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**A Misuse of Emergency Powers? An Analysis of the Legality of Fiji's 2006 and 2009  
States of Emergency and Public Emergency Regulations**

**Submitted for the LLB (Honours) Degree**

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2018**

## *Abstract*

States of emergency have long been linked with human rights abuses, in particular where the state of emergency is not legitimate under international law. Despite extensive research and reports clarifying the legal framework that states must follow, there has been limited analysis focusing on a particular state. This paper aims to provide a valuable case study by analysing the states of emergency declared in Fiji in 2006 and 2009 against existing legal frameworks to ascertain their legitimacy under international law. The 2009 Public Emergency Regulations, which allowed for a number of derogations from human rights, are also critically evaluated to assess their conformity with international law. As the emergency situations used as justification for invoking the states of emergency did not reach the required threshold, the imposed states of emergency were illegitimate. Furthermore, the Public Emergency Regulations permitted wide human rights derogations that were completely disproportionate to the situation. By providing a case study of a state that has misused a state of emergency and emergency powers, and showing how this misuse can result in ongoing human rights abuses, this paper affirms the value of ongoing international oversight and the importance of enforcing the international requirements.

## *Key words*

State of emergency, coup, Fiji, human rights

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## I. Introduction

In 2006 Fiji experienced its fourth coup in less than 20 years when military Commander Frank Bainimarama dispatched the government, installed military rule and imposed a state of emergency.<sup>1</sup> In 2009 the Court of Appeal in *Qarase v Bainimarama* declared the interim Government illegal and called for it to be replaced.<sup>2</sup> Following that decision Bainimarama abrogated the Constitution, declared of a new state of emergency and introduced the Public Emergency Regulations (PER).<sup>3</sup>

This paper will assess whether the states of emergency imposed in both 2006 and 2009 were legal under international law requirements, and then critically analyse certain provisions of the PER to determine whether derogations from human rights permitted under the Regulations were necessary or proportionate. There has been much written on the Fijian coups, in particular the events leading to the coups, but this paper considers the period after the coup and whether the actions of the government, which received worldwide condemnation, were actually legal under international law. This paper will conclude that both states of emergency were illegitimate as they failed to meet the established requirements or thresholds, and many of the provisions contained in the PER were in violation of international law.

Due to intense media censorship and a crackdown on free speech, the true nature of events in the period under consideration may never fully be known. The limited evidence available has mainly been sourced from international news stories and reports from human rights organisations such as Amnesty International.<sup>4</sup> Although this has resulted in some difficulty, a significant analysis was still able to be made on the evidence available.

Part II of this paper first considers the history of international oversight of states of emergency. Part II then sets out the threshold for a public emergency and the international law requirements, in particular those established by Article 4 of the International Covenant on

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<sup>1</sup> Brij Lal “This Process of Political Readjustment - Aftermath of the 2006 Fiji Coup” 2007 5(1) FSJ 89 at 94.

<sup>2</sup> *Qarase v Bainimarama* [2009] FJCA 9 at [170].

<sup>3</sup> Nina Markovic “A timeline of the 2009 political crisis in Fiji and key regional reactions” (20 August 2009) Parliament of Australia  
<[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/0910/Fiji](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/Fiji)>

<sup>4</sup> Amnesty International *Paradise Lost: A tale of Ongoing Human Rights Violations April - July* (Amnesty International Publication, London, 2009) at 17.

Civil and Political Rights (ICCPR). Other treaties also contain derogation clauses but will not be considered in this paper as they are not applicable to Fiji. However, some reference will be made to the European Convention on Human Rights (ECHR) and European case law as it is generally accepted that these interpretations are still relevant when looking at the ICCPR.<sup>5</sup> Part II then looks at the 2018 report by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Professor Fionnuala Ní Aoláin, and sets out the problems this report identifies.

In Part III, the history leading up to the 2006 coup is briefly addressed, as well as the events surrounding the coup. The Court of Appeal's decision in *Qarase v Bainimarama* and the following events are then detailed. Part IV considers the legitimacy of the 2006 and 2009 states of emergency by applying the facts to the legal framework set out in Part II(B), concluding that the requirements were not met. Part V considers key provisions of the Public Emergency Regulations and whether they follow established international law standards. This part will conclude that the provisions are not necessary or proportionate, and some are in direct contravention of international law.

## *II. States of Emergency*

This part of the paper will first briefly detail the history of international oversight starting in the 1970s. Past oversight is important as it highlights the historical problems surrounding states of emergency and the importance of following the legal requirements. This part then attempts to define what amounts to a state of emergency under international law, and what standards must be met to ensure subsequent derogations are legitimate. Finally, the 2018 Report by the Special Rapporteur Professor Fionnuala Ní Aoláin is considered, which usefully clarifies the current law and considers some of the current issues surrounding states of emergency. Part II is of particular importance as it will provide the framework for later analysis of the 2006 and 2009 states of emergency, and the PER.

### *A. History of International Scrutiny*

States of emergency have faced international scrutiny since the 1970s when concern was raised that states of emergency were being used to legalise and legitimise human rights abuses.<sup>6</sup> As

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<sup>5</sup> European Commission for Democracy Through Law (Venice Commission) *Opinion on the protection of human rights in emergency situations* Opinion no. 359 / 2005 (2006) [Venice Commission] at [11].

<sup>6</sup> Leandro Despouy *The administration of justice and the human rights of detainees: Question of human rights and states of emergency* E/CN.4/Sub.2/1997/19 (1997) at [3].

a result, Nicole Questiaux was appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities as Special Rapporteur to investigate the relationship between the use of emergency powers and human rights violations. Questiaux submitted an extensive report detailing the conditions and requirements that must be met for a state of emergency to be legal.<sup>7</sup> Leonardo Despouy was appointed as Special Rapporteur in 1985 and produced ten annual reports which addressed questions of compliance, provided guidelines that would serve as norms, and recommended measures that would help guarantee respect for human rights during states of emergencies.<sup>8</sup>

Following Mr Despouy's final report as Special Rapporteur in 1997, a number of independent bodies such as the European Commission for Democracy Through Law (Venice Commission) have attempted to clarify the norms and requirements of states of emergency.<sup>9</sup> However, there appears to have been a purposeful shift by the Human Rights Commission away from scrutinising states of emergency and human rights. In 2004 the United Nations High Commissioner for Human Rights suggested that this may have been due to unusual complexities which made comprehensive consideration of the issue difficult, or simply because the issue did not fall within a specific mandate.<sup>10</sup> Despite the recent shift away from intense international scrutiny, it is clear that there has always been a relationship between the misuse of emergency powers and human rights abuses, making compliance with the requirements of particular importance.

### *B. Substantive and Procedural Requirements*

The fact that states will at some point face an emergency situation is inevitable. During these periods states may be required to limit certain rights to allow for effective governance and to maintain public order and safety. International human rights treaties provide for emergency situations by allowing states to derogate from certain rights in exceptional circumstances.

