



COVID-19, COUNTER-TERRORISM AND EMERGENCY LAW

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Report prepared under the aegis of the Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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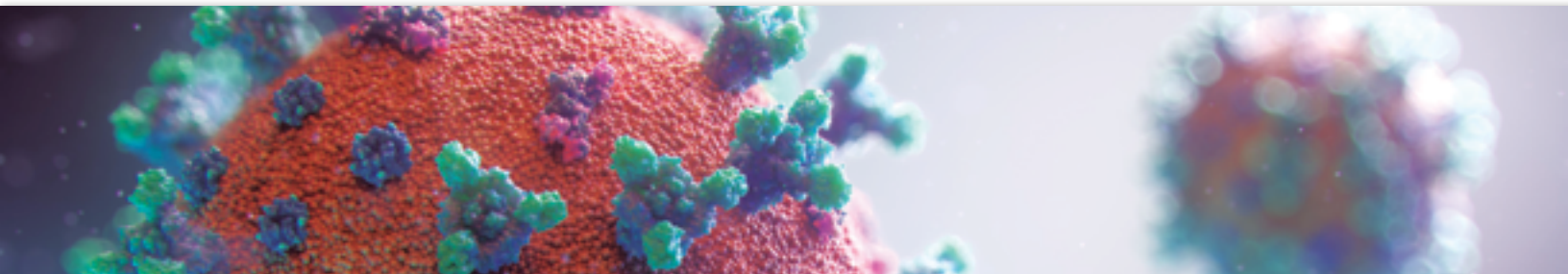
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INTRODUCTION

THE MANDATE OF THE SPECIAL RAPPORTEUR on the promotion and protection of human rights and fundamental freedoms while countering terrorism has consistently voiced concerns about the use of emergency powers and their impact on human rights and the rule of law, including through presentation of her 2018 report to the Human Rights Council (A/HRC/37/52). The Special Rapporteur has identified an exponential growth in the use of counter-terrorism measures as a form of sustained, entrenched, and normalized emergency practice. The Special Rapporteur has documented the overlap between the formal use of emergency powers premised on a threat or experience of terrorism and the use of counter-terrorism and security powers as a form of de facto permanent emergency in multiple states.¹ The lack of an agreed definition of terrorism and the wide-spread use of vague and ill-defined definitions of terrorism² has resulted in emergency powers being used as a chimera to enable sustained violations of human rights. Violations include the targeting of dissenters, ethnic, religious and other minorities, and generally to undermine the exercise of a range of fundamental human rights (speech, assembly, political participation) protected by international law. The outbreak of the global pandemic in March 2020 ushered in even greater permissiveness in the use of emergency powers and has increased the impact of such measures.

The world has faced an unprecedented health pandemic since March 2020 and the emergence of coronavirus 2, or SARS-CoV-2 (hereinafter “Covid-19”). The personal, familial, communal, and societal toll has been felt globally; there have been over 5 million reported deaths, with the true number of lives lost most likely much higher. The full and long-term effect of the pandemic on individual health, health systems, economies, education, communities, governance, and the rule of law are not yet fully understood.

From the outset, the Special Rapporteur and other mandate holders recognized the profound dangers

to the rule of law posed by the use of emergency powers by States. A primary concern was the expansive use of emergency powers and the repurposing of security and counter-terrorism entities and actors to address the global health challenges.³ We called on States to ensure that emergency responses to the health pandemic be ‘proportionate, necessary and non-discriminatory.’⁴ Thereafter, the counter-terrorism and human rights mandate partnered with the International Center for Non-Profit Law (ICNL) and European Center for Non-Profit Law (ECNL) to establish a global tracker to monitor the effects of emergency powers on civic space and fundamental rights.⁵

¹ Fionnuala Ni Aolain (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *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*, U.N. Doc. A/HRC/37/52 (Mar. 1, 2018) (hereinafter cited as A/HRC/37/52).

² As tracked by the Special Rapporteur’s legislative reviews of national counter-terrorism legislation. “Comments on Legislation and Policy,” OHCHR, 2022, <https://www.ohchr.org/EN/Issues/Terrorism/Pages/LegislationPolicy.aspx>.

³ “Covid-19: States should not Abuse Emergency Powers to Suppress Human Rights,” OHCHR, March 16, 2020, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>.

⁴ *Id.*

⁵ “Covid-19 Civic Freedom Tracker,” INCL, <https://www.icnl.org/covid19tracker/>.

Strong evidence has emerged from across the globe that emergency norms are being widely promulgated going far beyond a tailored response to this health crisis.⁶ Emergency powers function in multiple and overlapping forms and include the exercise of: (1) formal emergency powers; (2) *de facto* emergency powers; (3) exceptional emergency powers; and (4) repurposed emergency powers, specifically the use of counter-terrorism and security powers to regulate the pandemic. There is robust evidence that government 'overreach' is being facilitated by the widespread and understandable fears of the public for their health and safety and a willingness by many to concede fundamental rights to expression, movement, privacy, family, religious expression, and political participation.⁷

In parallel, alongside declared states of emergency, siege, and sanitary crises, many States are functioning in situations of *de facto* emergency.⁸ Here a range of exceptional powers are exercised without proclamation, notification, or official acknowledgment of the exceptional status of the new legal powers regulating day to day life.⁹ Executive powers use is on the rise, police enforcement and discretion are being amplified in law and practice across the globe, and in numerous countries the military is performing functions generally viewed as civilian in nature. As Special Rapporteur I have also observed a rise in counter-terrorism regulation, increased securitization, and the use of systems designed to regulate terrorism, (violent) extremism, and security being repurposed and adapted to respond to the pandemic. I have also observed security institutions and actors offering their services, structures, and products to governments as a panacea for the governance and health challenges they faced during this extraordinary time.¹⁰

In response to those observed practices, this Report documents some of the ways in which counter-terrorism and security norms, institutions and actors have been engaged in the pandemic response. The Report builds on my 2018 Report on emergency powers to demonstrate the uses of and dangers that follow from converting powers intended to address the acts of violent actors into tools to regulate a health pandemic, the impact of which has been most keenly felt across the globe by vulnerable and marginalized communities. I make a number of practical recommendations to prevent the misuse of emergency powers, to put in place systems to dismantle emergency powers when they are no longer needed, and offer reflections on how to prevent the legal and political exceptionalism distorting a return to robust rule of law, accountability, transparency and open governance across the globe.

The Report addresses the following topics:

- 1. Legal (and non-legal) Bases for Emergency Powers;**
- 2. The Repurposing of Counter-Terrorism Laws, Mechanisms and Practices;**
- 3. Risks of Normalizing Exceptional Uses of Emergency Powers; and**
- 4. Accountability Frameworks for Misuse of Emergency Powers.**

The Report concludes with a series of targeted recommendations addressed to States.

⁶ *Id.* See also, Privacy International, "Tracking the Global Response to Covid-19," Privacy International, <https://privacy-international.org/examples/tracking-global-response-covid-19>; International IDEA, "Covid-19 and Democracy," International IDEA, <https://www.idea.int/our-work/what-we-do/covid-19-and-democracy>.

⁷ Human Rights Watch, "Human Rights Dimension of Covid-19 Response," Human Rights Watch, March 19, 2020, <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>.

⁸ Fionnuala Ní Aoláin, "Exceptionality: A Typology of Covid-19 Emergency Powers," *UCLA J. of Int'l. L. & Foreign Affairs* (2022).

⁹ See: Joan M. Fitzpatrick, "Human Rights in Crisis: The International System For Protecting Rights During States of Emergency 21-22 (1994).

¹⁰ Fionnuala Ní Aoláin, "Under Cover of Covid at the UN: Why Counterterrorism is Not the Answer to a Pandemic," *Just Security*, July 10, 2020, <https://www.justsecurity.org/71305/under-cover-of-covid-at-the-un-why-counterterrorism-is-not-the-answer-to-a-pandemic/>.

Since March 2020 to December 2021 the Special Rapporteur's mandate has commented on counter-terrorism legislation emanating from the following States; Brazil (BRA OL 6/2021); the Netherlands (OL NLD 2/2021); Belarus (OL BLR 2/2021); Turkey (OL TUR 3/2021); Saudi Arabia (OL SAU 12/2020); Nicaragua (OLNIC 3/2020); United Arab Emirates (OL ARE 6/2020); France (OL FRA 4/2020); European Union (OL OTH 73/2020); Burkina Faso (OL BFA 2/2020); China (OL CHN 17/2020); Turkey (OL TUR 13/2020); Peru (OL PER 3/2020); The United Kingdom of Great Britain and Northern Ireland (OL GBR 7/2020, OL GBR 3/2022); the Philippines (OL PHL 4/2020); France (OL FRA 2/2020); China (OL CHN 13/2020); Switzerland (OL CHE 1/2020); India (OL IND 7/2020); Kirgizstan (OL KGZ 3/2020); China (Hong Kong) (OL CHN 7/2020); Cambodia (OL KHM 1/2020); Egypt (OL EGY 4/2020).



Photo by Alex Meel

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LEGAL (AND NON-LEGAL) BASES FOR EMERGENCY POWERS

DURING TIMES OF EMERGENCY, it is generally acknowledged that governments need a level of flexibility to address emerging threats and to exercise the powers vested in them to address the situation at hand.¹¹ Not surprisingly, governments across the globe have enacted emergency measures in response to the pandemic.¹² Some emergency measures have been necessary, proportionate and not discriminatory in effect. In some countries emergency powers have been used and then discarded or revised in substantive ways commensurate with the scale and form of the health crisis.¹³

Understanding Emergencies and Derogation

Terminology of Emergency

The term 'emergency' connotes a sudden, urgent, usually unforeseen event or situation that requires immediate action, often without time for prior reflection and consideration.¹⁴ Emergencies are clearly regulated by international law, specifically through the derogation regimes of international human rights treaties, as discussed below. Historically, those emergency

situations have involved armed conflict, terrorism, or other security crises but there are significant instances (e.g. SARS, Ebola¹⁵) when States have derogated from their human rights treaty obligations as a result of a compelling and substantial health crisis.

On 11 March 2020, the World Health Organization declared the coronavirus (Covid-19) outbreak a global pandemic and called on states to take urgent measures to tackle it. It was defined as 'a threat for every country, rich and poor' by the Director-General of the World Health Organisation (WHO).¹⁶ Formally, Covid-19 poses a health emergency necessitating a

¹¹ Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *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*, U.N. Doc. A/HRC/37/52 (Mar. 1, 2018).

