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Reconstructing the Notion of State of Emergency

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RECONSTRUCTING THE NOTION OF STATE OF EMERGENCY

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I. INTRODUCTION

Public unrest, terrorist attacks, natural disasters, and other serious events in recent years have prompted various governments to declare states of emergency. A proclamation of a public emergency may sometimes be necessary, or at least defendable. For example, a natural disaster may call for special measures that could not be taken with full respect for obligations under human rights treaties. In other cases, public emergencies can be used as a smokescreen for repressive government policies.[1] An extreme example is the Decree for the Protection of the People and the State adopted on February 28, 1933, pursuant to Article 48 of the Weimar Constitution, which nullified many of the key civil liberties in Germany indefinitely. The decree was never repealed by the Nazis, making the entire Third Reich a state of emergency that lasted twelve years.[2] Once the necessity for derogation is conceded, it becomes difficult to

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1. Allan Rosas, *Emergency Regimes: A Comparison*, *in* BROADENING THE FRONTIERS OF HUMAN RIGHTS: ESSAYS IN HONOUR OF ASBJØRN EIDE 165–166 (Donna Gomien ed., Scandinavian Univ. Press 1993); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE 177 (Cambridge Univ. Press 2003).

2. GIORGIO AGAMBEN, STATE OF EXCEPTION (STATO DI ECCEZIONE) 2, 14–15 (Kevin Attell, trans., Univ. Chi. Press 2005). The text of Article 48 reads:

> If security and public order are seriously disturbed or threatened in the German Reich, the president of the Reich may take the measures necessary to reestablish security and public order, with the help of the armed forces if required. To this end he may wholly or partially suspend the fundamental rights established in Articles 114, 115, 117, 118, 123, 124 and 153.

Id. at 14.

control whether the suspension of rights amounts to an abuse of power.[3] "Serious violations of human rights often accompany emergency situations."[4] Emergencies challenge central tenets of constitutional and liberal democracies: "principles of generality, publicity and the stability of legal norms."[5] As Tingsten wrote in the context of the expansion of Government powers during and after World War I: "a systematic and regular exercise of the institution necessarily leads to the 'liquidation' of democracy."[6] Liberty and security must be balanced – two concepts in a constant tug-of-war.[7]

While it can be debated whether specific incidents warranted such measures, one general question remains. Human rights law allows states of emergency under certain conditions. The purpose is to provide authorities extraordinary powers and resources that are normally unavailable, and to liberate the sovereign from legal constraints. However, human rights law serves to provide checks on sovereign powers to protect individuals, particularly in times of political and social upheaval. The permissibility of states of emergency under human rights law is a contradiction, a conflict between the societal interest and obligation of states to provide security for their citizens and individual human rights such as privacy and due process.

More issues are being perceived as existential threats that may warrant emergency measures. Thus, the aim of this Article is to study recent examples where governments have declared states of emergency under the premise that the perception of threats is evolving.

This Article begins by setting out an analytical framework which seeks to answer two questions: (1) what is the role of the sovereign, the legislative branch, and the executive branch in declaring and using powers under a state of emergency; (2) what States perceive as threats and what consequences those threats will have for their policies. The subsequent Section examines countries that represent models on how to deal with emergencies and exemplifies whether the use of emergency powers is a matter internal or external to the judicial order. Next, the Article describes the legislative framework provided for in human rights regimes. The analytical and legal framework is then applied to five recent cases or

3. DAVID JOHN HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 490 (Butterworths 1995).

4. Scott P. Sheeran, *Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT'L L. 491, 492 (2013).

5. OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 2 (Cambridge Univ. Press 2006).

6. AGAMBEN, *supra* note 2, at 7.

7. *See* GROSS & NÍ AOLÁIN, *supra* note 5, at 8–9.

phenomena: counterterrorism, the Arab Spring, migration, the Ebola outbreak in Western Africa, and economic crises. These examples are used to discuss whether the legal framework as expressed in international human rights treaties adequately reflects "the underlying theory and politics of emergency situations."[8]

II. ANALYTICAL FRAMEWORK: STATE OF EMERGENCY IN AN IDEOLOGICAL, HISTORICAL, AND SOCIETAL CONTEXT

A. The Role of the Sovereign

The concept of public emergency has historical roots that may be traced to Roman times, where countries nominated a "dictator" in exceptional circumstances of external attack or internal rebellion. Regulated powers during an emergency are set out in the constitutions of many but not all states. The conceptual rationale for states of emergency is rooted in the nature of the exceptional situation where the state has a need to safeguard the life of the nation. The International Commission of Jurists has described it as "the counterpart in international law of self-defence in penal law."[9] A state of emergency in Roman Law was not, as some may perceive it, that the sovereign acting as a dictator assumed full powers.[10] It was rather a standstill or suspension of the law.[11]

The expression "full powers" is used in the context of state of emergency and refers to the government's expanding powers. It involves an exceptional power and ability of the executive to issue decrees having the force of law,[12] a power normally reserved to the parliament.[13] The declaration of state of emergency may involve modifying ordinary laws, special emergency legislation, or interpretative accommodation (interpretation by judges) of the existing constitution and laws.[14]

In legislation, scholarship, and literature one may find that two related but distinct terms are used: "state of emergency" and "state of exception." These two concepts do not neatly relate to each other, as legal concepts may develop in different times, systems, places, and contexts without a grand plan demonstrating how all concepts relate to each other. This Article does not assert that scholars cited herein are working within the same

8. Sheeran, *supra* note 4, at 492.

9. *Id.* at 499. *See also* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 84 (N.P. Engel, 2d ed. 2005).

10. AGAMBEN, *supra* note 2, at 48.

11. *Id.*

12. *Id.* at 5–7.

13. *Id.*

14. *See* GROSS & NÍ AOLÁIN, *supra* note 5, at 66–79.

understanding of the concepts. Nevertheless, it could be argued that state of exception is a wider concept compared to a state of emergency. An example would be chapter 11 of the Polish Constitution of 1997 where "extraordinary state" includes martial law, a state of emergency or a state of natural disaster.[15]

As indicated, a state of emergency involves delegating legislative power to the executive and a total or partial suspension of the judicial order.[16] There are two main approaches regarding whether such a suspension can still be contained within the judicial order, the rule-or-law approach, and the sovereignty approach.[17] The *rule-of-law* approach, constitutional or legislative, relates to the state of exception. Proponents of the *sovereignty approach* "'criticize the pretense of regulating by law'" that which "cannot be reduced to legal norms."[18] In a similar vein, Alexander Hamilton argued that "no constitutional shackles can wisely be imposed on the power to which the care of it is committed" and in relation to the common defense he stated:

> [t]hese powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.[19]

Carl Schmitt is the most well-known proponent of the sovereignty approach.[20] He argues that in a matter of an extreme emergency, one cannot anticipate the precise details and how to eliminate it.[21] The content of the jurisdictional competence of the sovereign must by necessity remain unlimited.[22] The constitution can only indicate who has the competence to

15. Konstytucja Rzeczypospolitej Polskiej [Constitution of the Republic of Poland] art. 228.

16. AGAMBEN, *supra* note 2, at 22.

17. AGAMBEN, *supra* note 2, at 10; Sheeran, *supra* note 4, at 500–501.

18. AGAMBEN, *supra* note 2, at 10; Sheeran, *supra* note 4, at 500–01.

19. THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

20. The author is cognizant of the problematic nature of Schmitt and his writings because of his association to the Nazis in the Third Reich, anti-Semitism, radical anti-universalism and critique of liberalism. However, some Schmittian arguments are relevant when discussing the doctrine of emergency considering his approach to the power of the sovereign. *See also* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 428 (Cambridge Univ. Press 2001).

21. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 6–7 (MIT Press trans., 1922/1934).

22. *Id.*

act.[23] This is consistent with the maxim *necessitas legem non habet* (necessity has no law) which affirms that the state of emergency cannot have a juridical form. Similarly, Schwarzenberger noted that "[i]f self-preservation were an absolute and overriding right, the rest of international law would become optional, and its observance would depend on a self-denying ordinance, revocable at will by each State, not to invoke this formidable superright."[24]

Schmitt defines the sovereign as "he who decides on the exception," that is to say, on "whether there is an extreme emergency as well as what should be done to eliminate it."[25] A consequence of such reasoning is that law has to yield to power and considerations of policy, while law as obligatory policy is voluntary.[26] By having the authority to decide on the state of exception, the sovereign guarantees that the state of exception is anchored to the juridical order.[27] Schmitt assumes that the suspension of the rule is temporary.[28] When the exception becomes the rule, as happened in the Third Reich, Schmitt's theory arguably devours itself.[29] When the distinction between exception and normal conditions collapses, violence without law will prevail and there is only civil war or revolution.[30] Schmitt's theory of the exception should arguably not be understood as a constitutional or legal theory. The will of the sovereign is the only norm. The sovereign determines the exception, represents and protects the nation and the people.[31]

The question is whether decisions on public emergency are strictly of a policy nature, or if they can be subjected to judicial review? Any review is arguably open to criticism due to hindsight bias. By the nature of public emergency, it is often difficult to use domestic judicial remedies and redress, in which case international institutions may be available.[32]

Giorgio Agamben argues that the conflict over the state of exception is essentially a dispute about whether it is internal or external to the judicial

23. *Id.*

24. Julio Barboza, *Necessity (Revisited) in International Law*, *in* ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE MANFRED LACHS 28 (Jerzy Makarczyk ed., Nijhof 1984).

25. SCHMITT, *supra* note 21, at 5–7.

26. MARK KLAMBERG, POWER AND LAW IN INTERNATIONAL SOCIETY: INTERNATIONAL RELATIONS AS THE SOCIOLOGY OF INTERNATIONAL LAW 56 (Routledge 2015).

27. AGAMBEN, *supra* note 2, at 35.

28. *Id.* at 58.

29. *Id.*

30. *Id.*

31. GROSS & NÍ AOLÁIN, *supra* note 5, at 169.

32. HARRIS, *supra* note 3, at 490.

order.[33] His conclusion is that it is neither.[34] Modern jurists tend to assume states of emergency as objective situations, when necessity clearly entails a subjective judgment.[35] However, the sovereign is outside of the judicial order but still belongs to it.[36] The conceptual problem is that modern jurists, in Agamben's view, insist too much on the distinction between executive power and parliamentary acts of legislative power. States of exception entail situations where executive decrees and orders have the force of law without law, which appears as a mystical contradiction. The state of exception is not necessarily a dictatorship, but a space without law.[37] One may also contrast two perspectives: Kelsen's all-inclusive *identity thesis* (the state and law are two sides of the same coin) and Schmitt's conception of the state of exception. A Kelsenian approach would suggest that emergency powers are contingent on the legal system and thus can only exist within this system.[38] The Schmittian state of exception exists "outside the legal order."[39]

Locke advocated the rule of law approach and did this with experience of abuse of power during the reign of the Stuarts.[40] However, Locke also created a theory of prerogative power, which was a power "to act according to discretion for the public good, without the prescription of the law, and sometimes even against it."[41] Locke's theory influenced many of the founding fathers of the United States. The theory of prerogative power may appear inconsistent with other parts of Locke's view, specifically his defense of the rule of law. Broad executive powers are not what one normally associates with a civil libertarian. This apparent contradiction may be resolved by his view that prerogative power was extra-

33. AGAMBEN, *supra* note 2, at 23.

34. *Id.*

35. *Id.* at 29–30.

36. *Id.* at 35.

37. *Id.* at 39, 50–51.

38. HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 99 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1996).

> Cognition that is free of ideology, and thus free of all metaphysics and mysticism, can grasp the essence of the state only by comprehending this social structure as a system of human behaviour. A closer look shows it to be a coercive social system, which must be identical with the legal system since the very same coercive acts distinguish both systems, and since one and the same social community cannot be constituted by two different systems. The state, then, is a legal system."

Id.

39. Andrej Zwitter, *Constitutional Reform and Emergency Powers in Egypt and Tunisia*, 7 MIDDLE EAST L. & GOVERNANCE 257, 260 (2015).

40. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 170 (Ian Shapiro ed., Yale Univ. Press 2003); GROSS & NÍ AOLÁIN, *supra* note 5, at 119.

41. GROSS & NÍ AOLÁIN, *supra* note 5, at 120.

constitutional, i.e. the possibility to go outside the law in extreme cases.[42] Thomas Jefferson held a similar view, arguing that the laws of necessity, self-preservation, and saving the country when in danger are of greater importance than "a strict observance of the written laws."[43]

There is certainly opposition to the use of extra-legal measures based on the fear that the use of such measures may lead to totalitarianism and authoritarianism.[44] It is arguably a dangerous illusion to believe one can "protect" liberal democracy by suspending essential parts of it. Modern history has plenty of examples where emergency rule has brought democratic countries to dictatorship.[45] At one end of the spectrum one may posit the *rule-of-law* approach for the state of exception, and at the other end the *sovereignty approach*, which may make measures taken outside of the law legitimate.

