

The Valid Derogation from a Fair Trial in States of Emergencies

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Abstract: Fair trial in the states of emergency especially after September 11, 2001 attacks is of a high importance. The goal of this article is to recognize the concept of the states of emergency and the determination of their applicability, the study of the mechanism of deviation from the principles and guarantees of fair trial under the said conditions and the recognition of the principles of deviation of the fair trial. For this purpose, the regional and international documents and the policy of control and legal institutions have been studied. Among, several international documents, the International Covenant on Civil and Political Rights and the protocols attached to the Geneva conventions and among the regional documents of the European convention of human rights has had the highest protection of the fair trial guarantees. The deliberative views of the International Court of Justice and the legal policy of the European court of human rights have allocated a special place for the reinforcement of fair trial in the states of emergency. The Human Rights Commission of The United Nations and the International Committee of the Red Cross have also played a strong supervisory role in this matter.

The most important result of this article is that the minimum rules of fair trial should not be deviated from any states of emergency. On the contrary, it should be reinforced. Valid derogation of other rules of fair trial requires certain procedural and substantial standards.

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1. Introduction

"Litigation is one of the results of mankind's competence for enjoyment" (Mahmoodi, 102, 2006) and it is the first achievement of man's civilization. The international community has been the witness of events that has revealed the importance of fair trial and its importance to everyone in the state of emergency. The importance of the necessity in the modern criminal law especially after the September 11, 2001 attacks has become more flexible and the exact conditions and standards for the limited capability of its use has been taken into consideration. Although recognition of the state of emergency belongs to the governing body and subject to internal laws, the declaration of the state of emergency on the surface follows the international rules and regulations and the domestic, comparative and multi-national laws have been in conformity as far as the urgency of domestic and international armed hostilities is concerned. The comparison of reports from the human rights organization indicates that multiple lawsuits have been brought before the international tribunal, The United Nation's Human Rights Council, Europe's Human Rights Court and United State's

Court of Human Rights about the non-compliance with the fair trial during the state of emergency. Although the principles of non-compliance, have important potentials for the legitimacy of governments' function in none of the declaration of the state of emergency has been fully respected on the surface. Therefore the noncompliance with the fair trial has not been credible in any of those conditions.

Important trials such as the ones against Mohammad Ata, Abdolghane Mozoodi and Motesadegh on February 2004 in Hamburg proves that the domestic courts' procedures during the state of emergency have been conflicting and even after the September 11 attacks, despite the tendencies of governments of the United States, England, India and Germany for co-operation in their domestic and modification of the laws, they did not trust the results of one another's state of emergency. However, the regional and international courts, find it necessary to follow the principles of the international human rights in general and the rules of non-compliance in specific.

By comparing the domestic laws, comparative laws and the multi-national documents, a clear list of

guarantees regarding the fair trial that have to be complied with will be calculated and proven (of course, these aspects include, the assumption of innocence having the right not to testify against oneself and not to incriminate oneself, having been present, public trial, comprehension of the crime and its reason, having the right to have a defense attorney and having access to him, having an interpreter, not being officially detained not having to be prosecuted and tried again and having the right to task for compensation for the lack of justice. Also certain conditions for the justifiable non-compliance with other fair trial guarantees that can be ignored under special circumstance will be proven. (The principles of the state of emergency being exceptional, necessity and appropriateness, lack of inconsistency, lack of discrimination and the principle of giving information). For this purpose, in this article, the standards of the criminal justice system for guaranteeing the fair trial during the state of emergency in 3 parts will be studied.

2. The study of the state of emergency in connection with the fair trial

State of emergency (emergency situation) is an ambiguous and flowing concept for which there is no clear definition or proof. In some documents and conventions for the international human rights which allows governments not to comply with granting people their rights and liberties, we can somewhat get a brief definition of the concept of the state of emergency. The alliance of civil and political law is the first document in which the state of emergency and non-compliance with the recorded obligations has been referred to by governments. In paragraph 1 of article 4, the first treaty explicitly indicates that, "The public state of emergency under which people and the nation's integrity are threatened and this it officially been announced that the governments which are the members of this alliance can take measures not to comply with the said obligations provided that the said solutions will conforming with other obligations of the government will be according to the international laws and the discrimination will not exist exclusively based on race, color, language, religion or the religious or social origin." Therefore, the concept of the state of emergency from the first alliance point of view means the danger of conditions that threatens the existence and life of a nation. According to paragraph 1 of article 15 the European convention of human rights the concept of the state of emergency means "War or other emergency situations that threatens the existence of a nation." Therefore, the European convention of the human rights makes a reference to the alliance between civil rights and politics. In addition to that, according to

the American convention of the human rights in paragraph 1 of article 27, non-compliance with the obligations during the war, public endangerment or other states of emergencies in which the independence or the security of a nation is threatened is justified. However, in the African charter of the human rights and nations, there is no mention of the concept or the definition of the state of emergency and it appears that the written rights and liberties in this charter cannot be violated or misled.

Despite that, governments' abuse of power has always existed and also the undeniable facts about the extraordinary situations or emergencies cannot be ignored. Therefore, there is a necessity for the creation of some kind of a balance between the rights of governments in taking care of the nation's immediacies on the one hand and the rights of individuals especially the right of having fair trial on the other hand (Fazaeli, 81, 2008). According to the international law, the state of emergency can be declared only if there is an exceptional and serious threat such as exertion of threat or threat from abroad or within the country to put the integrity of the government or the territory in jeopardy. Therefore, the definition of the state of emergency means the temporary reaction to such a threat (T and Ashrafi, 2007, 274). The human rights commission also in its general analytical view believes that for sights and measures based on the non-compliance and divergence from obligations of the treaty should have of an exceptional and temporary nature and any chaos or disaster cannot be considered as a general emergency that threatens the integrity of a nation. Anyhow, based on the presented interpretations of the concepts and proofs of the state of the emergency, we can study the proofs of the state of the emergency as follows:

3. International (foreign) confirmation of the state of emergency

In the present discussion, the proofs of the state of emergency which threatens the integrity of a nation from abroad will be discussed. Anyhow, the reasons that have officially been considered as the ones for non-compliance and diversion from the rights and obligations of governments, we can name war force majeure and national disasters. (T.V. Ashrafi, 269, 2007). The human rights commission also has considered armed hostilities as the domestic and international ones. Therefore, we will study and analyze the international proofs of the state of emergency under the two general topics of "International armed hostilities" (The war between one country and other countries or foreign invasion) and "The war against terrorism" of course from the

external dimension and as a result of unclear attacks that are organized against a country.

