Chapter iv
Terrorism, State of Emergency, and Derogation from Judicial Guarantees

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Introduction

In its 1987 Advisory Opinion on “Habeas Corpus in Emergency Situations”, the Inter-American Court of Human Rights declared: “The concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent to the person, the guarantees applicable to them, and the rule of law form a triad. Each component defines itself, complements, and depends on the others for its meaning”.

This Advisory Opinion was issued at a time when extremely grave human rights violations were being committed by military dictatorships in the Americas in the name of “national security”, and by these words, the Inter-American Court intended to emphasize the essential role that judicial guarantees play in the permanence of the rule of law, even in times of war, or other exceptional situations.

In these situations, international human rights treaties permit the temporary suspension of certain rights and freedoms which, under normal circumstances, must be respected and guaranteed by the state. It does not follow, however, that the suspension of certain guarantees implies a temporary suspension of the rule of law.

Although these words were pronounced more that twenty years ago, it is curious to see how highly relevant they remain in the present day context. If in the context of the eighties they served to reject the policy that many states on the American continent were following in their fight against “the internal enemy” in a so-called “dirty war”, then today they have acquired renewed meaning. The same words serve to remind states that the rule of law cannot just be dispensed

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with, and that the “global war against terror” cannot justify the complete suppression of judicial guarantees which are intended to protect every person (even the “unlawful alien enemy combatants”) from arbitrary decisions by the state.

It is interesting to note that states that decided to launch a “crusade” against international terrorism after the 9/11 attacks have recurred to the same concepts and old-fashioned justifications to legitimize their adoption of exceptional legal measures on national security grounds. As we will see, this policy has profoundly affected the normal course of human rights and liberties, and has led to the progressive weakening of the most basic individual judicial guarantees. In fact, it is remarkable that many of the counter-terrorist measures that states have implemented in the last few years have profoundly curtailed the right of alleged terrorists to challenge the legality of their detention, or to obtain a fair trial. Some of the most striking examples are: (i) the subjection of persons to indefinite detention; (ii) civilians tried by military and special courts; (iii) abuse of immigration laws to circumvent judicial guarantees; (iv) “targeted sanctions” imposed by the UN Security Council without a previous penal process; and (v) the practice of “extraordinary renditions”. After obtaining patent and embarrassing evidence of the collaboration of the Council of Europe’s Member States in this last mentioned particularly aberrant practice, the Council’s Parliamentary Assembly publicly recognized that in the pursuit of what is said to be a “war”, states have committed “numerous and systematic human rights abuses”\(^2\). In these circumstances, judicial guarantees that were traditionally intended to shield the person from the state authority’s arbitrary decisions have become a key element in ensuring that counter-terrorist policy duly complies with international human rights law standards.

This contribution will focus on three particular counter-terrorism measures: (i) the “targeted sanctions”; (ii) the “extraordinary renditions”; and (iii) the military commissions created by the United States government to judge “unlawful enemy combatants”, which in our opinion, clearly contravene the very essence of the right to due process of law. This analysis will allow us to confirm the extent to which some states have erred by sacrificing human rights protection in the name of national security policies, to the detriment of the rule of law. The conclusion will demonstrate that international terrorism is a phenomenon that will generally prohibit states from either adopting exceptional measures, or maintaining

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\(^3\) This wording proceeds from the Parliamentary Assembly of the Council of Europe Resolution 1507 (2006) on “Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe Member States”. [http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/Eres1507.htm](http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/Eres1507.htm).