

# DEROGATIONS UNDERTAKEN BY SYRIA DURING ITS STATE OF EMERGENCY

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## INTRODUCTION

*Different sovereign states are subject to different legal obligations, and these legal obligations in the form of provisions, are contained in various treaties<sup>1</sup>. In this paper, the author in particular, is concerned about certain provisions of one such treaty – the International Covenant on Civil and Political Rights (ICCPR), whose Art. 4 governs state obligations, during a state of emergency.*

*ICCPR is a multilateral treaty, which protects people's civil and political rights. It is popularly known as the *primus inter pares* (most significant) of the universal international human rights treaties<sup>2</sup>. Many of the rights contained in ICCPR are subject to either limitations or derogations. Limitations are based on the idea that, when state parties respond to a situation of emergency, they must try to limit the scope of enforcement of specific rights instead of directly trying to derogate from them, because derogations are complete or partial elimination of international obligations on the part of state parties<sup>3</sup>. But that being said, ICCPR does allow states, to derogate from some of its obligations when there is a threat to the life of the nation, by undertaking certain measures, which are not inconsistent with their other obligations contained in international law at large and which do not involve discrimination solely on the basis of colour, race, sex, language, religion or social origin<sup>4</sup>. That being established, the subject of our study in this paper is the derogations undertaken by the Syrian Arab Republic AKA Syria, which is one of the countries having the longest continuous state of emergency.*

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<sup>1</sup> McGoldrick, D., *The Interface Between Public Emergency Powers and International Law*, Int J Constitutional Law (2004) 2 (2): 380-429.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

## 48 YEARS OF SYRIAN EMERGENCY

During the 1950's, Egypt's increasing influence on Syria via staunch nationalist and anti-imperialist Jamal 'Abd al- Nasser led to its unification with Egypt to form the United Arab Republic (UAR).<sup>5</sup> This union was short lived, as it lasted only for a period of 3 years, after which the anti- Nasserites seized power and declared Syria's succession from the UAR. In March of 1963, the Ba'th party in Syria via a military coup seized considerable power from the anti-Nasserites and brought into effect a state of emergency, under Legislative Decree No. 1 of 9 March 1963.<sup>6</sup> This legislation was governed by the core of emergency laws contained in legislative Decree No. 51 of 22 December 1962<sup>7</sup>. In due course of time, due to increasing pressure from fierce anti-regime protests, in April 2011, President Bashar – al – Assad's cabinet finally ratified the draft legislation, which put an end to 48 years of state emergency in Syria contained in Legislative Decree No. 161 of 21 April 2011.

In the 48 years of its existence, Syrian emergency laws have led to gross human rights violations, the effects of which are seen even today, their Human Rights Committee has termed these laws to be one of the most repressive laws till date<sup>8</sup>. These laws have eroded many rights of its citizens, such as - freedom of association and assembly, freedom of expression, freedom of movement, property rights, right to a fair trial, right to protection against torture, arrests and detention and many other rights protected by the ICCPR<sup>9</sup>. The reason why it had indulged, and continues to indulge in such appalling human rights violations, is because one, it has not yet filed a declaration under Art. 41 as a result of which other state parties are deprived from raising concerns against Syria's violations<sup>10</sup> and two, it has not yet signed the First Optional Protocol to the ICCPR which allows individuals to communicate violation of their rights to the HRC, as a result of which in the absence of an international redress mechanism, the rights of these

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<sup>5</sup> Michael Macaulay, *Syria: The need to Reform Monitoring of States of Emergency*, December 2, 2005, available at:

<http://www.lrwc.org/ws/wpcontent/uploads/2012/03/Syria.StateofEmergency.Macaulay.Feb...06.pdf>

<sup>6</sup> *Supra* note 5

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> But that being said, till date, state parties have not indulged in such practices, as their interests might get deeply affected, but nonetheless, even if this option is not used at all, the fact that such a mechanism exists which can put a country to shame is a petrifying thought in itself, and yet Syria's actions clearly prove it chose to ignore the same, and continue with its act of brutality against its citizens. This clearly establishes the existence of its little or no respect at all for the international obligations it prescribed to.

individuals are brutally violated. In short, there is no way Syria in reality can be stopped from indulging in such large scale human rights violations.

## EMERGENCY AND DEROGATIONS

Art. 4<sup>11</sup> of the ICCPR, is a key provision which allows state parties to derogate from some of its obligations, by strictly observing and applying the requirements enumerated in the covenant. It requires the state parties to observe the principles of proportionality, non-discrimination, necessity and consistency with other obligations under international law. Having said that, there are three clauses under Art. 4, of which the first one Art. 4(1) defines what could possibly constitute a state of emergency. The following are included in the definition of a state emergency: wars, an international or national armed conflict, a mass demonstration leading to instances of violence, a natural catastrophe or a major industrial accident<sup>12</sup>. Secondly, it states that there must be an actual and potential threat to the life of the nation, which means the physical and territorial integrity and political independence of the population and/or the nation's economy at large<sup>13</sup>. Thirdly, these derogations must not discriminate and must not be a departure from its international obligations at large.

The second clause Art. 4(2) talks about non-derogable rights<sup>14</sup> which if derogated would constitute an illegal action on part of the state. The rights contained in this clause can be limited in scope but cannot be derogated.