A. The conditions based on war or international armed hostilities

Generally, international armed hostilities appear when one nation resorts to force against another nation. This situation is true in all the partial or complete military occupation of a nation ever if the occupation comes face to face with the armed resistance. Of course, we should pay attention that merely resorting to armed resistance against individuals and groups will not be enough. Therefore, armed hostility depends on whether the parties in the hostility consider themselves being at war and also how the situation is described (Falak 71, 2008). Based on this, the international tribunal in its verdict Nicaragua's dispute versus the United States of America (2007) and its description of "armed attack" declares that armed attacks are not merely disciplined military operations at the international borders but dispatching armed groups, groups, irregular forces or even mercenaries from any nation.¹

Therefore, although the United Nation's charter has forbidden resorting to threats or force in paragraph 2 of article 4², we have to confess that even after the charter of the United Nations was ratified and the establishment of the United Nations Organization, the international armed hostilities did happen in different parts of the world and thus the rights and the liberties of the subjects of the hostile governments and even the neutral government, involved in the war have been terribly and seriously violated. Today, the international humanitarian rights as a developed and reinforced form of the traditional international rights of the war era (the rights of the war era) includes even those kinds of international armed hostilities that other parties do not consider being a war.

In fact, the international humanitarian rights include all the principles of the international rights that have been complied for dealing with people (including the military and nonmilitary, injured or healthy ones) in the international armed hostilities (Falak, 29, 2008). The fourfold Geneva Convention (1949) and the amended protocols (1977) include many of these international rules and regulations which should come to the attention during the emergency armed

hostilities especially the protection of the victims during the international armed hostilities.

Therefore, the conditions resulting from a war (international armed hostilities) can be the major proofs of the state of emergency when it comes to the fair trial. Despite that, the international rules and regulations of humanitarian rights (such as the principles of human rights) must be carried out under such conditions and this matter indicates the right connection between the principles of human rights and the humanitarian rights as such that both elevate the level of treatment of people and both deal with human rights. We should also maintain that from the pure human rights' point of view, war or any shape of using armed forces can, be itself violate human rights (Bigdeli, 7, 2004). The human rights commission in its number 13 public interpretive opinion maintains that during the armed hostilities (international or not international)

The principles of international humanitarian rights will be capable of being implemented and for the purpose of preventing it from abusing the powers related to the emergency conditions, they should be implemented along with other regulations of the treaty such as article 4 and 5.

B. The outcome of terrorism

Terrorism, as an unfortunate phenomenon, although it is not new, today its legal concept that is being referred to as the war against terrorism can be a new terminology at the international level. Anyway, the use or the application of the word war or combat against terrorism from the legal point of view is not pleasant and the extensive interpretation of this terminology can cause the violation of people's legal rights and freedoms for the pretense the state of emergency. The international Red Cross Commission while carefully strengthening its position against terrorism, gives warnings against the implementation of the international humanitarian rights against conditions that will read to war and call it dangerous and unnecessary (Cross, N.D, 8). On the other hand, although all the countries do not have a comprehensive definition of terrorism, the international law has explicitly forbidden terrorism.³ Therefore, the banning of terrorist activities against individuals knowing the existence of power in the hands of the enemy and also during the hostilities show that the international humanitarian rights will

¹ - I.C.J. Reports 1986, P. 14, Para. 195.

² - Article 4 (Note 2) United Nations Charter: All members in their international relations must refrain from making threats or resorting to force against the territorial integrity or the political independence of another government by any means that are in contradiction with the goals of the United Nation.

³ - Article 33 of the 4th convention in Geneva, article 4 (Note 2) the 2nd attached protocol and article 51 (Note 2) 1st attached protocol have referred to this ban.

become protectors of non-military personnel and their possessions against armed invasions and those that are accused of committing such terrorist acts will most probably be prosecuted by governments provided that granting legal immunities can be implemented (Ibid, 6)

Anyway, as to whether the said state of emergency in the treaty of civil and political rights includes fighting against terrorism too, some believe that the wording in article 4 of the said treaty points out to "the general emergency situation that threatens the existence of a nation and it is difficult to imagine that the situations related to the armed hostilities or terrorism not to include the ordinary meaning of these conditions. In fact, the armed hostilities and the violation resulting from terrorism were specifically discussed in the drafts of the treaty and during the discussions related to article 4 (schmid, 2009, 35) that is especially due to the fact that the subject of fighting against terrorism and its urgent conditions after the September 11, 2001 disasters with the United states of America at its center was followed up. The government of the United States in response to the inter-American commission of human rights over the lack of the legal basis for careful (cautionary) measures and strategies in the case of apprehended ones in Guantanamo Prison argued that it was the principles of humanitarian rights pertinent to the way the apprehended prisoners were being treated and not the principles of human rights. (Ibid, 34). In addition to this, the government of the United States in different instances in the fight against terrorism and its consequences has referred to it neither as one of the instances of implementation of the principles of the humanitarian rights nor as the principles of the human rights.⁴ This government before the human rights commission has declared that after the terrorist attacks of September 11, 2001 has not breached the articles of the treaty because of the state of emergency threatening the existence of a nation. Of course, the fact that the Human Rights Commission has accepted such conditions, at the present time, as in the United States and her allied countries such as England as one of the instances of non-compliance of the treaty, is ambiguous (Schmid, 2009, 33). In contrast, some of the establishments such as the European commission for democracy through the law (known as the Venice commission) have declared that terrorism essentially can not be used as a justification to get out of the framework of the international laws in general and the regime of non-compliance with the treaty in specific.⁵ In the case of

Lawless versus Ireland, "The European tribunal of human rights has emphatically said that the right to enjoy the benefits indicated in articles 5, 6 and 7 of the conventions include all people even if they are terrorists that have adopted hostilities towards the government that is a member of the alliance. In other words, the notoriety of the individual should not deprive him of getting fair trial." (Ashoori et al, 330, 2004). Anyway, although terrorism as one of the international (foreign) proofs of the state of emergency has been studied, this phenomenon can be considered as one of the domestic proofs as well. In the future discussions the domestic proofs of the state of the emergency will be reviewed.