¹² "Covid-19 Civic Freedom Tracker," INCL, <https://www.icnl.org/covid19tracker/>.

¹³ See e.g. Josh Smith & Sunghyuk An, 'S. Korea eases curbs, imposes vaccine passports, in 'living with Covid-19 campaign,'" Reuters, November 1, 2021, <https://www.reuters.com/world/asia-pacific/skorea-eases-curbs-imposes-vaccine-passports-living-with-covid-19-campaign-2021-11-01/>.

¹⁴ Oren Gross, "'Once More unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," *Yale Journal of International Law* 23, no. 4 (1998): 439

¹⁵ World Health Organization, *Managing Epidemics: Key Facts About Major Deadly Diseases* 15 (2018); World Health Organization, "Statement on the October 2018 Meeting of the IHR Emergency Committee on the Ebola Virus Disease Outbreak in the Democratic Republic of the Congo," World Health Organization, October 17, 2018, <https://www.who.int/news-room/detail/17-10-2018-statement-on-the-meeting-of-the-ihc-emergency-committee-on-the-ebola-outbreak-in-drc>; see also Alison Agnew, "A Combative Disease: The Ebola Epidemic in International Law," *B.C. Int'l & Comp. L. Rev.* 39 (2016): 97, 128 (noting that the Security Council declared Ebola a threat to peace and security).

¹⁶ "WHO Director-General's opening remarks at the media briefing on COVID-19," March 5, 2020, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-5-march-2020> cited in Emanuele Ventrella, "Privacy in emergency circumstances: data protection and the COVID-19 pandemic," *ERA Forum* 21, (2020): 379–393.

response. A common reaction from governments in response to Covid-19 included transferring greater responsibilities and powers to public health authorities and empowering security entities to act as agents of health authorities and the State, often with the explicit aim of addressing the contagion.¹⁷

Concerningly, in many states, from the United Kingdom to South Africa to Jordan, Covid-19 has been presented less in terms of being a specific and defined public health matter and more as a broader security threat.¹⁸ Securitization of Covid-19 responses is seen in the utilization of security apparatuses, deployment of security actors, alongside the use of legal and policy frameworks tailored for national security threats in ways that are often disproportionate and appear discriminatory. In tandem, the exercise of these powers has manifest adverse impacts on the enjoyment of rights in ways that appear to be unnecessary to regulate the unmistakable health challenges before us.

The Requirements of Derogation

Generally, the use of emergency powers with significant rights-limiting effects requires derogation from international human rights treaties. In the context of Covid-19, the United Nations Human Rights Committee has affirmed that, "States parties must take effective measures to protect the right to life

and health of all individuals within their territory and all those subject to their jurisdiction."¹⁹ Derogation is a formal legal mechanism enabling States to limit the exercise of certain rights under international law. Doing so provides a public stance on rights-limitation by communicating with other States about the limitations being introduced and also sharing information with the domestic public. Derogations are historically associated with armed conflict, terrorism, and security threats, though precedent for derogation in health contexts exists. Prior health emergency practice (e.g., in respect of H5N1, Ebola, Zika, SARS) has been regional or country specific. Even when national restrictions were considerable,²⁰ emergency health powers were constrained in ways that did not raise fears about widespread misuse or rule of law deficits that appear synonymous with this pandemic.

The possibility to derogate from obligations under international human rights law is subject to several conditions. First, states should attempt, where possible, to place limits on rights rather than derogating entirely from the recognition of any right.²¹ Where the former is not possible, derogations must adhere to some conditions. These include the official proclamation of a state of emergency; formal notification to a higher authority (such as the United Nations Secretary General); the strict necessity and proportionality of any derogating measure

¹⁷ Joelle Grogan, "States of emergency," *Verfassungblog*, May 26, 2020, <https://verfassungsblog.de/states-of-emergency>; Tom Ginsburg, and Mila Versteeg, "Binding the Unbound Executive: Checks and Balances in Times of Pandemic," University of Chicago (unpublished manuscript, June 9, 2020).

¹⁸ Costanza Musu, "War metaphors used for COVID-19 are compelling but also dangerous," *The Conversation*, April 8, 2020, <https://theconversation.com/war-metaphors-used-for-covid-19-are-compelling-but-also-dangerous-135406>; Elisha Aaron, "Coronavirus Shows the Need for a Human Rights-based Approach to Public Health Crises," *Freedom House*, August 3, 2020, <https://freedomhouse.org/article/coronavirus-shows-need-human-rights-based-approach-public-health-crises>; Gary Gibbon, "Boris Johnson Declares 'War' on Coronavirus," *Channel 4 News*, March 17, 2020, <https://www.channel4.com/news/boris-johnson-declares-war-on-coronavirus>; Michael Cohen "South Africa in Virus War with Worst to Come, Ramaphosa Says". *Bloomberg*, June 5, 2020, <https://www.bloomberg.com/news/articles/2020-06-05/south-africa-in-virus-war-with-worst-to-come-ramaphosa-says>.

¹⁹ Human Rights Committee, Statement on Derogations from the Covenant in connection with the COVID-19 pandemic, U.N. Doc. CCPR/C/128/2, ¶ 1 (Apr. 30, 2020).

²⁰ World Health Organization, *Managing Epidemics: Key Facts About Major Deadly Diseases* 15 (2018); World Health Organization, "Statement on the October 2018 Meeting of the IHR Emergency Committee on the Ebola Virus Disease Outbreak in the Democratic Republic of the Congo," World Health Organization, October 17, 2018, <https://www.who.int/newsroom/detail/17-10-2018-statement-on-the-meeting-of-the-ih-er-emergency-committee-on-the-ebola-outbreak-in-drc>; see also Alison Agnew, "A Combative Disease: The Ebola Epidemic in International Law," *B.C. Int'l & Comp. L. Rev.* 39 (2016): 97, 128 (noting that the Security Council declared Ebola a threat to peace and security).

²¹ Human Rights Committee, Statement on Derogations from the Covenant in connection with the COVID-19 pandemic, U.N. Doc. CCPR/C/128/2, ¶ 4 (Apr. 30, 2020).

taken; the conformity of measures taken with other international obligations; non-discrimination; and the prohibition on derogating from certain non-derogable rights.

Box 1: Restrictions on Derogations

Necessary: every measure that has a fundamental impact on impinging on human rights must be necessary. There must, in other words, be a definable and justifiable objective for any measure adopted.

Proportionate: measures must be proportionate: if states are going to take measures to restrict human rights in the context of an emergency, there must be a meaningful relationship between the measures taken and the focus on health emergency. Read together, emergency measures must not be adopted for alternative purposes or extend beyond what is necessary to respond to threat.

Lawful: Measures taken must be also lawful such that they are based and proclaimed in law; there must be a legal basis for the measures, which define the parameters of permissible conduct and corresponding limitations. They must also be known so that if people are subject to restraints they know, as a matter of the rule of law, what constraints they are subjected to.

Non-discrimination: measures taken in response to an emergency, including a health emergency, cannot adversely disadvantage certain groups based on their status.

*Adapted from A/HRC/37/52

Derogations notified to human rights treaty bodies are difficult to monitor and there exists no centralized tracker of the scale and form of derogations across treaty systems. These deficits have meant such frameworks are largely ineffective in curbing government emergency overreach. It seems that the overall number of recognized derogations is low when compared to the actual number of emergency measures in place across the world, creating

a distinct accountability and transparency vacuum in the global use of emergency powers. With respect to derogation and emergency powers during the pandemic, it appears that:

1. States **are generally not notifying** UN and regional human rights treaty mechanisms of derogations;
2. Derogation notifications **are not being regularly updated** by States commensurate with the changing circumstances of the health pandemic on the ground;
3. UN and regional treaty bodies **are not yet adequately responding** to the lack of notification or the extensive use of *de facto* emergency powers; and
4. Emergency powers **are rife and entrenched** in national pandemic regulation.

In multiple contexts, the pandemic has also functioned as cover for measures that in design or practice operate to deny human rights protections in the same way as broad counter-terrorism and security frameworks do. In practice, these security approaches are being harnessed to and are co-dependent with pandemic health regulations. Security and pandemic health regulation are being conflated or obscured through the new roles and responsibilities given to the security sector in ways that appear unnecessary, disproportionate and with questionable legal bases. Security led pandemic responses include wholesale limitations of rights and freedoms, particularly targeting those critical of the government, and discriminating against certain (vulnerable) groups,²² some of which are outlined below. I turn next to address security and counter-terrorism practice noting that while general attention to the misuse of pandemic measures is increasing, little systematic analysis has been provided about the repurposing of counter-terrorism and security measures to manage the health crisis.

²² See "Covid-19 Civic Freedom Tracker," INCL, <https://www.icnl.org/covid19tracker/>.

3

REPURPOSING COUNTER TERRORISM

I NOW FOCUS ON HOW COUNTER-TERRORISM measures, mechanisms, and practices have been repurposed to address the pandemic and the pervading conditions that make this possible. Terrorism lacks a comprehensive and agreed treaty definition under international law²³ and domestic legal systems vary widely in their regulation of counter-terrorism.²⁴ This lack of definition has enabled both authoritarian and democratic states to repurpose counter-terrorism discourse to create legal frameworks enabling them to limit or quash dissent in the name of combating terrorism.²⁵ Evidence from multiple States demonstrates the misuse of security and/or counter terrorism legislation against individuals peacefully exercising their rights; engaging in freedom of expression, association and peaceful assembly; and deprivation of liberty through arrests and detention.²⁶ Regrettably, the Covid-19 pandemic has illustrated the extent and ease with which counter-terrorism and security frameworks can be reworked and applied in contexts seemingly far beyond their material scope.

Many states have relied on counter terrorism laws, mechanisms, and practices as part of their Covid-19 response.²⁷ From an early point in the pandemic, the Special Rapporteur expressed concern around the use of the Covid-19 pandemic by States to further extend the use of counter-terrorism and emergency powers. The mandate stressed the need to ensure that counter-terrorism and corresponding mechanisms and practices were not exported for use in the health sector.²⁸ Yet, many governments have continued to repurpose

counter-terrorism frameworks as part of their Covid-19 responses, including by:

1. **Applying** counter-terrorism laws as part of Covid-19 responses;
2. **Utilising** counter-terrorism mechanisms in response to the pandemic; and
3. **Capitalising** on the pandemic as an opportunity to push through and expand new or pending counter-terrorism legislation.

²³ Alan Greene, "Defining Terrorism: One Size Fits all?", *International & Comparative Law Quarterly* 66, no. 2 (2017): 411-440.

