

## YEMEN'S "WAR ON TERROR": A LEGAL PERSPECTIVE

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### ABSTRACT

The article deals with the impact of the "war on terror" as a global trend, focusing on the particular case of Yemen. This case warrants interest not only because it has been relatively neglected by western observers in recent years, but also because it illustrates the outcome volatility of the "war on terror" strategy in a less controversial setting than those of Iraq and Afghanistan. After a brief review of the present political situation in Yemen, the paper analyzes the legality of the actions conducted by Yemen's government under the "war on terror" leitmotif in the light of domestic and international human rights law.

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*Key words:* Yemen, Public Emergency, War on Terror, Human Rights.

**GUERRA CONTRA EL TERRORISMO EN YEMEN:  
PERSPECTIVA LEGAL**

**RESUMEN**

*El artículo analiza el impacto de la guerra contra el terrorismo como tendencia global, concentrándose en el caso específico de Yemen. Este caso merece atención no sólo por la relativa falta de interés por parte de analistas occidentales de la que ha sido objeto en estos últimos años sino también por su capacidad ilustrativa de los riesgos que implica la estrategia de guerra contra el terrorismo, todo esto en un contexto menos polémico que el de Irak o el de Afganistán. Luego de un breve sobrevuelo de la situación política actual en Yemen, el artículo analiza la legalidad de la acción emprendida por el gobierno bajo la bandera de la guerra contra el terrorismo con respecto al marco interno e internacional relativo a la protección de derechos humanos.*

*Palabras clave:* Yemen, situaciones excepcionales, guerra contra el terrorismo, derechos humanos.

## SUMMARY

### Introduction

1. Yemen's socio-political context
  - 1.1. Yemen in recent history
  - 1.2. A delicate triangular relationship
2. The framework governing human rights derogations
  - 2.1. The international human rights regime
  - 2.2. The legal status of the applicable regime
  - 2.3. The ordinary regime *vs.* the exceptional regime
  - 2.4. Legal conditions for derogation
3. The legality of Yemen's "war on terror"
  - 3.1. Human rights and terrorism in Yemen
  - 3.2. Anti-terrorism measures and human rights abuses
  - 3.3. The legality of Yemen's "war on terror"

### Concluding remarks

### Bibliography

## INTRODUCTION

The world appears to have changed after the September 11 events. It seems now widely accepted both by governments and a large number of their citizens that national security should take the priority over other considerations, even at the expense of human rights. The relationship between these two terms is thus set as some sort of trade-off, meaning that security is only achievable through human rights limitation. The question is, however, how to account for the security of those who see their human rights violated. As the Secretary General of Amnesty International (AI), Ms. IRENE KHAN, noted in the foreword of AI's 2002 Annual Report:

“We must turn the debate about security and human rights on its head – human rights are not an obstacle to security and prosperity, they are the key to achieving these goals. Human security comes only with human rights and the rule of law”<sup>1</sup>.

It is, indeed, not clear to what extent national security may legitimize such governmental actions as arbitrary detention, mass deportation, denial of free and fair trial, restrictions on freedoms of expression and assembly as well as on religious freedom, and many others. Too often, such limitations are made instrumental by the elites in power to strengthen their domestic political position. This is certainly not a new phenomenon. However, there are many reasons why the “war on terror” should not be regarded as merely another illustration of the state of emergency doctrine.

First of all, its massive character makes the war on terror a worldwide trend with worldwide impact. In other words, if national security overrides any other value or goal, not only human rights but more generally international peace and security may be at risk. This danger is now particularly notorious if we consider the Iraq issue. A second reason comes from the fact that, as stated by IRENE KHAN:

“...it (is) not autocratic regimes but established democracies that took the lead in introducing draconian laws to restrict civil liberties in the name of public security”<sup>2</sup>.

From a political point of view, the defense of liberal values by western democracies is therefore seriously undermined. But, what is perhaps the most alarming of all, and this is our third reason, is the lack of reaction from people. Restrictive measures adopted by States seem to benefit from a large popular acceptance, either in the form of support or in that of tolerance. Captive of fear, the public opinion of most involved countries find it difficult to realize the

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1 Amnesty International, *Amnesty International Report 2002*, POL 10/001/2002, p. 2.

2 *Ibid.*, p. 1.

implications of such measures for civil liberties. And when they do realize them, the reaction is often directed against what is seen as foreign intervention in domestic affairs.

More generally, the war on terror raises a deeper question, namely that of the relationship between rules and exceptions. Is it possible or desirable to establish rules that are meant to be applicable in exceptional situations? In the human rights field, this fundamental question has been answered in the affirmative. Indeed, many human rights treaties expressly provide for the maintenance of certain core rights in any situation<sup>3</sup>. This core, which is rooted both in treaty and in international customary law, includes, among others, the right to life, the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, the prohibition of imprisonment for contractual debts, the *nullum crimen nulla pena sine lege* principles, the right to recognition as a person before the law, the right to freedom of thought, conscience and religion and some elements of the right to a fair trial<sup>4</sup>. If in the past this core had been mainly challenged by *de facto* practices in many countries, it is now being almost openly violated by *de iure* domestic instruments. Very often, it is the enlargement of the notion of terrorism introduced in criminal legislation as well as the easier conditions for detention (with the ensuing consequences in terms of ill-treatment) that are at stake. Beyond the core rights, many other freedoms such as those of expression and assembly have been restricted for the sake of security. Bluntly stated, the war on terror has left considerable room for human rights abuses.

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3 See for example: art. 3 common to the four 1949 Geneva conventions (which can be seen, after all, as a provision granting a minimal protection of the human being in case of armed conflicts); art. 4.2 of the International Covenant on Civil and Political Rights; art. 15.2 of the European Convention on Human Rights; art. 27 of the American Convention on Human Rights; art. 4.c. of the Arab Charter of Human Rights.

4 For a detailed analysis of the human rights core see: Human Rights Committee, *General Comment 29, States of Emergency (art. 4)*, 24 July 2001, UN Doc. CCPR/C/21/Rev. 1/Add.11; MEYER-BISCH, V.P. (ed.), *Le noyau intangible des droits de l'homme*, Universitaires, Fribourg, 1991.

This broad picture provides the general context within which we intend to analyze the particular case of Yemen. This case deserves interest for a number of reasons. First, it has been widely neglected by western observers, especially in recent years. Indeed, most of the studies on Yemen focus on the civil war and its consequences, but do not cover the present situation. Second, this case is interesting in that it illustrates a triangular pattern, involving Yemen's ruling elite, the U.S. government and traditional tribal powers, that can be observed in other countries as well and that may become recurrent in the years to come. Third, the fact that such a triangular interaction may result in very different outcomes, what we could call its "outcome volatility", is an important factor to consider in appraising the desirability of the current war on terror strategy. If we now turn to the legal perspective, this means that any attempt to provide a legal analysis of the Yemeni war on terror must pay particular attention to the political and social reality of Yemen. For this reason, the first part of this study will focus on the historical and political background necessary to have a better understanding of what will follow. The second part will concentrate on the main issues raised by the action of Yemen's government with regard to international human rights law. As we will try to show, in the case of Yemen, the war on terror constitutes a dangerous double-edge sword rather than a useful "carte blanche", as many western observers have claimed. While giving President SALEH the possibility to further assert his rule on the country, it also represents a heavy political burden capable of undermining the social and political basis of his regime.

## 1. YEMEN'S SOCIO-POLITICAL CONTEXT<sup>5</sup>

### 1.1. YEMEN IN RECENT HISTORY

The Republic of Yemen was proclaimed on 22 May 1990 unifying the two longtime antagonist States occupying the territory, namely the Yemen Arab Republic (YAR) on the North and the People's Democratic Republic of Yemen (PDRY) on the South. The project of unification dates back to the immediate aftermath of the 1972 war between the two Yemen. However, it was not seriously envisaged until the beginning of the 1980s, eventually leading to the adoption of a common Constitution (first published in December 1988) and then to the proclamation of the Republic (confirmed by popular referendum in May 1991). The merger soon appeared detrimental to the southern political leaders, who abandoned the government in 1993. The political deadlock persisted, however, despite some attempts of international mediation, until the break-off of the civil war in May 1994, following the secession of the former Southern Yemen. After a short war, President ALI ABDULLAH SALEH was able to re-unify Yemen, this time excluding the southern socialists from government. The composition of the new government is particularly relevant for our purpose.

Indeed, unlike its Arab neighbors, the Yemeni government has tried to integrate rather than suppress its Islamist components. Two major reasons are often advanced to explain this approach. The first

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5 For further reading on this subject see: CHELHOD, J., *L'Arabie du Sud. Histoire et civilisation*, Maisonneuve et Larose, Paris, 1984-1985; DRESCH, P., *Tribes, Government and History in Yemen*, Oxford University Press, Oxford, 1989; AL-SUWAIDI, J. (ed.), *The Yemeni war of 1994: Causes and Consequences*, Saqi Books, London, 1995; JOFFE, E.G. et al. (eds.), *Yemen Today: Crisis and Solutions*, Caravel Press, London, 1995; THORAVAL, Y. (ed.), *Le Yémen et la mer rouge*, L'Harmattan, Paris, 1995; KOSTINER, J., *Yemen: The Tortuous Quest for Unity, 1990-94*, Royal Institute for International Affairs, London, 1996; LEVEAU, R., MERMIER, F., STEINBACH, U. (eds.), *Le Yémen contemporain*, Karthala, Paris, 1999.

one refers to the 1994 civil war<sup>6</sup> in which SALEH received the support of various Islamist factions, and especially of those who had fought the anti-soviet war in Afghanistan. Whereas virtually all other Arab States outlawed in one way or another their *moujihadins*, Yemen welcomed them back and used them for the *jihad* against the southern socialists. The second reason concerns a more general feature of the Yemeni society that seems to attain stability only through the interplay of complex overlapping social forces among which tribal and Islamic identities have a major role. Thus, social stability could be in danger if this complex equilibrium is broken by the repressive action of the government. These two reasons could help explain why SALEH gave as many as nine ministerial posts to the Yemeni Islah Party (YIP)<sup>7</sup> and why the Islamic movements still have, despite the subsequent increasing tension between them and SALEH's party, the General People's Congress (GPC), an important role in social and political stability.

