mahoney*, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 187 (192) (“This has been a fine example of what a Report should be and of the procedure for the preparation of it.”); and the statement by *Lord Wilberforce*, *ibid.*, 196-197 (“the Report was one of the finest ever presented to an I.L.A. working session”).

102 See in this connection also the Committee on the Enforcement of Human Rights Resolution No. 1, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 19 (approving and appreciating the 1986 interim report and even recommending that already this preliminary report should be forwarded to the respective international governmental organizations as well as to NGOs “with a special interest in the topic”).

103 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (158) (“It would be shortsighted formalism to limit considerations to emergencies officially declared in conformity with domestic legal provisions.”).

104 See for example the statement by *Kaye Holloway*, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 187 (193); as well as the statement by *F. Ebrahim*, *ibid.*, 194.

105 United Nations Economic and Social Council, Commission on Human Rights, Question of the Human Rights of Persons Subjected to any Form of Detention and Imprisonment, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, prepared by *Nicole Questiaux*, UN Doc. E/CN.4/Sub.2/1982/15 of 27 July 1982, paras. 103 *et seq.*

suggested a modified approach to concerned the “very delicate” role played by NGOs in the international system¹⁰⁶ as well as the perceived desirability to also include economic, social and cultural rights in the Committee’s future work program on states of emergency.¹⁰⁷

II. 1988 ILA Conference in Warsaw

Originally, the Committee on the Enforcement of Human Rights envisioned to undertake during the subsequent period of 1986 to 1988 “selected case studies of several emergency situations” as well as to develop a “program for gathering comprehensive data on the legal and factual details of states of emergency” intended to identify and assess “points of maximum leverage” for inter-governmental and non-governmental monitoring bodies; a project that was considered to be “indispensable to the formulation of informed and realistic final recommendations for action by the ILA and relevant organizations and governments”.¹⁰⁸ However, a lack of funding prevented the Committee from adopting this quite ambitious approach in the following years.¹⁰⁹ As a result, the second interim report on the project, again drafted by Rapporteur *Hartman* and presented at the next ILA Conference taking place in Warsaw in August 1988, confined itself to an analysis of four more specific issues.¹¹⁰

Two of the topics deal with contemporary international developments and directly relate to, as well as continue, the research focus on more practice-oriented issues already pursued in the first interim report of 1986. This concerns on the one hand an “update” on the respective processes and procedures in the realm of intergovernmental organizations by highlighting some of the significant new developments that took place in their practice with regard to the human rights implications of states of emergency in the reporting period of 1986 to 1988.¹¹¹ On the other hand, and again picking up on an analysis already started in the first interim report,¹¹² the 1988 report provides a more in-depth – and quite revealing, albeit most certainly inherently “time bound” – assessment of the present and potential future role played by NGOs in monitoring human rights practices during states of emergency,¹¹³ thereby also specifically addressing the position of three NGOs and their different policy approaches – the International Committee of the Red Cross, the International Commission of Jurists as well as Amnesty International – considered to “have played an especially important role respecting states of emergency”¹¹⁴.

At least equally noteworthy in the present context, already in light of the fact that they are

106 See the statement made by *M. Milojevic*, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 187 (191).

107 See, e.g., the respective statement made by *Soli J. Sorabjee*, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 187 (194); and the statement by *Paul J.I.M. de Waart*, *ibid.*, 196.

108 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (110).

109 See Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (130 and 178).

110 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (130-209).

111 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (130-143) (“Recent Developments in Intergovernmental Organizations”).

112 See Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (154-157).

113 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (159-177).

114 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (168).

to a considerably lesser degree confined to their (by now) historical context, are the two other sections of the 1988 report; both having in common that they address from a significantly more abstract and systematic perspective overarching dogmatic questions related to human rights in times of emergency. The first of these sections, and the one that likely deserves to be qualified as the most important part of the whole 1988 interim report, bears witness to an attempt by the Committee to develop a typology of states of emergency in order to enable respective international actors to “treat states of emergency as a discrete phenomenon in the protection of human rights”, thereby in particular also including the concept of *de facto* emergencies whose relevance had already been stressed in the previous 1986 report as well as the subsequent discussion thereto during the working session of the ILA Conference in Seoul.¹¹⁵

While recognizing that “each emergency or apparent emergency is factually unique, as well as terribly complex and variable over time”, the 1988 report – with the obvious aim to reduce also in this regard the existing factual and legal complexities by way of systemization¹¹⁶ – suggests a classification of the respective situations into five different types of emergencies; a methodology that is not only supposed to provide a “useful analytical tool”, but also to assist in the more practical task of “devising a monitoring scheme for IGOs and NGOs” concerning the protection of human rights.¹¹⁷ The approach relies initially on two central factors for classifying emergencies, namely “whether an emergency has been formally proclaimed or notified, and whether actual conditions in the country constitute a serious public emergency, regardless of the cause”. In addition, concerning those situations in which there are both no formal declarations and no emergency conditions, the 1988 report suggests a further sub-categorization on the basis of other factors.

1. Type 1: “Good” *De Jure* Emergency

Based on these methodological considerations,¹¹⁸ the first two types of emergencies have in common that a formal proclamation of a public emergency – in case such a requirement exists under respective international or domestic law – and/or, if applicable, a notification to the other contracting parties under a respective human rights treaty have taken place. These situations are referred to as *de jure* emergencies. Among them, type 1 is labelled “the ‘good’ *de jure* emergency”. The adjective “good” indicates that not only the formal, procedural obligations are fulfilled, but indeed also the substantive requirement of actual conditions threatening the life of the nation is met. Such type 1 states of emergency actually resemble the scenario envisioned – and legitimized – in the derogation clauses of the respective international human rights agreements. Nevertheless, the 1988 report rightly emphasized that these findings should not automatically lead to the conclusion of a comprehensive compliance with international human rights obligations, considering the possibility – and indeed frequent occurrence in state

115 See Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (143-159). See thereto also, e.g., *Fitzpatrick*, Human Rights in Crisis – The International System for Protecting Rights during States of Emergency, 7 *et seq.*, with further references.

116 Generally on this underlying purpose pursued by approaches of systemization or categorization see, e.g., *Luhmann*, *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 19 (1967), 615 (618 *et seq.*); as well as already *Bruner/Goodnow/Austin*, *A Study of Thinking*, 12 (“A first achievement of categorizing has already been discussed. By categorizing as equivalent discriminable different events, the organism *reduces the complexity of its environment.*”) (emphasis in the original).

