Political Oppression in the Name of National Security: Authority, Participation, and the Necessity Within Democratic Limits Test

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The myth of domination by violence must be exposed; so must be the myth about the indispensability of the oppression of human rights to political or economic development.¹

Nearly all governments claim to represent the "will of the people."² Indeed, one suspects that few governments could survive without some mythical reference to this ultimate measure of authority.³ Governments are loath to admit openly that oppression⁴ of minorities or majorities is ever justifiable under international law, much less under

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¹ M. McDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 444 (1980). See also id. at 17-22 (deprivations relating to power), 22-25 (deprivations relating to enlightenment), 47 (imagined needs of national security and internal order), 807-08 (human rights not to be diluted or destroyed under any pretext).
⁴ By "oppression" I mean the intentional or highly foreseeable denial of effective participation in a given value process when such is not actually necessary in the context of violence or threats of violence perpetrated by those being denied effective participation. Here, the focus is on a governmental denial of private participation by groups or individuals in the power processes of a given society. Examples can include "political prisoners," persons "banned" (South Africa), and persons denied the right to vote because of their political or ideologic beliefs. Governmental oppression could occur, of course, with respect to any other value (e.g., wealth, enlightenment, respect); and, in any given case, private oppression could be equally thwarting of human rights. Oppression differs from a process of "accommodation" precisely because of the openness of an authoritative political system to private participation in choice (initially and/or during a continual process of review) about the accommodation of several interests at stake. As demonstrated below, this openness with respect to participation and proper attention to the international legal standard of authority allow one to differentiate in a more realistic and policy-oriented way between authoritative derogation or accommodation and impermissible oppression. On the process of authoritative accommodation, see M. McDOUGAL, H. LASSWELL & L. CHEN, supra note 1, at 119, 414-22, 459, 800, 804-15. On private participation generally, see id. at 85, 94-98, 101-113, 145, 167-68, 173-79, 400-01. On private participation during a process of review, see Paust, The Concept of Norm: Toward a Better Understanding of Content, Authority, and Constitutional Choice, 53 Temple L.Q. 226, 231-38, 257, 275-77, 286 (1980), and references cited therein.

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human rights law. Thus, oppression must have another name, and far too often it appears in the guise "national security" or that more patently incongruous phrase "martial law." 5

The point I wish to make is not that national security is unimportant or that derogations from certain more ordinary human rights are never permissible when "national security" is actually at stake. 6 My point is that governmental oppression of individuals and groups is illegal by any name, and that we, as interested participants and observers, should be ever alert to assure that derogations satisfy the human rights test of "necessity within democratic limits." 7

When political oppression of individuals and groups occurs, several potentially complementary international legal policies may be implicated. I will address these general legal policies and the precepts of authority, participation, and self-determination, and the relation between these and the necessity within democratic limits test. Only through detailed analysis of these legal concepts can one begin to engage in a more realistic and policy-oriented determination of whether political oppression exists or whether particular claims made by official elites to deprive groups of certain rights in the name of national security are permissible. In this regard, several broadly phrased legal precepts contained in the United Nations Charter are pertinent.

Charter norms which might be pertinent in any given case are: (a) the principle of equal rights and self-determination; 8 (b) the duty of all states to take joint and separate action to achieve "universal respect for, and observance of, human rights and fundamental freedoms for all"; 9 and (c) the prohibition of the threat or use of force by a state in any manner inconsistent with the purposes of the United Nations. 10 In addition, article 2, paragraph 7 of the Charter prohibits intervention by


6. Here, I differentiate between the security needs of the nation as a whole and attempts by power elites merely to maximize their own value positions through putative claims to national security. See also M. McDougal, H. Lasswell & L. Chen, supra note 1, at 805 ("Power elites notoriously often confuse their special interests in power and other values with the common interest of the community as a whole."). National security will be at stake "in times of high crisis and intense threat to general community interest." Id. at 806; see also id. at 421, 813-15.

7. See also id. at 421, 805-06, 814; Paust, International Law and Control of the Media, supra note 5, at 621-24, 631-33, 664-65, 675-77. The human rights test is set forth below at the text accompanying notes 13-18 infra.


