

International instruments on states of emergency and states of disaster

Table of Contents

Introduction.....	1
State of emergency	2
What is a state of emergency?	2
Possible human rights violations during a state of emergency	2
International and Regional Instruments on human rights.....	3
International Covenant on Civil and Political Rights (ICCPR).....	3
African (Banjul) Charter on Human and People’s Rights and derogation	3
International measures taken to curb the spread of COVID-19	4
Disaster risk management	4
Sendai Framework	4
International Federation of Red Cross and Red Crescent Societies (IFRC).....	5
Conclusion.....	5
Annex A: Examples of selected countries implementing states of emergency	6
Annex B: Terrorism-related derogations	7

Introduction

The COVID-19 pandemic brought the term ‘state of emergency’ into sharp focus. Many countries worldwide have declared the pandemic an emergency. However, the majority of these are not in law, meaning that derogations on human rights conventions were not made and international conventions not suspended. The emergencies were called only to unlock emergency resources to address the threat of the pandemic. Furthermore, the term emergency and disaster are often used interchangeably. As such, disasters and emergencies could refer to the same situation in some countries.

As in the case of South Africa, Heads of State can call a state of emergency (in law), which is provided for in their Constitutions, all of which are underpinned by rigorous parliamentary/legislative processes and oversight. South Africa’s choice to call the COVID-19 pandemic a disaster and not an emergency could be, in part, to avoid images of the brutal states of emergencies that were used in the 1980s to suppress public dissent. In addition, the decision follows the international trajectory of not calling a state of emergency in law to avoid suppressing international treaties on human rights.

South Africa is a signatory to various international instruments on human rights, notably the *International Convention on Civil and Political Rights (ICCPR)*, which allows signatories to take measures to derogate from the Covenant including limitations on human rights. However, South Africa is also a signatory to the *African Charter on Human and Peoples’ Rights*, which stands in stark contrast to the ICCPR in that it does not allow states of emergency nor the possibility of derogations on human rights.

In terms of disaster management, South Africa is part of the adoption of the UN Agenda for Sustainable Development 2015 - 2030 that entail development goals and targets known as the Sustainable Development Goals (SDGs). The *Sendai Framework for Disaster Risk Reduction 2015-2030* is one of

the agreements UN member states agreed to towards reaching the SDGs by 2030, the others including the more well-known Paris Agreement.

This paper focusses on states of emergency (both in and out of law) as the COVID-19 pandemic is a global emergency and/or disaster. While South Africa did not go to the extent of implementing a State of emergency, the State of Disaster and subsequent regulations have brought with it numerous challenges. The UN has already expressed concern around the heavy-handedness of the implementation of measures in South Africa and that a toxic lockdown culture has been created. This could call into question the extent to which South Africa is honouring international and regional instruments to protect human rights.

State of emergency

What is a state of emergency?

The United Nations Office for Disaster Risk Reduction (UNDRR) states that an emergency is sometimes used interchangeably with the term disaster, as, for example, in the context of biological and technological hazards or health emergencies, which, however, can also relate to hazardous events that do not result in the serious disruption of the functioning of a community or society.”

As for a state of emergency, the Geneva Centre for the Democratic Control of Armed Forces states that

“A state of emergency (in law) derives from a governmental declaration made in response to an extraordinary situation posing a fundamental threat to the country. The declaration may suspend certain normal functions of government, may alert citizens to alter their normal behaviour, or may authorise government agencies to implement emergency preparedness plans as well as to limit or suspend civil liberties and human rights. The need to declare a state of emergency may arise from situations as diverse as an armed action against the state by internal or external elements, a natural disaster, civil unrest, an epidemic, a financial or economic crisis or a general strike”.¹

In the case of South Africa, a state of emergency can be called through section 37 of the Constitution only when (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and “the declaration is necessary to restore peace and order.” This requires Parliamentary approval and oversight. This is the case for various counties where a state of emergency can only be declared with the approval of Parliament. Importantly, a senior lecturer at the University of Birmingham,² warned that countries may feel the need to circumvent the ordinary decision-making processes in their Constitutions that prevent them from acting swiftly to respond to this emergency.”