117 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (144).

118 See in this connection also the quite helpful chart reprinted in: Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (145); as well as in *Fitzpatrick*, Human Rights in Crisis – The International System for Protecting Rights during States of Emergency, 9.

practice¹¹⁹ – of the government taking recourse to certain measure that are either not in conformity with the principle of proportionality or with the legal limits stipulated by the recognition of non-derogable human rights.¹²⁰

2. *Type 2: “Bad” De Jure Emergency*

Contrary to the (at least reasonably) “good” type 1 state of emergency, the second category – pointedly and consequently termed “the ‘bad’ *de jure* emergency” – is lacking the material element of real and legally recognized emergency conditions, with a government which “out of anti-democratic or self-interested motives, or in overreaction to modest stresses, imposes a formal state of emergency in order to aggrandize extraordinary powers to itself even though there is no objective threat to the life of the nation”. Although the existence of such a type 2 state of emergency is, in the opinion of the members of the Committee, “not a perfect predictor of the severity of human rights abuses”, considering that in particular in countries under long-prolonged formal emergencies the “specific human rights abuses may moderate over time”, “bad” *de jure* emergencies most certainly have to be of primary concern for human rights monitors, already when bearing in mind that all emergency measures adopted are, due to a lack of emergency conditions, “by definition disproportionate to the ‘exigencies’ of the situation”.¹²¹

3. *Type 3: “Classic” De Facto Emergency*

Contrary to the two *de jure* emergency scenarios mentioned above, all of the other three categories have in common that there is currently no formal declaration and/or notification of a public emergency in place; a feature that is captured by the joint qualification as *de facto* emergencies. Thereby, the first of these situations – labelled as the “classic” *de facto* emergency, distinguishes itself from the remaining two categories by the existence of actual emergency conditions serious enough to justify the imposition of emergency measures. According to the 1988 report, these situations of classical *de facto* emergencies should, for the sake of systemization, again be subdivided into four distinct sub-types. The first of these sub-types is characterized by the fact that, although an emergency situation exists, the government chooses, for whatever reasons, to continue to operate on the basis of the normal legal regime both formally and in practice. This scenario does not require heightened international scrutiny of human rights conditions. Nevertheless, the Committee wisely and realistically adds that the primary challenge in such a situation concerns the difficulty “to determine whether the government’s claims to have preserved the normal legal order are truly credible”.

Second, another sub-type of classical *de facto emergencies* concerns a conflict or other emergency situation where the country at issue imposes extraordinary measures by decree or by imposing martial law without formally declaring a state of emergency; an approach that “represents a departure from ordinary legality” and, already in light of this finding, deserves closer scrutiny for the purposes of human rights monitoring. Third, there can be actual emergency situations with, however, the “legal” regime in the respective country being “totally *ad*

119 See also Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (147) (“One would be hard-pressed to cite a concrete instance of a *de jure* emergency that fully complied with all relevant international standards.”).

120 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (146-147).

121 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (147-148).

hoc”; a scenario of “lawless government” – something that today would probably be closely related to the more recently conceptualized phenomenon of “failed states”¹²² – that unfortunately often entails the clear and present danger of “wide-spread and grave human rights abuses”.

Fourth, a state can be faced with an armed conflict or other actual emergency and choose – instead of formally declaring or retaining a state of emergency, continuing to apply its normal legal regime or ruling by decree – to respond by terminating its previous emergency regime and/or amending its ordinary legal order by “incorporating harsh national security laws into its ordinary legislation as an alternative to temporary emergency measures”. Such a situation of what might be characterized as a formal circumvention of states of emergency or an escape into alleged normalcy has – undoubtedly for valid reasons – been highlighted in the report as a scenario where “special international concern remains justified” and thus, in the interest of an effective protection of human rights, “should not lead to an easing of international scrutiny”.¹²³

4. *Type 4: “Ambiguous or Potential” De Facto Emergency*

Not infrequently somewhat related to the fourth sub-type of classical *de facto* emergencies just mentioned, the fourth and fifth categories of states of emergency share with this type 3 classical *de facto* emergency the absence of any formal declaration and/or notification of a state of emergency. However, they both “distinguish” themselves not only by lacking a formal declaration, but also through the non-existence of actual emergency conditions, thus being devoid of the substantive precondition to justify such a formal proclamation in the first place.

One of them is referred to in the 1988 report as the “ambiguous or potential” *de facto* emergency. It is characterized by a “sudden shift in the scope of application of permanent, ‘ordinary’ internal security laws”; not infrequently legal regimes initially introduced already by the former colonial power with the original aim of securing colonial hegemony over the territory in question.¹²⁴ Already in light of the findings that, first, the respective situations in which these internal security regulations are suddenly more strictly applied do not amount to emergencies threatening the life of the nation and that, second, “draconian internal security laws in some countries may equal or exceed in severity other nations’ temporary emergency measures”, it is undoubtedly true that these scenarios under the type 4 state of emergency call for an intensified international human rights monitoring. Nevertheless, it is also rightly recognized in the 1988 report that a methodological approach that classifies “every nation with harsh security laws as being under a permanent state of emergency would drain the concept of all meaning”. Consequently, the Committee submits that “the most pertinent distinguishing factor” between an “ambiguous or potential” *de facto* emergency and other countries with harsh security laws “would seem to be the scope or severity of application of internal security laws”. Therefore, where “the shift in government behavior is sharp enough, human rights monitors should treat the altered situation as a functional emergency”; a yardstick whose application in

122 Generally on the phenomenon of failed states see for example *Geiß*, German Yearbook of International Law 47 (2004), 457 *et seq.*, with further references.

123 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (148-151).

124 On the allegedly different cultural background of this steering approach see Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (153) (“Unlike the Latin American nations, however, these Commonwealth nations are not as culturally conditioned to resort to a formal emergency when danger threatens or is perceived. The former British colonies have a choice between imposing a formal emergency under their [newly adopted written] constitutions or simply extending the scope of their ‘permanent’ internal security laws.”).

practice obviously requires an assessment “on a case-by-case basis”.¹²⁵

5. *Type 5: “Institutionalized” De Facto Emergency*

The fifth and final category of states of emergency – said to be bearing some resemblance to the concept of “complex states of emergency” introduced by *Nicole Questiaux* in her “Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency” presented to the UN Commission on Human Rights in July 1982¹²⁶ – is characterized by the ILA as “institutionalized” emergencies. This label refers to situations in which a government – for example in order to seek to escape from stricter forms of international scrutiny triggered by a recourse to formal emergency powers – decides to end and abandon a previously declared “formal state of emergency in favor of incorporating similar powers and provisions into its ordinary legislation”.