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<sup>7</sup> Nicole Questiaux *Question of the human rights of persons subjected to any form of detention or imprisonment: Study of the implications of human rights of recent developments concerning situations known as states of siege or emergency* E/CN.4/Sub.2/1982/15 (1982) at [32].

<sup>8</sup> Despouy, above n 6, at [13]-[14].

<sup>9</sup> Venice Commission, above n 5, at [3].

<sup>10</sup> United Nations High Commissioner for Human Rights *Protection of human rights and fundamental freedoms while countering terrorism: Study of the United Nations High Commissioner for Human Rights* A/59/428 (2004) at [43].

Derogation is permitted under Article 4 of the ICCPR, which sets out a number of substantive and procedural requirements that must be met.<sup>11</sup>

### 1. *Substantive requirements*

First, there must be a public emergency amounting to “a threat to the life of the nation”.<sup>12</sup> The ICCPR does not provide a definition as to what amounts to this. In general, there must be an exceptional threat which affects the ability of the state to function properly. In *Lawless v Ireland (No 3)* a public emergency was defined as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed”.<sup>13</sup> A similar definition was provided in the *Greek Case*. This requires the threat to be actual or imminent, involve the whole nation, and threaten the continuation of the organised life of the community. The crisis or danger must be exceptional, so normal restrictions on rights are not adequate.<sup>14</sup> Although these cases were concerned with the interpretation of Article 15 of the ECHR, both definitions were endorsed by Nicole Questiaux in her role as Special Rapporteur and are considered applicable to the ICCPR.<sup>15</sup> An emergency must also be exceptional and temporary in nature, and emergency powers should have a finite and limited purpose.<sup>16</sup> International law sets a high threshold and not all disturbances or catastrophes will meet this standard.<sup>17</sup>

Derogation must also be proportionate and necessary. States must only derogate from their obligations to the extent strictly required by the exigencies of the situation. Duration, geographical coverage and the material scope of derogations must all be limited as required.<sup>18</sup> The proportionality requirement applies to general derogation from the right itself, as well as specific measures taken to limit that right.<sup>19</sup> Each measure needs to be directed at an “actual,

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<sup>11</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 4.

<sup>12</sup> Fionnuala Ní Aoláin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism*, AHRC/37/52 (2018) at [10].

<sup>13</sup> *Case of Lawless v Ireland (No 3)* (1961) 332/57 Court (Chamber) ECHR at [28].

<sup>14</sup> *The Greek Case* (1969) Report of Sub-Commission 3321/67-3344/67 (EComHR) at [113].

<sup>15</sup> Questiaux, above n 7, at [55]-[57].

<sup>16</sup> Ní Aoláin, above n 12, at [14].

<sup>17</sup> United Nations Human Rights Council *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency* CCPR/C/21/Rev.1/Add.11 (2001) at [3].

<sup>18</sup> *General Comment No. 29*, above n 17, at [4].

<sup>19</sup> At [4].

clear, present or imminent danger”.<sup>20</sup> Derogations are required to be compatible with a state’s international law obligations, in particular international humanitarian law and any treaty obligations.<sup>21</sup> Finally, derogations cannot discriminate on the grounds of race, colour, sex, language, religion or social origin.<sup>22</sup>

## 2. *Procedural requirements*

The first procedural requirement under international law is that formal notice of the derogation must be given. Under the ICCPR this notice must officially be made through the Secretary-General of the United Nations.<sup>23</sup> Notification must include a description of the measures taken and a clear explanation of the reasons for those measures. If further measures are taken, for example an extension of the state of emergency, further notification is required.<sup>24</sup> Notification must also be made to other states.<sup>25</sup> The second requirement is proclamation, which is an obligation for the state to inform its citizens that the legal rules have changed.<sup>26</sup> Proclamation must be meaningful, provided by a clear and accessible source, be public and available, and be capable of being understood by the public at large.<sup>27</sup> A state will usually have these procedures set out in its constitution.<sup>28</sup> Finally, a state of emergency should always be for a fixed term and never exceed the period strictly required to return to normal circumstances.<sup>29</sup>

## 3. *Non-derogable rights*

Non-derogable rights are rights that cannot be deviated from under any circumstances. Under Article 4(2) of the ICCPR examples are: Article 6 (right to life), Article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent) and Article 15 (the principle of legality in the field of criminal law).<sup>30</sup>

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<sup>20</sup> Ní Aoláin, above n 12, at [39].

<sup>21</sup> *General Comment No. 29*, above n 17, at [9].

<sup>22</sup> International Covenant on Civil and Political Rights, above n 11, art 4(1).

<sup>23</sup> United Nations Economic and Social Council *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4 (1984) [*Siracusa Principles*] at [43].

<sup>24</sup> *General Comment No. 29*, above n 17, at [17].

<sup>25</sup> *Siracusa Principles*, above n 23, at [45].

<sup>26</sup> Ní Aoláin, above n 12, at [23].

<sup>27</sup> At [45].

<sup>28</sup> *General Comment No. 29*, above n 17, at [2].

<sup>29</sup> Richard Lillich “The Paris Minimum Standards of Human Rights Norms in a State of Emergency” (1985) 79 *AJIL* 1072 [Paris Standards] at [3a]-[b].

<sup>30</sup> International Covenant on Civil and Political Rights, above n 11, art 4(2).

Derogation measures cannot be inconsistent with the state party's other obligations under international law, in particular international humanitarian law.<sup>31</sup> States cannot invoke Article 4 of the ICCPR as justification for acting in violation of peremptory norms of international law, for example, arbitrary deprivations of liberty or deviating from fundamental principles of fair trial.<sup>32</sup> Rights explicitly recognised as non-derogable must be secured by procedural guarantees which will usually include judicial guarantees.<sup>33</sup> This is an incomplete list; states party to certain treaties will be subject to additional non-derogable rights, for example, states that have ratified the Treaty of Rome.

### *C. 2017 Special Rapporteur Report*

In 2017 Fionnuala Ní Aoláin was appointed Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Her first annual report considers states of emergency and derogations in the context of counter-terrorism. Of particular concern is the possibility that counter-terrorism legislation is functioning as a way of consolidating emergency practices into ordinary legislation, resulting in the permanent limitation of human rights.<sup>34</sup> This new mandate focusing on states of emergency shows that the use, and misuse, of emergency powers is still a relevant and pressing issue. The report is useful as a current and up-to-date consolidation of the international legal requirements and helps identify some of the current issues surrounding states of emergency. It provides a helpful framework for the analysis in Part IV and V. The report identifies the ICCPR and ECHR as the key treaties and the fundamental requirements contained in these treaties have been identified and set out in detail in Parts III(1)-(2) of this paper.<sup>35</sup>

The report identifies the importance of public derogation and notification as they ensure transparency and accountability. Failure to publicly derogate and keep other states notified leaves open the possibility to abuse the state of emergency.<sup>36</sup> Proclamation (notification to the state's citizens) helps to uphold the rule of law, ensures transparency and allows for contestation by citizens if measures are excessive.<sup>37</sup> Two main issues with notification and

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<sup>31</sup> International Covenant on Civil and Political Rights, above n 11, art 15(1).