An interesting illustration of this complex interaction can be found in the recent constitutional history of the Republic. The original Constitution of 1990 provided in its article 3 that: "Islamic Law is the principal source of legislation"<sup>8</sup>. This phrase, which was the result of a compromise between the religious northern Yemen and the more secular southern republic, was highly criticized by the Muslim Brotherhood, one of the components of Islah. This

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6 The integration of Islamists in the key moments of Yemen's history dates back to at least the 1940s. As FRANÇOIS BURGAT notes: "*Cette proximité (entre les islamistes et le régime) ne peut être bien comprise sans revenir sur l'histoire politique du Yémen dans la deuxième moitié du vingtième siècle. Depuis le début des années 1940, et la lutte révolutionnaire contre l'immobilisme de l'imamat zaydite, les islamistes ont été associés à des moments clefs de l'histoire de la République et ont ainsi acquis des créances historiques importantes sur le régime du président ALI ABDALLAH SALEH*", cf. BURGAT, F., Perplexité à Sana'a in *Monde-arabe-Maghreb-Machrek*, 174, Oct.-Dec. 2001, p. 67.

7 *Tajammu' yamani lil-Islah*, founded in September 1990.

8 1990 Constitution of the Republic of Yemen, official translation by Dr. AHMED NOMAN K. AL-MADHAGI, <http://www.al-bab.com/yemen/gov/off2.htm>

movement believed that *Shari'a* (Islamic) law should be enshrined in the Constitution of the unified Republic not as the principal but rather as the sole and unique source of legislation. It therefore advocated a boycott of the constitutional referendum that, as it turned out, did not prevent the draft from being adopted. However, after the end of the 1994 civil war, President SALEH decided to amend the Constitution introducing, in addition to some provisions aimed at strengthening his position, a new article 3, which runs as follows: "Islamic Shari'a is the source of all legislation"<sup>9</sup>. This was a clear concession to the Islamist groups who had helped him in the war against the left.

It is nevertheless true that tension between the YIP and GPC has increased considerably in these last years. Already in 1995, the YIP had marked its opposition to the economic reforms recommended by the World Bank as well as criticized regime's officials for attending a meeting in Jordan, to which Israeli representatives were also invited. This trend became more notorious throughout 1996 and 1997, for example when Islah's deputies withdrew from the parliament thus boycotting the vote for the 1997 budget. In spite of this trend, one should not underestimate YIP's political involvement during these years. Indeed, although the legislative elections of April 1997 resulted in a reduction of the parliamentary share of Islah (from 62 seats in 1993 to 53), its leader, the Sheikh ABDULLAH BIN HUSSAIN AL-AHMAR, was unanimously re-elected as Speaker of the House of Representatives. Thus, despite the fact that recent political developments seem to show increasing tension between the regime and Islamist social components, these latter still play a major role in Yemen politics.

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9 1990 Constitution of the Republic of Yemen, as amended in September 1994, <http://www.al-bab.com/yemen/gov/con94.htm>. See also the commentary of the Constitution by Brian Whitaker, <http://www.al-bab.com/yemen/gov/bwcon.htm>

## 1.2. A DELICATE TRIANGULAR RELATIONSHIP

We have already referred to the triangular relationship among SALEH's regime, tribesfolk and Islamists, and the U.S. government. Political observers have advanced two major interpretations of this relationship. First, it has been said that Yemen's government is torn apart between two antagonist sides, namely Islamists and the US, and that its action is aimed above all at formal, as opposed to substantial, satisfaction of U.S. antiterrorist demands. Thus, in order to keep American troops outside of Yemen's territory, with the sole exception of some military advisers and FBI officials, the Yemeni government would be playing the cooperative card in pursuing Islamists accused of terrorism. This cooperation would be further motivated by the experience of the Gulf war, when Yemen's condemnation of the attacks translated into political and economic retaliation, leaving the country in very difficult condition. The second major interpretation of Yemen's crackdown on terrorism suggests that SALEH is using the war on terror to eliminate Islamists as he had done with socialists earlier in the 1990s. As a matter of fact, these two major interpretations need not to be mutually exclusive. It is all a matter of degree. Whereas SALEH may be tempted to use American antiterrorist support to reinforce his political position within the country, especially by enhancing his control over a number of Islamic groups that have been causing domestic trouble and unrest in the last years, he seems to know very well how far he can go. The question is therefore whether the U.S. government is aware of these limits as well, and if yes, how far is it ready to go<sup>10</sup>.

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10 AS noted by ALI AL-SARARI, Head of Media Department, Yemen Socialist Party: "Since the September 11 incidents, the US demands from Yemen have accelerated and sometimes have been unreasonable. The fragile structure of the state as well as the sophisticated social structure made it impossible for the Yemeni government to carry out these demands as this entails some problems at the national level", cf. Yemen after a year of September 11 in *Yemen Times*, issue 37 - September 9 thru September 15, 2002, vol XI.

Let us first concentrate on the opportunities and risks of the war on terror from SALEH's perspective. The main argument is, as we have just noted, that SALEH is using the international antiterrorist wave to reduce tribal and Islamist power<sup>11</sup>. Thus stated, the argument appears to be quite persuasive, but also very general. What if SALEH's repressive action was somewhat being covertly endorsed by major tribe and Islamist leaders? It should not be forgotten that immediately after the September 11 events, SALEH rushed to a barrack in the outskirts of Sana'a to conclude a "moderation pact"<sup>12</sup> with those major tribal and Islamic forces likely to react violently against the U.S. and its allies. The hypothesis of a power readjustment strategy within tribes, to the benefit of its moderate wing may not be implausible<sup>13</sup>. Indeed, it is hard to think that SALEH would have dared to openly oppose tribes and Islamists on the sole basis of temporary political support from the U.S. government. Nobody in the Arab world ignores that American support comes only as a by-product of American interests and disappears when interests shift away. Assessing the real motivations of SALEH's increasing antiterrorism action is therefore a tricky exercise. In any case, one should not underestimate the power, both social and political, of tribal and Islamist elites. This is widely acknowledged by most observers of Yemen, where, as some say: "... a combination of Islam and tribalism

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11 "Après s'être appuyé sur les islamistes pour briser la rébellion des sudistes en 1994, il (SALEH) tentait depuis de marginaliser un courant profondément intégré à toutes les institutions du pays", cf. SHIHAB, S., Depuis un an, le Yémen intensifie sa guerre antiterroriste in *Le Monde*, 8 octobre 2002.

12 The expression belongs to BURGAT, F., *loc. cit.*, p. 68.

13 For example, shortly after the September 11 events, SALEH implemented a strong control, and then closed down Al-Imane University, directed by the leader of Islah's radical wing, the Sheikh ABDELMAJID AL-ZANDANI, and known for having been attended by suicidal Islamist activists. It would not be, by the way, politically unwise, for the Sheikh ABDULLAH BIN HUSSAIN AL-AHMAR, to adopt a moderate middle ground between, on the one hand, tribesfolk and Islamists, and, on the other hand, American demands, at least until the storm is over. Any eventual western State-building strategy would need the support of deeply rooted social leader, such as AL-AHMAR, to take part in it.

explains everything”<sup>14</sup>. What appears as a paradox to the eyes of western observers is the role played in Yemen politics by the Sheikh AL-AHMAR, the main leader of the opposition<sup>15</sup>. This man happens to be simultaneously the President of the main Islamist party, Islah, the leader of the stronger tribal confederation, the HASHID, and the constantly re-elected President of the Yemeni Parliament. In other words, he is a major variable of both the government and the tribal and Islamist sides of the political equation. As a matter of fact, the Sheikh has been in Yemen’s politics for a long time, largely before the arrival of SALEH to the scene. Many political observers consider that SALEH would not be able to stay in power if he was at war with the Sheikh. For our purpose, this means that there are strong limits for SALEH’s repression. Besides, this is not an absent argument in SALEH’s talks with Western powers<sup>16</sup>. How far he can go in this repressive line is another question, which depends heavily on the extent of western support. This leads us to consider our second question, namely the relationship between the Yemeni government and the U.S.

According to the website of the Yemeni embassy at Washington, President SALEH made “an important visit” to the U.S. at the end of November 2001. Although SALEH had already made “a historical visit” to the US in April 2000, the situation is now quite different from the one at that time. Indeed, American troops have been taking position at Djibouti, a small country located right in front of the

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14 Cf. CARAPICO, Sh., *Civil Society in Yemen: The Political Economy of Activism in Modern Arabia*, Cambridge University Press, Cambridge, 1998, p. 201. Many other authors adopt roughly the same stance: DRESCH, P., *loc. cit.*; SAIF, A.A.K., *A Legislature in Transition: The Parliament of the Republic of Yemen. 1990-99*, PhD. Dissertation, University of Exeter, 2000; KOSTINER, J., *loc. cit.*

15 Cf. BURGAT, F., *loc. cit.*, p. 67.

16 “*Le prix de la satisfaction des exigences américaines “brûle” en effet “la main du chef de l’Etat”. Celui-ci a tenu à le faire comprendre à plusieurs de ses interlocuteurs étrangers. Il l’a sans doute redit à ses hôtes à Washington (le 26 novembre 2001) et à Paris (le 30). La rue, si elle est restée paisible, semble moins que jamais convaincue par la lecture sécuritaire de la crise*”, cf. *Ibid.*, p. 69.

