

Toward New International Standards on Emergencies: Extreme Emergencies and the New Negation of Fundamental Rights

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Abstract

The purpose of this article is to discuss what could soon become the new international standards on emergencies. The terrorist attacks on 11 September 2001 in the United States paved the way for the legalisation of practices and facts that until then were the trademark of totalitarian societies. While traditional emergencies such as a state of exception and a state of emergency are the object of strict regulations under domestic and international law, especially in terms of human rights protection, extreme emergencies account for a situation where owing to terrorism threats (real or alleged) fundamental rights, including non-derogable rights can now be brought to a standstill. At the heart of my paper, lies an assessment of contemporary legal systems that have reacted to terrorist threats with emergency measures that differ in nature from more traditional emergency powers, with the latter being more ‘legalistic’ and respectful of human rights guarantees.

Keywords: State of Emergency; State of Exception; State of Siege; Martial Law; Emergency Powers; Human Rights; Terrorism; Democracy

Introduction

In this article¹ I discuss a new trend, which, in my view, could soon become the new standards on emergencies. It is generally agreed that human rights and the rule of law may be subject to suspension or derogations as a result of threats against state security such as war, insurrection, revolution, natural cataclysms, foreign invasion, terrorism and following the declaration of a state of emergency, state of siege, state of exception and/or martial law. Despite these possibilities of (lawful) suspension, certain human rights are said to be non-derogable, regardless of the prevailing situation. This is, for example, the case with the right to life and freedom from torture. Traditional emergencies are subject to strict regulations under domestic and international laws especially in terms of human rights protection. Yet, the terrorist attacks on 11 September 2001 in the United States have brought about the validation of torture and other practices, that until then were the trademark of authoritarian and totalitarian societies. This has paved the way for what I term extreme emergencies, that is, situations where owing to threats of terrorism—real or alleged fundamental rights, including non-derogable rights, can be subject to abuses by public authorities.

As early as May 2003, Amnesty International observed that the ‘war on terror’, far from making the world a safer place has made it more dangerous by curtailing human rights, undermining the rule of international law and shielding governments from scrutiny.² It has deepened divisions among people of different faiths and origins. Indeed, what was unthinkable until recently has become possible through the enforcement of what, in my opinion, stands for a new category of exceptional powers, termed extreme emergencies. Unlike traditional emergencies that are strictly framed by legal and constitutional restrictions, extreme emergencies are entirely driven by the executive power in an environment where citizens are not excluded from being a potential threat to state security. There are other threats to the life of a nation as mentioned above, but in this article I will focus only on terrorism because compared to other threats, this phenomenon inspired the shift that is occurring in democratic states. With this in mind, the core of my analysis is the way in which fundamental rights, especially non-derogable rights, are brought to a standstill within the context of the struggle against terrorism. Extreme emergencies and the new negation of fundamental rights suggest the idea that what was not an option under classic emergencies has become possible in modern democracies. The central point of the article is an assessment of contemporary legal systems that have reacted to terrorist threats with emergency measures that differ in nature from more traditional emergency powers, with the latter being more ‘legalistic’

1 This article is a full and extended version of the paper I presented at the International Conference on Sustainable Development held in Athens in Greece on 2 and 3 September 2015. For this article, the title was amended and new arguments, resulting from further research presented.

2 Amnesty International UK, ‘Annual Report: Human Rights Threatened by “War on Terror”’ (Press releases, 28 May 2003) <<https://www.amnesty.org.uk/press-releases/annual-report-human-rights-threatened-war-terror>> accessed 29 May 2021.

and respectful of human rights guarantees. Within the context of extreme emergencies, non-derogable rights have lost their character and became subject to abuse. This shift is not an isolated occurrence in a single state but amounts to what is a new negation of fundamental rights that recurred in various countries. In the fight against terrorism, a seamlessly repeated pattern of not complying with human rights especially non-derogable rights has now been established, leading towards new standards on emergencies. Yet, it is suggested that ‘in essence derogation clauses express the concept that states of emergency do not create a *legal vacuum*. The derogation regime aims at striking a balance between the protection of individual human rights and the protection of national needs in times of crisis by placing reasonable limits on emergency powers.’³ The fact is that derogations have the potential to bring about abuses of all sorts, notably the concentration of powers and the rise of a totalitarian state.

Despite this clarification, one must keep in mind that the issue of emergencies is a controversial one, for the difficulty is to determine whether in time of crisis such as for instance a terrorist attack, the state that suspends law and infringes on the human rights of individual citizens still acts according to law or in contradiction of it. If it is hypothesised that emergencies are unpredictable by nature and that a model of emergency measures established beforehand cannot be adapted, it must also be considered that emergency provisions allow the state to frame the extent and the duration of powers transferred and to prevent itself from being harmed.⁴ At the heart of the debate, is a conflict of two fundamental emanations of the legal sphere namely, norm and exception, what Ferejohn and Pasquino refer to as ‘the structure of emergency powers.’⁵ In this regard, the international legal standards on emergency provide for a set of clauses that state parties must abide by when confronted with emergencies. As will be discussed soon, various states have retreated from these clauses, being at the origin of the shift from traditional emergencies framed by international and domestic legislation to extreme emergencies under the aegis of the executive power. The recent spreading of anti-terrorist legislation around the world, the legalisation of mass espionage activity, and the rise of concepts such as ‘indefinite detention’, ‘war on terror’, ‘pre-emptive attack’ and ‘preventive war’ are indications that emergencies in contemporary states have deviated from legal constraints. Even when certain abuses have been challenged in courts of law, most of them have been validated. I intend to draw attention to the phenomenon of extreme emergencies, for most of the available literature focuses particularly on the traditional mechanisms that states rely on to address issues of national security—mechanisms centred around the balance between human

3 Joan Hartman, ‘Derogations from Human Rights Treaties in Public Emergencies - A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations’ (1981) 22(1) *Harvard International Law Journal* 2.