<sup>32</sup> *General Comment No. 29*, above n 17, at [11].

<sup>33</sup> At [15].

<sup>34</sup> Ní Aoláin, above n 12, at [4].

<sup>35</sup> At [7]-[14].

<sup>36</sup> At [22].

<sup>37</sup> At [23].

proclamation are identified. Firstly, treaty bodies are criticised for employing a check-box approach which results in a lack of robust engagement with states over notification, in particular when notification does not reach the required standard.<sup>38</sup> Secondly, many states no longer formally derogate when invoking emergency practices which results in a lack of legal oversight.<sup>39</sup> The importance of states applying the tests of legitimacy, proportionality and necessity are also stressed as they help to prevent adverse consequences for minorities and/or vulnerable groups.<sup>40</sup> Emergency powers could, for example, be used to target legitimate dissent and political opposition. However if the correct processes are followed international scrutiny and oversight can, in theory, discourage the misuse of emergency powers.<sup>41</sup>

The report defines *de facto*, hidden and complex emergencies. *De facto* emergencies are the use of emergency powers without formal acknowledgement of the existence of an emergency, for example, passing exceptional legislation without an official declaration of emergency.<sup>42</sup> Hidden emergencies occur when the courts and Parliament are persuaded to “acquiesce to the minimal interpretations” of human rights, stripping these rights of most of their content. This can result in covert derogations, or the redefinition and dilution of rights.<sup>43</sup> Complex emergencies arise when different forms of legislation and administrative practice pile up and result in “a complex and overlapping mosaic of legal regulation”.<sup>44</sup> The report stresses the need to scrutinise and pay greater attention to these types of practices.

The report deals with issues surrounding the ending of a state of emergency and the importance of substantial international oversight. Ending an emergency is easier when it has been finely tailored to a specific crisis and there is robust oversight, and due to the nexus between extended emergencies and human rights violations it is of great importance to ensure emergencies do not last any longer than absolutely necessary.<sup>45</sup> The report stresses that the more expansive and powerful the emergency regulations are, the closer the international oversight must be, as these types of regulations can often be targeted at minorities.<sup>46</sup>

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<sup>38</sup> Ní Aoláin, above n 12, at [26].

<sup>39</sup> At [27].

<sup>40</sup> At [28].

<sup>41</sup> At [47].

<sup>42</sup> At [30]-[34].

<sup>43</sup> At [35].

<sup>44</sup> At [37].

<sup>45</sup> At [55]-[58].

<sup>46</sup> At [6]-[62].

### *III. Fiji's Coup History*

This part briefly addresses the three coups that preceded the 2006 coup, showing the history of ethnic tensions within the country and the unstable political environment. The events immediately preceding and following the 2006 coup are then outlined, as well as the case of *Qarase v Bainimarama* and its aftermath. These events are critical as they provide the background that led to the implementation of the three-year state of emergency and the Public Emergency Regulations, which form the basis of this paper's analysis.

#### *A. Fiji's First Coups*

Since gaining independence from the United Kingdom in 1970, Fiji has experienced four coups. On 14 May 1987 Sitiveni Rabuka, a colonel in the Royal Fiji Military Forces (RFMF), led Fiji's first coup. Soldiers entered the House of Representatives and arrested government members.<sup>47</sup> Discussions between the Great Council of Chiefs and the Governor General resulted in a compromise plan that established an interim Council of Ministers to re-write the 1970 Constitution and a plan to gradually return the country to civilian rule.<sup>48</sup> However, mere days later on 25 September 1987 Rabuka orchestrated a second coup, during which the Constitution was formally revoked and Fiji was declared a republic. A civilian government was reinstalled by December, following a breakdown of civil order and an increase in crime and human rights abuses.<sup>49</sup>

A new Constitution was promulgated in 1990, enshrining the political dominance of indigenous Fijians by ensuring they could hold more seats than non-indigenous Fijians in both Parliament and the Senate.<sup>50</sup> In 1997 a new, non-discriminatory Constitution replaced the 1990 Constitution, and in 1999 Mahendra Chaudhry became the first ethnic Indian Prime Minister.<sup>51</sup> The third coup occurred on 19 May 2000 when George Speight, a failed Fijian businessman, took Chaudhry and members of the government hostage at gunpoint. President Ratu Sir Kamisese Mara declared a state of emergency, promulgated emergency regulations and prorogued Parliament for six months. On 29 May President Mara resigned, allegedly under duress, and the Commander of the RFMF Frank Bainimarama abrogated the constitution,

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<sup>47</sup> Paul Bellamy "The 2006 Fiji Coup: Impact on Human Security" (2006) 4 JHS 4 at 6.

<sup>48</sup> Roderic Alley "Fiji Coups of 1987 and 2000: A Comparison" (2001) 1 RJP Hors Série 217 at 224.

<sup>49</sup> At 224.

<sup>50</sup> Ved Nanda "Ethnic Conflict in Fiji" (1992) 25 Cornell Int'l L.J. 565 at 571.

<sup>51</sup> Bellamy, above n 47, at 7.

assumed power by decree and established an interim civilian government. The interim civil government was headed by Laisenia Qarase.<sup>52</sup> The hostages were eventually released eight weeks later following negotiations between Speight and Bainimarama. These negotiations resulted in the Mauanikau Accord, the terms of which included a review of the Constitution and immunity from prosecution for coup participants.<sup>53</sup>

### *B. 2006 Elections and Coup*

Tensions between the Qarase government and the military, led by Bainimarama, were evident as far back as 2003. These tensions continued throughout the 2006 election season.<sup>54</sup> In May 2006 the Qarase government was re-elected. The Fiji Labour Party, led by Chaudhry, also won a number of seats, which resulted in the introduction of a multiparty power-sharing cabinet.<sup>55</sup> There were no ground rules in place for a multiparty cabinet, which caused confusion. There was also a sluggish economy, allegations the government were bankrupt, and concerns about its competency.<sup>56</sup>

Things came to a head in October 2006 when Bainimarama gave the government three weeks to resign. He claimed that no special powers were required to legalise this and that the military would “walk into the office of the Prime Minister and demand his resignation”.<sup>57</sup> In response the government tried, unsuccessfully, to remove Bainimarama from power while he was overseas, resulting in increased public support for him.<sup>58</sup> In November, Bainimarama reiterated his demands which included all investigations into him for his role in ending the 2000 coup to be dropped, all cabinet members that had been involved in the coup to be removed from office and a political declaration that the coup was illegal. Qarase eventually conceded to nearly all Bainimarama’s terms but by this point it was too late.<sup>59</sup>

Fiji’s fourth coup occurred on 5 December 2006 at 6pm when Bainimarama announced a military take-over, invoking the “doctrine of necessity” to justify his actions. Bainimarama

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<sup>52</sup> Bellamy, above n 47, at 7.

