Introduction: Terrorism and Warfare—Extreme Conditions or the New Normal?

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Abstract Terrorism and warfare both represent violent extreme conditions *par excellence* and which often lead to an expressed need for a special reaction. On the other hand, terrorism seems to have become the new normal across the globe. The exception becomes the norm and the emergency becomes permanent. The problem is that permanent emergencies challenge democratic principles, such as the separation of powers: under states of emergencies, power is often concentrated in the hands of the executive. A second issue with using an exceptional framework to address both terrorism and wars is that it might undermine the constitutional protection of fundamental rights. This section examines terrorism and warfare and some of the consequences of treating them as extreme conditions on some elements of constitutionalism. The three articles offer a number of insights into the challenges faced by democratic states when they respond to security threats in the 21st century.

Terrorism and warfare both represent violent extreme conditions *par excellence*, which disrupt everyday life and which, therefore, often lead to an expressed need for a special reaction. States of emergency, *états de siège*, executive orders, and military measures are all common and justifiable responses to this kind of exceptional threat—perhaps more than financial or health crises which, while less ‘traditional’ are becoming increasingly disruptive. All these responses rely on the assumption that the threat is exceptional and requires an exceptional response for a limited time. Generally, this leads to a suspension of constitutional principles such as derogation to individual rights, as well as limits on the democratic principle of separation of power, with the executive branch being granted a prominent role.

Today however, both conflicts and terrorist attacks are common occurrences and increasingly form part of our daily life. The growing number of terrorist attacks across the world and the enduring nature of conflicts prove that these threats are indeed credible and require an adequate response. Yet at the same time, their recurrence and
length, as well as the complex frameworks that are adopted to deal with them, all question the qualification of terrorism and warfare as extreme conditions. 2016 was one of the deadliest years in the past decades from terrorist attacks and 2017 was only marginally better. The territorial defeat of the Islamic State has not so far led to a reduction of its attacks. In parallel, existing conflicts are enduring: American troops are still present in Afghanistan, and the conflict in Syria has been raging since 2011. The ‘Global War on terror’ isn’t ending anytime soon.

More deeply, the concept of global war on terror itself raises another question, that of the confusion of legal frameworks between terrorism and warfare: indeed, it must be stressed that terrorism and war are theoretically two very different phenomena, which traditionally fit into different legal framework: terrorism is usually dealt with through domestic criminal law and law enforcement tools, as well as international cooperation mechanisms and treaties. It also involves issues of human rights law, refugee law, etc. On the other hand, war theoretically follows a very strict framework of laws of war, which consists of a number of treaties and—as importantly—a number of customary international law norms.

These are two distinct legal regimes, which provide very different obligations on states and authorise very different actions in some cases. Two issues reflect this critical difference: detention and use of force against individuals. Under the laws of war framework, a legitimate prisoner of war can be detained for the length of the conflict. Yet, international human rights law, which applies to counterterrorism, prohibits arbitrary detention and pre-charge detention. Even more significantly, targeting a legitimate enemy combatant is a valid action under the laws of war, as long as certain conditions are met. However, under international human rights law, the right to life can not be derogated from. In these two cases, the default legal standards are diametrically opposed. In practice, in many cases, it is clear which legal framework applies and only one of the options will apply. However, the overlap

1See ‘Every 2017 terrorist attack, mapped’, The Washington Post, 18th January 2018. https://www.washingtonpost.com/news/worldviews/wp/2018/01/18/every-2017-terrorist-attack-mapped/?utm_term=.841b0387e941.
2For an overview of the international framework on counterterrorism, see Feinberg, Myriam (2016). Sovereignty in the Age of Global Terrorism: The Role of International Organisations. Brill.
3See, among others, Dinstein, Yoram (2016). The Conduct of Hostilities under the Law of International Armed Conflict. Cambridge University Press, and Solis, Gary D. (2010). The Law of Armed Conflict: International Humanitarian Law in War. Cambridge University Press.
4There are many more issues of course but these two illustrate the differences more clearly.
5Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135.
6Article 5, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (hereafter the ECHR), and article 19, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (hereafter the ICCPR).
7Customary rule of international humanitarian law of distinction between civilians and combatants.
8Customary principles of military necessity and proportionality.
9Article 2 ECHR and Article 6 ICCPR. Article 2 ECHR includes a list of exception for ‘absolute necessity’.
between conflicts, wars and counterterrorism operations is increasing and it confuses these two categories. International humanitarian law has developed concepts such as non-international armed conflict and direct participation in hostilities in order to cover conflicts involving non-state actors but this does not sufficiently reflect the overlap between the two legal frameworks.