Generally, states of emergency that derogate human rights are implemented in response to terrorist attacks and political conflict. Please see annex B for examples.

Possible human rights violations during a state of emergency

According to the UN, states of emergency (in law) are one of the most serious challenges to the implementation of international human rights law (IHRL) as they are associated with human rights

¹ https://www.files.ethz.ch/isn/14131/background_02_states_emergency.pdf

² Alan Greene

violations. The international *jurisprudence* on states of emergency is inconsistent and divergent. States often make dubious claims of a state of emergency.³

On 16 March 2020, the UN urged states to “avoid overreach of security measures in their response to the coronavirus outbreak and reminded them that emergency powers should not be used to quash dissent.”⁴ A statement read - “While we recognize the severity of the current health crisis and acknowledge that the use of emergency powers is allowed by international law in response to significant threats, we urgently remind states that any emergency responses to the coronavirus must be proportionate, necessary and non-discriminatory.”⁵

International and Regional Instruments on human rights

As stated above, international instruments does allow for states of emergencies (under extreme circumstances), but focus on the protection of human rights. Most conventions allow for the derogation of human right, however the African Charter on Human and Peoples’ Rights does not allow for derogation in any circumstances. The instruments include -

Universal Instruments-

- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social, and Cultural Rights, 1966
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention on the Rights of the Child, 1989

Regional Instruments

- African Charter on Human and Peoples’ Rights, 1981

International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession by the UN General Assembly resolution 2200A(XXI) on 16 December 1966 and entered into force on 23 March 1976, in accordance to Article 49. South Africa signed the ICCPR on 03 October 1994 and ratified it on 10 December 1998.

The ICCPR allows that in extreme circumstances, "in time of public emergency which threatens the life of the nation" (article 4(1) ICCPR), States may take measures to derogate from the Covenant, i.e. to temporarily suspend or adjust their obligations under the treaty, provided a number of conditions are met.

African (Banjul) Charter on Human and People’s Rights and derogation

In contrast to the above, the African (Banjul) Charter on Human and Peoples' Rights does not provide for states of emergency, nor the possibility of derogations being made. In other words, even a civil war cannot be used as an excuse by the state [for] violating or permitting violations of rights in the African Charter. That said, the African Charter only relate to civil and political, but not economic, social or cultural treaty rights.

³ <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1000&context=mjil>

⁴ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>

⁵ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>

International measures taken to curb the spread of COVID-19

It is estimated that by 26 March, 1.7 billion people worldwide were under some form of lockdown, which increased to 3.9 billion people by the first week of April, which equates to more than half of the world's population.⁶ The UN indicated that about 80 countries have declared emergencies due to the new coronavirus. As of 13 May 2020, six signatories of the European Convention on Human Rights (ECHR) used the ECHR to declare a state of emergency, thus allowing derogation on human rights. They are Armenia, Estonia, Georgia, Latvia, Moldova and Romania.⁷ Essentially, the ECHR was suspended in these countries.

The UN identified 15 countries where the allegations were deemed to have troubling lockdown measures with identified police abuses.⁸ They were - Nigeria, Kenya, South Africa, the Philippines, Sri Lanka, El Salvador, Dominican Republic, Peru, Honduras, Jordan, Morocco, Cambodia, Uzbekistan, Iran and Hungary. South Africa was described as having a toxic lockdown culture and that police and other security forces are using excessive and sometimes deadly force to enforce lockdowns and curfew measures.

According to a senior lecturer at the University of Birmingham,⁹ Other countries (Italy and Spain) "have not used the ECHR mechanism but have declared states of emergency in accordance with their constitutional provisions. It may be that these countries believe their constitutions provide better protections for rights than the ECHR and these higher protections need departing from. Or, they may feel the need to circumvent the ordinary decision-making processes in their constitutions that prevent them from acting swiftly to respond to this emergency."