B. The Threat from the Other

With the possible exception of natural disasters, public emergencies often involve a tension between "Us" and "the Other." When a terrorist seeks to overthrow the existing political or social order, the existing order is Us and the terrorist is the Other. The terrorist is often defined as someone from the outside who belongs to another nation, ethnicity or religion. The terrorist can also be a political extremist on the inside seeking to change the current order, such as Breivik in Norway.[46] This is also clear when it comes to situations where mass migration may be perceived as a threat. As a result, those in a group are perceived as the threat, regardless if this threat is associated with criminality, differences in values or as financial burden.

Schmitt uses the "friend-enemy" distinction, which purports to clarify who we are and what is rational for us to do in order to preserve our group.[47] Hegelian dialectics appear to be one source of inspiration, where "enemy" is not a political concept.[48] There is no threat to an individual,

42. *Id.*

43. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810) (on file with the Library of Congress); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 24–25 (1993); GROSS & NÍ AOLÁIN, *supra* note 5, at 124.

44. *See* GROSS & NÍ AOLÁIN, *supra* note 5, at 142.

45. PAUL WILKINSON, TERRORISM AND THE LIBERAL STATE 126 (N.Y. Univ. Press 2d ed. 1986).

46. *See* NAT'L COUNTERTERRORISM CTR., 2008 REPORT ON TERRORISM 22 (2009) (CHART illustrating the breakdown of deaths by perpetrator: Islamic Extremist (Sunni) 8,284; Unknown 3,721; Secular/Political/Anarchist 2,513; Christian Extremist 932; and Other 906).

47. Tracy B. Strong, *Foreword* to CARL SCHMITT, THE CONCEPT OF THE POLITICAL, at xxi, (George Schwab trans., Univ. Chi. Press 1996).

48. *See generally* GEORGE WILHELM FRIEDRICH HEGEL, THE PHENOMENOLOGY OF SPIRIT

but to a group.[49] Schmitt argues that the "friend-enemy" distinction "corresponds to the relatively independent criteria of other antitheses: good and evil in the moral sphere, beautiful and ugly in the aesthetic sphere, and so on."[50] Schmitt's anti-universalism is evident when he argues that liberal-individualistic doctrines can only materialize when the "possibility of war is precluded and every friend and enemy grouping" has "become[] impossible."[51] The foe can be both external and internal to the state. The concepts of friend and foe are constructed.[52] Moreover, the intensity of "we" can vary from a dull professional association, enthusiastic political activists to tribal groups based on ethnicity, religion, or nationality prone to use violence.[53] It appears, as Schmitt perceives, that with the advent of international treaties the vocabulary has changed. Instead of calling the adversary "the enemy", he speaks about the enemy as a "disturber of peace" and an "outlaw of humanity." However, this vocabulary that appears apolitical is still dependent on the same logics as the "friend-enemy" distinction.[54] Social identity connects to the concept of "we."[55] Cultural peculiarities, which can also be described as identities, would come under pressure from the homogenization and standardization required by the global economy.[56] Noll perceives the talk of "fighting illegal immigration" as an example of struggle between us and the other.[57] In a similar vein, Buzan compares the pattern of societal insecurities between Eastern and Western Europe with the relationship between the European Community (now the E.U.) and its southern periphery in the Middle East.[58] One difference is that the north-south relationship is not mediated by a shared European identity.[59] The modes "we," "us," and "them" are challenged by the formation of new

(Terry Pinkard, trans., Cambridge Univ. Press 2018).

49. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 28–29 (George Schwab trans., Univ. Chi. Press 1996).

50. *Id.* at 26.

51. *Id.* at 55.

52. GREGOR NOLL, NEGOTIATING ASYLUM: THE EU ACQUIS, EXTRATERRITORIAL PROTECTION AND THE COMMON MARKET OF DEFLECTION 571–72 (Martinus Nijhoff Publishers 2000).

53. Ole Wæver, *Societal Security: The Concept, in* IDENTITY, MIGRATION AND THE NEW SECURITY AGENDA IN EUROPE 17–40 (Ole Wæver et al. eds., Pinter Publishers 1993).

54. SCHMITT, *supra* note 49, at 79.

55. Wæver, *supra* note 53, at 17.

56. Barry Buzan, *The Changing Security Agenda in Europe, in* IDENTITY, MIGRATION AND THE NEW SECURITY AGENDA IN EUROPE 1–14 (Ole Wæver et al. eds., Pinter Publishers 1993).

57. NOLL, *supra* note 52, at 572–573.

58. Buzan, *supra* note 56, at 5–6.

59. *Id.*

identities.[60]

The fact that the targets of emergency are perceived as outsiders, frequently foreign ones, has serious implications when a state sets out to strike a proper balance between liberty and security in time of crisis or emergency.[61]

C. Securitization

The doctrine of emergency is often used in the context of national security.[62] Conversely, the concept of security is closely related to the concepts of emergency and the exceptional. One way to understand which matters become national security interests is through the concept of securitization. The conceptual framework of securitization of the Copenhagen School centered around the work of Barry Buzan and Ole Wæver.[63] Together with Kelstrup and Lemaitre, they argued that traditional military and ideological security preoccupations of Europe would become less important. Instead, they argued, *societal security* would be the most effective tool for understanding the new security agenda in Europe.[64] The starting point is that security is "broadly about the pursuit from threat."[65] There will always be some degree of insecurity. They do not follow theorists who pit individual security against state security, but rather perceive security as a collective phenomenon.[66]

Over time, the understanding of national security has shifted from a military to a much broader concept, potentially encompassing all areas of human activities.[67] A representative view of national security after World War II included three types of crises in democracies: war, rebellion, and economic depression.[68]

Buzan's and Wæver's collaborative work culminated in *Security: A New Framework for Analysis*, co-authored with Jaap de Wilde.[69]

60. *Id.*

61. GROSS & NÍ AOLÁIN, *supra* note 5, at 221.

62. *See* RAJAGOPAL, *supra* note 1, at 177.

63. OLE WÆVER ET AL., IDENTITY, MIGRATION AND THE NEW SECURITY AGENDA IN EUROPE, at ix (Ole Wæver et al. eds., Pinter Publishers 1993).

64. *Id.*

65. Wæver, *supra* note 53, at 23.

66. *Id.* at 23–24.

67. *See* Gregor Noll, *Securitising Sovereignty? States, Refugees, and the Regionalisation of International Law*, *in* REFUGEES AND FORCED DISPLACEMENT: INTERNATIONAL SECURITY, HUMAN VULNERABILITY, AND THE STATE 277, 280 (Edward Newman & Joanne van Selm eds., United Nations Univ. Press 2003); GROSS & NÍ AOLÁIN, *supra* note 5, at 215.

68. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (Princeton Univ. Press 1948).

69. *See generally* BARRY BUZAN ET AL., SECURITY: A NEW FRAMEWORK FOR ANALYSIS

Securitization concerns "the construction of security through 'speech acts' that designate particular issues or actors as existential threats."[70] Thus:

> "Security" is the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics. Securitization can thus be seen as a more extreme version of politicization. In theory, any public issue can be located on the spectrum from nonpoliticized (meaning that the state does not deal with it and it is not in any other way made an issue of public debate and decision) through politicized (meaning that the issue is part of public policy, requiring government decision and resource allocation or, more rarely, some other form of communal governance) to securitized (meaning the issue is presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure).[71]

It is not enough to present something as an existential threat to create securitization. "The issue is securitized only if and when the audience accepts it as such."[72] Securitization can either be *ad hoc* or institutionalized.[73] If a particular type of threat is persistent and recurrent, the choice of measures and the resources provided will become institutionalized.[74] Not every threat will be perceived as persistent or of priority, in such cases the response can be *ad hoc* in nature.[75]

One concern with widening the security agenda for issues and objects in the economic, environmental, and societal sectors is that it may entail undesirable and counterproductive effects on the entire fabric of social and international relations. Reserving security for the military sector fits better with liberal-democratic rule of law principles.[76] To make an issue securitized may transfer it to the "agenda of panic politics."[77] This is also why some scholars associate securitization with the same line of thinking as Schmitt. There is resistance to the agenda of "panic politics" and it is in this context that we may understand why Wæver has expressed a preference for desecuritization.[78]

(Lynne Rienner Publishers Inc. 1998). *See also* Matt McDonald, *Constructivism*, *in* SECURITY STUDIES: AN INTRODUCTION 59, 68 (Paul D. Williams ed., Routledge 2013).

70. McDonald, *supra* note 69, at 59.
71. BUZAN ET AL., *supra* note 69, at 23–24.
72. *Id.* at 25.
73. *Id.* at 27.
74. *Id.*
75. *Id.* at 28.
76. *See id.* at 209–10.
77. *Id.* at 34.
78. *See* McDonald, *supra* note 69, at 71.

III. THE ORIGINS OF AND NATIONAL VARIATIONS IN THE DOCTRINE OF EMERGENCY

There are several different historical examples and models of emergency regimes. In a historical comparison, Gross and Ní Aoláin describe three classical models of accommodation that all involve a compromise between the principles of rule of law and the ability for the state to take adequate measures to deal with a crisis: the Roman dictatorship, the French "state of siege," and the martial law in the United Kingdom.[79] A different, more functional, classification would put public emergencies in three different types of situations: "(1) political crises: war (international war, civil war, war of national liberation), internal unrest, grave threats to public order, or subversion; (2) public or natural disasters; and (3) economic crises."[80] The scope of what constitutes an emergency may vary. Considering it is difficult to know beforehand which emergencies may arise, it may be necessary to adopt a broad or vague definition in domestic laws. However, overly broad or vague definitions are open to abuse.[81]

This Part examines a selection of countries that represent models of different approaches to handle emergencies and have become examples for other states in their approaches. Although the Swedish system is arguably not a model to the same degree as other countries, this Article uses it as a background for the discussion on the 2015 migration crisis discussed in Section V.C. National constitutions generally differentiate between types of emergencies. For example, the constitutions of the Netherlands and Portugal establish a dual structure where there are two types of emergencies. The Dutch constitution distinguishes between "state of war" and a "state of emergency,"[82] while the Portuguese constitution distinguishes between a "state of siege" and a "state of emergency."[83] Similar dual structures may be found in the national constitutions of many former communist states such as Belarus, Estonia, Lithuania, Romania, Hungary, Slovakia, Slovenia, and Russia.[84]

Gross and Ní Aoláin note that many of the constitutions of Latin America distinguish between a variety of states of exception (*estado de excepción*), granting the government different emergency powers depending

79. *See* GROSS & NÍ AOLÁIN, *supra* note 5, at 17–35.

80. JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 31 (Clarendon Press 1992).

81. Anna Jonsson Cornell & Janne Salminen, *Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland*, 19 GERMAN L.J. 219, 222 (2018).

82. GW. [CONSTITUTION] arts. 96, 103 (Neth.).

83. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION] art. 19 (Port.).

84. GROSS & NÍ AOLÁIN, *supra* note 5, at 41.

on the type of emergency present.[85]

The fact that some legal orders have no explicit provisions to deal with emergencies does not necessarily mean that they lack the tools or means to counter emergency situations.[86] One option is to turn to the principle of necessity either as an autonomous source of law distinct from the constitution or as a meta-rule of constitutional construction. Under both of these approaches, necessity can make measures legal that otherwise would be unlawful or unconstitutional.[87] As explained below, both the United States and the doctrine of constitutional necessity (*konstitutionell nödrätt*) in Sweden may serve as examples of this approach.[88]

A. Suspension of Law and Dictatorship in Rome

The Roman dictatorship was founded on a system and constitutional framework in which an emergency situation was recognized as a regular instrument of Government, which became a prototype of emergency regimes.[89] Its features include limitation in time, recognition of the exceptional nature of emergencies, and appointment of a dictator, which separated those who declared the emergency from those who exercised dictatorial powers for well-defined and limited purposes with the ultimate goal of upholding constitutional order rather than replacing it.[90]

The Roman monarchy was overthrown in 509 B.C. when the Republican period began.[91] At the height of the Roman Republic, the executive power was vested in two consuls who held their office for one year.[92] However, the Romans understood that a coequal partnership at the top of the executive Government would not be adequate in crisis.[93] There was a need for shift to another institution — the dictatorship — which could be combined with *iustitium* (standstill or suspension of law).[94] The dictatorship was a relic of the monarchical system.[95] In case of a situation

85. *Id.* at 42.