4. The domestic proof of the state of emergency

Generally, the principles of fair trial have been compiled for implementation at the national level. Therefore, the existing domestic conditions in a country are a great importance to fulfill these standards because the existence of inappropriate domestic conditions causes the violation of principles and guarantees of fair trial and as a result they will jeopardize the individual rights and freedoms. Without a doubt, the state of emergency other than the influential foreign factors is possibly as a result of some domestic factors such as the occurrence of threatening events and disasters jeopardizing the national security of a country and or even other natural disasters.

A. The condition of international armed hostilities and domestic armed hostilities (civil war)

As it was stated before, armed hostilities will be divided into international armed hostilities and domestic ones. The Geneva fourfold conventions and the joint protocols, have not explained the armed hostilities and this was done on purpose because there was a hope that this terminology could expand more and will not go under the shadow of legal complications such as the definition of war (Falak, 2008, 72-3). In addition to that, domestic armed hostility includes confrontation between the state current authorities and groups of people who are subject to those authorities and it is done in the framework of the national country and it reaches the influence and the degree of importance of an armed chaos or a "Chaos and domestic tension such as scattered individual objections and other measures having the similar nature can not be considered as domestic armed struggle" (Kitty Shiazeri, 2004, 347). In the domestic armed hostility, both parties are

⁴ -Available at: <http://www.asil.org>.

⁵ - European commission for democracy through law, (Venice commission), Opinion on the protection of Human

Rights Emergency Situation, Adopted at 66th Plenary Session, Venice, 17-18 March 2006, CDL-AD (2006) O15, Para. 30.

required to carry out the least number of basic regulations for the international humanitarian rights that is recorded in the Geneva's fourfold (1949) convention of protection of cultural possession (1954) and the second attached protocol (1977) (Falak, 2008, 79-80). Therefore, in the document and treaties related to the humanitarian rights domestic armed hostilities were of importance and even the second attached protocol was allocated to the protection of nonmilitary people and possessions in the domestic armed hostilities and the rules in all these hostilities should be respected. According to article 3 shared with the 4 Geneva treaty in 1949 and article 1 of the 2nd attached protocol - even in armed hostilities with the domestic specification, some of the minimum guarantees should be respected (Tamooshat, 2007, 440). All any rate, the occurrence of an armed hostility at the domestic level of a country which is the subject of a more limited and different legal regime compared to the international hostility, can be one of the examples of the state of emergency according which fair trial and its principles and guarantees have been subject to damage and the legitimate rights and freedoms of the citizens of a government under the current conditions will be subject to violation or infraction.

B. The situation of threat against the national security of a country

National security was one of the commonly used concepts in the international relations of countries and one of their most important goals. This concept the same as many of the social science concepts is ambiguous, multi-meaning and flowing. Therefore, there are many differences of views about its meaning and applicability. For example, the National Defense College in Canada describes the term "National security as follows": National security means maintaining an acceptable method of living for all the people according to the legitimate needs and wishes of them. This matter includes getting rid of attacks or military pressure, domestic coup d'état and the destruction of social, economical and political values which are necessary for the quality of life (Mondale 2000, 52-3). Based on the definition of some of the political science experts and international relations, a nation can have security only if it can maintain it even by preventing from having a war (Boozan, 1999, 31).

On the other hand, the national security has always been referred to as one of the basic limitations in the field of human's basic rights and freedoms in the documents of international treaties related to the human rights. The ambiguity of the concept of the national security has caused a lot of governments to consider any threat against their national security as

new conditions and consequently calling for the state of emergency. The Human Rights Committee, in this direction and in one of its final observations, while it has shown concerns over the detentions in the country of Sudan because of national security reasons, it has recommended that the concept of "National security" should be defined by the law and the police and security authorities are required to render the reasons for detention in writing and this matter should be done overtly and should be appeasable to the court (TAHA and Ashrafi, 2007, 50). In addition to this, the Human Rights Committee has always emphasized over the least amount of interpretation of all the limitations especially the national security one. Of course, we should pay attention that the domestic applicability of the state of emergency is not limited to the domestic armed hostilities and threat against the national security of a country and instances such as the occurrence of disasters and natural calamities can also cause a state of emergency in a country. Based on this, the severity of the above mentioned situation should be as such that in order to maintain public order and eliminate the threats against the integrity of the government, resorting to the terminology of emergency is inevitable. (Momtaz and Taraz Koohi, 1999, 96). Still, taking advantage of the concession "emergency" and deviation of obligations by governments needs conditions and standards that any government should pay attention to. In the future discussion, compliance or non-compliance of the fair trial in the state of emergency and also its standards and criteria will be reviewed.

5. The conditions of non-compliance with the fair trial

The conditions of non-compliance have been mentioned in many documents of human rights. In fact, these instances have been the safeguard of the national sovereignty right in dealing with the public state of emergency and based on them, the member nations are allowed to some how carry out the non-compliance and the deviation from some of the requirements and obligations predicted in the treaty. The said conditions with the goal of preventing the emergency measures and stopping governments from using the term of state of emergency is to justify the lack of implementation of the human rights. Article 4 of the international treaty of the civil and political rights determines as to when and how a government is allowed not to comply with the rules and regulations of the treaty. The provisions for non-compliance and deviation from the rules and regulations of the treaty can be divided into two sections of what they look on the surface and what they really are. Therefore, at first the conditions the way they look and then they way they really are as

far as non-compliance and deviation from the standards of the treaty will be examined.

A. The superficial conditions of the non-compliance of the fair trial

We can discuss the conditions of non-compliance with the fair trial by referring to the contents of article 4 of the treaty of civil and political rights (notes 1 and 3) and also article 15 of the European convention of human rights and article 27 of the American Convention of human rights. Among the conditions and criteria mentioned above, some are related to the criteria of the nature of judiciousness and adopted measures by a certain government and in contrast, some of these conditions deal with the rule and figure of the non-compliance and deviation from the obligations. In here, the *** conditions of non-compliance with the fair trial will be discussed.

- Formal declaration

In note 1 of article 4 of the treaty it is declared that, "during the general state of emergency when people's lives and the integrity of a nation is threatened and it is officially declared the member governments...". Therefore, the general state of emergency should officially be declared. Some believe that this declaration should in the legal framework and especially the country's constitution be taken into consideration. Of course, not all the laws of the national constitution have their own emergency condition. For example, in the constitution of the United States nothing has been mentioned about this. However, in other constitutions, such as the German one, detailed criteria have been mentioned about it. (Schmid, 2008, 25-6). At any rate, what is important in article 4 of the treaty is that a country that declares to be in a state of emergency, should, indeed, be in that state. Of course, it should be paid attention that in the European and American conventions of the human rights, nothing has been mentioned about the official declaration of the state of emergency.