<sup>53</sup> At 7.

<sup>54</sup> Brij Lal “Anxiety, uncertainty and fear in our land: Fiji’s road to military coup, 2006” in Jon Fraenkel, Stewart Firth, Brij Lal (eds) *The 2006 Military Takeover in Fiji* (ANU E Press, Canberra, 2009) 21 at 23.

<sup>55</sup> Lal, “Anxiety, uncertainty and fear in our land”, above n 54, at 26.

<sup>56</sup> At 28-29.

<sup>57</sup> At 30.

<sup>58</sup> At 29.

<sup>59</sup> At 33-34.

claimed that the government were corrupt and nearly bankrupt, that new, controversial bills were going to cause “unprecedented harm” and that perpetrators of the 2000 coup were still at large. According to Bainimarama, it was therefore in the national interest for him to remove the Qarase government.<sup>60</sup> Bainimarama then claimed that the President, Ratu Josefa Iloilo, was under undue influence which prevented him from exercising his constitutional powers. Bainimarama temporarily assumed these powers and dismissed Prime Minister Qarase.<sup>61</sup> The following day Bainimarama dissolved Parliament and installed a military administration.<sup>62</sup> A state of emergency was also imposed and repeatedly extended until October 2007.<sup>63</sup> On 5 January 2007, Iloilo was reinstated as President and Bainimarama was appointed interim Prime Minister.<sup>64</sup> President Iloilo also ratified all actions taken by Bainimarama up to this point.<sup>65</sup>

### *C. 2009 Abrogation of Constitution and State of Emergency*

On 20 February 2007, ex-Prime Minister Qarase brought proceedings against Bainimarama challenging the actions of President Iloilo during the 2006 coup. Bainimarama argued the President had prerogative powers which enabled him to act in an emergency for the public good. Qarase argued that these powers were not specifically authorised by the Constitution.<sup>66</sup> Although it is not completely clear why proceedings were brought against Bainimarama rather than the President, the High Court and Court of Appeal make mention of the fact that the President’s actions were merely ratifications of the Commanders actions, which could provide some explanation.<sup>67</sup>

The High Court ruled that the President’s actions were legal; the President retained prerogative powers that were not limited by the Constitution.<sup>68</sup> The case was appealed, and on 9 October 2009 the Court of Appeal ruled that the military regime appointed following the 2006 coup was illegal.<sup>69</sup> Section 109 of the 1997 Constitution expressly set out the circumstances in

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<sup>60</sup> Lal “This Process of Political Readjustment”, above n 1, at 94.

<sup>61</sup> Lal “Anxiety, uncertainty and fear in our land”, above n 54, at 35.

<sup>62</sup> *Qarase v Bainimarama* [2009], above n 2, at [2].

<sup>63</sup> “Fiji’s govt to lift state of emergency” *The Sydney Morning Herald* (online ed, Sydney, 6 October 2007).

<sup>64</sup> Lal, “Anxiety, uncertainty and fear in our land”, above n 54, at 35.

<sup>65</sup> *Qarase v Bainimarama* [2009], above n 2, at [3].

<sup>66</sup> Anita Jowitt “The Qarase v Bainimarama Appeal Case” 200913(1) JSPL 24 at 28.

<sup>67</sup> *Qarase v Bainimarama* [2009], above n 2, at [3].

<sup>68</sup> Jowitt, above n 66, at 29.

<sup>69</sup> Markovic, above n 3.

which a President could dismiss a Prime Minister: if the government fails to get, or loses, the confidence of the House, and the Prime Minister does not resign or dissolve Parliament.<sup>70</sup> The President did not have discretion to dismiss the Prime Minister for reasons other than those prescribed, and therefore the dismissal of Prime Minister Qarase was invalid under the Fijian Constitution. The Court declared a number of acts unlawful under the Constitution, including Bainimarama's assumption of executive authority and declaration of state of emergency.<sup>71</sup> The Court called on President Iloilo to appoint an independent caretaker Prime Minister who was not Bainimarama to assist with elections.<sup>72</sup>

On 10 April, the day after the Court of Appeal ruling, President Iloilo abrogated the Constitution, sacked the judiciary, declared a 30-day state of emergency and brought the Public Emergency Regulations (PER) into force. Iloilo appointed himself the new head of state and reappointed Bainimarama as Prime Minister, extending his term and postponing elections until 2014.<sup>73</sup> On 9 June 2007 the state of emergency and the Public Emergency Regulations were extended for a further 30 days for national security reasons, including placing restrictions on media reporting.<sup>74</sup> The state of emergency was continually extended until January 2012, when both the state of emergency and the PER were lifted.<sup>75</sup> Elections were held in 2014, and Prime Minister Bainimarama was democratically re-elected.<sup>76</sup>

#### *IV. Legitimacy of Fiji's State of Emergency*

This part analyses whether the states of emergency invoked in Fiji in 2006 and 2009 were legitimate under international law. First, it must be established that the situation in Fiji at the time the states of emergency were invoked was a public emergency amounting to a threat to the life of the nation. Then the procedural requirements set out earlier in this paper will be applied. If these requirements are not met, the states of emergency will not be legitimate under international law.

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<sup>70</sup> *Qarase v Bainimarama* [2009], above n 2, at [92]-[93].

<sup>71</sup> At [170].

<sup>72</sup> Markovic, above n 3.

<sup>73</sup> As above.

<sup>74</sup> As above.

<sup>75</sup> "UN human rights chief welcomes lifting of state of emergency in Fiji" *UN News* (online ed, 9 January 2012).

<sup>76</sup> "Fiji's Frank Bainimarama confirmed as election winner with outright majority" *The Guardian* (online ed, London, 22 September 2014).

### A. 2006 State of Emergency

An initial issue that must be dealt with is that Fiji is not party to the ICCPR, and therefore might not be bound by Article 4. This question has been directly addressed by the Fijian courts, which have consistently ruled that s 43(2) of the 1997 Constitution allowed for the application of the ICCPR and other international human rights treaties, despite Fiji not being a state party to them.<sup>77</sup> Section 43(2) stated that courts “must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law”. The Special Rapporteur also specifically addressed this issue in her report, stating that the proclamation requirement in states of emergency remains good practice even if States are not party to the treaty.<sup>78</sup> Therefore even if a state is not bound by the ICCPR, there is still an expectation that they will comply with certain requirements.