Yemeni coast, since September 2001. In addition, by the end of 2001 a number of American special forces came to Yemen with the aim of training local troops in antiterrorist techniques. In February 2002, these forces were joined by FBI officers in charge of developing the sharing of information between Yemen and the U.S. More recently, American "help" has become a bit more rude. Indeed, on the 3rd November 2002, a CIA aircraft fired a missile at a car in north-western Yemen, killing six people believed to have very close links with al-Qaeda. At the same moment, the American chain ABC suggested that Washington was preparing a covert armed operation in North Yemen, where some tribes are believed to host al-Qaeda members. Admittedly, this was very negatively perceived by the Yemeni population as well as by Islah deputies in the Parliament. As to the government, its position is becoming more and more delicate. In this respect, the missile strikes on November 3 have revealed to be particularly difficult to manage. Until now, this technique had only been used in Afghanistan, but not in the Arab world and in complete violation of Yemen's sovereignty. SALEH's eventual answer has been to claim that the U.S. acted with his permission, which in the best of cases would mean to acknowledge American military intervention within Yemen's territory. The question then becomes how useful may the U.S. support turn out to be in a situation where social forces are increasingly opposed to such policy. In other words, Yemen's forced participation in the war on terror may reveal to be too sharp a sword to be managed by SALEH without cutting himself.

These brief historical and political elements are important for our legal analysis for at least two reasons. First, they allow for a better general understanding of the context within which human rights abuses unfold. Second, they are indispensable for the concrete interpretation of the legal measures adopted by Yemen in the years following the September 11 events.

## 2. THE FRAMEWORK GOVERNING HUMAN RIGHTS DEROGATIONS<sup>17</sup>

### 2.1. THE INTERNATIONAL HUMAN RIGHTS REGIME

We have already noted that international human rights law can be approached at two levels. The first one concerns individual rights in ordinary circumstances, as opposed to exceptional situations. The second level refers to those exceptional situations when States may, on the basis of their duty to protect their populations from violent criminal acts, decide to suspend some of the individual rights domestically and internationally recognized. The distinction between these two levels is crucial for the legal analysis of antiterrorist measures. An important illustration of such distinction is given by article 4.1 of the *International Covenant on Civil and Political Rights* (ICCPR), which runs as follows:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin”.

From a strictly legal point of view there are at least four important points to be extracted from this provision.

First of all, as a part of the ICCPR, article 4 reflects an international understanding on human rights derogations. Indeed, not only has the ICCPR been widely ratified by States, including the Republic of

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17 For a very short though useful presentation of this question see: Amnesty International, *Rights at risk, Amnesty International's concerns regarding security legislation and law enforcement measures*, ACT 30/001/2002. In this section we will use this report as a guide to the main international instruments relevant for our topic.

Yemen<sup>18</sup>, but it also represents one of the two components<sup>19</sup>, and certainly the main one, of what is commonly referred to as the *International Bill of Human Rights*. Second, the term *derogation* must, in the terminology of the ICCPR, be carefully distinguished from the terms *restriction* and *limitation*. Whereas, the original purpose of the admissibility of restrictions and limitations, as well as that of reservations, was to render international human rights standards adaptable to the particular social and political conditions of member States, derogations under article 4 go beyond what is admissible as a *restriction* or a *limitation*, and refer to those encroachments on individual rights that, in the absence of exceptional circumstances, constitute a violation of the Covenant. Third, the exceptional situations where the standard rights may be derogated are strictly identified as times "... of public emergency which threatens the life of the nation...", all other situations being covered by standard obligations. Fourth, even in cases of public emergency, derogations are subject to stringent conditions, namely the official declaration of the state of emergency, the obligation to inform other members through the intermediary of the UN Secretary-General of the provisions concerned by the derogations and the reasons of such action, the necessity and proportionality of the measures taken, their compatibility with other international law obligations and, finally, the prohibition of discrimination. Moreover, and this is of paramount importance, even under such conditions, no derogation is admissible with respect to certain core human rights identified in article 4.2:

"No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."

The rights concerned by this provision include the right to life<sup>20</sup>, the prohibition of torture or other cruel, inhuman or degrading

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18 Date of accession to the ICCPR: February 9th 1987; Date of entry into force: May 9th 1987.

19 The other being the International Covenant on Economic, Social and Cultural Rights.

20 Art. 6 ICCPR.

treatment or punishment<sup>21</sup>, the prohibition of slavery and servitude<sup>22</sup>, the prohibition of imprisonment for contractual debts<sup>23</sup>, the *nullum crimen nulla pena sine lege* principle<sup>24</sup>, the right to recognition as a person before the law<sup>25</sup> and the right to freedom of thought, conscience and religion<sup>26</sup>. Furthermore, there are other obligations based on customary law that, according the Human Rights Committee, belong to the human rights core and are excluded from derogation<sup>27</sup>.

These four points suggest, from a more general perspective, that whatever the exceptionality of antiterrorist measures, there are strict limits applicable to any encroachment on human rights. Whether these limits stem from treaty-law, such as the ICCPR, from international customary law, or from both, antiterrorist legislation cannot override a number of minimal standards expressly applicable in times of emergency. In the following sections we will present these limits in more detail in order to set the general framework governing the legality of Yemen's antiterrorist action.

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21 Art. 7 ICCPR.

22 Arts. 8.1 and 8.2 ICCPR.

23 Art. 11 ICCPR.

24 Art. 15 ICCPR.

25 Art. 16 ICCPR.

26 Art. 18 ICCPR.

27 The Committee refers here to the more general question of peremptory norms of international law: "The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7) ... Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2", Cf. Human Rights Committee, *General Comment* 29, paragraph 11.

## 2.2. THE LEGAL STATUS OF THE APPLICABLE REGIME

So far, we have been focusing almost exclusively on the ICCPR and the way derogations and limitations to the rights enshrined in it are treated. The reason for this apparently limited choice is that the ICCPR is applicable, as treaty-law, to the large majority of the members of the international community, including Yemen. But there is still another consideration that shows why such choice may not be as restrictive as it first appears to be. In the last decades, many elements of international human rights law have increasingly been considered as part of international customary law and therefore applicable to all States regardless of their participation to a particular treaty. As stated in the *Vienna Declaration on Human Rights*:

“The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. *The universal nature of these rights and freedoms is beyond question*”<sup>28</sup>.

The customary universal character of international human rights standards is nowadays widely acknowledged by States. However, when we try to move beyond this very general assertion many questions arise, particularly those regarding the content and the hierarchy of such standards. We do not pretend, of course, to treat these complex and delicate issues here. What counts, for the purpose of this section, is that the ICCPR, and more specifically its article 4, provides an essential part of the answer.

It might be extremely difficult to identify precisely which rights have a customary universal basis, but this does not mean that we cannot identify at least the main part of them. Indeed, there are many legal as well as political instruments that reflect the international

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28 UN Doc. A/ CONF.157/23, 12 July 1993, paragraph I.1 (italics added).

*opinio iuris* on the subject, such as the UN Charter<sup>29</sup>, the Universal Declaration of Human Rights, the two UN Covenants of 1966, the various regional conventions on human rights, international decisions both from political and jurisdictional bodies, but also domestic constitutions and legislations protecting rights and liberties as well as domestic jurisprudence. With respect to this corpus of State practice, there is, at the very basis of the interpretation process, a usual technique that refers to such provisions as article 4 of the ICCPR or the analogous provisions from other conventions<sup>30</sup>. By distinguishing those individual rights that can be suspended in exceptional circumstances and those that cannot, these provisions set a clear hierarchy among human rights<sup>31</sup>. At the same time, they identify a core content that, with some variations, shows a strong convergence among different treaties. Of course, there are other individual rights that, although not included in the core, can be claimed to have a customary basis<sup>32</sup> but their acceptability as such, and therefore their universality, is more difficult to establish. Thus, the use of such articles in order to apprehend the international *opinio iuris* on the subject is highly relevant.

If we now turn to our particular question, namely that of the legal status of the limitations and derogations regimes, the preceding considerations are of great importance. Concerning limitations, the identification of the content and hierarchy of customary international standards is essential to determine the extent to which a particular

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29 Particularly articles 55 and 56.

30 See art. 15 of Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950, most commonly referred to as the European Convention on Human Rights (ECHR); art. 27 of the American Convention on Human Rights, of 22 November 1969 (ACHR); art. 4 letters *b* and *c* of the Arab Charter on Human Rights, of 15 September 1994 (not in force).

31 The existence of a hierarchy has been asserted several times by the International Court of Justice. See for example the decisions and advisory opinions cited by SUDRE, F., *Droit international et européen des droits de l'homme* (3e édition), PUF, Paris, 1997, pp. 59-64.

32 An example would be the freedoms of expression and assembly.

right can be legally limited or restricted. Insofar as international customary law defines a more or less precise content for each of the core human rights, reflected by instruments like the ICCPR, such content impose limits on limitations and restrictions. As to derogations, here again, there is a considerable convergence as to what conditions must be met for such suspension of human rights. This convergence suggests that the scope of article 4 ICCPR goes beyond its conventional character and merges with international customary law.

### 2.3. THE ORDINARY REGIME VS. THE EXCEPTIONAL REGIME

Before undertaking the analysis of the conditions under which a State can derogate from a particular human right, it is necessary to introduce a clear distinction between such *derogations* and what is referred to as *restrictions* and *limitations*. We have already noted that the main difference between these terms comes from the fact that restrictions and limitations are ordinarily admitted while derogations suppose the existence of a qualified public emergency. Let us now go into more detail.

In principle, individual rights are not absolute but are granted within the limits set by the law. For instance, the right to liberty can be restricted or limited to some extent by criminal domestic law without violating international human rights standards<sup>33</sup>. Another example is that of restrictions imposed on the freedom of expression, based on the respect of the rights or reputations of others as well as on other considerations such as the protection of national security or public order. In fact, the terms *restriction* and *limitation* are taken here as the ordinary limits of particular rights in particular domestic orders. In other words, they are part of the "content" of the right,

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33 Thus, Articles 9 ICCPR, 7 ACHR, 5 ECHR and 8 of the Arab Charter, all provide for lawful restrictions to the right to liberty, which stem typically from domestic criminal law.

which is itself limited, the particular contours depending upon the concrete circumstances of each country. Of course, such limitations must be in accordance with international standards. Commenting on the ICCPR, MANFRED NOWAK describes the way in which the Covenant opens the possibility for the existence of restrictions:

“One technique is the use of the word ‘arbitrary’ as, for example, in Articles 6 (1), 9 (1) and 17 (1) of the CCPR. Other provisions, such as Articles 12 (3), 13, 18 (3), 19 (3), 21 and 22 (3), contain so-called limitations clauses which authorize restrictions on the condition that they are provided by the law, consistent with other Covenant rights, that they serve one of the purposes of the interference listed in the respective provision and are necessary for achieving this purpose. The decisive criterion for the permissibility of limitations is, therefore, the principle of *proportionality*”<sup>34</sup>.