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### <sup>11</sup> Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

<sup>12</sup> *Supra* note 1

<sup>13</sup> *United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985), available at: <http://hrlibrary.umn.edu/instreet/siracusaprinciples.html>

<sup>14</sup> Non-derogable rights:

- a. Art. 6 (right to life);

Thereby bringing us to the third part, Art. 4(3) which talks about official proclamation of the emergency in good faith. In order to maintain the rule of law and to uphold the principles of legality, it is only just and fair for the state declaring a situation of emergency to officially proclaim the same in front of the entire international community<sup>15</sup>. The state must then after having officially proclaimed an emergency, notify to other state parties through the intermediary of the Secretary-General of the United Nations, the provisions from which it has derogated and the reasons by which it was actuated. The notification must contain sufficient information whereby other states parties are allowed to exercise their rights and discharge their obligations under the Covenant<sup>16</sup>.

The state party must also notify the following in writing to the HRC: it must be able to prove that it was absolutely necessary for it to declare a state of emergency due to the presence of an actual and clear imminent threat and not merely because of an apprehension of a potential threat. It must, in clear and precise written terms, justify to the HRC as to why and what kind of measures it undertook in order to deal with the situation at hand, and also prove that top notch national authorities were appointed to individually assess the necessity of any derogation measure taken or proposed, to deal with the specific threats posed by the emergency, though their assessments and judgments cannot be treated as conclusive proof of an emergency at hand, hence their assessments must be corroborated with factual evidence. It must also prove in

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- b. Art. 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent);
  - c. Art. 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude);
  - d. Art. 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation);
  - e. Art. 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty) and
  - f. Art. 16 (the recognition of everyone as a person before the law), and Art. 18 (freedom of thought, conscience and religion).

<sup>15</sup> Procedures for the proclamation of a state emergency must be prescribed in advance under their national law.

<sup>16</sup> In particular, the notification must contain the following:

- a. "the provisions of the Covenant from which it has derogated;
- b. a copy of the proclamation of emergency, together with the constitutional provisions, legislation, or decrees governing the state of emergency in order to assist the states parties to appreciate the scope of the derogation;
- c. the effective date of the imposition of the state of emergency and the period for which it has been proclaimed;
- d. an explanation of the reasons which actuated the government's decision to derogate, including a brief description of the factual circumstances leading up to the proclamation of the state of emergency; and
- e. a brief description of the anticipated effect of the derogation measures on the rights recognized by the Covenant, including copies of decrees derogating from these rights issued prior to the notification."

writing to the HRC that the severity, duration, and geographic scope of any derogation measure undertaken was proportional to and necessary for the exigencies of the situation at hand<sup>17</sup>.

A state party which would fail to make an immediate notification of its derogation from the covenant in writing to the HRC would be clearly acting in breach of its obligations to other states parties<sup>18</sup>. Once the emergency is declared, the state party must try to terminate such derogation in the shortest period of time, in order to bring an end to the situation of public emergency, which threatens the life of the nation and establish normalcy.<sup>19</sup> On the date on which it terminates such derogation it must inform other state parties of the same in writing via the intermediary of the Secretary-General of the United Nations and upon termination all rights and freedoms protected by the Covenant must be restored in full.<sup>20</sup> A careful review of the continuing consequences of derogation measures undertaken during the state of emergency must be made immediately and steps shall be taken in order to correct injustices and to compensate those who had suffered injustice during or in consequence of the derogation measures<sup>21</sup>.

Lastly, General Comment 29 apart from encompassing and consolidating all of the points mentioned above, further adds to it by stating, the state parties must include in their reports submitted under Art. 40<sup>22</sup> sufficient and precise information about their law and practice in the

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<sup>17</sup> *Supra* note 1

<sup>18</sup> Further it may be deprived of the defences otherwise available to it in procedures under the covenant.

<sup>19</sup> *Supra* note 1

<sup>20</sup> *Supra* note 13

<sup>21</sup> *Supra* note 13

<sup>22</sup> **Article 40**

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.



field of emergency powers, they must present information regarding their international obligations which are relevant for the protection of the rights in question, in particular those obligations which are applicable during a state of emergency, also there is an absolute requirement of an objective assessment of the actual situation on part of the state as well as the HRC<sup>23</sup>.

## CONCLUSION

Even though Syria proclaimed a state of emergency, it never adhered to any of the above mentioned guidelines which were to be strictly followed afterwards. Firstly, it committed innumerable violations which were clear derogations of the non-derogable provisions, thereby constituting an illegal state action. Secondly, though reports on the situation of states are to be filed by state parties every 4 years, Syria had been irregular in doing the same<sup>24</sup> none of its reports till date answered HRC's queries with regard to what were the conditions for proclaiming a state of emergency, whether there had been any derogation of covenant rights and if so, which rights were derogated from and the scope of such derogation. Did the state party notify other state parties of these derogations, through the intermediary of the Secretary-General of the United Nations, in accordance with article 4 (3) of the Covenant? if so, when? How is compliance with article 4 of the Covenant secured, when it is read in the light of the Committee's general comment No. 29? and where are the details of the cases in which the Emergency Act has been applied?<sup>25</sup>. Not having answered these questions till date is a departure of the gravest kind from the guidelines prescribed by the UN and the HRC, and gross violation of its obligations under Art. 4 of the ICCPR as well as the international law. The only reason why it was able to indulge in such shameless acts for past 48 years is because there was and is no enforcement mechanism in place in the UN, hence on a concluding note the same is an immediate need of the hour.

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<sup>23</sup> *Supra* note 13

<sup>24</sup> Till date Syria has been able to file only 4 reports for the years 1977, 2000, 2004 and 2009

<sup>25</sup> Pg. no. 3, Para 6, G0541291, *CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT, List of issues to be taken up in connection with the consideration of the third periodic report of the SYRIAN ARAB REPUBLIC* (CCPR/C/SYR/2004/3), CCPR/C/84/L/SYR 28 April 2005.