Introduction

Testing Human Rights Theory During Emergencies

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Public emergencies such as terrorist attacks, economic catastrophes, and natural disasters offer an intriguing vantage point from which to examine the theoretical underpinnings of international human rights law (IHRL). Conventional wisdom suggests that human rights are universal, timeless, and inalienable entitlements. The Universal Declaration of Human Rights (UDHR) famously declares that human rights represent a "common standard of achievement for all peoples and all nations" that derives its authority from the "inherent dignity" and "equal and inalienable rights of all members of the human family."[1] During emergencies, however, IHRL permits states to deviate from many of its standards, producing localized variation in the application of human rights standards. Limitations clauses in human rights treaties empower states to curtail individual liberties such as freedom of expression within their jurisdiction in order to promote general societal interests such as national security and public health.[2] Some human rights agreements also allow states to suspend certain human rights protections temporarily where necessary to suppress threats to "the life of the nation"[3] or the "independence

[1] Universal Declaration of Human Rights pmbl., G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

[2] See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221, Eur. T.S. No. 5, entered into force Sept. 3, 1953 [hereinafter ECHR]; International Covenant on Civil and Political Rights art. 19, adopted Dec. 16, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter ICCPR]; American Convention on Human Rights art. 27.1, signed Nov. 22, 1969, O.A.S. Doc. OEA/Ser. L/V/II.23, doc. 21., rev.6 (1979), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force July 18, 1978) [hereinafter ACHR]; League of Arab States, Revised Arab Charter on Human Rights art. 32, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005) [hereinafter Arab Charter].

[3] ECHR, *supra* note 2, art. 15.1; ICCPR, *supra* note 2, art. 4.1; Arab Charter, *supra* note 2, art. 4.1.

or security"[4] of the state. As a consequence, relatively few human rights norms are immune from state adaptation during public emergencies. Far from constituting timeless and inalienable entitlements, human rights are commonly framed in international agreements as provisional safeguards that may be set aside when a state or its people face an existential crisis.

These features of IHRL's approach to public emergencies raise a host of important questions for human rights theory. Some of these questions cut to the heart of the definition of human rights. For example, in what sense do human rights qualify as "rights" if they may be modified or set aside during emergencies? If human rights constitute timeless moral trumps that are derived from common attributes of humanity,[5] we might well conclude that derogation clauses undermine human rights. But this is not the only possible conception of human rights. For example, we might think that human rights are better understood as vital human interests that states are morally obligated to respect, but that do not invariably trump other important societal interests.[6] Under this model, states could suspend human rights protections during a national crisis if the interests of rights-claimants were outweighed by other, more compelling interests. Several other conceptions of human rights also merit consideration. For example, some scholars emphasize that international human rights practice takes a distinctively *legal* form. The distinctive contribution of human rights treaties, they observe, is to frame positive legal rights to regulate state power for the benefit of humanity – without necessarily codifying individuals' moral rights, as such.[7] Under this positive juridical model of human rights, legally authorized derogations are entirely consistent with the idea that human rights are legal rights, because derogation provisions are constitutive of the positive definition of each human right.[8] Still other theorists characterize human rights as facilitating collective deliberation over the permissible means and ends of state power, with a view to achieving mutually acceptable justifications.[9]

4 ACHR, *supra* note 2, art. 27.1.

5 See Ronald Dworkin, Taking Rights Seriously (2d ed. 1977).

6 See, e.g., Joseph Raz, *Human Rights Without Foundations*, in The Philosophy of International Law (Samantha Besson and John Tasioulas eds., 2010).

7 See, e.g., Allen Buchanan, The Heart of Human Rights (2013); Gerald L. Neuman, *Constrained Derogation in Positive Human Rights Regimes*, *infra*, Ch. 1.

8 See, e.g., U.N. Human Rights Committee, General Comment No. 10, Article 19, § 3, June 29, 1983, U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994) ("It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right.").

9 See, e.g., Rainer Forst, The Right to Justification ch. 9 (2005); Thomas Poole, *The Logic of Emergency and Reason of State*, *infra*, Ch. 6; Amartya Sen, *Elements of a Theory of Human Rights*, 32 Phil. & Pub. Aff. 315 (2004).