Considering the fact that these scenarios are characterized by a lack of actual emergency conditions, “the superficial lifting of the formal emergency” and a “government’s cynicism by continuing to treat the situation the same as before” as far as the application of legal rules are concerned,¹²⁷ also the category of institutionalized emergencies most certainly require an intensified human rights monitoring. However, in the same way as with regard to the type 4 “ambiguous or potential” *de facto* emergencies, the question – and considerable challenge – arises how to distinguish this type 5 “institutionalized” *de facto* emergencies from states engaging in what is referred to in the report as “ordinary” repression and violations of human rights outside the context of states of emergency¹²⁸ with the 1988 report again suggesting “the scope and severity of application of [...] ‘ordinary’ security laws” as the “key factor” and thus “subject again to imprecise, case-by-case judgements of the necessary quantum of repression”.¹²⁹

125 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (151-156).

126 United Nations Economic and Social Council, Commission on Human Rights, Question of the Human Rights of Persons Subjected to any Form of Detention and Imprisonment, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, prepared by Nicole Questiaux, UN Doc. E/CN.4/Sub.2/1982/15 of 27 July 1982, paras. 118 *et seq.*

127 For respective examples see Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (156-157) (“Taiwan and Paraguay present examples of the ‘institutionalized’ emergency scenario. In each case, a long-prolonged formal emergency was lifted after many years of public pressure criticizing the regime for maintaining a ‘bad’ *de jure* emergency. Before these emergencies were terminated, however, numerous changes were made in the ‘ordinary’ laws of both nations to permit the regime to exercise equivalent control over its political opponents and essentially to maintain the *status quo*.”) (emphases in the original).

128 This situation of “ordinary” repression is referred to in the 1988 report as a sixth category and also contrasted with a seventh and preferred type of situations called “ordinary legality” with the aim of the human rights monitoring process as a whole” being first and foremost “to move as many states out of the other [six] categories and into this [seventh] one.” See thereto Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (158-159).

129 See thereto as well as generally on type 5 “institutionalized” emergencies: Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (156-158).

The fourth and final section of the 1988 report,¹³⁰ again addressing from a more abstract and systematic perspective overarching dogmatic questions related to human rights in times of emergency, deals with two general issues considered by the Committee to be of central relevance for the justification and success of the larger research project on gathering comprehensive data on the legal and factual details of states of emergency as well as the respective patterns of government behaviour as originally envisioned to be undertaken already in the previous two years and now foreseen as the main task in the program of action for the coming two years of 1988 to 1990.¹³¹ The first of these two topics concerns the question – already raised in the 1986 first interim report¹³² and in fact underlying the whole effort to develop a typology of states of emergencies as outlined above – whether states of emergency are really “an identifiable and discrete phenomenon” that merit separate attention and analysis by practitioners and scholars. Following a quite informative and enlightening assessment, the 1988 report identifies as the central “underlying scheme that explains the inclusion of otherwise disparate situations into the definition of states of emergency [...] the continuing existence of some benchmark of ‘normalcy’ under which rights would receive greater protection than under the emergency”.¹³³

While this benchmark of “normalcy” provides, in the opinion of the Committee, a useful factor to distinguish states of emergency from other situations, the second issue addressed in this final part of the 1988 report concerns the question of whether this – initially merely abstract and theoretical – possibility to identify states of emergency as a separate phenomenon should also be considered of practical relevance, in particular as far as the principled need for a heightened scrutiny of such scenarios on the side of international human rights monitors is concerned. On the basis of once again a rather instructive evaluation, the Committee comes to the conclusion that – although the “correlation between emergency measures and severity of rights abuse is not necessarily a strong one”¹³⁴ – there is indeed something “inherently undesirable from a human rights viewpoint” in the existence of *de jure* emergencies in particular, namely the presence of “an undesirable message” underlying the invocation of emergency powers. Bearing in mind that every emergency “involves a trade-off between state security and respect for fundamental rights”, declaring a state of emergency always, at least implicitly, also conveys the in principle undesirable – and thus only under very exceptional factual circumstances tolerable – message that a certain country does not grant a very high priority to the respect for human rights, at the time of declaration. Therefore, “even emergencies which do not involve heightened abuse present a challenge to the promotion of respect for fundamental rights”, which indicates also in practice a principled need for intensified international human

130 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (177-186).

131 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (178 and 186).

132 See Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (158) (“Greater thought should be devoted to the question whether there is something inherent in the nature of states of emergency which merits the special attention of human rights bodies, or whether states of emergency are of interest only because empirically linked to massive violations of human rights.”).

133 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (181); for a further explanation see also *ibid.*, 181 (“For instance, in the long-prolonged ‘bad’ *de jure* emergency, there will usually be some long-dormant constitutional provisions that set forth such ‘normalcy’, even though in fact the emergency restrictions have become the norm. In the contrasting ‘ambiguous or potential’ *de facto* emergency, where a government suddenly cracks down on its opponents under permanent national security legislation, the benchmark of ‘normalcy’ is provided by the pre-existing factual circumstances, in which rights were in practice more widely respected by the government. Situations excluded from the definition, in contrast, lack this benchmark.”).

134 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (185).

rights monitoring.¹³⁵

During the debates in the working session of the 1988 ILA Conference in Warsaw, many speakers applauded the Committee and its Rapporteur for the comprehensive and thoughtful second interim report.¹³⁶ The main issue that some participants – expectedly – were not entirely comfortable with concerned specific questions related to the typology of states of emergency and in particular some aspects thereof.¹³⁷ Furthermore, indicating that the occupation of the Committee with the topic of human rights in times of emergency is approaching its final phase, Chairman *Richard B. Lillich* announced during the working session that the final report on the subject would be presented on the occasion of the next ILA Conference and that “the Executive Council has authorized the Committee, looking to the completion of its work on states of emergency, to undertake a study of the status and implementation of the Universal Declaration of Human Rights”.¹³⁸

