Non-derogable rights and the need to protect the environment

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NON-DEROGABLE RIGHTS
AND THE NEED TO PROTECT
THE ENVIRONMENT

BY

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The question of non-derogable rights and the need to protect the environment deserves to be posed, even if for the moment it has not received close consideration. In this context, the question of whether environmental disasters can justify the declaration of a state of emergency must be addressed. If such is the case, it will then be necessary to envisage the consequences of such a situation for the status of human rights, and in particular for those human rights that are of a major importance for ensuring protection of the environment.

I. CAN ENVIRONMENTAL DISASTERS
   JUSTIFY A STATE OF EMERGENCY?

Environmental disasters may be natural or man made. (1) Consequently, they are taken to include not only natural phenomena, such

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(1) See Michael Böthe, «Relief Actions», in Rudolf Bernhardt, ed., Encyclopedia of Public International Law; Instalment 4-1982 (Amsterdam, North-Holland Pub. Co., 1982), pp. 173-178 at 173. There is a growing tendency not to draw such a distinction, which in any event has become
as volcanic eruptions, earthquakes or floods, but also industrial accidents (the Bhopal disaster) or accidents resulting from the use of nuclear energy (Chernobyl disaster).

Article 27.1 of the American Convention on Human Rights (hereinafter ACHR) provides for the possibility of taking exceptional measures in «time of war, public danger, or other situation or emergency that threatens the independence or security of a State Party». It thus contemplates the possibility of proclaiming a state of emergency in the event of an environmental disaster. (2)

On the other hand, the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the Convention for the Protection of Human Rights and Fundamental Freedoms, also called European Convention on Human Rights (hereinafter ECHR) appear to be more reluctant with regard to that eventuality. Article 15.1 of the ECHR and article 4.1 of the ICCPR provide, in similar terms, (3) for the proclamation of a state of emergency in time of war or other public emergency threatening the life of the nation.

Article 15 of the ECHR and article 4 of the ICCPR are so closely linked that it is generally considered that the definitions and criteria of article 15 established by European case law are applicable to article 4 (4) and that the preparatory work of article 4 is of relevance for the interpretation of article 15. (5) Consequently, this analysis will focus primarily on the provisions of the European Convention.

A number of scholars have argued that natural disasters justify recourse to article 15 of the ECHR or article 4 of the ICCPR, (6)

increasingly difficult to do. For example, United Nations General Assembly resolution 44/224 of 22 December 1989 entitled «International cooperation in the monitoring, assessment and anticipation of environmental threats and in assistance in cases of environmental emergency» makes no such distinction.


(3) For political reasons, article 4 of the ICCPR does not expressly provide for war, but this situation is clearly covered by this provision. See Thomas BURGENTHAL, «To Respect and to Ensure : State Obligations and Permissible Derogations», in Louis HENKIN, ed., The International Bill of Rights : The Covenant on Civil and Political Rights (New York, Columbia University Press, 1981), pp. 72-91 at 79.

(4) Ibid., p. 80.


whereas others have ruled out such an eventuality. It is the
unlikelihood that environmental disasters justify limitations other
than those already provided for by the relevant articles in their nor-
mal application (7) which seems to rule out placing environmental dis-
asters in the same category as situations that give rise to a state of
emergency. It has also been argued that these situations do not
warrant the adoption of exceptional measures other than labour
required for rescue efforts. (8)

However, article 15 of the European Convention does not enumerate
the causes or the origin of a danger that might trigger a state of
emergency. Thus, in addition to economic, social, political or religious
causes, there is no reason to exclude, a priori, environmental reasons. (9) The French delegation had, in fact, proposed that natural
disasters be explicitly included in article 15, but although the proposal
had been approved by the drafting committee of the European Con-
vention, it had not been followed up. (10) Likewise, the preparatory
work of the Covenant contains many points suggesting that natural
disasters can justify a state of emergency. National legislation in many
countries also provides for the proclamation of a state of emergency
in such cases. (11)

Environmental disasters can thus give rise to the right of derogation
if the conditions of article 15 are met. It does not seem inconceivable
that the consequences of a disaster can be so great that the conditions
of the application of article 15 are met, for example in case of a
general panic or widespread looting. (12)

(7) See Hector Faundez-Ledesma, « La protección de los derechos humanos en situaciones de
emergencia », in Thomas Buergenthal, ed., Contemporary Issues in International Law. Essays in
Honour of L.B. Sohn (Kehl/Strasbourg/Arlington, N.P. Engel, 1984), pp. 101-126 at 113. See also

(8) G. Tremblay, « Les situations d'urgence qui permettent en droit international de suspendre
les droits de l'homme », Cahiers de droit, No. 18 (1977), pp. 3-60 at 21 ff. But article 4, para. 3 (b)
of the European Convention recognizes that any service exacted in case of an emergency or
calamity threatening the life or well-being of the community shall not be regarded as forced or
compulsory labour under article 4. Article 8 (3) (e) (iii) of the Covenant provides for a similar excep-
tion.

