

# International Organizations' Emergency Powers: Ratchet or Rollback?

Written by Christian Kreuder-Sonnen

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CHRISTIAN KREUDER-SONNEN, DEC 17 2019

The past three decades have seen a considerable rise of political authority enjoyed by international organizations (IOs). Overall, the number of autonomous tasks delegated to supranational IO organs and the amount of decision-making competences pooled in intergovernmental IO organs have increased significantly since the end of the Cold War (Hooghe *et al.* 2017; Zürn 2018). At the same time, however, IO authority practically remains highly constrained. In everyday politics, disagreement among powerful states, legal hurdles, and general sovereignty concerns not only hinder discreet expansions of IO authority, but also impede its effective exercise more generally.

Yet, in times of global or regional crisis, windows of necessity and opportunity sometimes create conditions in which “leaps of authority” occur, as IOs intervene assertively in circumvention of legal or political constraints of normal times. Justified by exceptional circumstances, IOs may do something structurally very similar to what we know of national governments in the state of exception: they adopt emergency powers by expanding their executive discretion and interfering with the rights of their rule-addressees. This, at least, is what I argue in my new book *Emergency Powers of International Organizations* (EPIO).

Take the example of the European Central Bank (ECB) during euro crisis: To confront the threat of a Eurozone breakup, the Bank widened its authority by assuming the role of a lender of last resort to member states in the common currency and demanding fiscal conditionalities in return (both as part of the Troika and in its own right) – a rupture that arguably rendered the ECB “the most central—and powerful—supranational institution of our times” (Curtin 2017: 29). Or take the response of the United Nations (UN) Security Council to the terrorist attacks of September 11, 2001 (9/11): Justifying its measures as a necessary reaction to cope with an unprecedented threat to international security, it assumed the role of a global legislator decreeing permanent legal obligations to all states and started blacklisting terror suspects who would be severely sanctioned without recourse to legal remedies. Both practices represented factual expansions of the Council’s executive discretion.

What are the institutional consequences of IOs’ adoption of emergency powers? Will they remain truly exceptional and leave IOs’ broader authority structure largely unaltered? Or do they represent critical junctures that permanently change the organizations’ path?

### The Struggle over Normalization and Containment

Students of emergency politics have always been wary of the possibility of a perpetuation of supposedly exceptional powers. In fact, there are countless examples of states of exception in which the empowered executives have attempted to and often also succeeded in holding on to the discretionary authority far beyond the moment of crisis for which it was originally entrusted (Krebs 2009). At the level of IOs, emergency powers also trigger struggles over the long-term fate of the expanded discretion. Emergency powers can be understood as a constitutionally deviant form of executive authority that is justified by political necessity and that enjoys broader-than-usual discretion because constitutional constraints are legally or factually lowered. The “winners” of such emergency empowerment, that is, those state or institutional actors that can enact their preferences and gain political autonomy, will tend to press for a normalization of their extraordinary powers. However, the “losers” of IO emergency powers, that is, those state or

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societal actors that bear the brunt of the measures and see their political autonomy reduced, are likely to advocate for their reversal or containment.

The outcomes of the ensuing political conflicts vary. At the UN Security Council, for instance, the struggle over the practice of legislating for the entire international community resulted in its factual normalization. Despite initial contestation and resistance, the Council built on its self-set precedent and reenacted legislative measures in different policy fields over time. In EPIO, I call this a *ratchet effect*. By contrast, the Council's regime of individual sanctions against terror suspects (the "terrorism blacklists") has seen a remarkable trend of containment. After years of political and legal struggle, opponents of the practice obtained institutional concessions by the Security Council that rectified many problematic aspects at the level of due process rights (Heupel 2017). In EPIO, I call this a *rollback effect*.

Similarly divergent outcomes can be observed in the aftermath of emergency powers assumed by the World Health Organization (WHO). After adopting exceptional measures and arrogating new authority during the SARS crisis, the World Health Assembly decided to reform the International Health Regulations and legalize many of the new competences on a permanent basis (Hanrieder and Kreuder-Sonnen 2014). By contrast, after declaring the "swine flu" a pandemic in 2010 and devising emergency measures to confront this public health emergency, a backlash against the WHO's handling of the crisis led to several restrictions on its authority.