86. Cornell & Salminen, *supra* note 81, at 223.

87. GROSS & NÍ AOLÁIN, *supra* note 5, at 46–47.

88. *See infra* Sections III.E, III.F.

89. GROSS & NÍ AOLÁIN, *supra* note 5, at 17–18.

90. *Id.* at 18.

91. MAX CARY & HOWARD H. SCULLARD, A HISTORY OF ROME DOWN TO THE REIGN OF CONSTANTINE 56, 62–63 (Macmillan Press 3d. ed. 1975); GROSS & NÍ AOLÁIN, *supra* note 5, at 19.

92. CARY & SCULLARD, *supra* note 91, at 62–63; ROSSITER, *supra* note 68, at 19; GROSS & NÍ AOLÁIN, *supra* note 5, at 19.

93. ROSSITER, *supra* note 68, at 20.

94. AGAMBEN, *supra* note 2, at 41.

95. CARY & SCULLARD, *supra* note 91, at 63; ROSSITER, *supra* note 68, at 17; GROSS & NÍ AOLÁIN, *supra* note 5, at 19.

that threatened the Republic, the Senate would call upon the consuls by issuing a *senatus consultum ultimatum* (final decree).[96] As part of the *senatus consultum* there was a decree declaring *tumultus* (emergency situation, resulting from a foreign war, insurrection or civil war) and the reaction would normally be the proclamation of *iustitium*.[97] The proclamation of *iustitium* should not be conflated with dictatorship.[98] The dictator was a specific kind of magistrate chosen by the consuls, which eventually developed into a system with increased control by the senate.[99] Thus, *iustitium* as a state of exception was not necessarily a dictatorship.[100] The term of the dictator was limited to six months because of the military function of the institution and due to the early Romans only fighting in summer.[101] This time restriction was enforceable, and the dictator could be prosecuted after his resignation for illegally prolonging the tenure of his office.[102] The model dictator was Cincinnatus who saved the republic and left power after 15 days.[103] Machiavelli perceived the design of the Roman Dictatorship as something worthy to emulate, believing that republics should "have recourse to a dictatorship [or] some form of authority analogous to it" in time of crisis.[104]

The dictatorship declined over time as the powers of the institution were restricted. In 300 B.C a right to appeal the dictator's sentences was established and the last constitutional dictator left office in 202 B.C.[105] The Senate made sure there were no more dictators after the second Punic War.[106] Sulla later revived the dictatorship with unlimited and absolute power, setting up a tyranny.[107] In the old dictatorship, the dictator was named by a consul. Sulla unconstitutionally bypassed the senate when he convinced the citizens' assembly to make him into a permanent

96. AGAMBEN, *supra* note 2, at 41.

97. *Id.*

98. *Id.* at 47.

99. ROSSITER, *supra* note 68, at 23; GROSS & NÍ AOLÁIN, *supra* note 5, at 20.

100. AGAMBEN, *supra* note 2, at 47, 50.

101. ROSSITER, *supra* note 68, at 23; GROSS & NÍ AOLÁIN, *supra* note 5, at 21–22.

102. Gross & Ní Aoláin, *supra* note 5, at 22.

103. GROSS & NÍ AOLÁIN, *supra* note 5, at 25–26.

104. NICCOLÒ MACHIAVELLI, THE DISCOURSES 196 (Leslie J. Walker trans., Penguin Books 2003) (1531).

105. Rossiter, *supra* note 68, at 26; Pedro López Barja de Quiroga, *Cicero:* Bellum Iustum *and the Enemy Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF INTERNATIONAL CRIMINAL LAW: CORRELATING THINKERS 83 (Morten Bergsmo & Emiliano J. Buis eds., Torkel Opsahl Academic EPublisher 2018).

106. *Id.*

107. CARY & SCULLARD, *supra* note 91, at 235.

dictator.[108] Sulla set the precedent for Caesar's march on Rome and ascension to dictatorship in 49 B.C.[109] The suspension of law and dictatorship is relevant as background for how the state of emergency has developed as an institution to the present day, not only as inspiration for rules and decision-makers, but as a point of departure in scholarship. For example, Rossiter studied the Roman precedent and argued that the resort to constitutional dictatorship must follow certain criteria that govern its initiation, operation, responsibilities, and termination.[110] It is important that the initial decision to declare a state of emergency does not rest with the dictator but instead with a different branch of government.[111]

B. State of Siege and France

The *état de siège* (state of siege) originated in France and may be found in the decree issued by Napoleon on December 24, 1811. Its antecedent may be found in the law of July 10, 1791, concerning the conservation and classification of military areas.[112] Gross and Ní Aoláin explain that emergencies could "be anticipated and counter-measures . . . put in place by promulgating comprehensive legal rules" before the event.[113] It was originally conceived to give full powers to the military commandant of a besieged fortress, but with the French revolution the concept shifted to more political purposes, as well as internal rebellion and disquiet.[114] The 1811 decree has also served as the model employed throughout Latin America (known *as estado de sitio*).[115] There are examples of abuse, for example MacMahon's abortive coup d'état of May 16, 1877, when he dissolved the Chamber of Deputies to strengthen the monarchist faction.[116] Other, less controversial, instances include the decree on August 2, 1914, when President Poincare placed the entire country in a state of siege during World War I.[117] The state of siege was not declared between 1919 and the outbreak of World War II.[118] Moreover, this instrument

108. CARY & SCULLARD, *supra* note 91, at 235.

109. CARY & SCULLARD, *supra* note 91, at 271, 274–278; López Barja de Quiroga, *supra* note 105, at 67.

110. ROSSITER, *supra* note 68, at 297–306; GROSS & NÍ AOLÁIN, *supra* note 5, at 55.

111. ROSSITER, *supra* note 68, at 297–306; *See* GROSS & NÍ AOLÁIN, *supra* note 5, at 55.

112. ROSSITER, *supra* note 68, at 80.

113. GROSS & NÍ AOLÁIN, *supra* note 5, at 27.

114. *Id.*

115. *Id.* at 26.

116. ROSSITER, *supra* note 68, at 84–85.

117. *See* Décret du 2 août 1914 [Law 2-1914], JOURNAL OFFICIEL DES ETABLISSEMENTS FRANCAIS DE L'OCÉANIE [OFFICIAL JOURNAL OF THE OCEANIAN FRENCH INSTITUTIONS], 346 (Aug. 2, 1914).

118. ROSSITER, *supra* note 68, at 84–85.

was not adopted to use in economic crises like Weimar Germany's flexible Article 48.[119] Instead, the Parliament adopted the enabling act, which delegated lawmaking power to the French Government.[120] Sections 16 and 36 in the present constitution regulate states of emergency in the French system.[121]

C. Martial Law and the United Kingdom

While countries such as France, Italy, Germany, and Spain have histories of revolutions as well as abrupt and sometimes illegal changes of government, England had a comparatively peaceful evolution to parliamentary democracy. Thus, English jurists have historically been skeptical of the French state of siege, considering it contrary to "rule of law."[122]

However, emergency powers have been available in time of war. The term "martial law" in England has its origins in military law. The Parliament adopted the Petition of Right in 1628 under which martial law applied only to soldiers in wartime.[123] The Duke of Wellington stated that military law and martial law were "nothing more nor less than the will of the general" and in relation to a regime of military government outside England proper.[124] With time, "martial law" came to include a broad range of non-statutory, extraordinary powers intended to deal with violent crises, founded in the common law right to meet force by force.[125] It is limited only by necessity. With the outbreak of World War I, the Defence of the Realm Act (DORA) was passed into law.[126] Of the nations that went to war in 1914, Great Britain was forced to alter governmental organization and into far-reaching invasions of civil and economic liberties.[127] DORA was thus a general statutory scheme of wartime Government that institutionalized emergency powers. The precedent for DORA, however, may also be found in the extensive governmental powers

119. *See* WEIMARER VERFASSUNG [WEIMAR CONSTITUTION] art. 48 (Ger.).

120. *See* ROSSITER, *supra* note 68 at 91, 99, 117–18.

121. 1958 CONST. arts. 16, 36.

122. ROSSITER, *supra* note 68, at 135–136; ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 182–83 (Liberty Classics 1982); Charles Townshend, *Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800–1940*, 25 HIST. J. 167, 167 (1982).

123. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 39–41 (n.p., E. & R. Nutt 3d ed. 1739); Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1258 (1942); GROSS & NÍ AOLÁIN, *supra* note 5, at 31.

124. Fairman, *supra* note 123, at 1259; GROSS & NÍ AOLÁIN, *supra* note 5, at 31.

125. Townshend, *supra* note 122, at 171; DICEY, *supra* note 122, at 185; GROSS & NÍ AOLÁIN, *supra* note 5, at 31.

126. Defence of the Realm Act 1914, 4 & 5 Geo. 5 c. 29.

127. ROSSITER, *supra* note 68, at 151; GROSS & NÍ AOLÁIN, *supra* note 5, at 182–83.

existing in Ireland. Emergency powers applied by the British army overseas were eventually applied at home through the Emergency Powers Act of 1920.[128] With the end of the First World War, the normal pattern of British government was re-established. Civil liberties and privileges that had been restricted were restored. Government control over industry was relaxed. The first instance of a large-scale delegation of power was made in response to the economic depression of 1931 through 1932. The Government was granted temporary emergency powers in five separate statues, including the Gold Standard (Amendment) Act of September 21, 1931.[129] At the outbreak of World War II, the Parliament approved more than forty war statutes and a comprehensive enabling act for defense of the realm: the Emergency Powers (Defence) Act was passed August 24, 1939, a counterpart of DORA of 1914.[130] It "came to an automatic end on February 24, 1946," and its final extension had been for only six months.[131]

Escalating terrorist attacks in the 1980s emanating from the conflict in Northern Ireland led to the adoption of the Criminal Evidence (Northern Ireland) Order of 1988, which expanded powers not only in relation to terrorism but also ordinary crimes.[132] This was later extended to the rest of the United Kingdom with the adoption of the Criminal justice and Public Order Act (CJPOA) in November 1994.[133] The present legislation on emergencies, the Civil Contingencies Act adopted in 2004, is quite young.[134]

D. The Weimar Constitution in the Interwar Period and Militant Democracy in Post-War Germany

Rossiter finds the German Republic after 1919 to be the "most authentic modern parallel" to the Roman example of dictatorship in time of national emergency.[135] Article 48 of the 1919 Weimar Constitution provides for rules on emergencies.[136] The provision was adopted at a time

128. ROSSITER, *supra* note 68, at 151; GROSS & NÍ AOLÁIN, *supra* note 5, at 182–83.

129. Gold Standard (Amendment) Act 1931, 21 & 22 Geo. 5 c. 46.

130. Emergency Powers (Defence) Act 1939, 2 & 3 Geo. 6 c. 62. *See also* Fairman, *supra* note 123, at 1255.

131. ROSSITER, *supra* note 68, at 171–78, 184–85, 203.

132. The Criminal Evidence (Northern Ireland) Order 1988, SI 1998/1987 (N. Ir. 20).

133. GROSS & NÍ AOLÁIN, *supra* note 5, at 186.

134. Civil Contingencies Act 2004, c. 36 (UK). The Civil Contingencies Act replaced the Civil Defence Act 1948, 12, 13 & 14 Geo. 6 c. 5 (Gr. Brit.), the Civil Defence Act (Northern Ireland) 1950 c. 11 (N.I.), the Emergency Powers Act 1920, 10 & 11 Geo. 5 c. 55 (Gr. Brit.) and the Emergency Powers Act (Northern Ireland) 1926 c. 8 (N.I.). *Id.* sch. 3.

135. ROSSITER, *supra* note 68, at 31, 34.

136. *Id.*

when virtual anarchy reigned in large portions of Germany.[137] "Separatist movements and provincial rebellions threatened" the territorial integrity of the Reich.[138] Section two of Article 48 provides that:

> [i]n case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to re-establish law and order, if necessary using armed force. In the pursuit of this aim he may suspend the civil rights described in articles 114, 115, 117, 118, 123, 124 and 153, partially or entirely.[139]

The article was phrased in broad terms, it did not impose a time-limit and the question of what was "necessary" was left to the President and his Cabinet.[140] There was routine use of emergency powers during the Weimar Republic to counter economic crisis.[141] It was on the basis of this article that a state of emergency was proclaimed after the Reichstag Fire of 1933.[142] From that time Hitler ruled Germany by decree until the end of World War II.[143]

In the context of the challenges from Nazism and Fascism facing democracies in the 1930s, Loewenstein argued that "[d]emocracy must become militant."[144] His premise was that the enemies of democracy would abuse democratic legal guarantees and individual rights protections to undermine democracy.[145] Loewenstein describes how Fascism disguised as fundamental rights and the rule of law could be implemented to legally destroy democracy.[146] He distinguished between *constitutional government*, which preserves "a definite sphere of private law and fundamental rights," and *dictatorship*, which fuses private and public law and in which there is "no trace of individual rights or the rule of law."[147] Several countries were already under one-party controlled dictatorships at the time, such as Italy, Germany, and Turkey; Spain was about to be. Lowenstein noted that Fascist movements existed openly or secretly even in countries that were still democratic, such as Belgium, France, Switzerland,

137. *Id.* at 34.