4 *ibid.*

5 John Ferejohn and Pasquale Pasquino, ‘The Law of the Exception: A Typology of Emergency Powers’ (2004) *International Journal of Constitutional Law* 2 221.

rights and the security of society at large. Understanding the reasons that allowed for the new negation of fundamental rights owing to terrorism and violent extremism, requires an assessment of the meaning, place and localisation of emergencies in relation to the legal sphere. I therefore firstly provide a brief theoretical analysis on emergencies, especially the controversies surrounding this concept. I then proceed by looking at the concept of extreme emergencies through the prism of derogations available in international law, while dwelling at length on how this has become a global phenomenon by reviewing recent developments in various states.

Brief Controversies Surrounding the Concept of Emergencies

The controversy opposes two doctrines, the first being that emergencies are a part of the legal order, whereas the second places emergencies beyond such order.

Emergencies as Part of the Legal Sphere

This approach includes the phenomenon of emergencies within the realm of law and affirms its compatibility with the doctrine of constitutional democracy. Proponents of this approach depart from the popular conception that considers the enforcement of emergency powers, such as a state of emergency or a state of exception to be the business of the executive only. According to them, such powers being part of the legal order are part of the prerogatives of the executive, legislature and judiciary.

On the first point or the stand that a state of emergency is an executive affair, proponents of this approach consider such situations to be a constitutional dictatorship. According to Rossiter⁶ for example, the institution of democracy contains heavy mechanisms that can work only under normal circumstances. The principle of constitutional dictatorship finds its rationale in the following postulate: liberal democracy is complex, heavy and designed to function under normal circumstances and peaceful conditions. Accordingly, it is not adaptable to crisis periods which require celerity. As observed by Rossiter ‘those republics which in time of danger cannot resort to a dictatorship will generally be ruined when grave occasions occur.’⁷

On the second point or the view that the enforcement of a state of emergency is a prerogative of the legislature, proponents of this approach stress the necessity of parliamentary involvement at the time of crisis. The argument was developed in Dicey’s legality approach.⁸ According to him, in time of turmoil, priority should be given to the legislature, which remains the only authority to give *carte blanche* to officials when

6 Clinton Rossiter, *Constitutional Dictatorship (Crisis Government in the Modern Democracies)* (Princeton University Press 1948).

7 *ibid*, title page.

8 Albert Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan Press 1959) 246.

dealing with a threat.⁹ However, a further reading between Dicey's lines suggests a flexibility of the role granted to the legislature. In this respect, when there is not enough time for an act of parliament to be enacted, ministers ought to take every step, even at the peril of breaking the law, which is necessary either for restoring order or for repelling attacks, and must rely for protection on parliament passing an Act of Indemnity.¹⁰

On the third point, or the idea that the judiciary has a key role to play in the implementation of emergency powers, Dyzenhaus suggests that suspending law and allowing for such powers are at the origin of 'legal black hole' and 'legal grey hole.'¹¹ He considers the former to be a *legal vacuum* and the latter to be a situation with inefficient or inadequate legal mechanisms. To address these issues, Dyzenhaus proposes the adoption of what he refers to as the rule-of-law project that denotes the substantial role granted to judges and the necessary cooperation between the executive and the legislative branches of government. This also suggests that in time of turmoil, a judge's authorisation is needed for the government to justifiably break the rules to address the danger.¹²

Overall, the approach that places emergencies within the legal sphere is in favour of the legality of emergency powers. The key issue with this approach is that exceptional circumstances such as war, revolution, natural cataclysms and terrorism are not to be considered a *carte blanche* for the state to act outside the realm of law. No matter the gravity of the threat, the democratic structure of society must be preserved when dealing with issues of national security. Therefore, the human rights of individual citizens especially their non-derogable rights should not be subject to abuse. This is the foundation of traditional emergency mechanisms. Owing to multiple abuse of fundamental rights and states' continual ignorance of core democratic principles as a result of struggles against terrorism (real or alleged), this approach is not universally accepted and therefore justifies a different one.

Emergencies as Alien to the Legal Sphere

This approach is in conflict with the previous one. Proponents of this approach posit that a state of emergency and a state of exception are to be located beyond the sphere of law, but they represent a political nihilism and a vicious circle of violence. In this

9 ibid.

10 ibid.

11 David Dyzenhaus, *The Constitution of Law Legality in a Time of Emergency* (Cambridge University Press 2006) 3.

12 ibid 51.

section, I examine this approach by reviewing Schmitt's decisionism,¹³ Benjamin's messianism¹⁴ and Agamben's political nihilism.¹⁵

The origin of this approach was developed by Schmitt who considers a state of exception to be the limit not only of law but of the entire doctrine of liberal political theory. As Schmitt puts it 'sovereign is he who decides on the state of exception.'¹⁶ The occurrence of an exception is proof enough of the rule of law's weakness and inefficiency to frame human life.¹⁷ Against Kelsen's normativism¹⁸ that seeks to establish a theory of law that would be universally valid for all times and all situations,¹⁹ Schmitt contends that all law applies to a specific situation. Starting from the reasoning that the state suspends the law in the exception on the basis of its right to self-preservation,²⁰ the author argues for a fundamental relation between politics and the limit. The norm is made for men and not vice versa. Therefore the state of exception cannot be subject to the legal sphere, for the sovereign is part of the legal order but also transcends it.

