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THE PERUVIAN STATE OF CONSTITUTIONAL EMERGENCY IN THE LIGHT OF INTERNATIONAL LAW OF HUMAN RIGHTS: THREE RELEVANT ASPECTS[1]

O ESTADO DE EMERGÊNCIA CONSTITUCIONAL PERUANO À LUZ DO DIREITO INTERNACIONAL DOS DIREITOS HUMANOS: TRÊS ASPECTOS RELEVANTES

Abraham Siles Vallejos[2]

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asiles@pucp.edu.pe

Resumo: Este artigo analisa os princípios do Direito Internacional dos Direitos Humanos (DIDH) aplicáveis ao Peru em Estado de emergência constitucional, focando nos tratados vigentes no país: a Convenção Americana de Direitos Humanos (CADH, 1969) e o Pacto Internacional sobre Direitos Civis e Políticos (PIDCP, 1966), ambos internalizados no ordenamento peruano em 1978. Apesar da recente origem do DIDH (pós-Segunda Guerra), sua relevância é inquestionável, especialmente porque a Constituição peruana incorpora cláusulas de abertura ao direito internacional. O Tribunal Constitucional do Peru reconhece status constitucional a esses tratados, reforçando a identidade entre o sistema interno e o internacional na proteção da dignidade humana. O artigo examina as normas do DIDH sobre estados de emergência (art. 137.1 da Constituição peruana), destacando desafios práticos (violações sistemáticas durante crises) e teóricos (limitações a direitos). O objetivo principal é comparar as regras da CADH e do PIDCP com as disposições constitucionais peruanas, identificando divergências em três aspectos específicos: (i) a evolução das cláusulas de suspensão versus restrição de direitos; (ii) a legitimidade do sujeito que declara a emergência; e (iii) as situações que justificam a exceção e as medidas adotadas. A investigação busca complementar o ordenamento constitucional peruano com as obrigações internacionais, abordando lacunas e contradições entre os sistemas.

Palavras-chave: Direitos Humanos; Estado de emergência constitucional; Sistema Internacional de Direitos Humanos.

Abstract: This article examines the principles of International Human Rights Law (IHRL) relevant to Peru during constitutional states of emergency, focusing on two key treaties in force: the American Convention on Human Rights (ACHR, 1969) and the International Covenant on Civil and Political Rights (ICCPR, 1966), both ratified by Peru in 1978. Despite IHRL's relatively recent emergence (post-World War II), its significance is undeniable, particularly as the Peruvian Constitution incorporates international law through provisions. Peru's Constitutional Court has affirmed the constitutional status of these treaties, emphasizing a shared commitment to human dignity between national and international systems. The study analyzes IHRL regulations on emergencies (Article 137.1 of Peru's Constitution), addressing practical challenges (systemic rights violations during crises) and theoretical dilemmas (the justification for derogable rights). Its primary objective is to compare the ACHR and ICCPR frameworks with Peru's constitutional provisions, identifying discrepancies in three key areas: (i) the evolution of derogation vs. limitation clauses; (ii) the authority empowered to declare emergencies; and (iii) the permissible grounds

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2 Pontificia Universidad Católica del Perú

and measures for crisis response. The article ultimately seeks to harmonize Peru's constitutional emergency regime with its international obligations, addressing gaps and contradictions between the two systems.

Keywords: Human rights; State of constitutional emergency; International System of Human Rights.

1. INTRODUCTION

The purpose of this article is to examine the principles and norms of International Human Rights Law (IHRL) that are relevant to Peru in terms of constitutional emergency states[3].

The work focuses on the two international human rights treaties, of a general nature, which are in force in Peru and which contain regulations on the state power to declare a state of emergency and suspend certain international obligations for the protection of human rights for the duration of the crisis situation.

Such treaties are, on the one hand, the American Convention on Human Rights (ACHR), adopted on November 22, 1969, in force since July 18, 1978; and, on the other hand, the International Covenant on Civil and Political Rights (ICCPR), adopted on December 16, 1966, in force since March 23, 1976. Both international instruments —the first, of an American regional scope, celebrated in the framework of the Organization of American States (OAS); the second, of universal scope, celebrated at the level of the United Nations Organization (UN)— entered into force for Peru on the same day, on July 28, 1978[4].

Although the creation of the IHRL as a "legal and political phenomenon" is relatively recent, since it dates back only to the post-World War II period (Gross; Ní Aoláin, 2006, p. 247), it is not possible to doubt its current importance[5]. From the point of view of positive Constitutional Law, the Peruvian

[3] I thank my colleagues in the Research Group on Constitutional Law and Fundamental Rights (GIDCYDEF) for their comments to improve a preliminary version of this article.

[4] On the date of adoption and entry into force of the ACHR and the ICCPR (Novak; Salmón, 2000, p. 173-233).