(9) See Ergec, op. cit. (supra n. 5), p. 145.
(10) See Hartman, loc. cit. (supra n. 6), p. 26; the author does not explain why this was so.
(11) See Ergec, op. cit. (supra n. 5), p. 147.
(12) Ibid., p. 146.
It is the exceptional and imminent nature of the danger that must characterize the situation, and that rules out cases of potential, latent or speculative danger. (13) Nor does this latter condition pose any real problem that might stand in the way of the application of article 15 in the event of an environmental disaster.

There is a difference of opinion on whether the entire territory or only one part should be concerned if recourse to article 15 is to be warranted. For J.F. Hartman, « the entire State, rather than a discrete segment of the population, must be menaced », (14) although she recognizes that if the situation in a part of the territory has a significant impact on central institutions, the criterion would be met. J.E.S. Fawcett excludes any application of article 15 if the effects of the crisis are not felt at national level and argues that events which might only have a local impact cannot be included in the concept of « public emergency ». (15) Buergenthal draws a distinction between the size and the gravity of the threat and the geographic area in which the threat appears. (16) Moreover, it would seem that practice and case law have not retained the requirement that the entire territory be affected. Hence, « a danger limited to a portion of the territory or to a colony can justify application of the right of derogation as long as the danger is sufficiently serious ». (17) R. Ergec adds that « the same applies to natural disasters striking a particular part of the territory to the extent that they can cause serious disruption of the public order ». (18) However, it will be seen that in the case of an environmental disaster, the danger for central institutions would be difficult to establish if the effects are only felt in part of the territory and if society is only disrupted locally.

II. WHAT ARE THE CONSEQUENCES FOR GUARANTEED RIGHTS?

The validity of derogations can be assessed on the basis of the conditions constituting a crisis situation that jeopardizes the life of a

(14) Hartman, loc. cit., p. 16.
(16) Buergenthal, loc. cit. (supra n. 3), p. 80.
(18) Ibid.
nation and the proportionality of the measures adopted in response. (19)

A number of guaranteed rights may be infringed in the event of a large-scale environmental disaster. These include the right to life, the right to respect of privacy, freedom of expression, the right to own property, etc. Some of these rights may not be derogated from under any circumstances, whereas others may.

A. The right to life

The duty to protect the right to life falls a priori to the State, because life must be «protected by law». (20) This is primarily a negative obligation in the sense that the State cannot intentionally violate the right to life in conditions that are not those specifically provided for by the relevant provisions. (21) Respect for the right to life also includes positive obligations, such as prevention and punishment, (22) which come into play primarily during environmental disasters.

1. The right to life

and recourse to international assistance

In the absence of sufficient resources to meet an environmental disaster, the question is whether the State concerned has the obligation to request international assistance in order to protect the right to life of its nationals.

The Vienna Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (1986) provides for certain assistance procedures, but there is no obligation for the State to request the

(19) See Hartman, loc. cit., p. 3. See also Jacques Velu and Rusen Ergec, La Convention européenne des droits de l'homme (Bruxelles, Bruylant, 1990), pp. 142-143.
(21) Ibid., p. 92. See also Velu and Ergec, op. cit. (supra n. 19), pp. 179-180.
assistance of neighbouring or other States, even in cases in which it is unable to control the situation. (23)

But when accidents cannot be adequately controlled by the competent authorities, thus causing the risk of transboundary consequences, the discretion of the State in accepting an offer of assistance by an affected State might be deemed to be circumscribed. (24) Apart from this case, the existence of an obligation to accept assistance offered in the event of a disaster remains uncertain, because it is at variance with the principle of non-intervention in internal affairs. (25) It can be assumed however that the obligation to ensure respect for the right to life can in this context strengthen the existence of the obligation to accept international assistance. (26)

Parallels can also be drawn with humanitarian law in the area of assistance to the victims of conflicts. Consent of the State is required, but the State can only refuse consent for reasons that cannot be contested. (27) The resolution of the Institute of International Law on the protection of human rights and the principle of the non-intervention in the internal affairs of States, adopted on 13 September 1989, also provides that:

«States in whose territory these emergency situations [where the life or health of the population is seriously threatened] exist should not arbitrarily reject such offers of humanitarian assistance.» (28)


(24) See Günther Handl, «Internationalization of hazard management in recipient countries: accident preparedness and response», in Günther Handl and Robert E. Lutz, eds., Transferring Hazardous Technologies and Substances: The International Legal Challenge (London/Dordrecht/Boston, Graham & Trotman, 1989), pp. 106-128 at 126. This concerned a complaint by Austrian authorities that Swiss authorities had not called for assistance in cleaning up an oil spill brought about by a rail accident in the vicinity of the border.