Disaster risk management

Sendai Framework

As a UN member state, South Africa was part of the adoption of the UN Agenda for Sustainable Development 2015 - 2030 that entail development goals and targets known as the Sustainable Development Goals. The Sendai Framework for Disaster Risk Reduction 2015-2030 is one of the agreements UN member states agreed to towards reaching the SDGs by 2030. Other frameworks include the more well-known Paris Agreement. The Sendai Framework provides Member States with concrete actions to protect development gains from the risk of disaster.¹⁰ The UN Office for Disaster Risk Reduction (UNDRR) is managing the implementation of the Framework.

The Sendai Framework calls for parliamentary action through developing new or amending legislation, setting budget allocations and holding governments accountable for their actions to reduce disaster risks and protect their populations. Parliaments can play a major role to voice and strengthen the participation of all sectors of society in resilience building.

The UNDRR will further strengthen this partnership with focus on three key areas:

- Development of (model) disaster risk reduction laws and legal frameworks at the regional and national levels;

⁶ <https://www.businessinsider.co.za/countries-on-lockdown-coronavirus-italy-2020-3?r=US&IR=T>

⁷ <https://theconversation.com/state-of-emergency-how-different-countries-are-invoking-extra-powers-to-stop-the-coronavirus-134495>

⁸ <https://www.reuters.com/article/us-health-coronavirus-un-rights-idUSKCN2291X9>

⁹ Alan Greene

¹⁰ <https://www.undrr.org/implementing-sendai-framework/what-sf>

- Advocacy for the integration of disaster risk reduction into national and local budgets and enhanced oversight and accountability;
- Capacity development and trainings for parliamentarians.

International Federation of Red Cross and Red Crescent Societies (IFRC)

The International Federation of Red Cross and Red Crescent Societies (IFRC) defines a disaster as a sudden, calamitous event that seriously disrupts the functioning of a community or society and causes human, material, and economic or environmental losses that exceed the community's or society's ability to cope using its own resources. Though often caused by nature, disasters can have human origins. A disaster occurs when a hazard affects vulnerable people. The combination of hazards,¹¹ vulnerability and inability to reduce the potential negative consequences of risk results in disaster.¹²

$$(\text{VULNERABILITY} + \text{HAZARD}) / \text{CAPACITY} = \text{DISASTER}$$

It is important to calculate the disaster impact, which is the total effect, including negative effects (e.g., economic losses) and positive effects (e.g., economic gains), of a hazardous event or a disaster. The term includes economic, human and environmental impacts, and may include death, injuries, disease and other negative effects on human physical, mental and social well-being.

Conclusion

International responses to the COVID-19 pandemic have been varied. Whether it is called an emergency, state of emergency (in law) or a disaster, seem to make a difference to the level in which restrictions can be and are imposed on citizens. The various reports of the excessive use of power by law enforcement and arguably unnecessary restrictions on the movement of goods and people, calls into question whether South Africa is honouring its obligations as set out in international and regional instruments (ICPPR and African Charter on Human and Peoples' Rights). The human rights abuses that have been recorded to date stand in stark contrast to the African Charter that holds that no derogation on human rights can be made. This begs the question whether the country is in a state of disaster or a state of emergency.

¹¹ Hazard is defined in the Hyogo Framework for Action (preceding the Sendai Framework) as: "A potentially damaging physical event, phenomenon or human activity that may cause the loss of life or injury, property damage, social and economic disruption or environmental degradation. Hazards can include latent conditions that may represent future threats and can have different origins: natural (geological, hydrometeorological and biological) or induced by human processes (environmental degradation and technological hazards).

