

Terrorism as a Public Emergency and its Impact on Human Rights

Kristina Roepstorff

Global interactions increasingly rely on law to govern them. Today, numerous rules dominate the interactions between states and non-state parties. International courts and dispute settlement mechanisms are in place to ensure compliance with commonly agreed norms.

International Law, however, is complex and often lacks universal acceptance. Worse, its influence is disproportionately strong on the poorest countries and countries in crisis. It is in situations of poverty and conflict where international law has the most impact - for better or worse. International legal structures can provide security, stability and access to economic support, but they can just as easily prevent timely and adequate assistance. Development and humanitarian actors must increasingly be aware of their potential as well as their pitfalls.

Good Governance is easily prescribed, but must become a mindset of all involved to make the system work. Less and least developed countries are often governed by constitutions that are complex and inaccessible for their citizens. Without acceptance by their subjects, they weaken and cease to safeguard the nation state against failure. Development assistance must provide more than just models and institutions to move these countries forward.

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1. Introduction

When international human rights law was codified and treaties were drafted, a general recognition of the necessity to allow states the restriction or suspension of some human rights in emergency situation resulted in the inclusion of derogation clauses into the relevant human rights treaties. Yet, some of the rights were considered as being so fundamental that even in an emergency situation derogation from the obligations under human rights treaties is not justifiable. The human right treaties therefore provide provisions listing non-derogable rights.¹

The inclusion of derogation clauses into the human rights treaties necessitated the identification of the meaning, scope and effect of the treaty obligations. As states may derogate from their human rights obligations under states of emergency, abuse of these special emergency powers had to be prevented. Safeguards and guidelines thus have been elaborated.

States of emergency may have various causes, one of which is terrorism. As terrorism constitutes a threat to the state, the declaration of a state of emergency may become necessary. Thus, in order to combat terrorism, a state may suspend certain rights and derogate from its obligations under international human rights law.

In many countries terrorist activities have occurred and are occurring. Frequently states were and are being forced to take emergency measures to maintain law and order.

After the terrorist attacks of September 11th the international community stressed the threat of international terrorism. As a response, new Acts were passed and laws were changed in order to combat international terrorism.

In this essay I want to discuss the way in which terrorism can constitute a public emergency and therefore can justify the declaration of a state of emergency. As a public emergency allows states to derogate from their obligations under international human rights treaties, I want to look at the dangers of human rights violations and possible safeguards during states of emergency.

I will therefore first determine the concept of states of emergency and expose possible safeguards. Then I will set out the international legal regulations of derogation from human rights obligations under states of emergency and the non-derogable rights.

Terrorism as a public emergency may justify derogations from human rights treaties. Thus, a definition of what is regarded as terrorism is prerequisite.

¹ Chowdhury, p. ix

With the “war on terrorism” the international community adopted several documents calling for counter-terrorism measures. In reference to these documents I will look at the impact of measures taken at the international level on the national level and how human rights have been safeguarded or may be undermined in this context. I will conclude that adequate safeguards have to be implemented both at the national and the international level, as some states excuse violations of human rights in the name of the “war on terrorism”.

2. States of Emergency

States may face dangers, which threaten the security and general welfare of the whole nation.² In some circumstances the only way to restore order and secure the nation is by suspending the ordinary legal system. This emergency powers are legalised by the official proclamation of a state of emergency. Under a state of emergency additional emergency powers are conferred to the government and derogations and suspension of some fundamental rights are permissible. But when is a danger threatening the security of the whole nation and therefore legitimises the proclamation of a state of emergency?

The expression “public emergency” is generic and a central concept that includes a variety of legal terms in different legal systems to identify an exceptional situation of public danger, allowing the exercise of special powers. The expression “public emergency” covers the concepts of state of emergency, of siege, of alert, of prevention of internal war, of suspension of guarantees, of martial law, of special powers, and so on.³ The central idea is the fundamental and overriding importance of the preservation of the state.⁴ A modern authoritarian political doctrine encompasses this idea: the doctrine of national security.⁵ In summary, this doctrine asserts that the world is divided into two blocs, the friends and the enemies; the conflict between the two blocs is not only of military nature, but also a struggle against ideology, culture and traditions; the conflict occurs internationally and intra-nationally; therefore the duty of the state is to defend the nation and to combat against any manifestation of the enemy within the country; sacrifices in the rights of citizens and even alterations in the structure of government may be necessary and permissible.⁶ The doctrine of national security is helpful in explaining the frequent military coups and violation of human

² El Zeidy, p. 278

³ Chowdhury, p. 12

⁴ El-Zeidy, p.278

⁵ International Commission of Jurists, p. 416

⁶ *ibid.*

Effects of this doctrine were analysed by the authors in case studies of Greece, Turkey and Latin American countries.

rights – in particular the idea of the internal enemy and cultural and ideological threats may explain the reluctance to permit elections, civilian government and political and ideological pluralism.⁷

In general, states can face three different emergency situations⁸: a serious political crisis, such as armed conflict and internal disorder, force majeure⁹, or particular economic circumstances. Emergency provisions usually concentrate power in the hands of the executive and it is common to limit the scope of civil liberties during states of emergency.¹⁰

As in this essay I want to discuss terrorism as a threat to national security and therefore as a reason for the declaration of a state of emergency, I will focus on the first situation, namely a serious political crisis.