(27) Bothe, loc. cit. (supra n. 26), p. 93.

2. The right to life and the duty of assistance

Nor does there appear to be a duty to provide assistance under general international law, (29) although certain scholars suggest that the principle of « international solidarity » and the concept of essential humanitarian considerations may indicate an obligation to provide assistance in customary law. For example, the International Academy of Human Rights has affirmed the right to assistance for the victims and the duty of States to help provide such assistance on the basis of the obligation to cooperate as set forth in the Charter of the United Nations. (30) For most scholars, such a duty is more a question of good neighbourliness (comity; comitas gentium). (31) Some scholars have cited (32) the granting of humanitarian relief during national disasters as an example of a non-binding moral obligation.

International conventions generally do not provide for a duty to render assistance. The Vienna Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (1986) and the Helsinki Convention on the Transboundary Effects of Industrial Accidents (1992) contain no obligation to provide assistance when such a request is made. The sole obligation with which a State must comply is to decide promptly whether it is in a position to render such assistance and notify the requesting State thereof. (33)

However, States do have the right to offer assistance. A simple offer does not constitute interference in internal affairs. (34) Assistance against the will of the State does not constitute an unlawful intervention in the internal affairs of the State, (35) if, as pointed out by the International Court of Justice, the assistance provided is in conformity with certain conditions:


(32) Peter Macalister-Smith, « Comity », in Bernhardt, op. cit. (supra n. 1), pp. 41-44 at 43.

(33) Cameron, loc. cit. (supra n. 23), p. 31.

(34) Botte, loc. cit. (supra n. 1), p. 175.

There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any way contrary to international law. (36)

The Court has also posed conditions for strictly humanitarian aid by referring to the fundamental principles proclaimed by the Twentieth Conference of the Red Cross: non-discrimination and aid limited to «preventing and reducing human suffering» and «protecting life and health, as well as ensuring respect for the human person».

B. The prohibition of degrading treatment

The possibility of benefiting from protection against damage to the environment as part of the prohibition of inhuman or degrading treatment seems difficult to establish. The concept of «degrading treatment» implies intentional behaviour that is difficult to envisage in the context of environmental protection.

However, this possibility should not be entirely ruled out. For example, in the case Lopez Ostra v. Spain, (37) the applicant alleged that the fact that she was forced to live near a water purification and waste treatment plant (situated 12 metres from her residence) constituted a violation of article 3 of the European Convention on Human Rights. The health problems sustained by the persons living in the neighbourhood of the plant because of the fumes and stench had led the municipality to relocate them. The plant, which had begun operations without the necessary permit, had subsequently stopped some of its operations. The Spanish Government maintained that the harmful effects had since ceased, whereas the applicant maintained that the health problems persisted. The application was judged admissible under article 3. In its report, the European Commission of Human Rights noted, however, that the harmful effects suffered by the applicant were not sufficiently serious to constitute a violation of article 3; it nevertheless considered that there had been a violation of article 8 (private life). Such was also the position of the European Court in a judgment of 9 December 1994. (38)

(38) To be published in 303, European Court of Human Rights, Series A: Judgments and Decisions.
C. The right to private life

No article of the ECHR explicitly protects the right to health, but such protection is ensured by article 8 in connection with protection of private life. Hence, any violation of the physical integrity of the individual is generally considered to be a violation of private life: «A compulsory medical intervention, even if it is of minor importance, must be considered as an interference with this right.» (39)

Violations of private life may result from direct measures taken by the authorities or the indirect effects that are the consequences of the actions of the authorities. For example, in several cases the Commission and Court found that the noise in the neighbourhood of airports could constitute a violation of private life. In Arrondelle v. The United Kingdom, (40) the house of the applicant was situated between a runway of Gatwick airport and a motorway. The applicant alleged that the intensity and frequency of the noise had had adverse consequences for her health. The application was declared admissible under article 8, a friendly settlement was secured, and the Commission did not decide on the merits. (41) In the Powell and Rayner case, which also concerned a problem of noise pollution, the Court decided that:

«In each case, albeit to greatly differing degrees, the quality of the applicant’s private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport.» (42)

In the Lopez Ostra case, the nuisance caused by fumes and stench was also considered to be a violation of the right to private life, given their consequences for the health of the applicant.

