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Human Rights and Security in Public Emergencies

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In public emergencies, the relationship between security and human rights is distilled to its purest form. When an emergency declaration is made and the legal order is suspended, the interaction between security and human rights can be observed in the absence of confounding variables: this makes the 'state of exception' "critically important from a human rights perspective because the suspension of legal order often paves the way for systematic human rights violations" (Criddle & Fox-Decent 2012, 45).

This essay will explore the relationship between security and rights during the state of exception. To do so, I will first discuss how the international human rights regime allows for the suspension of rights through derogation clauses by considering Article 4 of the *International Covenant on Civil and Political Rights* (ICCPR). I will show that while the Article differentiates between derogable and non-derogable rights, its safeguards are insufficient in reining in violations of personal integrity rights. Violations of these rights, and in particular the use of torture, are the focus of this essay as they are "closer to the very core of human rights" (Neumayer 2003, 651). To understand why these violations occur I will discuss the intellectual foundations of the state of exception through two of its major theorists, Carl Schmitt and Giorgio Agamben, showing how distinguishing between violable and inviolable rights in declarations of emergency is impracticable. I will use these findings to discuss real-world examples of violations of personal integrity rights through the United States Select Committee on Intelligence's 2014 report on waterboarding by the Central Intelligence Agency (CIA), showing how in times of perceived danger and relaxed human rights standards brutal violations occur which sever the relationship between security and rights. I will also show that the oppositional relationship between human rights and security is not intrinsic, using David Parker's analysis of human rights-centric counterterrorism methods to show that these are more effective security tools.

The conclusions of this essay are as follows: human rights and security as expressed in contemporary practice are in opposition. The human rights regime permits the creation of states of exception which result in violations of non-derogable personal integrity rights because the state of exception assumes that human rights and security are in a zero-sum game. However, they are not intrinsically opposed because a human rights-compliant approach to emergencies results in improved security outcomes.

The ICCPR and Article 4

The 1966 ICCPR established a legal basis for the moral principles expressed in the 1948 Universal Declaration of Human rights, "the essential document, the touchstone, the creed of humanity that surely sums up all other creeds directing human behaviour" (Danieli et al. 1998, viii.). While the Declaration was non-binding, the ICCPR "concretised into positive norms the ideals embodied in the Universal Declaration" (Provost 2004, 2), establishing binding directives to its ratifiers. The Convention, however, also complicated the relationship between human rights and security as Article 4 states, "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant" (UN General Assembly 1966, 174). Derogation clauses are central to the security of the state, Criddle and Fox-Decent argue, because the state has fiduciary obligations in its relationship with citizens and thus, where inflexibility regarding articles in human rights covenants would endanger the state's ability to guarantee security to its citizens, it is obliged to abrogate them for the greater good (2012, 41). Given this, it has been argued that the "cornerstone of [human rights] covenants are their derogation clauses" (Oraá 1992, 1).

Article 4, however, also enumerates seven rights that are non-derogable, one of which is a fundamental personal integrity right: Article 7 states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (UN General Assembly 1966, 175). Other articles may be suspended by informing the UN Secretary General, giving reasons for their derogation, and the end date of the same derogations, a process which was solidified through the 1984 *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. This document reaffirmed the non-derogability of Article 7, stating that "No state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment" (UN Commission on Human Rights 1984, 9).

In practice, however, the derogation clause has negative effects on personal integrity rights, defined as "political imprisonment, torture, and killings or disappearances" (Keith 1999, 101), and violations of non-derogable articles are routine in public emergencies. In her study, Keith conducted an empirical analysis of violations of rights between members and non-members of the ICCPR between 1976 and 1993. While she found that States Parties to the treaty were one level above the mean in measures of political and civil freedom (1999, 103), the difference between party and non-party states was "insubstantial" in regard to non-derogable personal integrity rights, which she attributed to contamination "by the inclusion of state parties who had made derogations from the Covenant" (1999, 104). This poses a theoretical problem as may not be immediately apparent why a state would follow the procedural requirements of the Convention only to violate the non-derogability clause, a practice which occurred in numerous cases (Hargrove et al. 1994, 203-227).