The second idea of this approach comes from Benjamin. In his essay 'Critique of violence',²¹ he raises the issue of violence in the social and political realms and questions whether such violence can be justified as a pure means in itself, independent of whether it is applied to just or unjust ends.²² Following an analysis of what he refers to as the mythical form of violence and the pure or divine violence, Benjamin considers the current state of emergency as a fiction. According to him, a real state of emergency is that which has the potential to deny the law and affirm the possibility of a human existence outside the law.²³

The third argument considers emergencies as alien to the sphere of law and was developed by Agamben. According to him, a state of exception refers to a situation of suspension of law in which application and norm reveal their separation. As he argues, a state of exception amounts to the recognition of law outside, but it simultaneously prompts sovereign attempts to encompass the outside within the law.²⁴ This is where application and norm split from each other and where facts are converted into law and

13 Carl Schmitt, *Political Theology Four Chapters on the Concept of Sovereignty* (MIT Press 1985).

14 Walter Benjamin, 'Critique of Violence' *the Continental Ethics Reader* (Routledge 2003).

15 Giorgio Agamben, *State of Exception* (University of Chicago 2005).

16 *ibid* 5.

17 Schmitt (n 13) 6–7.

18 Hans Kelsen, *Pure Theory of Law* (University of California Press 1967).

19 Schmitt (n 13) 13.

20 *ibid* 12.

21 Benjamin (n 14) 115.

22 *ibid*.

23 *ibid*.

24 Agamben (n 15) 6.

law into facts.²⁵ As a result, emergencies cannot be perceived as a mere legal phenomenon, but a situation where the line between facts and law becomes blurred.

Overall, this approach provides justification for the fundamental rights and the rule of law being subject to infringements. On the one hand, Schmitt's approach justifies such violations by reaffirming the primacy of the rule of men over the rule of law and by confirming that there are no objective causes for the enforcement of emergencies. According to him, the declaration of a state of exception is a matter of sovereignty. On the other hand, unlike Schmitt, Benjamin and Agamben explain the processes that result in human rights violations during emergencies. Benjamin is of the view that violence cannot be part of the means deployed to address issues in the social and political realms and will only lead to brutality and retribution. For Agamben, a state of exception is located in a mixed area between inside and outside the legal sphere and result in anomie and the destruction of the legal order through the removal of the force of law from the law. In such circumstances, human rights are violated only because the norms that protect them remain valid but are simply de-activated.

The New Negation of Fundamental Rights: Assessing Terrorism and Extreme Emergencies Through the Prism of Derogations

A derogation of a right or an aspect of a right is its complete or partial elimination as an international obligation during times of emergency that 'threatens the life of the nation.' A set of norms that states must comply with when dealing with threats to their existence is contained in various international instruments including the United Nations Charter (UN Charter), the Geneva Convention, the International Covenant on Civil and Political Rights (ICCPR), the International Labor Organisation (ILO), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. These instruments include the clauses on severity, proportionality, non-derogable rights, non-discrimination and good faith motivation. Within the context of terrorism and extreme emergencies, these clauses are subject to a considerable retreat by states. But I have to mention that this retreat is implicit and is identifiable by the fact that in the name of fighting terrorism, various states have established a parallel exceptional legal architecture along the existing ones without formally repealing the latter.

Retreat of the Clause of Severity or Exceptional Threat

The idea of exceptional threat during a state of emergency is described in the first paragraph of Article 4 of the ICCPR. The provision refers to the concept 'exceptional threat' as 'a public emergency which threatens the life of the nation and the existence of which is officially proclaimed.' This concept denotes the seriousness and the gravity of a situation that may lead up to the enforcement of emergency powers. A threat to the life of the nation is one that on the one hand affects the whole of the population and

25 *ibid* 50.

either the whole or part of the territory of the state, and on the other hand, threatens the physical integrity of the population, the political independence or the territorial integrity of the state; or the basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.

Despite this precision, the idea of exceptional threat in modern states is most evident in the phenomenon of terrorism—that targets not only the territory and state structures but the state's population, in whole or in part. As a result of this growing threat, various states around the world have been relying on exceptional powers to combat terrorism. Since the 9/11 attacks, terror threats have become a major factor in justifying the ignorance of international commitments regarding human rights in times of crisis. In 2008, Amnesty International observed²⁶ that since 9/11, many states have adopted draconian new 'anti-terrorism measures',²⁷ including new legislation, which are in breach of their international obligations and pose a serious threat to human rights. In such circumstances, one of the most prominent features of statehood—it's the population—is generally suspected of being part of terrorist organisations. Being the main target of terrorist threats on the one hand, and the main object of suppression by states in their counter-terrorism policies on the other, civilian populations find themselves trapped within and between two fires. Whereas the purpose of extremist groups is to spread fear and insecurity among populations, the state's action is to counter this by finding the right balance between individual rights and community interests. Unfortunately, this has not been properly handled owing to the enactment of brutal measures that remain inconsistent with public liberties and democratic values. The recent inflation of anti-terror legislation across the world is implemented at the expense not only of terrorists but more importantly civilian populations. As observed by Lumina '... it must be recognised that state efforts to curb terrorist activities have also culminated in the abridgment of many rights and freedoms, not only of the 'terrorist' suspects but also of innocent civilians.'²⁸ Owing to terrorism threats, the tension between the protection of society and the guarantee of fundamental rights has reached a peak in modern constitutional states. Within the framework of extreme emergencies, the inflation of counter-terrorism measures not only undermine the fundamental rights

26 Amnesty International, 'Security and Human Rights Counter-Terrorism And The United Nations' (2008) <<https://www.amnesty.org/en/wp-content/uploads/2021/07/ior400192008en.pdf>> accessed 23 May 2021.

27 For example, in Australia, anti-terrorism laws include the Security Legislation Amendment (Terrorism) Act 2002 (No 2) Suppression of the Financing of Terrorism Act 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002, Telecommunications Interception Legislation Amendment Act 2002, and Border Security Legislation Amendment Act 2002. In Britain, see Anti-Terrorism, Crime and Security Act 2001 (ATCSA), the Prevention of Terrorism Act 2005. In Canada, see Anti-Terrorism Act 2001. In India, see Prevention of Terrorism Act 2002. In Cameroon see law No 2014/028 of 23 December 2014 on the suppression of acts of terrorism.