¹² <https://www.ifrc.org/en/what-we-do/disaster-management/about-disasters/what-is-a-disaster/>

Annex A: Examples of selected countries implementing states of emergency

Worldwide, an estimated 80 countries have declared a 'state of emergency' (not in law) to stem the spread of the COVID-19 virus in order to unlock emergency resources.¹³ Amongst these are -

- 1) On 9 April 2020, **Botswana** President Mokgweetsi Masisi declared a state of emergency.
- 2) On 8 April 2020, **Ethiopia** Prime Minister Abiya Ahmed declared a state of emergency.
- 3) On 7 April 2020, **Japan** Prime Minister Shinzō Abe declared a national emergency.
- 4) On 25 March 2020, **India** Prime Minister Narendra Modi declared a national emergency.
- 5) On 25 March 2020, **New Zealand** Minister for Civil Defence Peeni Henare declared a National State of Emergency.
- 6) On 25 March 2020, Prime Minister of **Thailand** Prayut Chan-o-cha declared a state of emergency.
- 7) On 21 March 2020, **Kyrgyzstan** Prime Minister Mukhammedkalyi Abylgaziev declared a state of emergency.
- 8) On 21 March 2020, **Georgian** President Salome Zurbishvili declared a state of emergency.
- 9) On 18 March 2020, **Luxembourg** Prime Minister Xavier Bettel declared a state of emergency.
- 10) On 18 March 2020, **Portugal** President Marcelo Rebelo de Sousa declared a state of emergency for COVID-19. It was renewed twice (2 April and 17 April) in the constitutionally-mandated 15-day periods, lasting until 1 minute before midnight on 2 May 2020. Beginning midnight, 3 May 2020, the country is now in a "*situation of calamity*", a different status enshrined in the Basic Law of Civil Protection, which allows for restrictions on circulation or conditioning in the operation of certain establishments, but not the suspension of constitutional rights and freedoms as with the state of emergency.
- 11) On 18 March 2020, **North Macedonia** President Stevo Pendarovski declared state of emergency.
- 12) On 17 March 2020, **Philippine** President Rodrigo Duterte declared all of the Philippines to be in a "state of calamity" following a dramatic rise in cases of COVID-19.
- 13) On 16 March 2020, Government of **Armenia** declared a state of emergency for COVID-19.
- 14) On 15 March 2020, President of **Serbia** Aleksandar Vučić declared a state of emergency.
- 15) On 15 March 2020, President of **Kazakhstan** Kassym-Jomart Tokayev declared a state of emergency.
- 16) On 13 March 2020, Prime Minister of **Spain** Pedro Sánchez announced the declaration of the state of emergency in the nation for a period of 15 days, to become effective next day after the approval of the Council of Ministers for the COVID-19 pandemic in Spain.
- 17) On 13 March 2020 the Government of the **Czech Republic** announced a state of emergency.
- 18) On 12 March 2020 the Government of **Estonia** declared a state of emergency
- 19) On 11 March 2020, **Hungarian** Prime Minister Viktor Orbán declared a state of emergency for COVID-19.
- 20) On 31 January 2020, **Italian** Prime Minister Giuseppe Conte declared a state of emergency
- 21) Canada
 - On 22 March 2020, **Nova Scotia** Premier Stephen McNeil declared a state of emergency.
 - On 17 March 2020, **Alberta** Premier Jason Kenney declares public health emergency.
 - On 17 March 2020, **Ontario** Premier Doug Ford declared a state of emergency.
 - On 14 March 2020, **Quebec** Premier Francois Legault declares public health emergency.

¹³ This is not an exhaustive list and only includes selected countries.

22) On 13 March 2020, President Donald Trump declared a national emergency in the **USA**. The majority of States have also declared a state of emergency.

Annex B: Terrorism-related derogations

Derogations Article 4(3) of the International Covenant on Civil and Political Rights (ICCPR)

Azerbaijan

- 20-hour state of emergency following an attack on 4 October 1994; later extended for a period of 60 days.
- Derogation made from articles 9, 12, 19 and 22.

Chile

- State of emergency declared following wave of terrorist aggression on 16 September 1986.
- Derogation made from articles 9, 12, 13 and 19.

Colombia

- Declared a state of emergency three times in response to terrorist activities by guerrilla organizations and organized crime syndicates on 16 July 1992, 10 November 1992 and 3 November 1995.
- Derogations made from articles 12, 17, 21 and 22.
- Further derogations made from articles 9 and 12 on 18 June 1996 "to control the activities of criminal and terrorist organizations in special public-order zones".