²⁴ Ben Saul, "The Legal Black hole in United Nations Counterterrorism," IP Global Observatory, June 2, 2021, <https://reliefweb.int/report/world/legal-black-hole-united-nations-counterterrorism>.

²⁵ Susan Wilding, "Counter-terrorism Laws Provide a Smokescreen for Civil Society Restrictions," Open Global Rights, January 15 2020, <https://www.openglobalrights.org/counter-terrorism-laws-provide-a-smokescreen-for-civil-society-restrictions/>; Georgia Papadopoulou Holmer, "Counter-terrorism in the COVID Era: Why Human Rights Matter even more now," Organisation for Economic Development and Cooperation, July 14 2020, <https://www.osce.org/blog/counter-terrorism-in-the-COVID-era>.

²⁶ Connor Gearty, "Is the Human Rights Era Drawing to a Close?" *European Human Rights Law Review* 5 (2017): 425-431.

²⁷ Fionnuala Ní Aoláin, "Under Cover of COVID at the UN: Why Counterterrorism Is Not the Answer to a Pandemic," Just Security, July 10 2020, <https://www.justsecurity.org/71305/under-cover-of-covid-at-the-un-why-counterterrorism-is-not-the-answer-to-a-pandemic/>

²⁸ Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, "Technical Recommendations on Human Rights & Counter-Terrorism for the 7th Biennial Review of the Global Counter-Terrorism Strategy (A/RES/72/284)," <https://www.ohchr.org/Documents/Issues/Terrorism/SR/GlobalStrategy/TechnicalRecommendations.pdf>.

Repurposing means that many of the problems associated with counter-terrorism frameworks including infringements on rights, targeting of ethnic and religious and other minorities, lack of transparency, and covert and unaccountable practices are carried over to the pandemic response. There are numerous examples and, as with many counter-terrorism measures, such laws have often been used to stifle dissent and opposition. A notable development in the context of Covid-19 has been the use of counter-terrorism laws to target those that criticize state responses to the pandemic. The use of counter-terrorism laws in the context of Covid-19 demonstrates again how – in the absence of an international agreed definition of terrorism – counter-terrorism laws and regulations can be used in ways wholly unrelated to the threat of terrorism.

Box 2:

In **India**, CIVICUS has drawn attention to the use of The Unlawful Activities (Prevention) Act 1967 (UAPA).²⁹ Individuals detained under the UAPA can be held without charge for up to 180 days as opposed to the usual 60 to 90 days under Indian criminal law. By employing this counter-terrorism law, the Indian government has sought to stifle dissent and opposition, restricting the rights of those that voice criticism of the government.

Box 3:

In **Cameroon**, it is reported that the government has used anti-terror laws and limitations on movements due to Covid-19 as

a pretext to restrict freedoms of association and expression after opponents announced plans to protest the holding of regional elections set for December.³⁰

Box 4:

In **Tajikistan**, authorities have tightly controlled news and information around the Covid-19 pandemic and restricted freedom of expression, blaming media and civil society for spreading ‘false’ information. The courts have also used counter-terrorism legislation to block access to some independent media outlets based abroad.³¹

The pandemic has also revealed that national security laws and mechanisms, many related to counter-terrorism frameworks, have been adapted under the pretense of the pandemic response. To this end, many governments have, for example:

1. **Repurposed** cyber security laws;³²
2. **Amended** criminal law to enforce heavy and disproportionate punishments;³³
3. **Applied** extensive public order measures to deal with those that violate Covid measures;³⁴ and
4. **Adopted or interpreted** ordinary legislation in ways that disproportionately and unnecessarily infringe on individual rights.

²⁹ CIVICUS, “Punished for Speaking Up: The Ongoing Use of Restrictive Laws to Stifle Dissent in India, <https://www.civicus.org/documents/reports-and-publications/India.PunishedForSpeakingup.pdf>; “Proposed new Indian Anti-terror Laws would Violate Human Rights,” Amnesty International, December 23, 2008, <https://www.amnesty.org/en/latest/news/2008/12/proposed-new-indian-anti-terror-laws-would-violate-human-rights-20081223>.

³⁰ Human Rights Watch, *World Report 2021* (New York: Human Rights Watch, 2020), 128, https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf.

³¹ Ibid, 350.

³² See e.g. Niger use of the 2019 Cybercriminal Act during the pandemic; Saudi Arabia use of the Anti-Cyber Crime Law during the pandemic; Kenya’s use Computer Misuse and Cyber Crimes Act of 2018 during the pandemic.

³³ OL FRA 4/2020; OL GBR 7/2020

³⁴ OL KHM 1/2020

This report demonstrates that governments are repurposing counter-terrorism and security frameworks in response to Covid-19 and using emergency laws to produce similar effects to CT and security frameworks. These measures adversely impact on the enjoyment of human rights in ways that appear unnecessary, disproportionate, and discriminatory. Two distinct but interrelated trends flow from these observations.

Accelerating the Passage of Counter-Terrorism and Security Legislation

As detailed above, counter-terrorism law is often used as the basis to limit rights in ways that are disproportionate and unnecessary. Legislation aimed at countering terrorism and “extremist violence” is frequently adopted following accelerated procedures and/or in the direct aftermath of a terrorist attack. As a result, there tends to be little space for thorough and measured discussions of the human rights impacts and appropriate safeguards for such laws.³⁵ The global pandemic has similarly been marked by fear and uncertainty, and reduced oversight and scrutiny.

One clear trend linking counter-terrorism legislation and the pandemic is global accelerated adoption of counter-terrorism and security laws including:

- In the **Philippines**, lawmakers approved the controversial Anti-Terrorism Act of 2020 (ATA 2020), which effectively repealed the 2007 Human Security Act and supposedly strengthened the government’s response to terrorism.³⁶ The ATA is criticized for drawing a ‘vague and overly broad definition of terrorism, permitt[ing] warrantless arrests and allow[ing] authorities to hold individuals for weeks without charge.’ While it is not a Covid-19 statute *per se*, the ATA is viewed by civil rights advocates as a ‘crackdown on dissent and free speech’³⁷ conveniently legislated at a time when the public’s discontent over the government’s management of the pandemic was at its peak, yet, due to quarantine measures, the chance of public protest was less probable.³⁸
- **France’s** Senate adopted a controversial anti-terrorism bill in July 2021, aimed at strengthening anti-terrorism measures and intelligence. With provisions to shut down places of worship and



Photo by Nicolas Weldingh

³⁵ Council of Europe Commissioner for Human Rights, “Human Rights Comment: Misuse of Anti-terror Legislation Threatens Freedom of Expression,” Council of Europe Portal, December 4, 2018, <https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression>.

³⁶ Special Procedures Experts: Comment on ‘The Anti-Terrorism Act of 2020,’ OL PHL 4/2020, (June 29, 2020), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25384>.

³⁷ Raul Dancel, “Duterte Signs Controversial Anti-terror Law in the Philippines,” The Straits Times, July 3, 2020, <https://www.straitstimes.com/asia/se-asia/duterte-signs-controversial-anti-terror-law-in-the-philippines>.

³⁸ Cliff Venzon, “Duterte Signs Controversial Philippine Anti-terror Bill into Law,” Nikkei Asian Review, July 3, 2020, <https://asia.nikkei.com/Politics/Duterte-signs-controversial-Philippine-anti-terror-bill-into-law>.

block access to the state's secret archives to strengthen internal security, this law has been criticized for its potential to adversely impact upon the enjoyment of human rights.³⁹

- In **Turkey**, Law No. 7262 on Preventing Financing of Proliferation of Weapons of Mass Destruction entered into force on 31 December 2020. This Act has been criticized for limiting the work of civil society organizations, alongside deprivations of rights to association and freedom of assembly.⁴⁰
- In **China**, The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ('National Security Law') was passed in Beijing on 30 June 2021. This law was criticized for, amongst other things, limiting freedom of expression, peaceful assembly, and association; the implications of the scope and substance of the security law as a whole on the rule of law; and the interference with the ability of civil society organizations to perform their lawful function.⁴¹
- In **Jordan**, King Abdullah II declared a state of emergency on March 19, by a Royal Decree. The

legal basis for this state of emergency is Article 124 in the Jordanian Constitution. Under an April 15, 2020 decree, sharing news that would 'cause panic' about the pandemic in media or online can carry a penalty of up to three years in prison.⁴²

- In **Sudan**, Emergency Order No. 1 2020 declared a 'state of public health emergency' due to the coronavirus pandemic. The order criminalized 'disseminating incorrect statements or information, including rumors, through any means of publication or misleading the authorities regarding the pandemic.'⁴³

In **Thailand**, the government invoked emergency powers through declaration of a constitutional state of emergency in March 2020 that included a prohibition against sharing 'false news' or information related to Covid-19 and empowered public officials to censor these types of communications and prosecute those accused of the offence.⁴⁴ In response to the pandemic, the **Philippines** passed a new emergency law, the Bayanihan to Heal as One Act, which included provisions penalizing the spreading of 'false information' on social media and other platforms.⁴⁵ The National Bureau of Investigation (NBI) initiated legal action against 17 people for allegedly

³⁹ Cliff Venzon, "Duterte Signs Controversial Philippine Anti-terror Bill into Law," *Nikkei Asian Review*, July 3, 2020, <https://asia.nikkei.com/Politics/Duterte-signs-controversial-Philippine-anti-terror-bill-into-law>.

⁴⁰ Special Procedures Experts: Comment on Law No. 7262 on Preventing Financing of Proliferation of Weapons of Mass Destruction which entered into force on 31 December 2020, OL TUR 3/2021, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26004>; Amnesty International, "Turkey: Terrorism Financing Law has Immediate 'Chilling Effect' on Civil Society," Amnesty International, October 19, 2021, [https://www.amnesty.org/en/documents/eur44/4864/2021/en/#:~:text=Careers-,Turkey%3A%20Terrorism%20financing%20law%20has%20immediate,chilling%20effect'%20on%20civil%20society&text=7262%20on%20the%20Prevention%20of,Force%20\(FATF\)%20in%202019](https://www.amnesty.org/en/documents/eur44/4864/2021/en/#:~:text=Careers-,Turkey%3A%20Terrorism%20financing%20law%20has%20immediate,chilling%20effect'%20on%20civil%20society&text=7262%20on%20the%20Prevention%20of,Force%20(FATF)%20in%202019).

⁴¹ Special Procedures Experts: Comments on the Decision of the National People's Congress on Establishing and Improving the Legal System and Enforcement Mechanisms for Safeguarding National Security in the Hong Kong Special Administrative Region, OL CHN 17/2020, 1 September 2020, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25487>.