2.1. Political Crisis and States of Emergency

Political crisis, caused by armed conflict¹¹ or internal disorder, may result in the declaration of a state of emergency. Whether a state of emergency is declared depends on the dimension of the political crisis situation. Thus, the political crisis must be severe enough to justify the necessity of emergency powers.

There are four basic elements in the definition of a public emergency¹²: the territorial scope, the magnitude of the threat, the provisional or temporary status of the public crisis, and an official proclamation.

By definition, the crises or danger must constitute a threat to the life of the nation. If the crisis has only a locally restricted impact, it cannot be considered a public emergency: “*A mere local crises cannot be converted into a national emergency.*”¹³ Yet, a local crisis may threaten the life of the whole nation.¹⁴

This definition of a public emergency thus establishes two conditions in the context of the territorial scope: first, the proclamation of a state of emergency may either affect the whole country or only parts of it, depending on the extent of the crisis. Secondly, if the extension of emergency measures becomes necessary, or in the contrary the emergency situation does not

⁷ *ibid.*

⁸ I am following the classification by Chowdhury (Chowdhury, p. 15).

⁹ *Ibid.*, p. 16.

Force majeure is a concept both in domestic and international law covering natural disasters of various kinds.

¹⁰ Barendt, p. 168

¹¹ Armed conflicts are: external aggression, war or international armed conflict; wars of national liberation; non-international armed conflicts. (Chowdhury, p. 22)

¹² This definition is given by the International Law Association (Chowdhury, p. 24)

¹³ Chowdhury., p. 24

¹⁴ *ibid.*

The European Court of Human Rights has decided in favour of this in Ireland v. UK

longer exist in parts of the country, changes of the territorial scope may be necessary and are permissible.¹⁵

The emergency situation must be so exceptional, that other normal measures of restriction provided for by law are inadequate.¹⁶ Thus, the magnitude of the threat must be justifying the suspension of the normal legal order. The threat to the life of a nation therefore is one that affects the whole of the population and the whole or part of the state's territory. The physical integrity of the population, the political independence or the territorial integrity of the state as well as the existence or functioning of institutions must be threatened.¹⁷

Another important element in the definition of a public emergency is the provisional nature of a state of emergency. A state of emergency involves a temporarily suspension of ordinary law.¹⁸ The idea of an emergency is not compatible with a perpetual state¹⁹ as the objective of the proclamation must be the preservation of democratic institutions and the return to the normal legal order as soon as possible and therefore must be done in good faith.²⁰

A de facto state of emergency has to be distinguished from a permanent state of emergency.²¹ A de facto state of emergency has to main features²²: firstly, there is no official proclamation of the state of emergency or of the termination, or even if it was proclaimed officially, the state of emergency remains de facto after having been officially terminated. Secondly, although there is no official proclamation of a state of emergency, derogation from rights and suspension of the ordinary law is reality.

In contrast, a permanent state of emergency is defined by the systematic extension of emergency powers until it becomes the normal legal order. A permanent state of emergency may either result from a non-termination of the state of emergency or from provisions in constitutions itself which give the government the power to declare a state of emergency whenever it considers it as necessary.²³ When the state of emergency becomes permanent and the rule, less account is normally taken of the imminence of the threat, the principle of proportionality is no longer fundamental and no period of validity is specified.²⁴ The

¹⁵ Chowdhury, p. 26

¹⁶ *ibid.*

¹⁷ *ibid.*, p. 27

Chowdhury quotes the Siracusa principle 39, which provides this definition.

¹⁸ Singhvi, p. 1

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ Chowdhury, p. 45

²² *ibid.*

²³ *ibid.*, p. 49

An example is Cameroon, where the chief executive of the country may declare a state of emergency in the event of repeated disturbances of the public order and threatening national security.

²⁴ *ibid.*

institutionalisation of a state of emergency has occurred where an extended transitional emergency regime was considered as being necessary for the return to some form of democracy.²⁵

2.2. Safeguards against Abuse of Emergency Powers

The measures taken during states of emergency allow the derogation from national and international legal obligations. The suspension of certain rights give extra power to the government in order to face the danger of the situation. Thus, rights the citizens would normally be entitled to may be infringed during states of emergency. These can also be fundamental rights guaranteed in the constitution. Safeguards preventing the abuse of the emergency powers must therefore come into play.

