

Book Reviews

Jaime Oraa, *Human Rights in States of Emergency in International Law*, Oxford, Clarendon Press (1992) 285p. + Index

As Professor Ian Brownlie writes in his Preface to Father Jaime Oraa's book, 'the significance of its subject cannot be overstated'. Indeed, the truth is that modern attempts to limit and control the exercise by the various national legal systems of their powers in times of emergency, i.e. when the governments are generally tempted to disregard most recognized human rights, represented an extraordinary challenge. To a large extent this challenge has been rather successful and may be considered as one of the greatest achievements of contemporary international law. Moreover, according to the author, it may be considered as the very paradigm of the new emerging system of international protection of human rights. These very simple introductory remarks explain the great importance of Jaime Oraa's book¹ much beyond the mere utility or even the commodity of a good monograph.

As stated by the author in the very first sentence of his introduction 'States of emergency as a legal institution which justifies derogations from human rights standards is a well-known institution recognized in almost all systems of municipal law'.² Indeed, any study of the derogation clause has its counterpart in internal law. Oraa has chosen not to devote much attention to that question (except for very brief remarks in the introduction). Even if one keeps in mind that the book is clearly devoted to a problem which is seen through the eyes of international law, it seems that some form of comparative approach could have added to the later developments. May one suggest that, perhaps, the development of (internal) judicial review could also lead to a strengthening of the internal remedies, despite the seemingly widely accepted view according to which internal remedies, in times of emergency, are inefficient?³

At first glance, the plan for such a study seemed quite obvious. Dealing with the question of human rights standards in states of emergency, there had to be two parts: the first one analysing the human rights standards in states of emergency within the context of specific multilateral treaties (that is mainly the problem of the legal regime of the so-called derogation clause), whereas the second part would deal with the same question within the context of general international law. The only methodological problem with such a way of exposition remains, of course, its inevitable lack of proportion: whereas the first part (the presentation of the legal regime of the derogation clauses in multilateral treaties) had rich material to offer, the second part (general international law) was quite poorer (at least in quantity). As a matter of fact, if the first part covers a total of 200 pages, the second part encompasses barely 70 pages, even though, according to the author himself, 'the analysis of the principles governing human rights in states of emergency in general international law'⁴ was one of the principle aims of his research.

To all intents and purposes, the first part of Jaime Oraa's book can be considered as one of the most accurate and precise presentations of the derogation clauses in the three great international human rights treaties i.e. the *European Convention on Human Rights and Fundamental Freedoms* (ECHR) which was signed in 1950 and came into force in 1953, the *International Covenant on Civil and Political Rights* (ICCPR) which was signed in 1966 and came into force

1 It has been previously submitted as a thesis at Oxford University (the book under review is a revised version of the thesis).

2 At 7.

3 See for instance, Alexander, 'The Illusory Protection of Human Rights by National Courts during Periods of Emergency', 5 *Human Rights Journal* (1984) 1-67.

4 At 2 and at 270.

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in 1976⁵ and the *American Convention on Human Rights*⁶ (ACHR) which was signed in 1969 and came into force in 1978. As a matter of fact, the presentation and analysis of the derogation clause in the ECHR which may rightly be considered as the inspiring 'mother' of all the derogation clauses – mainly through its quite famous Article 15 – had already been done before⁷ and in this respect Oraa's book has only the obvious advantage of bringing us up-to-date. But, obviously this was not Oraa's aim. What really characterizes this book is an ambitious attempt to present an exhaustive and synthetic approach to the subject, integrating the common standards achieved by three main treaties in order to suggest that the derogation clause theory has actually become customary international law, i.e. principles which are binding even in the absence of an international treaty.

Oraa's exposition method is quite systematic even didactic. It starts with a first general assessment which can hardly be refuted and which actually constitutes the exposition plan for the first part: in analyzing and comparing the three great human rights treaties and their derogations clauses, Oraa determines that 'the legal regime of the derogation clause contains what could be called seven fundamental "principles".'⁸

The Principle of Exceptional Threat

The chapter deals with the very existence of a State of Emergency as envisaged in the three treaties. The comparison between the wording of the three treaties, as to the definition of the conditions justifying the implementation of the derogation clause is precise and helpful. Such is also the second part of the chapter which deals with the interpretation given to the state of emergency by the bodies entrusted with the application of the three treaties, i.e. the European Court of Human Rights and the Commission (with special emphasis on the famous *Lawless* case and the *Greek* case), the UN Human Rights Committee and the Inter-American Commission for Human Rights. Oraa's conclusion is quite interesting and the main characteristics of the state of emergency in the treaties and of their interpretation which he presents⁹ are useful and carefully summarized.¹⁰

The Principle of the Proclamation of the State of Emergency

Actually, the requirement of 'official proclamation' of the emergency appears only in the ICCPR, whereas there is no such formal requirement in the two other treaties. Oraa seems to have some difficulties with this discrepancy: one could ask whether it constitutes – under international law – a 'principle', even in the non-binding meaning of the concept.

5 The emergency clause in the Covenant is (mainly) Article 4.

6 The emergency clause in this convention is Article 27.

7 See for instance the excellent study by R. Ergac, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles: Etude sur l'article 15 de la convention européenne des droits de l'homme* (1987).