⁴² "Covid-19 Civic Freedom Tracker," INCL, <https://www.icnl.org/covid19tracker/>; Human Rights Watch, "Jordan: State of Emergency Declared," Human Rights Watch, March 20, 2020, <https://www.hrw.org/news/2020/03/20/jordan-state-emergency-declared#>.

⁴³ "Covid-19 Civic Freedom Tracker," INCL, <https://www.icnl.org/covid19tracker/>.

⁴⁴ CIVICUS, "Activists and Opposition Face Judicial Harassment as Emergency Measures in Thailand Raise Concerns," CIVICUS, April 8, 2020, <https://monitor.civicus.org/updates/2020/04/08/activists-and-opposition-face-judicial-harassment-emergency-measures-thailand-raise-concerns/>.

⁴⁵ Freedom House, "Philippines," Freedom House, last accessed January 21, 2022, <https://freedomhouse.org/country/philippines/freedom-net/2021>.

posting 'false information' online, an offense that carries steep penalties.⁴⁶

- **Myanmar's** popular leader, Aung San Suu Kyi, who has been in custody since the country's military seized power in a coup on February 1, was charged and convicted of a new crime: that of violating the country's National Disaster Management Law. The new charge carries a maximum three-year prison sentence. An amendment to Myanmar's penal code instituted by the junta on February 14 permits the army to detain people without having to go to court.⁴⁷

Not only have Covid-19 emergency measures been used as a pretext to target dissent, they appear to have provided an opportunity for authorities to target minorities on the purportedly non-discriminatory basis of public health policy.

In **India**, Anti-Muslim rhetoric surged following the outbreak of Covid-19. In March, after Indian authorities announced that they found a large number of Covid-19 positive cases among Muslims who had attended a mass religious congregation in Delhi, some ruling Bharatiya Janata Party (BJP) leaders called the meeting a 'Talibani crime' and 'Corona Terrorism.'⁴⁸ Some media had used terms such as 'Corona-Jihad' and social media platforms were flooded by calls for social and economic boycotts of Muslims. There were also numerous physical attacks on Muslims, including volunteers distributing relief

material, amid falsehoods accusing them of spreading the virus deliberately.⁴⁹

In **Sri Lanka**, religious discrimination was identified in the management of the pandemic, notably directed at Muslim burial practices.⁵⁰ UN Special Procedure mandate holders articulated their deep concerns at these practices.⁵¹

Covid-19 has also provided a pretext for the adoption of national laws which, while not strictly counter-terrorism-related, nevertheless serve similar purposes. For instance, under Article 22 of the **Cambodian** constitution, the government has the power to declare a state of emergency with unanimous agreement from the Prime Minister, the President of the National Assembly and the President of the Senate. While Article 22 confers the power to declare a state of emergency, it remains unclear what the actual operative effect of such a declaration would be. Cambodia's State of Emergency law, passed in response to the virus, was enacted through this procedure on April 29, 2021.⁵²

Repurposing Counter-Terrorism Mechanisms and Practices

In addition to the accelerated passage of formal counter-terrorism and/or national security laws set out above, States have also repurposed mechanisms and practices normally utilized in the context of counterterrorism to address the pandemic.⁵³ These

⁴⁶ Carlos H. Conde, "Philippine Authorities Go After Media, Online Critics, Human Rights Watch" Human Rights Watch, April 6, 2020, <https://www.hrw.org/news/2020/04/06/philippine-authorities-go-after-media-online-critics>.

⁴⁷ Jonathan Head, "Myanmar Coup: Detained Aung San Suu Kyi faces charges," BBC News, February 3, 2021, <https://www.bbc.co.uk/news/world-asia-55915354>.

⁴⁸ Human Rights Watch, World Report 2021 (New York: Human Rights Watch, 2020), 317, https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf.

⁴⁹ K. Raj Thulasi, "COVID-19 and the Crisis in Indian Democracy," *Verfassungsblog*, February 6, 2021, <https://verfassungsblog.de/covid-19-and-the-crisis-in-indian-democracy/>.

⁵⁰ Palina Kolvani, Shreeya Pillai, Amanda B. Edgell, Sandra Grahn, Stefanie Kaiser, Jean Lachapelle and Anna Lührmann, "Pandemic Backsliding: Democracy Nine Months into the Covid-19 Pandemic," V-Dem Policy Brief no. 26, (2020): 3.

⁵¹ "Sri Lanka: Compulsory cremation of COVID-19 bodies cannot continue, say UN experts," OHCHR, January 25, 2021, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26686&LangID=E>.

⁵² Fionnuala Ní Aoláin, "Under Cover of Covid at the UN: Why Counterterrorism is Not the Answer to a Pandemic," Just Security, July 10, 2020, <https://www.justsecurity.org/71305/under-cover-of-covid-at-the-un-why-counterterrorism-is-not-the-answer-to-a-pandemic/>.

⁵³ See Saman Rizwan, "Securitisation of COVID-19," Centre for Strategic and Contemporary Research, February 4, 2021, <https://cscr.pk/explore/themes/politics-governance/securitisation-of-covid-19/>.

range from exceptional security methods of surveillance to the use of high-risk data technologies to respond to the health crisis.

The ability to locate and trace individuals with the virus is an important tool for ensuring limited transmission. For instance, outbreak surveillance tools such as the World Health Organization's "Go.Data" aid the discovery of disease transmission dynamics and pandemic response.⁵⁴ Nevertheless, such measures risk undermining fundamental rights to privacy and increasing the intersection of national security apparatus in the daily lives of citizens. The right to privacy can be described as a 'gateway' right; a right that enables other rights, including the protection of non-derogable rights. These include but are not limited to, the rights to life, to liberty and security of person, the right to be free from torture, cruel, inhuman or degrading treatment, the rights to a fair trial, privacy and family life, freedom of expression or movement. As I have previously noted:

*"It is the scale of impingement, together with the universal, interdependent, and interconnected nature of these rights leading to manifold, interrelated effects across a series of individual and collective freedoms that makes the need for human rights compliant regulation of the use of biometric tools and data an imperative and urgent need."*⁵⁵

Rights restrictions must be proportionate and necessary even during a health crisis. Limiting one right can have a knock-on effect in terms of how other rights are enjoyed, and in turn functions to limit

the overall effectiveness of a crisis response. The types of surveillance measures adopted include public surveillance of population movements under lockdown through closed-circuit television (CCTV), drones, mobile phone usage data, and biometric tracker bracelets.⁵⁶ These extraordinary measures transferred to health regulation from security practices through the pandemic in multiple States, have fundamentally negative effects on the rule of law and human rights. Examples abound and include:

- Through an application installed on their smartphones which embeds geolocation and facial recognition features, **Polish** residents placed in quarantine had to authenticate themselves by regularly sending the police a selfie taken from their home.⁵⁷
- In **Azerbaijan**, to leave their place of residence, persons had to send an SMS with their identity information and reason for leaving. A person could leave only after receiving a positive response from the e-Government information system.⁵⁸
- **Bahrain** used electronic bracelets connected to a mobile app to track confirmed cases of the coronavirus. The punishment for being caught breaking the quarantine was a potential prison sentence of at least three months.⁵⁹
- In **Hong Kong**, the government used electronic wristbands to enforce quarantines. The wristbands were connected to a smartphone app and were used to ensure that individuals remain at

⁵⁴ Akarsh Venkatasubramanian, "The Human Rights Challenges of Digital COVID-19 Surveillance," *Health and Human Rights Journal* 22, no. 2 (December 2020): 79 – 83.

⁵⁵ Krisztina Huszti-Orbán and Fionnuala Ní Aoláin, "Use of Biometric Data to Identify Terrorists: Best Practice or Risky Business?," *University of Minnesota Human Rights Center*, 2020, 14, <https://law.umn.edu/sites/law.umn.edu/files/2020/07/21/hrc-biometrics-report-july2020.pdf>.

⁵⁶ Kristine Eck, and Sophia Hatz, "State surveillance and the COVID-19 crisis," *Journal of Human Rights* 19, no. 5 (2020): 603-612.

⁵⁷ Félix Tréguer, "The Virus of Surveillance: How the COVID-19 Pandemic is Fuelling Technologies of Control," *Political Anthropological Research on International Social Sciences (PARISS)*, Brill 2, no. 1 (2021): 16-46.

⁵⁸ "Covid-19 Civic Freedom Tracker," INCL, <https://www.icnl.org/covid19tracker/>.

⁵⁹ Dave Gershgorn, "We Mapped How the Coronavirus Is Driving New Surveillance Programs Around the World," *One Zero*, April 9, 2020, <https://onezero.medium.com/the-pandemic-is-a-trojan-horse-for-surveillance-programs-around-the-world-887fa6f12ec9>.

home. Violations were subject to a \$5,000 HKD fine (\$644) and six months in prison.⁶⁰

- In **India**, the Karnataka state government directed all persons in quarantine to send a ‘selfie’ of themselves every hour from their home. The directive required that the selfie image include location coordinates to inform the government of the sender’s location, and that every selfie sent by a home-quarantined person will be verified by the government.⁶¹ The mobile app for tracking of quarantined patients was also adopted by the Delhi, Gujarat, Tamil Nadu, and Maharashtra governments.⁶²
- With more than 100,000 cameras around Moscow, the **Russian** government has used facial recognition and phone-based location tracking to monitor those under quarantine.⁶³
- **China** is reportedly using a mix of ‘smart’ thermal scanners and facial recognition technologies in public places to track the spread of the virus. Chinese tech giant Alibaba has rolled out a health tracking feature that uses data about personal health and assigns a color-coded health status to an individual. Green is for ‘safe’, yellow requires a seven-day quarantine and red is for a 14-day quarantine. This system is used to determine people’s access to public spaces.⁶⁴

A health crisis does not diminish the responsibility of States to limit their use of exceptional and high-risk technologies. As a starting point, when such technologies are used, it is essential that surveillance and biometric data is prescribed by law and limited to that which is strictly and demonstrably necessary

to achieve a legitimate aim. Their use requires clear rules and accountability for how data is collected, analyzed, stored, used, and shared.⁶⁵

An additional challenge might be termed the “slippage of counter-terrorism” mechanisms and practices into other arenas. Ostensibly, counter-terrorism exists as an exceptional framework tasked to deal with a specific and narrow threat – terrorism. To this end, counter-terrorism mechanisms and practices, such as the types of surveillance techniques discussed above, exist to address this particular security-focused threat. The examples above illuminate how some counter-terrorism measures are being applied in wholly unrelated contexts and the relative ease with which such transposing can occur. Secondly, counter-terrorism mechanisms have revealed themselves to be far from exceptional, applying on an almost continuous basis since 9/11 across the globe. Much of the existing rhetoric from governments is that measures adopted in response to Covid-19 are temporary. However, the examples discussed above demonstrate that far from being ‘temporary,’ exceptional measures cannot only be normalized but also repurposed and applied.