III. 1990 ILA Conference in Broadbeach, Queensland

The expectations – or at least hopes – that sufficient external financial support for the case studies as well as in particular the ambitious comprehensive data-gathering project on states of emergency, originally considered to be “indispensable to the formulation of informed and realistic final recommendations for action by the ILA”,¹³⁹ could be obtained following the 1988 ILA Conference in Warsaw were unfortunately not met – or fulfilled – by reality. In fact, little is known from the official ILA documents about the activities undertaken by the Committee on this issue in the subsequent two years. The overall remarkably brief 1990 final report presented by the Committee at the next ILA Conference held at Broadbeach, Queensland in August 1990 is conspicuously silent on this question and its context. It seems not too far-fetched to assume, albeit most certainly remaining speculative, that a certain degree of frustration resulting from unsuccessful fundraising efforts as well as the realization of the research project soon coming to an end without the working program being completed might have contributed to a certain “research fatigue” on the part of some relevant actors. Nevertheless, but that is again purely speculative, there was apparently also the perception, initially in particular on the side of the Rapporteur *Fitzpatrick*, formerly *Hartman*, that a research project that the Committee has dealt with that intensively for a comparatively long period of time does not deserve the fate of simply “withering away”.

And it might very well have been first and foremost also for this reason that she drafted and

135 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (181-186); see also specifically *ibid.*, 185 (“a special focus upon states of emergency can be justified as part of a general effort to increase the priority of rights observance in the calculations of governments’ self-interest”).

136 See in this regard also the 1988 Committee on the Enforcement of Human Rights Resolution, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 14-15.

137 See for example the statement by *Soli J. Sorabjee*, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 210 (211); as well as the statement by *Vojin Dimitrijevic*, *ibid.*, 215-216.

138 Statement by *Richard B. Lillich*, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 210.

139 Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference in Seoul in August 1986, 1987, 108 (110); see also still in this regard Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (130) (“The need remains for a comprehensive data-gathering project of this kind before final conclusions can be drawn [...]”).

proposed¹⁴⁰ the 1990 Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency, in order to complement the 1984 Paris Minimum Standards,¹⁴¹ possibly also with the intention to provide for the overall “symmetry” of the decade-long ILA research project as a whole. The 1990 report explains that the Guidelines, totalling twenty-two individual recommendations in number, are “organized according to the differing functions discharged by the bodies to whom they are addressed”. Among them are, first, treaty implementation bodies with the Guidelines again distinguishing between bodies tasked with the implementation of human rights treaties containing explicit derogation clauses and those institutional configurations that are set up to enforce respective international agreements that do not stipulate such provisions. The second part of the Guidelines is addressed to charter organs and subsidiary bodies of IOGs with a particular competence in the realm of human rights. Finally, guidelines No. 19 to 22 deal with the functions exercised by NGOs.¹⁴²

Contrary to the 1984 Paris Minimum Standards,¹⁴³ however, there is no indication in the official ILA documents that the structure and content of the 1990 Queensland Guidelines have ever been subject to a discussion by the Committee members prior to the 1990 ILA Conference. Rather, it seems quite plausible that this document has been proposed and introduced only at relatively short notice.¹⁴⁴ Although a number of suggestions for changes and additions to the Draft Guidelines were made during the working session at the Conference,¹⁴⁵ the steering instrument was ultimately – and comparatively quickly – adopted without a single modification and “without dissent” at the proposal of Justice *Purvis* during the working session¹⁴⁶ and subsequently approved by the ILA on 25 August 1990 through its 1990 Resolution on the Enforcement of Human Rights Law.¹⁴⁷

140 See thereto Committee on the Enforcement of Human Rights Law, Final Report on Monitoring and States of Emergency: Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency, reprinted in: Report of the Sixty-Fourth ILA Conference in Broadbeach, Queensland in August 1990, 1991, 229-230.

141 See also Committee on the Enforcement of Human Rights Law, Final Report on Monitoring and States of Emergency: Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency, reprinted in: Report of the Sixty-Fourth ILA Conference in Broadbeach, Queensland in August 1990, 1991, 229 (230) (“The Guidelines will serve as a complement to the Paris Minimum Standards [...]”); as well as *Lillich*, *American Journal of International Law* 85 (1991), 716.

142 The 1990 Queensland Guidelines are reprinted in: Committee on the Enforcement of Human Rights Law, Final Report on Monitoring and States of Emergency: Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency, reprinted in: Report of the Sixty-Fourth ILA Conference in Broadbeach, Queensland in August 1990, 1991, 229 (232-236); as well as, *inter alia*, in: *Lillich*, *American Journal of International Law* 85 (1991), 716 (717-720). For an exegesis of this document and its related context subsequently undertaken by the Rapporteur and author of the Guidelines see *Fitzpatrick*, *Human Rights in Crisis – The International System for Protecting Rights during States of Emergency*, 1994.

143 On the considerably longer drafting history of the 1984 Paris Minimum Standards see already *supra* under B.

144 See in this connection for example the remarks by the Chairman of the Committee, *Richard B. Lillich*, at the beginning of the working session, reprinted in: Report of the Sixty-Fourth ILA Conference in Broadbeach, Queensland in August 1990, 1991, 237 (240) (“[...] the discussion would be divided into two parts. First, the Committee wished to have a full discussion on the Guidelines in order that they could be considered for approval by the Council.”).

145 See for example the statement by *H. Corell*, reprinted in: Report of the Sixty-Fourth ILA Conference in Broadbeach, Queensland in August 1990, 1991, 237 (246); the statement by *J. Anand*, reprinted in: Report of the Sixty-Fourth ILA Conference in Broadbeach, Queensland in August 1990, 1991, 237 (247); as well as the statement by *C. Soriano*, reprinted in: Report of the Sixty-Fourth ILA Conference in Broadbeach, Queensland in August 1990, 1991, 237 (247).

146 See Report of the Sixty-Fourth ILA Conference in Broadbeach, Queensland in August 1990, 1991, 237 (247).

147 The resolution is reprinted in: Report of the Sixty-Fourth ILA Conference in Broadbeach, Queensland in August 1990, 1991, 12-13.

D. What Remains? Some Thoughts on the Continued Relevance of the ILA's Previous Work on Human Rights in Times of Emergency in the 1980s

Viewed in retrospect, the efforts undertaken by the ILA in the 1980s to analyse and address the topic of human rights in times of emergency have, somewhat expectedly, not been able to provide a solution to all of the practical and theoretical challenges arising in connection with this still as of today very topical issue. This is, to mention but one important example, already illustrated by the formation of the current ILA Committee on Human Rights in Times of Emergency in May 2017 as well as the underlying reasoning that led to this establishment. In addition, and closely connected, the ILA's previous work and achievements in the 1980s have most certainly not ended the respective discussions. It is well-known that the scholarly assessments and debates continue up to this day.¹⁴⁸ That said, the question of what remains of the respective work undertaken by the ILA between 1979 and 1990 obviously arises. Are there any notable findings, standards and/or concepts that are still relevant in addressing the ongoing or new challenges and thus deserve to be taken into account in the present and future work of the current ILA Committee on Human Rights in Times of Emergency?

