



The University of Fiji

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WRITTEN SUBMISSIONS TO THE PARLIAMENTARY STANDING COMMITTEE ON JUSTICE LAW AND HUMAN RIGHTS

ON

CYBERCRIME BILL 2020

JDP School of Law.

1.0 INTRODUCTION

The University of Fiji JDP School of Law is grateful to be provided with an opportunity to make submissions on the Cybercrime Bill 2020 (Bill No 11 of 2020).

These submissions are made from the perspective of professionals with relevant qualifications and experiences to be able to do so on behalf of the University of Fiji

1.1 Digital Evidence presented a number of significant challenges when it first appeared in courts and continues to do so. The difficulty arises with the nature of digital evidence as it is fundamentally different from physical evidence.

1.2 The obvious difficulties are as follows:

Degradation: In the world of physical evidence, real evidence, if handled correctly with proper preservation measures, can be utilized as an exhibit at the point of trial. The same cannot be said in general

about digital evidence as it is by its very nature volatile. It is not uncommon for a single item within a large file to get altered over time. The resulting effect on the entire document can be fairly serious and applies to storage media also.

Ownership: It is quite difficult to determine ownership of a digital document. Whilst it is possible to determine the physical machine on which a document is found, given the current technical realities associated with shared computer resources, networked computers and virtual machines, knowledge of the machine on which that document was placed is not always sufficient to prove who authored the document.

Original Documents: It is literally impossible to distinguish an original document from copies of it. At the most basic level, all digital documents are simply a series of zeros and ones that are interpreted by the computer. Two documents containing the exact same string of zeros and ones in every sense are identical and it is impossible to determine which was created first or who created it without additional information

2.0 OUR RESPECTFUL SUBMISSIONS ON SUGGESTIONS TO ADD TO THE EXISTING LEGISLATION

▪ SEARCH WARRANT PART 5 PROCEDURAL MEASURES

- 2.1 It is submitted that the search scope is unusually relevant in the field of digital evidence and digital forensics. Warrants are crafted around the simple realities of the physical world. The warrant sets down the exact scope of the allowable investigations and any evidence outside the scope is not admissible.

In the case of *United States v Mann* the accused was charged with possession of child pornography which was found on Mann's computer

subsequent to a search of his computer under a search warrant. In the course of investigation the officer utilized the FTK software which is used commonly used by many forensic computer examiners to image and analyze items of the suspects' digital media. The investigator also utilized the known file filter technology provided by FTK to remove standard system files from his search, as well as detect any known instances of child pornography. The investigator found files known to be child pornography "without obtaining another search warrant".

The defense challenged the admissibility of the evidence as the warrant was granted pursuant to an issue of voyeurism and not pornography thus exceeding the scope of the warrant. The warrant specifically authorized officers to search for "video tapes", CDs or other digital media, computers, and the contents of said computers, tapes or other electronic media to search for images of women in locker rooms and other private areas as opposed to child pornography. The accused argued that upon suspecting child pornography the police officers were required to obtain a separate warrant.

The court ruled the search was executed within the scope of authorization and admitted the evidence.

- 2.2 In ***United States v Graziano*** the court provided even stronger language supporting broad interpretation of warrants to relative to digital evidence. The same program, FTK, was used however the defense challenged the admissibility of the evidence arguing that that the warrant was facially overbroad and invalid because it did not require a certain methodology or limit the Search of computers to certain keywords or "terms". The court held that the Constitution must be taken into account in the Court's decisions which interprets that search warrants must also include specification of the precise manner in which they are to be executed.

- 2.3 Therefore it is recommended that a separate clause is added within Section 16 which should include words that empower authorities to undertake a thorough investigatory process in order to retrieve relevant admissible evidence.

▪ **SEARCH WARRANTS WITH REGARD TO MOBILE PHONES**

- 3.1 Mobile Phone data has become commonplace for storing information, correspondence and is a new area in criminal forensics. Most people have cell phones and data devices which can be highly relevant in the context of an investigation. The interesting question is therefore not only how relevant it is but also how to seize and analyze data from it. A Mobile Phone is a mini computer and operates much like a container which law enforcers are allowed to open, however they do contain vast amounts of personal information.
- 3.2 *In the case of **United States v Edwards**, the 9th circuit of the USA ruled that mobile phones are effectively computers and therefore require a warrant to search. Modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, e-mail, video and instant messages." Individuals store highly personal information on their cell phones through email and text, voice and instant messages. The prosecution in this case attempted to seize cell phones as part of the booking process. The Court concluded that the Government had failed to show any purpose other than furthering the criminal investigations and did not properly articulate any reason why it was necessary to search the contents of cell phone in order to fulfill any legitimate Government interest served by a booking search.*
- 3.3 *In the case of **United States v Finley**, the accused was searched after his arrest and his mobile phone taken pursuant to the defendants arrest. The court held that the search was lawful and that "reasonable search" was not "constrained to search only for weapons or instruments of escape on the arrestee's person"; they may also, without any additional justification,*