Any state of emergency has to be officially proclaimed. This is an important safeguard against abuse of emergency powers, as the formalities required by the procedure determined by law – for example by the constitution – may discourage abusive exercise of emergency powers and scrutiny is facilitated. Other safeguards may be implemented in the constitution itself, may be of legislative or institutional nature, or may be provided for in international law. Also, the independence of the judiciary is a key factor in the supervision of states of emergency.

Constitutional safeguards are of fundamental importance as the constitution is the basic law of the country. It is therefore not surprising that almost all constitutions in the world include clauses concerning states of emergency, determining the circumstances in which they may be declared, the procedure for declaration and the effects of their declaration.²⁶

These constitutional provisions have two main functions: on the one hand they serve as guidelines and legal restrictions for governments, on the other hand they serve as a basis for criticism and scrutiny of governments not respecting the rule of law. But in many cases, constitutional provisions protecting the rights of the citizen during a state of emergency are being ignored or violated. Although the violation of the constitution itself is of not significant in international law, the consequence is often the violation of internationally recognised human rights and hence constitutes a breach of obligations under international human rights law.²⁷ Thus, constitutional provisions should be in accordance with the relevant human rights

²⁵ *ibid.*, p. 50

A authoritarian, restricted or gradual democracy. This happened for example in Pakistan, where the military ruled most time after independence.

²⁶ International Commission of Jurists, p. 432

²⁷ *ibid.*

treaties and should complement the norms established in international law.²⁸ As constitutional provisions they should, as a matter of course, be suitable for the particular country's governmental system, legal tradition, social and cultural values and historical experience.²⁹ However, some basic principles have been recommended by the International Commission of Jurists³⁰ in respect to constitutional provisions for states of emergency:

1. The effects of states of emergency on the rights of the citizen as well as the powers of each branch of government should be clearly defined.³¹
2. The constitution should list and specify the situations in which states of emergency may be declared.³²
3. The procedure for declaring a state of emergency should be defined and the primary responsibility should be given to the legislature.³³
4. The duration of states of emergency should be confined and specified.³⁴

As in many constitutions the power of the judiciary and the normal court system may be restricted, special safeguards must be provided in respect to the effects of states of emergency on the judiciary and the legislature. In order to protect the human rights of the citizens, the judiciary must be given the greatest possible extent of power in states of emergency.³⁵ Thus, normal judicial remedies should remain in effect for all rights not suspended during states of emergency. The ordinary civilian judiciary should review individual cases of detention to ensure that the detention, the procedure and the conditions of detention are in compliance with the emergency legislation. It also should retain jurisdiction over trials of civilians charged with security offences. Further, the ordinary courts should have jurisdiction over charges of abuse of power by security force. The right to appeal criminal convictions must remain in force and the independence of the judiciary must be safeguarded, so that the protection of human rights and the rule of law are guaranteed.³⁶

As the executive enjoys extra powers during states of emergency, it is important to maintain governmental and social institutions to prevent potential abuses.³⁷ Thus, legislative and other institutional safeguards have to be guaranteed. All too often the executive takes over the powers of the legislature during states of emergencies and intimidates the judiciary or even

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*, p. 433

³³ *ibid.*

³⁴ *ibid.*, p. 434

³⁵ *ibid.*, p. 435

³⁶ A list of recommendations given by the International Commission of Jurists (*ibid.*, p.437).

³⁷ *ibid.*

bans organisations. Since the preservation of the legislature and other institutions can help limiting the abuse of power by the executive, an elected legislature should remain in power and priority should be given to maintain institutions such as the free press, trade unions, and other types of organisations.³⁸

*“ The validity of emergency measures depends not only on the existence of a legitimate emergency and the need for the measures in question, but also on the efforts made to ensure that the measures employed will not be abused. ”*³⁹

3. Human Rights and States of Emergency

In certain circumstance derogation from human rights obligations are permissible and international human rights treaties include derogation clauses to regulate and determine the powers when derogation comes into force. As the inclusion of such clauses was considered as being important in order to meet the needs of state to perform its duties for the sake of the common good,⁴⁰ and at the same time human rights were codified for the protection of the individual against the government, a balance between the individual’s rights and freedoms on the one hand, and rights and freedom of the community on the other hand had to be sought.⁴¹ Thus, human rights treaties contain accommodations in favour for the state: the possibility of denunciation of a treaty, reservation as to its terms, articles stating that individual rights can only be exercised in conformity with the rights of others, clauses interpreting the scope of guaranteed rights, the possibility the breach of an obligation for a specific number of public reasons in normal circumstances⁴², and derogation clauses which allow suspension or breach of certain obligations in circumstances of war or public emergency.⁴³

What I want to look at are those accommodations referring to national security, democracy and public order, as these are applying in questions of terrorism.⁴⁴ At the national level provisions for the regulation of states of emergency are included in the constitution or

³⁸ International Commission of Jurists, p. 438

³⁹This is a principle the European Commission on Human Rights has adopted in Ireland v. The United Kingdom: (International Commission of Jurists, p. 438)

⁴⁰ *ibid.*, p. 281

⁴¹ *ibid.*, p. 282

⁴² Rosalyn Higgins differentiates “clawback clauses” from “derogations stricto sensu”. “Clawback clauses permit the breach of an obligation for a specific number of reasons in normal circumstances, whereas “derogations stricto sensu” allow suspension or breach of certain obligations in times of war or public emergency. (Higgins, p. 281).

