

COVID-19 Symposium: To Derogate or Not to Derogate?

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Earlier [contributors](#) have highlighted that in addition to permissible *restrictions* (or *limitations*) upon human rights, applicable in perfectly normal situations, some human rights treaties also allow for the more far-reaching option of a State to *derogate* from some of its obligations during a situation of grave crisis. This applies to the subset of other than so-called non-derogable rights under the UN-level [International Covenant on Civil and Political Rights](#) (ICCPR, see article 4) and two of the regional human rights treaties, the [American Convention on Human Rights](#) (ACHR, see article 27) and the [European Convention on Human Rights](#) (ECHR, see article 15).

Almost twenty States parties to the three treaties mentioned have resorted to derogation during the current COVID-19 epidemic, officially declaring it as a state of emergency threatening the life of the nation and, as a consequence, notifying the United Nations, Organization of American States or Council of Europe about unilaterally derogating from some of their treaty obligations under the three treaties. As of 2 April 2020, they included [eight countries](#) derogating from the ECHR (Albania, Armenia, Estonia, Georgia, Latvia, Moldova, North Macedonia and Romania), three of them notably EU Member States, as well as no less than [ten](#) Latin American countries (Argentina, Bolivia, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Panama, Peru) derogating from the ACHR. A subset of [six](#) of these States have also notified the UN about derogating

from the ICCPR (Armenia, Ecuador, Estonia, Guatemala, Latvia and Romania). The mere number of derogations because of COVID-19 – almost one out of every ten countries in the world – is unprecedented.

Many more States have resorted to domestic emergency powers, either nationally or on a regional or local basis. Such powers typically entail rule by decree, i.e., the executive assuming law-making powers that normally belong to the elected Parliament. In addition to such a power shift, in most cases they also allow deviation from constitutionally protected fundamental rights or some of them.

Emergency powers carry a grave risk of being abused, often for political purposes such as curtailing dissent, dissolving Parliament, postponing elections or cementing the powers of a would-be dictator. What is happening right now in Hungary demonstrates how this risk also applies during the public health emergency of the COVID-19 pandemic.

In light of the risk of abuse, it appears as the safe course of action to insist on the *principle of normalcy*, i.e. to handle the crisis through normally applicable powers and procedures and insist on full compliance with human rights, even if introducing new necessary and proportionate restrictions upon human rights on the basis of a pressing social need created by the pandemic. This would be the approach of resisting panic, a *Leitmotiv* during my six-year work as UN Special Rapporteur on human rights and counter-terrorism. As 9/11 of 2001 or the phenomenon of global terrorism did not create a permanent threat to all nations in the world, States should resist declaring a state of emergency for the purpose of combatting terrorism and, instead, rely on, review and improve their counter-terrorism laws, including by securing full respect for human rights when so doing. In my dealings with governments, I found myself not only recommending not to resort to emergency powers but also not to stretch, breach or abuse their normal laws through treating terrorism as a *de facto* emergency and the assumed terrorist as an enemy of humankind who belongs to a legal black hole.

During COVID-19, however, there is a powerful counter-argument. It was eloquently captured by Alan Greene in a recent blog post: Officially declaring a State of emergency and notifying international institutions about measures that derogate from some of their human rights treaty obligations, may have the positive effect of *taming emergency powers* by constraining the State to articulate their emergency measures under the terms of necessity, proportionality, exigency in the situation, temporality and a commitment to human rights as a framework for legitimate emergency measures.

The current pandemic has triggered many philosophers, political theorists or legal scholars to remind us about Carl Schmitt as the theorist who claimed that a state of emergency is the moment that shows who in a State actually is the sovereign. Legislators and laws, even the Constitution, may be set aside when the true sovereign, typically a President or Prime Minister, declares a state of emergency. As Alan Greene explains, Carl Schmitt is *passé* and his relevance grossly overrated. After World War Two and the adoption of human rights treaties, we have in principle fixed the problem. The possibility of officially derogating from some but not all provisions in some but not all human rights

treaties, coupled with the requirement of international notification, results, as Greene writes, in ‘the closest we shall get to an “ideal state of emergency”’. For Greene, it would be the *failure to use* the derogation option that today ‘risks normalising exceptional powers and permanently recalibrating human rights protections downwards’. If the exigencies of the COVID-19 pandemic require exceptional measures and deviation from some dimensions of the full enjoyment of all human rights, then it is best to introduce those measures through a framework that entails a commitment to legality and to the full restoration of normalcy as soon as possible.