look for evidence of the arrestee's crime on his person in order to preserve it for use at trial. The court ruled that while Finley did possess a reasonable expectation of privacy, the officer had the right to search that phone as part of the booking process, and therefore cell phone data was admissible.

3.4 Courts have resolved the tension of the two cases in ***People v Diaz***, 165 ***Cal. App. 4th*** 72, in which the defendant's cell phone was seized from the person incident to his arrest, but the cell phone itself was searched 90 minutes later. The court, upheld the validity of the search and noted that the court has previously upheld delayed warrantless searches of wallets.

3.5 Therefore within the Constitutional provisions on privacy it will be pertinent to consider how far we can extend the meaning to mobile phone devices as it only includes recording devices at the moment.

3.6 The **Constitution of Fiji** at section 24 states, as follows:

Section 24 (1) Every person has the right to personal privacy, which includes the right to-

- (a) confidentiality of personal information
- (b) confidentiality of their communications; and
- (c) respect for their private and family life.

(2) To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights set out in section (1).

3.7 The importance of the Constitutional protections of privacy cannot be under-estimated. Any new law must be drafted pursuant to this provision of the Constitution and it is not clear that Part 5 of the Bill in all respects has such compliance. For example section 17 (2) of the Bill may be too broad and could even undermine the Constitution itself n may need to be re-drafted for clarity.

3.8 The Siracusa Principles, attached to these Submissions, outline the ways in which limitations on rights are to be construed. The general sentiment is that, first, the limitations are to be interpreted in favour of the rights and not to undermine them, and secondly the burden is on the state to show that the limitation is reasonable and lawful.

3.9 Section 7 (1) (b) of the Fijian Constitution states as follows:

Interpretation of this Chapter (Chapter 2 Bill of Rights)

.....a court, tribunal or other authority...may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter.

Section 24 (right to privacy) comes within the Bill of Rights Chapter.

It is not clear whether section 17 (2) of the Cybercrime Bill as it is currently expressed provides sufficient protection against arbitrary interference with that right as the provision is very unclear.

▪ **CYBER TERRORISM AND HATE SPEECH**

4.1 Hate speech is a complex area and has nexus with freedom of expression, individual, group and minority rights as well as concepts of dignity, liberty and equality. Both national and international legislation, prohibition on incitement to harm (particularly, discrimination, hostility or violence) based upon targets being identified with a certain social or demographic group. Hate speech also extends to expressions that foster a climate of prejudice, intolerance and comments that fuel targeted discrimination, violence and hostilities towards a certain groups being identified.

4.2 The context of causing terror can be both internal and external. Cyber Terrorism can be loosely defined as premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or significant subgroups. Hacker groups are also politically motivated, highly trained people who have the capacity to

breach security and are connected through religious ideology and social connections. Hackers are also linked with organized crime and the profit motivation further boosts cyber terrorism

4.3 *In the cases of **Jersild v Denmark** and **Soulas v France** the courts' discussed hate speech as it involved demonstrations of hostility or was likely to or intended to stir up hatred. Both cases were based on Article 17 of the ECHR and Xenophobic speech. Similarly, in the case of **Norwood v United Kingdom** in which the applicant displayed a poster showing the World Trade Centre aflame with the words "Islam out of Britain", was considered to be against within Section 5 and Public Order Act.*

4.2 Therefore it is imperative to include Hate Speech which is politically motivated and cause resentment through social media and other media through the Cyber Crime Bill.

4.3 The Constitution of Fiji prohibits Hate Speech in section 17 (3) (b) (i) and (d) and this section should be considered in any Cyber Crime Bill to be passed by parliament.

4.4 A further offence can be added in line with Communal Antagonism Section of the Crimes Act specifically focusing on the online platform.

▪ **OTHER**

➤ An additional section should be added for the warrant which would read..... *the Judge or Magistrate may instruct a police officer on how the evidence in proving an offence is to be extracted in the interest of justice.* The section can be added after Section 16 (2) as (c).

