HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW by Jaime Oraá (Don Mills: Oxford University Press, 1992)

During states of emergency it is perhaps expecting too much of any government to respect fully the human rights of residents, whether they be nationals or aliens. The various international documents on the protection of human rights, tend to recognize this, while providing that certain more basic rights, for example, protection against torture or arbitrary killing, are never to be derogated from. The Geneva Conventions of 1949 together with the Protocols thereto of 1977 seek to ensure that even in time of war, the emergency that most threatens the life of a state, basic human rights are still to be honoured. However, as may be seen from events in the former Soviet Union and Yugoslavia, as well as Cambodia, Somalia and the like, these commitments are often ignored with little done to bring the offenders to justice.

Father Oraá, Society of Jesus, has now provided us with a comprehensive study of the entire problem of *Human Rights in States of Emergency in International Law* as enunciated primarily in the International Covenant on Civil and Political Rights, and the European and American Conventions on Human Rights, but without ignoring the position as it exists in customary law. This latter analysis is extremely significant in view of the fact that the African Charter of Human and People's Rights contains no derogation clause,[1]while there are still many countries which have not become parties to any of the instruments mentioned and whose obligations are therefore merely those of customary law.[2]

Broadly speaking, derogation of the rights guaranteed in the international instruments only becomes possible when there is an emergency which constitutes an exceptional threat, followed by a proclamation of the existence of that emergency, and notification to the authority concerned with supervision of the instrument whose provisions it is intended to derogate from. It is because of the 'exceptional' nature of the threat that specific derogation clauses have been introduced rather than relying, as might have been expected, upon ordinary limitation provisions.[3]

The public emergency which justifies derogation is one that is so severe that it 'threatens the life of the nation.' This means that it must be actual or imminent and a measure of last resort, so that to declare an emergency as a preventive measure would not satisfy the treaty requirements. In the *Lawless*[4] case, the European Court pointed out that the threat must be directed against the general public and not any particular part thereof.[5] This would imply that the policy of 'ethnic cleansing' directed by the Serbs against the Moslems in Bosnia might not amount to such an emergency even if Bosnia had been bound by the Covenant as a part of Yugoslavia which became a party to that instrument

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1 J. Oraá, *Human Rights in States of Emergency in International Law* (Don Mills: Oxford University Press, 1992) at 209-210.

2 *Ibid.*

3 *Ibid.* at 9.

4 *Lawless* v. *Ireland* (1961), 31 Int'l Law Rep. 290.

5 J. Oraá, *supra* note 1 at 16-17, 28-29.

in 1971. It could, however, possibly be argued that this campaign is in fact part of a larger scheme directed against the very existence of the state.

As regards judicial control of a declaration of emergency, Father Oraá points out that experience suggests that there is little to be gained if reliance is placed upon the municipal courts,[6] but we cannot place too much reliance on the European Court either if we look at its comments in *Ireland* v. *United Kingdom*:[7]

> ...it falls in the first place to each Contracting State, with its responsibility for 'the life of the nation' to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both the presence of such an emergency and on the nature and scope of derogation necessary to avert it. ...Nevertheless, ... the Court ... is empowered to rule on whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis.

Surprisingly, while Father Oraá indicates that he is aware of the effect of this remark, he does not refer to this case on this issue, although he does cite both it and *Lawless*[8] from the point of view of emphasising the need for proportionality in response.[9]

Closely related to the issue of proclamation is that of notification. The purpose of notification is to inform the supervising authority of the treaty and the parties thereto so that they may see to what extent their interests or those of their nationals have been affected and to enable them to decide the extent to which they wish to exercise their own rights, which may involve challenging the derogation through the complaints procedure provided.[10]

Regardless of the treaty under discussion at any time, attempts to list non-derogable rights will always cause controversy and human rights documents are no exception. In fact, the three international agreements examined in this volume all include different lists, with the American Convention including a number of rights relating to the right to marry and found a family,[11] as well as the right to participate in government,[12] and "entrenching also the judicial guarantees essential for the protection of these non-derogable rights."[13] In addition to the listed non-derogable rights, the author suggests that it is also impermissible to derogate from the right to an effective remedy and the prohibition of discrimination; any provisions which contain general prohibitions and derogation from which would result in "destroying or limiting the right or freedom recognized, more than is necessary according to the derogation clause;" and provisions

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6 *Ibid.* at 41.
7 *Ireland* v. *United Kingdom* (1978), 17 Int'l Law Rep. 680.
8 *Supra* note 4.
9 J. Oraá, *supra* note 1 at 144-151.
10 *Ibid.* at 83.
11 *Ibid.* at 98.
12 *Ibid.* at 100.
13 *Ibid.* at 88.

relating to the machinery of implementation.[14] It is submitted, however, that this suggestion is by no means as definite as Father Oraá suggests. In an interesting commentary,[15] he raises the question whether a state might get round the non-derogable provisions by way of reservation, indicating that "it would be prima facie against the spirit of the treaties to make reservations to such fundamental rights."[16] In any case, such reservations aimed at the very purpose of the treaty or directed against the basic humanitarian purposes of a humanitarian instrument would be contrary to both the Advisory Opinion of the World Court on the *Genocide Convention Reservations* and the Vienna Convention on Treaties itself.