Before serving as UN Special Rapporteur (2005-2011), I sat for eight years (1997-2004) on the UN Human Rights Committee, the treaty body under the ICCPR. During that time, in 2001, we adopted the Committee’s General Comment No. 29 on states of emergency. After 9/11, this document proved extremely useful in efforts to keep a check on human-rights-intrusive counter-terrorism measures. Even if the document does not mention pandemics as a category of situations that may threaten the life of a nation, I do insist that it forms an extremely valuable source in efforts to prevent the abuse of power or, more broadly, in securing that any measures in the fight against the pandemic that have a negative impact upon human rights, will not constitute human rights violations but either permissible restrictions or necessary and proportionate derogations.

Hence, my answer to Alan Greene is: we can both have our cake and eat it. One can insist on the principle of normalcy and on full respect for human rights. What can be done under the framework of permissible restrictions, should be preferred. If those available options prove insufficient during COVID-19, then it is better to derogate than not to derogate. General Comment No. 29 will then show that the scope of legitimate additional human-rights-intrusive measures is quite limited. As a consequence, what we will see *after* declaring a state of emergency is that the principle of normalcy is still there, or, in other words, much of the cake of human rights remains untouched. It is worth underlining that Hungary has *not* derogated from the ECHR or the ICCPR, suggesting that those who abuse emergency powers for a power grab do not accept to be tamed by the framework of official derogation. So, Alan Greene is right in that international notification of an emergency may reflect a country’s commitment to legality and normalcy. As doing so will demonstrate that human rights are not suspended and emergency powers will be tamed, a government may as well decide to maintain the usual form of normalcy, i.e. fight the pandemic within the framework of permissible limitations that are proven necessary and proportionate in pursuit of a legitimate aim. It is useful to note that hardest-hit countries, such as Italy or Spain, have *not* notified about any derogations. This puts into question whether a state of emergency needs to be elevated to the status of the ‘new normal’ through formal notification and derogation, rather than seeking to preserve normalcy, i.e. the ‘old normal’ at least for purposes of international law.

A quick inventory of the ICCPR notifications so far made suggests that the derogation clauses do work in taming emergency powers. The new derogations usually relate to the freedoms of movement, assembly and association (articles 12, 21 and 22), where the effect of the derogation may be quite harmless, in light of the fact that even in normal

times these rights are subject to a proportionality test. Paradoxically, this would nevertheless suggest that it was not necessary to derogate at all. In two cases derogations also relate to liberty and fair trial (articles 9 and 14, Estonia and Latvia) and in two cases to privacy (article 17, Estonia and Romania). Derogations from liberty and fair trial will require close scrutiny. Although privacy in principle is subject to a proportionality test also in normal times, it is in my view different from the first set of rights just mentioned because of the risk of letting loose Orwellian surveillance in respect of highly sensitive personal health data. The risk of breaching the essential core of privacy rights is real.

The pattern of derogations under the ECHR is similar. The ACHR pattern is less obvious due to the persistent tendency in Latin America to use the notion of 'suspension' of rights as the framework for derogations.

Finally, many human rights are not subject to derogation during a state of emergency. During the COVID-19 pandemic, it is worth remembering that the right to life and the prohibition against any inhuman or degrading treatment belong to this category. One dimension of General Comment No. 29 makes the case that many human rights that do allow for derogations may include non-derogable dimensions. Further, derogation is generally not available under treaties on economic, social and cultural rights, with the European Social Charter an exception to this rule. And some human rights treaties, such as the Convention on the Rights of Persons with Disabilities (article 11), call for *heightened* protection in situations of crisis.