

HUMAN RIGHTS IN EMERGENCIES

Public emergencies such as civil wars, natural disasters, and economic crises test the theoretical and practical commitments of international human rights law. During national crises, international law permits states to suspend many human rights protections in order to safeguard national security. States frequently overstep the limits of this authority, violating even peremptory human rights such as the prohibitions against torture and prolonged arbitrary detention. In this volume, leading scholars from law, philosophy, and political science grapple with challenging questions concerning the character, scope, and salience of international human rights, and they explain how the law seeks to protect human rights during emergencies. The contributors also evaluate the law's successes and failures and offer new proposals for strengthening respect for human rights.

Evan J. Criddle is Professor of Law at William and Mary Law School, where he specializes in public international law, international legal theory, human rights, fiduciary law, and administrative law.





ASIL Studies in International Legal Theory

Series Editors

Elizabeth Andersen (ASIL) Mortimer Sellers (University of Baltimore)

Editorial Board

Samantha Besson (Universit é de Fribourg)
Allen Buchanan (Duke University)
David Kennedy (Harvard University)
Jan Klabbers (University of Helsinki)
David Luban (Georgetown University)
Larry May (Vanderbilt University)
Mary Ellen O'Connell (University of Notre Dame)
Onuma Yasuaki (Meiji University)
Helen Stacy (Stanford University)
John Tasioulas (University College London)
Fernando Tes ó n (Florida State University)

The purpose of the ASIL Studies in International Legal Theory series is to clarify and improve the theoretical foundations of international law. Too often the progressive development and implementation of international law has foundered on confusion about first principles. This series raises the level of public and scholarly discussion about the structure and purposes of the world legal order and how best to achieve global justice through law.

This series grows out of the International Legal Theory project of the American Society of International Law. The ASIL Studies in International Legal Theory series deepens this conversation by publishing scholarly monographs and edited volumes of essays considering subjects in international legal theory.

Volumes in the Series:

International Criminal Law and Philosophy
edited by Larry May and Zachary Hoskins

Customary International Law: A New Theory with Practical Applications
by Brian D. Lepard

The New Global Law by Rafael Domingo

The Role of Ethics in International Law
edited by Donald Earl Childress III

Global Justice and International Economic Law: Opportunities and Prospects
edited by Chios Carmody, Frank J. Garcia, and John Linarelli

Parochialism, Cosmopolitanism, and the Foundations of International Law
edited by Mortimer Sellers

Morality, Jus Post Bellum, and International Law
edited by Larry May and Andrew T. Forcehimes



The Future of International Law: Global Governance
by Joel P. Trachtman
Normative Pluralism and International Law: Exploring Global Governance
by Jan Klabbers and Touko Piiparinen
Jus Post Bellum and Transitional Justice
by Larry May and Elizabeth Edenberg
Negotiating State and Non-State Law: The Challenge of Global and Local
Legal Pluralism
edited by Michael A. Helfand
The Theory of Self-Determination
edited by Fernando R. Tesón
Human Rights in Emergencies
edited by Evan J. Criddle



Human Rights in Emergencies

EVAN J. CRIDDLE

William and Mary Law School





CAMBRIDGE UNIVERSITY PRESS

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org Information on this title: www.cambridge.org/9781107115835

© Cambridge University Press 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

A catalogue record for this publication is available from the British Library.

ısвn 978-1-107-11583-5 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.



For my parents, Dean and Nancy, with love





Contents

	of Contributors powledgments	раде хі хііі	
	oduction: Testing Human Rights Theory During Emergencies J. Criddle	1	
PAR	Г I. DESIGNING A HUMAN RIGHTS REGIME		
FOR	EMERGENCIES	13	
1	Constrained Derogation in Positive Human Rights Regimes Gerald L. Neuman	15	
2	Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference Evan J. Criddle	32	
3	Two Models of Normative Frameworks for Human Rights During		
	Emergencies James W. Nickel	56	
PAR	TII. LAW, POLITICS, AND POWER	81	
4	Emergency and Escape: Explaining Derogations from Human Rights Treaties Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss	83	
5	The Cloak and Dagger Game of Derogation Fionnuala Ní Aoláin	124	
6	The Law of Emergency and Reason of State Thomas Poole	148	



X	Contents	
7	Human Rights Lawyers v. Carl Schmitt William E. Scheuerman	175
PAR	T III. EMERGING CHALLENGES	203
8	Human Rights and Derogation in Peacekeeping: Addressing a Legal Vacuum Within the State of Exception Scott Sheeran	205
9	Austerity Measures and International Economic, Social, and Cultural Rights Diane A. Desierto	241
Inde	ex	277



Contributors

Evan J. Criddle, Professor of Law, College of William & Mary, Marshall-Wythe School of Law.

Diane A. Desierto, Associate Professor of Law (tenured) and Michael J. Marks Distinguished Professor in Business Law, University of Hawaii William S. Richardson School of Law; Co-Director, ASEAN Law & Integration Center; Research Fellow, WSD Handa Center, Stanford Global Studies; 2016–2017 Faculty Fellow, Center for Advanced Study in the Behavioral Sciences, Stanford University.

Christopher J. Fariss, Jeffrey L. Hyde and Sharon D. Hyde and Political Science Board of Visitors Early Career Professor in Political Science, Pennsylvania State University.

Emilie M. Hafner-Burton, Professor and Director of the Laboratory on International Law and Regulation, School of International Relations and Pacific Studies and Department of Political Science, University of California, San Diego.

Laurence R. Helfer, Harry R. Chadwick, Sr. Professor of Law, Duke University.

Gerald L. Neuman, J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law, Harvard University, and Member of the U.N. Human Rights Committee from 2011 to 2014.

Fionnuala Ní Aoláin, Robina Chair in Law, Public Policy, and Society, University of Minnesota.

James W. Nickel, Professor of Law and Philosophy, University of Miami.



xii Contributors

Thomas Poole, Professor of Law, London School of Economics and Political Science.

William E. Scheuerman, Professor of Political Science, Indiana University.

Scott Sheeran, Senior Legal Counsel and Sanctions Team Leader, New Zealand Delegation on the U.N. Security Council (2015–16), and Senior Lecturer (on leave), School of Law and Human Rights Centre, University of Essex.



Acknowledgments

On May 15, 2014, the American Society of International Law's (ASIL) International Legal Theory Interest Group invited leading international lawyers, political scientists, and philosophers to a symposium in Washington, D.C., to discuss how international human rights law deals with emergencies. With one exception, the chapters in this volume are the product of these conversations. I owe a special debt of thanks to Trey Childress, Evan Fox-Decent, and Tim Sellers for their enthusiastic support for this project from day one, and to the Wes Rist, Sheila Ward, and the staff of ASIL's Tillar House for their able assistance with the symposium. I also gratefully acknowledge the Canadian Social Science and Humanities Research Council and the College of William and Mary Marshall-Wythe School of Law for financial support that made this volume possible. Thanks also to John Berger, Kaylee Gum, Krishana Patel, and the editors at Cambridge University Press for their assistance in preparing this volume for publication. As in all things, I express my love and gratitude to Anika Criddle and our children, Isaac, Andrew, Elin, Claire, and Lucie, for their support, encouragement, and inspiration.