Examples below demonstrate the institutionalization and use of counter-terrorism actors and mechanisms in Covid-19 responses, including:

- In **Bangladesh**, the government increased surveillance, creating two units to identify Covid-19 ‘rumors’ one under the Information Ministry and another under the Rapid Action Battalion (RAB), the country’s primary counterterrorism unit, which has previously been singled out for

⁶⁰ Elisha Aaron, “Coronavirus Shows the Need for a Human Rights–based Approach to Public Health Crises,” Freedom House, August 3, 2020, <https://freedomhouse.org/article/coronavirus-shows-need-human-rights-based-approach-public-health-crises>.

⁶¹ Gautam Bhatia, “An Executive Emergency: India’s Response to Covid-19,” *Verfassungblog*, April 13, 2020, <https://verfassungsblog.de/an-executive-emergency-indias-response-to-covid-19/>.

⁶² Nirupam Bajpai, John Biberian, and Manisha Wadhwa, (2020) “ICT Initiatives in India to Combat COVID-19,” *Center for Sustainable Development* 32 (2020).

⁶³ Elisha Aaron, “Coronavirus Shows the Need for a Human Rights–based Approach to Public Health Crises,” Freedom House, August 3, 2020, <https://freedomhouse.org/article/coronavirus-shows-need-human-rights-based-approach-public-health-crises>.

⁶⁴ Amnesty International, “COVID-19, Surveillance and the Threat to your Rights,” Amnesty International, April 3, 2020, <https://www.amnesty.org/en/latest/news/2020/04/covid-19-surveillance-threat-to-your-rights/>.

⁶⁵ A/HRC/13/37.

its abuses of the rule of law.⁶⁶ Reports of arbitrary arrests of individuals who spoke out against the government's response to the pandemic or were otherwise critical of the ruling party have followed.⁶⁷

- In **Pakistan**, the government involved the Inter-Services Intelligence agency in tracking the spread of the coronavirus.⁶⁸ Geo-fencing and phone-monitoring systems normally used to track militant non-state actors have been employed to monitor neighborhoods on lockdown and to listen in on conversations Covid-19 patients have with their contacts to assess whether contacts have shown symptoms. In June 2020, two Pakistani reporters were tortured by the Anti-Terrorism Force for covering a protest at a quarantine centre on the Afghan border.⁶⁹
- In **Iran** a special task force was established to tackle 'cyber rumours' and 'fake news' related to Covid-19 on social media. Scores of journalists, social media users, health care workers and others were arrested, summoned for questioning or given warnings.⁷⁰
- **Israel's** Securities Authority (ISA) is its internal secret service. Its main responsibility is protecting state security against terrorism, subversion and

espionage. On 17 March 2020, Israel's interim Government issued an emergency order that harnesses the ISA's surveillance technology for what seems to be a pure public health purpose – stopping the spread of Covid-19. In other words, Shabak's electronic surveillance capability to monitor the movements of suspected terrorists was repurposed to interrupt the chain of infection.⁷¹ This repurposing has ignited legal and parliamentary debate. In April 2020 it led several human rights organizations to make an appeal to the Israeli Supreme Court. The Court approved Shabak's monitoring in principle, but it limited the duration to one week, after which the government was required to regulate its activity through primary legislation. The Knesset in July authorized the surveillance for six months, following an Israeli Supreme Court ruling in April that the government must bring the program under legislative oversight.

Finally, military and security apparatus more generally can play an important role in responding to emergencies. In general, such actors are primarily engaged with security and military threats and management. They possess significant resources and are often highly organized and efficient. However, the role of the military should always be limited

⁶⁶ "Covid-19 Civic Freedom Tracker," INCL, <https://www.icnl.org/covid19tracker/>.

⁶⁷ Human Rights Watch, *World Report 2021* (New York: Human Rights Watch, 2020), 77, https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf; "Bangladesh: UN Rights Chief Urges Transparent Probe into Writer's Death, Review of Law under which he was Charged," UN News, March 1, 2021, <https://news.un.org/en/story/2021/03/1086002>.

⁶⁸ Zuha Siddiqui, "Pakistan Is Using a Terrorism Surveillance System to Monitor the Pandemic," Slate, July 15, 2020, <https://slate.com/technology/2020/07/pakistan-isi-terrorism-surveillance-coronavirus.html>.

⁶⁹ Ibid

⁷⁰ Amnesty International, "Amnesty International Report 2020/21: The State of the World's Human Rights," Amnesty International, April 7, 2021, 191–92, <https://www.amnesty.org/download/Documents/POL1032022021ENGLISH.PDF>.

⁷¹ Amir Cahane, "Counterterrorism Measures to Counter Epidemics: Covid-19 Contact Tracing in Israel," *blogdroiteuropeen*, July 18, 2020, <https://blogdroiteuropeen.com/2020/07/18/counterterrorism-measures-to-counter-epidem-ics-covid-19-contact-tracing-in-israel-by-amir-cahane/>; Moran Amit, Heli Kimhi, Tarif Bader, Jacob Chen, Elon Glassberg, and Avi Benov, "Mass-surveillance Technologies to Fight Coronavirus Spread: the Case of Israel," *Nature Medicine* 26, (2020): 1167–1169; Rachel Noah, "Using Counterterrorism for Fighting the Pandemic: Israel During the Days of COVID-19," *Oxford Law*, June 19, 2020, <https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2020/06/using-counterterrorism-fighting-pandemic-israel>; Gil Murciano, "Covid-19 and the Securitization of National Crises in Israel's Strategic Approach: Reliance on the Security Community As a 'Comfortable Necessity,'" *SWP Comment* 2020/C 63 (2020): 8 Seiten.

to supporting the civilian authority.⁷² There is an observable increase in the use of military authorities in response to the global health crisis, embedding the security sector firmly in the regulation of a health pandemic in multiple States. When the military is deployed in a health context, there should be clear rules established for the extent and nature of this assistance, alongside permissible conduct when undertaking these roles. Heightened involvement of the military in ways that extend beyond assistance increase the prospect for human rights violations, undermine accountability and create democratic deficits. Moreover, and as is the case for emergency measures more generally, the increased role of the military can be difficult to undo post-pandemic. Examples of military involvement during the pandemic include:

- **Croatia**, the military was involved with transporting patients and erecting a camp to accommodate infected patients (not with confinement measures); and
- **Azerbaijan**, from February 2021, military hospitals started vaccinating the population.

There must be heightened public oversight, accountability, transparency and adherence to international human rights standards when the military, police and other security actors undertake leading or supportive roles in responding to a health crisis. These agencies and entities have generally been confined to traditional security and counter-terrorism arenas and in those areas, concerns have historically abounded about oversight, transparency and accountability. The import of these security actors to the health arena must be accompanied by robust oversight and transparency.

⁷² The law confers a host of powers on the government during including powers to ‘impose: bans or limits on the freedom to travel; bans or limits on the freedom to hold meetings or gatherings; bans or limits on daily work or professional activities; and bans or limits on people leaving their homes or using other accommodation.’



Photo by Brendan Beale

4

ACCOUNTABILITY

PREVIOUS SECTIONS HAVE ILLUSTRATED that States, in the context of Covid-19, have relied on and assumed a range of emergency powers stemming from varying constitutional and legislative bases to enact restrictions and measures that negatively and disproportionately impact human rights. In many contexts, there is a lack of clarity regarding the authority, competencies, and duration of such emergency measures. These measures have also been demonstrably associated with the repurposing of counter-terrorism and national security frameworks, largely due to the interchangeability of public order and criminal law and the legacies of exceptionalism in the counter-terrorism space.

There are numerous frameworks under domestic and international law, which exist to limit the use of these powers to ensure that any measures are necessary, proportionate, lawful, and applied in non-discriminatory ways. In theory, existing checks on power—such as through the courts, legislatures, and even civil society—ought to function in ways that ensure governments do not misuse or act beyond the parameters established under law. However, historically, emergency law frameworks have been ineffective at limiting the actions of government and security actors. The structural challenges of overuse and abuse of emergency law are evident in national accountability lacunae across the globe. Several impediments, which are the result of covid-19 itself, further complicate this accountability picture. These include:

1. **Generic restrictions**, such as limits on public gatherings, impacting upon the extent to which civil society can protest government overreach. Notably in the years before the pandemic social protest movements were central to challenging public dissatisfaction with government and highlighting demands

for political change in multiple societies. This capacity has been greatly reduced throughout the pandemic.

2. **Structural restrictions** on decision making bodies, including access to alternative means of gathering and communication in order to hold governments accountable. This has been particularly evident where parliaments have been unable to sit virtually or where oversight bodies such as Ombudsman have been impeded in their functions because of the pandemic.
3. **Absolute restrictions** such as shutdowns of communication or media platforms – or other restrictions on freedom of expression, under the guise of combatting ‘fake news’, in some countries including wholesale media blackouts.
4. **Designed restrictions**, for examples where parliaments were rescinded because of Covid-19, and lawyers and judges were not deemed essential workers.

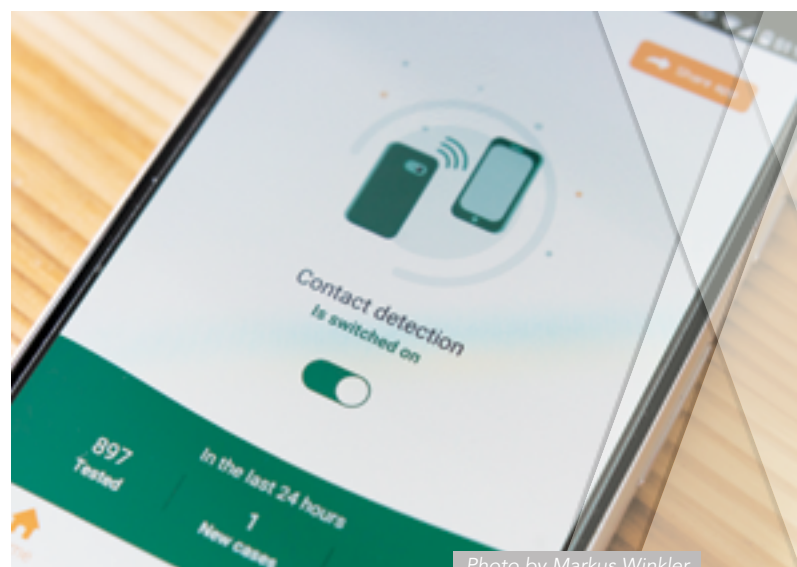


Photo by Markus Winkler

Covid-19 has had a particular effect in national contexts where constitutionalism, the rule of law, and existing checks and balances were already weakened, thereby exacerbating pre-existing exceptionalism and system weaknesses. While holding governments to account is necessary to prevent human rights abuse, the impacts of emergency frameworks often limit the scope of existing checks on the use of power resulting in a dearth of necessary accountability mechanisms.