⁴³ *ibid.*, p. 281. Although reservations or denunciation of treaties is a possibility for states to accommodate their interests, these two techniques are conceptually different from “clawback” clauses and derogations. (Higgins, p. 315)

⁴⁴ I follow the analysis by Rosalyn Higgins. (Higgins, p. 282)

domestic laws. At the international level, the need for special powers in exceptional situations of public emergency was acknowledged as well. Derogation clauses were included into international legal instruments.⁴⁵

3.1. International Human Rights Law

Although some rights guaranteed in human rights treaties can be regarded as *jus cogens*⁴⁶ and therefore are absolute rights binding not only as mutual treaty commitments, not all human rights have the status of *jus cogens*.

The International Covenant on Civil and Political Rights (ICCPR) provides a derogation clause in Article 4. Under this Article the state parties are given the right to derogate from its obligations during declared states of emergency. However, this provision is subject to limitations: the derogations must be such as strictly required by the exigencies of the situation, must not be inconsistent with other obligations under international law, and must not involve discrimination of any kind. Also, a list of non-derogable rights is given under article 4, paragraph 2. Non-derogable rights and freedoms of the ICCPR are: the right to life, the freedom from torture or cruel, inhuman and degrading treatment or punishment, the freedom from slavery and servitude⁴⁷, the freedom from imprisonment on the ground of inability to fulfil a contractual obligation, the prohibition of retrospective penal punishment, the right to be recognised as a person before the law, and the right to freedom of thought, conscience and religion.⁴⁸ If a state party to the covenant takes measures derogating from its obligations, it must immediately inform the all other states parties through the Secretary-General of the United Nations stating the provisions from which it has derogated and the reasons for derogation. The termination of derogation must be communicated in the same manner.

The European Convention on Human Rights also provides a derogation provision. Under article 15 of the European Convention the derogation from obligations established by the convention is allowed in time of war or other public emergencies that threaten the life of the nation. Also in the European Convention the derogation must be only to the extent strictly required by the nature of the emergency. The list of non-derogable rights and freedoms is provided for by article 15, paragraph 2. Non-derogable rights are: the right to life,⁴⁹ the

⁴⁵ El Zeidy, p. 278

⁴⁶ For example the principle of non-discrimination (Chowdhury, p. 124).

⁴⁷ Article 8, paragraph 3 prohibits forced labour. This paragraph is not included in the list of non-derogable provisions.

⁴⁸ Ghandhi, p. 65; Higgins, p. 287

⁴⁹ With the exception of deaths resulting from lawful acts of war (Ghandhi, p. 218).

prohibition of torture, the prohibition of slavery,⁵⁰ and the prohibition of punishment without law. It is striking that the list is shorter than the one of the ICCPR and doesn't include the right to freedom of thought, conscience and religion. When a state party of the convention derogates from its obligations, it has to inform the Secretary-General of the Council of Europe of the measures taken and of the reasons for the derogation. The same applies when the measures cease to operate. As Article 15 of the European Convention does not specify the extent of powers in respect of derogations the doctrine of a "margin of appreciation" was established. The margin of appreciation allows a state to assess what measures are strictly required by the exigencies of the emergency situation.⁵¹ This doctrine was subsequently extended to include the assessment of a public emergency itself.⁵²

The American Convention on Human Rights provides for suspension of guarantees in time of war, public danger, or other emergency that threatens the independence or security of a state. As in the two other instruments, the American Convention restricts the derogation to the extent strictly required by the exigencies of the situation. In addition, the text includes the restriction of period of time strictly required by the emergency situation. The derogation measures must not involve any form of discrimination. The list of non-derogable provisions is more extensive than the ones of the ICCPR and the ECHR and does not allow suspension of: the right to juridical personality, the right to life, right to humane treatment, freedom from slavery, freedom from ex post facto law, freedom of conscience and religion, rights of the family, right to a name, rights of the child, right to nationality and the right to participate in government, or any judicial guarantees essential for the protection of these rights. A state party to the convention has to inform the other states parties through the Secretary-General of the Organisation of American States whenever it derogates from its obligations. It must communicate which provisions it has suspended, the reasons for suspension and the date set for the termination of any suspension.