[5] Giuseppe de Vergottini (2002, p. 19, my translation) considers that the internationalization of human rights after the end of the Second World War has produced a relevant process of "circularity of constitutional models", since the distinctive values of the liberal and socialist constitutions were embodied in international instruments of human rights approved after the victory of the allied powers over Nazi Germany and the other Axis powers, and this in turn has conditioned the preparation of the new constitutional texts, which are thus influenced by the IHRL. For his part, Antonio Cançado Trindade (2001, p. 271, my translation) observes that the recent transformations in the world, such as those that have followed the fall of the Berlin Wall,

Fundamental Charter contains "opening clauses" towards international law. First, the Fourth of the Final and Transitional Provisions (IV FTP) must be taken into account, in virtue of which the Universal Declaration of Human Rights (UDHR) and the international treaties and agreements on this same matter (human rights), ratified by Peru, are a hermeneutical guideline for the application of the provisions on rights and freedoms contained in the Constitution.

In this sense, the Constitutional Court, in jurisprudence that can be considered already established, has affirmed that the public authorities are obliged to incorporate in the constitutional rights, through an interpretative exercise, the protection granted by international human rights treaties, indicating that there is a "Substantial nuclear identity shared by constitutionalism and the international system for the protection of human rights", which is based on the value of the dignity of the human person[6].

Secondly, the human rights treaties signed by the Peruvian State and in force are part of national law, as stipulated in Article 55 of the Constitution. And its legal status is constitutional, as established by means of interpretation by the Constitutional Court, based on the IV FTP and Articles 55, 3, 57 and 205 of the Charter (Hakansson, 2009, p. 234-235; Salmón, 2014, p. 284-287)[7].

Consequently, both the hermeneutic value of international instruments and the legal nature and constitutional status of human rights treaties make it necessary to determine the scope of the IHRL's regulations with regard to the state of emergency provided for in article 137.1 of the Peruvian Constitution.

To undertake the task, it must be taken into consideration what is indicated by Scott Sheeran, for whom states of emergency are currently "one of the most serious challenges to the implementation of International Human Rights Law (IHRL)" (Sheeran, 2013, p. 491), as well as the views of Criddle and Fox-Decent, for whom "at the heart" of the IHRL "lies a practical challenge intertwined with a theoretical problem", namely, the practical challenge of the massive and systematic violations of human rights that are often occur during

"have generated, at the same time, a new constitutionalism as well as an opening to the internationalization of the protection of human rights".

[6] See STC 2730-2006-PA / TC (Castillo Chirinos case), dated July 21, 2006, paragraph 9.

[7] See STC 0025-2005-PI / TC and 0026-2005-PI / TC (case PROFA 2), dated April 25, 2006, paragraphs 25-34.

emergencies, and the theoretical problem expressed in the question of "in what sense are human rights rights if they are subject to derogation during emergencies" (Criddle; Fox-Decent, 2012, p. 40).

Having stated the above, it can be said that the general objective of this article is to establish in what way and to what extent the supranational human rights order in force for Peru complements the regulations of the Peruvian Constitution regarding the state of emergency. As will be seen in the following pages, in certain cases there are appreciable differences between what is foreseen in the Fundamental Charter and what is enshrined in the ACHR and the ICCPR, which must be addressed in this investigation.

However, the article will focus on three specific issues, which are judged to be of particular importance. They are: (i) a panoramic view of the evolution of the instruments of the IHRL in matters of states of exception, in particular with regard to the difference between clauses of repeal or suspension and clauses restricting human rights; (ii) the subject legitimated for the proclamation of the emergency; and (iii) the situations that enable the declaration/maintenance of the state of exception, as well as the adoption of specific measures aimed at conjuring up crises.

They remain some topics to be developed in a subsequent investigation: the impact of the emergency on human rights, as regards both "non-derogable" rights and rights that may be suspended; and guarantees or constitutional processes during the state of emergency.

2. BRIEF OVERVIEW OF THE EVOLUTION OF THE INSTRUMENTS OF THE IACHR REGARDING STATES OF EXCEPTION

Without any intention of exhaustiveness, it is convenient to make a quick review of the general evolution of the instruments of the IHRL with regard to states of exception. This summary overview will provide elements of the historical context that are necessary to adequately understand not only the evolution of the IHRL in the subject matter of this article, but especially certain influences and normative loans made between the different international protection systems of the human rights.

The same can be said, in particular, of the question concerning the difference between clauses of restriction and clauses of derogation or suspension of rights, a matter of theoretical importance, but also practical, that an even basic idea of the historical perspective helps to better understand, and that should be taken up when studying in a future article the human rights regime during the state of emergency.

As is known, the first human rights instruments approved by the international community at the end of the Second World War were the Declarations of American regional scope and of universal scope. In effect, the American Declaration of the Rights and Duties of Man (ADRDM) was adopted by the IX International American Conference, held in Bogotá (Colombia), on May 2, 1948, and entered into force on that same date; whereas the UDHR was approved by the General Assembly of the United Nations, meeting in Paris (France), on December 1, 1948, the date on which it also began its validity[8].