28 Cephas Lumina, 'Counter-terrorism Legislation and the Protection of Human Rights: A Survey of Selected International Practice' (2007) *African Human Rights Law Journal* 7 60.

of people but also fail to distinguish between extremists and innocent civilians when the balance between human rights and the security of the society is at stake. Emergencies have become extremes given that under the particular framework characterised by terrorism threats, major sections of populations are concerned about laws purportedly enacted to protect them. The shift from the traditional emergencies to extreme emergencies highlights a delicate issue, namely to determine which one of terror threats or counter-terror measures could be more lethal.

Retreat of the Clause of Notification and Proclamation

A state of exception and a state of siege entail human rights violations and infringements of the rule of law. Therefore, prior to their implementation, they must be officially proclaimed to inform the population about the fragile situation surrounding the legal sphere, especially in terms of human rights and the rule of law. The clause of notification is flexible as a formal notification is admitted. Article 4(3) of the ICCPR requires that the other state parties be notified through the intermediary of the Secretary-General of the United Nations. The existence of a public emergency must be officially proclaimed, the procedures for the proclamation must be prescribed in national law in advance of the emergency.²⁹ The clause of notification and proclamation are publicity mechanisms against a de facto emergency.

However, looking at the clause of notification and proclamation within the context of terrorism and extreme emergencies, a number of occurrences point to the fact that states have failed to comply with such principles in a number of occasions, probably due to the levels of suspicion. In this atmosphere, public authorities have invested themselves with exceptional prerogatives that are not always in line with the ideals of liberal political theory; prerogatives sometimes implemented without notifying the citizens and complying with fundamental rights. Over the past years, there has been an upsurge in espionage and surveillance characterised by the (il) legal listening of private phone conversations as measures to address terrorism and violent extremism. The revelations of former NSA expert Edward Snowden regarding mass surveillance of the population and the invasion of privacy by the United States is an indication that traditional emergencies mechanisms have been overshadowed by new practices that negate human rights and the rule of law. Indeed in 2013, a US District Judge, William Pauley ruled that the National Security Agency's (NSA) collection of millions of Americans' telephone calls was lawful, rejecting a challenge to the controversial counter-terrorism programme by the American Civil Liberties Union. This organisation contended that the NSA collection of 'bulk telephony metadata' violated the bar against warrantless searches under the Fourth Amendment to the US Constitution. Judge Pauley argued that the NSA programme 'represents the government's counter-punch' to eliminate al-

29 UN Economic and Social Council Commission on Human Rights 'Status of the International Covenants on Human Rights' para 42 and 43 7 (41st Session, E/CN.4/1985/4, 28 September 1984).

Qaeda, and observed that the programme's constitutionality 'is ultimately a question of reasonableness.'³⁰ The fact that the judiciary upholds certain categories of counter-terror measures initiated by the executive and that are inconsistent with fundamental rights accounts for a new development in terms of the protection of the society in crisis period. This important shift is a sign that extreme emergencies are not only an expression of the executive's dominion, but a symbol of the super powers of the entire politico-judicial machinery. The legal invasion of privacy as a counterterror measure by authorities is a trend that is not confined to the United States.

Within the same context, in July 2015, former British Prime Minister, David Cameron, called for the end of privacy on the Internet. He criticised the so called 'advanced encryption' methods used by various companies, suggesting that they are sophisticated and prevent British intelligence services from accessing private conversations without the right code.³¹ Following the truck attack in Stockholm, Sweden in April 2017, a number of governments reiterated their demands to have full access to the encrypted code of popular social media such as WhatsApp, Facebook and Twitter which, seem to be conversation platforms, but are also utilised for recruitment and radicalisation by terrorist organisations. If the debate to restrict the freedom to privacy and expression to efficiently address terrorist threats is still ongoing in the UK, a similar law has already been enacted in Cameroon. On 4 April 2011, parliament passed a bill into law that empowers the President of the Republic to enact 'ordinances on the security of intelligence activities in Cameroon' and 'on the use of intelligence's technologies in Cameroon.' Following the provisions of this legislation the President is vested with the power to request access to private e-mails, monitor the telephone traffic of people across the country, and waive the immunity of the elected parliamentarians. These developments attest to the fact that terrorism and violent extremism have somehow contributed to the rise of extreme emergencies where the deal 'privacy versus security' is being emphasised by authorities. Freedom to privacy and communication seems to have been surrendered to the state in exchange for security. We may well find ourselves in an Orwellian state under the continued watch of Big Brother for our own good. In exceptional circumstances such as war, natural disaster and revolution, the invasion of privacy and infringements of democratic principles must be subject to checks. But the new trend seems to demonstrate that in extreme emergencies trust seems to be an issue, as some sections of the population could be regarded as potentially plotting against society. As a result, citizens' fundamental rights could be infringed in the name of fighting terrorism without informing them about such infringement. It may well be

30 Jonathan Stempel, 'US Judge Says NSA Phone Surveillance is Lawful' <<http://uk.reuters.com/article/2013/12/27/uk-usa-security-aclu-idUKBRE9BQ0D920131227>> accessed 27 January 2021.

31 Trevor Timm, 'Banning All Encryption Won't Make us Safer, No Matter what David Cameron Says' <<http://www.theguardian.com/commentisfree/2015/jan/13/banning-encryption-david-cameron-not-safer>> accessed 30 January 2021.

argued that within such a context, state authorities seem to be struggling to draw the line between terrorists and civilians. Under extreme emergencies, the focus seems to have shifted to a new category of legislation designed to override the traditional mechanisms of human rights protection in times of turmoil. The irony is that, despite negating human rights and the rule of law in the name of fighting terrorism and violent extremism, the inflation of counter-terror laws may bring about a society of fear, which is the aim of extremist organisations.