138. *Id.*

139. WEIMARER VERFASSUNG [WEIMAR CONSTITUTION] art. 48 (Ger.) (translation from AGAMBEN, *supra* note 2, at 14).

140. ROSSITER, *supra* note 68, at 32, 64–73.

141. *Id.* at 37–38, 41–49, 51; GROSS & NÍ AOLÁIN, *supra* note 5, at 4–5.

142. ROSSITER, *supra* note 68, at 59.

143. *Id.*

144. Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 31 AM. POL. SCI. REV. 417, 423 (1937).

145. *Id.*

146. *Id.*

147. *Id.* at 418.

Norway, Ireland, Denmark, Sweden, and England.[148] He advocated for the abandonment of the "exaggerated formalism of the rule of law" in circumstances that democracies faced in the 1930s.[149] "After the end of World War II, the concept of 'militant democracy' became" the cornerstone of the constitutional order of the Federal Republic of Germany.[150] It is on this basis that Germany's Basic Law provides for the forfeiture of basic rights for whoever abuses them and deems unconstitutional any political parties that aim to undermine Germany's free democratic order.[151]

The emergency provisions were incorporated into the Basic Law in 1968.[152] At the time the Basic Law was originally adopted, Germany was an occupied country that relied on the Allied Powers for security. Thus, there was no need for emergency powers in the Basic Law. This changed with Germany's rearmament and its accession to NATO.[153] The Basic Law distinguishes between the internal state of emergency and the external state of emergency, each of the two subdivided into additional subcategories. Internal state of emergency concerns the maintenance or restoration of security or order, grave accident, natural disaster or imminent danger to the existence or to the free democratic basic order of the Federation or of a land.[154] External state of emergency may relate to either state of tension or state of defense.[155]

E. The U.S. Constitution

The U.S. system of government has two main pillars: separation of powers under a written constitution and conferral of executive power upon an independent president which is not under the immediate control of the legislature. The bill of rights, federalism, and separation of powers under the U.S. Constitution represent a barrier to strong and abnormal action from the executive, which is arguably more robust than the laws and charters of Britain, France, and Weimar Germany.[156] However, martial law, i.e. the use of armed force to keep the peace of the nation, is still

148. *Id.* at 419.

149. *Id.* at 424, 432.

150. GROSS & NÍ AOLÁIN, *supra* note 5, at 39.

151. GRUNDGESETZ [GG] [BASIC LAW] arts. 18, 21(2), *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html. *See also* GROSS & NÍ AOLÁIN, *supra* note 5, at 39.

152. *See* Siebzehntes Gesetz zur Ergänzung des Grundgesetzes [Seventeenth Law Amending Basic Law], June 27, 1968, BGBL I at 709 (Ger.).

153. Rainer Grote, *Regulating the State of Emergency – The German Example*, 33 ISR. Y.B. ON HUM. RTS. 153, 154 (2003).

154. GRUNDGESETZ [GG] [BASIC LAW], arts. 35, 91 (Ger.).

155. *Id.* arts. 80(a), 115(a)–115(l).

156. ROSSITER, *supra* note 68, at 211–12; Monaghan, *supra* note 43, at 33–34.

available.[157]

The U.S. Constitution "contains no general provision authorizing suspension of the normal governmental processes" when an appropriate governmental authority declares an emergency.[158] The regulation of emergency powers is brief. Article I, section 8, clause 15 provides that Congress shall have the power "to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repeal invasions'" and Article I, section 9, clause 2 provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[159] There are other clauses that use the words "war" or "time of war," but they do not grant special powers to any branch of government during such emergencies.[160] However, in contrast to the federal constitution, many state constitutions contain more explicit emergency provisions.[161]

The American Civil War provides an example of where such powers were exercised. During the initial phase of the war, President Lincoln took measures beyond the legal limits set by the Constitution and the congress—including calling forth the militia and imposing a blockade on the ports of the Southern states—which was ratified afterwards by Congress.[162] Lincoln's wartime presidency developed into a theory of crisis government based on the concept of inherent presidential powers.[163]

The largest single delegation of power during World War I was the Lever Act of August 10, 1917.[164] It was one among several emergency measures during the war. In the summer of 1920 Congress passed a bill that repealed sixty wartime measures.[165] As a response to the depression,

157. ROSSITER, *supra* note 68, at 215.

158. Monaghan, *supra* note 43, at 33.

159. U.S. CONST. art. I, § 8 cl. 15; *id.* § 9, cl. 2.

160. *Id.* art. I, § 8, cl. 11 (Congress's power to declare war); *id.* art. III, § 3, cl. 1 (the crime of treason); *id.* amend. III (prohibition on the quartering of soldiers in private premises); *id.* amend. V (exemption from the requirement of Grand Jury). *See also* George Winterton, *The Concept of Extra-Constitutional Executive Power in Domestic Affairs*, 7 HASTINGS CONST. L.Q. 1, 24–25 n.160 (1979); Monaghan, *supra* note 43, at 32–38; GROSS & NÍ AOLÁIN, *supra* note 5, at 37.

161. Oren Gross, *Providing for the Unexpected: Constitutional Emergency Provisions*, 33 ISR. Y.B. ON HUM. RTS. 13, 19–20 n.28 (2003) (listing state constitutional emergency provisiosn).

162. ROSSITER, *supra* note 68, at 224–27; GROSS & NÍ AOLÁIN, *supra* note 5, at 47–48.

163. William C. Banks & Alejandro D. Carrió, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1, 21–23 (1993); David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 179 (2002). *See also* Ex parte Milligan, 71 U.S. 2 (1866) (holding that even acting as Commander-in-Chief, the president could not disregard statutory requirement governing the release of prisoners); Monaghan, *supra* note 43, at 28 n.135; GROSS & NÍ AOLÁIN, *supra* note 5, at 48.

164. Food and Fuel Control Act, Pub. L. No. 65-41, 40 Stat. 276 (1917) (repealed 1921).

165. ROSSITER, *supra* note 68, at 254.

which peaked in 1933, Roosevelt led a crisis government. Roosevelt was a supporter for the expansive view of emergency power. In his inaugural address he asked the Congress for "broad Executive power to wage a war against the emergency, as great as the power that would be given [him] if we were in fact invaded by a foreign foe."[166] Several emergency laws were adopted from March to June 1933. At the outbreak of World War II a limited national emergency was proclaimed. As a response to Nazi Germany's threats of world domination, President Franklin D. Roosevelt announced an unlimited emergency May 27, 1941 with the purpose of protecting shipping in the Atlantic, continued humanitarian and military aid to Britain, and the establishment of a civilian defense.[167] This also led to the nation being prepared for total war following the attack on Pearl Harbor, December 7, 1941.[168]

F. Emergency Powers and Constitutional Necessity in Sweden

Chapter 15 of the Instrument of Government (RF), which is a part of the Swedish Constitution, provides certain powers during war or when there is a risk of war.[169] This includes the right of the Government to regulate matters by decree.[170] In peacetime, the power of Government to regulate by decree first requires prior authorization by Parliament.[171] However, there are no provisions or general clauses in the constitution regulating states of emergency that would increase the power of the Government for any other situations. Regular administrative structures apply during emergencies, which means that the applicable laws under normal conditions will also apply during emergencies. Such emergencies may involve acts of "terrorism, organized crime, large accidents, natural disasters, epidemics, and large failures or shut down of vital infrastructures."[172] The relevant statutory laws are phrased in a general manner, the legal concepts do not have legally established meanings and there is limited case law.[173]

166. *Id.* at 257.

167. Proclamation No. 2487, 3 C.F.R § 234 (1938-1943).

168. ROSSITER, *supra* note 68, at 266.

169. REGERINGSFORMEN [RF] [CONSTITUTION] 15 (Swed.).

170. *Id.* 15:6.

171. *Id.*

172. Cornell & Salminen, *supra* note 81, at 228. *See also* Statens Offentliga Utredningar [SOU] 2001:41 Säkerhet i en ny tid, [government report], at 79, 119 (Swed.); Statens Offentliga Utredningar [SOU] 2005:104 Sverige och tsunamin—granskning och förslag at 56 (Swed.); Statens Offentliga Utredningar [SOU] 2008:61 Krisberedskapen i grundlagen, at 21 (Swed.); EMMELIE ANDERSSON ET AL., FÖRUTSÄTTNINGAR FÖR KRISBEREDSKAP OCH TOTALFÖRSVAR I SVERIGE, 161 (Försvarshögskolan (FHS—Swedish Defence University) 2017).

173. PER BERGLING ET AL., KRISEN, MYNDIGHETERNA OCH LAGEN: KRISHANTERING I

Even during emergencies the Government is required to take decisions as a collective and the constitutional prohibition against ministerial rule still applies.[174] In view of cases from the 1970s that have caused debate, Wennerström argues that the problem is not that new legal norms need to be adopted in an urgent manner or that the limits of the Instrument of Government needs to be expanded, it is rather the requirement that the Government needs to make a decision with five members present.[175] This quorum rule may in urgent situations pose a problem.

A law on a particular subject matter, for example biosecurity, may have clauses applicable to an emergency,[176] but that is something different than having a general clause in the constitution.

The Prime Minister's Office and Government ministries have responsibilities for coordination, preparation, and general direction of crisis management at the national level,[177] but as already stated, the national Government does not have any general emergency powers under the Instrument of Government to derogate from any laws, except during war or when there is a risk of war. This means that responsibilities, powers, and available measures must be regulated by law to the extent possible before any emergency happens. However, the Government has argued that, when it comes to emergencies, there are unwritten rules and silent exceptions on how the constitution should be interpreted.[178] The availability of such silent powers would mean a collapse of two opposing models. The constitution builds on a *rule-of-law approach*, but there appears to be an opening for the *sovereignty approach*, which admits that the handling of some situations cannot be regulated by legal norms.[179] This view is controversial, and two Government Inquiries that were only five years

RÄTTENS GRÄNSLAND 19 (Gleerups Utbildning 2016).

174. REGERINGSFORMEN [RF] [CONSTITUTION] 11:3, 12:2–3 (Swed.); Proposition [Prop.] 2009/10:80 En reformerad grundlag [government bill] (Swed.); ANDERSSON ET AL., *supra* note 172, at 73, 78; BERGLING ET AL., *supra* note 173, at 68–74; Cornell & Salminen, *supra* note 81, at 226.

175. *See* REGERINGSFORMEN [RF] [CONSTITUTION] 7:3–4 (Swed.).

176. *See, e.g.*, 9 ch. 5–6 §§ SMITTSKYDDSLAG (SFS 2004:168) (law on biosecurity); 3 ch. 8 § LAG OM SKYDD MOT OLYCKOR (SFS 2003:778) (law on accidents and rescue service); 1a § EPIZOOTILAG (SFS 1999:657) (law on epizootic diseases).

177. *See* Proposition [Prop.] 2007/2008:92 Stärkt krisberedskap—för säkerhets skull [government bill] (Swed.). *See also* Cornell & Salminen, *supra* note 81, at 226–27.

178. *See* Konstitutionsutskottets betänkande 1973:KUU20 [parliamentary committee report], 17 (Swed.); Konstitutionsutskottets betänkande 1974:KUU22 [parliamentary committee report] 19–20; commented by BERGLING, et al., *supra* note 173, at 76-82. *See also* HENRIK JERMSTEN, KONSTITUTIONELL NÖDRÄTT, at 91 (Juristförlaget 1992) ("One could describe constitutional necessity as an unwritten rule at the constitutional level.").

179. *Supra* Section II.A. *See also* AGAMBEN, *supra* note 2, at 10; Sheeran, *supra* note 4, at 500.

apart came to contradicting conclusions on whether constitutional necessity is available. The 2003 inquiry following the attacks on September 11th noted that in Sweden, state authorities had at that time rejected constitutional necessity.[180] In contrast, in 2008, the constitutional law inquiry stated that in certain emergencies it *may* be possible pursuant to constitutional necessity to decide in a manner that violates the instrument of Government.[181] The 2008 inquiry also noted that such action may, in subsequent review, be accepted as legal.