8 At 3. In a footnote attached to the word 'principles' (footnote 5, at 3) the author indicates that 'the word "principles" is used here in a very wide and abstract way and not in the technical sense of "principles of international law" or "general principles of law". Whether or not some, or all of these principles could be considered "general principles" in the technical sense is something that will be studied in the following chapters'. Needless to say that this indication is quite precious to avoid some misunderstandings. Perhaps it would have been wiser to choose another concept than 'principles'.

9 At 23.

10 Such conclusions with a summary are presented at the end of each chapter and part. They are useful even though they recall most vividly the fact that the work was first written as a doctorate.

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The Principle of Notification

This principle appears in the three treaties, its rationale is obvious. The jurisprudence is quite illuminating, though it is interesting to note that there is no clear-cut answer to the question whether the failure to comply with this requirement, i.e. the failure to notify nullifies *ipso facto* the right to derogation. Actually, the answer seems rather negative.

The Principle of Non-derogability of Fundamental Rights

There is little doubt as to the fact that this principle is certainly the most important one. Very simply put it means that even in the worst period, when there is a real need for a recourse to the state of emergency, i.e. when the State authorities will be entitled to disregard the generally accepted human rights, there are some rights which can never be infringed upon. Those are the non-derogable human rights. There is no clear agreement upon the precise list of those rights: the European Convention has four,¹¹ the UN Covenant has seven and the American Convention eleven. In this respect, Oraa's work is really admirable: his exhaustive study of the *Travaux préparatoires* provides us with a magnificent chapter, both analytical and critical: certainly one of the central chapters of the book.

The Principle of Proportionality

It is well known that this principle has become central both in international and in internal law. It appears that the principle is not only present in the three treaties (i.e. the principle according to which the derogatory measures must be proportional to the threat) but also that the application by the supervisory bodies is very similar.

The Principle of Non-discrimination

Again, the principle is central to the entire theory, even though it does not appear in the European Convention in the non-derogatory clause, but is applicable through the general prohibition of non-discrimination (Article 14 of the Convention): though some questions pertaining to the relations between Article 14 and 15 are still unsolved in this respect, as appears from the *Ireland v. UK* case.

The Principle of Consistency

In Oraa's words this principle means 'that the right of a State to take measures of derogations (in emergencies) is limited by the condition that the measures must not be inconsistent with other obligations under international law.'¹² What seems to be essentially aimed at here are, of course, the laws of war (mainly the Geneva Conventions of 1949 and the 1977 Protocols). For the time being the practical application seems rather limited.

Having carefully presented the three international treaties, Oraa devotes the second part of his book to the question of Human Rights in States of Emergency in General International Law.

11 The four non-derogable rights in the European Convention are common to the three treaties: the right to life, the right to be free from torture and other inhuman or degrading treatment or punishment, the right to be free from slavery or servitude and the principle of non-retroactivity of penal laws. Thus it is possible to affirm that those rights are now *jus cogens*.

12 At 190.

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Oraa's plan here constitutes certainly a very didactic model for this kind of research. He starts with what he calls 'two preliminary questions', i.e. the question of the existence of human rights standards in customary law and the question of the special evidence required to prove the existence of customary norms in the area of human rights. The examination is concluded through two 'lines of inquiry': the first line consisting in the existence of legal doctrines: they are to be found mainly in the doctrine of necessity. The second line is more general and, it must be stressed, more original: it contends that some of the principles of the derogations' clauses are emerging as principles of general international law. The contention is well presented, it relies on all possible sources, from the general 'norm-creating' character of the ICCPR, to the importance of the repetition of the same norms in several human rights treaties (as probative source for customary law), the practice of various organs of International Organizations and the acceptance of some of these principles by States Non-Parties to the Human Rights treaties. In various respects this way of establishing the existence of such new principles may be considered what the French call a magnificent *exercice de style*.

On the basis of these inquiries, Oraa concludes that there are various principles which constitute emergent principles of International Law governing Human Rights in states of emergency. He cites: the principle of exceptional threat, the principle of proportionality, the principle of non-discrimination and, last *but certainly not least*, the principle of non-derogability of fundamental rights.

Oraa's work is impressive. His conclusions are stimulating: it is undoubtedly a major contribution to this very special corner of International Human Rights theory and practice. It is well-known that the real test for enlightened and democratic regime is precisely in times of emergency. Whether the State is exposed to external or internal threat, when its organs have to use exceptional means in order to restore order and security, it will be judged according to this very special yardstick provided now by general international law and not only by conventional law. Oraa indicates clearly that he precisely aimed at that result, since 'almost half of the States of the international community are not parties to the international treaties on human rights which establish a legal regime for emergencies'¹³ it is of paramount importance to perform 'a thorough analysis of the standards in general international law'. This job has been perfectly achieved.

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Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Clarendon Press, (1991) 411p. + Annexes + Index

Nowadays the world community faces not only the question of how to ensure democratic majority rule, but also the growing problem of guaranteeing respect for the rights of various underprivileged minority groups. It is hardly disputable that the problem of 'national', 'racial', 'ethnic', 'religious' and 'linguistic' minorities all over the world constitutes currently one of the most burning issues on the international human rights agenda. The development of modern human rights philosophy occurred in such a way that it passed over to a large extent from the ideas of simple majority rule and political rights for all to taking into consideration the interests of those who are distinct in some respect from the majority and, being therefore in a minority, find it difficult for themselves to make the bodies of power consider their special position and interests.