The truth is that neither the American Declaration nor the Universal Declaration contains provisions that regulate the state of emergency and that contemplate the possibility of repealing or suspending certain obligations of International Law on human rights as a means to face extreme emergencies that threaten the life of the nation or the State.

Both instruments contain only general clauses limiting or restricting rights. Thus, article XXVIII of the ADRDM, whose epigraph reads "Scope of human rights", stipulates that "the rights of each man are limited by the rights of others, by the security of all and by the just demands of general well-being and of democratic development ". In turn, article 29 of the UDHR, together with mentioning the existence of duties of every person towards the community, indicates as the only permissible limitations established by law in order to ensure the rights of others and satisfy "the just demands of morality, public order and general well-being in a democratic society".

After this initial stage, there comes a period in which general human rights treaties are approved, both universal in scope (United Nations system) and regional in scope (European and American systems). The first legally binding instrument is the Convention for the Protection of Human Rights and

[8] On the date of adoption and entry into force of the DADDH and the UDHR (Novak; Salmón, 2000, p. 161, 221).

Fundamental Freedoms or the European Convention on Human Rights (ECHR), which was opened for signature on November 4, 1950 and entered into force on September 3, 1953 (Fitzpatrick, 1994, p. 52, note 6). The European Convention dedicates its article 15 to regulate the "derogation in time of emergency", incorporating for the first time in an instrument of the IHRL a clause of derogation or suspension of human rights facing existential crises that hover over the continuity of the national life or state.

The next international treaty, in chronological order of approval, was the aforementioned ICCPR —adopted, as indicated, in 1966, entered into force ten years later—, belonging to the universal system of the United Nations, which likewise enshrine a regime of derogation or suspension of human rights in situations of extreme crisis (article 4). It should be noted, however, that the drafting process of the Pact occurred in a manner that was partially concurrent with the elaboration of the European Convention, so that some crossings and mutual influences could have taken place. Be that as it may, it must be repaired, as Anna-Lena Svensson-McCarthy does, that during the preparatory work for the ICCPR the discussion on Article 4 was for some time "closely linked to the question of limitations in general" (Svensson Mccarthy, 1998, p. 200).

The third international treaty, in order of approval, was the ACHR, already referred to —approved in 1969, entered into force in 1978, as has been said—, which also includes a clause of suspension of human rights in situations of serious emergency (article 27).

As can be seen, in this second phase of the development of international human rights instruments, which goes from the early year of 1950 to the end of the seventies of the twentieth century, the international community adopts treaties of universal and regional scope (in Europe and the Americas) which, together with their binding nature in terms of International Law, consider insufficient the general clauses that enable the restriction of rights, and stipulate, rather, additional clauses of derogation or suspension of rights in situations of existential crisis.

Despite the evolution recorded in the first two stages referred to in this section —which led from non-binding Declarations that contained only general clauses of restriction of rights (ADRDM and UDHR) to international treaties, of mandatory legal force, which included special provisions on derogation or

suspension of rights in emergencies (ECHR, ICCPR and ACHR)—, since the 1980s until recently, the situation has become more complex because there is no longer a clear and unique evolutionary line.

On the contrary, the African Charter on Human and People's Rights (ACHPR), known as the Banjul Charter —was adopted by the Organization of African Unity on June 27, 1981 and entered into force on October 21, 1986—, does not contemplate the states of exception nor authorizes to repeal or suspend the rights enshrined in the new regional instrument, including only several provisions that allow restrictions of rights with amplitude and enshrining a strong conception of duties (Criddle; Fox-Decent, 2012, p. 46)[9].

Even closer in time, and returning to the scope of old Europe, the Charter of Fundamental Rights of the European Union (CFREU), which was proclaimed by the European Parliament, the Council of the European Union and the European Commission on December 7, 2000, in Nice (France), the state of exception does not regulate either and only establishes general clauses limiting rights (articles 52-54).

Something different happens, however, in the case of the most recent regional instrument of all, namely, the Arab Charter of Human Rights (AChHR). Approved by the League of Arab States on May 22, 2004, it entered into force on March 15, 2008, and regulates the state of exception in article 4.

Therefore, in this third stage of the evolution of the instruments of the IHRL —from the eighties of the last century to date—, we have a remarkable heterogeneity in the IHRL regulations on states of emergency. Both the ACHPR and the CFREU have returned to the suppression of the clauses of derogation or suspension of human rights, to rely again on mere clauses limiting or restricting rights. However, the AChHR, the last regional instrument to be approved and enter into force, dismisses such models and adheres to the tradition established in the ECHR and followed by the ICCPR and the ACHR, which authorizes the most stringent interventions on human rights in cases of states of exception.

[9] For a critique of the "Business as Usual Model" that apparently distinguishes the African Charter, but that in practice admits adaptations through interpretative modalities, see Gross and Ní Aoláin (2006, p. 252-255).