Fiji’s 2006 state of emergency has already been found to be illegal under the 1997 Constitution in the Court of Appeal decision of *Qarase v Bainimarama*.<sup>79</sup> Under s 187 of the Constitution Parliament could confer on the President, acting on behalf of Cabinet, the power to proclaim a state of emergency and make emergency regulations.<sup>80</sup> The Court in *Qarase v Bainimarama* ruled that these powers did not fall under the President’s prerogative. Therefore, as the President was not acting on behalf of Cabinet, he was not authorised to use his discretion to issue a state of emergency and dismiss the Prime Minister and Cabinet.<sup>81</sup>

The 1997 Constitution also established that for a state of emergency to be declared, there must be reasonable grounds for believing the “life of the state is threatened”.<sup>82</sup> International law requires the same threshold to be met.<sup>83</sup> The *Lawless v Ireland* standard requires there to be an “exceptional and imminent danger or crisis” constituting “a threat to the organised life of the community”.<sup>84</sup> Bainimarama justified the state of emergency as necessary to prevent civil disruption following intelligence reports suggesting protests had been planned, but no specific

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<sup>77</sup> Amnesty International *Paradise Lost*, above n 4, at 17.

<sup>78</sup> Ní Aoláin, above n 12, at [23].

<sup>79</sup> *Qarase v Bainimarama* [2009], above n 2, at [170].

<sup>80</sup> The Constitution of Fiji 1997, ch 187(1)-(2).

<sup>81</sup> *Qarase v Bainimarama* [2009], above n 2, at [134].

<sup>82</sup> The Constitution of Fiji 1997, ch 187(3)(a).

<sup>83</sup> Ní Aoláin, above n 12, at [10].

<sup>84</sup> *Case of Lawless v Ireland (No 3)*, above n 13, at [28].

threat was identified and only vague references were made to preventing civil disturbance and the possibility of protests.<sup>85</sup>

Both Fiji's Constitution and international law principles repeatedly stress the high standard required for the threshold to be met, and the Siracusa Principles established that "internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation" will not reach the required standard.<sup>86</sup> Furthermore, General Comment 29 establishes that states need to carefully consider their justifications for derogations in situations that are not armed conflicts.<sup>87</sup> There was no evidence of a serious or imminent threat to the general public or the community as a whole, and the possibility of protests did not pose a serious enough danger to the State to warrant a declaration of a state of emergency. The situation in Fiji was not an armed conflict and clearly did not reach the high threshold required to amount to a threat to the life of the nation.

International law also requires derogation to be proportionate and necessary.<sup>88</sup> Unlike the 2009 state of emergency, during which the Public Emergency Regulations were promulgated, there were only a few specific derogations made following the 2006 coup, mainly restricting freedom of movement. There was to be a cordon around the Greater Suva area and checkpoints set up and the military was given power to impose curfews if required.<sup>89</sup> Although there was evidence of a possibility of protests, it does not appear that this constituted a legitimate threat to public safety. Instead, it is more likely the measures were introduced to prevent any protests or civil dissent in response to the coup. As a serious threat to public safety cannot be established, the measures introduced will not have been proportionate or necessary. Finally, formal and public notification of the state of emergency and proposed derogations was required.<sup>90</sup> Fiji failed to notify the Secretary-General of the state of emergency or proposed derogations.<sup>91</sup> At the very least, Fiji would be expected to notify other states of the state of

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<sup>85</sup> Fred Attewell "State of Emergency Declared in Fiji" *The Guardian* (online ed, London, 6 December 2006).

<sup>86</sup> *Siracusa Principles*, above n 23, at [40].

<sup>87</sup> *General Comment No. 29*, above n 17, at [3].

<sup>88</sup> At [3].

<sup>89</sup> "Fiji's military declares a state of emergency - calls in all reserves" *Radio NZ* (online ed, Wellington, 6 December 2006).

<sup>90</sup> *Siracusa Principles*, above n 23, at [43].

<sup>91</sup> Details of states notifications of a derogation under Article 4 are lodged online. Fiji had no notifications lodged. United Nations "International Covenant on Civil and Political Rights" United Nations Treaty Collection <<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5>>

emergency and any proposed limitations to rights, however no evidence can be found that this happened.<sup>92</sup>

Proclamation is also required; states must inform their citizens that the legal rules have changed.<sup>93</sup> The military officially announced the state of emergency but provided limited detail about any derogations.<sup>94</sup> Despite this there were widespread reports that freedom of expression and freedom of information were suspended between December 2006 and May 2007: political critics and the media were threatened, the military were present in newspaper offices, and dissenters were rounded up and tortured.<sup>95</sup> There was an absence of guidance as to what was deemed to be acceptable for publication or broadcast, which resulted in the military intervening on a case-by-case basis.<sup>96</sup> International law requires proclamation to be meaningful and adequately inform the public of any new laws or changes to existing laws to ensure that the principle of legality is upheld.<sup>97</sup> However this did not happen, providing clear evidence that the proclamation was not adequate: the media were not informed of the new laws or standards, yet were still punished for any breach or if their actions were not deemed acceptable.

Following the correct procedures helps to ensure international oversight and prevents the misuse of emergency powers. In this case these procedures clearly were not followed. The standard required by international law for a public emergency was not met, and the threat itself was not adequately identified or made clear. Both the public and the international community were left in the dark in regards the specific derogations and new legal standards, but despite this lack of clarity human rights were still severely limited and abused. The Fijian government assured the general public that international covenants and international humanitarian law would continue to be respected, but the evidence shows this clearly was not the case.<sup>98</sup>

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<sup>92</sup> States such as New Zealand and the United States instead froze aid to Fiji following the coup, which would suggest they were not no official channels of notification were used. “Fiji’s military ruler declares state of emergency” *CBC News* (online ed, Toronto, 6 December 2006).

<sup>93</sup> Ní Aoláin, above n 12, at [23].

<sup>94</sup> “State of emergency declared in Fiji” *The Guardian* (online ed, London, 6 December 2006).

<sup>95</sup> Russell Hunter “State control and self-censorship in the media after the coup” in Jon Fraenkel, Stewart Firth, Brij Lal (eds) *The 2006 Military Takeover in Fiji* (ANU E Press, Canberra, 2009) 277 at 279-281.

<sup>96</sup> Amnesty International *Fiji: Submission to the UN Universal Periodic Review* (International Secretariat, London, 2009) at 6.

<sup>97</sup> Ní Aoláin, above n 12, at [45].

<sup>98</sup> Robbie Robertson *The General’s Goose: Fiji’s Tale of Contemporary Misadventure* (ANU Press, Canberra, 2017) at 212.