The Commonwealth Convention on Human Rights and Fundamental Freedoms deals with derogations under article 35. As in the other instruments, in times of war or other emergency situation threatening the higher interest on any party to the convention, derogations from the obligations under the convention are permissible to the extent strictly required by the gravity of the situation and provided that they are in compliance with other obligations under international law. Derogations from obligations must not be in violation of

⁵⁰ As the ICCPR, the European Convention doesn't include forced labour in its list of non-derogable provisions (article 4, paragraph 2).

⁵¹ Higgins, p. 297; Harris, O'Boyle, Warbrick, p.501

⁵² *ibid.*

article 20 of the convention, guaranteeing freedom from discrimination. The list of non-derogable rights and freedoms embraces: the right to life⁵³, the freedom from torture or cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and servitude,⁵⁴ and prohibition of retrospective penal punishment. Any state availing itself of the right of derogation must keep the depositary of the convention informed of the measures taken and the reasons for derogation, as well as when the measures have ceased.

Neither the African Charter on Human and Peoples' Rights nor the Arab Charter on Human Rights include any derogation clauses.

1.2. Paris Minimum Standards

At the 61st Conference of the International Law Association held in Paris in 1984, the Committee on the Enforcement of Human Rights Law approved a set of standards regarding the declaration and administration of states of emergency that threaten the life of a nation.⁵⁵ They are known as the Paris Minimum Standards of Human Rights Norms in a State of Emergency and contain 16 articles determining the non-derogable rights and freedoms during states of emergency. The objective of the International Law Association was to elaborate norms governing states of emergency, which are declared frequently in all parts of the world and are often accompanied by gross human rights violations. These minimum standards can give guidance to governments, international monitoring bodies and non-governmental organisations when faced with emergency situations.⁵⁶

The Paris Minimum Standards are set out in three main parts, discussing:

1. declaration, duration and control of the state of emergency
2. general principles for emergency powers and the protection of the individual
3. non-derogable rights and freedoms.

The constitution of every state must define the procedure for declaring a state of emergency. The mandatory procedural requirement provides an important safeguard against abusive exercise of emergency powers by the executive. In a democratic society, the legislature or the executive may declare states of emergency. These organs are regarded as being in the position to assess facts of national security and dimensions of public danger. Whereas the executive may be in a better position to act immediately when facing a public

⁵³ Except from deaths resulting from lawful military action (Ghandhi, p. 405).

⁵⁴ As in the other instruments, excluding the prohibition of forced labour. (Article 4, paragraph 2 and 3)

⁵⁵ Lillich, p. 1072

⁵⁶ Lillich., 1073

emergency, the legislature has the primary responsibility for the declaration of a state of emergency. However, the declaration of a state of emergency by the executive must be provisional and always subject to approval by the legislature as soon as possible, preferably by an enhanced majority.⁵⁷ The legislature should also have the power to revoke the proclamation of public emergency as well as amend the period of its validity by simple resolution.⁵⁸ The observance of the time limit is a basic safeguard.⁵⁹ But as in the case of war or external aggression the uncertain duration of the emergency situation makes a time limit impracticable.⁶⁰ Four different forms for fixing time limits were recognised: first, the constitution itself does not include a time limit, but the proclamation of a state of emergency shall set a limit; secondly, the constitution or basic text determines the time limit; thirdly, the time limit may be extended in accordance with the requirements to renew the formalities of proclamation; and finally, either the limit is set by the constitution or it depends upon the occurrence of some event.⁶¹ An analysis of these different forms for fixing the time limit in a state of emergency reveals that rather than depending on the country, the form should correspond the nature of the emergency.⁶²

The International Law Association has specified two important norms regarding the duration and the control of states of emergency. First, a state of emergency is a temporary or provisional situation. Second, the democratic control of the state of emergency should not change the basic institutions of the country.⁶³ The conditions for achievement of these norms are: that the duration of the emergency must not exceed the strictly required period and the duration of the period should be determined in the constitution. Additionally, the extension of a state of emergency must be newly declared and be subject to scrutiny. Prior approval by the legislature is necessary. Another condition defined by the International Law Association is that the legislature should not be dissolved during the state of emergency. If dissolution is required, it must be replaced immediately by constitutionally means.

The protection of the individual in times of public emergency can be supported by four requirements for a legitimised derogation: the notification of derogation, the rule of

⁵⁷ Chowdhury, p. 44

⁵⁸ *ibid.*, p. 42

⁵⁹ *ibid.*, p. 43

The International Commission of Jurists has recommended that the constitution should specify that the legality of a state of emergency should cease after a fixed period of time. The maximum period should be six months.