3. THE SUBJECT LEGITIMIZED FOR THE PROBLAMATION OF THE EMERGENCY

In a previous article I have defended that, regarding the proclamation (and maintenance) of the state of emergency, the model assumed by the Peruvian Constitution of 1993 is that of the "auto-investiture" (Siles, 2017, p. 141-144). This means that the body legitimized to declare the existence of an extreme crisis, which eventually merits the assumption of extraordinary powers and the suspension of certain fundamental rights, is the Executive Branch, as article 137 of the current Charter in effect provides when delegating in the President of the Republic, with the agreement of the Council of Ministers, the power to introduce one of the two constitutional exception regimes (state of emergency and state of siege).

It is interesting now, as an extension and complement, to highlight the perspective of the IHRL on this matter. And, as for the competent authority for the proclamation of the emergency, both article 27 of the ACHR and article 4 of the ICCPR refer in general to the "State Party", so that it corresponds to the domestic legal systems of each State —in the first place, to the constitutional texts— to determine which will be the specific body that will receive this legal capacity.

As Claudio Grossman points out, from the perspective of International Law, they have the capacity to represent a State party —for example, under a treaty such as the ACHR— those authorities whose actions may give rise to the international responsibility of that State, that is, the Executive Power, the Legislative Power and the Judicial Power (Grossman, 1984, p. 123). It is clear, then, that the election of the Peruvian constituent is fully compatible with the International Human Rights Law applicable in the country, insofar as it is the executive authority to whom the Fundamental Charter grants this attribution.

More relevant, however, is the role that should be assigned to the other organs of public power, and, in what matters in this section, especially to Parliament, in accordance with the IHRL. And is that they are the principle of separation of powers and the clause of democratic state, enshrined in both applicable treaties (the ACHR and the ICCPR), which determine that the

Legislative Power is called to play a leading role in the establishment of the exceptional regime.

Indeed, even when the declaration of the state of emergency gives rise to a strong concentration of powers in the hands of the Executive, this does not mean that the other powers of the State are annulled and the rule of law and the corresponding principle of legality are suppressed, as well as the protection of the fundamental rights. On the contrary, the real possibility of committing serious violations of human rights during the emergency necessitates the role of counterweight and controller under the other powers of the State, which must operate from the first moment (that is, from the proclamation of the emergency).

Hence, the Inter-American Court of Human Rights (IACtHR), in its very important Advisory Opinion 8, entitled "The Habeas Corpus under Suspension of Guarantees", issued on January 30, 1987, had the opportunity to emphasize that, impeded as is to "ignore the abuses" to which it may give rise, and in fact has given in the hemisphere the application of unjustified exception measures, it is its duty to note that "the suspension of guarantees cannot be separated from the “effective exercise of representative democracy” referred to in Article 3 of the OAS Charter" and that it "lacks all legitimacy when used to attempt against the democratic system [...]" (Corte IDH, 1987, paragraph 20, my translation).

Later, in this same pronouncement, the Inter-American Court establishes the following guiding principles:

> “The guarantees being suspended, some of the legal limits of the action of the public power may be different from those in force under normal conditions, but they should not be considered non-existent and, consequently, it cannot be understood that the government is invested with absolute powers beyond the conditions under which such exceptional legality is authorized. As the Court has already pointed out on another occasion, the principle of legality, democratic institutions and the rule of law are inseparable (see “The expression “laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, paragraph 32)” (Corte IDH, 1987, paragraph 24, my translation).

Moreover, even before the adoption of the ACHR, the Inter-American Commission on Human Rights (IACHR), in an important public statement, issued on April 16, 1968, had highlighted these same values in relation to the protection of human rights in cases of "suspension of constitutional guarantees" or "state of siege". On that occasion, the Inter-American Commission stated that

for the proclamation of emergency to be compatible with the "democratic representative government regime", an indispensable condition is required, among others, that "it does not entail the restriction of the rule of law or the constitutional norms, nor the alteration of the Powers of the State or the operation of the means of control" (CIDH, 1968, p. 46-48, my translation).

And even earlier, in 1966, the Final Report of the Special Rapporteur appointed by the IACHR to study the states of exception in the American hemisphere —which constituted an important precedent in preparing the Draft and the final text of the CADH, helping to make sense of its provisions[10]—, said that, among the various alternatives related to the "competent body" to declare the emergency, that which consisted in a self-investiture of the Executive without any participation of the Parliament should be ruled out (Martins, 1972, p. 140).

Consequently, Dr. Martins considered that it was appropriate for the Executive to decree the suspension, but immediately submitting to the national representation the adopted measures, in such a way that it was the Congress of the Republic that decided whether said measures had to be maintained or if they should cease or be modified (Martins, 1972, p. 142).

Thus, it can be concluded that according to the Inter-American Human Rights System (IAHRS), there is no absolutist regime derived from the extraordinary powers that the Government assumes as a result of the establishment of the state of emergency, but must be respected, even in the situations of extreme crisis, the limits of power set by the principle of legality, the rule of law and democratic institutions, including the means of control, all of which form an inseparable unit (Gross; Ní Aoláin, 2006, p. 292).