## *B. 2009 State of Emergency*

The 2009 state of emergency failed to reach the threshold established by international law for the same reasons the 2006 emergency failed. The emergency was not adequately identified; later broadcasts made mention of the fact that the emergency would help the government “in achieving their objective” however it was not made clear what this objective was.<sup>99</sup> Bainimarama declared in a speech made two days after the introduction of the PER that their purpose was to prevent the opposition from stalling reforms, and that freedom of speech “had caused problems in the past”.<sup>100</sup> This does not even come close to an emergency that threatens the life of the nation. No clear emergency was identified, and no evidence was provided of any threat to the safety of the nation. The main motive for introducing the emergency powers instead appears to have been to allow a crack-down on dissent and criticism of the regime. The possibility of emergency powers being exploited for this very purpose is explicitly identified by the Special Rapporteur in her report, and Fiji provides a clear illustration of this misuse.<sup>101</sup>

The implementation of the PER made it clear which rights had been derogated from. This provided the public with clear and accessible information on which rights were being limited and the new laws that had been introduced. The proclamation requirement was therefore likely to have been met, but serious questions can be raised in regard to the proportionality and necessity of the PER. This question will be addressed in more detail in Part V. Furthermore, there was again no official notification to the Secretary-General or other states.<sup>102</sup> Despite the fact that the proclamation requirement was met, the 2009 declaration of a state of emergency was still illegitimate under international law. The required threat threshold was not achieved, and the reasons given by the interim government for imposing the state of emergency did not even come close to providing adequate justification for its implementation.

## *V. Evaluation of Content of Public Emergency Regulations 2009*

This part will analyse specific provisions from the Public Emergency Regulations and whether the limits they placed on rights were proportionate and necessary, and required by the exigencies of the situation. States will sometimes derogate from rights under the pretext of a state of emergency for purposes other than managing an emergency, or to a wider extent than

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<sup>99</sup> “State to extend emergency regulation” *Fiji Sun Online* (online ed, Suva, 26 August 2009).

<sup>100</sup> Robertson, above n 98, at 242.

<sup>101</sup> Ní Aoláin, above n 12, at [47].

<sup>102</sup> United Nations Treaty Collection, above n 92.

justified. Therefore it is important that these standards are strictly enforced.<sup>103</sup> The actions of the Government, military and police in enforcing the PER will also be considered.

#### *A. Freedom of Expression*

Under the PER serious restrictions were placed on freedom of expression and the media. The Permanent Secretary for Information was authorised to prohibit a broadcast or publication if they believed it may result in disorder or a breach of the peace, promote disaffection or public alarm, or undermine the government.<sup>104</sup> Ministry of Information officers, usually accompanied by police or military officers, were placed in newsrooms with the ability to censor broadcasts or publications and news scripts were required to be emailed to the Ministry before going to air.<sup>105</sup> There were numerous reports of threats and intimidation against the media: editors, publishers and journalists were summoned by the Ministry or police to justify their stories, content was often restricted, and reporters were arrested and detained.<sup>106</sup> Foreign journalists were expelled and local media was warned not to speak to the foreign media.<sup>107</sup>

The derogations under the PER do not appear to have been proportionate or necessary. Freedom of expression is an important right and the incidents detailed show this right was seriously curtailed by the Fijian government. There is no evidence that media publications would have incited violence or resulted in public disorder or breaches of the peace and therefore the level of censorship imposed by the PER was completely unnecessary. Even if some level of censorship was necessary which, in my opinion, it was not, the censorship imposed is completely disproportionate especially when considered alongside the intimidation the media faced. Instead it appears to be more likely that the extensive restrictions were introduced to prevent the media publicly criticising the abrogation of the Constitution and the new government. This is further supported by comments made by Bainimarama himself stating that free speech had caused trouble in the past. Furthermore, the government failed to clearly identify an actual threat; instead they introduced blanket restrictions preventing the media from publishing anything critical of the regime.

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<sup>103</sup> Venice Commission, above n 5, at [12].

<sup>104</sup> Public Emergency Regulations 2009 (Fiji) s 16(1).

<sup>105</sup> Human Rights Watch *UPR Submission: Fiji* (New York, 2009) at 3.

<sup>106</sup> At 3.

<sup>107</sup> Frank La Rue *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Fiji Urgent appeal A/HRC/14/23/Add.1* (2010) at [856].

In her report the Special Rapporteur is critical of laws, in the context of terrorism, that criminalise freedom of expression in particular views that may appear to praise or support terrorism, as they raise concerns of legality and place an unjustifiable limit on freedom of expression. These laws are often used to target legitimate political opposition, critics and dissidents, and the report clearly states that non-violent criticism of the state should not be made a criminal offence.<sup>108</sup> If laws against praising or supporting terrorism place an unjustified limit on freedom of expression, it is highly unlikely that the situation in Fiji would justify the imposition of such strict laws limiting freedom of expression. State discretion is not unfettered, and emergency powers should not be used as “a means to limit legitimate dissent, protest, expression and the work of civil society”.<sup>109</sup> However, it appears that this is exactly what the Fijian government did by using the exceptional powers contained in the PER to subvert legitimate criticism and opposition to the state.

A state of emergency and any derogations from rights should strictly only last for as long as the situation requires.<sup>110</sup> When the PER were first introduced they were only supposed to be in place for 30-days.<sup>111</sup> However they were repeatedly extended until for almost three years.<sup>112</sup> The restrictions contained in the PER has already been shown to be unnecessary and disproportionate, and to have them repeatedly renewed under the vague justification of “the security situation” was completely unwarranted.<sup>113</sup> There is no evidence to show that there was an ongoing threat of civil disruption during this period that could justify media restrictions to this extent, and for this length of time.

Professor Ní Aoláin is extremely critical in her report of instances where emergency regulations become ordinary laws. When this happens, emergency powers become permanent which is illegal under international law.<sup>114</sup> In 2010 the Media Industry Development Decree (Media Decree) was introduced. This was introduced as ordinary (not emergency) legislation, and imposed, among other things, jail time of up to two years and/or a fine of \$25,000 for any

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<sup>108</sup> Ní Aoláin, above n 12, at [47].

<sup>109</sup> At [49].

<sup>110</sup> Paris Standards, above n 29, at [3a]-[b].

<sup>111</sup> Markovic, above n 3.

<sup>112</sup> “UN human rights chief welcomes lifting of state of emergency in Fiji” *UN News* (online ed, 9 January 2012).

<sup>113</sup> “Fiji Extends Public Emergency Regulation, Drawing Criticisms” *Solomon Times Online* (online ed, Honiara, 11 June 2009).

<sup>114</sup> Ní Aoláin, above n 12, at [4].

reporting that was deemed to be “against the national interest” by a government body.<sup>115</sup> The Media Decree has resulted in continuous self-censorship by the Fijian media and still remains in place today.<sup>116</sup> This is a prime example of emergency powers becoming permanent, ordinary legislation and continuing in domestic law even after the state of emergency has ended. The derogations from freedom of expression under the PER were completely disproportionate, unfounded and have resulted in media suppression that continued well past the revocation of the PER.