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ Chowdhury., p. 44

proportionality, the consistency with other international law obligations, and the principle of non-discrimination.⁶⁴

The notification of derogation forces the governments to take decision in public⁶⁵ and thus measures of derogation are transparent and governments are accountable.

Emergency measures taken must be in proportion to the exigencies of the emergency situation. The permissibility of derogation depends on the need of the public emergency and proportionality between the need and the response must be kept.⁶⁶ Thus, the measures taken must be adequate and the least draconic of other possible alternatives.⁶⁷

The emergency measures must be consistent with other obligations under international law. This legal criterion requires a case-to-case determination of what the relevant obligations under international treaties or international customary law are.⁶⁸

All emergency measures and any derogation from obligations must be in accordance with the principle of non-discrimination. Thus, the measures of derogation taken must not involve any discrimination on the ground of race, colour, sex, language, religion or social origin. This principle is based on the idea of equality and is generally regarded a fundamental prerequisite for the protection of human rights.⁶⁹

As already mentioned, the Paris Minimum Standards contain a list of 16 draft articles of non-derogable rights and freedoms.⁷⁰

4. Terrorism as a Public Emergency

Terrorism constitutes a crime under international law.⁷¹ As such any act of terrorism is subject to punishment. Within the United Nations the question of punishing terrorists was discussed.⁷² But the definition of this crime has been a point of disagreement. In the view of most Third World Countries, the crime of terrorism could not include violence perpetrated by individuals and groups struggling for self-determination. These groups were differentiated

⁶⁴ *ibid.*, Chapter 2

⁶⁵ *ibid.*, p. 91

⁶⁶ Harris, O'Boyle, Warbrick, p. 499

The definition of proportionality as being between need and response has been determined in De Becker v. Belgium.

⁶⁷ *ibid.*

⁶⁸ Chowdhury, p. 119

⁶⁹ *ibid.*, p. 121

⁷⁰ They are: right to legal personality, freedom from slavery or servitude, freedom from discrimination, right to life, right to liberty, freedom from torture, right to fair trial, freedom of thought, conscience and religion, rights of minorities, rights of the family, right to a name, rights of the child, right to nationality and finally the right to a remedy. (Lillich, pp. 1075-1081).

⁷¹ Cassese, p. 246

⁷² *ibid.*

from terrorists and instead regarded as freedom-fighters. Hence, the United Nations drew up conventions⁷³ prohibiting individual sets of well-specified acts, rather than giving a general definition of terrorism. With an increasing condemnation of terrorist acts however, the solution of avoiding the labelling of freedom-fighters as terrorists given by the adoption of the First Protocol of 1977⁷⁴ was broadly accepted and gave way to an agreement on the general definition of terrorism as: “ *Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.* ”⁷⁵

This definition of terrorism consists of three elements: first, the act must constitute a criminal offence under the majority of national legal systems; second, the objective of these acts is to spread terror among the public or a group of persons; and finally, these acts have to be politically motivated. Any such act may be considered a crime under international law. As a consequence, states are legally entitled to bring to trial the alleged terrorists within their jurisdiction.⁷⁶ However, there is no general definition of terrorism. The most recent treaties concerning terrorism shifts emphasis from the criminalisation of terrorist acts to activities in support of terrorist campaigns.⁷⁷

4.1. International Terrorism, States of Emergency and Human Rights

Human rights law has sought to balance reasonable national security concerns and the protection of individual fundamental freedoms. It must be acknowledged that terrorism is a genuine national security concern. Terrorism may cause a political crisis and thus threaten the life of the nation. Large-scale terrorist activities constitute a public emergency threatening the life of the nation.⁷⁸ Depending on the territorial scope of terrorist attacks, terrorism may constitute a threat to the whole nation of such a magnitude as required in order to justify the proclamation of a state of emergency. Emergency powers are frequently granted to deal with

⁷³ The Conventions on the hijacking of aircrafts (1963; 1970; 1971), Convention on crimes against internationally protected persons including diplomatic agents (1973), the Convention on the taking of hostages (1979), and the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (1971).

⁷⁴ The Protocol grants under Article 44.3 legal status as combatants, and prisoners of war status in case of capture, to fighters who are not member of the armed forces and who normally do not carry their arms openly.

⁷⁵ A/RES/49/60, Annex, paragraph 3, 1994

⁷⁶ Cassese, p. 259

⁷⁷ Warbrick, p. 1

⁷⁸ Basu, p. 538, see Irleand v. United Kingdom

terrorism when it cannot be combated through ordinary law.⁷⁹ Terrorism differs from an armed rebellion as it works underground⁸⁰, is therefore difficult to combat and thus requires special powers.