- Provisions of legal procedure

In addition to the official declaration as one of the nominal conditions, especial criteria for legal procedure during the state of emergency such as declaration of the state of emergency, the declaration of the non-compliance cases and their reasons can be considered as other nominal conditions in the field of non-compliance with the fair legal procedures. These conditions have been taken into consideration in article 4 of the treaty of the civil and political rights and the European and American convention of human rights. At any rate, these treaties and documents allow governments non-compliance with the fair legal procedures under completely defined conditions and by merely respecting these conditions, governments can justify deviation or non-compliance.

The conditions of legal procedures are regarded as follows:

-Declaration of the state of emergency: Based on not 3 in article 4 of the first treaty, any member country that intends to use the right of non-compliance according to the regulations of the treaty, should promptly inform other member states through the secretary general of the United Nations of its intention. There are 2 separate obligations mentioned: 1) The member country of the treaty should inform the member states of the treaty of civil and political rights and 2) is obligated to render information about the state of the emergency (Ibid, 31). The human rights commission, in this direction, believes that when the member states resort to adopting non-compliance based on the article 4; consider themselves obligated to the mechanism of giving news. Therefore, a member state should immediately inform other member states through the Secretary General of the United Nations.⁶

However, if a government fails to do so, can we assume that the non-compliance with the rules of the treaty is totally invalid. The human rights commission has announced in its public interpretive view that the responsibility of the watchdog committee over the rights and the function of the member country of the convention in following the article 4 of the treaty is not related to giving information or the lack of it (Ibid). Some believe that policy of the human rights commission in this matter is not very clear and this way of interpretation of the committee in its public interpretive view has, certainly, been the result of giving information by a few of the member states of the treaty (Joseph, 2006, 96). In other words, the committee does not have any belief in the lack of credibility in the non-compliance of the rules of the treaty because of not respecting such a nominal guarantee.

Also, in the regional documents, there has been a reference to the observation of (sending information) regarding the state of emergency. In the European convention, of support for the basic or essential rights and liberties it has been established that the member state should merely inform the Secretary General of the European council of its intentions and the decisions it has adopted (note 3 of article 15 of the convention). Therefore, based on this convention, a member state for breaching the contents of the convention does not need to inform other member states and merely informing the Secretary General of the European council will be enough. In contrast the American convention of the human rights has required that the government asking for non-compliance with the regulations of the convention

⁶ - HRC General Comment No. 29, Para. 17.

must inform the other member states the Secretary General of the Organization of American States⁷ of the decision and the adopted foresights.

-Declaration of non-compliance cases:

Every government while asking for non-compliance with the contents of the treaty including asking for the right of fair trial and principles or guarantees related to it should explicitly mention the rules for non-compliance in the announcement of the state of emergency. Note 3 of article 4 of the treaty of civil and political rights and note 3 of article 27 of the American convention of the Human Rights explicitly requires that the member government requesting the non-compliance with the criteria (standards) of the treaty should inform other member states its reasons for non-compliance as required by the treaty. Of course, such rules and regulations have not been observed in the European convention of the Human Rights. Therefore, declaration of the reason of non-compliance is important which can lead to unpleasant results because if a government informs (the convention) of some criteria and not of others, that country would not, later on, would not benefit from non-compliance with other standards especially if the condition of informing (the convention) will not be a separate condition for non-compliance. In that case, it will not be fair that a country that has not informed to practically be allowed not to comply with all the criteria of the treaty (Schmid, 2008, 35-6). The Human Rights Commission has also explicitly emphasized on announcing the rules of non-compliance with the rules of political and civil rights treaty.⁸

- Reasons of relinquishment

The human rights commission has stated in its public interpretive theory that in addition to announcing the cases of relinquishment and non-compliance with the criteria of the treaty including the right to a fair trial, the government asking for having the right of non-compliance must explicitly announce the reasons for the relinquishment. The committee believes that such a report is not only important for the committee's performance of its duty especially the assessment of whether the adopted measurements by the member state is precisely (completely) in conformity with the circumstances (necessities) of the situation, but also this matter gives the member states the permission (opportunity) to have control over following and obeying the rules.

Also the committee based on the information and reports that it has received in the past, emphasize that the report by the member states should guarantee the complete information about the measures and

foresights that have been adopted and a clear explanation of their reasons (adopted measures) and also their own complete legal documents that have been attached (Ibid).

The announcement of the reason for relinquishment (non-compliance) of the criteria of a treaty at the time of non-compliance of a country is the instances that have clearly been mentioned in the trans-national legal documents. Note 3 of article 4 of the treaty requires that the country that wants to use the right mentioned in not one of article 4 should inform other governments of its relinquishment (non-compliance) through the Secretary General. In addition to this, it has been mentioned in the European and American conventions of the human rights that countries taking advantage of the right of non-compliance must inform the Secretary General of their reasons for relinquishment and non-compliance. (Of course, the word Secretary General is a reference to the S.G. of the European Council in the European Convention of the human rights and the Secretary General of the Organization of the American Countries in the American convention of the human rights.)

-Reasonable period: In general, the non-compliance of governments with regulations and standards of a treaty can never have a permanent aspect because this matter is in contradiction with the goals and will be the subject of all the treaties and human rights documents. This matter in the human rights documents in which the right of non-compliance and relinquishment has been mentioned, has seriously been emphasized on. The international treaty of civil and political rights in relation to this matter has required that the government that has implemented the right of non-compliance with the regulations of the treaty should inform the other member states the termination of the measures and adopted foresights by the means of a new announcement the same way that it did with the beginning of these measures and foresights. Article 15 of the European convention of the human rights has also declared that "also when such foresights are stopped and the regulations of this convention are once again carried out; it (the member state engaged in practicing non-compliance) should inform the secretary general of the European council." In this direction, Note 1 of article twenty seven of the American convention of the human rights has explicitly announced that a government can merely because of the existence of the state of emergency and exceptional conditions take advantage of the regular right of non-compliance of the convention. Also in Note 3 of the mentioned article it has been required that the government that does not comply should inform the other member states of the desired date for the termination of the related non-

⁷ -(O.A.S)

⁸ - HRC General Comment, Op. Cit.

compliance through the Secretary General of the Organization of American Countries.