It is understood then that, for Claudio Grossman, the scope of article 27 of the ACHR, as regards the extent of the powers conferred to the body in charge of conjuring the emergency and the role of the Legislature as a control body, should be read in harmony with article 29 of the same American Convention, referring to the "norms of interpretation". And this last provision stipulates that none of the clauses of the treaty must be interpreted in the sense

[10] Several authors have pointed out the influence of the Report of Rapporteur Martins in the elaboration of the ACHR, see Norris and Reiton (1980, p. 192-193) and Grossman (1984, p. 123).

of "excluding other rights and guarantees that are inherent to the human being or that derive from the representative democratic form of government" (emphasis added). According to Grossman, "in the “representative democratic forms of government” the legislature is normally given an important role in the declaration of emergency, either because of the need for prior authorization or confirmation of a previous statement by the executive when it has not been possible that the parliament meets to consider such a declaration” (Grossman, 1984, p. 124).

In the Universal System of Human Rights too, the democratic principle and the principle of separation of powers play in favor of an active role of Parliament in the balance and control over the Executive that assumes extraordinary powers before an existential threat. This can be inferred from the requirement, provided only in the ICCPR (not in the ACHR), regarding the need to proclaim the emergency. As is known, the United Nations Pact requires that the extraordinary situation that endangers the life of the nation "has been officially proclaimed" (article 4.1 ICCPR).

That is why, in General Comment N° 29, entitled "Emergency States (Article 4)", the Human Rights Committee, the Covenant control body, has indicated that the proclamation "is essential for the maintenance of the principles of legality and rule of law when they are most needed”[11]. For his part, the United Nations Special Rapporteur on States of Emergency, Leandro Despouy, in his Final Report, issued after twelve years of work, together with mentioning that the proclamation constitutes a measure of publicity, which is "inherent in the Republican form of government" and that tends to "avoid *de facto* states of emergency", considers that it "also points to the appreciation of the competent national authority to make the decision" (Despouy, 1999, p. 26). Later in the same Report, the United Nations Rapporteur deplores the pernicious effects of diminishing until eventually the role of Parliament as a means of controlling extraordinary powers disappears, warning that, in certain cases, deviations from the canonical model enshrined in the ICCPR can lead to "the substitution of the principle of separation of powers for the hierarchy of

[11] See Comité de Derechos Humanos (2001, paragraph 2, my translation).

them, in favor of the Executive and this, in turn, in some cases, is subordinated to military power" (Despouy, 1999, p. 67-69)[12].

As a result of the review made, it can be concluded that the applicable IHRL in Peru regarding states of emergency requires the State to adopt the rules and procedures that are necessary so that, by virtue of the democratic principle and the principle of separation of powers, the Congress of the Republic has a relevant role in the balance and control of the extraordinary powers assumed by the Executive by its own decision when declaring a state of emergency.

This controlling role is very important and must be carried out from the moment of the self-investiture of the President of the Republic. Unfortunately, as I have stated in a previous article, this does not occur in Peru, since neither the Regulations of the Congress nor other regulatory bodies provide for the necessary mechanisms to do so (Siles, 2017, p. 133-134). Nor has the national representation enshrined a practice that, despite the regulatory deficiencies, imposes such control, as in fact it could have happened.

The role of the Constitutional Court, as its turn, has also been modest, although it has stated that under a state of emergency there must be political controls under Parliament, "so that the principles of accountability and political responsibility are met"[13]. Moreover, the supreme interpreter of the Fundamental Charter has argued that the institution of the state of emergency has evolved to achieve respect for the "principle of balance of powers", so that the declaration of the emergency must have a "foundation (political-legal)" that enables a “progressive system of accountability”, which should not be limited to the jurisdictional scope, but include the parliamentary action[14]..

4. THE CAUSES OF THE STATE OF EMERGENCY IN LIGHT OF THE HUMAN RIGHTS TREATIES

[12] The Report of Nicole Questiaux (1982) also noted the existence of characteristics by virtue of which the concept of separation of powers was replaced by the "hierarchy of powers", placing even at the top of the Executive a civil authority that, despite retaining some prerogatives, could be subordinated to military power. See also Fitzpatrick (1994, p. 35).
[13] See STC 017-2003-AI/TC, de 16 de marzo de 2004, paragraph 18.i (my translation); STC 00022-2011-PI/TC, de 8 de julio de 2015, paragraph 351 (my translation).
[14] See STC 00002-2008-AI, de 9 de septiembre de 2009, paragraph 21 (my translation).

In my In the aforementioned article, I developed the argument according to which the applicable IHRL in Peru helps to determine, by means of interpretation, that the grounds provided in Article 137.1 of the Constitution for the declaration of a state of emergency —"case of disturbance of peace or internal order, catastrophe or serious circumstances"— must always be understood as qualified by the requirement to affect "the life of the Nation", also provided for in said constitutional clause (Siles, 2017, p. 145-152).