Existing Accountability Frameworks

The various safeguards around derogations reflect an important balance that govern times of emergency. On one hand, governments need flexibility to address emerging threats and to exercise all power vested in the state to alleviate the situation.⁷³ On the other, emergency frameworks are guided by certain principles and rules.⁷⁴ Requirements of necessity, proportionality, lawfulness and non-discrimination exist to prevent the normalisation of emergency powers. They also seek to ensure that any measures adopted respond to the virus and not used for other unrelated purposes. The challenge that arises, is that in practice, these frameworks are largely ineffective with few examples of effectiveness in practice.

Domestic Models of Accountability

Models of emergency powers also, in theory, include important accountability mechanisms. Constitutions frequently provide for emergencies as well as

limiting emergency powers.⁷⁵ Constitutions also frequently place temporal constraints on a state of emergency to prevent their normalization, and parliaments may be required to approve any proposed extensions, sometimes through an increased majority approval threshold. Courts and parliaments can be entrusted to scrutinize both procedural compliance and substantive measures adopted under a state of emergency. For instance, while in most cases some derogation of rights is permitted, constitutions will frequently include a subset of rights that cannot be abrogated regardless of the emergency. In theory, declaring a state of emergency ensures that emergency powers are assumed and exercised within a legal framework, albeit one that differs from the normal constitutional arrangements.

There are also limitations placed on emergency powers derived from legislation. A defining feature of the legislative model is that 'however unusual it may be, emergency legislation remains ordinary within the framework of the constitutional system: it is an act of the legislature working within its normal competence.'⁷⁶ In theory, using legislation ought to ensure compliance with overriding public law and rule of law principles. Legislation should include limits on executive power, for instance in the form of sunset clauses. Under the legislative model, ex post scrutiny of legislation can also ensure that the responses are proportionate and protect human rights. Legislation must also ordinarily be drafted

⁷³ To this end, in application of Article 15(3) of the ECHR, Latvia, Romania, Armenia, Estonia, Moldova, Georgia, Albania, North Macedonia, Serbia, and San Marino notified the Secretary General of the Council of Europe that they were invoking this provision to face the ongoing pandemics. In application of Article 27(3) of the ACHR, Guatemala, Peru, Ecuador, Columbia, Bolivia, Panama, Chile, Honduras, Argentina, El Salvador, and the Dominican Republic notified the Secretary General of the Organization of American States (OAS) of the state of emergency, informing other states on the special regulations they adopted. See Audrey Lebret, "COVID-19 Pandemic and Derogation to Human Rights," *Journal of Law and the Biosciences* 7, no. 1 (January-June 2020): 1–15.

⁷⁴ See Alan Greene, *Emergency Powers in a Time of Pandemic* (Bristol University Press, 2020); Alan Greene, "Derogating from the European Convention on Human Rights in response to the Coronavirus pandemic: if not now, when?," *European Human Rights Law Review*, 2020, no. 3 (2020): 262-276; Alan Greene, "On the Value of Derogations from the European Convention on Human Rights in Response to the COVID-19 Pandemic: A Rejoinder," *European Human Rights Law Review*, no. 5 (2020): 526-532. This view is, however, not without opposition. See, for example, Kanstantsin Dzehtsiarou, "COVID-19 and the European Convention on Human Rights," Strasbourg Observers, March 27, 2020, <https://clr.iliauni.edu.ge/wp-content/uploads/2020/07/Kanstantsin-Dzehtsiarou-pp.53-58.pdf>.

⁷⁵ Joelle Grogan, "States of Emergency Analysing Global Use of Emergency Powers in Response to COVID-19," *European Journal of Law Reform* 22, no. 4 (2020): 341.

⁷⁶ John Ferejohn and Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2, no. 2 (2004): 210–39, 215.

so as to be non-discriminatory in its application and applied accordingly.

These legal frameworks can mean that emergency powers are subject to legislative and judicial scrutiny. For instance, in many cases, legislatures are required to approve emergency powers. In **Argentina**, for instance, the legislature sanctioned Law 27541, that declared a state of public emergency and gave the executive the power to take measures via decree on covid-19 related issues.⁷⁷ In **Sierra Leone**, a State of emergency needs to be approved by the parliament or otherwise it expires after 21 days (Article 29, point 3 of the Constitution). In other cases, while emergency powers can be enacted without legislative approval, they must be approved after. In Guatemala, for instance, Article 138 of the Constitution provides that the president declares the state of disaster via decree and the congress needs to ratify/modify/disapprove it in the following three days.⁷⁸

Limitations of Accountability

Nevertheless, the theoretical potential of regulatory frameworks often does not comport with reality. Numerous states have enacted measures without a firm legal basis raising questions about legality and the unconstrained and unregulated exercise of governmental power. This overlaps with the Special Rapporteur's finding that in the counter-terrorism arena:

[A]n acute form of de facto emergency practice is created, which bypasses explicit legislative authorization entirely. Here, governments rely predominantly or exclusively on executive powers to regulate terrorism and enable counter-terrorism responses.⁷⁹

Where emergency powers are assumed outside of a constitutional or legislative framework, there is less scope for legislatures and courts to limit the activities of the executive.⁸⁰ Unfortunately, the limits on the operation of both courts and legislatures during the pandemic have significantly and adversely impacted on their oversight functions. Many argue that the declaration of a state of emergency should act almost as a 'quarantine' on the use of those powers.⁸¹ Yet, few countries have formally issued notifications of derogation.⁸² At a global level, it appears that only 14 of 173 signatory states (or 8%) notified derogations from the International Covenant on Civil and Political Rights (ICCPR).⁸³ Tracking the status of such derogations is procedurally difficult and labor intensive as none of the universal or regional treaties have easily accessible and up to date collective derogation trackers. For accountability purposes, the opacity of collective derogation practices, and the lack of up-to-date information on which state is in derogation and on what basis, remains a significant procedural challenge to assessing global practice.

Domestic legal frameworks, such as constitutional or legislative models, rely on accountability from courts and parliaments to constrain emergency powers.

⁷⁷ "Argentina," Github, https://github.com/vdeminstitute/pandem/blob/master/by_question/emlegapp.md

⁷⁸ "Sierra Leone," Github, https://github.com/vdeminstitute/pandem/blob/master/by_question/emlegapp.md.

⁷⁹ A/HRC/37/52, ¶ 33.

⁸⁰ Sean Molloy, "Emergency Law Responses to Covid-19 and the Impact on Peace and Transition Processes," International Institute for Democracy and Electoral Assistance, 2021, 19, <https://www.idea.int/sites/default/files/publications/emergency-law-responses-to-covid19.pdf>.

⁸¹ Martin Scheinin, "Covid-19 Symposium: To Derogate or Not to Derogate?," *Opinio Juris*, April 6, 2020, <https://opinio-juris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>; Alan Greene, "Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic: If Not Now, When?," *European Human Rights Law Review* 3(2020): 262; Sean Molloy, "Covid-19 and Derogations Before the European Court of Human Rights," *VerfassungsBlog*, April 10, 2020, <https://verfassungsblog.de/covid-19-and-derogations-before-the-european-court-of-human-rights/>.

⁸² Grogan, "States of Emergency Analysing Global Use of Emergency Powers," 341. In a study of 74 countries, on 12 had derogated formally from their treaty obligations.

⁸³ Niall Coghlan, "Dissecting Covid-19 Derogations," *VerfassungsBlog*, May 5, 2020, <https://verfassungsblog.de/dissecting-covid-19-derogations>.

However, the pandemic has limited the capacity of these traditional mechanisms to function effectively. For instance, particularly at the beginning of the pandemic, parliaments were formally suspended or dissolved. **North Macedonia's** parliament did not convene between its dissolution on 12 February and the snap election on 15 July. By the time of the election, the country's president had declared a state of emergency five times, allowing the caretaker government to rule by decree. Across the globe, particularly in the formative stages of the pandemic, many parliaments adopted the same approach.

Secondly, particularly in societies transitioning from periods of conflict or repression, accountability mechanisms are in a state of flux. A key aim in transitioning societies is to establish effective checks and balances on power. However, the evolving nature of this process can hinder institutions' capacity to effectively constrain executive power even in normal circumstances, but particularly when faced with exogenous shocks. In other cases, the limited role of institutional oversight can be explained by the lack of progress in establishing the institutions necessary to contain executive action. For instance, a State of Health Emergency was declared in **Sudan**, supported by articles 40–41 of the Constitution. The declaration of a state of emergency is not legitimate if the Legislative Council does not ratify it. However, Sudan does not have a legislature and therefore the emergency response could not be approved as required by its Constitution.

In other cases, the pandemic has occurred against a broader context of democratic deconsolidation whereby the competences of courts and parliaments have been gradually eroded, often through legal

means such as constitutional amendments.⁸⁴ The pandemic has provided an opportunity to further limit these roles.⁸⁵ In **Sri Lanka**, for instance, the president refused to recall the parliament that had been dissolved ahead of elections, even though the Constitution clearly requires such a recall in circumstances such as a pandemic. The Supreme Court, exercising significant deference to the executive during a pandemic, also denied leave to proceed with multiple challenges to the president's refusal to act according to the Constitution.⁸⁶

Moreover, other forms of accountability, such as that provided by the media and civil society, are often severely restricted both because of emergency measures and because of the gradual curtailing of civic space.