Therefore, from the contents of these documents and treaties, we can conclude that the non-compliance (relinquishment) of the rules of these conventions should be a decent period of time and requiring such conditions. In note 1 of article 4 of the treaty it is emphasized that the adopted measures should be as such that they are precisely needed and require such conditions. The Human Rights Committee in relation to this matter, in its general interpretive opinion believes that measures based on the non-compliance of the rules of the treaty should have the exceptional and temporary nature.

Every country that wants to deviate from the rules and regulations of legal and trans-national documents than can be deviated from should observe the procedural guarantees and conditions. Some believe that the said conditions should be perceived as an independent standard in ignoring the treaty. Therefore, whenever a government refuses to carry them out, the observing organizations, repeatedly, hold that country responsible for the treaty and the members of the international community should officially respect these conditions (Schmid, 2008, 36). In the next discussion, the substantial conditions related to the deviation of the rules and regulations of the treaty for the states of emergency will be discussed.

B. The Analysis of the Substantial Conditions

In the previous discussion, the procedural conditions and guarantees for deviation from some of the fair trial rules were discussed. In the present discussion, conditions and guarantees that are related to the essence of the state of emergency and also measures and foresights that were adopted will be reviewed. Without a doubt, the existence of the essential conditions relatively has more importance and substance compared to the procedural conditions and conveying information. The most important of these substantial conditions that have been mentioned in the legal trans-national documents is as follows:

- The existence of the state of emergency (the real exceptionality):

By reviewing the trans-national legal documents such as the treaty of civil and political rights or the regional convention in which the right of deviation and relinquishment of the obligations and the contents of the treaty that have been considered for the member states, we realize that the first and the most important condition of deviation from the obligations of the treaty and taking advantage of this legal right for the governments, is the existence the state of emergency or in other words the exceptionality of the conditions as such that in Note 1 of article 27 of the American Convention of the

Human Rights has explicitly has put emphasis on "the exceptionality of the situations". The Human Rights Commission also, as it was stated believes that this condition should essentially be exceptional and temporary. Without a doubt, the situations of deviation are, merely, justifiable in exceptional cases. Of course, there are some evidence that indicate this important and essential condition has often times not been respected and the emergency measures have often been indeed a common method for delaying the principles of the Human Rights (Marks, 1995, 86). However, some believe that ordinary meaning of "the public state of emergency that threatens the national support" in the treaty of the civil and political rights is understood as such that deviation can merely take place in situations that are extremely critical and this criteria can be discussed under the conditions of an armed struggle or terrorism situation if it is happening in a very dangerous condition for the targeted countries (Schmid, 2008, 23-4)

- The principle of necessary and conformity

Measures based on the deviation or relinquishment should, in particular, be necessary and in conformity with the said conditions in the treaty of the civil and political rights. So that the limitations that are not very severe will be assumed as threats (Ibid, 26)

In other words, any deviation of the fair legal justice by the government should precisely meet those conditions. The principle of conformity requires that deviation from the obligations taking into consideration what is needed for the emphasis on the state of emergency that threatens people's lives with stipulation and it also requires that the necessity for deviation should, in certain periods, be studied by the judicial and executive powers (T.V. Ashrafi, 2007, 272).

Also, in the legal trans-national documents, while deviation or relinquishment of the rules and the regulations are allowed, there is an emphasis on the necessity and the conformity of the measures and adopted foresights with the public state of emergency. Note 1 of article 4 of the civil and political treaty has taken advantage of the phrase, "up to the point that it is precisely necessary for the situation" and Note 1 of article 15 of the European convention has required that every obligated member can merely adopt foresights for the purpose of deviation from obligations based on this convention up to the point that the circumstances of the mentioned situation require. "The Human Rights Commission, also, in its common interpretive view believes that", an essential requirement for any measures concerning deviation from the contents of the treaty based on Note 1 of article 4 that such foresights precisely because of the circumstances of the state of (emergency) to have been required. This requirement depends on the time

period, the extent of geographical inclusion and the main territory of the state of emergency and any measures depend on the deviation because of emergency and conditions derived from it⁹." Also the committee explicitly points out to the "principle of conformity in this field.

- The principle of consistency

The principle of the lack of contradiction, in general, requires that relinquishment (deviation) from the criterion and the contents of the treaties and international conventions should be in accordance with all the other obligations of that country according to the international laws including the customary international laws, international humanitarian laws and the treaties of human rights not to be breathable (Schmid, 2008, 27). The said principle was suggested the first time in 1950 by the American representation. The said delegation suggested a replacement for Note 2 for deviation article 4 of the political and civil rights treaty based on which, some rights should not be complied with during the state of emergency. The purpose of this suggestion of the United States was to replace the principle of the fact that some of the rules and regulations of Human Rights can not be complied with and such criterion explicitly declares that no deviation of the treaty by any country should be done based on the international law and or in accordance with an international treaty. In order to clarify the transparency of this criterion, the representation delegation of the United States offered a suggestion to recognize which one of the criteria related to the human rights in the state of emergency should not be breached and should be referred to the war rights. Basically, the said delegation of representatives based on the principle of the lack of contradiction was against providing any list of cases that in violation of fair trial and considered it to be completely unnecessary (Oraa, 1992, 191-2).

At any rate, the principle of the lack of contradiction as one of the substantial conditions for the violation of the rights of fair trial in the legal trans-national documents has been into consideration. In Note 1 of article 4 of the political and civil rights of the treaty for the adoption of foresights and measures based on violation, the conditions of conformity with other obligations of the country that is in violation has been determined based on the international laws. Such a condition in the European condition of the human rights (Note 1, article 27) has explicitly be mentioned. The considerable point in this relation is that the human rights commission in its common interpretive opinion has declared that the said committee does not have the duty to assess the behavior of governments

based on other sources of international law. This committee states that the eligible country (the country asking for breach or non-compliance) should, considering all the other international obligation decide whether the treaty allows the member state not to comply with the special regulations and criteria of the treaty¹⁰. Still, some believe that the principle of lack of contradiction can be an essential and pivotal tool for the recognition of cases that are not can be heard.

- The Lack of Discrimination

The criteria and regulations of legal trans-national documents about the deviation from some essential liberties and rights and also rights related to the fair trial are always requiring governments to stop discrimination based on race, color, language, religion, etc. Note 1 of article 4 of the treaty of civil and political rights and Note 1 of article 27 of the American convention of human rights explicitly states that emergency measures and foresights should not bear any discrimination based on race, language, religion or the social or religious origins.