The State of Exception

The state of exception occurs, as with Article 4 of the ICCPR, when security concerns result in the suspension of the legal order. Despite the inbuilt safeguards of the human rights regime, however, "many of the most grave and systematic human rights abuses occur during public emergencies" (Criddle & Fox-Decent 2012, 40). This section explores the theory behind the state of exception, showing that it creates an oppositional relationship between rights and security and, by its nature, it leads to the abuse of non-derogable rights.

The conservative legal scholar Carl Schmitt (1888–1985) "has had enormous influence on scholarship related to emergency powers" (Criddle & Fox-Decent 43). In language that would echo in Article 4 of the ICCPR, Schmitt described the state of emergency as "a danger to the existence of the state" (Schmitt 1922, 6), and his views on emergency provisions are the intellectual foundations of contemporary arguments for unfettered powers in times of existential security concerns (Dyzenhaus 2003, 3). To Schmitt, expansive emergency powers were not only necessary for public safety but constitutive of the state itself: "the sovereign is he who decides the exception" (Schmitt 1922, 8), thus any restraint in these situations must be considered by its nature incompatible with governance. In his view, constitutional checks (and we may view the ICCPR as part of an international constitution) hamper sovereignty (1922, 7) and it cannot be expected that during public emergencies any constitutional commitments be respected: "What characterises an exception is principally unlimited authority, which means the suspension of the entire existing order (…) on the basis of its right of self-preservation" (1922, 12). This would explain the tendency towards the violation of non-derogable rights by states even when the procedural requirements of Article 4 are followed; when the legal order is suspended, it is unfeasible to expect that the same legal order be respected: "There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist" (1922, 13). Any restriction, including non-derogable rights, are anathema to emergency declarations. Keith's data on violations of personal integrity rights by States Parties to the ICCPR appear to confirm this proposition.

Giorgio Agamben critiqued the extraordinary consolidation of emergency powers by Western states following 9/11 in his 2005 book, *The State of Exception*. To Agamben, the attacks resulted in a "permanent state of emergency [which] has become one of the essential practices of contemporary states" (2005, 2). The United States' response to the attacks in the form of the PATRIOT Act "radically erase[d] any legal status of the individual, thus producing a legally unnamable and unclassifiable being" (Agamben 2005, 3), resulting in indefinite detention and physical abuse, in violation of ICCPR Articles 9 and 7 respectively. In situations where 'need' is paramount, and security is this need,

necessitas legem non habet: the illegal becomes constitutional and produces new norms (Agambern 2005, 24) based on a subjective judgment where "the only circumstances that are necessary and objective are those that are declared to be so (…) not only does necessity ultimately come down to a decision, but that on which it decides is, in truth, something undecidable in fact and law" (Agamben 2005, 30). The consequences of this to my argument are two-fold: not only does the need for security in the chaotic state of exception justify all violations, but the state of exception a political process which develops over time and entrenches itself. Using Foucault's concept of biopolitics and "the emergence of techniques of power that were essentially centered on the (…) individual body" (Foucault 1976, 245), Agamben further shows that the state of exception is exercised so that the individual – as with the detainees in Guantanamo – is reduced to 'bare life' (Agamben 2005, 87), leading to violations of personal integrity rights. This idea is taken to its logical conclusions by the post-colonial theorist Achille Mbembe in his own discussion of sovereignty, the state of exception, and rights violations: "the ultimate expression of sovereignty largely resides in the power and capacity to dictate who is able to live and who must die" (2019, 66). What we see from both Mbembe and Agamben is that the state of exception is intrinsically related to the exercise of control over the individual, it implies violations of personal integrity rights and, as with the War on Terror, "when politics is considered a form of war, the question needs to be asked about the place that is given to life, death, and the human body" (Mbembe 2019, 66). Agamben and Mbembe reach the same conclusions as Schmitt despite being diametrically opposed to his politics: the existence of state of exception creates a legal vacuum where necessity justifies physical abuse, and human rights and security are always duelling forces.