This reasoning can be applied *mutatis mutandis* to the study of other international human rights instruments, at least as far as negative liberties are concerned. Summarizing, restrictions and limitations are the ordinary techniques used to define the contours of a domestically granted individual right in accordance to international standards. Hence, such limitations, which by their very definition tend to be permanent or at least long standing, do not require an exceptional situation to be legal. However, in some particular cases, individual rights are absolute and cannot be subject to any limitation or, as we will see later on, to derogation. This is the case of provisions such as the prohibition of torture or that of slavery, which represent absolute rights.

Concerning derogations, they go beyond mere limitations and literally encroach on individual rights either by imposing an excessive restriction on it or by completely suspending its exercise. Such important breaches cannot be tolerated unless there are overriding reasons justifying their imposition. As a consequence, they are

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34 NOWAK, M., “The Covenant on Civil and Political Rights”, in HANSKI, R., SUKSI, M. (eds.), *An introduction to the international protection of human rights: a textbook*, Abo Akademi University, Turku/Abo, 1999, pp. 90-91 (italics original).

governed by an exceptional regime and subject to strictly defined conditions. A good understanding of this regime is essential for the legal analysis of antiterrorist measures.

#### 2.4. LEGAL CONDITIONS FOR DEROGATION

There are several conditions that must be met in order for States to legally derogate from certain obligations under international human rights law. In this regard, there is, as we have already noted, considerable convergence among the respective provisions of different human rights treaties. From a general perspective, derogations require five conditions: the existence of a qualified public emergency; respect of the principles of necessity and proportionality; consistency with other obligations under international law; respect of the principle of non-discrimination; a number of procedural steps. Even under such conditions, no derogations are admitted from some particularly important rights, which constitute the human rights core. We will treat these five conditions in the order mentioned. In this task, particular attention will be paid to the stances of the Human Rights Committee, and this for two reasons. First, as the monitoring body of the most widely accepted human rights treaty, the Committee benefits from a special position in the international arena. Second, the legal regime established by the ICCPR is directly applicable to the Republic of Yemen since 1987.

Concerning the *first condition*, derogations are only possible in case of "public emergency which threatens the life of the nation". This formulation is used by articles 15.1 European Convention of Human Rights (ECHR), 4.2 ICCPR and 4 *b* of the Arab Charter on Human Rights (ArCHR)<sup>35</sup>. A slightly different expression is found

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35 Adopted by Resolution 5437 of the Council of the League of Arab States. According to Article 42 (b) of the Arab Charter on Human Rights, the document enters into force two months after the date of deposit of the seventh instrument of ratification, which has not yet been the case.

in article 27.1 of the American Convention of Human Rights (ACHR), namely:

“In time of war, public danger, or other emergency that threatens the independence or security of a State Party”.

Broadly speaking, the notion of public emergency seeks to cover situations such as:

“international armed conflict(s), civil war(s), other serious cases of violent internal unrest, natural or human-made disasters”<sup>36</sup>.

However, this characterization remains vague. There might be situations of public emergency that do not pose a threat to the life of the nation. As stated by the Human Rights Committee:

“The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situation than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances”<sup>37</sup>.

In some situations, it may be very difficult to assess whether the life of the nation is in danger or not. It is therefore necessary to further clarify the meaning of the expression “which threatens the life of the nation”. The European Court of Human Rights has said that the mere public utility cannot be assimilated to the threat required under article 15 of the ECHR<sup>38</sup>. This hypothesis refers rather to:

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36 NOWAK, *loc. cit.*, p. 90.

37 Human Rights Committee, *loc. cit.*, paragraph 3.

38 Cf. *Lawless v. Ireland*, Judgement of July 1st 1961, cf. SUDRE, F., *loc. cit.*, p. 148.

"... an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed"<sup>39</sup>.

In the particular case considered by the Court, the threat was posed by terrorist violence in Northern Ireland. It is therefore especially relevant for our purpose of analyzing measures adopted after the September 11 events. Of course, this analysis can only be conducted on the basis of the concrete circumstances of Yemen so we will leave this question open for the moment.

Regarding the *second condition*, the terminologies used in different treaties show, as before, a strong convergence. The four treaties under consideration provide that derogations can only be made:

"... to the extent strictly required by the exigencies of the situation"<sup>40</sup>,

with, again, a slight variation in the case of the American Convention, which uses the following expression:

"... to the extent *and for the period of time* strictly required by the exigencies of the situation"<sup>41</sup>.

According to the Human Rights Committee:

"This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency"<sup>42</sup>.

More precisely:

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39 *Ibid.*, paragraph 28.

40 Arts. 15.1 ECHR, 4.2 ICCPR and 4 *b* of the Arab Charter on Human Rights.

41 Art. 27.1 ACHR (italics added).

42 Human Rights Committee, *loc. cit.*, paragraph 4.

“... the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers”<sup>43</sup>.

In addition, the Committee considers that:

“This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation”<sup>44</sup>.

We see then that derogations must strictly respect the principles of necessity and proportionality and that these principles apply both to the decision proclaiming the state of emergency and to the measures taken as a consequence. However, the question remains open of who should be in charge of determining the extent to which a particular action meets the requirements of necessity and proportionality. The answer that the European Court of Human Rights has given to this question is that:

“... the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it”<sup>45</sup>.

This stance is even more clear in the *Brannigan and McBride* case where it is stated that:

“It is not the Court’s role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective

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43 *Idem*.

44 *Ibid.*, paragraph 5.

45 *Ireland v. UK*, Judgement of January 18th 1978, paragraph 207, cf. SUDRE, F., *loc. cit.*, pp. 149-150.

measures to combat terrorism on the one hand, and respecting individual rights on the other"<sup>46</sup>.

With respect to the *third condition* identified, it is only required by three of the conventions studied, the Arab Charter being the exception. States could only proceed to derogations:

"... provided that such measures are not inconsistent with their other obligations under international law"<sup>47</sup>.

The idea behind such requirement is to ensure that:

"there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent"<sup>48</sup>.

FRÉDÉRIC SUDRE notes that:

*"La présence d'une clause dérogatoire similaire dans les textes universels et régionaux est un facteur d'harmonisation des régimes dérogatoires: ainsi, l'Etat partie à la fois à la CEDH (ECHR) et au PIDCP (ICCPR), ne pourra recourir à l'article 15 de la CEDH que sous réserve d'adopter des mesures également conformes à la clause dérogatoire du Pacte; or celle-ci contient une liste de droits "indérogeables" plus large que l'article 15"*<sup>49</sup>.

This latter point is particularly interesting because it shows another way in which the inter-play among articles governing derogations contributes to the development of a non-derogable human rights core, as seen above. It is important to point out that this

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46 Brannigan and McBride v. United Kingdom, Judgement of May 26th 1993, cf. *Ibid.*, p. 150.

47 Arts. 15.1 ECHR, 4.2 ICCPR and 27. 1 ACHR.

48 Human Rights Committee, *loc. cit.*, paragraph 9.

49 SUDRE, F., *loc. cit.*, p. 150.

condition is not limited to conventional obligations but refer to obligations stemming from international customary law as well. This is highly relevant for at least two reasons. First, there are a number of rights that are part of the non-derogable core, although the respective articles do not mention them, because they are in some way implied by non-derogable rights. In this line of thought, the Human Rights Committee considers that:

“As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant”<sup>50</sup>.

Second, and more generally, the fact that a treaty proclaims certain provisions as the only ones that cannot be the object of derogation does not prevent other rights from being non-derogable as peremptory norms of international law. Indeed:

“... the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence”<sup>51</sup>.

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50 Human Rights Committee, *loc. cit.*, paragraph 16.

51 *Ibid.*, paragraph 11.

As to the *fourth condition*, namely the principle of non-discrimination on grounds of race, color, ethnic origin, sex, language, religion or social origin, it is perhaps one of the most widely shared principles of international human rights law, with a far larger scope than as a mere requirement for the legality of derogations. In this latter function, it aims at preventing that derogations be made to the detriment of a particular group of individuals. Its existence as a condition for derogation reflects therefore nothing more than its non-derogable character as a principle. According to the Human Rights Committee:

“Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant”<sup>52</sup>.

Finally, the *fifth condition* refers to some procedural requirements necessary for the implementation of derogations to international standards. According to articles 15.3 ECHR, 4.3 ICCPR and 27.3 ACHR, a State resorting to derogations must immediately inform the other States parties (through the intermediary of the Secretary-General of the respective organization) of the provisions concerned and of the reasons justifying its action, as well as proceed to a similar communication when such measures are terminated. The ICCPR requires, in addition, that the state of public emergency be officially proclaimed before derogative measures can be adopted. In the view of the Human Rights Committee, this latter condition:

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52 Human Rights Committee, *loc. cit.*, paragraph 8.

“... is essential for the maintenance of the principles of legality and rule of law at times when they are most needed”<sup>53</sup>.

This is why:

“When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers”<sup>54</sup>.

To avoid abuses based on excessive margins left by domestic laws:

“it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4 ... (for which) ... States parties to Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers”<sup>55</sup>.

This general framework provides the standard against which the legality of the measures undertaken by the Yemen to combat terrorism within its territory can be assessed. As we will see, the main case justifying the resort to derogations may not come from where we expect it.

### 3. THE LEGALITY OF YEMEN’S “WAR ON TERROR”

#### 3.1. HUMAN RIGHTS AND TERRORISM IN YEMEN

From a purely legal perspective, it is very difficult to identify a clear-cut change between the situation in Yemen before and after the September 11 attacks. In order to perform such task, one must rather

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53 *Ibid.*, paragraph 2.