It is worth saying that I used the ACHR and the ICCPR, as well as its jurisprudential and doctrinal developments, to defend the thesis that, even in situations of internal disturbances, riots, violent action as a result of popular protests, as well as in the event of disasters caused by nature or with human intervention (earthquakes, floods, mudslides, fires, industrial accidents, etcetera), it is necessary to overcome a certain threshold of seriousness —there must be, in reality, an "existential threat"— in order to proclaim the emergency and assume the corresponding extraordinary powers aimed at conjuring it.

On this occasion, I will reinforce the argument by recourse to the preparatory work of the American Convention and the International Covenant, which confirm that the correct interpretation is the one that it is chosen. For this, however, it is necessary to start from the enabling normative causes stipulated in the applicable international treaties. The ACHR provides for "a case of war, a public danger or another emergency that threatens the independence or security of the State Party" (Article 27.1), while the ICCPR contemplates "exceptional situations that endanger the life of the nation" (article 4.1).

The question then arises about how to harmonize these different normative texts. Are there different thresholds of demand between one international treaty and the other? Are there any between both international instruments and the Peruvian Constitution? Even more precisely, it is worth asking whether the ACHR is more permissive than the ICCPR, as well as whether the Peruvian Basic Charter is more permissive than both treaties.

Thomas Buergenthal has drawn attention to the fact that a first assessment of the "wording" of article 27.1 of the ACHR shows it as "substantially different" from the ICCPR, as well as from the ECHR, so that such differences could be understood as indicating that these last two instruments

"envisage emergencies of a greater magnitude" than those contemplated in the American Convention (Buergenthal, 1980-1981, p. 165, note 32)[15].

However, as has already been anticipated, the preparatory work for the Pact of San José and the ICCPR allows to arrive at a different conclusion, in the sense that the differences in the meaning and scope of the regulation are not so broad (O'Donnell, 1984, p. 204), but rather, on the contrary, they converge on the interpretative construction of a threshold of emergency severity that is essentially the same in the ACHR and in the ICCPR, as well as in the ECHR (which, incidentally, served as inspiration for the writers of article 27 of the American Regional Convention)[16].

The first thing that should be noted is that the Report presented by Dr. Martins as part of the activities of the IACHR in 1966, when dealing with "the cause" that enables the emergency, along with rejecting terms of excessive "generality" and "very weak limitations" of the extraordinary powers, considered as adequate the clause "When the security of the State so requires", insofar as it refers only to "serious cases in which the integrity or existence of the three constituent elements of the State: population, territory, legal order" (Martins, 1972, p. 141).

The Rapporteur of the IACHR added that the expression favored by him included "exclusively" the following situations:

(i) A current or imminent danger to the existence of the people as a nation;

(ii) For the survival of the State as a sovereign and independent political entity;

(iii) For the integrity of the territory;

(iv) To comply with the current Political Constitution;

(v) For the exercise of legitimate powers by the constitutional authorities;

(vi) A serious and imminent danger of profound disturbance of social peace, public order, which endangers the internal security of the State (Martins, 1972, p. 141).

[15] See also O'Donnell (1989, p. 398) and Provost (2004, p. 272).
[16] See the speech of the delegate of Brazil, Dr. Carlos Dunshee de Abranches, in the debate held in Committee I of the Inter-American Specialized Conference on Human Rights, which approved the Pact of San José, (OEA, 1969, p. 264). See also O'Donnell (1984, p. 398).

These considerations about the special gravity required for a State to go to the institution of the "suspension of guarantees" or "state of siege" were then adopted specifically by the IACHR when studying the suspension clause (article 19) of the Draft Convention on Human Rights for the Americas wrote by the Inter-American Council of Jurists (IACJ) and the Projects of Uruguay and Chile. In this regard, the IACHR referred to the Martins Report in the following terms:

> "With regard to article 19 of the IACJ Project and the corresponding texts of the Projects of Uruguay and Chile, the Commission may suggest to the Council of the Organization [of the OAS] that it take into consideration the corresponding part of the Second Report entitled “The Protection of Human Rights Faced with the Suspension of Constitutional Guarantees or State of Siege”, prepared by Dr. Daniel Hugo Martins, Member of the Commission” (CIDH, 1966, p. 18).

Later, in the aforementioned Resolution issued by the IACHR in April 1968, the Inter-American Commission confirmed the criterion of the severity necessary to declare the state of emergency, considering that for its compatibility with the governmental regime of "representative democracy" it is essential that the "suspension of guarantees" be adopted "in case of war or other serious public emergency that endangers the life of the Nation or the security of the State" (CIDH, 1968, p. 47, my translation).

As can be seen, the Resolution choose a wording that is similar to the one established in article 15.1 of the ECHR and, without express mention of war, in article 4.1 of the ICCPR, since it refers to one (other) "emergency" public "that endangers, in a serious way", the life of the Nation ", while adding to this the risk for "the security of the State". Beyond the peculiarities and nuances, it is clear that, based on the special studies conducted and the institutional experience with the states of exception in the hemisphere, the IACHR is of the opinion that the threat posed by the emergency must be of a large scale.