Three cases from the 1970s frequently arise in the preparatory works relating to emergencies and scholarly discussion: the "Bulltofta drama," an aircraft hijacking in September 1972; the Norrmalmstorg bank robbery involving hostage taking in August 1973; and the attack in April 1974 by Red Army Faction (RAF) members against the embassy of West Germany in Stockholm.[182] There are different views on how to classify these events in legal terms. Bull and Jermsten argue that the legal violations that the Government and individual ministers committed and the fact they were not criminally sanctioned should be understood in terms of general rules on necessity and not in terms of constitutional necessity.[183]

The 2008 constitutional law inquiry suggested a proposal to regulate emergency powers in peace in the constitution.[184] The proposal was rejected by the Government, which did not object to the idea that this should be regulated, but thought the matter needed more consideration.[185]

180. Statens Offentliga Utredningar [SOU] 2003:32 Vår beredskap efter den 11 september [government report series], 96 (Swed.).

181. En reformerad grundlag [SOU] 2008:125, at 525. *See also* Statens Offentliga Utredningar [SOU] 2005:104 [government report series], 57 (Swed.).

182. Konstitutionsutskottets betänkande 1973:KUU20 [parliamentary committee report], 17 (Swed.); Konstitutionsutskottets betänkande 1974:KUU22 [parliamentary committee report], 19–20; Statens Offentliga Utredningar [SOU] 2003:32 Vår beredskap efter den 11 september [government report series], 96–98 (Swed.); JERMSTEN, *supra* note 178, at 78–84; BERGLING ET AL., *supra* note 173, at 76.

183. Tingsten compares the concept "fullmaktslagar" (law of authorisation) with "konstitutionell nödförordningsrätt" (regulatory power by constitutional necessity). Jermsten argues that it might have been adequate to say that the doctrine of constitutional necessity existed in the Swedish constitution before 1974, but not after when a new Instrument of Government was adopted; JERMSTEN, *supra* note 178, at 89–90; Thomas Bull, *Arbetspapper—Regeringens Rättsliga Ansvar vid Kriser (Bilaga 1), in* REGERINGEN OCH KRISEN—REGERINGENS KRISHANTERING OCH STYRNING AV SAMHÄLLETS BEREDSKAP FÖR ALLVARLIGA SAMHÄLLSKRISER (RIR 2008:9), at 96 (Riksrevisionen, ed., 2008); BERGLING, et al., *supra* note 173, at 78. *See also* Cornell & Salminen, *supra* note 81, at 228–29, 231–32.

184. Statens Offentliga Utredningar [SOU] 2008:125 (Swed.) (proposal for amended ch. 15, §§ 17–19: "§17 Rules that according to the constitution should be adopted [by Parliament] as laws may be adopted as a decree in an emergency situation . . . .").

185. *See* Proposition [Prop.] 2009/2010:80 En reformerad grundlag [government bill], 207.

IV. INTERNATIONAL LAW FRAMEWORK

A. Accommodation of and Derogation from Human Rights Norms in the State of Peace

Human rights law protects several different rights, not all of which are absolute. Societal function and human interaction arguably require that some human rights may be restricted under certain circumstances. For example, taxation is needed in order to acquire public funding, interfering with the right to property; surveillance may be necessary for law enforcement purposes, interfering with right to privacy; and defamation laws may be needed in order to protect the reputation of persons, interfering with the freedom of expression. Human rights concepts may change depending on the needs of the state to take legitimate measures in order to perform its public duties.[186]

In international law, there are several legal techniques to allow such accommodation: denunciation of treaties, reservations as to terms, and "clawback" clauses—limiting the scope of the particular right. A clawback clause is a provision that allows interference with a human right under normal peace-time conditions for public reasons.[187] Articles 8–11 of European Convention on Human Rights (ECHR) provide examples of clawback clauses.[188]

Thus, some rights are relative and can be restricted if certain requirements are met. To restrict such rights, the interference must: have a legal basis, pursue a legitimate aim, be necessary in a democratic society, and be proportionate.[189] A handful of rights are absolute and cannot be restricted in any circumstances, such as the prohibition against torture. The need to interfere with human rights is not reserved to war or public emergencies, as the examples with taxation, surveillance, and defamation show, it is also needed in everyday life. In a state of emergency, international law allows even greater interference with some human rights.[190] The next Section will examine how this interference is regulated.

186. *See* GROSS & NÍ AOLÁIN, *supra* note 5, at 9.

187. Rosalyn Higgins, *Derogatians Under Human Rights Instruments*, 48 BRIT. Y.B. INT'L L. 281, 281–82 (1977).

188. Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 8–11, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

189. *See* International Covenant on Civil and Political Rights, arts. 17, 19, 21–22, Dec. 16, 1966, S. Exec. Doc. 95-E (1978), 999 U.N.T.S. 171, [hereinafter ICCPR]; ECHR, *supra* note 188, arts. 8–11; American Convention on Human Rights, arts. 11–13, Nov. 22, 1969, 144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, arts. 9–12, June 27, 1981, 1520 UNTS 217.

190. *See* General Comment 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 4 (Aug. 31, 2001).

B. Derogation from Human Rights Norms in the State of Emergency

In times of public emergency, states may take measures derogating from some of their treaty obligations. Both specific restrictions taken in the normal course of events and general restrictions during public emergency widen the discretion of states.[191]

This Section focuses on the derogation clauses of the ECHR (Article 15) and the International Covenant on Civil and Political Rights (ICCPR) (Article 4). Other relevant documents include the Siracusa Principles,[192] the Paris Minimum Standards,[193] and the Turku Declaration.[194]

1. The European Convention on Human Rights

Article 15(1) of the ECHR provides that States have to meet three conditions in order to derogate from their obligations: (1) the public emergency must threaten "the life of the nation"; (2) the measures should be limited to those "strictly required by the exigencies of the situation"; (3) the measures should "not [be] inconsistent with its other obligations under international law."[195]

"The term 'emergency' is, by its nature, 'an elastic concept.'"[196] The International Law Association has suggested the following:

> It is neither desirable nor possible to stipulate *in abstracto* what particular type or types of events will automatically constitute a public emergency within the meaning of the term; each case has to be judged on its own merits taking into account the overriding concern for the continuance of a democratic society.[197]

Nevertheless, the phrase "public emergency threatening the life of the nation" has been elucidated in case law. In a case concerning Greece, the European Commission on Human Rights refused to allow the Junta to rely on a public emergency, and formulated four criteria for such reliance: (1) the emergency must be actual or imminent; (2) its effects must involve the whole nation; (3) the continuance of the organized life of the

191. KLAMBERG, *supra* note 26, at 91.

192. *See* U.N., Econ & Soc. Council, Comm. on Human Rights, Siracusa Principles on Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984).

193. *See Minimum Standards of Human Rights Norms in a State of Emergency*, 61 INT'L L. ASS'N REP. CONF. 58 (1985) (adopted at the 61st Conference of the International Law Association, held in Paris August 26 to September 1, 1984) [hereinafter *Paris Minimum Standards*].

194. *See* U.N., Comm. on Human Rights, Declaration of Minimum Humanitarian Standards, UN Doc. E/CN.4/Sub.2/1991/55 (Dec. 2, 1990).

195. ECHR, *supra* note 188, art. 15(1).

196. GROSS & NÍ AOLÁIN, *supra* note 5, at 5.

197. *See Paris Minimum Standards*, *supra* note 193, at 59; ORAÁ, *supra* note 80, at 31.

community must be threatened; (4) the crisis or danger must be exceptional.[198] Public emergencies are not limited to war—derogations may also be allowed in the face of low-intensity, irregular violence.[199] The European Court of Human Rights has stated "that it falls to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far is necessary to attempt to overcome the emergency."[200] By reason of their direct and continuous contact with current pressing needs, the national authorities are better able than the international judge to decide on the presence of such an emergency, as well as the nature and scope of the derogations necessary to avert it. Accordingly, deference should be given to national authorities. But contracting parties do not enjoy an unlimited discretion. "It is for the Court to rule whether, *inter alia*, the States have gone beyond the 'extent strictly required by the exigencies' of the crisis."[201] The difficulty with defining state of emergency may be explained with "its close relationship to civil war, insurrection, and resistance."[202] All of those conditions are opposite to the normal condition.[203] The traditional discourse on state of emergency is based on a clear separation between normal times and normal cases with the worst of times and exceptional cases.[204] To a large extent it follows the dichotomy in international law between peace constituting the norm and wartime representing the exception from the norm.[205]

Turning to the requirement that measures be "strictly required by the exigencies of the situation," the Court has stated that:

> it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were 'strictly required'. In particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate

198. *See* Denmark, Norway, Sweden and Netherlands v. Greece, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 69 (Eur. Comm'n on H.R.). *See also* A. and Others v. United Kingdom, 2009-II Eur. Ct. H.R. ¶ 176.

199. *See* Ireland v. United Kingdom, App. No. 5310/71, Eur. Ct. H.R. ¶ 205 (1978); HARRIS, et al., *supra* note 3, at 492.

200. A. and Others v. the United Kingdom, ¶ 173.

201. *Id.*

202. AGAMBEN, *supra* note 2, at 2.

203. *Id.*

204. *See* GROSS & NÍ AOLÁIN, *supra* note 5, at 173.

205. *Id.* at 179.

safeguards were provided against abuse.[206]

In other words, the perceived utility of using emergency measures has to be weighed against interference with the rights of the individuals concerned. Article 15(2) allows no derogation from the right to life, prohibitions against torture, slavery, servitude, and retrospective penal punishment.[207] Paragraph 3 contains procedural provisions which require that the public emergency be publicly proclaimed, and notification be given to keep the secretary general of the Council of Europe.[208]

2. The International Covenant on Civil and Political Rights

Article 4(1) of the ICCPR provides that States have to meet four conditions in order to derogate from their obligations: (1) The public emergency must threaten "the life of the nation"; (2) the measures should be limited to those "strictly required by the exigencies of the situation"; (3) the measures should "not [be] inconsistent with their other obligations under international law; (4) and the measures should "not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."[209]

Not every disturbance or catastrophe qualifies as a public emergency that threatens the life of the nation. The presence of armed conflict normally meets this threshold, however the ICCPR requires that even during an armed conflict, measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. States have to justify why there is a threat to the life of the nation if they are considering invoking article 4 in situations other than armed conflict.[210]

The requirement that measures must be "strictly required by the exigencies of the situation . . . relates to the duration, geographical coverage, and material scope of the state of emergency, and any measures of derogation resorted to because of the emergency."[211]

With reference to the requirement that the measures be consistent with other obligations under international law, international humanitarian law may become applicable and help to prevent the abuse of a State's emergency powers. The U.N. Human Rights Committee has stated that "[i]f States parties consider invoking Article 4 in other situations than an

206. A. and Others v. United Kingdom, 2009-II Eur. Ct. H.R. ¶ 184.
207. ECHR, *supra* note 188, art. 15(2).
208. *Id.* art. 15(3).
209. ICCPR, *supra* note 189, art. 4(1).
210. *See* General Comment No. 29, *supra* note 190, ¶ 3.
211. *Id.* ¶ 4.

armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances."[212] "On a number of occasions, the Committee has expressed its concern about States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by Article 4."[213]

Turning to non-discrimination, the inclusion of the word "solely" means that "derogations which inadvertently discriminate may, if the other conditions are met, be lawful."[214] Article 4(2) of the ICCPR places greater limitations upon the rights of derogation compared to Article 15 of the ECHR because it lists more rights which allow for no derogation. It not only excludes derogation from the right to life, prohibitions against torture, slavery, servitude, and retrospective penal punishment, but also prevents derogations against the prohibition against imprisonment on the ground of inability to fulfill a contractual obligation, the right to recognition everywhere as a person before the law, and the freedom of thought, conscience, and religion.[215]

The notification procedure under Article 4(3) is asymmetrical in the sense the U.N. Secretary-General is notified and not the Human Rights Committee, which is "the body that may pronounce authoritatively on the status of the derogation."[216] The notification is not only for the discharge of the Committee's functions, "but also to permit other States parties to monitor compliance with the provisions of the" ICCPR.[217]

Nowak argues that the restrictions on the declaration of an emergency are effective only when their observance is subject to international supervision.[218] One mode of supervision is interstate, with the U.N. Human Rights Committee as the main international monitoring body. The Committee has followed the Strasbourg organs by being empowered to review individual and inter-State complaints.[219] It has noted that "[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation."[220]