Retreat of the Clause of Proportionality

The requirement of proportionality is reiterated by various international instruments. The ILO conventions that govern the freedom of association³² and the right to collective bargaining³³ do not allow derogation from them. Fitzpatrick observed that ‘many governments imposing emergency measures will suspend trade union rights and arrest and subject trade union leaders to torture, arbitrary execution or exile.’³⁴ The clause of proportionality implies that a declaration of a state of emergency or a state of exception would be illegal in a situation where ordinary legislation could bring adequate solutions to the crisis. In other words, the enforcement of the state’s exceptional powers would be valid only if the existing legal order is inefficient in addressing the situation. The derogation measures shall be such as are strictly necessary to deal with the threat to the life of the nation and should be proportionate to its nature and extent.³⁵

Assessing the clause of proportionality through the prism of terrorism and extreme emergencies entails the idea that the current legal framework in various countries is not powerful enough to address the situation. As a result, a new set of rules, mainly from the executive body, consistently overlaps the existing legislation. What characterises extreme emergencies in this case is their lack of interest for the traditional mechanisms of human rights protection and the rule of law, which therefore leads to a securitised society characterised mainly by fear. Conor Gearty, in his Hamlyn Lecture Series, ‘Can Human Rights Survive?’ points out that ‘the single greatest disastrous legacy of the war on terror from a human rights point of view has been the supercession of the criminal model based on justice and due process by a security model based on fear and suspicion.’³⁶ The recent rise of terrorism has brought about extreme emergencies, a situation where the rule of law seems to have been turned into a device of social

32 The Right of Association and Protection of the Right to Organise Convention, 1948 (No 87) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232> accessed 27 February 2021.

33 Freedom of Association and Collective Bargaining <<https://www.ilo.org/global/topics/dw4sd/themes/freedom-of-association/lang--en/index.htm>> accessed 27 February 2021.

34 Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press 1994) 109.

35 UN (n 29) para 51, 8.

36 Conor Gearty, *Can Human Rights Survive* (Cambridge University Press 2006) 137.

oppression. It is this distortion of the process which constitutes the negation of fundamental rights. In other words, the prevailing idea within the framework of extreme emergencies is the impossibility to combat terrorist threats while adhering to human rights and democratic principles. Yet the UN General Assembly resolution adopted on 18 December 2002 affirmed that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, especially international human rights, refugee and humanitarian law.³⁷

The peculiarity of extreme emergencies is to shift the temporary state of emergency to a permanent one because ‘nobody is safe.’³⁸ In the same vein, it is reported that Australia’s national anti-terror laws are striking in volume as well as scope.³⁹ They include provisions for warrantless searches,⁴⁰ the banning of organisations, preventive detention,⁴¹ and the secret detention and interrogation of non-suspect citizens by the Australian Security Intelligence Organisation (ASIO).⁴² The new set of measures against terrorism and violent extremism not only contradict public liberties guaranteed by domestic and international standards but more importantly, their domestication moves such measures from the exceptional sphere to that of the ordinary one. Reflecting on this situation, Zedner and Flyghed noted with concern the potential for the migration of national security measures to the law and order context. For Zedner, the most serious threats to security provide ‘the underlying rationale and licence for measures that tackle much lesser risks but pose no small threat to basic liberties.’⁴³ Similarly, Flyghed observed that once new coercive measures have been introduced to counteract extremely serious forms of crime, such as terrorism, there follows a slide towards their employment in connection with increasingly minor offences.⁴⁴ Within this particular framework, the new negation of fundamental rights is exemplified by the (temporary) new derogating measures becoming permanent. What characterises the traditional emergencies is the temporary feature attached to the use of exceptional powers by authorities. Within the current context of the struggle against terrorism and violent extremism, these measures that aimed to counter them are being issued on a regular basis and thereby becoming the new normal. In so doing, a parallel sphere of law is being erected along the existing one that somehow remains in force. The principle of

37 UNGA Res/57/219 (18 December 2002) UN Document A/RES/57/219.

38 In 2017, following a series of coordinated attacks in Paris that claimed the life of 130 people on November 2015, the then French Minister of Interior coined the phrase that ‘nobody is safe as France is still in a state of war.’

39 George Williams, ‘The Legal Legacy of the “War on Terror”’ *Macquarie Law Journal* (2013) 12 (3)

40 Crimes Act 1914 (Cth) s3UEA.

41 Criminal Code (Cth) div 105.

42 Australian Security Intelligence Organisation Act 1979 (Cth) pt III div 3.

43 Lucia Zedner, ‘Seeking Security by Eroding Rights: The Side-stepping of Due Process’ in Benjamin Gould and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 264.

44 Janne Flyghed, ‘Normalising the Exceptional: The Case of Political Violence’ (2002) *Policing and Society* 13 28.

proportionality remains one of the key benchmarks to assess the shift from traditional emergencies to extreme emergencies just as in the case of the retreat of the clause of non-derogable rights.

Retreat of the Clause of Non-derogable Rights

Non-derogable rights are those that cannot be subject to limitation by states, even during emergency situations. Article 4(2) of the ICCPR provides that ‘no derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.’ These Articles refer respectively to the right to life, freedom from torture or cruel, inhuman, or degrading treatment or punishment, slavery or being held in servitude, imprisonment on the grounds of an inability to fulfill a contractual obligation, arbitrary detention, right to recognition everywhere as a person before the law, and freedom of thought, conscience, and religion. This requirement was also reaffirmed by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in its non-derogable clause in Article 2. This non-derogable clause expressly targets emergency situations, which are usually deemed a legal excuse for torture and other human rights abuses by states.