9. Id. art. 55; see also id. preamble, art. 1, para. 3, art. 56.

10. Id. art. 2, para. 4.
the United Nations in "matters which are essentially within the domestic jurisdiction" of a state.

Article 2, paragraph 7 could be raised by a claimant state in an effort to prevent outside intervention in what it perceives to be a domestic "national security" matter. Nevertheless, when other Charter norms, such as the right to self-determination or individual human rights, are contravened, the matter is of international concern and, thus, no longer a matter "essentially" within the "domestic" jurisdiction of a claimant state. Therefore, Article 2, paragraph 7 does not provide a legal basis for deprivations of human rights. A more viable basis for derogation may arguably be found in the more specific law of human rights.

The most important human rights law document is the Universal Declaration of Human Rights. Article 29, paragraph 2 of the Universal Declaration is an "exceptions clause" that can be used by a claimant government in an attempt to obviate or restrict certain human rights. It states:

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


13. For relevant provisions of other human rights instruments, see M. McDOUGAL, H. LASSWELL & L. CHEN, supra note 1, at 807-15.

14. Universal Declaration, supra note 2, art. 29, para. 2.
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Though a government may thus impose restrictions on certain human rights in the interest of public order or national security, there are strict limitations to permissible derogations. Such limits are necessarily related to more fundamental precepts of authority, human dignity, and self-determination.

According to article 29, the first limit is that any deprivation must be "determined by law." Thus excluded and impermissible are extralegal or extra-constitutional deprivations by state agents or agencies. The second limit is that the restriction must be solely for the purpose of: (1) implementing the rights and freedoms of other individuals or groups or of the society as a whole; and (2) meeting just "requirements" of morality, public order, and welfare. The words "solely" and "requirements" are significant. They specify the types of purposes that are permissible and the degree of necessity that must exist. The "just requirements" phrase establishes the criterion of necessity.

The third limit is that restrictions may only be imposed by states that have political systems that conform to the concept of a "democratic


16. See M. McDougal, H. Lasswell & L. Chen, supra note 1, at 814. There, they also mention "proportionality," a normal concern with regard to any inquiry into actual necessity, as for example with regard to the necessity of a particular use of force. See, e.g., id. at 804; Paust, Does Your Police Force Use Illegal Weapons?—A Configurative Approach to Decision Integrating International and Domestic Law, 18 HARV. INT'L L.J. 19 (1977).

Concerning the European Convention and the additional need thereunder for "strictly required" measures in time of "public emergency which threatens the life of the nation" see Pacht, Experiences Regarding the War and Emergency Clause (Article 15) of the European Convention on Human Rights, 1 ISRAEL Y.B. ON HUMAN RIGHTS 327 (1971). Such measures "lose their legitimacy after life has normalized or the absolute necessity no longer exists." Id. at 332. See also F. Castberg, The EUROPEAN CONVENTION ON HUMAN RIGHTS 165 (doctrine of necessity), 168 (British measures and the "strictly required" test), 169 ("measures are necessary in the prevailing situation") (2d ed. 1974); Hartman, Derogation from Human Rights Treaties in Public Emergencies, 22 HARV. INT'L L.J. 1, 3, 17, 31-35, 51 (1981); Higgins, Derogations Under Human Rights Treaties, 48 BRIT. Y.B. INT'L L. 281, 283, 297 ("strictly required"), 300 ("strictly necessary"), 304-05, 308, 312 (1978); the Lawless Case, 1961 Y.B. EUR. CONV. ON HUMAN RIGHTS 430 (Eur. Court of Human Rights), (first case in the European Court of Human Rights and one involving a secret army, an emergency of an "exceptional . . . crisis" nature, and an increase in terrorist activities over a long period); O'Boyle, Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. the United Kingdom, 71 AM. J. INT'L L. 674 (1977); Hannum & Boyle, Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: The Donnelly Case, 68 AM. J. INT'L L. 440 (1974).
Thus, relevant just requirements are possible only within a democratic society. Accordingly, ideological conclusions such as "just" and "democratic" are unavoidable in the consideration of whether a particular restriction of human rights by a given state is permissible. This is not surprising, in view of the promulgation of ideologically significant rights and expectations expressed elsewhere in the Universal Declaration and in the United Nations Charter itself.