54 *Idem.*

55 *Idem.*

concentrate on the concrete application of the already existent legislation. Indeed, at this practical level, the war on terror has had a much stronger impact than what the mere analysis of legislation would reveal. However, the actions adopted by Yemen's government to fight terrorism, as well as their consequences on human rights abuses, can by no means be interpreted as a new phenomenon. In fact, Yemen has a long-standing record of human rights' violations and political repression although the precise political targets may have changed over time<sup>56</sup>. One can easily draw this conclusion by reading the relevant reports of major human rights organizations such as Amnesty International and Human Rights Watch or those of the U.S. State Department. There have been many cases of bomb attacks against government officials and institutions as well as against foreign embassies or other forms of foreign presence on Yemen. A major example of this is given by the bombing of the USS Cole, an American guided missile destroyer, in Aden harbor, on October 12 2000. In addition, in recent years the kidnapping of foreigners has largely developed, used by tribal and Islamic groups to exert indirect pressure on the government for various political reasons. For instance, on December 28, 1998, 16 British tourists were taken hostage in Abyan by the "Islamic Army of Aden-Abyan", an Islamic paramilitary group, and four of them died when Yemeni forces tried to rescue them. These episodes are only major examples of what the Yemeni society has experienced in the last years. If we now turn to the human rights field, Yemen's record has been widely criticized by most human rights organizations. In this regard, the main issues raised include persecution based on political or religious grounds, arbitrary detention, denial of judicial guaranties, torture and ill-treatment as well as many other reprehensible practices. Although the Yemeni government has made a number of commitments

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56 For a detailed account of major events concerning political insecurity and terrorism see the web-page created by Brian Whitaker, Yemen's Gateway: <http://www.al-bab.com/yemen/Default.htm>.

and has adopted several measures in order to improve the human rights situation, these efforts have remained mainly formal<sup>57</sup>.

The preceding considerations help explain why Yemen's war on terror has not required the enactment of new comprehensive legislation. Indeed, according to Yemen's reports<sup>58</sup> to the United Nations Counter-Terrorism Committee<sup>59</sup>, no new anti-terrorism legislation has been adopted by the Republic of Yemen in the aftermath of the September 11 attacks<sup>60</sup>. Yemen's legal reaction has for the main part taken the form of *ad hoc* administrative measures as well as, exceptionally, that of Presidential decrees<sup>61</sup>. In other words, Yemen's war on terror has been almost exclusively the province of the executive power. This latter point has, of course, strong implications with regard to human rights abuses. The

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57 Amnesty International noted in 1997 that: "In theory, Yemen has made encouraging progress in the field of human rights, ratifying the major human rights treaties, but in practice, the Yemeni Government remains a major violator of the rights protected by these treaties", cf. Amnesty International, *Yemen: Government Fails to Deliver on Paper Promises on Human Rights*, 27 March 1997, MDE 31/03/97. In a similar vein, though for a different period, the 2001 Human Rights Watch Report states that: "Yemen's poor human rights record showed little improvement in 2000. While the government set up several committees to monitor abuses, it signally failed to implement basic human rights protection in most areas", Human Rights Watch, *World Report 2001: Yemen: Human Rights Developments*, <http://www.hrw.org/wr2k1/mideast/yemen.html>.

58 The first report was presented on March 4th 2002 to the Chairman of the Counter-Terrorism Committee and then submitted to the Security Council by letter dated 6 March 2002, S/2002/240. Yemen was later requested to provide a supplementary report, which was presented on October 17th 2002 to the Counter-Terrorism Committee and submitted to the Security Council by letter dated 25 October 2002, S/2002/1213.

59 Established by the Security Council's resolution 1373 (2001), adopted on September 28th 2001, S/ RES/ 1373 (2001).

60 Many countries, including the US, Canada, France, the UK, etc., have passed new legislation in order to intensify their fight against terrorism, see [http://www.amnestyusa.org/amnestynow/responses\\_terrorism.pdf](http://www.amnestyusa.org/amnestynow/responses_terrorism.pdf).

61 See the responses to questions 1(a) and 2 (b) of the second report to the Counter-Terrorism Committee.

crackdown on terrorism has in practice come to mean the repression of whatever group President SALEH considers as being terrorist. This feature is particularly striking if evaluated in the light of three main considerations.

First of all, the anti-terror leitmotif has greatly enlarged the margin of action of the Yemeni security forces, and especially that of the Political Security Organization (PSO), an independent agency that reports directly to the President and that has been widely known in the past for its blatant and repeated abuses as well as for its impunity. A second point concerns the functioning of the judiciary in Yemen. As stated by the U.S. Department of State in a recent report:

“The judiciary (of Yemen) is nominally independent, but is weak and severely hampered by corruption, executive branch interference, and the frequent failure of the authorities to enforce judgments”<sup>62</sup>.

This assertion is confirmed in the facts by the great influence of the President in the administration of the Judiciary<sup>63</sup>. The third consideration refers to the current international situation and its impact on Yemen political affairs. If in the past, Yemen has considered important to make a number of concessions in the field of human rights, this was, at least in part, because of international pressure. At present, such pressure has disappeared. Which is worst, the wind

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62 U.S. Department of State, *Country Reports on Human Rights Practices – 2002 – Yemen*, March 4, 2002, <http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8313.htm>.

63 Article 150 of the Yemeni Constitution establishes a Supreme Judicial Council as the administrative authority of the judiciary. The Council reviews policies regarding the structure and function of the judiciary, and supervises appointment, promotion, and transfer of judges. According to article 150 of the Constitution: “The law shall organize it (the Supreme Judicial Council), clarify its functions and system of nominating and appointing its members”. The Parliament, where SALEH’s party holds a large majority, has provided that the Council will be composed of the President of the Republic, the Ministry of Justice and his deputy, the Chief Justice of the Supreme Court and his deputies, the Attorney General, the Chairman of the Judicial Inspection Commission, and three senior Supreme Court justices. In practice, this clearly means that the Judiciary is largely dependent upon the President.

seems to have changed of direction. Under the umbrella of the “war on terror”, political repression against Islamic groups is not only a possibility, but it seems rather to be a duty imposed by the US on the Yemeni government. We have already mentioned the sort of dilemma that is faced by President SALEH. While the crackdown on Islamic activists may be a useful tool to assert his power over informal powers, it could also undermine SALEH’s political basis. This could be one of the reasons why the war on terror in Yemen has remained informal, giving SALEH the possibility to adapt to changing circumstances. In any case, the above remarks confirms that any attempt to analyze Yemen’s war on terror from a legal point of view cannot neglect the political reality that lies beneath.

### 3.2. ANTI-TERRORISM MEASURES AND HUMAN RIGHTS ABUSES

We saw before that Yemen’s reaction after the September 11 events has been the province of the executive<sup>64</sup>. This should be understood as including two different though related kinds of actions, namely, formal administrative or executive measures on the one hand, and changes in the practical implementation of previous legislation on the other. Measures falling into the first category have been reported by Yemen in the already cited report to the UN Counter-Terrorism Committee. They cover a number of instructions issued by the Central Bank of Yemen to the intention of all banks operating in the Yemeni territory, which provide lists of organizations and/or

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64 The term executive is taken here in the sense given by paragraph 1.2 of the *Guidance for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001* issued by the Chairman of the Counter-Terrorism Committee: “In compiling their reports, States should aim to demonstrate concisely and clearly, by reference to the provisions of resolution 1373 (2001), the legislative and executive (i.e. administrative or non-legislative) measures in place or contemplated to give effect to the resolution, and the other efforts they are making in the areas covered by the resolution”.

individuals whose assets must be frozen<sup>65</sup>. With respect to the security field, the government has tightened its control over the circulation of weapons and explosives<sup>66</sup>. More importantly, a Presidential decree provides for the establishment of a National Security Agency to combat terrorism and liaise more closely with foreign intelligence bodies. This second initiative stems primarily from the increasing US influence on Yemen's security matters. Until present, this influence had basically taken the form of US training programs for Yemeni troops as well as of *ad hoc* exchanges of information<sup>67</sup>. According to the Presidential decree, the new agency's main role will be that of gathering and analyzing intelligence data about foreign threats to national security. As the Political Security Organization, it will report directly to President. By contrast, the decree does not say when the agency will begin working or how it will be formed. In any case, if we compare the current attitude of the

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- 65 The second report identifies three circulars issued by the Central Bank of Yemen, pursuant to letter n° RW/35/3513 of the Prime Minister, dated 3 October 2001, letter n° (1)/156/102/1553 of the Minister for Foreign Affairs, dated 2 October 2001, and the resolution adopted by the Council of Ministers at its session of 2 October 2001: Circular N° 81206 of 4 October 2001, containing 27 names of organizations and persons whose assets are to be frozen; Circular n° 8735 of 18 October 2001, containing 39 names of companies, individuals and entities; Circular n° 99230 of 24 November 2001 including two lists, the first containing the names of 16 organizations and the second, the names of 62 individuals and organizations. According to the report, the instructions of the Central Bank included the reporting of banks, organizations and individuals whose accounts must be frozen, any funds frozen and any other information relating to any name appearing in the list.
- 66 See the second paragraph of the response to question 2(a) of the report. We are not sure of the precise date of each of the measures but we know that the September 11 events were followed by a significant tightening of governmental control in this matter.
- 67 Human Rights Watch reports that: "Expenditures on training programs for Yemeni military officers in the U.S. doubled to \$250.000 in fiscal year 2002. In its presentation to Congress requesting these funds, the State Department characterized Yemen as 'at the forefront of the Arab world in both democratic and economic reform' and said the country had 'taken significant strides toward opening its multiparty political system to full public participation, including women' ...", cf. *World Report 2002*.

Yemeni government towards the US to its more reluctant one immediately after the USS Cole incident, the American impact on the adoption of such decree becomes particularly clear.