Accordingly, on this view, derogation and limitations clauses serve primarily as procedural devices for promoting public deliberation during national crises. In sum, whether we accept limitation and derogation clauses as compatible with the idea of human rights will naturally depend upon how we conceptualize the relationship between legal rights, moral rights, human interests, and other values.

A related puzzle posed by international human rights agreements is the distinction between derogable and nonderogable rights. Leading treaties such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the Arab Charter on Human Rights (Arab Charter) classify some human rights norms such as the prohibitions against slavery and torture as nonderogable.[10] The treaties do not speak with one voice, however, in specifying which human rights are derogable and which are nonderogable. For example, the ICCPR, ACHR, and Arab Charter all designate freedom of conscience and religion as nonderogable rights, but the ECHR does not. The ACHR alone characterizes as nonderogable the right to participate in government, the right to a name, rights of the child, and rights of the family. Similarly, the Arab Charter is unique in placing the prohibition of forced labor and human trafficking, the prohibition of medical experimentation without free consent, and the prohibition of arbitrary exile in the category of nonderogable rights.[11]

For those who believe that human rights norms are not solely positivist artifacts of state consent, these divergent features of leading human rights agreements are of considerable theoretical interest. Is there a principled basis for distinguishing derogable human rights from nonderogable rights? And why are some rights subject to derogation only during "public emergencies," while other rights are subject to general limitations that apply equally during "ordinary" times?

Another set of questions deals with the purposes that human rights derogation serves during emergencies. Derogation clauses are widely understood as a response to the concern that human rights standards may impede states' efforts to maintain public order during major national crises such as civil wars, deadly infectious disease outbreaks, and natural disasters. During

[10] See ICCPR, *supra* note 2, art. 15, § 2; ICCPR, *supra* note 2, art. 4, § 2; ACHR, *supra* note 2, art. 27, § 2; Arab Charter, *supra* note 2, art. 4, § 2.

[11] For a more detailed discussion of the commonalities and differences between the lists of nonderogable rights in these agreements, see Louise Doswald-Beck, Human Rights in Times of Conflict and Terrorism 80–81 (2011).

emergencies, states often feel compelled to depart from standard human rights protections such as liberty and security of person, freedom of assembly, and freedom of movement in order to more effectively safeguard human security for all. States may decide, for instance, to impose public curfews, expand the use of administrative detention, or commandeer private property for public purposes. Determining whether such measures are "strictly required" by the exigencies of a particular crisis depends, in part, on how international law defines the permissible purposes of derogation. For better or worse, however, international agreements do not specify the purposes of human rights derogation with great precision. Does derogation represent a concession to sovereign prerogative, empowering national institutions to guarantee the state's survival at the *expense* of human rights? Or are derogation clauses designed instead to *advance* the cause of human rights, by empowering states to protect human security and fulfill social, economic, and cultural rights more effectively overall during emergencies?[12] Do the purposes set forth in human rights treaties constitute *exclusive* grounds for derogation? Or should IHRL submit to Carl Schmitt's thesis that, ultimately, the sovereign decides whether a public emergency exists and what measures are necessary to address the emergency? By raising such questions, public emergencies force the international community to grapple with the contested relationship between sovereignty and human rights under international law.

The dichotomous structure of derogation clauses also fits uneasily with how states actually deploy emergency powers. Derogation clauses assume that states normally will respect the full inventory of rights set forth in international human rights agreements, derogating from their human rights commitments only irregularly during major national crises. Derogation clauses thus provide a legally authorized mechanism whereby states may restore "a state of normalcy where full respect for [human rights] can again be secured" following a rupture of public order.[13] In practice, however, the idea that full respect for human rights represents the "norm," and derogation the "exception," does not match up consistently with reality. Not all threats to the "life of the nation" or the "independence and security" of the state are transitory in nature, and it is often unclear whether such threats are sufficiently grave or imminent to justify derogations. Scholars have debated, for example, whether the

[12] See Evan Criddle and Evan Fox-Decent, *Human Rights, Emergencies, and the Rule of Law*, 34 *Hum. Rts. Q.* 39 (2012).