To generalize, the Universal Declaration and the U.N. Charter express a fundamental demand of individuals for human dignity and of political societies for self-determination. These demands are not ideologically neutral. They constitute a bulwark against the denial of the dignity of any member of any society and against the denial of self-determination through totalitarian controls that do not allow full and

17. The 1966 International Covenant does not mention "democratic society" in connection with free speech provisions but does with regard to peaceful assembly and freedom of association. Nevertheless, the 1966 Covenant recognizes the right of self-determination, which is nearly equivalent. See International Covenant on Civil and Political Rights, arts. 1, 4(1), 13-22 G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); see also id. art. 5(2). Articles 8-11 of the 1950 European Convention on Human Rights also contain the conditional language "democratic society." 213 U.N.T.S. 221 (1955). Article 15(1) adds the proviso that measures of derogation must not be inconsistent with other international legal obligations. As explained below, the precept of self-determination is a relevant legal norm and, thus, should also condition article 15 of the European Convention. As explained by Frede Castberg, article 3 of Protocol No. 1 of the European Convention (which requires "free elections" to "ensure the free expression of the opinion of the people") is quite similar to the requirement of article 21, para. 3 of the Universal Declaration in that both "protect democracy as a system of government" and seek to effect the will of the people as the basis of the authority of government. See F. CASTBERG, supra note 16, at 181. He adds that "[a] number of variants of the democratic system of government exist and are fully compatible with the requirement [in article 3]." Id. Castberg also noted that in the case of a "seizure of power . . . effected to an authoritarian end" the derogation clause "may not be invoked, regardless of the gravity of the crisis." Id. at 170. This point is accepted by Professor Joan Hartman. See Hartman, supra note 16, at 7 n.30, citing F. CASTBERG, supra at 170; see also id. at 3, 11, 17 (not to take repressive actions against political rivals or disfavored minorities) & 29 n.152; Higgins, supra note 16, at 282 (requirements of democracy), 307, 310.

18. This is not unusual when one recognizes that a commitment to human rights and "the dignity and worth of the human person" (U.N. Charter, preamble) is an ideologically relevant commitment. See generally McDougal, Lasswell & Reisman, Theories About International Law: Prologue to a Configurative Jurisprudence, 8 VA. J. INT'L L. 188 (1968); Paust, International Law and Control of the Media, supra note 5, at 628-29; see also Paust, Human Rights, supra note 3, at 227-28, 248-49.


20. See U.N. CHARTER art. 1, para. 2.
free participation in the political process of any society.21

Even more significant with regard to the ideologically loaded phrase “democratic society” set forth in article 29 is article 21 of the same Declaration. Article 21 recognizes that every individual has the right “to take part in” the governmental process of his country and to “equal access to public service.” In addition, the article states in paragraph 3:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be held by secret vote or by equivalent free voting procedures.22

Thus, the authority of the government may lawfully derive only from the will of the people.

Other norms, when taken together, confirm the concept of authority contained in the third paragraph of article 21. Article 1 of the Declaration affirms the fundamental expectation that all human beings are born free and equal in dignity and rights. Article 2 affirms that everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction, for example, on the basis of race, sex, or political opinion. Finally, article 7 affirms that everyone has the right to recognition as a person, and that all are entitled to equal protection of the law.23


22. Universal Declaration, supra note 2, art. 21, para. 3.

23. The recognitions of right are, to a degree, also expressly recognized in the U.N. Charter. The preamble to the Charter, which is as relevant as the articles of a treaty to its meaning, reaffirms both the “dignity and worth of the human person” and the “equal rights of men and women.” Article 1, paragraph 3, and article 55, paragraph c, add the expectation that human rights and fundamental freedoms shall be implemented “without distinction as to race, sex, language, or religion.” For recognition of the point that these and other rights are interrelated for purposes of aggregate protection of the right to political participation, see M. McDougal, H. Lasswell & L. Chen, supra note 1, at 709.
Participation in political processes must be on the basis of one person, one voice,\textsuperscript{24} if individual dignity and equal participation are to be served.\textsuperscript{25} It is therefore understandable that article 21 contains similar references to what one might term the related aspects of a process of authority.