The second category is far larger and therefore much more difficult to grasp. Such difficulty has been expressly noticed by the Counter-Terrorism Committee<sup>68</sup>. In this respect, two main considerations should be kept in mind. The first is that our purpose of identifying the main legal instruments concerned and the way they are being applied purports a supplementary problem stemming from the fact that Yemen's report does not include some pieces of legislation, which are nevertheless being used to restrict human rights on the basis of national security imperatives. This is especially the case with regard to the freedom of the press, and more generally to the freedom of expression. In fact, the "war on terror" leitmotif is being used on a case-by-case basis, therefore transcending the measures enumerated by the report. The second consideration refers to the fact that the analysis of human rights violations by means of excessive restrictions based on anti-terrorism measures cannot be conducted without an assessment of the human rights regime applicable to Yemen. In other words, in order to provide a legal analysis of Yemen's anti-terrorism action with regard to human rights, it is necessary to identify those human rights provisions that are legally binding within Yemen, either as part of domestic law or as part of international human rights law. For the time being, we will limit ourselves to a general presentation of the already existent legal framework that is being used to combat terrorism as well as of its practical implementation. We will come back to the question of the human rights regime in the next section.

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68 "The Committee acknowledges the complexity of the legislation and areas of activity covered by resolution 1373 (2001) ... It recognizes too that all States do not have available the same resources or technical expertise in the relevant areas. The Committee intends to consider carefully how to assist or provide further guidance to States in overcoming any such difficulties", cf. *Guidance for the submission of reports*, paragraph 2.2.

As in most other countries, Yemeni anti-terrorism legislation covers a wide range of fields. The second report to the Counter-Terrorism Committee mentions such fields as financial intermediation surveillance<sup>69</sup>, remittance system's regulation<sup>70</sup>, establishment and monitoring of non-governmental associations and institutions<sup>71</sup>, constitution and functioning of political parties and groups<sup>72</sup>, criminal

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69 This field is mainly concerned by Central Bank instructions as well as by article 25(1)(a) of the Banking Act, which requires from every bank or financial institution designated in a decision issued by the Central Bank to provide a monthly report containing information that may be useful to fight terrorism financing.

70 This field is regulated by a number of Acts: Central Bank Act (n° 14 of 2000), the Financial Code (n° 8 of 1990), the Commercial Code (N° 32 of 1991), the Civil Code (n° 14 of 2002), the Exchange Act (n° 20 of 1995). Moreover, customary banking practices and Central Bank instructions also a very important role. For instance, the Central Bank has issued instructions to banks and exchange establishments in the Republic of Yemen requiring the ascertainment of the identity of persons not having an account with the bank who request the transfer of sums of money greater than U\$10.000 or the equivalent in other currencies.

71 For example, Act n° 1 of February 2001 on non-governmental associations and institutions grants the Ministry of Social Security and Social Affairs and its offices in the capital and the governorates legal oversight over non-governmental associations and institutions and their activities. It also establishes penalties ranging from fines to imprisonment for anyone who undertakes an activity or spends money in violation of the purpose for which the association or institution was created.

72 This is a crucial domain of legislation. According to article 35 of the Constitution: "The state is the authority to establish the armed forces, the police, the security forces and any such bodies ... No organization, individual, group, political party or organization may establish forces or paramilitary groups for whatever purpose or under any name ...". This important provision, which should of course be interpreted in the light of Yemen's tumultuous past and present, is further asserted by article 8, paragraph 6 of Act n° 66 of 1991, on political organizations and parties, which provides against: the establishment of military or paramilitary formations or assistance in their establishment; the use, threat of use or incitement to use violence in any form; the inclusion in the programmes, publications or printed materials of an organization of any incitement to violence or the creation of open or secret military or paramilitary formations.

offences<sup>73</sup> including narcotics<sup>74</sup>, kidnapping and armed intervention<sup>75</sup>, criminal procedure<sup>76</sup> as well as international cooperation in criminal matters<sup>77</sup>, civil status regulation<sup>78</sup> and, finally, alien entry and residence<sup>79</sup>. This broad picture would be incomplete if we did not take into account the important domain of the press

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73 Act n° 12 of 1994, especially the chapter devoted to offences relating to State security and internal security (such as armed rebellion and membership in armed bands) and that devoted to crimes involving public danger (such as arsons, explosions, the jeopardizing of transport and communication means and the possession and transportation of and traffic in explosives). Yemen is also part, since March 1983, of the Convention for the Suppression of Unlawful Seizure of Aircraft.

74 There is a narcotic control agency.

75 This is a crucial issue in Yemen's security policy. Act n° 24 of 1998, on combating kidnapping and armed interception, provides a number of penalties, including the death penalty in case of the person who heads a band for kidnapping, armed interception or the looting of public or private property.

76 According to article 17 (2) of the Code of Criminal Procedure (Act n° 13 of 1994), territorial competence for criminal matters covers both the crimes committed by Yemeni nationals and those committed by aliens and stateless persons. As to extraterritorial competence, an issue of great importance in the repression of terrorism, Article 246 gives Yemeni tribunals criminal competence over crimes committed by Yemeni nationals outside the territory of Yemen provided certain conditions are met. This competence is extended by article 247 to foreigners in the case of certain particular crimes prejudicial to the security of the Yemeni state.

77 The report mentions several conventions in its response to paragraph 2(f).

78 According to the report, the civil status agencies have begun work on a project for the computerized issuance of identity cards, using advanced technologies to prevent falsification. In the same vein, the Department of Immigration and Passports has worked on the issuance of passports using a secure system that prevents falsification.

79 This is also a very important issue in Yemen. Act n° 47 of 1991, concerning alien entry and residence, altogether with its implementing regulation n° 4 of 1994, governs the conditions for entry, registration and residence in Yemeni territory. The Act empowers the Minister of the Interior to expel any alien pursuant to a decision of the Deportation Committee created by the Act. It also devotes a chapter to penalties, ranging from a fine to imprisonment, for the illegal entry of any alien into Yemen or for failure to comply with a deportation decision issued by the Minister. The report adds a political remark, namely that: "Yemen is one of the countries that have suffered from terrorism. Yemen does not export terrorism, but is rather the target of exported terrorism".

and publications<sup>80</sup>, where the anti-terror leitmotif has played a major role in justifying restrictions to freedom of expression. Concerning the implementation of this general framework, while many provisions have traditionally served to legitimize important encroachments on basic individual rights by the Government, and, above all, by the Political Security Organization, the intensity of this phenomenon has varied over time, especially in the aftermath of the September 11 events<sup>81</sup>. In this respect, we could cite a great number of examples reported by human rights organizations, such as arbitrary detentions followed by torture and ill-treatment mostly affecting members of the political opposition, either socialist or Islamic, or, in some cases, foreign nationals. A good illustration of this latter case is given by the detention by the Political Security of ABD AL-SALAM NUR AD-DIN HAMAD and AHMAD SAIF, two visiting academics affiliated to the Centre for Red Sea Studies at Exeter University in the United Kingdom, in October 2001. According to Human Rights Watch, they remained in detention for two days, during which they were blindfolded and beaten while being interrogated about:

“spying for foreign powers, and maintaining a relationship with OSAMA BIN LADEN, Israel and the separatists”<sup>82</sup>.

Increased governmental pressure on the press has also been widely reported. According to Human Rights Watch:

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80 Act n° 25 of 1990 on the Press and Publications.

81 As noted by MOHAMMED NAJJI ALLAW, a human right activist: “The September 11 incidents have considerably affected the human rights position in Yemen. Because of its totalitarian culture, Yemen does not bide by the law and constitution whose articles pertaining to freedoms comply with the International Declaration of Human Rights and other international treaties. The political security office (PSO) has taken the US pressure after these attacks of September 11 to exercise its habit of arresting people in a clear infringement to the law”, cf. *Yemen after a year of September 11 in Yemen Times*, issue 37 - September 9 thru September 15, 2002, vol XI.

82 Cf. *World Report 2002*, already cited.

“Defamation, which is loosely defined under Yemeni press law, was the most frequent charge levied against independent and opposition papers, both by the government and by private citizens; by November (2001), cases were pending against AL-AYYAM, SAWT AL-SHURA, AL-UMMA, AL-RA’I AL-‘AMM, AL-WAHDAWI, AL-SHUMU’ and AS-SAHWA”<sup>83</sup>.

These few examples are of great importance for any fair attempt to assess the impact of the Yemen’s war on terror on the human rights situation. Indeed, they provide a clear insight into the reality of Yemen’s reaction, which could not be derived from merely considering legal texts. In the following section, after a short presentation of the human rights regime applicable in Yemen, we will come back to these and other issues in order to analyze them from a legal perspective.

### 3.3. THE LEGALITY OF YEMEN’S “WAR ON TERROR”

In a recent world survey on the consequences of the anti-terrorism war and its abuses, Amnesty International identifies, with regard to Yemen, four main categories of human rights violations committed under the umbrella of the war on terror leitmotif. Such categories are: reported use of torture; detention without trial, arbitrary detention, or prolonged detention without charge; clampdown on foreigners, including denial of right to asylum, harsher treatment of asylum seekers and mass deportations; restrictions on freedom of expression or religious freedom<sup>84</sup>. Although such account may appear quite rigid, it nevertheless provides a very useful framework for structuring our legal analysis. However, before going into more detail, let us first concentrate on the human rights obligations assumed by the government of Yemen both at the domestic and international levels.

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83 *Idem*.

84 [http://www.amnestyusa.org/amnestynow/responses\\_terrorism.pdf](http://www.amnestyusa.org/amnestynow/responses_terrorism.pdf)

At the domestic level, Part two of the Yemeni Constitution is entirely devoted to the basic rights and duties of citizens. Articles 40 to 60 cover many human rights and guarantees including freedom of thought and expression of opinion<sup>85</sup>, the prohibition of extraditing political refugees<sup>86</sup>, the *nullum crimen nulla poena sine lege* principle as well as the presumption of innocence<sup>87</sup>, personal freedom, dignity and security<sup>88</sup>, a number of due process or related judicial guarantees<sup>89</sup>, and many others. These few examples are particularly

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85 Article 41: "Every citizen has the right to participate in the political, economic, social and cultural life of the country. The state shall guarantee freedom of thought and expression of opinion in speech, writing and photography within the limits of the law". In addition, article 27 states: "The state shall guarantee freedom of scientific research and achievements in the fields of literature, arts and culture, which conform with the spirit and objectives of the Constitution ...".