Personal Integrity Rights Violations in Counter-Terrorism Practice

At the micro-level, the intellectual process by which states of exception result in violations of personal integrity rights despite safeguards can be seen by taking the case of Michael Ignatieff. His 2004 book,*The Lesser Evil: Political Ethics in an Age of Terror,* packaged justifications of human rights abuses for popular consumption. Ignatieff made the case that to ensure the survival of liberal democracies, resorting to "coercion, deception, secrecy, and violation of rights" (2004, xiii) may be necessary during public emergencies. Largely, the book followed the derogability restrictions of the ICCPR: he argued for the permissibility of abrogation of certain rights including freedom of association, the right to privacy, rules of access to counsel, and directives barring preventive detention (Ignatieff 2004, 3), which are reflected in ICCPR Articles 22, 17, 14, and 9 respectively, and affirmed the non-derogability of personal integrity rights, albeit half-heartedly: "it might be worth subjecting an individual to relentless—though nonphysical—interrogation to elicit critical information" (Ignatieff 2004, 8). By 2006, however, in an opinion piece entitled '*If Torture Works…*'Ignatieff began defending the use of waterboarding and 'enhanced interrogation' by the CIA: "I submit that we would not be 'waterboarding' Khalid Sheikh Mohammed (…) if our intelligence operatives did not believe it was necessary" (Ignatieff 2006). His intellectual trajectory follows the path shown by Keith's study where the move from violating derogable to non-derogable rights is short and predictable, and follows the principle of justification by necessity elaborated by Agamben. 'Necessity', then, becomes critical in the practice of counterterrorism and Ignatieff calls the respect for human rights in emergencies a "perfectionist stance, leaving aside the question of whether it is realistic" (Ignatieff 2004, 20). To Ignatieff, security and human rights are in a zero-sum game and the former trumps the latter when 'necessary', and he accepts a priori that this formula is effective.

With the benefit of hindsight, we can assess the outcomes of the interrogation of Khalid Sheikh Mohammed (KSM) cited by Ignatieff. In 2014, the United States Senate Select Committee on Intelligence published a report on the CIA's detention and interrogation program which stated that from the very start, "KSM was subjected to facial and abdominal slaps, the facial grab, stress positions, standing sleep deprivation (with his hands at or above head level), nudity, and water dousing. Chief of Interrogations [redacted] also ordered the rectal rehydration of KSM without a determination of medical need" (Senate Select Committee on Intelligence 2014, 82). When waterboarding was approved by the CIA's Office of Medical Services (OMS), interrogators "felt that (…) HQ was more or less demanding that it be used early and often" (2014, 85). KSM was waterboarded at least 183 times, 65 times just between March 12 and 13, 2003 (2014, 87). The techniques had the effect of making KSM "clam up" (2014, 83), and he instead responded positively to a subsequent interrogation where enhanced interrogation techniques were not used (2014, 83). Despite the CIA HQ itself questioning the technique's effectiveness, with various officials stating it was "not working," "ineffective," "counterproductive," and "may poison the well," the waterboarding continued for another 10 days (2014, 88). KSM would say in June 2003 that he "fabricated" stories, "explaining that he was 'under enhanced

measures when he made these claims and simply told his interrogators what he thought they wanted to hear'" (2014, 92). The conclusions in the executive summary of the report stated that 'enhanced interrogation' techniques were "brutal" (2014, xii.) and rested on "inaccurate claims about their effectiveness" (2014, xi.). In the foreword of the report, Chairwoman Dianne Feinstein distanced the United States government from these actions, stating that the CIA had avoided executive oversight and that "CIA personnel (…) decided to initiate a program of indefinite secret detention and the use of brutal interrogation techniques in violation of U.S. law, treaty obligations, and our values" (2014, v.). This is disingenuous: the state-sanctioned exception instituted by the PATRIOT Act, as Agamben showed, predictably lead to violations of personal integrity rights. Torture was the product of an intellectual and discursive process conducted on the public stage free of occultation: in 2006, the UN Committee Against Torture had already found the United States in breach of the convention, stating that "interrogation technique[s], including (…) 'waterboarding' (…) constitutes torture or cruel, inhuman or degrading treatment or punishment" (UNCAT 2006, 71); that same year Ignatieff, a politically moderate public intellectual, openly justified torture and in 2008 George Bush vetoed a bill banning the use of waterboarding by stating that it "would take away one of the most valuable tools of the war on terror" (Washington Post 2008). The formula reoccurs: to policy-makers, violations of human rights are valuable, necessary, and effective in the pursuit of security.