As to the restrictions on the exercise of this right, article 8 (2) states that the prevention of disorder, the protection of health and the protection of the rights and freedoms of others are legitimate reasons for restrictions. These reasons might justify most measures that may be adopted following an environmental disaster. The requirement of a


(41) E.A. Arrondelle v. The United Kingdom, Report adopted on 13 May 1983, Decisions and Reports, vol. 26, pp. 5-15. In a similar case, the European Commission of Human Rights noted that the harmful effects were greater than in the Arrondelle case. Here again, a friendly settlement was secured (see Frederick William Baggs v. The United Kingdom, Application No. 9310/81, Decision of 16 October 1985 on the admissibility of the application, Decisions and Reports, vol. 44, pp. 13-21).

"pressing social need" (43) is met a priori in the case of a disaster situation consistent with the conditions of article 15.

The declaration of a state of emergency would probably broaden a State's latitude for deciding what measures to take in order to respect the private life and health of individuals.

D. The right to information

1. The right to information between States

It is unclear whether a general obligation exists to notify the States concerned when an environmental disaster may have serious consequences for their environment. For example, for some scholars the obligation to inform neighbouring States in the event of a nuclear accident is not clearly established. (44) For others,

"[...] there is an obligation under international custom that the State of origin of an incident having border crossing detrimental effects has to promptly inform and warn affected States in order to give them the chance to minimize the damage. [...]" (45)

Several international conventions and instruments provide for an obligation of notification, such as the Bonn Convention on the Protection of the Rhine (1976), the Vienna Convention on Early Notification in the Event of a Nuclear Accident (1986), (46) the Helsinki Convention on the Transboundary Effects of Industrial Accidents (47) and the Decision of the Council of the OECD on the exchange of information relating to accidents that may cause transboundary harm. However, the obligation to notify is usually a function of the subjective assessment by a State of the extent of the effects that may be felt in the territory of other States. There is no objective criterion for determining the circumstances that impose an obligation to provide notification. (48)

(44) CAMERON, loc. cit. (supra n. 23), p. 22. In the International Atomic Energy Agency (IAEA), it has been assumed that nuclear safety matters are the prerogative of States.
(45) PELZER, loc. cit. (supra n. 23), p. 298.
(46) Its scope is limited, excluding accidents affecting military activities and those whose effects are exclusively domestic.
(47) The Convention does not apply to nuclear accidents or nuclear activities.
(48) See HANDL, loc. cit. (supra n. 24), p. 121; CAMERON, loc. cit. (supra n. 23), p. 31; and PELZER, loc. cit. (supra n. 23), p. 303.
In this context, it should be recalled that an environmental disaster imperiling the citizens of a neighbouring State should be the subject of notification:

« An elementary duty of humanity requires all Governments with knowledge of a natural disaster which is threatening other States or their nationals to notify them thereof. » (49)

The Corfu Channel case is often cited in this connection, in which the International Court of Justice referred in part to « elementary considerations of humanity » in order to establish an obligation to notify of dangers for the life of nationals of another State. (50)

2. The right to information:
the State and its citizens

One problem is whether the State in the territory of which a disaster has occurred and the States which have been informed thereof have the obligation to impart the information that they have to persons under their jurisdiction. It is reasonable to assume that if the disclosure of information in the possession of the State constitutes a measure sufficient to prevent loss of life, such information must be made public.

It is useful to take certain criteria into consideration in cases of environmental disaster to justify this obligation. This is the case for the danger of unintentionally exposing persons to risk and the need to publicize information on the risks incurred.