This criterion was embodied in the "Proposed Draft American Convention on the Protection of Human Rights", which, on behalf of the OAS Council, was prepared by the IACHR at its Nineteenth Session (Extraordinary), held in July 1968. Indeed, in article 24 of the Draft Bill it was stipulated that "in case of war or other emergency that threatens the independence or security of the State Party", the latter could adopt provisions for the suspension of its human rights obligations (CIDH, 1968, p. 51, my translation).

The text thus followed closely the drafting of the Resolution adopted by the IACHR in April 1968, for which it had to depart from the proposal originally formulated as a Working Document by the Secretariat of the IACHR, which it referred to, rather —taking into account the recent model established by the ICCPR, then already approved, although not yet in force—, "to exceptional situations that endanger the life of the nation and whose existence has been officially proclaimed" (CIDH, 1968, p. 50, my translation).

The text of the Draft Bill prepared by the IACHR was the one used at the San José Conference that adopted the ACHR, to which the representatives gathered in the Costa Rican capital only added the "public danger" assumption. Although this is a very broad and vague expression, the preparatory work shows that the intention of the drafters was to allow the inclusion of cases of natural disasters, without political characteristics, as the delegate of El Salvador, author of the proposal finally accepted by the Plenary of the Conference.

Without doubt, then, the preparatory work of the ACHR show an evolutionary route that confirms that the enabling emergency of the state of emergency and the consequent assumption of extraordinary powers, including the possibility of decreeing the suspension of certain human rights, must be of considerable entity. In the light of these preparatory works, it is clear that the wording finally enshrined in the ACHR cannot be understood as looser or less demanding than the counterpart instruments of European or universal scope.

Moreover, as noted by authors such as Robert Norris and Paula Reiton, Claudio Grossman and Joan Fitzpatrick, the initial proposals of the ICJ and Uruguay and Chile allowed the "suspension of guarantees" under the indefinite formula of "exceptional situations", which, in the projects of the South American countries mentioned, they had to be determined by each State unilaterally (Norris, 1980, p. 191-192; Grossman, 1984, p. 125; Fitzpatrick, 1994, p. 58). The IACHR, however, criticized this plan early on and exercised a strong leadership that leads, through a process not free of ups and downs, to finally enshrine conventional provisions whose threshold of severity has to be judged in all similar to that in force in the ICCPR, which, as has been said, is also similar to European.

An additional element to consider, of undoubted theoretical and practical relevance, is that, as Claudio Grossman has pointed out, the inclusion of the clause on "State security" as a condition that enables the declaration of emergency requires considering it in relation to the various provisions that, by enshrining private rights, admit ordinary restrictions, different from the suspension, which must be applied in situations of constitutional normality, hence the subsidiary or residual nature of the system of derogation or suspension of guarantees (Grossman, 1984, p. 125-126).

Of course, this verification refers us to the theoretical question of the difference between suspension or derogation and restriction of rights, which should be addressed in a future article.

With regard to the preparatory work for the ICCPR, we cannot now undertake a reconstruction of the main milestones of the process. We will only point out that, according to the most authoritative doctrine, the requirement of a threat to the life of the nation, a formula similar in its essential features to that adopted in article 15 of the ECHR, prepared in conjunction with article 4 of the ICCPR, must be understood as referring to events of significant magnitude that consist of the four elements defined by European jurisprudence and that have become widely consensual, to be stated within the scope of the universal system of the United Nations and also in the American system: the "public emergency" “must be (i) present or imminent, (ii) exceptional, (iii) involve the entire population, and (iv) constitute" a threat to the organized life of society" (Criddle, 2012, p. 61)[17].

From that it is said in this section, it can be concluded that the preparatory work of the ACHR and the ICCPR corroborate as a correct interpretation that which requires of the three grounds provided in article 137.1 of the Peruvian Constitution for the declaration of the state of emergency such a seriousness threshold, which requires in each case that the life of the Nation be affected. This is a mandate that is imposed by the applicable IHRL in the

[17] For a reconstruction of the drafting process of Article 4 of the IDCP, see in particular Svensson McCarthy (1998, p. 199-217) and Fitzpatrick (1994, p. 52-54). See also Despouy (1999, p. 34-38). For the reception of European jurisprudence on states of exception, in the American system, see O’Donnell (1984, p. 203-209), O’Donnell (1989, p. 400-403). See also CIDH (2007, p. paragraph 46).

country, in a manner complementary to that enshrined in Peruvian Fundamental Charter.

REFERÊNCIAS

BUERGENTHAL, Thomas. The American and European Conventions on Human Rights: Similarities and Differences. **American University Law Review**, v. 30, 1980-1981, pp. 155-166.

CANÇADO TRINDADE, Antonio. **El Derecho Internacional de los Derechos Humanos en el siglo XXI**. Barcelona/Buenos Aires/México, D.F./Santiago de Chile: Editorial Jurídica de Chile, 2001.

COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS (CIDH). Resolución sobre la Protección de los Derechos Humanos frente a la Suspensión de las Garantías Constitucionales o Estado de Sitio, emitida el 16 de mayo de 1968. In: CIDH. ***Informe sobre la Labor Desarrollada durante el Decimoctavo Período de Sesiones (1-17 de abril de 1968)***, Washington DC, Secretaría General de la OEA, 24 de julio de 1968, pp. 46-48 [documento OEA Ser.L/V/II.19, Doc. 30 (español), párrafo 79].

COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS. **Informe sobre la Labor Desarrollada durante el Decimonoveno Período de Sesiones (Extraordinario) (1-11 de julio de 1968)**, Washington DC, Secretaría General de la OEA, 30 de diciembre de 1966 (documento OEA Ser.L/V/II.19, Doc. 51 (español), de 18 de diciembre de 1968).

COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS. **Informe sobre la Labor Desarrollada durante el Decimocuarto Período de Sesiones (3-21 de octubre de 1966)**, Washington DC, Secretaría General de la OEA, 30 de diciembre de 1966 (documento OEA Ser.L/V/II.15, Doc. 29 (español).

COMITÉ DE DERECHOS HUMANOS. **Observación General N° 29***. Estados de emergencia (artículo 4)*, del 24 de julio de 2001 (documento ONU CCPR/C/21/Rev. 1/Add. 11, del 31 de agosto de 2001).

CORTE INTERAMERICANA DE DERECHOS HUMANOS (Corte IDH). **Opinión Consultiva 8**. El Hábeas Corpus bajo Suspensión de Garantías, del 30 de enero de 1987.

CRIDDLE, Evan; FOX-DECENT, Evan. Human Rights, Emergencies, and the Rule of Law. **Human Rights Quarterly**, v. 34, 2012, pp. 39-87.

DESPOUY, Leandro. **Los derechos humanos y los estados de excepción**. México: IIJ-UNAM, 1999.

FITZPATRICK, Joan. **Human Rights in Crisis**. The International System for Protecting Rights During States of Emergency. Philadelphia: University of Pennsylvania Press, 1994.

GROSS, Oren; NÍ AOLÁIN, Fionnuala. **Law in Times of Crisis**. Emergency Powers in Theory and Practice. Cambridge: Cambridge University Press, 2006.

GROSSMAN, Claudio. Algunas consideraciones sobre el régimen de situaciones de excepción bajo la Convención Americana sobre Derechos Humanos. In: AA.VV. **Derechos Humanos en las Américas. Homenaje a la Memoria de Carlos A. Dunshee de Abranches**. Washington DC: CIDH, 1984, pp. 121-134.

HAKANSSON, Carlos. **Curso de Derecho Constitucional**. Lima: Palestra, 2009.

MARTINS, Daniel Hugo. La Protección de los Derechos Humanos frente a la Suspensión de las Garantías Constitucionales o Estado de Sitio. In: SECRETARÍA GENERAL DE LA OEA. **La Organización de los Estados Americanos y los Derechos Humanos. Actividades de la Comisión Interamericana de Derechos Humanos 1960-1967**. Washington DC, 1972, p. 122-154 (documento OEA/Ser.L/V/II.15 Doc. 12, del 11 de octubre de 1966).

NORRIS, Robert; REITON, Paula. The Suspension of Guarantees: A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the States Parties. **American University Law Review**, v. 30, n. 1, p. 189-223, 1980.

NOVAK, Fabián; SALMÓN, Elizabeth. **Las obligaciones internacionales del Perú en materia de derechos Humanos**. Lima: PUCP, 2000.

O'DONNELL, Daniel. **Protección Internacional de los Derechos Humanos**. 2. ed. Lima: Comisión Andina de Juristas,1989.

O'DONNELL, Daniel. Legitimidad de los estados de excepción, a la luz de los instrumentos de derechos humanos. **Derecho**, Lima, v. 38, p. 165-231, 1984.

PROVOST, René. **International Human Rights and Humanitarian Law**. Cambridge: Cambridge University Press, 2004.

QUESTIAUX, Nicole. **Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency**. ONU, E/CN.4/Sub. 2/1982/15, July 1982.

SALMÓN, Elizabeth. **Curso de Derecho Internacional Público**. Lima: PUCP, 2014.

SECRETARÍA GENERAL DE LA OEA. **Conferencia Especializada Interamericana sobre Derechos Humanos: Actas y Documentos** (7-22 de noviembre de 1969). Washington DC: OEA, s/f.

SHEERAN, Scott. Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics. **Michigan Journal of International Law**, v. 34, n. 3, p. 491-557, 2013.

SILES, Abraham. Problemática constitucional del estado de emergencia en el Perú: algunas cuestiones fundamentales. **Estudios Constitucionales**, a. 15, n. 2, p. 123-166, 2017.

SVENSSON MCCARTHY, Anna-Lena. **The International Law of Human Rights and States of Exception**. The Hague – Boston, London: Martinus Nijhof Publishers, 1998.

VERGOTTINI, Giuseppe. **Las transiciones constitucionales**: desarrollo y crisis del constitucionalismo a finales del siglo XX. Bogotá: Universidad Externado de Colombia, 2002.