### *B. Freedom of Assembly*

While the most serious restrictions under the PER were on freedom of expression and the media, freedom of assembly was also seriously curtailed. The Venice Commission recognise freedom of assembly as a fundamental right which should not be interpreted narrowly.<sup>117</sup> Derogation is permitted under the ICCPR only where necessary in a democratic society; the main justification will usually be for the protection of public safety or national security.<sup>118</sup>

Under the PER the Police Commissioner was authorised to prohibit, absolutely or subject to conditions, any procession, meeting, or assembly in any private or public place. The powers were wide: no standard was required to be met before a meeting was banned, and it was irrelevant if a permit had already been obtained.<sup>119</sup> This power was far wider than required by the exigencies of the situation. In the days following the abrogation of the Constitution it might have been reasonable to expect protests and gatherings, and a ban may have been required to keep the peace and ensure public safety. However, a blanket provision that allowed complete prohibition, and that remained in force for the duration of the PER, is extensive and overreaching.

Numerous abuses of this power were reported including arbitrary restrictions and revocations of permits for meetings. The National Farmers Union’s annual general meeting had its permit revoked and the Fiji Institute of Accountants were refused a permit unless certain speakers were removed and speeches were vetted by government officials prior to the meeting.<sup>120</sup> There

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<sup>115</sup> Media Industry Development Decree 2010 (Fiji) s 22-24.

<sup>116</sup> National Federation Party “NFP will repeal Media Decree” (press release, 2 May 2017).

<sup>117</sup> Venice Commission, above n 5, at [14]-[17].

<sup>118</sup> International Covenant on Civil and Political Rights, above n 11, art 11(1).

<sup>119</sup> Public Emergency Regulations 2009 (Fiji) s 3(1).

<sup>120</sup> Human Rights Watch, above n 102, at 3.

seems to be no legitimate reason for banning these meetings as there is no evidence of a threat to national security or public safety. The Methodist Church of Fiji were also banned from holding their annual conference until 2014 and numerous officials and members were arrested, detained and charged under the PER. The former President of the Church, Reverend Manasa Lasaro, was arrested and detained for two days under the PER following statements denouncing the PER and reiterating the Church's opposition to the government.<sup>121</sup> Banning the Methodist Church of Fiji's conference appears to have more likely been a response to the Church's opposition of the government than a decision to protect public safety. This provides further evidence that the PER were used as a means to quash legitimate dissent and criticism of the government.

As with the power for prohibition, wide powers to disperse gatherings were also introduced. Any police officer, administrative officer or army officer above rank of sergeant could order a gathering to disperse and was authorised to use any force necessary to do so. This included authorisation of the use of arms. Furthermore, immunity was provided from civil or criminal proceedings for any harm of death caused.<sup>122</sup> There are a number of issues with this particular provision. Firstly, the use of force to disperse demonstrations is a serious limitation on freedom of assembly.<sup>123</sup> These powers under the PER again had no apparent restrictions placed on them: the assembly did not have to be non-peaceful and evidence of the potential for violence or disruption was not required.<sup>124</sup> Again, this restriction on freedom of assembly was not proportionate or necessary and the powers granted were far wider than the exigencies of the situation required. Furthermore, the powers were not just given to the police but also to the army and administrative officers. This widened the power even more, in particular the fact that administrative officers, who were not defined, could use force to disperse any sort of assembly or gathering.

The provision also lacked clarity for the general public. No definition was provided for what would amount to a procession, meeting or assembly. Police officers or army officers were entitled to enter any building, excluding a private dwelling, where they believed a meeting of three or more people was being held.<sup>125</sup> If a gathering of three or more people was enough to

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<sup>121</sup> Amnesty International *Submission to the UN*, above n 93, at 5.

<sup>122</sup> Public Emergency Regulations 2009 (Fiji), s 3(2)-(3).

<sup>123</sup> Venice Commission, above n 5, at [14].

<sup>124</sup> Public Emergency Regulations 2009 (Fiji), s 3(2)-(3) contained no guidance on the standard required before dispersion could be enforced.

<sup>125</sup> Section 3(5).

constitute a meeting or assembly, the definition would have been extremely wide. Giving the police, army or an administration officer the power to disperse a group of three or more people was completely disproportionate and the public had no guidance as to when this power might have been enforced.

Furthermore, any person in contravention of the rules set out in s3(3) of the PER would be guilty of an offence, meaning that in this case the principle of legality rule applies. Under the principle of legality criminal liability and punishment is limited to “clear and precise provisions of the law” and is recognised as a non-derogable right, which means that even in a state of emergency this right cannot be derogated from.<sup>126</sup> The ambiguity of s 3 and the fact that it carries a criminal punishment puts in clear contravention of the principle of legality. As the Venice Commission recognised, freedom of expression is an important right and the limitations placed on it by the PER were neither necessary or proportionate.

### *C. Arbitrary Detention and Freedom from Torture*

Under the PER the police and army were granted wide powers of arrest and detention. If a person was reasonably suspected of either acting, or being about to act in a manner “prejudicial to public safety or preservation of the peace”, either the police or army could arrest that person pending enquires.<sup>127</sup> A police officer or magistrate was permitted to extend detention for up to seven days, and anyone detained under the PER was deemed to be in lawful custody and could be detained in any prison, police station or other place authorised by the Police Commissioner or Commanding Officer.<sup>128</sup> Police officers and the armed forces were also permitted to use any force necessary, including the use of arms, to assist an arrest or search a person or building and immunity was provided for any harm or death caused.<sup>129</sup>

The powers granted to the police and army were unnecessarily wide. There were countless reports of arbitrary arrests and detentions under the PER. The PER allowed for the arrest of people, usually those legitimately dissenting or protesting the government, under vague concepts such as threatening peace and stability.<sup>130</sup> In particular the media and human rights

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<sup>126</sup> International Covenant on Civil and Political Rights, above n 11, art 15.

<sup>127</sup> Public Emergency Regulations 2009 (Fiji) s 18(1).

<sup>128</sup> Section 18(2)-(3).

<sup>129</sup> Section 21(a)-(c).

<sup>130</sup> Amnesty International *Paradise Lost*, above n 4, at 24.

defenders were targeted. In April 2009, six people were arrested and detained for four days for distributing pamphlets critical of the regime.<sup>131</sup> Again, in the period directly following the abrogation of the Constitution a crackdown on dissent and protests may have been necessary for a short period while there was a level of political instability, and the possibility of civil disruption. However, it would not have been necessary or proportionate for the purpose of public safety and keeping the peace for the police and army to have such wide and ambiguous powers. The period of time allowed for detention was also completely disproportionate. This once again seems to be evidence of the regime abusing the state of emergency and the PER to crack down on legitimate political dissent and opposition.

There is also evidence that many of those arrested were beaten and forced to perform military drills.<sup>132</sup> Under the ICCPR freedom from torture is recognised as a non-derogable right, and it as a peremptory norm under international law.<sup>133</sup> Freedom from torture under the ICCPR includes freedom from cruel, inhuman and degrading punishment.<sup>134</sup> The actions by the police and military were therefore in direct contravention of international human rights law. Although they were not specifically authorised under the PER, it is clear that the wide powers granted to the police and army, and their immunity from prosecution, resulted in severe abuses of peoples most fundamental human rights.