It goes almost without saying and thus hardly needs to be mentioned that it will not be possible to provide a comprehensive and definitive assessment of these questions in the course of our contribution, already in light of the fact that such an undertaking first and foremost also requires a more in-depth identification and evaluation of the current challenges arising in connection with the issue of human rights and emergencies; a task that is precisely one of the central aims of the current and future work of the present ILA Committee as a whole. Moreover, it is surely and ultimately a decision to be taken – preferably on an informed basis – by the current ILA Committee and all of its members whether, and in the affirmative to what extent, the work previously done in the 1980s is still relevant for their ongoing research activities. In light of these findings, one of the main tasks of the present authors was and is to assist the Committee members by attempting to provide this informed basis by summarizing and structuring the previous and extensive ILA work on this issue as well as its main background and context.

Nevertheless, in order to also provide some additional – and to a certain extent subjective – guidance and ideas as to the decisions to be taken in this regard by our Committee, we also intend to present some thoughts, no more than that, on the question as to the possible continued significance of the ILA's previous work on this issue as well as, more broadly, on the lessons potentially to be learned from these activities for the work of the current ILA Committee.

To begin with, the two practice-oriented steering documents that emerged as a result of ILA's previous work, the 1984 Paris Minimum Standards as well as the 1990 Queensland Guidelines, do not appear – at least according to our perception based on a cursory evaluation – to have exercised a significant or even decisive influence on the subsequent practice and scholarly discussions on this issue. Most certainly, they – as well as the ILA's previous work

148 See, e.g., more recently *Kadelbach/Roth-Isigkeit*, *Nordic Journal of International Law* 86 (2017), 275 *et seq.*; *Yordan Nugraha*, *International Journal of Human Rights* 22 (2018), 194 *et seq.*; *Polzin*, *Heidelberg Journal of International Law* 78 (2018), 635 *et seq.*; *Spieker*, *Heidelberg Journal of International Law* 79 (2019), 155 *et seq.*; *Mariniello*, *German Law Journal* 20 (2019), 46 *et seq.*

more generally – are occasionally referred to and addressed in the legal literature.¹⁴⁹ However, there seem to be for example relatively few more comprehensive assessments of these documents.¹⁵⁰ This applies in particular to the 1990 Queensland Guidelines. Moreover, it is rather telling that the two probably by far most detailed descriptions and analyses of the 1984 Paris Minimum Standards and the 1990 Queensland Guidelines, including the activities of the ILA leading to the adoption of these instruments, were published by authors that happened to be, to say the least, considerably involved in the drafting of these documents, namely the Chairman of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, *Subrata Roy Chowdhury*,¹⁵¹ and the Rapporteur of the Committee on the Enforcement of Human Rights, *Joan F. Hartman*.¹⁵²

In light of these findings, it seems appropriate for the members of the current ILA Committee – in case the decision should be taken to draft a new set of guidelines on this issue – to, first, bear in mind the importance of subsequent dissemination and promotion activities¹⁵³ as well as, second, to potentially adjust their expectations concerning the subsequent impact of such documents in practice and scholarly discussions. In order to ensure the future utility of any deriving documents, the authors would like to draw the Committee’s attention to the importance of considering – and adapting accordingly their suggestions – to the new developments and realities on the ground, such as the proliferation of NGOs in the last decades, the effect of the increased use of technology in the exchange of information and the continuously increasing use of social media platforms as a source of information on current affairs, including global emergencies.

In part, this more limited attention subsequently paid to the 1984 Paris Minimum Standards and the 1990 Queensland Guidelines might very well also to a certain extent be the result of certain flaws in the drafting and content of these documents. This applies in particular to the 1990 Queensland Guidelines. For example, it appears questionable whether the detailed reference to an individual initiative undertaken in the second half of the 1980s included in the 1990 Queensland Guidelines¹⁵⁴ can be considered as a suitable approach for a steering instrument that is in principle intended to serve as a guiding document for a number of years and decades to come. Moreover, to mention but one more example, the recommendation stipulated in paragraph 9 of the 1990 Queensland Guidelines that treaty implementation bodies with authority to issue general interpretations or advisory opinions should make “creative” use of this authority “to inform the states parties of their obligations under derogation clauses” is for a variety of dogmatic reasons surely not likely to be universally welcomed by treaty parties and scholars

149 See for example *Oraá*, Human Rights in States of Emergency in International Law, 30-31.

150 With regard to the 1984 Paris Minimum Standards see, e.g., *Ghandhi*, German Yearbook of International Law 32 (1989), 323 (345 *et seq.*); as well as, primarily from an overarching perspective of critical legal studies, *Carty*, in: Campbell/Goldberg/McLean/Mullen (eds.), Human Rights: From Rhetoric to Reality, 60 *et seq.* On the last-mentioned contribution see also already the comments by Rapporteur *Hartman* in: Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Third ILA Conference in Warsaw in August 1988, 1988, 129 (182).

151 *Chowdhury*, Rule of Law in a State of Emergency – The Paris Minimum Standards of Human Rights Norms in a State of Emergency, 1989.

152 *Fitzpatrick*, Human Rights in Crisis – The International System for Protecting Rights during States of Emergency, 1994.

153 On the importance of such activities see also in the context of ILA’s previous work on the issue of human rights in times of emergency for example already the comments made by *K. Hossein* and *Richard B. Lillich*, reprinted in: Report of the Sixty-Fourth ILA Conference in Broadbeach, Queensland in August 1990, 1991, 237 (241-242).

154 See Paragraph 18 of the 1990 Queensland Guidelines, reprinted in: *Lillich*, American Journal of International Law 85 (1991), 716 (719) (“Initiatives such as that undertaken by the Sub-Committee on the Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights under the Economic and Social Council resolution 1985/37, to authorize a Special Rapporteur on States of Emergency, deserve high praise and adequate support services. The following aspects of the Special Rapporteur’s programme of work in particular represent a positive model for such undertakings. [...]”).

of public international law alike.