The non-discrimination act or principle should be assumed as a supplementary to the principle of equality in the enjoyment of rights and liberties¹¹. However, in the area of the lack of discrimination in the states of emergency, some believe that for as long as other provisions of article 4 of the treaty of civil and political are carried out, discrimination based on political opinion or the national origin will not be banned in emergencies (Nowak, 1993, 86). Of course, we can perhaps agree with this idea to a certain degree, but at any rate, government, are required to destroy any discrimination regarding the implementation the right of deviation from the rules and the standards of fair trial.

Despite that, we should pay attention that in the interpretation of the criteria related to the deviation from the right to a fair trial, there should not be an interpretation that will be a guarantee for creating a right for any government, group or individual based on which, in order to weaken any of the recognized rights and liberties that have been recognized in the documents of conventions for the protection of the human rights or limiting them more than what has

¹⁰ - HRC General Comment No. 29, Para. 10.

¹¹ - The principle of equality and the enjoyment of Respectability and rights in article 1 of the Human Rights charter, Note 1, article 2 of the political and civil law treaty, article 1 (Note 1) American Convention of the Human Rights and article 2 of the African charter of the Human Rights has been mentioned.

⁹ - HRC General Comment No. 29, Para. 4.

been predicted in the documents and treaties, no action will be taken.¹²

In spite of this, the standards of deviation from a fair trial and the conditions of deviation from the rights related to the fair trial have not exclusively been mentioned in the trans-national law documents and the human rights treaty, but it can be referred to these standards in the international legal verdicts and policies.

6. Legal Policies and International Control over Deviation from Fair Trial

Along with compiling treaties and trans-national documents of human rights, international legal or controlling institutions in the documents and international treaties have been anticipated to supervise the claims and complaints resulting from the breaching of obligations and requirements of legal, trans-national documents and also the international common law and also control over the performance of these documents at the national level by the member states. Therefore, the current discussion is allocated to studying the legal procedures and control over these legal institutions and supervision over the execution of the standards of deviation from the rights of the fair trial.

A. The analysis of legal procedures of international institutions

In general, the current legal institutions in the international arena which are responsible for the hearing the lawsuits (legal proceedings) and or complaints (criminal procedures) can be divided from the wide view and the qualification inclusion for hearing the cases that will be divided into legal institutions with international jurisdiction (common) and the legal institutions or regional jurisdiction.

-Legal Authority with the International Jurisdiction

In this section, the legal procedure of the International Court of justice and the international criminal court including the international criminal court (ICC) and the special Ad Hoc Tribunals of the old Yugoslavia and Rowanda or mixed such as the special court of Sierra Leon or special court of Cambodia and special branches of Eastern Taymoor will be reviewed.

-Legal Procedures of the International Court of Law (Advisory opinions)

The International Court of Justice (ICJ) as the main legal institution of the United Nations¹³ in its verdicts

¹² - Article 5 (Note 1) of the political and civil rights treaty, article 26 of the American Convention of the Human Rights and also article 17 of the European Convention of supporting human rights and political liberties contain such regulations.

and advisory opinions which is the most important source of international legal procedures hears legal disputes.¹⁴ The court in its two advisory opinions in 1996 and 2004 discussed the standards of deviation from fair trial specially if there were the states of emergency.

The International Court of Justice in its advisory view regarding the legality of threat or the use of unclear weapons which was discussed in 1996 at the request of the World Health Organization (WHO) has explicitly rejected the theory that human rights is merely good only in peacetime.¹⁵ In this advisory view, the foundations of the court's decision making are based on a few principles. Firstly, the rules and the regulations of human rights during armed hostilities should also be respected. Secondly, the only way that some of the special or specific standards can be ignored is if a country deviates from them properly and these conditions have been included in article 4 of the treaty. The said rights in article 4 (Note 2) can not be deviated from.

In addition to that, the International Court of Justice in its "advisory view in connection with the legal ramification regarding the wall surrounding the occupied Palestine emphasizes on its belief regarding the previous advisory view (advisory view regarding the legitimacy of threat or the use of atomic weapons).¹⁶

Despite the fact that the court believed that the human rights documents on a territory outside the borderers of a country are applicable, it clearly affirmed its result and accomplishment in the advisory opinion of the unclear weapons.¹⁷ The court in this view repeats that the protection or support of human rights treaties about armed conflicts can not be stopped unless it is done through carrying out the standards that are not breathable and was mentioned in article 4 of the International Covenant on Civil and Political Rights.¹⁸

- International Criminal Courts

In the charter and procedures of international military courts of Nuremburg and Tokyo regarding the fair trial and its principles and guarantees, there are a lot of doubts and discussions. However, in article 20 and 21 of the international criminal court of justice in a

¹³ - Article 92 of the United Nations charter

¹⁴ - Article 36 of the Constitution of the International Supreme Court

¹⁵ - Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, Para 24, P.226.

¹⁶ - Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, P.136.

¹⁷ - Advisory Opinion (Wall Opinion), ICJ Reports 2004, Para 105

¹⁸ - Ibid, Para 106.

country used to be called Yugoslavia, more attention was paid to the right fair trial. The international criminal court allocated for Rwanda was similar to the criminal court of a country used to be called Yugoslavia. The articles 64-67 of the chart of the International criminal court (ICC) indicate that special attention has been given to respecting the international standards of fair trial. In the constitution of the new generation of international criminal courts (mixed criminal courts) such as the special court of Sierra Leon and the extraordinary branches of Cambodia's and East Timor courts, there is an emphasis on the rights of the accused and guarantees for hearing. In spite of that, deviation from the fair trial is in contradiction with the philosophy of establishing international criminal courts and such a mechanism does not exist in the constitution of these courts (Stapleton, 1999, 578-9). As an exception, the subject of protecting victims and the witnesses has been considered to be supposable.

In this direction, "The branches of Criminal Courts especially Yugoslavia and Rwanda have always declared that the witnesses and their families being fearful of their lives can limit the rights of the accused to an open hearing and public's should, of course, be limited to what is needed and should not hurt the right of the accused for a fair trial. Certainly, these measures can not mean suspension (breaching) of a fair trial (Fazaeli, 2008, 91-94).

Summarily, we should say that the international criminal courts and on the top of them the International Supreme Court can not become the subject of a "state of emergency" which, in general, threatens the integrity of a nation and this matter is in contradiction with the supplementary jurisdiction of the supreme court and on the other hand, there is no mechanism for appealing the decisions of the supreme court in regards to deviation from the fair trial (Stapleton, 1999, 605). Therefore, in the international criminal courts, the national interest were not much taken into consideration but, exceptionally, it was the private interests of the parties involved in the dispute and the interests of justice that were important.