It is a fundamental principle of the law of war that action taken even against a military objective should be limited by the principle of proportionality in so far as collateral damage to civilians or civilian objects is concerned. The same principle applies in measuring the compatibility of derogation actions in relation to human rights instruments. Father Oraá goes further and maintains that "the principle of proportionality can be deemed to constitute a general principle of international law," reminding us that:[17]

> ...in the Age of Enlightenment the problem of balancing the rights and freedoms of individuals with the public interest became one of the main problems in political and legal philosophy. Thus proportionality became one of the main legal principles available by which to determine the legality of States' interference in individual rights and freedoms. The same rationale lies behind its applicability in modern human rights law; the rights and freedoms recognized to individuals are not absolute or without limits; however, such limits must be proportionate to the legitimate aim pursued by the limitation.

Any action taken by way of derogation is open to the allegation that it is discriminatory. For it to be compatible with international human rights legislation it must be absolutely even-handed and in no way discriminatory. The escape mechanism is, however, fairly easy to achieve. Thus:

> ...in the *Nicaragua-Miskitos*[18] case, the Inter-American Commission found that the compulsory relocation of the Miskito Indians had not been discriminatory because it was due to military necessity. The Commission carefully considered the possibility of discrimination, because the measure was directed against an ethnic group which was considered to be disloyal to the Government. At the same time, it gave a lot of weight to the fact that the Miskitos constituted an indigenous population with especially strong ties to their land.[19]

The last 60 pages of Father Oraá's *Human Rights in States of Emergency in International Law* are devoted to consideration of the problem in 'general international law.' In so far as Latin America is concerned, he argues that for those states which are not parties to the Inter-American Convention, obligations can arise from both the OAS

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14 *Ibid.* at 101-106.
15 *Ibid.* at 127-139.
16 *Ibid.* at 127.
17 *Ibid.* at 140-141.
18 *Nicaragua-Miskitos* OAS/Ser.L/V/II.62 dec. 10, rev. 3 (19 Nov. 1983).
19 J. Oraá, *supra* note 1 at 189.

Treaty and the 1948 American Declaration of the Rights and Duties of Man. While he concedes that this instrument "is not a treaty [and] was not intended to create legal obligations for States" he contends that:[20]

> ...with the passage of time it has gained legal force.... [In fact,] the Inter-American Commission on Human Rights has in practice consistently applied those standards of the Declaration in its case-law... and [since] the American Declaration has no derogation clause, the Commission has therefore to find some general principles regulating this matter.

He suggests that this could serve as a persuasive precedent for the UN system:[21]

> ...because of the similarity between the two systems. Thus, within the UN framework, there are States non-parties to the Covenant on Civil and Political Rights but which are parties to the UN Charter. Therefore the international obligations concerning human rights for those States non-parties to the Covenant arise form the UN Charter and from the UDHR [Universal Declaration of Human Rights], as authoritative expression of the obligations of the Charter in so far as they constitute general international law. At this stage in the evolution of international law, it is clear that customary law imposes international obligations in the area of human rights which are binding even for States which are non-parties to human rights treaties.

Apart from the question of the obligatory character of the Declaration, this still leaves open the extent to which a group of states is able to create customary law by way of its own treaties for states which have expressly declined to become parties to those treaties. In so far as the principle of derogation is relevant in such circumstances, Father Oraá bases it on the doctrines of state necessity and *force majeure*[22] subject to the limits derived from the principles of proportionality and non-discrimination. He suggests that these principles might in fact amount to "general principles of law recognized by most of the world legal systems" and thus part of international law in accordance with Article 38 of the Statute of the World Court.[23]

Father Oraá has clearly provided us with a provocative and interesting exposition of the problems related to *Human Rights in States of Emergency in International Law*. Not only is it a valuable contribution to the doctrine of international human rights law, but it serves as a superb example of the standard which should be sought after by graduate students writing a thesis for the Ph.D. degree.

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20 *Ibid.* at 210-211.
21 *Ibid.* at 211.
22 *Ibid.* at 221-226.
23 *Ibid.* at 257.