As mentioned above, paragraphs 1 and 2 of article 21 proclaim a right “to take part” and a right of “access” for each and every person, and articles 1 and 2 of the Declaration reiterate these expectations. Of further significance with regard to a process of authority and the standard of authority recognized in paragraph 3 of article 21, is the fact that the paragraph also contains related and fairly precise exemplifying language. Not only is the “will of the people” to be the basis of the authority of any given government, but this will shall be expressed in free and periodic elections held on the basis of “universal and equal suffrage.” This language provides an example of the interconnections between the exercise of individual rights of equal participation in the political process and an outcome of a political process which allows a relatively full, free and equal participation—the aggregate will of individual participants.

The consistency evident in the Declaration between expectations concerning the sharing and shaping of power and an outcome of such a participatory process is a key to a more realistic and policy-oriented understanding of relevant patterns of legal expectation that relate to another aspect of the process of authority—the right to self-determination.\textsuperscript{26} One can identify a significant interconnection between paragraph 2 of article 1 of the U.N. Charter, which recognizes “the principle of equal rights and self-determination of peoples,” and paragraph 3 of that same article, which recognizes the existence of human rights for each individual human being. Self-determination and human rights both demand that the only legitimate basis of the authority of any government is a dynamic process involving the genuine, full and freely expressed will of the people, that is, a dynamic aggregate will of individuals.\textsuperscript{27}

\textsuperscript{24} The word “voice” is used here instead of “vote” because some choose to participate by not voting. Additionally, apathy may result in a failure to vote, which can function as a form of passive participation or deference to more active participation by others.

\textsuperscript{25} See generally Paust, The Concept of Norm, supra note 4, at 286; Paust, Human Rights, supra note 3, at 248-49. Participation in the political process also allows a better effectuation of other rights or interests if political guarantees or remedies are forthcoming.

\textsuperscript{26} See generally supra note 21.

\textsuperscript{27} See generally id. See also U.N. CHARTER art. 76, para. b (“self-government” related to “the freely expressed wishes of the peoples concerned”). The interrelationship of “gross and massive violations of human rights . . . and any other form of the denial of the right of
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Documentation of this general expectation concerning the meaning of article 1, paragraph 2 is contained in the unanimously approved Declaration on Principles of International Law.\(^{28}\) The Declaration expresses the expectation of the international community that “all peoples have the right freely to determine” their political, economic, social, and cultural processes, that “every State has the duty to respect this right,” that states have “the duty to promote” the realization of self-determination, and that every state “has the duty to refrain from any forcible action which deprives” a relevant people “of their right to self-determination and freedom and independence.”\(^{29}\) The Declaration on Principles of International Law supplements article 21 of the Universal Declaration of Human Rights, for it equates self-determination, and thus a general process of authority, with a full, freely expressed, and consensual will of the people.\(^{30}\) As the Declaration on Principles of International Law affirms, a state that complies with the principle of equal rights and self-determination is one “possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.”\(^{31}\) No other state complies; no other political elite maintains its control in accordance with the right to self-determination or the standard of authority noted above.\(^{32}\) A state does not comply by representing merely half the people, an elite, a preferred party, the military, or any other power group.

This is the only approach to self-determination that is consistent with the preamble to the United Nations Charter\(^ {33} \) and the norm of nondis-

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\(^{29}\) See Western Sahara (Advisory Opinion), 1975 I.C.J.12 (utilizing similar standards of authority and legitimate self-determination).

\(^{30}\) Declaration on Principles of International Law, supra note 28 (“the principle of equal rights and self-determination of peoples”).

\(^{31}\) See Western Sahara (Advisory Opinion), 1975 I.C.J. 12 (using same general standard regarding legitimate self-determination).

\(^{32}\) See supra note 21. A dangerous pattern of media control is related to this overall problem in Paust, International Law and Control of the Media, supra note 5. See also M. McDougal, H. Lasswell & L. Chen, supra note 1, at 697 (“sharing of power, further, depends upon a free exchange of opinion; a democratic society can only thrive by cultivating and testing a great pluralism of ideas and alternatives”), 698-99 (quoting T. Emerson: “Such freedom is essential to the whole process of legitimation of social decisions”).