The tendency to use various legal regimes to address terrorism or conflicts allows a great flexibility for an ever-changing threat and provides varied responses to the different types of attacks and conflicts that states face sometimes simultaneously in different geographical locations. For instance, the following measures have been used to fight the Islamic State (ISIS) by states: a number of members of ISIS are included in the UN sanctions list pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning ISIL (Da’esh), Al-Qaida, and associated individuals, groups, undertakings and entities. This regime imposes financial sanctions, arms embargoes and travel bans on the individuals and entities it targets. All UN member states have to implement these measures through their own domestic system. In addition, and based on Resolution 2178 (2014), adopted by the UN Security Council, a number of states have adopted new legislation to prevent the travel of foreign terrorist fighters to zones of conflict. Moreover, as a result of the November 2015 terrorist attacks in France, claimed by ISIS, France declared a state of emergency, which lasted for two years and that allowed the executive to adopt measures for the creation of zones of protection and security; the imposition of curfews; traffic stops and searches; house arrest for individuals whose activity is deemed dangerous; and administrative searches. Finally, a number of states are conducting airstrikes against ISIS, both in Iraq and Syria. The legal justification for these airstrikes varies according to each state and depends on whether they are conducted in Iraq or Syria.

The observations made here point to two tendencies in the area of national security threats, but which also reflect an increasing use of states of emergency regimes in a variety of legal areas to deal with a number of crises: on the one hand, states argue

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10 Article 3 common to the Geneva Conventions of 12 August 1949.
11 International Committee of the Red Cross, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, 21st December 2010.
12 The United States, the UN and a number of other states use the ISIL acronym (Islamic State of Iraq and the Levant), but the group is also known as the Islamic State in Iraq and Syria (ISIS), or Daesh, which are the initials in Arabic. This introduction uses ISIS.
13 See Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning ISIL (Da’esh) Al-Qaida and associated individuals groups undertakings and entities, https://www.un.org/sc/suborg/en/sanctions/1267#further%20information.
14 UN Security Council, Security Council resolution 2178 (2014) [on threats to international peace and security caused by foreign terrorist fighters], 24 September 2014, S/RES/2178 (2014).
15 Décret n° 2015-1475 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955.
16 See (in French), Factsheet ‘Etat d’urgence et autres états d’exception’, http://www.vie-publique.fr/actualite/faq-citoyens/etat-urgence-regime-exception/.
17 For an analysis of the international legal framework surrounding the airstrikes, see Feinberg, Myriam (2015–2016). The Legality of the International Coalition against ISIS: The Fluidity of International Law. JUSTICE 57: 24.
that they need special tools to respond to the exceptional threats of terrorism, hybrid conflicts and asymmetrical warfare, because these cannot be addressed by conventional methods. They use this argument as a justification for an increasing number of legislation and legal methods to address the threat. On the other hand, terrorism seems to have become the new normal across the globe and wars aren’t won anymore. In short, the exception becomes the norm and the emergency becomes permanent. A 2018 report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ni Aoláin, criticises the concept of de facto emergencies, created by counterterrorism legislation post-9/11, a process also described by Kim Lane Scheppel’s ‘emergency script’. In their chapter of this book, Kumaravadivel Guruoparan describes the instrumentalisation of law as a tool for normalising emergency. The problem is that permanent emergencies challenge democratic principles, such as the separation of powers: under states of emergencies, the power is often concentrated in the hands of the executive. The executive is also the favoured actor for national security responses. The parliament is often side-tracked to adopt measures as fast as possible, and there is a history of the judiciary deferring to the executive in matters of national security. In recent years and in some countries, the judiciary has taken a proactive role in reviewing executive decisions, even in areas of national security. Some of the articles in this section show the active role of the Israeli Supreme Court in this context. A second issue with using an exceptional framework to address both terrorism and wars is that it might undermine the constitutional protection of fundamental rights. Indeed, moving away from criminal law and human rights protection means that counterterrorism shifts towards targeting enemies. It was said that the 9/11 attacks ‘transformed the face of the foreigner into a prima facie face of terrorism.’

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18 AHRC/37/52 2, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, ‘The Human Rights Challenge of States of Emergency in the Context of Countering Terrorism’, Advanced Unedited Version, distributed 9th February 2018.

19 See Scheppel, Kim Lane (2010). Exceptions that Prove the Rule: Embedding Emergency Government in Everyday Life. In Tulis J.K. and Macedo, S. (eds). The Limits of Constitutional Democracy. Princeton University Press, page 134.

20 See Roach, Kent (2011). The 9/11 Effect: Comparative Counter-Terrorism. Cambridge University Press.

21 See for instance the United States v. Reynolds, 345 U.S. 1 case of 1953 where the court upheld ‘the privilege against revealing military secrets, a privilege which is well established in the law of evidence’; or R v. Secretary of State for the Home Department, ex parte Cheblak [1991] 2 All ER 319 (CA) where the court held that national security was exclusively the responsibility of the executive.