A Human-Rights-Based Approach to Counter-Terrorism

Louise Richardson argues that the pattern of state responses to terrorist attacks to "demonstrate resolve by the adoption of a draconian response" (Richardson 2006, 234) is a persistent pathology, and Tom Parker similarly finds a "profound and persistent belief in many national security establishments around the world that international legal regimes and human rights norms prohibit effective action against terrorism" (Parker 2019, 459). Parker, a counter-terrorism strategist who has advised the European Union and United Nations Counter-Terrorism organisations, proposes an alternative way of approaching the relationship between human rights and security in terrorist emergencies. In *Avoiding the Terrorist Trap: Why Respect for Human Rights is the Key to Defeating Terrorism* , Parker argues that fighting terrorism should occur within a human rights framework: "a well-constituted security establishment, operating in full compliance with international human rights law, is perfectly capable of addressing terrorist activity" (2019, 494). In response to 'enhanced interrogation' tactics, Parker states that in emergency interrogation situations where obtaining information is paramount, the pervasive "zero-sum mindset is greatly flawed and lies at the heart of one of the most common human rights abuses that occurs in the counter-terrorism context — the physical and mental abuse of detainees in custody by their interviewers" (Parker 2019, 568). He expounds on the idea of 'ethical interviewing' pioneered through the research of Leche and Hagelberg, which hinges on respect of the presumption of innocence of suspects, building rapport, and "asking open-ended questions rather than trying to direct the suspect's answers (…) the focus is on establishing the truth, not gaining a confession" (Parker 2019, 582-583). Parker argues that confession-aimed approaches are flawed, appealing to the data available showing the unreliability of confessions uncovered by DNA exoneration cases, 28% of which involved false confessions (2019, 568). The interrogation of KSM is an illustration of this point. Parker shows that the effectiveness of ethically-compliant interrogations is supported by research findings by forensic scientists as well as the US Intelligence Science Board (2019, 588) and he presents an interrogation case that we can view in opposition to that of KSM. In the human rights-compliant interrogation of Osama bin Laden's former bodyguard, Abu Jandal, FBI Special Agent Ali Soufan used his understanding of Jandal's worldview to "build rapport by using arguments drawn from Abu Jandal's own moral landscape and through small acts of kindness" which had "major impact" (Parker 2019, 591). Although Jandal had been trained in counter-interrogation techniques he eventually revealed critical information about al-Qaeda's structure and operations (Parker 2019, 592). This episode is but one of many examples given in his book, and Parker uses a rigorous evidence-based approach to demonstrate alternatives to current counterterrorism practice (see Parker 2019, 459-768). Despite repeated claims to the contrary, then, violations of personal integrity rights fail the efficacy test their validity rests on, and in the case of abuses during interrogations, rely on bad science and a misunderstanding of the physiological effects of torture in extracting information (see Iacopino et al. 2011).

The state of exception is built into the international human rights regime through derogation clauses which rupture the relationship between human rights and security. Where states of exception arise, violations of non-derogable rights are likely to occur, and constitutional safeguards are ineffective in regulating the infringement of personal integrity rights. If it is unrealistic to expect that derogation clauses be abolished, it is equally unrealistic that the resulting state

of exception will adhere to restrictions when triggered. The adversarial relationship between the two, however, is not inherent as the example of effective human-rights conscious interrogation techniques destabilises the pivotal argument that the state of exception creates around 'necessity'. This provides a distant glimmer of hope that human rights and security may be integrated through an evidence-based approach without the need to create states of exception.

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