That said, there are in the opinion of the present authors undoubtedly a number of aspects and dogmatic ideas to be found in the previous work of the ILA undertaken in the 1980s on the issue of human rights in times of emergency that the members of the present ILA Committee are well-advised to at least take into account and consider in the course of their current research activities and discussions. Aside from more general questions such as those related to the necessary or typical characteristics of states of emergency, whose new answers might also benefit from looking back to the respective old ILA discussions from the 1980s, this finding holds true for example for the quite detailed recommendations included in Section A, paragraphs 2 *et seq.* and Section B, paragraphs 3 *et seq.* of the 1984 Paris Minimum Standards (and the respective commentaries thereto¹⁵⁵) concerning the domestic legislative and constitutional design of procedures applying to states of emergency, in particular the continued important role preferably to be played by the legislative and judicial branch;¹⁵⁶ recommendations that have already previously been characterized for example as quite notable “additional and significant safeguard[s] against the usurpation of an untrammled power by the executive” in such situations¹⁵⁷ and most certainly continue to pose a considerable challenge until this very day.

In addition, the innovate conceptual ideas developed and described by the ILA Committee in the second phase of its previous work relating to the phenomenon of *de facto* states of emergency,¹⁵⁸ irrespective of whether one considers the respective classification approach in its entirety to be convincing, should surely also be regarded in principle as an important guiding concept for the present work of the current ILA Committee.

Finally, also the ongoing task of identifying and concretizing non-derogable human rights beyond the individual legal entitlements listed in Article 4 (2) of the 1966 International Covenant on Civil and Political Rights, Article 27 (2) of the 1969 American Convention on Human Rights as well as in Article 15 (2) of the 1950 European Convention on Human Rights and in a number of additional protocols to this treaty,¹⁵⁹ constituting an important part also of the work of the current ILA Committee on Human Rights in Times of Emergency, can and should clearly benefit, among others, from the quite comprehensive list of respective human rights stipulated in Section C of the 1984 Paris Minimum Standards and the related commentaries.¹⁶⁰

155 On the related commentaries see Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-First ILA Conference in Paris in August/September 1984, 1985, 56 (59-71).

156 See the respective sections of the 1984 Paris Minimum Standards, reprinted in: *Lillich*, American Journal of International Law 79 (1985), 1072 (1073-1075).

157 See *Ghandhi*, German Yearbook of International Law 32 (1989), 323 (346).

158 See thereto already *supra* under C.II.

159 See generally thereto also, e.g., CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, adopted at the Seventy-Second Session of the Human Rights Committee on 31 August 2001, CCPR/C/21/Rev.1/Add.11, General Comment No. 29, para. 11; Office of the High Commissioner for Human Rights/International Bar Association, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, 2003, Chapter 16, 831 *et seq.*

160 Concerning the commentaries see Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-First ILA Conference in Paris in August/September 1984, 1985, 56 (71-96).

References

- AAKEN, Anne van, International Investment Law between Commitment and Flexibility: A Contract Theory Analysis, *Journal of International Economic Law* 12 (2009), 507-538.
- BRUNER, Jerome S./GOODNOW, Jacqueline J./AUSTIN, George A., *A Study of Thinking*, New York 1956.
- BUERGENTHAL, Thomas, To Respect and to Ensure: State Obligations and Permissible Derogations, in: Henkin, Louis (ed.), *The International Bill of Rights – The Covenant on Civil and Political Rights*, New York 1981, 72-91.
- CARTY, Anthony, Human Rights in a State of Exception: The ILA and the Third World, in: Campbell, Tom/Goldberg, David/McLean, Sheila/Mullen, Tom (eds.), *Human Rights: From Rhetoric to Reality*, Oxford/New York 1986, 60-79.
- CASTBERG, Frede, *The European Convention on Human Rights*, Leyden 1974.
- CHOWDHURY, Subrata Roy, Rule of Law in a State of Emergency – The Paris Minimum Standards of Human Rights Norms in a State of Emergency, London 1989.
- CRIDDLE, Evan J., Protecting Human Rights during Emergencies: Delegation, Derogation, and Defiance, *Netherlands Yearbook of International Law* 45 (2014), 197-220.
- CRIDDLE, Evan J./FOX-DECENT, Evan, Human Rights, Emergencies, and the Rule of Law, *Human Rights Quarterly* 34 (2012), 39-87.
- DAM, Kenneth W., *The GATT: Law and International Economic Organization*, Chicago 1970.
- DINSTEIN, Yoram, Derogation from International Human Rights, in: Stein, Gustav (ed.), *Menschenrechte in Israel und Deutschland*, Cologne 1978, 63-71.
- FAWCETT, J. E. S., *The Application of the European Convention on Human Rights*, Oxford 1969.
- FISHER, Sydney G., The Suspension of Habeas Corpus During the War of the Rebellion, *Political Science Quarterly* 3 (1888), 454-488.
- FITZPATRICK, Joan, *Human Rights in Crisis – The International System for Protecting Rights during States of Emergency*, Philadelphia 1994.
- GEISS, Robin, Failed States – Legal Aspects and Security Implications, *German Yearbook of International Law* 47 (2004), 457-501.
- GHANDHI, P. R., The Human Rights Committee and Derogation in Public Emergencies, *German Yearbook of International Law* 32 (1989), 323-361.
- GIEGERICH, Thomas, Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien – Ein konstitutioneller Ansatz, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 55 (1995), 713-782.
- GREEN, L. C., Derogation of Human Rights in Emergency Situations, *Canadian Yearbook of International Law* 16 (1978), 92-115.
- GROSS, Oren, Chaos and Rules: Should Responses to Violent Crisis Always be Constitutional?, *Yale Law Journal* 112 (2003), 1011-1134.
- “Once More unto the Breach”: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies, *Yale Journal of International Law* 23 (1998), 437-501.
- GROSS, Oren/Ní AOLÁIN, Fionnuala, *Law in Times of Crises – Emergency Powers in Theory and Practice*, Cambridge 2006.
- GROSSMAN, Claudio, A Framework for the Examination of States of Emergency under the American Convention on Human Rights, *American University Journal of International Law and Policy* 1 (1986), 35-55.
- HAFNER-BURTON, Emilie/HELPER, Laurence R./FARISS, Christopher J., Emergency and Escape: Explaining Derogations from Human Rights Treaties, *International Organization* 65 (2011), 673-707.
- HAMILTON, Alexander, The Federalist No. 23, in: *The Federalist Papers by Alexander Hamilton, James Madison and John Jay*, edited and with an Introduction by Garry Wills, New York/Toronto/London 1982, 111-115.
- HARTMAN, Joan F., Working Paper for the Committee of Experts on the Article 4 Derogation Provision, *Human Rights Quarterly* 7 (1985), 89-131.
- Derogation from Human Rights Treaties in Public Emergencies, *Harvard International Law Journal* 22 (1981), 1-52.
- HIGGINS, Rosalyn, Derogation under Human Rights Treaties, *British Yearbook of International Law* 48 (1976-77), 281-320.
- HOOF, F. van, The Protection of Human Rights and the Impact of Emergency Situations under International Law with Special Reference to the Present Situation in Chile, *Human Rights Journal* 10 (1977), 213-248.
- IMBERT, Pierre-Henri, Die Frage der Vorbehalte und die Menschenrechtskonventionen, in: Maier, Irene (ed.), *Europäischer Menschenrechtsschutz – Schranken und Wirkungen*, Heidelberg 1982, 95-133.
- JACOBS, Francis G., *The European Convention on Human Rights*, Oxford 1975.
- JENSEN, Steven L.B., *The Making of International Human Rights – The 1960s, Decolonization, and the Reconstruction of Global Values*, Cambridge 2016.
- KADELBACH, Stefan/ROTH-ISIGKEIT, David, The Right to Invoke Rights as a Limit to Sovereignty – Security Interests, State of Emergency and Review of UN Sanctions by Domestic Courts under the European Convention on Human Rights, *Nordic Journal of International Law* 86 (2017), 275-301.