Analysing the non-derogation clause in relation to terrorism and extreme emergencies, the recent anti-terrorist legislation around the world seems to overlook the right to life, which is an absolute right. In Cameroon for example, four articles (2, 3, 4 and 5) of the recent counter-terrorism law enacted on 23 December 2014 provide for the death penalty for a variety of acts branded as ‘terrorist acts’ including among others the perpetration and financing of terrorist activities and wide-spread insurrection and demonstrations against the state.⁴⁵ Based on this law, Ahmed Abba, a Hausa-language reporter for the French broadcasting media Radio France International (RFI) was arrested in July 2015 by security forces in Maroua in Cameroon’s Far North region, where he was reporting on the extremist group Boko Haram. Following the resumption of his trial on 24 April 2017 and after more than 635 days behind bars, Abba was sentenced to ten years in prison and a fine of FCFA fifty-five million (around 92 000 US dollars) by the military court in Yaounde. I want to point out that even though Abba was freed, the prosecutor initially requested the death penalty. Introducing or re-introducing capital punishment in the name of counter-terrorism and violent extremism has recurred in various parts of the world. On 30 July 2015 legislation similar to that of the Cameroon counter-terror law was enacted in neighbouring Chad, one of the leading countries together with Cameroon and Nigeria in the fight against the extremist

45 In a recent publication available somewhere else, I assessed how Law No 2014/028 of 23 December 2014 on the suppression of acts of terrorism threaten human rights in the country. This legislation blurred the line between civilian populations who may be involved in protests against the state and those involved in terrorist activities both being subject to capital punishment. For further details, see Gerard Kamdem Kamga, ‘Killing Two Birds With One Stone: Insights Into the Recent Counterterrorism Legislation in Cameroon’ (2020) 53(2) *VRÜ Verfassung und Recht in Übersee*.

movement Boko Haram. As a result, only six months after its abolition, the death penalty was re-instated in Chad, following an overwhelming majority of 146 votes of the 189 parliamentarians present. A few weeks later, based on the new law, some members of Boko Haram were sentenced by a court and executed without any possibility to appeal the sentence. The adoption and implementation of the death penalty during extreme emergencies account for a step backwards for when it concerns absolute rights, which are not subject to derogations even during exceptional situations. Yet, this does not seem to apply in the context of terrorism and extreme emergencies.

Regarding the freedom from torture, which is another non-derogable right, the Israeli Prime Minister's office supported legislation that allowed physicians to force-feed prisoners, arguing that the government is obligated to save the lives of prisoners in its system.⁴⁶ This rhetoric is a *du déjà vu* in a context where the logic entertained by public authorities is that torture is not always bad, especially within the framework of counter-terrorism. In enacting this legislation in July 2015, the Knesset (Israel's Parliament), voted that in case of a hunger strike, force-feeding is allowed, a process which is painful and degrading. On 11 September 2016, the Supreme Court of Israel ruled the legislation on force-feeding as constitutional and rejected a petition by the Israeli Medical Association and various human rights organisations to declare such legislation void.⁴⁷ The Israel Medical Association advised its physician members not to participate in any force-feeding, deeming the practice to be inhumane.⁴⁸ In response, Israeli authorities consider the recruitment of foreign doctors to force-feed Palestinian hunger strikers if doctors continue to resist taking part in the practice.⁴⁹ Within the framework of extreme emergencies, there seems to exist a parallel universe of exceptional legislation that appears to be challenging the values and ethics in which society has always been grounded. Laws that openly violate the dignity of human beings are being enacted while legislation on torture is being introduced and validated by courts. Processes not allowed during traditional emergencies have been admitted during extreme emergencies. The Israeli legislation mirrors the involuntary feeding of prisoners on hunger strikes at Guantanamo, the American prison on the Cuban Island, where various kinds of torture have merged with ordinary US military practices. It was reported that tactics approved by the then Secretary of Defence, Rumsfeld and implemented by senior officials of the army at Guantanamo involved the use of dogs for interrogation, stripping persons naked, hooding for interrogation, stress positions designed to inflict pain and isolation in cold and dark cells for more than thirty days. In the same vein, other uses of harsh cold and

46 'Israel Seeks to Circumvent Doctors Who Refuse to Force-feed Hunger Strikers' *The Jerusalem Post* (6 May 2017) <<http://www.jpost.com/Israel-News/Israel-seeks-to-circumvent-doctors-who-refuse-to-force-feed-hunger-strikers-489898>> accessed 7 February 2021.

47 *ibid.*

48 *ibid.*

49 *ibid.*

heat, and the withholding of food have also been reported.⁵⁰ In a given circumstance, some of these approved tactics might not constitute ‘torture’ or ‘cruel’ treatment but each tactic, including the use of ‘fear up harsh’ could constitute illegal treatment, that is, ‘physical suffering,’ ‘inhumane,’ ‘degrading,’ ‘humiliating,’ a use of ‘physical or moral coercion,’ or a use of ‘intimidation.’ In any case, whatever the argument, it cannot change the fact that a tactic that violates Geneva Convention is a war crime.⁵¹ These patterns of the use of torture was already identified in Iraq when detailed information emerged:

Pictures of outrageous abuse of detainees at Abu Ghraib, Iraq, disclosed in May 2004 demonstrated that some human beings in control of the U.S. military had been stripped naked with hoods placed over their heads and threatened with dogs near their bodies. Were these forms of patently illegal treatment isolated aberrations at the hands of a few errant soldiers or had the tactics of stripping naked, hooding, and use of dogs been approved at highest levels in the Bush administration and the military?⁵²

In 1996, the European Court ruled that where a detainee was stripped naked, with his arms tied behind his back and suspended by his arms, such treatment amounted to torture.⁵³ In a similar case, the European Court held that such treatment was ‘degrading’ because it was calculated to arouse feelings of fear, anguish and inferiority capable of humiliating and debasing its victims.⁵⁴

The Committee Against Torture condemned the use of the following interrogation tactics as either torture or cruel, inhuman, or degrading treatment: (1) restraining in very painful conditions; (2) hooding under special conditions; (3) sounding of loud music for prolonged periods; (4) sleep deprivation for prolonged periods; (5) threats, including death threats; (6) violent shaking; and (7) using cold air to chill.⁵⁵ In his statement to the Third Committee of the UN General Assembly, the Special Rapporteur on Torture spoke of reported circumventions of the prohibition on torture in the name of the fight against terrorism. These attempts included the legal arguments of necessity and self-defence; attempts to narrow the scope of the definition of torture and arguments that some harsh methods should not be considered as torture but merely as cruel, inhumane

50 Jordan Paust, *Beyond the Law the Bush Administration's Unlawful Responses in the "War" on Terror* (Cambridge University Press 2007) 15.