#### *D. Use of Lethal Force and Lack of Recourse*

As previously shown, the police and armed forces were authorised in certain situation to use any force deemed necessary and were provided complete immunity for any resulting death or injury. The right to use lethal force authorised the breach of one of the most fundamental human rights, the right to life, which under the ICCPR is a non-derogable right.<sup>135</sup> Although there is no record of any deaths caused by the police or armed forces under while enforcing the PER, between 2007 - 2008 four men were killed on separate occasions following assaults perpetrated by either the armed forces or the police. Each of these four men died as a direct result of the beatings they received while in custody.<sup>136</sup> Of these four deaths only one resulted in those responsible serving a prison sentence for murder. The police officers and soldiers

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<sup>131</sup> Amnesty International *Submission to the UN*, above n 93, at 5.

<sup>132</sup> At 5.

<sup>133</sup> *General Comment No. 29*, above n 17, at [11].

<sup>134</sup> International Covenant on Civil and Political Rights, above n 11, art 7.

<sup>135</sup> Article 3.

<sup>136</sup> Human Rights Watch, above n 102, at 2.

responsible for the deaths of two of the men were convicted of manslaughter, however in May 2009 the Minister for Justice authorised their release from prison under compulsory supervision orders.<sup>137</sup> There was no police investigation into the fourth death. Although these deaths occurred before the introduction of the PER they highlight the lack of recourse the public were given for grave human rights breaches under the regime.

Despite there being no recorded deaths due to action taken under the PER, the mere fact that blanket immunity was provided for the use of lethal force is of serious concern. Access to the courts or an effective remedy is the cornerstone of most democracies. Even if, to the extent strictly required, there are adjustments to the practical functioning of judicial or remedial procedures states must provide access to an effective remedy.<sup>138</sup> Derogation measures should not extend to right of access to court and/or the right to an effective remedy.<sup>139</sup> The PER were in direct violation of these requirements. Derogation from the right to an effective remedy or access to the courts is never necessary or proportionate, and removing this right for the breach of one of the most fundamental rights can never be justified in any situation.

Courts were also prevented from considering or ruling on the legality of any of the actions taken by the regime following the 2006 coup including the abrogation of the Constitution, the PER or any of the decrees introduced thereafter.<sup>140</sup> This directly contradicted international human rights standards that prohibit interference in judicial cases. The Fijian Human Rights Commission were barred from receiving complaints or investigating the legality of the abrogation of the Constitution or any Decrees.<sup>141</sup> This again took away access to the courts or any other avenues for recourse. Although many provisions of the PER disproportionately and unnecessarily limited human rights, removing access to the courts or an effective remedy is likely the most unjustifiable and would never be recognised as valid under international law.

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<sup>137</sup> Human Rights Watch, above n 102, at 2.

<sup>138</sup> *General Comment No. 29*, above n 17, at [14].

<sup>139</sup> Venice Commission, above n 5, at [13].

<sup>140</sup> Administration of Justice (Amendment) Decree 2009 (Fiji) s 2(5)-(6).

<sup>141</sup> Human Rights Commission Decree 2009 (Fiji) s 27(2).

## *VI. Conclusion*

On 7 January 2012 the Public Emergency Regulations were lifted. This move was welcomed by the international community, including the United Nations and New Zealand.<sup>142</sup> However immediately prior to this, on 5 January 2012, the Public Order (Amendment) Decree was introduced which continued many of the provisions of the PER including severe restrictions on public gatherings. Although this was amended in 2017 to relax some of these restrictions, it still remains in force.<sup>143</sup> The Media Decree is still in place today and the 2013 Constitution has upheld previous immunity provisions for those involved in the 2006 coup.<sup>144</sup> Despite the lifting of the Public Emergency Regulations, some of the provisions have been cemented in ordinary law and continue to remain in force. This is a direct illustration of what the Special Rapporteur warned against in her report: extraordinary legislation becoming ordinary legislation, permanently cementing emergency provisions into domestic law.<sup>145</sup>

Fiji's declaration of a state of emergency did not meet the standards established by international law and was therefore not legitimate. There was no emergency that amounted to a threat to the life of the nation, and the notification and proclamation requirements were not met. Provisions of the PER and many of the decrees introduced were not necessary or proportionate, and were not required by the exigencies of the situation. Instead the provisions were broad, extensive and infringed on citizens' rights far more than necessary. Some of the provisions of the PER violated international law by permitting derogations from non-derogable rights such as the right to life, freedom from torture and the principle of legality. They took away access to the courts, provided blanket immunity and restricted access to effective remedies.

The situation faced in Fiji is not unique. A similar scenario has played out in Turkey following a failed coup in July 2016. Immediately after, Turkey imposed a state of emergency which was renewed seven times before eventually being lifted on 19 July 2018.<sup>146</sup> Under the state of emergency there were constitutional amendments and Presidential Decrees which extended

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<sup>142</sup> "NZ welcomes end to emergency laws in Fiji" *NZ Herald* (online ed, Auckland, 2 January 2012).

<sup>143</sup> "Fiji Parliament passes Public Order Amendment Bill" *Radio New Zealand* (online ed, Wellington, 9 February 2017).

<sup>144</sup> Constitution of the Republic of Fiji 2013 s 157.

<sup>145</sup> Ní Aoláin, above n 12, at [4].

<sup>146</sup> "Turkey ends state of emergency after two years" *BBC News* (online ed, London, 18 July 2018).

both the President's and the authorities' powers.<sup>147</sup> There were crackdowns on the media, human rights defenders and jurists, and tens of thousands of people were reportedly arrested or dismissed from their jobs over the two year period.<sup>148</sup> During the state of emergency the UN, echoing previous statements made in regard to Fiji, stated that emergency powers should be "fine tailored to an immediate and urgent crisis" and were not to be used to "limit legitimate dissent, protest, belief and opinion, expression and the work of civil society, which in turn risks violating, inter alia, fair trial and due process guarantees, the prohibition of torture and of arbitrary detention and even the right to life".<sup>149</sup>

The similarities to the situation in Fiji are striking and highlight how important it is that emergency powers are used in the correct and prescribed manner, and subject to rigorous international scrutiny. Emergency powers and derogations are an important tool for states to have when there is a legitimate emergency requiring a dramatic response. However too often these powers are exploited and used as an excuse to limit and abuse citizens human rights. This raises an important question for the future: what more can be done by the international community to enforce the required standards and ensure states are not misusing these powers?

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<sup>147</sup> United Nations Human Rights Office of the High Commissioner "UN human rights experts urge Turkey not to extend state of emergency" (press release, 17 January 2018).

<sup>148</sup> "Turkey ends state of emergency after two years" *BBC News* (online ed, London, 18 July 2018).

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Word Count: 7,907 excluding abstract, table of contents, footnotes and bibliography.