86 Article 45: "Extraditing political refugees is prohibited".

87 Article 46: "Criminal liability is personal. No crime or punishment shall be undertaken without a provision in the Shari'a or the law. The accused is innocent until proven guilty by a final judicial sentence, and no law may be enacted to put a person to trial for acts committed retroactively".

88 Article 47 lit. a: "The state shall guarantee to its citizens their personal freedom, preserve their dignity and their security. The law shall define the cases in which citizens freedom may be restricted. Personal freedom cannot be restricted without the decision of a competent court of law"; Article 47 lit. b: "No individual can be arrested, searched or detained unless caught in the act (*in flagrante delicto*) or served with summons from a judge or the Public Prosecutor, which is necessary for the progress of an investigation or the maintenance of security. No person can be put under surveillance unless in accordance with the law. Any person whose freedom is restricted in any way must have his dignity protected. Physical and psychological torture is prohibited. Forcing confessions during investigations is forbidden. The person whose freedom is restricted has the right not to answer any questions in the absence of his lawyer. No person may be imprisoned or detained in places other than those designated as such and governed by the law of prisons. Physical punishment and inhumane treatment during arrest, detention or imprisonment are prohibited".

89 Article 47 lit. c: "Any person temporarily apprehended on suspicion of committing a crime shall be presented in front of a court within a maximum of 24 hours from the time of his detention. The judge or Public Prosecutor shall inform the detained individual of the reason for his detention and questioning and shall enable the accused to state his defense and pleas or reputals. The court then gives an order justifying the release of the accused individual more than seven days except with a judicial order. The law shall define the maximum period of custody"; Article 47 lit. d: "Upon arrest,

relevant for our purpose if we keep in mind the types of abuses that have been reported. In addition, article 6 of the Constitution states expressly that:

“The Republic of Yemen confirms its adherence to the UN Charter, the International Declaration of Human Rights, the Charter of the Arab League, and dogma of international law which are generally recognized”.

This important provision can be interpreted as an explicit incorporation of international human rights standards into the Yemeni domestic legal order. If we now focus on the international level, beyond those general obligations imposed by international customary in the last years, Yemen has become member of most major human rights instruments, including the International Covenants on Economic, Social and Cultural Rights as well as on Civil and Political Rights<sup>90</sup>, the International Convention on the Elimination of All Forms of Racial Discrimination<sup>91</sup>, the Convention on the Elimination of All Forms of Discrimination against Women<sup>92</sup>,

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for whatever reasons, a person may immediately contact someone of his choice. The same notification shall be repeated whenever a court orders the continuation of the detention. If the nominated person can not be notified, the detainee’s closest relative or concerned friend shall be notified”; Article 48: “The right to defend oneself in person or by representation is guaranteed during all periods of investigation and in front of all courts, in accordance with the rules of the law. The state shall guarantee judicial assistance to those who cannot afford it, according to the law”; Article 50: “Citizens have the right of recourse to the courts to protect their rights and lawful interests. They also have the right to submit their complaints, criticisms, and suggestions to the various government’s offices directly or indirectly”. In addition, article 151 states that: “Court sittings are open to public unless a court determines, for reasons of security or general morals, to hold sessions behind closed doors. In all cases, verdicts are announced in an open session”.

90 The instruments of accession for both treaties were received by the UN on February 9th 1987, which entered into force on May 9th 1987.

91 Date of receipt of accession instrument by the UN: October 18th 1972. Date of entry into force: November 17th 1972.

92 Date of receipt of accession instrument by the UN: May 30th 1984. Date of entry into force: June 29th 1984.

the Convention on the Rights of the Child<sup>93</sup> and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment<sup>94</sup>. It can therefore be asserted that the human rights regime applicable within Yemen is quite complete and covers the main categories of abuses identified by Amnesty International. It is, however, another question whether Yemen could invoke a state of public emergency or not in order to legally justify at least part of the restrictions and violations of human rights reported by different organizations.

The answer to this question supposes that we consider Yemen's reaction as going beyond the scope of limitations and restrictions as defined by the ICCPR. We saw above that, in general terms, the decisive criterion for the permissibility of limitations is given by the principle of *proportionality* between the impact of the restriction and the goal pursued by the measure. Thus, in ordinary times, a State can restrict or limit a right or a liberty provided certain conditions are met, aimed primarily at ensuring a given level of proportionality. As a matter of fact, the possibility of derogating from fundamental rights also depends upon the respect of a certain level of proportionality, differing from the preceding case in that the goal pursued by the measure is far more compelling and can therefore justify even the suspension of certain rights. In any case, after consideration of what has been reported by humanitarian organizations, it would hardly be possible to argue that the impact on human rights of Yemen's war on terror remains within the scope of ordinary restrictions. Moreover, the government itself has largely used the "war on terror" leitmotif to justify its action thereby recognizing the necessity of an exceptional justification. But even in exceptional situations, international standards set stringent

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93 Date of receipt of ratification instrument by the UN: May 1st 1991. Date of entry into force: May 31st 1991.

94 Date of receipt of accession instrument by the UN: November 5th 1991. Date of entry into force: December 5th 1991.

conditions for the admissibility of excessively restrictive measures or derogations<sup>95</sup>. The question then becomes: has Yemen met these conditions?

The *first and most basic condition* required is the existence of a “public emergency which threatens the life of the nation”. Article 4.1 of the ICCPR, which is binding on Yemen, adds that the existence of such public emergency must be “officially proclaimed”. We saw before that this expression refers typically to situations such as international armed conflict, civil war, other serious cases of violent internal unrest, natural or human-made disasters, and only when this poses a threat to the life of the nation. With regard to Yemen, if this condition could have been met during the 1994 civil war, it would be hard to characterize the current domestic unrest provoked by the Islamic and tribal opposition as a threat to the life of the nation. Ironically, one of the most destabilizing forces threatening Yemen may stem from US pressure. Indeed, the possibility of deployment, from Djibouti, of American troops on Yemen’s territory, supposedly in order to destroy Al-Qaeda shelters, could pose a far more important threat to Yemen, as illustrated by the case of Afghanistan. In this line of thought, US antiterrorism action would, arguably, be the main real threat capable of justifying from a legal point of view the human rights derogations imposed by Yemen’s war on terror. As to the condition of official proclamation of the state of emergency, it cannot be said to be satisfied. States must, according to the Human Rights Committee, act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers. Article 118

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95 We saw above that from a general perspective, derogations require five conditions: the existence of a qualified public emergency; respect of the principles of necessity and proportionality; consistency with other obligations under international law; respect of the principle of non-discrimination; a number of procedural steps.

(17) of the Yemeni Constitution gives this power to the President<sup>96</sup>, who did not, in the present events, make official use of it. Even if we admitted, as some have claimed, that Prime Minister's declaration, following the September 11 attacks, deciding:

“... that investigations must be carried out into anyone who had any connection ... (with) Afghanistan”<sup>97</sup>

amounts to a *de facto* proclamation, the question would remain whether there is such an emergency to be proclaimed. Moreover, Yemen has also fallen short of satisfying the obligation of information stated by article 4.3 ICCPR. In short, neither the condition requiring the existence of an officially declared public emergency threatening the life of the nation nor the procedural exigencies stated by the ICCPR can be considered to be clearly met by the Yemeni government. The only caveat in this regard is represented by the impact of the American shadow.

The *second condition*, namely the respect of the principles of necessity and proportionality, must be satisfied both by the decision proclaiming the state of emergency and by every restrictive measure taken as a consequence of it. Of course, we cannot analyze here the legality of every measure taken, analysis that is supposed to be conducted on a case-by-case basis. We can instead focus on the declaration of the public emergency and then continue the analysis with regard to one particular example, namely encroachments on the freedom of the press. Concerning the declaration of the state of emergency, we have already mentioned that, in fact, there has been no such official proclamation. In other words, there is in this particular case no measure to be evaluated. As to encroachments on the freedom of the press, despite the solid guarantees stated by

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96 “The responsibilities of the President of the Republic are as follows: ... (17) To proclaim states of emergency and general mobilization according to the Law”.

97 Reported by the already cited *Amnesty International Report 2002*.

international and domestic law<sup>98</sup> as well as some symbolic gestures<sup>99</sup>, journalists and newspapers have come under increased pressure from the government. In a very interesting paper presented to the New Media and Change in the Arab World Conference, held in Jordan on March 1, 2002, the Yemeni journalist MOHAMMED H. AL-QADHI reviews the main flaws affecting the press in Yemen<sup>100</sup>. He says that, in a regular basis:

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98 Especially article 19 ICCPR, article 41 of Yemen's Constitution. Several articles of Act n° 25 of 1990 on the press and publications provides for the freedom of the press. However, as stated by the Yemeni journalist MOHAMMED H. AL-QADHI: "The Law n° (25) of 1990 for Press and Publications is full of shortcomings that constitute a major hindrance for the journalism movement in Yemen", cf. AL-QADHI, M.H., Yemen needs a free press in *Yemen Times*, Issue 10 - Mar 4 thru Mar 10 2002, vol XI, <http://www.yementimes.com/02/iss10/focus.htm>. There are a number of loosely defined sources of restriction that may pave the way for governmental encroachments on the freedom of the press. For example, article 4 of the Act states that: "The press shall be independent and shall have full freedom to practise its vocation. It shall serve society, form public opinion and express its different outlooks *within the context of Islamic creed, within the basic principles of the Constitution, and the goals of the Yemeni Revolution and the aim of solidifying of national unity ...*" (italics added); article 20 states that: "In what he/she publishes, *a journalist shall respect the objectives and aims of the Yemeni Revolution* and the provisions of the Constitution and shall not contravene this law" (italics added). Another interesting example is given by article 103 lit. 1) of the Act: "Persons employed in radio, television and written journalism and especially those employed in responsible positions in radio and television journalism, owners and editors-in-chief of newspapers, owners of printing presses and publishing houses and journalists, shall be bound to abstain from printing, publishing, circulating or broadcasting: ... 1) To criticize the person of the head of state, or to attribute to him declarations or pictures unless the declarations were made or the picture taken during a public speech. These provisions do not *necessarily* apply to constructive criticism" (italics added). Moreover, the Penal Code criminalizes, with fines and up to 5 years in jail, offences such as "the publication of false information" that "threatens public order or the public interest".