Rajagopal argues that since the entry into force of the ICCPR, the doctrine of emergency has turned out to be the weak spot of the human rights

212. *Id.* ¶ 3.
213. *Id.*
214. Higgins, *supra* note 187, at 287.
215. ORAÁ, *supra* note 80, at 87–127.
216. Higgins, *supra* note 187, at 288.
217. General Comment No. 29, *supra* note 190, ¶ 17.
218. NOWAK, *supra* note 9, at 85.
219. *See* General Comment No. 29, *supra* note 190, ¶ 3.
220. *Id.*

regime.[221] The draft for Article 4 of the ICCPR was introduced by the United Kingdom.[222] This raises the question as to why the United Kingdom took the lead on this issue and from which legal contexts it drew inspiration. While martial law was unused in Britain from 1800 to World War I, it was a familiar practice and used by the British empire in its colonies.[223] Rajagopal suggests that this was one particular context of emergency that was brought into Article 4.[224] He argues that two factors led Britain to adopt emergency as a necessary form of total rule. First, it was the fear of the masses that worried colonial administrators. Second, emergencies could be used to influence the outcome of change in Britain's interest.[225]

The use of the term "emergency" posits the situation in the "law and order" paradigm rather than a challenge to the regime concerned.[226] Colonial policies have thus been made a "natural" part of international law.[227] The phenomenon of dual regimes may also be found in the French experience. During the Algerian War from 1954 to 1962 there was a state of emergency declared in Algeria, which was under French law, even though normalcy existed in France.[228] Another example of dual regimes would be the special legal regimes created for the individuals suspected as al Qaeda or Taliban fighters the United States detained at its naval base at Guantanamo Bay.[229]

3. The Gap in International Human Rights Law and International Humanitarian Law in the Protection of Individuals

International law aims to protect individuals in and different, partly overlapping legal frameworks may be applicable in any given situation. The overlap and potential gaps between international human rights law and international humanitarian law are of particular relevance in the study of states of emergency. The applicable legal framework illustrated in Figure 1 below depends on whether the situation is characterized as: (1) a state of peace; (2) situations of internal disturbances and tensions; (3) non-international armed conflicts; or (4) international armed conflicts.

221. RAJAGOPAL, *supra* note 1, at 176.

222. NOWAK, *supra* note 9, at 88–89.

223. Townshend, *supra* note 122, at 167; Fairman, *supra* note 123, at 1254–55; GROSS & NÍ AOLÁIN, *supra* note 5, at 182.

224. RAJAGOPAL, *supra* note 1, at 177–82.

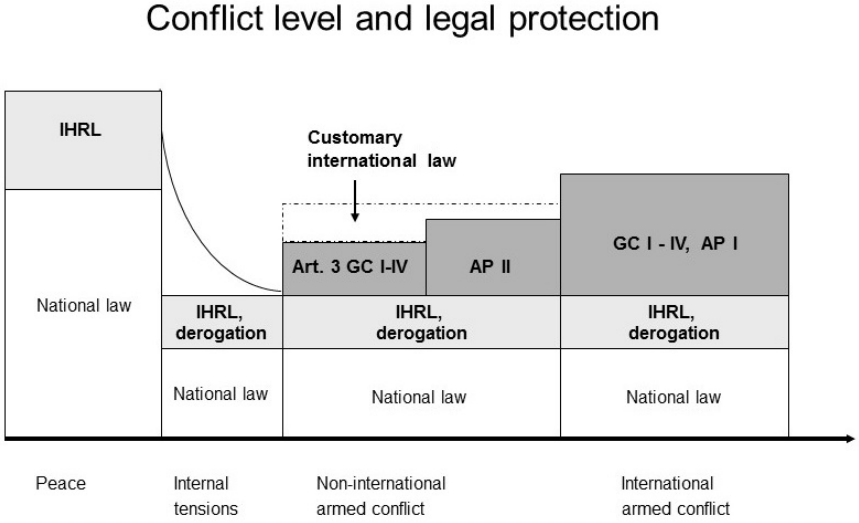
225. *Id.*

226. *Id.*

227. *Id.*

228. *See* GROSS & NÍ AOLÁIN, *supra* note 5, at 190–91.

229. GROSS & NÍ AOLÁIN, *supra* note 5, at 202.



International human rights law (IHRL) applies in all four types of situations but may be subject to additional derogation in situations (2)–(4).[230] However, international humanitarian law only applies in time of armed conflict, namely situations (3) and (4). International humanitarian law may add safeguards that have been lost because of derogations from human rights law. A risk for gaps may occur in situation (2), where derogation from human rights law is permitted while the situation remains below the threshold for making international humanitarian law applicable. A reoccurring problem in these situations relates to the protection against arbitrary detention, which may be derogated in a declared a state of emergency based on internal disturbances and tensions, situation (2). But the protection against arbitrary detention in international humanitarian law is *not applicable* unless there is an armed conflict, situations (3) and (4).

Individuals and groups that seek to criticize or challenge the Government in a peaceful way are best protected when the situation is

230. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8) ("The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 106 (July 9) ("[T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.").

characterized as a state of peace, namely situation (1). Armed non-state groups that are fighting against the Government normally seek recognition as well as legal protection, thus they normally want the situation to be characterized as an armed conflict, situations (3) or (4). In contrast, Governments that are pitted against an armed non-state actor are reluctant to give them special status; for their purposes it is more convenient to have the situation classified as internal disturbances and tensions, situation (2), which provides less legal protection for individuals or non-state actors.[231] Malevolent and oppressive regimes may also seek to have the situation characterized as internal disturbances and tensions, situation (2), when confronted with opposition solely using peaceful protests, since that classification gives state organs more power.[232]

There is thus a potential overlap between situations characterized as "high-intensity" emergencies and situations of low-intensity armed conflict. Gross and Ní Aoláin argue that the rigid ''emergency—normal" or ''emergency—conflict" distinctions are misplaced.[233] High-intensity emergencies are a particular form of emergency "that combine[] features of complex, institutionalized, and permanent emergencies."[234] This should be contrasted with derogation regimes, which are time-bound, limited, and proportionate responses for states experiencing crisis.[235] Additional Protocol II to the Geneva Conventions states that low-intensity armed conflict excludes situations of internal disturbances and tensions.[236] The protocol requires that a dissident group is organized and in control of physical territory,[237] criteria which open up a gray area as to which legal regime applies.

Protocol II applies to high-intensity non-international armed conflict.[238] Common Article 3 of the Geneva Conventions provides some remedy since it has a lower threshold for applicability and thus provides

231. GROSS & NÍ AOLÁIN, *supra* note 5, at 329–30, 359–60.

232. *See* Mark Klamberg, *Exploiting Legal Thresholds, Fault-Lines and Gaps in the Context of Remote Warfare*, *in* RESEARCH HANDBOOK ON REMOTE WARFARE 201–202 (Jens David Ohlin, ed., 2017).

233. GROSS & NÍ AOLÁIN, *supra* note 5, at 339.

234. *Id.* at 342.

235. *Id.* at 345; *See also* ROSSITER, *supra* note 68, at 297 ("[T]he use of constitutional emergency powers may well become the rule and not the exception. This may not be a happy prospect, but it is a very possible one.").

236. *See* Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

237. *Id.* art. 1(1).

238. Mark Klamberg, *The Legality of Rebel Courts During Non-International Armed Conflicts*, 16 J. INT'L CRIM. JUST. 235, 239 (2018).

protection for the most vulnerable during low-intensity non-international armed conflict.[239] However, it also has a lower standard for protection compared to Protocol II, which contains additional protection compared to Common Article 3.[240]

In conclusion, it should be noted that an armed conflict within the meaning of IHL depends on factual criteria and is not dependent on formal declarations of the state.[241] The determination by the International Committee of the Red Cross (ICRC) as to whether a situation meets the threshold of being an armed conflict should be considered, since it was founded on the principles of impartiality, neutrality, and independence.

V. WIDENING THE USE OF STATES OF EMERGENCY

As set out in the analytical framework of this article, the argument is made that the understanding of national security has shifted from a military to a much broader concept, potentially encompassing all areas of human activities. Since the doctrine of emergency is often used in the context of national security, this means that the use of emergency powers has widened. This trend will be illustrated in the following sections with five recent cases or phenomena: counterterrorism, the Arab Spring, migration, the Ebola outbreak in Western Africa, and economic crises.

A. Counterterrorism

In response to September 11th, the USA PATRIOT ACT, adopted on October 26, 2001, expanded surveillance powers and powers to detain aliens suspected of activities that endangered "the national security of the United States."[242] Subsequent presidential orders authorized "indefinite

239. "Common Article 3" refers to Article 3 of the Geneva Conventions of August 12, 1949. Article 3, "Conflicts not of an international character," is common to all four Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and sick in Armed Forces in the Field, art. 3 Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3156, 75 U.N.T.S. 287 [hereinafter Geneva IV].

240. *See* Common Article 3, Geneva Conventions of Aug. 12, 1949; Protocol II, *supra* note 236, art. 1(2).

241. *See* Geneva I, *supra* note 239, art. 2; Geneva II, *supra* note 239, art. 2; Geneva III, *supra* note 239, art. 2; Geneva IV, *supra* note 239, art. 2. *See also* NILS MELZER, EUROPEAN PARLIAMENT, HUMAN RIGHTS IMPLICATIONS OF THE USAGE OF DRONES AND UNMANNED ROBOTS IN WARFARE 19 (May 3, 2013), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET(2013)410220_EN.pdf.

242. Uniting and Strengthening America by Providing Appropriate Tools Required to

detention" and trial by "military commissions" with no obligation to adhere to the rules of evidence generally recognized in the trial of criminal cases in U.S. district courts.[243] In effect, it erased any legal status of the concerned individuals, "thus producing a legally . . . unclassifiable being."[244] To ease concerns, a sunset provision was incorporated in the USA PATRIOT ACT stating that the several provisions of the act would cease to have effect on December 31, 2005.[245] On July 21, 2005, however, the House of Representatives and later the Senate voted to extend indefinitely and make permanent essentially all provisions of the Act which were subject to the sunset provision.[246]

The U.K. Government contended that the events of September 11, 2001, demonstrated that international terrorists, notably those associated with al-Qaeda, had the intention and capacity to mount attacks against civilian targets.[247] In the government's assessment, the U.K., "because of its close links with the [United States], was a particular target."[248] They decided there was a serious emergency threatening the life of the nation.[249] The government also determined that "the threat came principally, but not exclusively," from "foreign nationals in the United Kingdom, who were providing a support network for Islamist terrorist operations linked to al-Qaeda."[250]

On November 11, 2001, the U.K. Secretary of State "made a derogation order under section 14 of the Human Rights Act 1998, . . . in which he set out the terms of a proposed notification to the Secretary General of the Council of Europe of a derogation pursuant to Article 15" of the European Convention.[251] On December 18, 2001, "the government lodged the derogation with the Secretary General."[252] It provided, *inter alia*, that

Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 18 U.S.C.).

243. *See* Military Order of November 13, 2001, 66 Fed. Reg. 57,833, § 1(f) (Nov. 16, 2001).

244. AGAMBEN, *supra* note 2, at 3.

245. USA PATRIOT ACT § 224.

246. Stephen Smith, *House Votes To Renew Patriot Act*, CBS NEWS (July 22, 2005), https://www.cbsnews.com/news/house-votes-to-renew-patriot-act-22-07-2005/; Eric Lichtblau, *Senate Makes Permanent Nearly All Provisions of Patriot Act, With a Few Restrictions*, N.Y. TIMES (July 30, 2005), https://www.nytimes.com/2005/07/30/politics/senate-makes-permanent-nearly-all-provisions-of-patriot-act-with-a.html; GROSS & NÍ AOLÁIN, *supra* note 5, at 178.

247. A. and Others v. United Kingdom, 2009-II Eur. Ct. H.R. ¶ 10.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* ¶ 11.