Thus, human rights may be threatened by terrorism in two ways: first, terrorist activities constitute a threat to a democratic society with its essential human rights guarantees. Second, the counter-measures to terrorism by means of suspension of certain rights under a declared state of emergency infringe human rights. But whereas terrorists violate fundamental human rights, the suspension of rights must not necessarily constitute such a violation. Although the human rights may be restricted during a state of emergency, such suspensions are permissible under international human rights law to a certain extent, as it is under most national legal systems. As long as the derogation is in accordance with the relevant international rules and national constitutional provisions, the suspension is legitimised. Counter-terrorism measures thus may legitimately infringe human rights, with the exception of non-derogable rights. Yet, some human rights bodies and independent experts have expressed the concern that counter-terrorism measures may undermine human rights: “ *[The special rapporteurs and independent experts] express alarm at the growing threats against human rights, threats that necessitate a renewed resolve to defend and promote these rights. They also note the impact of this environment on the effectiveness and independence of special procedures. Although they share in the unequivocal condemnation of terrorism, they voice profound concern at the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism which affect negatively the enjoyment of virtually all human rights – civil, cultural, economic, political and social. They draw attention to the dangers inherent in the indiscriminate use of the term “terrorism”, and the resulting new categories of discrimination.*”⁸¹

⁷⁹ Barendt, p. 167

In the United Kingdom a number of statutes have been passed to deal with terrorism in context of the continuing troubles in Northern Ireland. In Germany, the basic law has been amended in 1968 in order to deal with terrorist activities.

⁸⁰ Basu, p. 538

For example the International Convention on the suppression of the Financing of Terrorism (1999).

⁸¹ E/CN.4/2nn4/4, annex 1

See also the concerns raised by the various special rapporteurs: The special rapporteur on migrant workers has noted that anti-terrorism measures adopted after September 11th include national legislation allowing for long periods of detention of non-nationals (ECOSOC, E/CN.4/2003/85, 2002, paragraph 25)

The special rapporteur on torture is concerned that the provisions of new anti-terrorist legislation at the national level may not provide adequate legal safeguards for the prevention of torture and other forms of ill-treatment (General Assembly, A/57/173, 2002, paragraph 5)

The special rapporteur on freedom of expression has noted that counter-terrorism measures in many countries violate the right to freedom of opinion and expression. The adoption of restrictive laws, arrest, detention, censorship bans, surveillance of and restrictions on publications or the use of the internet infringe the rights in

Regional organisations too have responded to the problem of international terrorism and its impact on human rights. A number of documents were adopted by various regional organisations addressing the need to combat terrorism. But in some of the regional documents the definition of terrorism is too broad and may be misused to encompass peaceful opposition. Often reference to international human rights standards is missing.⁸² However, some of the regional bodies referred expressively in their documents on terrorism to human rights obligations.⁸³

4.2. The Response to International Terrorism

Although the impact of terrorism on human rights has long been an issue of the United Nations human rights bodies⁸⁴, it has become even more urgent after the terrorist attacks of 11 September on the United States of America and the continuing worldwide increase in terrorist activities.⁸⁵ Hence, the Office of the High Commissioner for Human Rights has prioritised the question of protecting human rights in the context of counter-terrorism measures taken by the international community and has emphasised that human rights must be respected during states of emergency.⁸⁶ The combating of international terrorism requires joint action by states and cooperation at the international level.

After the September 11 attacks, the United Nations Security Council used its powers under Chapter VII of the United Nations Charter to mandate member states to adopt specific counter-terrorism measures.⁸⁷ Measures that shall be taken by the member states are:

particular of journalists, political opposition and human rights defenders (ECOSOC, E/CN.4/2003/67, 2002, paragraph 34)

The special rapporteur on extrajudicial, summary or arbitrary executions has stressed that even in time of public emergency the right to life is non-derogable and the importance to prevent governments from misusing the international war on terrorism as justification for extrajudicial, summary and arbitrary executions or other human rights (General Assembly, A/57/138, paragraph 16)

⁸² A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003, p. 8

The Paper lists following regional organisations: African Union (Convention on the Prevention and Combating of Terrorism, 2000), Organisation of the Islamic Conference (Convention on Combating International Terrorism, 2002), Association of South East Asian Nations (working on a regional agreement to combat terrorism).

⁸³ *ibid.*, p. 9

These regional bodies are: Inter-American Commission on Human Rights (Inter-American Convention Against Terrorism, 2002), Committee of Ministers of the Council of Europe (guidelines on human rights and the fight against terrorism, 2002), and the Ministerial Council of the Organisation for Security Cooperation in Europe (Charter on Preventing and Combating Terrorism, 2002).

⁸⁴ The Sub-Commission on the Promotion and Protection of Human Rights recommended the appointment of a Special Rapporteur to conduct a study on human rights and terrorism in 1997.