- Legal Authorities with Regional Jurisdiction

In the analysis of regional legal procedures of legal authorities on the subject of standards of deviation from the fair trial, we will merely study the supreme court procedures of the European Supreme Court and the American Supreme Court of human rights and the legal procedures of the African Supreme Court of human rights will not be discussed because in the African charter of human rights, there is not any deviation and divergence of the rights in question in the charter in regards to the states of emergency is not anticipated and, naturally, it is not possible to rely

on the legal procedures of the African Supreme Court regarding the deviation of fair trial.

-The European Supreme Court of Human Rights

The European Supreme Court of human rights in the case of *Lawless versus Ireland*¹⁹ in regards to the explanation of the states of emergency believes that emergency should be real and about to happen any moment and it should affect the entire nation and threaten people's lives and cause some other limitations. In this case, the way the European Supreme Court has stipulated, it is as if, in the eyes of the Supreme Court, generally the diagnosis of the national government in the determination of the emergency situation is more suitable.²⁰ Furthermore, the Supreme Court has emphasized in one of its verdicts that the international institutions involved in the analysis of legalization of the states of emergency should conduct this study and research according to the prevailing conditions at the time of proceeding and its next application.²¹

Basically, the Supreme Court believes that article 15 (Note 1) of the European convention of the human rights has granted a bigger scope²² of its assessment and decision making to the domestic authorities.²³

The European Supreme Court of human rights has always emphasized on the principle of the lack of contradiction as a basic natural condition in making decisions based on deviation from the rights and obligations of the convention. According to the European convention of the human rights, the deviation from the fair trial should not be in

¹⁹ - Case of "Lawless V. Ireland", Judgment of 1 July 1961 (series A, No.3), Para. 107. available at:

<http://www.echr.coe.int>

²⁰ - In this case, the plaintiff who was a citizen of Ireland and a member of the Irish Republic Army (IRA) claimed that article 5 (the right to freedom), article 6 (the ban precedent to the criminal law) and article 7 (the right to fair hearing) of the European Convention of Human Rights had been violated by the government of Ireland and he had spent 5 moths without hearing in detention. The government, the defendant responded that the detention had not been a violation of the convention and even it was the state of emergency in Ireland Valid derogation from the obligations based on the convention. The court, at the meantime that refers to some examples of violations by the government of Ireland, it justifies the natural and common meaning of the state of emergency that effects the entire population and creates a threat to the organized living of a country.

²¹ - Case of Iran V. the United Kingdom, 18th January 1978, Para. 214.

²² -Margin of Appreciation

²³ - Case of Ireland V. the United Kingdom, Op Cit. Para. 207, also: Brannigan and McBride V. United Kingdom, 26 May 1993, A 258-b, Para.43.

contradiction with the obligations of a country based on the international law.²⁴

The European Supreme Court of human rights rendered a verdict that an individual from one of the autonomous states in Georgia who was illegally detained was against articles 5 and 6 of the convention and the emergency situation cannot justify it. However, although the situation was emergency and considered to be of an exceptional matter, the Supreme Court asked the respondent government to free the plaintiff as soon as it can be guaranteed (Zamani, et al, 2007, 129). This legal verdict of the Supreme Court can be an appropriate guideline for the European governments that were the members of the European convention of human rights in the field of deviation from the obligations. In many of the cases, the Human Rights Commission of the United Nations which has a worldwide jurisdiction in this field, in order to justify its verdicts and opinions made a reference to the legal procedures of the European Supreme Court of human rights.

- The Inter-American Court of Human Rights

The inter-American Court of Human Rights which has the jurisdiction in matters related to the execution and the implementation of obligations by the member states of the American Convention of Human Rights (Stapleton, 1994, 605) because of being new and the limitation of its jurisdiction has not demonstrated much of any legal procedures.²⁵ In spite of that, the said court in some of its annual reports²⁶ and also in its interpretive opinions²⁷ in regards to the subject of deviation and divergence of the member states from the obligations of the convention in the states of emergency has paid attention. Also, this court insists on the confirmation of adopted measures and

²⁴ - Case of Brannigan and McBrid V. U.K., OP. Cit. Para. 67-73.

²⁵ - The organization, the duties, the jurisdiction and the procedures of the American Court of Human Rights in cases 52-73 of the American Convention of the Human Rights have been mentioned and based on that, the court has the jurisdiction of hearing cases coming from the governments which are the members of the American Commission of American Human Rights. It also issues verdicts regarding the compensation of damages to the plaintiff and paying the cost.

²⁶ - The American Court of Human Rights based on article 65 of the American of Human Rights is required to give a report of its activities in the previous year to the organization of American States (O.A.S.).

²⁷ -Based on article 64 of the American Convention of the Human Rights, the American Court of the request of the member states of the Organization of American States (O.A.S.) and also the said organizations in the 10th principle of the organization's chart of the said organization will issue interpretive opinions.

foresights in emergency states by an impartial and independent legal institution. Of course, while the court offers interpretations of the standards for deviation from the obligations in this opinion, has insisted that some of the rights of fair trial can not be deviated from²⁸.

Also, the court in an advisory opinion regarding the legal guarantees in the states of emergency²⁹ believes that effective legal regulations to support the rights that cannot be deviated from in the states of emergency should be paid attention to and should be implemented within the framework of the principle and the guarantees that have been established in article 8 of the American convention of human rights (the article related to the right of fair trial) to be implemented and carried out.³⁰ This court has announced in another interpretive opinion that "the issue of stopping the detention of an accused without cause and longer than 24 hours and his quick transfer to the court room and the legal authorities and similar actions cannot be suspended in the emergency situations.(Mehrpoor, 2004, 224)

B. the Procedures of International supervisory Institution

Some of the international supervisory institutions that have an important and special place in the system of international human rights are European Commission of Human Rights (ECHR)³¹, American Commission of Human Rights and also International Committee of Red Cross (of course, in the humanitarian section). Among these (institutions) without a doubt, the Human Rights Committee and its policy is more important.

-Human Rights Committee

The Human Rights Committee which is established based on (articles 28-45) of the International Covenant on Civil and Political Rights is responsible

²⁸ - "Habeas Corpus in Emergency Situations", Inter-American Court of Human Rights, Advisory Opinion, OC-8/87, 30 January 1987.