252. *Id.*

U.K. authorities would have extended powers of arrest, detention, and deportation.[253]

A three-month state of emergency was declared in response to the attacks in November 13, 2015, in Paris.[254] It involved increased powers to ban public demonstrations, enabled police to carry out searches without a warrant, permitted house arrest without trial, and blocked websites that encouraged acts of terrorism.[255]

Other measures taken in response to terrorism include: increased surveillance of electronic communications; control and freezing of economic assets; sharing of personal data between states; targeted killings; and military action in other countries. Some of them have been taken as part of public emergency measures.[256] Others are implemented under normal legislation using clawback clauses, having the same effect as if taken under a public emergency. Some describe this as a "global civil war" which has consequences for measures taken and perception of the relevant legal rules.[257] Those who favor the *sovereignty approach* may have no problem with this. Wilkinson, however, who is an exponent of the *rule-of-law* approach, argues that main and overriding aim of counter-terrorist strategy must be to act within the confines of rule of law and uphold liberal democracy.[258]

Measures such as freezing of assets and surveillance of electronic communication may be put under judicial oversight while targeted killings and military interventions are not. Judicial oversight may put some checks on the sovereign. However, such judicial procedures are often not subject to much scrutiny as the state is present before the court. Counter-terrorism deals with existential threats and for that reason its resources allocated, policies, and actions have become strongly securitized. What would normally be considered emergency measures are made more or less permanent. Actions are taken and justified normally fall outside the bounds of political and legal procedure.

253. *Id.*

254. *See* Décret n° 20151475 du 14 novembre 2015 portant application de la loi n° 55385 du 3 avril 1995 [Decree No. 2015-1475 of November 14, 2015 implementing Law No. 55-385 of April 3, 1955], LEGIFRANCE, Nov. 14, 2015. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031473404&categorieLien=id.

255. *Id.*

256. *See* GROSS & NÍ AOLÁIN, *supra* note 5, at 177.

257. AGAMBEN, *supra* note 2, at 2.

258. WILKINSON, *supra* note 45, at 125.

B. Arab Spring

The Arab Spring refers to the popular uprisings in Tunisia, Egypt, Libya, Syria, Bahrain, and Yemen. Several of the countries "had in place abusive states of emergency that had lasted decades."[259] Arab citizens demanded the governments' repeal of emergency laws that were associated with political repression.[260]

Since 1963 Syria has had derogations in law or practice from the rights guaranteed under Articles 9, 14, 19, and 22 of the ICCPR.[261] The U.N. Human Rights Committee noted that "without any convincing explanations being given as to the relevance of these derogations to the conflict with Israel and the necessity for these derogations to meet the exigencies of the situation claimed to have been created by the conflict."[262] The Committee has further noted that Syria had not fulfilled its obligation to notify other States Parties of the derogations it has made and the reasons for these derogations, as required by Article 4(3) of the ICCPR.[263] Sheeran finds that Syria "illustrates the institutionalization of emergency by the transfer of emergency laws into mainstream security laws."[264]

Egypt has remained under a state of emergency since the Six-Day War of 1967.[265] It was lifted for an eighteen month period in 1980 but was reinstated in 1981.[266] The Human Rights Committee noted its disturbance over the fact that the state of emergency proclaimed by Egypt in 1981 is still in effect, which the Committee describes as a "semi-permanent state of emergency."[267] It gave the Egyptian authorities "powers to prohibit demonstrations, detain suspects indefinitely, try suspects in front of a military tribunal, retry suspects in front of a military tribunal if the desired outcome was not obtained through a civilian court, conduct surveillance, and censor news agencies."[268] Egyptian authorities have, according to Human Rights Watch, "used these powers to disrupt and

259. Sheeran, *supra* note 4, at 493, 515–18.

260. *Id.* at 515.

261. *See* U.N., Human Rights Comm., Concluding Observations of the Human Rights Committee, ¶ 6, U.N. Doc. CCPR/CO/84/SYR (Aug. 9, 2005).

262. *Id.*

263. *Id. See also* U.N., Human Rights Comm., Concluding Observations of the Human Rights Committee, ¶ 6, U.N. Doc. CCPR/CO/71/SYR (Apr. 24, 2001).

264. Sheeran, *supra* note 4, at 516.

265. Andrej Zwitter, *The Arab Uprising: State of Emergency and Constitutional Reform*, 5 AIR & SPACE POWER J.-AFRICA & FRANCOPHONIE 48, 50 (2014).

266. *Id.*

267. U.N., Human Rights Comm., Concluding Observations of the Human Rights Committee, ¶ 6, U.N. Doc. CCPR/CO/76/EGY (Nov. 28, 2002).

268. David Ferguson, *Silencing the Arab Spring with Co-Opted Counterterrorism* 7 BERKELEY J. MIDDLE EASTERN & ISLAMIC L. 1, 8–9 (2016).

prevent gatherings and arrest individuals solely for exercising their rights to freedom of association, assembly, and expression."[269] President Mubarak renewed the emergency powers implemented after his predecessor's assassination and amended the constitution granting him new permanent executive powers.[270] The state of emergency during the Arab Spring, declared in March 30, 2011, was based on the Constitutional Declaration adopted by the Supreme Council of Armed Forces.[271]

Following the ousting of President Mubarak, the Muslim Brotherhood secured a majority in parliament, and its president won the election in June 2012.[272] President Mursi issued a declaration in November of that year which authorized him "to take any measures he sees fit in order to preserve the revolution, to preserve national unity or to safeguard national security,"[273] powers reminiscent of the Emergency Law of 1981. This added to his unpopularity and he was ultimately removed in a military coup in July 2013, followed by new repressive measures, including a state of emergency declaration on August 14, 2013, granting additional powers to the police.[274]

Zwitter describes Tunisia as an exception to the rule when it comes to the use and misuse of emergency powers.[275] Before the Arab Spring the last instance of a state of emergency was the Bread Riots of 1984. It was on January 14, 2011, that President Ben Ali declared a state of emergency on the same day he fled the country, an emergency that was prolonged due to continuing social tension and military struggle with Algeria.[276] The state of emergency was renewed until March 2014.[277] When thirty-eight foreign tourists were killed on July 2015 by an Islamist gunman, the state of emergency was reinstated, but then lifted in October of the same year.[278] It was reintroduced in November, however, following a terrorist

269. *Elections in Egypt: State of Permanent Emergency Incompatible with Free and Fair Vote*, HUM. RTS. WATCH (Nov. 23, 2010), https://www.hrw.org/report/2010/11/23/elections-egypt/state-permanent-emergency-incompatible-free-and-fair-vote.

270. Ferguson, *supra* note 268, at 9.

271. CONSTITUTIONAL DECLARATION OF THE ARAB REPUBLIC OF EGYPT, 30 Mar. 2011; Zwitter, *supra* note 39, at 265.

272. David D. Kirkpatrick, *Named Egypt's Winner, Islamist Makes History*, N.Y. TIMES (June 24, 2012), https://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html.

273. Yolande Knell, *Egypt's President Mursi Assumes Sweeping Powers*, BBC (Nov. 22, 2012), https://www.bbc.com/news/world-middle-east-20451208.

274. Zwitter, *supra* note 39, at 266; Ferguson, *supra* note 268, at 10–13.

275. Zwitter, *supra* note 39, at 279.

276. *Id.*

277. AMNESTY INT'L, 'WE WANT AN END TO THE FEAR': ABUSES UNDER TUNISIA'S STATE OF EMERGENCY 6 (2017).

278. Eileen Byrne, *Tunisia's President Declares State of Emergency Following Terrorist*

attack on a police bus in central Tunis, which killed twelve security personnel.[279] In March 2018 Tunisia announced that it would extend its state of emergency for another seven months.[280]

The state of emergency has been abused in Egypt and Syria, even before the present war. Even if there initially were reasons for relying on such powers to avert emergency, they are now used to suppress political dissent. They have been used to stabilize regimes that had lost popular legitimacy.[281]

C. Migration Crisis

The migration issue has been building momentum for several years but came to the fore of the European political agenda in 2015. Buzan describes migration as one of the most common issues that threatens societal security.[282] Different societies have different vulnerabilities depending on their identity:

> If a nation is built on the integration of a number of ethnic groups wit . . . histories of distinct national lives, . . . ideas of nationalism and self-determination can be fatal (e.g., . . . Yugoslavia . . .); if a state is built on [the idea of being] a "melting-pot" . . . [where] different groups are blended into one new group . . . [it] may be vulnerable to a reassertion of racial and cultural distinctiveness (e.g., . . . the United States). If the nation is tied closely to the state, it will be more vulnerable to . . . integration (e.g., Denmark . . .) [compared to a nation with] a tradition of operating independent of the state and of having multiple political layers simultaneously (e.g., Germany).[283]

Buzan also noted that if the E.C. (now the E.U.) was not seen to provide adequate defense against migration pressure, then the Community would become politically vulnerable to nationalist disaffection and accusations that it was eroding national identities both by stimulating migration and by replacing distinct national identities with a common European identity.[284]

As illustrated next, several of the migration laws and measures introduced in 2015 and 2016 are responses to perceived national threats. The Hungarian Government has declared a state of emergency due to

Attack, GUARDIAN (July 4, 2015), https://www.theguardian.com/world/2015/jul/04/tunisias-president-declares-state-of-emergency-sousse-terrorist-attack.

279. *Id.*

280. Helen Coffey, *Tunisia State of Emergency: Is It Safe to Visit for UK Tourists?*, INDEPENDENT (Mar. 16, 2018), https://www.independent.co.uk/travel/news-and-advice/tunisia-state-of-emergency-extended-safe-uk-tourists-holidays-what-means-a8259791.html.

281. Zwitter, *supra* note 39, at 48.

282. BUZAN ET AL.,, *supra* note 69, at 121, 124–25, 130, 132.

283. *Id.* at 124–25.

284. Buzan, *supra* note 56, at 3.

migration.[285] Orban, for example, said that refugees "look like an army"[286] and that Muslims threaten Europe's Christian identity.[287] In the United States, President Trump declared a national emergency to build a U.S.-Mexico border wall without Congressional approval to prevent migrants from entering the country.[288]

When Sweden tightened its migration policies by introducing checks on travel documents, the law was titled "law on special measures in case of serious danger for the public and the internal safety of the country.[289] Sweden, as of November 24, 2015, had received 145,000 asylum seekers, of which 30,000 were unaccompanied minors.[290] The preparatory works of the law stated that this put the country's asylum system under pressure and placed "high stress" on other key functions such as housing, health care, and social services.[291] This is nothing strange considering the circumstances. However, the immediate ensuing sentence explains that "the Government makes the assessment that the current situation in a wide perspective constitutes a serious threat against public order and internal security."[292] Labeling stress on housing, health care, and social services as a "serious threat" against public order and internal security is something very distinct from the traditional national security paradigm focused on military threats. Migration has clearly been securitized, evidenced by the extraordinary measures taken.

285. Press Release, Hungarian Ministry of Interior, Hungarian Government Declares State of Emergency Due to Mass Migration (Mar. 9, 2016), http://www.kormany.hu/en/ministry-of-interior/news/hungarian-government-declares-state-of-emergency-due-to-mass-migration.

286. *Refugees 'Look Like an Army', Says Hungarian PM Viktor Orban*, GUARDIAN (Oct. 23, 2015), https://www.theguardian.com/world/2015/oct/23/refugees-look-like-an-army-says-hungarian-pm-viktor-orban.

287. *Muslims Threaten Europe's Christian Identity, Hungary's Leader Says*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/09/03/muslims-threaten-europes-christian-identity-hungarys-leader-says.

288. *Trump Threatens 'National Emergency' Over Wall*, BBC (Jan. 5, 2019), https://www.bbc.com/news/world-us-canada-46763940.

289. LAG OM SÄRSKILDA ÅTGÄRDER VID ALLVARLIG FARA FÖR DEN ALLMÄNNA ORDNINGEN ELLER DEN INRE SÄKERHETEN I LANDET ([SFS] 2015:1073) (Swed.).

290. Proposition [Prop.] 2015/16:67 Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landetat at 6 [government bill] (Swed.).

291. *Id.*

292. Author's translation of Proposition [Prop.] 2015/16:67 Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landetat at 7 [government bill] (Swed.) ("Det är inte bara det svenska asylsystemet som utsätts för mycket stora påfrestningar. Även andra centrala samhällsfunktioner utsätts för en hög belastning. Det som särskilt kan lyftas fram är boendesituationen, hälso- och sjukvården, skolan och socialtjänsten. Regeringen har gjort bedömningen att den aktuella situationen ur ett brett perspektiv innebär ett allvarligt hot mot allmän ordning och inre säkerhet.").