22 For an analysis of the role of the European Court of Justice’s case law on human rights in counterterrorism, see Feinberg Myriam. Sovereignty in the Age of Global Terrorism, chapter 10.

23 Guild, Elspeth (2006). International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001. In Public Policy and the New European Agendas. Edward Elgar Publishing, page 237.
This section of the book examines terrorism and warfare and some of the consequences of treating them as extreme conditions, on some elements of constitutionalism. The three following articles offer a number of insights into the challenges faced by democratic states when they respond to security threats in the 21st century.

In ‘Human Rights in Times of Terror—A Judicial Point of View’, former Chief Justice of the Israeli Supreme Court, Aharon Barak summarises his views on the role of judges in promoting democracy in a country that deals with terrorism on a daily basis. An experienced judge, Barak offers here a call to arms. The article focuses on the role of judges in times of terrorism and is specific to the context of Israel, but Barak stresses that, while terrorism is the ultimate threat to national security, the decisions of judges will have an impact on democracy in peace time. Therefore, he insists that the balance between values should be the same in times of terrorism and in times of peace, and that the independence of the judiciary should remain the same: ‘this is how democracy acts in times of peace and calm. This is how democracy acts in times of war and terror. It is precisely in these difficult times that the power of democracy is revealed. Precisely in the difficult situations in which Israel finds itself today, Israeli democracy is put to the test.’ For Barak, extreme conditions should be dealt with within the confines of the law and, while he reminds us that security needs to be protected, he also states that there shouldn’t be different rules when it comes to terrorism. The proportionality exercise should be applied at all times. Barak offers abstract of rulings which show that judges balanced the legal constraints with the operational needs to stress that not all means are allowed when it comes to addressing the threat of terrorism. Aharon Barak’s words have been quoted worldwide and constitute a positive outlook on judicial review in times of terrorism. Yet, one must remember first, that not all countries have an active court, which will take upon itself to provide this kind of review; that the composition of courts might evolve according to political changes, especially when judges are appointed by the executive; and finally, that in some cases, especially in times of emergency, some courts are not given a role at all. This is why it is critical to limit emergency and executive measures both in time and in scope, to deal with extreme conditions.

Joshua Segev, in ‘Detaining Unlawful Enemy Combatants in Israel: A Matter of Misinterpretation?’ focuses on the interpretation by the Israeli Supreme Court of the Detention of Unlawful Enemy Combatant Act of 2002. In particular, he criticises the ‘territorial and over-individualisation interpretation’ of the court, which, he argues, created a normalised administrative detention mechanism for the areas that are outside of Israel’s borders. Segev’s article illustrates the confusion between criminal law and laws of war framework to deal with national security threats and how this ‘challenges the institutional design’ of democracies. The article offers support for an ‘associative theory of culpability’ in order to detain enemy combatants, which would be based on their ranking in their organisation in addition to the individual threat element required by the court.

In “The Law Governing the Right of Enemy Aliens’ Access to Courts”, Yoram Rabin, Liav Orgad and Roy Peled tackle another complex category of ‘enemies’. They first offer a historical and comparative analysis of enemy aliens’ access to courts in England, France, the United States and in International Law. Their analysis
shows an evolution from an original blanket prohibition, to a more recent situation where access to courts is accepted in some limited conditions. But Rabin, Orgad and Peled argue that the presumption against access should now be reversed to allow any individual to have their day in court and that this presumption should be based on a functional rule, which they develop in the second part of their paper. Their justification is that democratic principles of the 21st century call for a restatement of the law to focus on the reality of the threat rather than on concepts of national identity and citizenship, which, as mentioned, have permeated the security discourse.

The variety of angles shown in these articles reflect the complexity of the issue—even within one single state—and it calls for further discussion on the topic. The three articles stress the need for the protection of national security in the face of ever-changing threats, but encourage legal precision and the adherence to constitutional principles. When crises become the new normal, constitutionalism should provide answers rather than be set aside indefinitely.

References

Dinstein Y (2016) The conduct of hostilities under the law of international armed conflict. Cambridge University Press
Feinberg M (2015–2016) The legality of the international coalition against ISIS: the fluidity of international law. Justice 57:24
Feinberg M (2016) Sovereignty in the age of global terrorism: the role of international organisations. Brill
Guild E (2006) International terrorism and EU immigration, asylum and borders policy: the unexpected victims of 11 September 2001. In: Public policy and the new European agendas. Edward Elgar Publishing, p 237
Roach K (2011) The 9/11 effect: comparative counter-terrorism. Cambridge University Press
Scheppele KL (2010) Exceptions that prove the rule: embedding emergency government in everyday life. In: Tulis JK, Macedo S (eds) The limits of constitutional democracy. Princeton University Press, p 134
Solis GD (2010) The law of armed conflict: international humanitarian law in war. Cambridge University Press