- KRIEGER, Heike, Notstand, in: Dörr, Oliver/Grote, Rainer/Marauhn, Thilo (eds.), EMRK/GG, Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, Volume I, 2nd edition, Tübingen 2013, 417-443.
- KUCIK, Jeffrey/REINHARDT, Eric, Does Flexibility Promote Cooperation? An Application to the Global Trade Regime, *International Organization* 62 (2008), 477-505.
- LAUTERPACHT, Hersch, *International Law and Human Rights*, London 1950.
- *An International Bill of Rights of Man*, Oxford 1945.
- LEICESTER FORD, Paul (ed.), *The Writings of Thomas Jefferson*, Volume IX, New York/London 1898.
- LILLICH, Richard B., Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency, *American Journal of International Law* 85 (1991), 716-720.
- The Paris Standards of Human Rights Norms in a State of Emergency, *American Journal of International Law* 79 (1985), 1072-1081.
- LUHMANN, Niklas, *Soziologie als Theorie sozialer Systeme*, *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 19 (1967), 615-644.
- MACDONALD, Ronald St. J., Derogations under Article 15 of the European Convention on Human Rights, *Columbia Journal of Transnational Law* 36 (1997), 225-267.
- MARINIELLO, Triestino, Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise its Immunity System, *German Law Journal* 20 (2019), 46-71.
- MCDUGAL, Myres S., Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies, *Virginia Journal of International Law* 14 (1974), 387-421.
- MCDUGAL, Myres S./LASSWELL, Harold D./CHEN, Lung-chu, Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry, *American Journal of International Law* 63 (1969), 237-269.
- MCGOLDRICK, Dominic, The Interface between Public Emergency Powers and International Law, *International Journal of Constitutional Law* 2 (2004), 380-429.
- NEUMAYER, Eric, Qualified Ratification: Explaining Reservations to International Human Rights Treaties, *Journal of Legal Studies* 36 (2007), 397-429.
- NORRIS, Robert E./DESIO REITON, Paula, The Suspension of Guarantees: A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the States Parties, *American University Law Review* 30 (1980), 189-223.
- NOWAK, Manfred, *U.N. Covenant on Civil and Political Rights*, Commentary, 2nd edition, Kehl 2005.
- O'BOYLE, Michael P., Emergency Situations and the Protection of Human Rights; A Model Derogation Provision for a Northern Ireland Bill of Rights, *Northern Ireland Legal Quarterly* 28 (1977), 160-187.
- Torture and Emergency Powers under the European Convention on Human Rights: Ireland v. The United Kingdom, *American Journal of International Law* 71 (1977), 674-706.
- O'DONNELL, Daniel, States of Exception, *International Commission of Jurists Review* 21 (December 1978), 52-60.
- ORAA, Jaime, *Human Rights in States of Emergency in International Law*, Oxford 1992.
- PADDEU, Federica, *Justification and Excuse in International Law – Concept and Theory of General Defences*, Cambridge 2018.
- PARTSCH, Karl Josef, Experiences Regarding the War and Emergency Clause (Article 15) of the European Convention on Human Rights, *Israel Yearbook on Human Rights* 1 (1971), 327-334.
- PELC, Krzysztof J., *Making and Bending International Rules: The Design of Exceptions and Escape Clauses in Trade Law*, Cambridge 2016.
- Seeking Escape: The Use of Escape Clauses in International Trade Agreements, *International Studies Quarterly* 53 (2009), 349-368.
- POLZIN, Monika, Art. 15 EMRK und die Rolle des Europäischen Gerichtshofs für Menschenrechte, *Heidelberg Journal of International Law* 78 (2018), 635-669.
- ROBERTSON, A. H., *Human Rights in Europe*, 2nd edition, Manchester 1977.
- ROSENDORFF, B. Peter/MILLER, Helen V., The Optimal Design of International Trade Institutions: Uncertainty and Escape, *International Organization* 55 (2001), 829-857.
- ROSSITER, Clinton L., *Constitutional Dictatorship – Crisis Government in the Modern Democracies*, Princeton 1948.
- SCHEPPELE, Kim Lane, Law in a Time of Emergency: States of Exception and the Temptations of 9/11, *University of Pennsylvania Journal of Constitutional Law* 6 (2004), 1001-1083.
- SCHMITT, Carl, *Political Theology – Four Chapters on the Concept of Sovereignty*, translated by George Schwab, Chicago/London 2005.
- SCHREUER, Christoph, Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights, *Yale Journal of World Public Order* 9 (1982), 113-132.
- SCHWELB, Egon, Some Aspects of the International Covenants on Human Rights of December 1966, in: Eide, Asbjörn/Schou, August (eds.), *International Protection of Human Rights*, Stockholm 1968, 103-129.