Courts can play an important role in scrutinizing emergency measures. In **Brazil**, the Constitutional Court has intervened to prevent President Bolsonaro from understating the risks associated with Covid-19. In **Kosovo**, the Constitutional Court ruled that the government could address the pandemic through ordinary law rather than resorting to emergency law. In **El Salvador**, the Supreme Court ruled in May 2020 that President Nayib Bukele had overstepped his powers by declaring a state of emergency in order to extend stringent lockdown measures without congressional approval. The Constitutional Court of **Bosnia and Herzegovina** concluded that prohibiting the movement of persons under 18 years of age and over 65 violated the right to freedom of movement under article II (3) (m) of the Constitution of Bosnia and Herzegovina and article 2 of Protocol No. 4 to the European

⁸⁴ Tom Gerald Daly, "Democratic Decay: Conceptualising an Emerging Research Field," *Hague Journal on the Rule of Law* 11, no. 9 (2019); Nancy Berneo, "On Democratic Backsliding," *Journal of Democracy* 27, no. 1 (2016); Aziz Huq and Tom Ginsburg, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018); Larry Diamond, "Facing up to the democratic recession," *Journal of Democracy* 26, no. 1 (2015).

⁸⁵ Gábor Halmai, Gábor Mészáros, and Kim Lane Scheppele, "From Emergency to Disaster: How Hungary's Second Pandemic Emergency will Further Destroy the Rule of Law," *Verfassungsblog*, May 30, 2020, <https://verfassungsblog.de/from-emergency-to-disaster/>; Radosveta Vassileva, "Bulgaria: COVID-19 as an Excuse to Solidify Autocracy?," *Verfassungsblog*, April 10, 2020, <https://verfassungsblog.de/bulgaria-covid-19-as-an-excuse-to-solidify-autocracy/>; Paul Kalinichenko and Elizaveta Moskovkina, "Russia – With Scepter and Corona," *Verfassungsblog*, May 23 2020, <https://verfassungsblog.de/russia-with-scepter-and-corona/>

⁸⁶ Meera Srinivasan, "Sri Lanka's Top Court Dismisses Petitions Challenging Poll Date," *The Hindu*, June 2, 2020, <https://www.thehindu.com/news/international/sri-lankas-top-court-dismisses-petitions-challenging-poll-date/article31733871.ece>.

Convention for the Protection of Human Rights and Fundamental Freedoms.⁸⁷

However, there are also limits as to the impacts that courts can make, particularly when they appear unwilling to challenge the government directly. In the **Democratic Republic of Congo**, for instance, observers have criticized the Constitutional Court for failing to rule unconstitutional the president's failure to obtain approval for a state of emergency from both the Senate and the National Assembly, as required by law.⁸⁸

Difficulties such as those identified above necessarily affect accountability in the area of counter-terrorism and security laws as they intersect with pandemic regulation. Courts are often entrusted to ensure that counter-terrorism legislation is not contrary to a state's international human rights obligations or constitutions.⁸⁹ But, as the Special Rapporteur has noted elsewhere, "Counterterrorism practice around the world is grossly deficient on human rights, lacks oversight and independent monitoring in most states, and may contribute to the very conditions producing violence by systemically violating the most fundamental rights in the guise of countering terrorism and extremism".⁹⁰

⁸⁷ Sean Molloy, "Emergency Law Responses to Covid-19," 19.

⁸⁸ Trésor M. Makunya, "DRC's Constitutional Court: Broken shield in overseeing the executive in emergencies?," ConstitutionNet, 27 May 2020, <https://constitutionnet.org/news/drcs-constitutional-court-broken-shield-overseeing-executive-emergencies>.

⁸⁹ Kent Roach, "Judicial Review of the State's Anti-Terrorism Activities: The Post 9/11 Experience and Normative Justifications for Judicial Review, *Indian Journal of Constitutional Law* 138 (2009).

⁹⁰ Fionnuala Ní Aoláin, "Under Cover of Covid at the UN: Why Counterterrorism is Not the Answer to a Pandemic," *Just Security*, July 10, 2020, <https://www.justsecurity.org/71305/under-cover-of-covid-at-the-un-why-counterterrorism-is-not-the-answer-to-a-pandemic/>.



Photo by Daniel Lee

5

THE RISK OF NORMALIZING THE EXCEPTION



Photo by Joseph Allen

IN TIMES OF EMERGENCY, where exceptional measures are taken, the risks extend far beyond the potential and immediate adverse impacts on the enjoyment of rights.⁹¹ They also include the risk of normalizing emergency powers, a problem known as ‘the normalization of the exception’ because the exception has become the norm and the distinction between normal and exceptional conditions has broken down.⁹² When the different ways in which Covid-19 and counterterrorism are connected become clear, the risk of normalization is significantly more complex. Such risks stem from accountability deficits alongside uncertain expiration dates of emergency laws and poor oversight and review processes.

⁹¹ See generally Fionnuala Ní Aoláin and Oren Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).

⁹² *Ibid.*

There are numerous ways in which emergency measures, adopted to respond to a particular crisis, can endure long after the supposed emergency has lapsed. In the first instance, emergency measures adopted without a clear legal basis are largely discretionary and subject to little or no oversight.

Secondly, when counter-terrorism, security and normal laws are repurposed, their use has consistently demonstrated a permanence that has been virtually impossible to dislodge. Elsewhere, the Special Rapporteur has highlighted the increased use of ordinary law as an emerging vehicle for counter-terrorism legislation.⁹³ This creates sustained and enduring situations of emergency at the national level, with severe and frequently unjustified restrictions on many non-derogable rights.⁹⁴

Thirdly, even where there is a legal basis, significant issues arise. For one, problems of accountability and scrutiny addressed previously necessarily feed into the potential normalization of emergency measures. For instance, where courts are unable to provide a check on power, or civil society is constrained in holding governments to account, important safeguards against the normalization of emergency powers are removed.

Fourthly, it is not always clear when emergency laws terminate. **Kenya's** Public Order (State Curfew) Act of March 26 (1), which contains provisions for a nationwide curfew, was initially declared for a period of 30 days. All later extensions of the emergency measures had limits on duration. This is an example of a sunset clause, which is a legislative technique employed when passing emergency legislation with two primary elements: (i) limited duration; and (ii) ex post evaluation. As the phrase suggests, a sunset clause does not aim at continuity, but rather

'sets the sun' on a provision or entire statute on a specific date, unless there are substantial reasons to believe that the former should be extended for a determined period.⁹⁵ In other words, sunset clauses terminate a piece of emergency legislation unless an extension is approved and in so doing provide an important check on the continuation of measures adopted in response to a particular crisis.

Positive examples of sunset clauses in other contexts promote a broadly participatory review process wherein civil society, academia, and other stakeholders are consulted as to the effectiveness and human rights implications.⁹⁶ Yet, much of the pandemic-related legislation passed in countries around the world lacks sunset clauses and is of uncertain duration. In Nepal and Zambia, for example, relevant legislation lacks any sunset clauses or expiration dates. In **Zambia**, there is no official end date or sunset clause in the Public Health Regulations 2020 document, or in the Public Health Act sections used for legal power to implement these regulations (section 28, 30, and 114).⁹⁷ In contrast, **Singapore's** Covid-19 (Temporary Measures) Act 2020⁹⁸ and **Canada's** Covid-19 Emergency Response Act 2020⁹⁹ set out different time periods for the various sections in the acts to apply and expire. In the United Kingdom, despite the inclusion of an expiration date, Section 90 of the Coronavirus Act grants the power to (with the agreement of Parliament) to extend its effect for up to 6 months – a power that was repeatedly exercised.

Nevertheless, there are also significant limitations associated with sunset clauses¹⁰⁰ and the counter-terrorism context provides significant insights as to the efficacy of these limits. Often, legislation is repeatedly extended such that emergency

⁹³ A/HRC/37/52, ¶ 27.

⁹⁴ Ibid.

⁹⁵ Sean Molloy, "Sunset Clauses as Safeguards of Democracy?," *European Journal of Law Reform*, no. 2 (2021).

⁹⁶ See, for example, Nicola McGarrity, Rishi Gulati, and George Williams, "Sunset Clauses in Australian Anti-Terror Laws," *Adelaide Law Review* 33, no. 2 (2012): 320.

⁹⁷ "Zambia," Github, https://github.com/vdeminstitute/pandem/blob/master/by_question/emlimit.md.

⁹⁸ Singapore's Covid-19 (Temporary Measures) Act 2020, accessed here: <https://sso.agc.gov.sg/act/covid19tma2020>

⁹⁹ Canada's Covid-19 Emergency Response Act 2020, accessed here: https://laws-lois.justice.gc.ca/eng/annualstatutes/2020_5/FullText.html.

¹⁰⁰ Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?," *The Yale Law Journal* 112, no. 5 (2003).

legislation becomes the norm.¹⁰¹ A notable example in this regard is the **United States'** Patriot Act adopted after 9/11.¹⁰² In other cases, the subsequent review processes become little more than a tick box exercise. In the **UK**, for instance, scholars have identified that often few legislators are present to debate legislation and little time is afforded for these debates.¹⁰³ Thus, even where sunset clauses are included, this is not guarantee for an effective review process or cessation of emergency legislation.

As noted, constitutions can provide for emergency measures, which have been used to expand the powers of governments, widen the competences of the security apparatus, restrict individual rights, particularly those who oppose the state and discriminate against certain individuals. Despite the existence of constraints placed on governments to prevent the normalization of emergency powers, constitutional states of emergency can normalize in different ways. For one, states of emergency can continue to be extended. For instance, a state of emergency (Section 172 of the constitution) was declared in **Thailand** on 24 March 2020. This allows the Thai government to rule by Emergency Decree. The State of Emergency has been extended 8 times since it was first enacted on 26 March 2020. For another, new emergencies can be declared. In **Liberia**, the government declared a national health emergency under the Public Health Law Title 33 (Chapter 14) Liberian Code of Laws Revised. On April 9 2020, a state of emergency was declared in accordance with Articles 85, 86, 87 and 88 of the Liberian constitution. This state of emergency expired on July 21 2020 and a revised national health emergency was announced on July 22 2020. This National Health Emergency remained in force and became the main legal instrument after the state of emergency ended.

There is also a tendency to speak about states of emergency as homogenous. However, often a State's legal system will have different types of

emergency situations (state of emergency, state of disaster, state of health emergency, as examples). While states initially declare a state of emergency as provided for in their constitutions, as time persists new forms of emergency can be adopted, often with similar provisions. This gives the impression that the emergency has ended, while continuing emergency powers by other means.

States can also shift from a constitutional state of emergency to the legislative model, retaining many of the competences of the former but under a new form.