The obvious question is: When are IO emergency powers ratcheted up and when are they rolled back? Under what conditions are the proponents of normalization able to assert their preference, and under what conditions the advocates of containment?

## Rhetorical Power and Proportionality

In EPIO, I develop a proportionality theory of IO emergency powers to account for the variable institutional consequences of exceptionalist IO conduct. It builds on core tenets of sociological institutionalism and holds that it is the distribution of rhetorical power among the coalitions of "pro-ratchet" and "pro-rollback" actors which is decisive for the longer-term fate of IO emergency powers (Krebs and Jackson 2007; Schimmelfennig 2001).

Rhetorical power can be understood as an actor's ability to convince an audience of the appropriateness of their claims. In the struggle over normalization and containment, the opposing actor coalitions strategically deploy normative arguments to justify or contest (the normalization of) IO emergency powers. If the pro-rollback coalition successfully delegitimizes the perpetuation of emergency powers in the eyes of the constituents, the IO is forced to provide institutional concessions if it is not to jeopardize its authority. Only if the pro-ratchet coalition can convincingly justify the emergency powers as legitimate can they endure.

But what is the standard of legitimacy against which IO emergency powers are justified and contested? In line with normative theory on the state of exception and just wars, the main reference point in debates over IO emergency powers is their *proportionality*. The starting assumption is that emergency powers can, in principle, be normatively justifiable to avert a greater threat. However, because emergency powers always create *costs* to constitutionalism, this can be the case only if the threat to political order makes exceptional measures *necessary*, and if those measures are *functional* to remedy the problem. Accordingly, the main line of argumentation by the pro-rollback coalition will be that IO emergency powers are disproportionate, because their costs are excessive (since they are either unnecessary or dysfunctional). Conversely, the pro-ratchet coalition will try to argue that the emergency powers are proportionate, because the costs are outweighed by the necessity and/or functionality of the measures.

Who gains the upper hand in those rhetorical battles? EPIO emphasizes the relevance of "rhetorical opportunity structures". That is, the main driver is less the positionality of the speaking actors, nor is it the power of the speech acts themselves. Rather, whether or not claims about the (dis-) proportionality of IO emergency powers resonate with the audience should depend on the credibility of these arguments in light of external conditions. Arguments about necessity, for example, should gain more traction if a crisis is widely perceived as intense and enduring. In the same vein, arguments about functionality likely convince a larger share of the audience, if actors can point to clear

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indications of their effectiveness. Finally, claims about excessive costs should be most powerful when emergency measures are particularly intrusive and interfere with widely recognized rights of individuals.

## Explaining Ratchet and Rollback at the UN Security Council

If we go back to the example of the UN Security Council's emergency measures after 9/11, we can nicely trace the divergent outcomes of normalization and containment to the distribution of rhetorical power among the opposing coalitions. Importantly, in both cases – the legislative measures and the individual sanctions – the institutionally most powerful states including the United States and most permanent Council members supported a normalization of the new powers. The variance in outcomes can thus not be attributed to the distribution of formal and informal institutional power among states – the foremost alternative explanation explored in EPIO.

What varied across the two cases were the rhetorical opportunities the two actor coalitions could tap. In the case of the Council's global legislation, the pro-ratchet coalition was able to justify the emergency powers as proportionate because, on the one hand, a high level of enduring crisis perception surrounding transnational terrorism lent credibility to arguments of necessity and, on the other hand, a relatively low level of intrusiveness of the emergency measures (interference only with sovereignty rights of states) hampered arguments about excessive costs. In 2004, when the Council was set to enact a new legislative resolution for the first time since 9/11, the main episode of contention took place. In open debates at the UN Security Council, pro-ratchet actors advocated the expansion of legislative emergency powers to the field of non-proliferation to non-state actors, arguing that weapons of mass destruction in the hands of terrorists represented the greatest danger to mankind and that assertive action was thus necessary. Concerns about the Council's power grab and restrictions in the UN Charter were dismissed as "legal niceties" (UN Security Council 2004a, 2004b). While the pro-rollback coalition mounted a vociferous challenge to this attempt at normalization and expansion of emergency powers, its cause did hardly gain any traction outside the member state circle that opposed the resolution anyway. Its normative arguments did not resonate with the audience.