France

- Declared a state of emergency on 23 November 2015 following terrorist attacks in Paris.
- Derogations made from articles 9, 12 and 17.
- Renewed periodically between 26 February 2016 and 14 July 2017. Formally ended on 1 November 2017 with the introduction of a new counter-terrorism law.

Israel

- Declared on 3 October 1991 that the state of emergency proclaimed in May 1948 has remained in force ever since due to the "continuous threats and attacks on its very existence as well as on the life and property of its citizens".
- Derogations made from article 9.

Nepal

- Declared a state of emergency on 26 November 2001 in response to the "serious situation arising out of terrorist attacks perpetrated by the Maoists in various districts, killing several security and civilian personnel and attacking the government installations".
- Suspended numerous rights under its own constitution, including the right to freedom of opinion and expression, freedom to assemble peacefully, right to press and publication, right against preventive detention, the rights to information, property, privacy and constitutional remedy; but declared that the rights contained in articles 6, 7, 8 (1) and (2), 11, 15, 16 of the Covenant remained in effect.
- Further declared a state of emergency on 1 February 2005 in response to a threat to the nation's sovereignty and the "untold sufferings brought about by the rise in terrorist activities throughout the country".
- Derogated from articles 2(3), 12(1) and (2), 17 and 19.

Russia

- Declared a state of emergency on 22 June 1993, "in view of the deterioration of the situation and the increased frequency of terrorist acts and widespread disorder on national soil involving the use of firearms".
- Derogated from articles 9, 12, 19, 21 and 22.
- Declared state of emergency on 30 September 1993 in several districts due to "the increase in the number of acts of terrorism and violence".
- Derogated from articles 12(1), 13, 19(2) and 22.
- Declared a further state of emergency on 4 April 1994 due to continuing tensions and "unceasing acts of terrorism and violence, including violence against the civilian population".
- Derogated from articles 12(1), 19(2), 21, 22(1) and 22(2).

Sri Lanka

- Promulgated constitutional emergency regulations on 2 May 2010 to deal with the threat of terrorism posed by the Liberation Tigers of Tamil Eelam (LTTE).
- Following elimination of the threats posed by the LTTE emphasised the need for vigilance to prevent potential future threats, but nonetheless enumerated the terminations of derogations from articles 9(2), 12, 14(3), 17(1), 19(2), 21 and 22(1).

United Kingdom

- On 17 May 1976, no state of emergency was declared; but a declaration was made to extend powers in response to "campaigns of organized terrorism related to Northern Irish affairs".
- On 18 December 2001, following the 9/11 attacks, recognized that there "exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism" and that "[a]s a result, a public emergency, within the meaning of article 4(1) of the Covenant exists".
- Derogated from article 9.

Derogations under article 15 of the ECHR

A small number of Contracting Parties to the European Convention on Human Rights have derogated from its provisions under article 15. To date, these have included Albania, Armenia, France, Georgia, Greece, Ireland, Turkey, Ukraine and the United Kingdom.

The most recent declarations of states of emergency which have or which may result in derogations are:

Ukraine

- 5 June 2015 notification to the Council of Europe due to deteriorating security situation in the East of Ukraine (subsequently renewed on 4 November 2015, 30 June 2016, 2 February 2017; extant at the time of writing).
- Derogated from articles 5, 6, 8 and 13.

France

- 24 November 2015 notification to Council of Europe, following large scale terrorist attacks, initially in Paris (subsequently renewed on 25 February 2016, 25 May 2016, 22 July 2016, 21 December 2016 and 13 July 2017; ended on 1 November 2017).
- Kept open option of derogation.

Turkey

- 21 July 2016 notification to Council of Europe following attempted coup d'état (subsequently renewed on 17 October 2016, 5 January 2017, 19 July 2017, 19 October 2017 and 19 January 2018).
- Kept open option of derogation.