[13] U.N. Hum. Rts. Comm., General Comment No. 29: States of Emergency (Art 4), ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

ever-present risk of a 9/11-style terrorist attack is sufficient to justify prolonged derogation from ordinary human rights standards. Moreover, as fear of terrorism has spread and gained enhanced political salience, states have curtailed basic civil and political rights without offering cause for optimism that the future will bring a return to "normalcy." Indeed, some states have maintained emergency measures for decades, expressing concerns about the continuing threats of international armed conflict and attacks from violent nonstate actors.[14] Studies suggest that these prolonged deviations from the norm/exception frame are far from unique; in practice, temporary states of emergency that follow the derogation requirements of IHRL are far less prevalent than permanent, de facto, and institutionalized emergencies.[15] These facts expose a fundamental disconnect between IHRL's formal regulation of emergency powers, on the one hand, and the actual behavior of states, on the other. Reflecting on this tension, some critics have argued that the derogation regimes established in leading human rights treaties simply do not provide a workable framework for reconciling the moral demands of human rights with the practical imperatives of real-life emergencies.

Public emergencies thus challenge human rights theorists to clarify the character, scope, and salience of international human rights. This volume responds to the awaiting challenge by collecting fresh insights from leading international lawyers, political scientists, and philosophers on the relationship between sovereignty, human rights, and the rule of international law during emergencies. In particular, the essays collected in this volume contribute to current debates over emergency powers by furnishing answers to the following questions:

- In what sense are international human rights properly considered "rights" if they are subject to derogation during emergencies?
- How can international legal regimes be designed to maximize states' respect for human rights standards, while also strengthening states' capacity to protect and fulfill human rights?
- What is the proper relationship between state sovereignty and international human rights?

[14] See Scott P. Sheeran, *Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT'L L. 491, 517–18 (2013) (discussing Egypt's thirty-year state of emergency).

[15] See OREN GROSS AND FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 304–25 (2006) (discussing studies of emergency powers that undermine the conventional norm/exception paradigm and demonstrate the need for a more comprehensive and multifaceted approach to emergency).

- How should the politics and practice of emergencies inform international legal theory and the progressive development of international law?
- How does IHRL relate to other regimes that govern emergencies, including the law of armed conflict, the law of international peacekeeping, and international economic law?

The balance of the book is organized into three parts. Part I discusses general theoretical challenges associated with the international community's efforts to design positive legal regimes for protecting human rights during emergencies. Part II considers the politics of public emergencies, examining the mechanisms by which international and domestic political pressures may either complement or compromise states' respect for human rights during emergencies. Part III extends current scholarship on emergencies by explaining how human rights standards apply in settings where international institutions, regional organizations, and other states intercede in the domestic sphere to address national crises that threaten the international system.

Part I opens with three essays that consider how derogations clauses fit into the positive legal architecture of IHRL. Gerald L. Neuman's Chapter 1 explains why, in his view, the presence of derogation provisions in human rights treaties does not contradict the idea that international human rights qualify as genuine "rights." Building on his theory that legal rights have three aspects – consensual, suprapositive, and institutional[16] – Neuman argues that the concept of a right subject to limitation or derogation is consistent with a human right's positive embodiment. Far from undermining human rights protections, Neuman asserts that limitation and derogation clauses in human rights treaties are facets of the complex definition of a positive legal right. Express derogation clauses allow states to take measures necessary to deal with emergencies, applying human rights standards that are tailored to particular contexts. Derogation clauses thus serve an institutional function, bifurcating the rules on restriction of rights into normal limitation standards applicable under normal conditions and exceptional derogation standards applicable only for the duration of a public emergency. Including a derogation mechanism in human rights treaties can have a variety of beneficial effects, Neuman argues, because formal derogation requirements promote domestic deliberation, facilitate international oversight by international treaty bodies, and guide national authorities by clarifying *ex ante* which human rights norms are derogable during emergencies. Neuman concludes his essay by making

[16] See Gerald Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 *Stan. L. Rev.* 1863 (2003).

the case that derogation clauses are preferable to various alternative approaches for addressing emergencies, including requiring continued compliance with normal human rights standards; accepting open violation of human rights standards; and relying on other mechanisms such as general limitations clauses, treaty denunciation clauses, the customary principle of necessity, and the *lex specialis* exclusionary principle.