References

- SHEERAN, Scott P., Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics, *Michigan Journal of International Law* 34 (2013), 491-557.
- SOTTIAUX, Stefan, Derogation in Time of Emergency, in: van Dijk, Pieter/van Hoof, Fried/van Rijn, Arjen/Zwaak, Leo (eds.), *Theory and Practice of the European Convention on Human Rights*, 5th edition, Cambridge/Antwerp/Portland 2018, 1063-1076.
- SPIEKER, Luke Dimitrios, Does Article 15 ECHR Still Matter in Military Operations Abroad? The UK Government's "Presumption to Derogate" – Much Ado About Nothing?, *Heidelberg Journal of International Law* 79 (2019), 155-183.
- STEIN, Torsten, Die Außerkraftsetzung von Garantien menschenrechtlicher Verträge, in: Maier, Irene (ed.), *Europäischer Menschenrechtsschutz – Schranken und Wirkungen*, Heidelberg 1982, 135-145.
- SVENSSON-MCCARTHY, Anna-Lena, *The International Law of Human Rights and States of Exception – With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs*, The Hague/Boston/London 1998.
- SYKES, Alan O., Economic "Necessity" in International Law, *American Journal of International Law* 109 (2015), 296-323.
- Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations, *University of Chicago Law Review* 58 (1991), 255-305.
- WARBRICK, Colin, The Protection of Human Rights in National Emergencies, in: Dowrick, F. E. (ed.), *Human Rights – Problems, Perspectives and Texts*, Westmead 1979, 89-106.
- WEIL, Gordon L., *The European Convention on Human Rights – Background, Development and Prospects*, Leyden 1963.
- WURST, Otto, *Die völkerrechtliche Sicherung der Menschenrechte in Zeiten staatlichen Notstandes – Artikel 15 der Europäischen Menschenrechtskonvention*, Cologne 1967.
- YORDAN NUGRAHA, Ignatius, Human Rights Derogation during Coup Situations, *International Journal of Human Rights* 22 (2018), 194-206.

Rechtswissenschaftliche Beiträge der Hamburger Sozialökonomie

ISSN 2366-0260 (print) / ISSN 2365-4112 (online)

Bislang erschienene Hefte

Heft 1

Felix Boor, Die Yukos-Enteignung. Auswirkungen auf das Anerkennungs- und Vollstreckungssystem aufgehobener ausländischer Handelsschiedssprüche

Heft 2

Karsten Nowrot, Sozialökonomie als disziplinäre Wissenschaft. Alternative Gedanken zur sozialökonomischen Forschung, Lehre und (Eliten-) Bildung

Heft 3

Florian Hipp, Die kommerzielle Verwendung von frei zugänglichen Inhalten im Internet

Heft 4

Karsten Nowrot, Vom steten Streben nach einer immer wieder neuen Weltwirtschaftsordnung. Die deutsche Sozialdemokratie und die Entwicklung des Internationalen Wirtschaftsrechts

Heft 5

Karsten Nowrot, Jenseits eines abwehrrechtlichen Ausnahmecharakters. Zur multidimensionalen Rechtswirkung des Widerstandsrechts nach Art. 20 Abs. 4 GG

Heft 6

Karsten Nowrot, Grundstrukturen eines Beratungsverwaltungsrechts

Heft 7

Karsten Nowrot, Environmental Governance as a Subject of Dispute Settlement Mechanisms in Regional Trade Agreements

Heft 8

Margaret Thornton, The Flexible Cyborg: Work-Life Balance in Legal Practice

Heft 9

Antonia Fandrich, Sustainability and Investment Protection Law. A Study on the Meaning of the Term *Investment* within the ICSID Convention

Heft 10

Karsten Nowrot, Of “Plain” Analytical Approaches and “Savior” Perspectives: Measuring the Structural Dialogues between Bilateral Investment Treaties and Investment Chapters in Mega-Regionals

Heft 11

Maryna Rabinovych, The EU Response to the Ukrainian Crisis: Testing the Union’s Comprehensive Approach to Peacebuilding

Heft 12

Marita Körner, Die Datenschutzgrundverordnung der Europäischen Union: Struktur und Ordnungsprinzipien

Heft 13

Christin Krusenbaum, Das deutsche Krankenversicherungssystem auf dem Prüfstand – Ist die Bürgerversicherung die ultimative Alternative?

Heft 14

Marita Körner, Age Discrimination in the Context of Employment

Heft 15

Avinash Govindjee/ Judith Brockmann/ Manfred Walser, Atypical Employment in an International Perspective

Heft 16

Cara Paulina Gries, Gesetzliche Barrieren bei der Integration von geduldeten Flüchtlingen in den deutschen Arbeitsmarkt

Heft 17

Karsten Nowrot, Aiding and Abetting in Theorizing the Increasing Softification of the International Normative Order - A Darker Legacy of Jessup’s *Transnational Law*?

Heft 18

Matti Riedlinger, Das CSR-Richtlinie-Umsetzungsgesetz: Implementierung von Corporate Social Responsibility Berichtspflichten in nationales Recht

Heft 19

Karsten Nowrot, “Competing Regionalism” vs. “Cooperative Regionalism”: On the Possible Relations between Different Regional Economic Integration Agreements

Heft 20

Karsten Nowrot, The 2017 EU Conflict Minerals Regulation: An Effective European Instrument to Globally Promote Good Raw Materials Governance?

Heft 21

Karsten Nowrot, The Other Side of Rights in the Processes of Constitutionalizing International Investment Law: Addressing Investors' Obligations as a New Regulatory Experiment

Heft 22

Karsten Nowrot/Emily Sipiorski, Arbitrator Intimidation and the Rule of Law: Aspects of Constitutionalization in International Investment Law

Heft 23

Karsten Nowrot, European Republicanism in (Legitimation) Action: Public Participation in the Negotiation and Implementation of EU Free Trade Agreements

Heft 24

Karsten Nowrot, Non-Recognized Territorial Entities in the Post-Soviet Space from the Perspective of WTO Law: Outreach to Outcasts?

Heft 25

Marita Körner, Beschäftigtendatenschutz im Geltungsbereich der DSGVO

Heft 26

Vladlena Lisenco/Karsten Nowrot, The 2018 Pridnestrovian Law on State Support for Investment Activities: Some Thoughts on an Investment Statute in a Frozen Conflict Situation

Heft 27

Marita Körner, Die Rolle des Betriebsrats im Beschäftigtendatenschutz