\(^{33}\) See, e.g., Vienna Convention on the Law of Treaties, supra note 21, art. 31(2) (recognition of a customary approach to the use of preambles).
crimination that is recognized, indeed cemented, in article 1, paragraph 3 and in article 55, paragraph c of the Charter. The preamble to the Charter reaffirms human rights and the "dignity and worth of the human person," and the other articles state unequivocally that human rights are rights for all persons and that there shall be no distinction on the basis of "race, sex, language, or religion." Clearly, any approach based on such a distinction would violate the intent of articles 1 and 55, and, thus, the state obligations contained within article 56. Further, no other approach to authority or self-determination would be compatible with the right of each person to "dignity and worth" as a human person.

Therefore, the U.N. Charter, the Universal Declaration, and the Declaration on Principles of International Law offer a consistent approach to the questions of authority and participation. The two Declarations combine to offer the interpreter of the U.N. Charter a consistent subsequent practice, one that relates directly to both the object or purpose of the Charter and the specific preambulary and article 1 and 55 provisions. For these reasons, it was appropriate for the International Court of Justice to discover the meaning of self-determination by reference to articles 1, 55, and 56 of the Charter and conclude that the process of self-determination involves a right of peoples to freely determine their political status and that an exercise of such a right "requires a free and genuine expression of the will of the peoples concerned."

In light of the foregoing discussion, one can understand that when a government invokes national security to deny relatively free and equal participation in the political process, it fails to meet the test of article 29 of the Universal Declaration for permissible deprivations of human rights and acts without authority in such a way as to thwart human dignity, the human right to participate in the political process, and legitimate self-determination. Such a government cannot really be seeking the security of the nation, for it is depriving individuals and groups within the nation of their security and their right to participate. Most likely, such a government seeks security only for itself, and, as is often the case with dictatorial power elites, use of the phrase "national security" merely demonstrates the insecurity of those in power.

One can also understand that a government's claim to prohibit the relatively free expression of political ideas by the majority of the popu-

34. See, e.g., M. McDougal, H. Lasswell & L. Chen, supra note 1, at 564-68, 702-07, 916-18.
35. See Western Sahara (Advisory Opinion), 1975 I.C.J. 12.
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lation under the guise of national security would hardly satisfy the necessity within democratic limits test found in article 29 of the Universal Declaration. Such a government would certainly not be one with a democratic society composed of individuals who were treated with equal dignity and worth by the government, and would hardly reflect the will of the people. Not only would such a government be non-democratic and, since it did not allow the will of the people to be expressed, one without a basis in authority, but the claim to control the expression of political ideas by the vast majority of the population would hardly serve the just requirements of a democratic society.

Therefore, a government's claim to regulate the political content of the media under the guise of national-security should be rejected on the basis of articles 18 and 19 of the Universal Declaration. These articles declare the rights to freedom of thought, conscience, opinion, expression, and the right to receive and disseminate information and ideas which are not subject to restriction under article 29(2) under the circumstances, as interpreted and supplemented by consideration of articles 1, 2, 7, and 21. Furthermore, such a governmental claim would not only violate relevant human rights norms, but would also thwart the right of the people of such a state to self-determination. Finally, to the extent that force was used to police the prohibition of a free political expression, article 2, paragraph 4 of the U.N. Charter would also have arguably been violated, because the government would have used force in a manner inconsistent with the purposes of the Charter—i.e., in violation of human rights and the right of the people to self-determination.\(^{36}\)

It should not matter whether such a government exists in South Africa,\(^{37}\) Poland,\(^{38}\) or some other territory. The fundamental precepts of international law, the legal concepts of authority, participation, and self-determination, are standards for every official elite and for any claim to deprivation in the interest of national security. They must also be a part of any adequate set of principles of content and procedure for

36. See Paust & Blaustein, supra note 21, at 11-12 n.39, 19, 30-31; Paust, *A Definitional Focus*, supra note 21, at 5, 7, 9; Paust, *International Law and Control of the Media*, supra note 5, at 629.


rational and policy-serving decisions regarding the permissibility of derogations from human rights. Indeed, it is evident from the relation between articles 21 and 29(2) of the Universal Declaration that paragraph 3 of article 21 is one of the few human rights provisions that can never lawfully be violated.