As explained above, securitization involves politics beyond the traditionally established rules.[293] Noll argues that the securitization of migration "entails a parallel militarization and a move away from civil society discourse."[294] The consequence is the introduction of bias that ultimately works against the individual.[295]

D. Ebola Outbreak in Western Africa

The 2014 Ebola outbreak in Western Africa was the largest in history with widespread transmission in Guinea, Liberia, and Sierra Leone.[296] Over 2,700 people died from Ebola in Liberia alone during this outbreak.[297] There were also four confirmed cases in the U.S.[298] Thousands of health care workers from other countries responded to the crisis.[299] The governments of Guinea, Liberia, and Sierra Leone instituted emergency measures that restricted basic rights and freedoms, which included freedom of association, assembly, and movement. Liberia closed government offices and placed workers on leave for thirty days to contain the outbreak.[300] Sierra Leone declared a national "stay at home" day.[301] Nigeria ordered all schools to remain closed for forty-three days beyond the usual summer vacation.[302] Guinea closed all schools and universities indefinitely until measures to control the outbreak took effect.[303] Liberia and Sierra Leone quarantined infected persons.[304] To contain outbreaks, public health practitioners were permitted to quarantine persons who were not yet ill but had been exposed to serious infectious agents.[305]

President Koroma of Sierra Leone, in his July 30th and August 7th broadcasts to the nation, announced a state of emergency and measures to respond to the crisis under Section 29(5) of the 1991 constitution.[306]

293. *See supra* Section II.C.

294. Noll, *supra* note 67, at 280.

295. *Id.*

296. Melissa Markey et al., *Ebola: A Public Health and Legal Perspective*, 24 MICH. ST. INT'L L. REV. 433, 434 (2016).

297. James G. Hodge Jr. et al., *Efficacy in Emergency Legal Preparedness Underlying the 2014 Ebola Outbreak*, 2 TEX. A & M L. REV. 353, 354–55 (2015).

298. *Id.*

299. *Id.*

300. *West Africa: Respect Rights in Ebola Response*, HUM. RTS. WATCH (Sept. 15, 2014), https://www.hrw.org/news/2014/09/15/west-africa-respect-rights-ebola-response; Hodge Jr. et al., *supra* note 297, at 360.

301. *West Africa: Respect Rights in Ebola Response*, *supra* note 300.

302. *Id.*

303. *Id.*

304. *Id.*

305. Markey et al., *supra* note 296, at 434.

306. *West Africa: Respect Rights in Ebola Response*, *supra* note 300.

Article 26(2) of the Constitution of Sierra Leone permits restrictions on the freedoms of assembly and association.[307] The power of the President to issue a proclamation of state of emergency follows from Article 29, a power available when "(a) Sierra Leone is at war, (b) Sierra Leone is in imminent danger of invasion or involvement in a state of war, (c) there is actual breakdown of public order and public safety, (d) there is a clear and present danger of an actual breakdown of public order and public safety, (e) there is an occurrence of imminent danger, or the occurrence of any disaster or natural calamity; or (f) there is any other public danger which clearly constitutes a threat to the existence of Sierra Leone."[308]

The measures in Sierra Leone, which were to be implemented for sixty to ninety days, included police enforced quarantines, police and military protected health workers and centers, public meetings and gatherings being restricted when not related to Ebola sensitization, and surveillance and house-to-house searches to trace and quarantine those who had been exposed.[309] "The statement further called on local leaders . . . to establish by-laws that would complement other efforts to deal with the Ebola outbreak."[310]

"On August 13th, Guinean President Condé declared . . . a national public health emergency under the public health code law 97 of June 19, 1997."[311] Notably, Article 6 of the Constitution of Guinea provides that "[n]o situation of exception or of emergency should justify the violations of human rights."[312] President Condé announced "a quarantine enforced by health workers and security forces [to evaluate] everyone suspected of having the disease until test results came through," stating that, "[a]nyone who blocks or incites someone to block in any way the detection, isolation, treatment, or examination of a sick person, of a suspect case or contact will be considered a menace to public health and will be brought before the law." [313]

"On July 30th, Liberian President Johnson Sirleaf announced several emergency measures, including closing schools and markets [as well as] quarantines in several areas."[314] Article 86 of the 1986 Constitution of Liberia provides the following.

307. CONSTITUTION OF SIERRA LEONE (1991), art. 26(2).

308. *Id.* art. 29(2).

309. *West Africa: Respect Rights in Ebola Response*, *supra* note 300.

310. *Id.*

311. *Id.*

312. CONSTITUTION OF GUINEA (2010), art. 6 (English translation available at https://www.constituteproject.org/constitution/Guinea_2010.pdf?lang=en).

313. *West Africa: Respect Rights in Ebola Response*, *supra* note 300.

314. *Id.*

> (a) The President may, in consultation with the Speaker of the House of Representatives and the President Pro Tempore of the Senate, proclaim and declare the existence of a state of emergency in the Republic or any part thereof. Acting pursuant thereto, the President may suspend or affect certain rights, freedoms and guarantees contained in this Constitution and exercise such other emergency powers as may be necessary and appropriate to take care of the emergency, subject, however, to the limitations contained in this Chapter.
>
> (b) A state of emergency may be declared only where there is a threat or outbreak of war or where there is civil unrest affecting the existence, security or well-being of the Republic amounting to a clear and present danger.[315]

The prohibition in Article 12 of the Constitution on forced labor is relevant to the Ebola outbreak of 2014. However, it also provides that "work or service which forms part of normal civil obligations or service exacted in cases of emergency or calamity threatening the life or well-being of the community shall not be deemed forced labor."[316] On August 6th, Sirleaf declared a state of emergency for ninety days, citing the need for "extraordinary measures for the very survival of our state."[317] "The statement said the government could suspend certain rights and privileges, though it failed to define which rights were to be curtailed."[318] Liberian security forces were tasked with enforcing all of the emergency measures the National Task Force announced on Ebola.[319] "Liberian groups called on the government to regularly define in detail what rights were subject to the state of emergency."[320] However, there are specific actions that may illustrate the measures taken. "On August 19, 2014, Liberia implemented a twenty-one day quarantine of over 50,000 people in a Monrovian slum following an attack on an Ebola clinic."[321]

Some of these infringements may arguably be unacceptable under human rights law, for example the measures that included social distancing measures, the three-day lock-down in Sierra Leone, blockades of Ebola-affected areas, limitation in person's travel, and hampering the ability to obtain necessities.[322] Even though it is possible to find fault with the way Guinea, Liberia, and Sierra Leone handled the Ebola crisis, the

315. CONSTITUTION OF LIBERIA (1986), art. 86.
316. *Id.* art. 12.
317. *West Africa: Respect Rights in Ebola Response*, *supra* note 300.
318. *Id.*
319. *Id.*
320. *Id.*
321. Hodge Jr. et al., *supra* note 297, at 364.
322. *Id.* at 366.

proclamation of public emergencies and the measures taken on a whole appear necessary and adequate.

The crisis also signaled a global emergency. Traditionally crisis management is a national matter where international law serves as protection against abuse by states. With infectious disease outbreaks, the international community has an interest in a state taking action by using emergency powers, not only to protect its own population, but also to protect the population of other states. International institutions, such as the World Health Organization (WHO), may find themselves on the frontline as a response to the crisis at hand.[323] The WHO has adopted International Health Regulations, which place emergency authority in the hands of the Secretariat, and requires each state to designate or establish a National International Health Regulation (IHR) focal point accessible for communication and coordination with the WHO.[324] It is the WHO Director-General who determines whether an event constitutes a public health emergency of international concern.[325] The Ebola crisis thus triggers a debate on what a threat or emergency is and who the sovereign is.

E. Economic Crises

In 1948 Rossiter listed economic depression as one of three types of situations in democracies that may amount to an emergency triggering extraordinary measures.[326] This was based on crises that Rossiter observed at the time. On several occasions during the Weimar Republic, particularly in October 1923, the German government used the emergency powers under Article 48 of the constitution "to cope with the fall of the mark, thus confirming the tendency to conflate politico-military with economic crises."[327] In the United States, President Roosevelt resorted to emergency powers during the depression of the 1930s.[328] He is not the only U.S. president to do so. President Truman announced on April 8, 1952, in order to avoid a nationwide strike, an executive order directing the secretary of commerce to seize the steel industry.[329] The President stated that a strike endangered United States' military efforts in

323. J. Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 HARV. INT'L L.J. 1, 2 (2016).

324. WHO, INTERNATIONAL HEALTH REGULATIONS (3d ed. 2005), arts. 4–10; Heath, *supra* note 323, at 21–22.

325. *Id.* art. 12.

326. *See generally* ROSSITER, *supra* note 68.

327. *See also* AGAMBEN, *supra* note 2, at 15; GROSS & NÍ AOLÁIN, *supra* note 5, at 4–5.

328. ROSSITER, *supra* note 68, at 256–57.

329. Adler, *supra* note 163, at 157–58.

the Korean War and its foreign policy and national agenda in Europe.[330] Similarly, President Trump raised steel tariffs without asking for congressional approval based on the advice that the there is a shrinking ability of the United States "to meet national security production requirements in a national emergency."[331] He also stated that the United States may be unable to "meet [steel] demands for national defense and critical industries in a national emergency."[332] Agamben argues that the presidential power to resort to emergency powers is linked to the state of war and the "metaphor of war" has become a central part of the presidential vocabulary when adopting decisions of national concern."[333]

More recent examples used to counter economic crises may have been warranted, while others may involve abuse or amount to oppression. In the wake of the 2008 economic crisis, the Government of Iceland took control over its three biggest banks.[334] At the same time the British Government decided to invoke anti-terrorism legislation to seize Icelandic banks' funds that could be used to compensate U.K. depositors.[335] Iceland's Prime Minister Geir Haarde "expressed anger at Britain's use of anti-terror laws to freeze Icelandic assets in Britain."[336] In 2016, President Maduro of Venezuela, amid a grim economic crisis, "declared a [sixty] day state of emergency due to what he called plots from Venezuela and the United States to subvert him."[337]

Although domestic legislation in the mentioned countries allows intervention in the economic arena, normal measures may appear insufficient for governments. However, the transfer of power from regular bodies to a president or prime minister alone is arguably excessive as the need for urgency is less than required for an ongoing terrorist attack or Ebola outbreak. The law-making body, the central bank, and other standing regulatory bodies should be able to deal with economic depression issues in an orderly fashion.

330. *Id.*

331. *See* Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018).

332. *Id.* (alteration in original)

333. AGAMBEN, *supra* note 2, at 21–22.

334. ARABELLA THORP ET AL., ICELAND'S FINANCIAL CRISIS 17 (Library House of Commons Mar. 27, 2019).

335. *See* HM Treasury, Press Release 101/08 (Oct. 8, 2008); THORP ET AL., *supra* note 334, at 17.

336. Frank Prenesti, *UK and Iceland in Row over Bank Deposits*, REUTERS (Oct. 9, 2008), https://uk.reuters.com/article/uk-financial-iceland-britain/uk-and-iceland-in-row-over-bank-deposits-idUKTRE4988F020081009.

337. *See* Alexandra Ulmer & Corina Pons, *Venezuela Opposition Slams 'Desperate' Maduro State of Emergency*, REUTERS (May 14, 2016), https://www.reuters.com/article/us-venezuela-politics-idUSKCN0Y501X.

VI. CONCLUSION

Egypt, Syria, and other countries exemplify how states assert a state of emergency to violate human rights, especially to suppress political dissent. Even if measures are taken as part of counter-terrorism efforts, and not with an aim to suppress political dissent, there are several examples of real or potential abuse. The inherent "friend-enemy" distinction of counterterrorism may metastasize to other parts of society. It is detrimental to core democratic values and stigmatizes groups belonging to another nation, ethnicity, or religion than the majority. While judicial review may be inefficient to prevent such violations, courts and tribunals may offer some redress after the fact. The legal framework, as it is positively expressed in international human rights treaties, arguably does not adequately reflect the underlying politics of emergency situations. The international legal framework grants the sovereign significant powers, which may prevent adequate redress. Authoritarian regimes may, in times of internal tensions, exploit the gap between international human rights law and international humanitarian law.

Recent events show that a state of emergency is not only invoked in instances of terrorism or war. It may also be used as a tool for addressing migration, health emergencies, and economic crises. One way to frame this is through the lens of securitization, where the issue is presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure. Expanding issues that are perceived as existential threats may be tempting, but it may cause defective resource allocation, neglect for individual human rights, and abuse of power. Even though it may be easy to accept the reasoning for the use emergency powers in the Ebola outbreak, unacceptable infringements of rights may be the result.

The debate on states of emergency cannot be reduced to a choice between a *rule-of-law* approach and the *sovereignty approach*. It is also reasonable to consider whether emergency measures are taken to preserve the system or to transform the system. Countries that, under normal conditions, can be portrayed as democracies should not be transformed to something else after an emergency.

The permissibility of states of emergency under human rights law is a contradiction, a conflict between the societal interest and the obligation of states to provide security for their citizens and individual human rights such as privacy and due process. We may be unable to resolve this contradiction for all future emergencies, but it is still possible to learn from some of past mistakes and occurrences of abuse.