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ARE DEROGATIONS USEFUL? (2/2 points)

1. Among the conditions that are listed by Article 4 ICCPR, Article 27 ACHR and Article 15 ECHR, for the adoption of derogation measures in the face of an emergency threatening the life of the nation, is a condition of necessity: the said measures will only be allowed to the extent that they are strictly required by the exigencies of the situation. What does this condition tell us about the mechanism of derogation?

- ☒ This condition implies that the measures that derogate from the State's human rights obligations still must take into account the rights and freedoms that are derogated from, since no restriction will be allowed to such rights and freedoms that would go beyond what is necessary to respond to the crisis. ✓
- ☐ Since derogations allow a State to suspend the enjoyment of certain rights and freedoms, the condition of necessity has no useful role to play;
- ☐ Since derogations respond to public emergencies threatening the life of the nation, even the most extreme measures would still pass the test of necessity, almost by definition.

EXPLANATION

What the condition of necessity shows, is that even where a State faces an emergency (or, more precisely, a serious threat), it may not ignore the requirement to refrain from imposing restrictions to human rights beyond what the situation requires. The State is not given a blank check simply because of the proclamation of a state of emergency. In other terms, the function of derogation clauses in the three human rights instruments which include them is *not* to exonerate the State from complying with human rights in the face of certain emergency situations. Quite to the contrary, these clauses serve to define carefully under which conditions certain guarantees may be (in part) suspended. In other words, as stated by the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1985), 'derogation from rights recognized under international law in order to respond to a threat to the life of the nation is not exercised in a legal vacuum. It is authorized by law and as such it is subject to several legal principles of general application' (para. 61).

The Human Rights Committee described the condition of necessity as follows, in its *General Comment No. 29, Derogations during a State of Emergency* (Art. 4), adopted in 2001:

"(The requirement that any measure adopted under cover of a derogation be strictly required by the exigencies of the situation) relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several


provisions of the Covenant (see for instance, Arts. 12 and 19 of the Covenant). Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.

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

This same idea is expressed as follows by the Inter-American Court of Human Rights (*Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) *American Convention on Human Rights*), Advisory Opinion OC-8/87 of 30 January 1987, Series A No. 8), para. 24:

"The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the circumstances justifying the grant of such exceptional legal measures".

2. After all, taking this condition of necessity into account, does the possibility to proclaim a state of emergency and to adopt derogation measures constitute a useful safeguard for States? What is really the added value of having such an "escape clause" in the concerned treaties, for the States that seek to rely on it?

- ☒ The possibility to proclaim a state of emergency and to adopt derogation measures is useful in that it allows to restrict rights that otherwise would have to be treated as absolute; 
- ☐ The possibility to proclaim a state of emergency and to adopt derogation measures is useless, since the State must in any case justify that the measures concerned are strictly necessary to respond to the crisis;
- ☐ The possibility to proclaim a state of emergency and to adopt derogation measures is not only useless to the State, but even counterproductive, in fact obliging the State to inform the other parties to the Treaty about measures that that State could adopt anyway as restrictions to human rights.

EXPLANATION

The answer is: the derogation clauses are only useful to the extent that certain human rights could not otherwise be subject to restrictions, even where such restrictions appear necessary to respond to serious threats. Where a right may be restricted for the safeguard of the public interest or, as expressed in the American Convention on Human Rights, for the "general welfare" (article 30, ACHR), there is no reason for the State to notify that it intends to derogate from it, in the light of the emergency situation it faces: it will be sufficient to impose a limitation on the said right, without having to follow the exceptional (and more burdensome) procedure of derogation. In addition, since each of the derogation clauses contained in Article 4 ICCPR, Article 27 ACHR and Article 15 ECHR, provide that a number of rights cannot be derogated from even in situations of emergency, the range of rights for which derogation measures are useful ends up being quite narrow. In practice, only the right to liberty and security (i.e., the protection from arbitrary detention, as protected under Art. 9 ICCPR, Art. 7 ACHR, Art. 5 ECHR) is neither normally subject to restrictions, nor a "non-derogable" right which cannot be suspended even in situations of emergency. Therefore it is generally this right that governments seek to restrict, when they announce a state of emergency and notify, within the respective treaties concerned, that they are adopting certain measures derogating from their human rights obligations. To express the same conclusion in different terms: it is typically the right to liberty and security that is subject to derogation measures, because all the other rights protected under the ICCPR, the ACHR or the ECHR either can be subject to "normal" restrictions (i.e., they are not "absolute"), or are prohibited from being subject to derogations (i.e., they are "non-derogable").

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