²⁹ - "Judicial Guarantees in States of Emergency"

³⁰ - Inter-American Court of Human Rights, Advisory Opinion, OC-9/87, October 1987, OAS/Ser. L/V/III/19. doc13. 1988.

³¹ - The European Commission of Human Rights which is established 19 of the initial text of the European Convention of Human Rights and has been active next to the European Court of Human Rights based on protocol No. 11 attached on the European Convention of Human Rights about renewal of the supervision mechanism prescribed in the convention was deleted from the European Convention on May 11, 1994 and the European Court of Human Rights adopted all the duties of the commission. Despite that, the said commission during the time of being active, was able to have a positive impact.

for maintaining and supervising over the execution of its contents by the member states. The committee, in its common interpretive views has offered different interpretations and guidance about the deviation from fair trial in the states of emergencies.³² In addition, the Human Rights Committee has studied the principle of conformity in deviation from the obligations in some cases including the report of the government of Columbia (since most of the information asked for was regarding the expansion of military jurisdiction) the report of the government of EL Salvador (that deviation from the basic rights of the fair trial seems to be unnecessary) and also the report of Uruguay (which the committee had learned that the measures and foresights adopted against specific groups were repressing and out of conformity with threat, (Schmid, 2008, 23). Although in this direction, the committee has offered not much guidance regarding the number of emergencies and crises in its verdicts and opinions, yet it has emphasized on the need of governments on being more cautious in their decision making as far as the common state of emergency at the absence of armed hostilities (either domestic or international) (Stapleton, 1999, 519-3)

The Human Rights Committee has announced that "if the member states of the treaty in the common emergency conditions violate the said common fair proceedings in article 14 of the treaty in the way it was required in article 4 of the treaty, they should guarantee that such cases of deviation have not gone beyond the scope of the state of emergency and also, other conditions of Note 1 of article 14 have been observed. Of course, it should be not that recently the Human Rights Committee knowing that the rules and regulations of fair trial recorded in the treaty of political and civil rights can not be deviated from, states that governments do not have the right to detain, arrest or setting people free willfully and they also do not have the right of stipulation in regards to the right of fair trial and its principles and guarantees (T.V. Ashrafi, 2007, 271).

- The European Commission of Human Rights

The European Commission of Human Rights has officially identified the (objective) aspect of human rights (Pradel and Corstner, 2007, 19). This commission in one of the well-known cases versus Greece³³ concluded that such a condition does not

³² - HRC General Comment No.13: Article 14 (Administration of Justice), 1984; and also: General Comment No.29: Article 4 (Derogations During a state of emergency)

³³ - Greek Case, European Commission on Human Rights, Year Book of Eur. Conv. On H. R. 12, 1969, Para. 165.

justify deviation from fair trial and other rights and liberties.³⁴

The government of Greece because of the conditions that were created had declared martial law and when the case was being reviewed at the commission, a few countries objected to this declaration. The commission reached the conclusion that the reasons for the breach of convention were not justified as the announced public emergency situation did not have the specific requirement for deviation. According to the commission's opinion, instable political conditions and tension mixed with the increasing communist activities and public disorder can not create a public state of emergency.

The European Commission of Human Rights has been cautious to determine and recognize the public state of emergency as the principle condition of deviation from the rights and obligations of convention. This commission has even announced explicitly in some of its verdicts such as the case of McBride versus England its opinion regarding the state of emergency³⁵.

- The American Commission of Human Rights

American Commission (the same as the American supreme court of human rights) does not have much connection with the states of emergency and deviation from the obligations of the convention in said conditions. In spite of that, this commission in a case versus Nicaragua has explicitly emphasized on the principle of the lack of contradiction as one of the substantial and essential conditions of deviation in the states of emergency.

In the said case, the question was whether the mandatory settlement of 8500 of the inhabitants of Miskitos in 5 camps outside of their homeland was a legal action in deviation from the right of settlement stated in the American Convention of Human Rights (article twenty two) or not. However, that is if it does not contradict with other obligations of the government of Nicaragua in accordance with the international laws and the right of commuting and settlement immediately after the state of emergency is rendered to the said natives (Schmid, 2008, 28).

³⁴ -The said case was as follows: In 1967 a military power in Greece replaced the legitimate government in this country and declared martial law. It suspended many of the articles in the Constitution and took control of government. In this process, the military power put many leaders of the opposition group in jail. Also, at the same time in Greece the state of emergency was declared and it was claimed that this situation gave the new government, the authority to deviate from respecting some specific rights.

³⁵ - Casa of Brannigan and McBride V. United Kingdom, OP. Cit., Para. 45.

7. Conclusion

The reaction to the September 11, 2001 attacks has once again brought up the deviation from fair trial during the state of emergency. According to two advisory opinions of the international court except for the function of mechanism in deviation that have been mentioned in some international human rights documents, fair trial during the continuous armed hostilities. The conditions of deviation recorded in the documents of human rights allow a country to defend its nation against threats towards its national existence. At the meanwhile these conditions determine how much legal authorities can temporarily reduce human rights.

The provision of deviation from the treaty and also the regional documents of human rights determine that if deviation from other obligations of the country based on the international rights are in contradiction, they are not credible. The form and content of mechanism in deviation or relinquishment is an inseparable section of the legal foundation in the state of emergency and it is always preferable if the countries are convinced that they are in a situation that deviation from the criterion is an appropriate substitute for the lack of care and disrespecting the law.

The principle of the lack of contradiction determines which aspects of the fair trial criterion can not be deviated from. If a country claims that it is in the state of emergency, but does not announce the armed conflict, it should, at least, implement the applicable guarantees in both kinds of armed conflict. Some aspects of fair trial that are common between the legal systems in connection with international armed hostilities and domestic armed conflicts should in all kinds of the states of emergency even those that are of less importance and about to enter into legal armed conflict be implemented. Any deviation from these aspects is in conflict with the traditional rights and therefore such deviation is not justified. By gathering the rights recorded or mentioned in article 15 of the first attached protocol and article six of the second protocol attached to the Geneva Convention, a list of fair trial guarantees will be gained that should be executed in all situations and there should be no legal impasse where these regulations can not be executed.

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[27] HRC General Comment No. 29, Para. 17.

[28] HRC General Comment No.13: Article 14(Administration of Justice) , 1984; and also : General Comment No.29: : Article 4(Derogations During a state of emergency)

[29] HRC General Comment No.29, Para. 10.

[30] HRC General Comment No.29, Para. 4.

[31] <http://www.asil.org>.

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