By contrast, in the case of the Council's regime of targeted sanctions against terror suspects, rhetorical opportunities were reversed. For one thing, the measures were much more intrusive as they suspended basic individual due process rights which enjoy near-universal acceptance. Since blacklisted individuals were severely sanctioned but the Council provided no access to legal remedies, the regime has even been likened to Kafka's *The Trial* (Federal Court of Canada 2009). The pro-rollback coalition could thus capitalize on arguments about excessive costs to constitutionalism. For another thing, when the episode of contention was most acute (2006-2012), the level of public crisis perception had strongly receded. It thus became harder and harder for the pro-ratchet coalition to justify the continuation of the emergency measures based on arguments about necessity. As a consequence, contestations of the Council's arbitrary authority over individuals grew bolder and more widespread. Initially supported merely by a few non-governmental organizations, the pro-rollback cause was soon joined by a group of like-minded states, a plethora of international lawyers and human rights activists, the Parliamentary Assembly of the Council of Europe, and, most importantly, the Court of Justice of the European Union (CJEU). In 2008, the latter for the first time struck down implementing acts by the EU Commission as incompatible with fundamental rights and thus indirectly challenged the authority of the UN Security Council (e.g., Tzanakopoulos 2014). In response to this and later judgments in the so-called *Kadi*-saga, the Council eventually succumbed to the pressure and agreed to incremental constraints on its authority.

Hence, in EPIO, I argue that it is the distribution of rhetorical power which best explains the divergent outcomes of ratchet and rollback at the UN Security Council. In the book, the proportionality theory is tested against alternative explanations in four more cases of emergency powers at the European Union and the World Health Organization.

## Are IO Emergency Powers Good or Bad News for Global Governance?

The fact that IOs nowadays can and sometimes do resort to emergency politics akin to exceptionalism at the domestic level may seem as a cause for optimism to observers of global governance. Finally, one could argue, in those instances, IOs get to do what they were envisioned for. And indeed, there is some positive potential in IO emergency powers. It is precisely in the gridlocked structures of international politics, where institutions with

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incomplete contracts and curtailed mandates are confronted with transboundary crises, that IO emergency powers can represent a welcome escape route on the path to actually governing global problems. The WHO's intervention in the SARS crisis may be a case in point where IO emergency politics literally saved lives and a less assertive approach could have had daunting consequences – as the 2014 Ebola fiasco indicates.

On the other hand, however, IO emergency powers also come with formidable normative problems. First, IO authority leaps (especially if normalized), represent acts of self-empowerment by executive actors. In fundamental contradiction to democratic principles, constituted powers “usurp” the role of the constituent power (Patberg 2018). This issue is not only theoretical: The less IOs are seen as democratic, the more they are vulnerable to nationalist delegitimation attempts. Second, as of yet, IOs have not embraced the regulative ideal of emergency powers. In the absence of actual emergency constitutions enshrined in IO legal orders, their exceptionalism tends to be extra-legal, informal, and secretive. Not only does this mean that IO emergency powers may go rogue, but it also implies threats to the integrity of IOs' legal orders. Third, IO emergency powers may be lauded for the potential to defy or circumvent sovereign state voluntarism. But it also represents an opportunity for powerful states to exploit IO authority for their parochial purposes and assert their interests internationally. In fact, as the examples of the UN Security Council highlight, globalized emergency politics represents just another playing field for power politics among states.

The task is to find ways to realize the potential of IO emergency powers and at the same time eliminate their dangers. Theory and history of the emergency problematique at the domestic level testify to the enormity of this task.

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