



**OSCE Parliamentary Assembly,
General Committee on Democracy, Human Rights and Humanitarian Questions**

Introductory Remarks on The Scope of Legitimate Restrictions in Times of Emergency

21 February 2019

(To be checked against delivery)

Thank you Madam Chair, dear Margareta Kiener Nellen,
Dear Ambassador Ivo Šrámek,
Dear rapporteur Kyriakos Hadjiyianni,
Dear Michael Link,
Ladies and Gentlemen,

I am honoured to address the OSCE Parliamentary Assembly today on what is a very timely and pressing subject. And I want to thank you for choosing this issue—the scope of legitimate restrictions on Human Rights in time of emergency—for our discussion today. It is a very timely one, as the OSCE region is confronted with so many crisis and security emergencies, including terrorist threats and attacks.

Such a context, both at the international and national levels in many participating States, has led governments to adopt exceptional measures of security to ensure the protection of citizens.

As parliamentarians, as legislators, you are also confronted with new phenomena that can have grave consequences, such as the dissemination of hate speech, extremist and violent content, and the manipulation of information.

But, even when justified by the seriousness of the situation, security measures must remain compatible with Human Rights principles and commitments of the OSCE participating States. In particular, this applies to freedom of expression and freedom of the media.

As the security threats in our region are numerous, and given that there is a risk that they remain a reality for long periods of time; we must be attentive that the exceptions to Human Rights do not become the new normal.

If so, it would mean that we renounce the human dimension pillar of our comprehensive concept of security in the OSCE region and we will not reinforce the security in our region by doing so.

In the field of freedom of expression and freedom of the media, there is a lot at stake — from access to information on the Internet, to the ability of the press to report and investigate, to free expression of views and opinions. These are all essential, even in a time of conflict, of crisis or of emergency.

I will be happy to elaborate on different situations and cases during our discussion, as too many journalists are prosecuted, deprived of their rights, jailed, or media closed under the pretext of security; but I would first like, in the introduction, to recall some principles.

I would first recall that this topic also has deep roots in the past. It is sometimes said that notions of “emergency” have been summoned, not just in the last couple of years, but since Roman times to justify government actions which would normally not be permitted.

The concept of “Justitium”, or state of exception, was first invoked in 465 BC when Rome was gripped by panic due to a mistaken belief of imminent invasion by Aequi, their neighbours, making it one of the most famous fake news in History.

Throughout history, when states have been faced with serious challenges – such as civil war or unrest, armed conflict or natural disasters – ideas of “emergency” – or related concepts such as “calamity” and “crisis” – have provided the rationale for suspending the fundamental rights and freedoms guaranteed under law, particularly constitutional law.

Even President Abraham Lincoln suspended *habeas corpus* during the American Civil War. Since the early 20th century, the idea of “state of emergency” in particular has been applied across the world as a legal justification to limit rights in times of crisis.

More recently, especially in the OSCE region, states of emergency have been implemented in response to terrorist attacks, such as that which France declared after the November 2015 Paris attacks, or after the coup attempt in Turkey in 2016.

However, I note a contemporary phenomenon: the overuse in many countries of the term “emergency” through political rhetoric, conveying the impression that we are in a permanent “state of emergency”, even without formally or legally declaring it.

The mere invocation of a “state of emergency” by a government representative, or a reference to a situation of crisis, should not be considered as giving governments a *carte blanche* to override human rights.

In particular, I want to recall that international law – under the International Covenant on Civil and Political Rights, the ICCPR of 1966 – still applies during states of emergency and determines the scope of permissible limitations on a state’s human rights obligations, including with respect to freedom of expression and information – rights essential for media freedom.

Under international law, states have very specific and concrete human rights obligations when they wish to activate their emergency powers.

First, a state may restrict certain individual rights in exceptional circumstances, but only if it has entered a valid derogation from relevant international human rights treaty provisions. The ICCPR states that such exceptional circumstances may exist in a “time of public emergency which threatens the life of the nation”. General appeals to an unspecified threat are insufficient.

Second, only some rights can be suspended during times of emergency. International law does not permit derogation on, for instance, arbitrary killings, torture, inhuman and

degrading treatment, or the suspension of freedom of thought, conscience and religion.

You will notice that freedom of expression – the basis of media freedom – can be suspended. But there are other conditions that constrain the scope of its limitations (defined in Article 19 of ICCPR and Article 10 of the European Convention of Human Rights).

Third, any emergency measure must be finite and temporary in nature. It cannot be a permanent state of affairs. States should specifically identify any emergency measure, generally in a law, and its effect on human rights, and provide reasons for the adoption.

Fourth, and crucially, any emergency measure must be exceptional: it should be “limited to the extent strictly required by the demands of the situation” in terms of its duration, geographical coverage and material scope. It must pass the legal thresholds of legality, proportionality and necessity. In other words, each emergency measure must be directed “to an actual, clear, present or imminent danger”, as the UN Rapporteur on Counter-Terrorism and Human Rights underlined in her 2018 report.

Fifth, any emergency measure must not be discriminatory. In other words, it should not have an adverse impact upon minorities, religious groups, or vulnerable groups, including women and children.

Sixth, the “state of emergency” and the derogation should also be officially proclaimed to inform individuals subject to the change in the law affecting their rights. It must also be communicated or notified to the treaty repository.

Seventh, there must be genuine and robust independent oversight mechanisms, at the domestic and international levels.

To summarize, any emergency measure must relate to an actual emergency that is threatening the life of the nation; it must be taken in relation to a derogable right, and remain exceptional, limited, temporary and non-discriminatory; and it must be subject to genuine oversight.

Ladies and Gentlemen,

All this has specific meaning for freedom of expression and freedom of the media. There cannot be general restrictions on this right, just based on the idea of an emergency situation, or an indefinite state of emergency.

Before concluding, I would like to stress that during states of emergency, the role of journalists and media organisation as “public watchdogs” is even more significant.

Journalists and media organisations can help to spotlight precisely how emergency provisions, notably counter-terrorism measures, that affect human rights operate under emergency conditions and whether they are in line with states’ international obligations.

More generally, during emergency or crisis situations it is even more important that matters of public interest are discussed.

Put differently, the free flow of information – including on issues that might have led to the actual or purported state of emergency – is critical for the public’s right to know, and for the

transparency and accountability of powerful state organs, bodies, agencies and authorities, as well as private sector entities. For it is the public that is the ultimate check on government and the media that is critical to ensuring that the public is duly informed.

As Justice Stewart of the U.S. Supreme Court wrote in 1971 in the seminal *Pentagon Papers* case on the relationship between national security and press freedom under the First Amendment, including in a time of war or crisis: “the only effective restraint upon executive policy and power ... may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government.”

For these reasons, the rights and freedoms of journalists and media organisations have to be protected even during times of emergency and crisis, in accordance with international law.

And here, your role, as national legislators, is absolutely key.

Free access to information, well informed citizens, free expression of views and opinions are not detrimental to our security. Quite the contrary, I am convinced that they reinforce the resilience of societies confronted to security crisis or emergency situations.

As Abraham Lincoln said: “Let the people know the facts, and the country will be safe”.

We could say the same of the OSCE region: let the people know the facts, let the media work, let the journalists investigate and report, let the discussion be free, open and democratic, and the region will be safer.

Thank you.