➤ Section 16 should also include search of "mobile phones and smart phone devices" which is an additional sub-section. It is also submitted

that the definition of “computer system” must include cell phones and mobile devices as well.

- A further section on the offence section can be added to state *“whoever disseminates information through any information system or device which is likely to advance inter-faith, sectarian or racial hatred shall be punished for a term not exceeding 2/3 years imprisonment.*

▪ **FINAL WORD**

The proposed law cannot be inconsistent with the Constitution of Fiji and care must be taken that sections of the proposed Cybercrime law do not have the effect of impliedly ousting important provisions of the Bill of Rights of the Constitution. Since the Constitution prevails the Courts' duty to interpret any law consistently with the Constitution must be left unimpaired.

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Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights

Annex, UN Doc E/CN.4/1984/4 (1984)

I. Limitation Clauses

A. General Interpretative Principles Relating to the Justification of Limitations

B. Interpretative Principles Relating to Specific Limitation Clauses

- i. "prescribed by law"
- ii. "in a democratic society"
- iii. "public order (ordre public)"
- iv. "public health"
- v. "public morals"
- vi. "national security"
- vii. "public safety"
- viii. "rights and freedoms of others," or "rights and reputations of others"
- ix. "restrictions on public trial"

II. Derogations in a Public Emergency

A. "Public Emergency Which Threatens the Life of the Nation"

B. Proclamation, Notification, and Termination of a Public Emergency

C. "Strictly Required by the Exigencies of the Situation"

D. Non-Derogable Rights

E. Some General Principles on the Introduction and Application of a Public Emergency and Consequent Derogation Measures

F. Recommendations Concerning the Functions and Duties of the Human Rights Committee and United Nations Bodies

I. LIMITATION CLAUSES

A. General Interpretative Principles Relating to the Justification of Limitations*

- 1. No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.
- 2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
- 3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.
- 4. All limitations shall be interpreted in the light and context of the particular right concerned.
- 5. All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.
- 6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.

7. No limitation shall be applied in an arbitrary manner.
8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.
9. No limitation on a right recognized by the Covenant shall discriminate contrary to Article 2, paragraph 1.
10. Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:
 - (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
 - (b) responds to a pressing public or social need,
 - (c) pursues a legitimate aim, and
 - (d) is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.
12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.
13. The requirement expressed in Article 12 of the Covenant, that any restrictions be consistent with other rights recognized in the Covenant, is implicit in limitations to the other rights recognized in the Covenant.
14. The limitation clauses of the Covenant shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding upon the state.

B. Interpretative Principles Relating to Specific Limitation Clauses

i. "prescribed by law"

15. No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.

16. Laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.

17. Legal rules limiting the exercise of human rights shall be clear and accessible to everyone.

18. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights.

ii. "in a democratic society"

19. The expression "in a democratic society" shall be interpreted as imposing a further restriction on the limitation clauses it qualifies.

20. The burden is upon a state imposing limitations so qualified to demonstrate that the limitations do not impair the democratic functioning of the society.

21. While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.

iii. "public order (ordre public)"

22. The expression "public order (ordre public)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).

23. Public order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.

24. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

iv. "public health"

25. Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

26. Due regard shall be had to the international health regulations of the World Health Organization.

v. "public morals"

27. Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.

28. The margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant.

vi. "national security"

29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.

32. The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

vii. "public safety"

33. Public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.

34. The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

viii. "rights and freedoms of others" or the "rights or reputations of others"

35. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the Covenant.

36. When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to rights not subject to limitations in the Covenant.

37. A limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism.

ix. "restrictions on public trial"

38. All trials shall be public unless the Court determines in accordance with law that:

(a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open court showing that the interest of the private lives of the parties or their families or of juveniles so requires; or

(b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order (ordre public), or national security in a democratic society.

II. DEROGATIONS IN A PUBLIC EMERGENCY

A. "Public Emergency which Threatens the Life of the Nation"

39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

(a) affects the whole of the population and either the whole or part of the territory of the State, and

(b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.

41. Economic difficulties per se cannot justify derogation measures.

B. Proclamation, Notification, and Termination of a Public Emergency

42. A state party derogating from its obligations under the Covenant shall make an official proclamation of the existence of the public emergency threatening the life of the nation.

43. Procedures under national law for the proclamation of a state of emergency shall be prescribed in advance of the emergency.

44. A state party derogating from its obligations under the Covenant shall immediately notify the other states parties to the Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and the reasons by which it was actuated.