According to A. Kiss,

« [...] it is thus fair to say that States should pass on to their nationals information received from other States with regard to events and activities inasmuch as these persons may be affected by the consequences of these events and activities either in their persons, in their property or, lastly, in their private life. » (51)

Although article 10 of the European Convention does not provide for a right actively to seek information, it is generally argued that this right is guaranteed by article 10 (52) when the information is intended


(51) Kiss, loc. cit. (supra n. 48), p. 288.

for the general public or for the person seeking it. (53) The right actively to seek information does not, however, impose positive obligations on the public authorities. (54) They have no obligation to provide information: (55)

"Traditionally, constitutional freedom to receive (and seek) information does not include a general ‘democratic’ right of access to administrative records or other information; this ‘public’ access depends on additional legislation [...]" (56)

A right of access might, however, flow from the right to receive information when such information is particularly important for the individual. (57) Thus, the European Commission of Human Rights noted:

* However, even assuming that the right to receive information may under certain circumstances include a right of access by the interested person to documents which although not generally accessible are of particular importance for his own position, [...]" (58)

However, in the Leander case, (59) the applicant had been denied employment as a civil servant in a post of importance for the national security because a secret police report had been conveyed to his employer. The applicant had not been able to have access to the register. The European Court decided that:

* Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual." (60)


(54) See VELU and EROEC, *op. cit.* (supra n. 79), p. 608.


(56) Bullinger, *loc. cit.* (supra n. 52), p. 70.

(57) Ibid. See also Malinverni, *loc. cit.* (supra n. 51), p. 450.

(58) X. v. The Federal Republic of Germany, Application No. 8383/78, Decision of 3 October 1979, *Decisions and Reports*, vol. 17, pp. 227-229. In this case, the applicant complained of the delay in the receipt of important documents as a result of an error by the postal service.

(59) European Court of Human Rights, *Leander case*, Judgment of 26 March 1987, Series A: *Judgments and Decisions*, vol. 116, para. 74. In the Gaskin Case (Judgment of 7 July 1989, Series A: *Judgments and Decisions*, vol. 160, para. 52), the applicant had been placed in a foster family by the municipality. The latter had a file containing information of a personal nature on the childhood of the applicant. Upon reaching the age of majority, the applicant, wishing to institute proceedings because of the ill-treatment received, requested access to the file, which was refused. The Court, citing the Leander decision, again decided that «also in the circumstances of the present case, Article 10 does not embody an obligation on the State concerned to impart the information in question to the individual." (60)

(60) *Leander case* (supra n. 59), para. 74.
In these cases, the Court did not, however, completely rule out the possibility of a right of access, even if the circumstances that might give rise to this right were not made explicit. In the two cases, the information sought was of a personal nature, and certain scholars have argued that a right of access might be recognized for information of considerable importance for a certain number of persons. (61)

In the absence of a personal right of access, individuals may have access to information conveyed by the media. In this context, the right to impart and to receive information is covered by article 10. In the *Sunday Times* case, the European Court stressed that:

"In the present case, the families of numerous victims of the tragedy [thalidomide], who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important to them, only if it appeared to be absolutely certain that its diffusion would have presented a threat to the ‘authority of the judiciary’.« (62)

The right to impart or to receive information may be limited on the basis of article 10 (2). In general, however, a State's discretionary latitude in assessing freedom of the press is rather narrow, because «freedom of expression constitutes one of the essential foundations of a democratic society» (63) A derogation in accordance with article 15 would probably broaden the discretionary latitude of the notifying State.

III. Conclusion

The requirements of environmental protection have been making themselves increasingly felt, leaving their mark on international human rights law and in particular on the question of non-derogable rights.

The risks of environmental disaster are manifold, and States must have the means to meet these challenges. The problem is whether these disasters can lead to the declaration of a state of emergency.


so, this can, of course, only take place in accordance with the general principles applicable to states of emergency.

These situations put respect for human rights to the test, and the restrictions that may be imposed upon their exercise on the pretext of a state of emergency must be identified. Furthermore, certain protected rights have environmental aspects that must be taken into account in any circumstance. Respect for these rights help ensure better protection of the environment while strengthening the principle of the non-derogable character of human rights.
LES NATIONS UNIES
ET LA PROTECTION DES MINORITÉS
PENDANT LES ÉTATS D'URGENCE :
LES DROITS INTANGIBLES DES MINORITÉS

PAR

JOHN PACKER (*)

SOMMAIRE

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INTRODUCTION

Songeant à l'extension des droits de l'homme depuis quelques décennies, Higgins faisait remarquer à juste titre qu'il est nécessaire, cependant, que les progrès des droits de l'homme s'accompagnent d'ajustements tenant compte des besoins raisonnables des États pour s'acquitter de leurs obligations au service de l'intérêt général (1) — remarque qui réunissait, en s'efforçant de les équilibrer, au moins quatre idées distinctes : une prémisse, la « nécessité » ; un moyen, les « ajustements » ; un critère, le « raisonnable » ; et un objectif, l'« intérêt général ». Nous reviendrons dans un instant sur les trois premières de ces