Evan J. Criddle's Chapter 2 considers whether the broad legal standards in derogation clauses are better understood as delegations of lawmaking authority to states or to international human rights tribunals. The state-delegate approach contemplates that derogation provisions will enable states to protect human rights more effectively by empowering them to address situations where strict adherence to some human rights norms would undermine their capacity to protect other important rights. The controversial "margin of appreciation" doctrine employed by the European Court of Human Rights resonates with this argument, preserving a zone within which states may exercise discretionary authority to adapt IHRL's default regime for the benefit of their people. In contrast, the tribunal-delegate approach posits that international institutions are ultimately responsible for specifying the content of IHRL derogation standards. Although states serve as the first responders to emergencies, the tribunal-delegate model accords no particular deference to a state's decision to deploy emergency powers. Criddle argues that the state-delegate model better tracks the structure of leading international human rights treaties, which entrust states with discretionary authority to determine how they should respond to emergencies as fiduciaries for their people. To the extent that some international tribunals have declined to accord deference to states' human rights derogations, Criddle argues that this second-best approach may be appropriate – and even necessary – in settings where conflicts of interest compromise states' abilities to serve as loyal fiduciaries for their people. A counterintuitive lesson that emergences from Criddle's chapter is that the margin of appreciation doctrine may be least justified in contexts where the survival of public institutions is most at risk.

How should the international community design derogation clauses to protect human rights most effectively during emergencies? In his contribution to this volume (Chapter 3), James W. Nickel distinguishes two models that could be employed to adapt general human rights standards for emergencies. One model identifies different categories of emergencies (e.g., armed conflict, natural disasters, public health crises) and establishes different norms to govern each category within its taxonomy. A second model sets forth a unitary set of substantive and procedural norms that apply across different types of

emergencies. Whereas the type-oriented model seeks to provide detailed guidance *ex ante* regarding the types of measures that may be justified to deal with particular emergencies, the broad and flexible standards of an undifferentiated emergency framework invite case-specific application. Nickel shows how international human rights agreements currently incorporate a mix of type-oriented and undifferentiated frameworks for emergencies. Although a more type-oriented approach to emergencies might be desirable for a variety of reasons, Nickel warns that the international community should proceed with caution. Type-oriented frameworks are likely to be most successful, he argues, if they emerge from an incremental, deliberative process that draws on the collective wisdom of multiple stakeholders, including the experience of national authorities, specialized international organizations, and nongovernmental organizations; the jurisprudence of international human rights tribunals; and the interdisciplinary insights of legal theorists, historians, political scientists, and philosophers.

The essays collected in Part II explore the complex politics of state emergency powers and their implications for IHRL. Part II opens with Chapter 4, by Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss. Using global datasets of state derogations and states of emergency over three decades, the authors develop a theory to explain why some states are more likely than others to derogate from their human rights obligations during emergencies. According to the authors, stable democracies with strong domestic courts are more likely than other regimes to avail themselves of derogation clauses if they are subject to "compliance constituencies" that are capable of monitoring and holding national authorities accountable for rights violations. National authorities in such states use derogation to publicize, defend, and legitimate emergency measures so that they can minimize the domestic political costs associated with unpopular rights restrictions. In states that do not have comparable domestic political pressures to comply with human rights standards, national authorities sometimes derogate from human rights treaties, but they are less likely to provide clear information about their rights restrictions, and they are more likely to make rights restrictions permanent. Although international lawyers tend to stress the role of international institutions in supervising states of emergency, Hafner-Burton, Helfer, and Fariss suggest that domestic legal and political pressures have far greater salience in shaping when and how states deviate from their human rights commitments during emergencies.