⁸⁵ www.unhchr.ch/terrorism/

⁸⁶ *ibid.*

⁸⁷ Resolution 1373 includes many elements of already existing counter-terrorism treaties and makes them binding to all member states. As resolution 1373 does not make any positive reference to the states parties'

prevention of the financing of terrorism, establishment of terrorist acts as serious crimes in national laws and regulations with corresponding punishment, and taking appropriate measures before granting refugee status to ensure that asylum seekers have not planned or participated in terrorist activities.⁸⁸ The measures taken by national governments have to be consistent with their obligations under international law.⁸⁹

The subsequent campaign against terrorism has led to human rights infringements in many countries.⁹⁰ Governments have enacted new security laws that restrict basic rights and freedoms of the citizens and have denied alleged terrorists due process and the protection of law.⁹¹ Some governments use the “war on terrorism” to justify the repression of opponents or arbitrary and punitive measures against asylum seekers.⁹² Preventive detention and restrictions on fair trial often are employed and violation of fundamental human rights are to be found worldwide.⁹³

The Counter Terrorism Committee and the Office of the High Commissioner for Human Rights responded to the concerns raised in that context⁹⁴ and the latter produced a set of guidelines defining human rights obligations that should be considered by the Counter Terrorism Committee when reviewing country reports and elaborating further counter-terrorism measures.⁹⁵

In Addition, the Commission on Human Rights calls on the Office of the High Commissioner for Human Rights to examine the question of the protection of human rights while countering terrorism by taking into account reliable information from all sources, give general recommendations to states how to protect and promote human rights while combating

obligations under international human rights, humanitarian or refugee law, the non-abuse of resolution 1373 has to be controlled. (Security Council Resolution 1373).

⁸⁸ A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003, p. 4

⁸⁹ Security Council Resolution 1456 (2003) for example emphasises that all measures taken by states must be in compliance with their obligations under international law.

See# also Commission on Human Rights Resolution 2003/37.

⁹⁰ A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003, p. 2

⁹¹ The Asian Legal Resource Centre has expressed its concern regarding national security laws in Asia (E/CN.4/2004/NGO/49).

⁹² A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003, p. 2

⁹³ *ibid.*, see the country studies, pp. 10-24

⁹⁴ By non-governmental organisations as well as United Nations bodies. (see communications regarding terrorism www.unhcr.ch/huridocda/huridoca.nsf/FramePage/Subject+terrorism+En?OpenDocument).

⁹⁵ A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003, p. 2

terrorism, and assist and advise states and relevant United Nations bodies, upon their request.⁹⁶

5. Conclusion

When the International Commission of Jurists analysed the impacts of states of emergency on human rights, it has found that the abuse of states of emergency is mainly due to disregard for constitutional and legal regulations and safeguards, and not so much a question of inadequate law.⁹⁷

Derogations from human rights obligations are acceptable and justified if they are necessary and proportionate to the threat of the situation. Thus, measures of derogation must be subject to international scrutiny and review in order to prevent abuse and to guarantee that such measures are both necessary and proportionate.⁹⁸

Terrorism may constitute a threat of such a magnitude that the proclamation of a state of emergency is the only way of securing the life of the nation. If the procedures provided by law are followed and international standards (like the Paris Minimum Standards) and international law provisions (as the derogation clauses of international human rights treaties) are respected and applied, sufficient safeguards will prevent the abuse of emergency powers. However, this ideal situation is rarely found in reality and abuses of emergency powers are common. With the “war on terrorism” scrutiny of the adoption and implementation of security laws has weakened and governments that had been criticised for their human rights violations are now being praised for their support in the fight against international terrorism.⁹⁹ Yet, the international community has become aware of the corrosion of human rights and critiques are expressed, as has been shown by the communications and resolutions within the United Nations.

Emergency powers are in some circumstances necessary, but they must be of temporary nature and should not lead to amendments of constitutions or an excessive adoption of new security laws that will still be valid when the emergency situation has ceased to exist. The problem with the “war on terrorism” at the international level is, that no time limit can be fixed, as the threat is latent and may not cease in the near future. And as international

⁹⁶ Resolutions 57/219 and 58/187 (2003), adopted by the General Assembly, and resolution 2003/68 adopted by the Commission on Human Rights.

⁹⁷ International Commission of Jurists., 417

⁹⁸ *ibid.*, p. 283

⁹⁹ One example is Malaysia, which had been criticised by the USA before September 11th because of their rigorous preventive detention laws (Human Rights Watch, 31.01.03).

terrorism does not operate within a defined and restricted area, but worldwide, the state of emergency applies to the whole of the international community. These special features have to be kept in mind and show that the scrutiny of the implementation of counter-terrorism measures both at the international as at the national level is very important. Above all the prevention of the undermining of human rights has to be a priority: “ *to pursue security at the expense of human rights is short-sighted, self-contradictory, and, in the long run, self-defeating.* ”¹⁰⁰

¹⁰⁰ A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003, p. 3 (Quote of the United Nations Secretary General at an open debate in 2002).

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