51 *ibid.*

52 *ibid* 12.

53 *ibid* 15; *Aksoy v Turkey*, 6 Eur Ct HR 2260, 23 EHRR 553 paras 60, 64 (18 December 1996). The court stated that ‘torture attaches only to deliberate inhuman treatment causing very serious and cruel suffering.’ *ibid* paras 63–64. The victim was detained for some two weeks and had claimed to have been subjected to beatings and had been stripped naked, hooded, and subjected to electric shocks. *ibid* paras 60, 64.

54 Paust (n 47) 15–16; *T & V v United Kingdom*, Judgment of 16 Dec 1999, para 71, 30 EHRR 121 (2000).

55 *ibid* 16.

or degrading treatment or punishment; acts of torture and ill-treatments perpetrated against terrorist suspects by private contractors; the indefinite detention of suspects (including children) without determination of their legal status and without access to legal representation.⁵⁶ It is noticeable how the extremes measures issued by states to confront terrorism and restore law and security can end up with perpetrators, protectors and victims being completely dehumanised.

Concerning arbitrary detention, imprisonment without judgment is strictly prohibited under international human rights law. According to the following provisions of the ICCPR ‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’ (Article 10 (1)); ‘Everyone shall have recognition everywhere as a person before the law.’ (Article 16); ‘All persons shall be equal before the law and are entitled without any discrimination to the equal protection of the law.’ (Article 26). However, despite this clarification, indefinite and arbitrary detentions within the framework of terrorism and extreme emergencies remain a fact. In 2003 the United Nations Working Group on Arbitrary Detention observed that the conditions of people detained by the United States as a result of the so-called war against terror were arbitrary.⁵⁷ The Guantanamo prison, the secret interrogatory spaces of the Central Intelligence Agency (CIA) across Europe and the Secondary Prisons in Cameroon amount to arbitrary detention on the pretext of fighting terrorism and violent extremism and human rights including non-derogable ones have been subject to various abuses. It is in this sense that extreme emergencies demarcate themselves from the traditional emergencies where the protection of human rights in time of turmoil have always been the main concern.

Retreat of the Clause of Non-Discrimination

Certain clauses that discriminate on the grounds of race, color, gender, language, religion, or social origin may not be imposed.⁵⁸ This clause is entrenched in Article 3 of the Geneva Convention that reads ‘persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in “all circumstances” be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.’ These provisions are echoed by Article 4(1) of the ICCPR.

Within the framework of extreme emergencies, it is suggested that various anti-terror laws discriminate between the citizens of a country and foreign nationals. In its report for 2004, Amnesty International mentioned that countries have continued to flout international human rights standards in the name of the ‘war on terror.’ This has resulted

56 Lumina (n 28) 63.

57 Working Group on Arbitrary Detention, Report E/CN 4/2003/8.

58 Article 4(2) of the ICCPR and Art 3 of the Geneva Convention.

in thousands of women and men suffering unlawful detention, unfair trial and torture—often solely because of their ethnic or religious background.⁵⁹ Recent counter-terrorism legislation passed in the UK, France, Germany and Italy introduced severe restrictions on freedoms including prolonged detention and refusal to grant the right of asylum and immigration on the mere suspicion that an individual or group of individuals belonged to a terrorist group.⁶⁰ The UN Special Rapporteur on Religious Intolerance observes that responses to terrorism have also led to new forms of racial discrimination and a growing ‘acceptability’ of the traditional forms of racism where certain cultural or religious groups are viewed as terrorist risks.⁶¹ Under extreme emergencies, that which was not possible during classic emergencies has been achieved by leaning on terrorism as the key feature to unlock and subvert the traditional mechanisms of human rights protection and the rule of law. The retreat of the clause of non-discrimination by states led to the classification of humans in two categories including those who are potential terrorists and those who are not. Individuals have been subjected to profiling and their enjoyment of human rights and other treatment may strongly depend on the group to which they belong.

Retreat of the Clause of Good Faith Motivation

The clause of good faith motivation in the case of emergency is merely implicit in the derogation’s articles.⁶² The issue at play is that the implementation of emergency powers in a bid to undermine a democratic system of government would arguably be invalid. The fact that the executive entity in some liberal democracies permanently place the legal system in a state of suspension on the ground of fighting terrorism, may raise some genuine concerns. The same also applies when counter-terrorism legislation are enacted to sanction criticism of the regime, curtailing freedom and public liberties and to sideline potential political opponents. The rise of extreme emergencies and the fight against terrorism in the past few years brought about the legalisation of practices that until recently would not have been considered in free nations.

Conclusion

The aim of this article was to explore the shift that has occurred in terms of human rights protection during times of crisis and that may lead to new international standards for extreme emergencies. In assessing the new negation of fundamental rights resulting from the fight against terrorism, I have demonstrated that unlike traditional emergencies that are subject to international and domestic restrictions, the concept of extreme emergencies is almost entirely driven by the executive power at the expense of the rights of individual citizens. Extreme emergencies are characterised by the ignorance of the

59 Lumina (n 28) 60.

60 *ibid*, 62–63.