In sum, no government may claim lawful authority to restrict article 21 of the Universal Declaration to oppress either minorities or majorities within a society. In the final analysis, this is true because, as Thoreau might have agreed, a government cannot act with authority to oppress the individual:

There will never be a really free and enlightened State until the State comes to recognize the individual as a higher and independent power, from which all its own power and authority are derived, and treats him accordingly.

Postscript: Suspect Patterns in European Practice

Excellent papers by Professors Boyle and Schreuer raise questions concerning the interrelation between European Convention standards

39. For the beginnings of such principles, see M. McDougal, H. Lasswell & L. Chen, supra note 1, at 419-22, 815; see also id. at 804-05. With regard to Principles of Procedure and the Principle of Clarified Focus, id. at 421, one might also use a checklist like the following:

With regard to any claim to derogation, assure that:
(a) self-determination is not being denied or thwarted;
(b) there is no denial or subversion of the process of democratic authority;
(c) individuals are not being denied participation in the political processes;
(d) individuals are not being denied freedom of association; and
(e) groups are not being denied participation in the political processes.

For evidence of listed deprivations relating to power, see id. at 17-22; see also id. at 15-16 (respect), 22-25 (enlightenment). Concerning a peremptory constitutional right to participation, see L. Lusky, By What Right? 11-12 and passim (2d ed. 1978); Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1 (1977); Paust, The Concept of Norm, supra note 4, at 282-84.

40. For evidence of other peremptory provisions, see the International Covenant on Civil and Political Rights, supra note 17, art. 4, paras. 1 & 2; European Convention on Human Rights, supra note 17, art. 15, paras. 1 & 2; American Convention on Human Rights, supra note 17, art. 15, paras. 1 & 2; American Convention on Human Rights, supra note 17, 27, paras. 1 & 2, art. 29, paras. b, c & d. For evidence of relevant constitutional limitations on our own government, see Paust, Is the President Bound, supra note 15; Paust, International Law and Control of the Media, supra note 5, at 622-23, 662-65.

41. Thoreau, Civil Disobedience, in WALDEN AND OTHER WRITINGS OF HENRY DAVID THOREAU 659 (B. Atkinson ed. 1963). For similar points, see Chen, Self-Determination as a Human Right, in TOWARD WORLD ORDER AND HUMAN DIGNITY 198, 201, 241, 242-44 (W. Reisman & B. Weston eds. 1976); Suzuki, Self-Determination and World Public Order, supra note 21, at 782; Paust, Human Rights, supra note 3, at 227-28, 248-49, and references cited therein; Paust, The Concept of Norm, supra note 4, at 228-37, 284, 286; H. Lauterpacht, International Law and Human Rights 120 (1968 reprint) (concerning “the individual human being [who] as the ultimate unit of all law rises sovereign over the limited province of the State”); see also id. at 27, 34-35.
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and those of the international community with respect to permissible derogations. In particular, questions arise with regard to the attention paid by European institutions to international legal precepts of authority, participation, and self-determination noted above. In my opinion, actual trends in European institutional decisions leave much to be desired.

The main derogation provision of the European Convention expressly requires that measures of derogation be "not inconsistent with . . . other obligations under international law."[42] Necessarily then, European human rights institutions must pay adequate attention to the U.N. Charter[43] and, more specifically, to the precepts of authority, participation, and self-determination. As recognized by Professor Rosalyn Higgins, however, such a requirement "has generated virtually no jurisprudence in the organs of the Convention."[44] She adds:

In the Lawless case neither the Commission nor the Irish Government referred to this. The Court none the less declared that, proprio motu, it should determine whether the condition had been fulfilled, and found it had. . . . [I]n the Greek case, no submissions were made on this point by the applicants. The Commission . . . [also did not have to consider] whether the derogations were consistent with Greece's other obligations under international law.[45]