99 For instance, in September 2001, the Minister of State for Human Rights was reported to have said that: "press freedom and human rights are two faces of the same coin", cf. AMNESTY INTERNATIONAL, *Report 2002*, already cited.

100 AL-QADHI, M.H., *loc. cit.*

"Yemen journalists, thinkers, and opinion makers are subject to different sorts of harassment. They are detained, imprisoned, beaten up and threatened"<sup>101</sup>.

Amnesty International's 2002 Annual Report mentions that, in November 2001:

"... the editors of eight different newspapers and magazines were reportedly asked to appear before the West Sana'a Court to answer lawsuits brought against them. One involved a case brought by the Ministry of Information against the AL-SHURA newspaper for publishing excerpts from a novel which was inconsistent with the Islamic religion"<sup>102</sup>.

Whereas the necessity and proportionality of censorship on articles susceptible of exacerbating tribal dissensions and hostile attitudes against the delicate governmental cooperation with the US on the war on terror may, arguably, be admissible, there can be no justification, from this point of view, of such measures as the harassment and the imprisonment of journalists and their relatives. In short, a large part of governmental restrictions of the freedom of the press go beyond what is "strictly required by the exigencies of the situation".

Regarding the *third condition*, which requires that any measure taken must be consistent with other obligations assumed by Yemen under international law, again, its fulfillment must be analyzed individually for each precise measure. In this regard, it could be useful to analyze the case of religious freedom, which is not included among the basic rights of citizens stated by the Yemeni Constitution. Article 18 of ICCPR, which is binding on Yemen, states that:

"Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with

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101 *Idem*.

102 *Report 2002*, already cited.

others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”.

It then adds in its paragraph 3 that: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. After the September 11 events a massive campaign was launched against *Afghan Arabs*<sup>103</sup>. By late October, the *Yemen Times* reported, several hundred “Afghan Arabs” had been picked up for questioning in Sana’a, Taiz and Aden. Many were released in days. However, at least eight suspects in the October 2000 attack on the USS Cole were still held without charge in November, most of whom had been held well beyond the maximum six-month period permitted under the Criminal Code of Procedure. Within the same context, the excuse of religious extremism was used to legitimize the deportation of thousands of Arabs from Egypt, Algeria, Sudan, Libya, Saudi Arabia, and Jordan who had illegally entered the country<sup>104</sup>. In this same vein, there were also actions against Islamic educational institutions. Although human rights’ abuses concern above all the prohibition of arbitrary detention and/or deportation, what is particularly relevant for our purpose is that the basis for such encroachments was given by religious discrimination. Such action, which was to a large extent motivated by US pressure, was conducted against the political basis of the opposition to SALEH’s party. From a legal point of view, a number of international standards could be applicable to qualify the same situation. From the perspective of the ICCPR, such basis of discrimination would be illegal even on national security grounds. As noted by the Human Rights Committee:

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103 Name given to those Islamists who had returned after spending time in Afghanistan.

104 The fact that such action was part of the same campaign was reported to the *Yemen Times* by a governmental official, who requested anonymity. Cf. Massive Arrest Campaign against Arab-Afghans in *Yemen Times*, issue 39 - September 24, 2001 thru 30 September, 2001, vol XI.

"The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they are predicated. Restrictions may not be imposed for discriminatory purposes or *applied in a discriminatory manner*"<sup>105</sup>.

Thus, when illegal restrictions to any of the rights stated by the ICCPR are introduced on a religious basis, not only is the principle of non-discrimination being blatantly violated but there is also an encroachment on religious freedom itself. The way all these principles are combined in a particular situation illustrate this third condition for derogations. Indeed, when assessing the content of the term "discrimination" within the context of the ICCPR, the Human Rights Committee makes explicit reference both to the International Convention on the Elimination of All Forms of Racial Discrimination as well as that on the Elimination of All Forms of Discrimination against Women, thereby reflecting the integrated approach pursued in this respect<sup>106</sup>. Moreover, according to paragraph 2 of article 4 ICCPR, article 18 is not subject to legal derogation, even in times of public emergency threatening the life of the nation. Summing up, Yemen's campaign against Arab-Afghans can in many regards be considered a violation of Yemen's obligations under international law.

The preceding analysis also applies to the *fourth condition* for derogation, namely the respect of the principle of non-discrimination, which, for the reasons stated, would also be clearly violated in this particular case.

Finally, let us add some further comment on Yemen's war on terror with regard to non-derogable rights as defined by article 4.2

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105 Human Rights Committee, *General Comment 22, Article 18*, adopted in its 48th session, 1993, UN Doc. HRI/GEN/1/Rev.1 at 35 (1994), paragraph 8.

106 Human Rights Committee, *General Comment 18, Non-discrimination*, adopted in its 37th session, 1989, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994), paragraph 6.

ICCPR. Even if we admitted that Yemen satisfies all the conditions necessary to introduce derogations, which as we have seen is far from being the case, international human rights standards impose a number of absolute limits. Many of the human rights abuses reported by non-governmental organizations are simply not legally justifiable under any grounds. Encroachments such as arbitrary detention without trial or the use of torture or other inhuman or degrading treatment or punishment, which have taken place on a regular basis, clearly constitute a breach of the “immutable” human rights core. According to Amnesty International:

“(in the aftermath of the September 11 events) thousands of people have been subject to arbitrary arrest and incommunicado detention. They include people who had traveled to Afghanistan or Pakistan, and their relatives, including women; members of Islamic groups; students of religious schools, including children as young as 12 years old; journalists, and academics. In all cases, the arrests were carried out without judicial warrant, and the detainees held at the total mercy of the arresting authority without access to lawyers, family or the judiciary to challenge the legality of their detention”<sup>107</sup>.

Such measures, taken either on real grounds of national security or only under the excuse of national security, can simply not be justified under international law.

## CONCLUDING REMARKS

In an important declaration, regarding security legislation and law enforcement measures after the September 11 events, MARY ROBINSON<sup>108</sup>, WALTER SCHWIMMER<sup>109</sup> and GÉRARD STOUDMANN<sup>110</sup> stated:

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107 Amnesty International, *Yemen: human rights violations have no justification*, 17 July 2002, MDE 31/003/2002.

108 United Nations High Commissioner for Human Rights.

109 Secretary-General of the Council of Europe.

110 Director of the Organization for Security and Cooperation in Europe’s (OSCE) Office for Democratic Institutions and Human Rights.

"While we recognize that the threat of terrorism requires specific measures, we call on all governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent. In pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms"<sup>111</sup>.

Behind this declaration, which synthesizes in a moderate diplomatic wording the main issues at stake, one can discern two more profound questions that have traditionally been approached as dilemmas.

The first dilemma refers to the relationship between the norm and the exception. Exceptional times seem to require exceptional measures. But, how far can these measures go? Is it possible to establish norms applicable in exceptional situations? International human rights law answers these two questions in a very clear manner. As we pointed out in the introduction, the central idea on which is based the solution to this dilemma is to assert the existence of a non-derogable human rights core. However, while the existence of such core is easily justifiable as a conventional obligation, its customary character is far more problematic. This latter point does not mean that the customary nature of the human rights core is the object of controversies but it refers rather to its hierarchy. The answer to such interrogation would lead us to open maybe the most difficult and delicate chapter of international law, namely the theory of *ius cogens*. Of course, in the case of Yemen's war on terror, such question is superfluous since Yemen is legally bound by most major international human rights treaties. However, in the absence of such conventional obligations, how could one be sure of the limits within which exceptional responses must remain? And what would happen if a powerful State simply considered itself as not being bound by some particular provisions on grounds of paramount security

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111 Organization for Security and Cooperation in Europe's (OSCE) Office for Democratic Institutions and Human Rights, press release, 29 November 2001.

considerations? In fact, exceptional situations may sometimes be such that they constitute a challenge even to those norms established to govern them, reopening the original dilemma.

The second dilemma, of a more political nature, is that between prevention and repression. This opposition can be approached at different levels. For instance, a prolonged detention, which is a clear form of repression, may at the same time constitute a form of prevention, if the detainee is suspected to be planning an attack. If we focus on the war on terror, the interpretation of this opposition may become highly politicized. It could indeed be argued that September 11 attacks themselves could have been prevented if the US foreign policy in the last decades, especially with regard to Israel and the Arab States, had been different. The American war on terror could, in this line of thought, be interpreted as a way of repression of what the US was unable to prevent or, more realistically, unable to foresee. When General DWIGHT EISENHOWER was elected President of the United States in the 1950s, he was confronted to a different though comparable situation, namely the communist threat. Curiously enough, Eisenhower, himself a military man, preferred not to engage in restrictive and invasive policies. In this respect, he thought that:

“If we let defense spending run wild ... you get inflation ... then controls ... then a garrison state ... and then we’ve lost the very values we were trying to defend ... Should we have to resort to anything resembling a garrison state ... then all that we are striving to defend would be weakened”<sup>112</sup>.

EISENHOWER words are wise. The American war on terror is strongly affecting those values the US once strived for both directly, at home, and indirectly, by the example it provides to other more oppressive-prone regimes, such as that of Yemen. Human rights are

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112 Cited in SHERRY, M., “Eisenhower’s Heroic But Failed Crusade Against Militarization”, in PATERSON, T.G. (ed.), *Major Problems in American Foreign Relations*, vol. II, D.C. Heath and Co, Lexington MA, 1978, p. 355.

undoubtedly a major part of such values. The conclusion is then very simple. Sacrificing human rights for the sake of security would leave security devoid of any human interest.

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