45. The notification shall contain sufficient information to permit the states parties to exercise their rights and discharge their obligations under the Covenant. In particular it shall contain:

(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.

46. States parties may require that further information necessary to enable them to carry out their role under the Covenant be provided through the intermediary of the Secretary-General.

47. A state party which fails to make an immediate notification in due form of its derogation is in breach of its obligations to other states parties and may be deprived of the defenses otherwise available to it in procedures under the Covenant.

48. A state party availing itself of the right of derogation pursuant to Article 4 shall terminate such derogation in the shortest time required to bring to an end the public emergency which threatens the life of the nation.

49. The state party shall on the date on which it terminates such derogation inform the other state parties, through the intermediary of the Secretary-General of the United Nations, of the fact of the termination.

50. On the termination of a derogation pursuant to Article 4 all rights and freedoms protected by the Covenant shall be restored in full. A review of the continuing consequences of derogation measures shall be made as soon as possible. Steps shall be taken to correct injustices and to compensate those who have suffered injustice during or in consequence of the derogation measures.

C. "Strictly Required by the Exigencies of the Situation"

51. The severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.

52. The competent national authorities shall be under a duty to assess individually the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by the emergency.

53. A measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitations clauses of the Covenant would be adequate to deal with the threat to the life of the nation.

54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger.

55. The national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.

56. Effective remedies shall be available to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation.

57. In determining whether derogation measures are strictly required by the exigencies of the situation the judgment of the national authorities cannot be accepted as conclusive.

D. Non-Derogable Rights

58. No state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.

59. State parties to the Covenant, as part of their obligation to ensure the enjoyment of these rights to all persons within their jurisdiction (Art. 2(1)) and to adopt measures to secure an effective remedy for violations (Art. 2(3)), shall take special precautions in time of public emergency to ensure that neither official nor semi-official groups engage in a practice of arbitrary and extra-judicial killings or involuntary disappearances, that persons in detention are protected against torture and other forms of cruel, inhuman or degrading treatment or punishment, and that no persons are convicted or punished under laws or decrees with retroactive effect.

60. The ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.

E. Some General Principles on the Introduction and Application of a Public Emergency and Consequent Derogation Measures

61. 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.

62. A proclamation of a public emergency shall be made in good faith based upon an objective assessment of the situation in order to determine to what extent, if any, it poses a threat to the life of the nation. A proclamation of a public emergency, and consequent derogations from Covenant obligations, that are not made in good faith are violations of international law.

63. The provisions of the Covenant allowing for certain derogations in a public emergency are to be interpreted restrictively.

64. In a public emergency the rule of law shall still prevail. Derogation is an authorized and limited prerogative in order to respond adequately to a threat to the life of the nation. The derogating state shall burden of justifying its actions under law.

65. The Covenant subordinates all procedures to the basic objectives of human rights. Article 5(1) of the Covenant sets definite limits to actions taken under the Covenant:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Article 29(2) of the Universal Declaration of Human Rights sets out the ultimate purpose of law:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

These provisions apply with full force to claims that a situation constitutes a threat to the life of a nation and hence enables authorities to derogate.

66. A bona fide proclamation of the public emergency permits derogation from specified obligations in the Covenant, but does not authorize a general departure from international

obligations. The Covenant in Article 4(1) and 5(2) expressly prohibits derogations which are inconsistent with other obligations under international law. In this regard, particular note should be taken of international obligations which apply in a public emergency under the Geneva and I.L.O. Conventions.

67. In a situation of a non-international armed conflict a state party to the 1949 Geneva Conventions for the protection of war victims may under no circumstances suspend the right to a trial by a court offering the essential guarantees of independence and impartiality (Article 3 common to the 1949 Conventions). Under the 1977 additional Protocol II, the following rights with respect to penal prosecution shall be respected under all circumstances by state parties to the Protocol:

- (a) the duty to give notice of charges without delay and to grant the necessary rights and means of defense;
- (b) conviction only on the basis of individual penal responsibility;
- (c) the right not to be convicted, or sentenced to a heavier penalty, by virtue of retroactive criminal legislation;
- (d) presumption of innocence;
- (e) trial in the presence of the accused;
- (f) no obligation on the accused to testify against himself or to confess guilt;
- (g) the duty to advise the convicted person on judicial and other remedies.

68. The I.L.O. basic human rights conventions contain a number of rights dealing with such matters as forced labor, freedom of association, equality in employment and trade union and workers' rights which are not subject to derogation during an emergency; others permit derogation, but only to the extent strictly necessary to meet the exigencies of the situation.