One of the troublesome decisions involved the denial of an application presented to the Commission by the German Communist Party in 1957.[46] In denying the application, the Commission did not use one of the derogation clauses found in the European Convention, but used a general article which proclaims that nothing in the Convention may imply the right of a "State, group or person . . . to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms" of others.[47] The German government had outlawed the German Communist Party and, despite claims raised in the application concerning the right of political participation and freedoms of thought, conscience, expression, and association, the Commission found that the avowed purpose of the Party to establish a revolutionary dictatorship of

42. See European Convention, supra note 17, art. 15, para. 1.
44. See Higgins, supra note 16, at 305.
45. Id. at 305-06.
47. European Convention, supra note 17, art. 17. See also supra note 46; Universal Declaration, supra note 2, art. 30.
the proletariat was in conflict with the Convention, would lead to the suppression of the human rights of others, and obviated the admissibility of the Party's claim.48

What is troubling about this denial is the recognition by the Commission that the Party would not use violence, but would attempt to obtain power through peaceful, constitutional means.49 It was the subsequent "dictatorship" of the proletariat by non-democratic means that the Commission had found unacceptable.50 Therefore, a denial of political participation in a democratic process hinged on the present purpose of a political party and an uncertain future event—certainly not the sort of circumstance that could justify a derogation under the necessity within democratic limits test.51 Further, as noted above, the necessity within democratic limits test is necessarily correlated with the precept of authority and the human right of all individuals to participate in the political processes of their society. It is difficult to imagine, therefore, how the denial of peaceful participation by individuals or groups in the political processes of West Germany can be permissible when measured against the standard of authority, rights of participation, and self-determination noted above, regardless of the ultimate aim of those who seek to participate. If a dictatorship of the proletariat was later established in such a way as to deny the right of others to participate, the Commission could use the same standards of authority, participation, and self-determination in an effort to keep the new political processes open and in compliance with general norms of international law.

In The Greek Case,52 democratic considerations seemed to weigh more heavily against governmental claims to derogate from human rights relevant to the participation of individuals and groups in the political process.53 The claim of the Greek military government was denied by the European Commission; and the Commission, with some

48. See supra note 46.
49. See id. Castberg seems to recognize the problem but assures the reader that the Commission's decision "was correct in law." F. CASTBERG, supra note 16, at 171.
50. See supra note 46.
51. The European Commission and various commentators have stressed that such reasoning under article 17 of the European Convention cannot justify detention of such political minorities. See, e.g., F. CASTBERG, supra note 16, at 172; A. DEL RUSSO, supra note 43, at 127-28.
dissenting views, found that no actual or imminent emergency existed,\(^54\) that mere strikes and demonstrations under the circumstances did not justify the human rights derogations,\(^55\) that the military government had committed a "clear and persistent breach" of its obligation to hold free, democratic elections,\(^56\) and that press censorship forbidding criticism of the military government was not justifiable.\(^57\) Importantly, there was also a rejection of the government's claim that the Commission would be interfering impermissibly in the "internal affairs" of Greece if it investigated the actions by which the military government maintained its power position.\(^58\) These actions included outlawing political parties, rigid censorship, detention of political opponents, and other measures noted above.\(^59\) Before sanctions could be imposed, however, the Greek government withdrew from the Council of Europe.\(^60\)

At least two other cases, the *Dutch Soldiers Case*\(^61\) and *Arrowsmith*,\(^62\) raise interesting questions concerning the right of nonviolent participation in political demonstrations and/or the dissemination of information, but space does not permit further elaboration. In both cases, deprivations were found to be reasonably necessary under the circumstances. In *Arrowsmith*, the majority of the Commission found that a pacifist's distribution of leaflets to military personnel went beyond expression of a political opinion and that "the decision to prosecute her was necessary for the protection of national security and the prevention of disorder in the army."\(^63\) In my opinion, the dissent had the better argument in *Arrowsmith*.

In any event, the "other obligations under international law" clause of the main derogation article of the European Convention compels recognition of the fact that an adequate test of derogations even under the Economic Convention must involve inquiry into the effects of a


\(^{59}\) *Id.* at 156-57. See also *supra* text accompanying notes 57-58.

\(^{60}\) See A. Del Russo, *supra* note 43, at 158.


\(^{63}\) See *id.* at paras. 90-97, 103.
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proposed derogation on the serving of more general international precepts of authority, participation, and self-determination.