Fionnuala Ní Aoláin's Chapter 5 also reflects on the uneven record of state derogations from human rights treaties. In contrast to the preceding chapter,

however, Ní Aoláin finds little cause for hope that democratic states will avail themselves of formal derogation procedures during future national crises. Although many democratic states have curtailed civil liberties in the wake of the terrorist attacks of 9/11, Ní Aoláin observes that only the United Kingdom has formally derogated from its human rights commitments. Far from defusing political tensions, the United Kingdom's derogation caused it to become a lightning rod for criticism both internationally and domestically. According to Ní Aoláin, the lesson that other states have taken from the United Kingdom's experience is that the political costs of derogation are simply too high. Hence, states have gone out of their way to avoid formal derogation when they have adopted emergency measures that compromise human rights protections. Because states are able to accomplish their national security objectives without recourse to derogation – for example, through limitations clauses, unacknowledged de facto derogations, and regime shopping – the international notification and oversight procedures established in human rights treaties have become largely obsolete in practice. International courts and commissions will need to adapt to this changing landscape, Ní Aoláin argues, if they – and the human rights instruments under their charge – are to remain relevant during future emergencies.

Thomas Poole's Chapter 6 seeks to fill the gap in international legal theory that Ní Aoláin identifies by introducing the concept of reason of state (*raison d'état*) as an alternative to theories of emergency powers that are based on either state prerogative or liberal legalism. Poole argues that state prerogative and liberal idealism suffer from a common defect: both are premised on a dynamic of norm and exception and thus are poorly equipped to deal with the more nuanced "pseudoemergencies" that dominate state practice today. The hard cases for human rights theory do not generally lie on the boundary where legitimate but extralegal authority meets unauthorized political violence, Poole argues; rather, they involve states' aberrant uses of ordinary modes of legality for violent or morally dubious ends. According to Poole, reason of state better illuminates the legal and political dynamics of these cases by focusing attention on the state's role as *custos* – a guardian or protector of the regime of law – and the pressures that such a claim places on legal order. Viewed from this perspective, human rights adjudication can be seen as a mechanism for normalizing and constitutionalizing reason of state by subjecting its exercise to public deliberation, contestation, and justification.

Rounding out the book's examination of the politics of emergencies, Part II closes with Chapter 7, by William E. Scheuerman, addressing authoritarian

jurist Carl Schmitt's challenge to IHRL. In recent years, legal scholars have recognized that derogation clauses make human rights treaties vulnerable to Schmitt's critique that executive fiat is given free rein within the otherwise appealing normative parameters of human rights. Scheuerman outlines Schmitt's core theses about emergency power and explains why and how those ideas reveal weaknesses in IHRL. He then critiques human rights scholars' attempts to disarm Schmitt's claims. Specifically, Scheuerman analyzes three leading responses to Schmitt: international legalism, extralegality, and human rights as fiduciary duty. Scheuerman concludes that each of these responses fails to remove the sting of Schmitt's "exception," albeit for different reasons. According to Scheuerman, legal theorists' inability to fully counter Schmitt's challenge underscores the urgent need for more ambitious legal and political reforms to the current global order.

Part III examines emerging challenges to current international legal frameworks for protecting human rights during national crises. One such challenge involves gaps in the coverage of international human rights treaties: to what extent do limitation and derogation frameworks apply when the applicable human rights norms derive from customary international law rather than treaties? Scott Sheeran's Chapter 8 addresses this question in the context of international peacekeeping operations. Peacekeeping poses a fascinating puzzle for human rights theory because public powers are exercised not only by the territorial state, but also by the United Nations and other states pursuant to resolutions from the U.N. Security Council. When international peacekeepers suspend or otherwise limit human rights protections, they rely on the Security Council's authority to take action "to maintain or restore international peace and security,"[17] rather than focusing on whether circumstances threaten "the life of the nation" or the "independence and security" of the state as such. Although peacekeepers are subject to human rights obligations, Sheeran argues that these obligations flow primarily from the U.N. Charter and customary IHRL (which do not offer concrete derogation procedures), rather than from human rights treaties (which do). Nonetheless, Sheeran concludes that the Charter and customary international law authorize international peacekeepers to derogate from their human rights obligations to the extent strictly necessary to manage threats to international peace and security.

Diane A. Desierto's concluding chapter, Chapter 9, highlights a second emerging challenge to IHRL, one that has taken center stage during the

[17] UN Charter arts. 39, 42.