69. No state, including those that are not parties to the Covenant, may suspend or violate, even in times of public emergency:

- (a) the right to life;
- (b) freedom from torture or cruel, inhuman or degrading treatment or punishment and from medical or scientific experimentation;
- (c) the right not to be held in slavery or involuntary servitude; and,
- (d) the right not to be subjected to retroactive criminal penalties as defined in the Covenant.

Customary international law prohibits in all circumstances the denial of such fundamental rights.

70. Although protections against arbitrary arrest and detention (Art. 9) and the right to a fair and public hearing in the determination of a criminal charge (Art. 14) may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency. Respect for these fundamental rights is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation. In particular:

- (a) all arrests and detention and the place of detention shall be recorded, if possible centrally, and made available to the public without delay;
- (b) no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge;
- (c) no person shall be held in isolation without communication with his family, friend, or lawyer for longer than a few days, e.g., three to seven days;

- (d) where persons are detained without charge the need of their continued detention shall be considered periodically by an independent review tribunal;
- (e) any person charged with an offense shall be entitled to a fair trial by a competent, independent and impartial court established by law;
- (f) civilians shall normally be tried by the ordinary courts; where it is found strictly necessary to establish military tribunals or special courts to try civilians, their competence, independence and impartiality shall be ensured and the need for them reviewed periodically by the competent authority;
- (g) any person charged with a criminal offense shall be entitled to the presumption of innocence and to at least the following rights to ensure a fair trial:
- the right to be informed of the charges promptly, in detail and in a language he understands,
 - the right to have adequate time and facilities to prepare the defense including the right to communicate confidentially with his lawyer,
 - the right to a lawyer of his choice, with free legal assistance if he does not have the means to pay for it,
 - the right to be present at the trial,
 - the right not to be compelled to testify against himself or to make a confession,
 - the right to obtain the attendance and examination of defense witnesses,
 - the right to be tried in public save where the court orders otherwise on grounds of security with adequate safeguards to prevent abuse,
 - the right to appeal to a higher court;
- (h) an adequate record of the proceedings shall be kept in all cases; and,
- (i) no person shall be tried or punished again for an offense for which he has already been convicted or acquitted.

F. Recommendations Concerning the Functions and Duties of the Human Rights Committee and United Nations Bodies

71. In the exercise of its power to study, report, and make general comments on states parties' reports under Article 40 of the Covenant, the Human Rights Committee may and should examine the compliance of states parties with the provisions of Article 4. Likewise it may and should do so when exercising its powers in relevant cases under Article 41 and the Optional Protocol relating, respectively, to interstate and individual communications.

72. In order to determine whether the requirements of Article 4(1) and (2) have been met and for the purpose of supplementing information in states parties' reports, members of the Human Rights Committee, as persons of recognized competence in the field of human rights, may and should have regard to information they consider to be reliable provided by other inter-governmental bodies, non-governmental organizations, and individual communications.

73. The Human Rights Committee should develop a procedure for requesting additional reports under Article 40(1)(b) from states parties which have given notification of derogation under Article 4(3) or which are reasonably believed by the Committee to have imposed emergency measures subject to Article 4 constraints. Such additional reports should relate to questions concerning the emergency insofar as it affects the implementation of the Covenant and should be dealt with by the Committee at the earliest possible date.

74. In order to enable the Human Rights Committee to perform its fact-finding functions more effectively, the committee should develop its procedures for the consideration of communications under the Optional Protocol to permit the hearing of oral submissions and

evidence as well as visits to states parties alleged to be in violation of the Covenant. If necessary, the states parties to the Optional Protocol should consider amending it to this effect.

75. The United Nations Commission on Human Rights should request its Sub-Commission on Prevention of Discrimination and Protection of Minorities to prepare an annual list of states, whether parties to the Covenant or not, that proclaim, maintain, or terminate a public emergency together with:

- (a) in the case of a state party, the proclamation and notification; and,
- (b) in the case of other states, any available and apparently reliable information concerning the proclamation, threat to the life of the nation, derogation measures and their proportionality, non-discrimination, and respect for non-derogable rights.

76. The United Nations Commission on Human Rights and its Sub-Commission should continue to utilize the technique of appointment of special rapporteurs and investigatory and fact-finding bodies in relation to prolonged public emergencies.

* The term "limitations" in these principles includes the term "restrictions" as used in the Covenant.