61 As quoted by Lumina (n 28) 65.

62 Fitzpatrick (n 34) 59.

traditional mechanisms of human rights protection in times of crisis, especially non-derogable rights. In the struggle against terrorism and violent extremism, human beings have been subject to torture, death, invasion of privacy and arbitrary arrests. Where those practices were challenged, they were validated by a court of law. Extreme emergencies point to a direction where the intersecting line between democratic societies and totalitarian states is about to be blurred. Putting these developments within the controversies surrounding the doctrine of emergency, the current state practices are in line with the approach that places emergencies beyond the sphere of law, unlike the opposing stand that locates this phenomenon inside the realm of law. Paradoxically, despite the global proliferation and inflation of counter-terrorism legislation and its harsh measures, contemporary societies seem to be becoming less safe owing to the emergence and resurgence of extremist organisations such as Islamic State, Al Chabab, Al Nusra, Al Qaeda and Boko Haram.

References

- Agamben G, *State of Exception* (University of Chicago 2005)
<<https://doi.org/10.7208/chicago/9780226009261.001.0001>>
- Amnesty International UK, 'Annual Report: Human Rights Threatened by "War on Terror"' (Press releases, 28 May 2003) <<https://www.amnesty.org.uk/press-releases/annual-report-human-rights-threatened-war-terror>> accessed 29 May 2021.
- Amnesty International, Security and Human Rights Counter-Terrorism And The United Nations (2008) <<https://www.amnesty.org/en/wp-content/uploads/2021/07/ior400192008en.pdf>> accessed 23 May 2021.
- Benjamin W, '*Critique of Violence*' the *Continental Ethics Reader* (Routledge 2003).
- Dicey A, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan Press 1959).
- Dyzenhaus D, *The Constitution of Law Legality in a Time of Emergency* (Cambridge University Press 2006) <<https://doi.org/10.1017/CBO9780511618246>>
- Ferejohn J and Pasquino P, 'The Law of the Exception: A Typology of Emergency Powers' (2004) *International Journal of Constitutional Law* <<https://doi.org/10.1093/icon/2.2.210>>
- Fitzpatrick J, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press 1994)
<<https://doi.org/10.9783/9781512815924>>
- Freedom of Association and Collective Bargaining
<<https://www.ilo.org/global/topics/dw4sd/themes/freedom-of-association/lang-en/index.htm>> accessed 27 February 2021.
- Gearty C, *Can Human Rights Survive* (Cambridge University Press 2006)
<<https://doi.org/10.1017/CBO9781139167369>>
- Hartman J, 'Derogations from Human Rights Treaties in Public Emergencies - A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' (1981) 22(1) *Harvard International Law Journal*.
- 'Israel Seeks to Circumvent Doctors Who Refuse to Force-feed Hunger Strikers' *The Jerusalem Post* (6 May 2017) <<http://www.jpost.com/Israel-News/Israel-seeks-to-circumvent-doctors-who-refuse-to-force-feed-hunger-strikers-489898>> accessed 7 February 2021.
- Kamdem Kamga GE, 'Killing Two Birds With One Stone: Insights Into the Recent Counterterrorism Legislation in Cameroon' (2020) 53(2) *VRÜ Verfassung und Recht in Übersee* <<https://doi.org/10.5771/0506-7286-2020-2-190>>

Kelsen H, *Pure Theory of Law* (University of California Press 1967)
<<https://doi.org/10.1525/9780520312296>>

Lumina C, 'Counter-terrorism Legislation and the Protection of Human Rights: A Survey of Selected International Practice' (2007) *African Human Rights Law Journal*.

Paust J, *Beyond the Law the Bush Administration's Unlawful Responses in the "War" on Terror* (Cambridge University Press 2007) <<https://doi.org/10.1017/CBO9780511611322>>

Rossiter C, *Constitutional Dictatorship (Crisis Government in the Modern Democracies)* (Princeton University Press 1948).

The Right of Association and Protection of the Right to Organise Convention, 1948 (No 87)
<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232> accessed 27 February 2021.

Schmitt C, *Political Theology Four Chapters on the Concept of Sovereignty* (MIT Press 1985).

Stempel J, 'US Judge Says NSA Phone Surveillance is Lawful'
<<http://uk.reuters.com/article/2013/12/27/uk-usa-security-aclu-idUKBRE9BQ0D920131227>> accessed 27 January 2021.

Timm T, 'Banning All Encryption Won't Make us Safer, No Matter what David Cameron Says' <<http://www.theguardian.com/commentisfree/2015/jan/13/banning-encryption-david-cameron-not-safer>> accessed 30 January 2021.

UN Economic and Social Council Commission on Human Rights 'Status of the International Covenants on Human Rights' para 42 and 43 7 (41st Session, E/CN.4/1985/4, 28 September 1984).

UNGA Res/57/219 (18 December 2002) UN Document A/RES/57/219
<[https://doi.org/10.1016/S0168-8227\(02\)00143-2](https://doi.org/10.1016/S0168-8227(02)00143-2)>

Williams G, 'The Legal Legacy of the "War on Terror"' *Macquarie Law Journal* (2013) 12 (3)
L Zedner, 'Seeking Security by Eroding Rights: The Side-stepping of Due Process' in Benjamin Gould and Liora Lazarus, eds, *Security and Human Rights* (Hart Publishing 2007).

Cases

Aksoy v Turkey, 6 Eur Ct HR 2260, 23 EHRR 553 (18 December 1996).

T & V v United Kingdom, Judgment of 16 Dec 1999, EHRR 121 (2000).

Legislation

Security Legislation Amendment (Terrorism) Act 2002 (No 2).

Suppression of the Financing of Terrorism Act 2002.

Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002.

Telecommunications Interception Legislation Amendment Act 2002.

Border Security Legislation Amendment Act 2002.

Anti-Terrorism, Crime and Security Act 2001 (ATCSA).
the Prevention of Terrorism Act 2005.

Anti-Terrorism Act 2001.

Prevention of Terrorism Act 2002.

Crimes Act 1914 (Cth) s3UEA.

Criminal Code (Cth) div 105.

Australian Security Intelligence Organisation Act 1979.