In **Mozambique**, a state of emergency was first declared on March 30, via Presidential Decree no 11/2020. It was extended three times, until July 29. According to the constitution, a state of emergency can be declared for up to thirty days at a time and can be extended a maximum of three times. Since legally it could no longer be extended, President Filipe Nys declared a new state of emergency for thirty days starting from August 8, via Presidential Decree no 23/2020. After the first thirty days under Presidential Decree no 23/2020 expired, a second state of emergency was not declared. Instead, a state of Public Calamity was declared via Decree no 79/2020.

In **Angola**, The Law no 17/91, Article 8, establishes that a state of emergency cannot last more than 90 days and, when declared, it must have an end date. But a state of emergency can be readily renewed with legislative approval. It was first declared for 15 days in March 2020, and later extended by Presidential Decree. Thereafter a similar 'State of Public Calamity' was declared, lasting until

¹⁰¹ See generally Sean Molloy, "Sunset Clauses as Safeguards of Democracy?," *European Journal of Law Reform*, no. 2 (2021).

¹⁰² See Chris Mooney, "A Short History of Sunsets", *Legal Affairs*, January-February 2004, https://www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp.

¹⁰³ Fiona de Londras, "Counter-Terrorism Review Project: Sunset Clauses," University of Birmingham, April 12, 2018, <https://blog.bham.ac.uk/counterterrorismreview/2018/04/12/sunset-clauses>.

Papua New Guinea has previously declared a state of emergency under Chapter X: Emergency Provisions in the constitution. When this ended on June 16, PNG replaced it with the National Pandemic Act which allows for numerous emergency measures in relation to Covid-19. In other cases, states can move from a legal basis to measures that lack a legal foundation.

In **Ecuador**, a state of emergency was declared via the Presidential Decree no 1017, from March 16 and it was extended three times. After the third extension, the Constitutional Court announced that another extension would not be accepted, so the state of emergency ended in September. Once it expired, it was replaced by a set of mandatory guidelines without specific reference to legal instruments.

An additional challenge stems from the complexity of emergency law practice. In the context of counter-terrorism, the Special Rapporteur has identified the phenomenon of **complex emergencies**. Complex emergencies are a distinct and under-appreciated dimension of emergency practice in counter-terrorism contexts. Complex emergencies evolve from the piling up of multiple forms of legislation and administrative practice, including constitutional exercises of emergency powers, combined with legislative counter-terrorism measures and mingled with devolved uses of emergency powers in federal systems (regional, state and local governments in particular), which create a complex and overlapping mosaic of legal regulation.¹⁰⁴

Covid-19 responses in many countries have demonstrated similar levels of complexity.¹⁰⁵ This complexity plays out in competing frameworks between the central state and substate units. For instance, **Bosnia and Herzegovina's** fragmented state structure has made crisis management more of a challenge, as the country failed to establish a central organization to coordinate the crisis response. This has resulted in competing overlapping legal frameworks and no clear understanding of which laws prevail. Territorial power-sharing arrangements can thus contribute to confusion about which laws apply and complicate coordination between different layers of governance.¹⁰⁶ Ibezim-Ohaeri notes that in **Nigeria**, the maze of Covid-19-focused legal frameworks enacted at the federal and state levels has led to brewing political tension and jurisdictional confusion, leading to the federal government being in conflict with some of the constituent states of the republic.¹⁰⁷ In **Mexico**, uncoordinated actions taken at the state and local levels, such as banning the sale of alcohol and instituting curfews, have created a complex web of contradictory laws.¹⁰⁸

Finally, the overarching framing of Covid-19 as a security threat has helped to ensure the continuation of repressive measures. As in the case of terrorism, while emergency measures often result in serious infringements on individual liberties, packaged as necessary to protect wider society, these measures are often accepted. Thus, the securitizing logic is an important facet in emergency powers potentially normalizing beyond the pandemic and underscores the need for revision, restraint, and oversight of those measures in real time as States continue to manage the health and social crises occasioned by Covid-19.

¹⁰⁴ A/HRC/37/52, ¶137

¹⁰⁵ Clive Walker & Andrew Block, "Coronavirus Legislative Responses in the UK: Regression to Panic and Disdain of Constitutionalism," Just Security, May 12, 2020, <https://www.justsecurity.org/70106/coronavirus-legislative-responses-in-the-uk-regression-to-panic-and-disdain-of-constitutionalism>.

¹⁰⁶ Molloy, "Emergency Law Responses to Covid-19," 28.

¹⁰⁷ Victoria Ibezim-Ohaeri, "COVID-19 and the Shrinking Civic Space in Nigeria," Just Security, May 19, 2020, <https://www.justsecurity.org/70226/covid-19-and-the-shrinking-civic-space-in-nigeria>.

¹⁰⁸ Molloy, "Emergency Law Responses to Covid-19," 28.

RECOMMENDATIONS

THERE IS NO DOUBT THAT GOVERNMENTS across the world faced an unprecedented and novel health crisis. For some governments the health costs and burdens remain intense and undulating. In other countries the crisis has waxed and waned with high and low points in loss of life and health system overload. New variants continue to pose enduring challenges for health systems as virus mutation continues to challenge regulation. For a smaller number of countries vaccine availability, widely adopted public health measures, the accessibility of new therapeutics and effective treatment has meant that the scale of the crisis has diminished. In these countries governments have shifted their response from entirely exceptional to 'new normal' regulation. For countries lacking equal access to vaccines, allied with structural health system weaknesses and/or poor political management, lack of transparency and over-repressive responses, the negative costs of the pandemic are measured in multiple negative dimensions. Across all these contexts, the use, calibration and ending of emergency powers is essential.



Photo by Alex Mecl

Recommendations to Address the Limits and Gaps in Existing Emergency and Derogation Legal Frameworks

States should:

1. **Fulfill** their international law obligations when derogating from applicable human rights treaty obligations when counter-terrorism law and practices operate to suspend the full and effective enjoyment of human rights within their territories.
2. **Ensure** constitutional provisions aimed at limiting the misuse of emergency and exceptional powers extend to those emergency responses undertaken in the context of a pandemic.
3. **Update** other legislative or administrative frameworks on the use of emergency measures to recognize the relevance of safeguards in the context of a global health pandemic. Such human rights protections should be proactively advanced rather than considered in response to future health emergencies. Such updates can contribute to harmonized legal frameworks to ensure that a rule-of-law-based response can be adopted in the future.

4. **Guarantee** that any emergency or exceptional measures are subject to both review and sunset clauses enabling structured periodic review. Clear and benchmarked requirements should be established for such reviews.
5. **Adopt** where possible, normal legislative frameworks without relying on emergency law responses.
6. **Put** in place, in contexts engaging the provision of technical assistance and capacity building assistance, pandemic response frameworks for judicial and legislative review to ensure adequate safeguards and adherence to human rights due diligence.

Remaining within ordinary legislative frameworks requires undertaking measures to ensure that existing checks on power can function in times of emergency. **States should undertake measures to ensure:**

7. **Provision** for working in non-face to face capacity for parliaments and courts are developed and supported, including by way of technology investments.
8. **Adequate** assistance is given to ensure that courts can properly function and maintain appropriate separation of powers, including by way of technological investments.
9. **Step-down models** are developed for states that have extensively relied on emergency powers, including security and counter-terrorism powers to manage the pandemic. Recognizing that a move from 100-0 is not sensible as states calibrate their regulation of the pandemic to current health and system assessments. Measured step-downs from emergency practice should be implemented by responsible States, as well as by those that provide technical and capacity building assistance.

Recommendations to Address Repurposing of Counter-Terrorism Measures & Interchangeability of Responses to the Pandemic

Vague and ambiguous definitions have enabled counter-terrorism frameworks to be repurposed

as part of Covid-19 responses. In doing so, the many problems associated with counter-terrorism approaches— adverse impact on human rights; limited accountability; disproportionate impact on minorities; have also been transposed into the fraught context of battling a health pandemic. It seems obvious but necessary to stress that States should not repurpose counter-terrorism frameworks to other sectors, specifically health responses to global pandemics such as Covid-19. In addition, locating the influence and use of counter-terrorism frameworks in response to Covid-19 means identifying the intersecting influence of other frameworks. This is primarily because counter-terrorism is rarely pursued through a clearly defined and time-bound policy or legal domain. Rather, different laws and practices – from cyber security, criminal law, and public order law – are also used in counter-terrorism responses, which in turn borrow practice from counter-terrorism. To prevent serious human rights violations associated with the use of counter-terrorism measures during the pandemic states must:

10. **Guarantee**, when revising existing, or drafting new, counter-terrorism legislation during the pandemic, that all enactments meet the thresholds of legality, legitimacy, necessity, and proportionality as set out by international law.
11. **Ensure** that counter-terrorism frameworks are not being misapplied in other contexts, such as Covid-19 responses.
12. **Support** independent oversight by courts and oversight bodies of de facto and permanent emergencies — particularly in contexts of unrelenting suspension of rights and freedoms. The longer the emergency, the higher the burden of justification for the State.

In response to the negative implications of interchangeability described throughout this report, States should also:

13. **Undertake** a robust assessment of how other laws are used in place of or to support counter-terrorism and desist from drawing on these frameworks as part of the Covid-19 response.
14. **Establish** clear rules for the extent and nature of military assistance, alongside permissible conduct when undertaking these roles.

Recommendations to Address the Impact of Emergency Responses on the Enjoyment of Human Rights, Civil Society, and Civic Space

Emergency measures have significantly impacted upon the enjoyment of rights. However, the extent of these infringements is only understood when the interrelatedness, indivisibility, and interconnectedness of rights are considered.

In response, States must:

- 15. Undertake** robust and meaningful periodic review of their Covid-19 responses to assess whether the effect on the enjoyment of human rights is necessary and proportionate. These reviews must address the cumulative impact of a State's counter-terrorism measures which may, in sum, be disproportionate to the exigencies of the situation. Such reviews should not only include assessment of the necessity, proportionality, and lawfulness of emergency measures. They should also be underpinned by equality impact assessments, examining in

particular the effect of emergency measures on different groups.

It is necessary to identify pandemic related laws and practices that are adversely impacting upon the ability of civil society to perform their role in holding governments to account. Immediate remedial measures are needed to address the ongoing negative impact of Covid-19 responses on civil society.

States should:

- 16. Immediately** halt the use of emergency measures, which limit civic space by, for instance, restricting freedom of expression or impacting upon civil society actors' ability to monitor government;
- 17. Explore** opportunities to invest in providing much need prioritization of financial resources to civil society organizations; and
- 18. Conduct** assessments of the laws and practices that are adversely impacting upon the ability of civil society to perform and conduct their legally protected activities.

