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Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference

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Chapter 8

Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference

Evan J. Criddle

Abstract Leading human rights treaties permit states as a temporary measure to suspend a variety of human rights guarantees during national crises. This chapter argues that human rights derogation is best justified as a temporary mechanism for empowering states to protect human rights, rather than as a device for enabling national authorities to advance their own interests in a manner that compromises human rights protection. Human rights treaties use broad legal standards to entrust states with responsibility for deciding what measures are best calculated to maximise human right protection during emergencies. For this delegation of authority to operate effectively, international tribunals must accord a healthy measure of deference to state derogations. Deference to state derogations is not warranted, however, if circumstances suggest that national authorities are not prepared to serve as impartial, rights-optimising trustees for their people.

Keywords Human rights · Emergencies · Temporariness · Delegation · Derogation · Deference · Margin of appreciation · Rules · Standards · Individualism · Altruism

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8.1 Introduction

International human rights law (HRL) obligates states to respect, protect, and fulfill basic norms of humane treatment, but few of these requirements are set in stone. Many human rights treaties contain limitation clauses, which permit states to restrict the protection afforded by various human rights in deference to important values such as public health and safety.¹ Derogation clauses likewise permit states to suspend various civil and political rights during public emergencies.² Most economic and social rights are framed as aspirational standards that states agree to pursue without committing to any singular pathway for the ‘progressive realization’ of these rights.³ Indeed, only a handful of human rights such as the prohibitions against slavery, genocide, and torture are widely accepted as peremptory norms that bind all states at all times and in all circumstances.⁴ As a result, most human rights norms are subject to dynamic application over time, allowing states to adapt human rights protection to changing circumstances.

How HRL responds to public emergencies, in particular, challenges the idea that human rights are timeless and unchanging entitlements that human beings may claim at all times and in all circumstances. By authorising states to derogate from certain human rights commitments during public emergencies, leading human rights agreements such as the International Covenant on Civil and Political Rights (ICCPR),⁵ the American Convention on Human Rights (American Convention),⁶ the Arab Charter of Human Rights (Arab Charter),⁷ and the European Convention on Human Rights

¹ See, e.g., Articles 14(1), 19, 21, 22 of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 (hereinafter ICCPR); Article 4 of the 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (hereinafter ICESCR).

² See, e.g., Article 4(1) ICCPR.

³ See, e.g., Article 2 ICESCR.

⁴ See, e.g., Article 4(2) ICCPR.

⁵ See Article 4(1) ICCPR.

⁶ See Article 27(1) of the 1969 American Convention on Human Rights, 1144 UNTS 123 (hereinafter American Convention).

⁷ See Article 4(1) of the 2004 Revised Arab Charter on Human Rights, reprinted in 12 International Human Rights Report 893 (2005) (hereinafter Arab Charter).

and Fundamental Freedoms (European Convention)⁸ effectively allow states to design their own temporary, ad hoc human rights regimes.

How should the international community ensure that states do not abuse this authority to suspend human rights norms? In his classic monograph, *The Concept of Law*, H.L.A. Hart outlines three techniques that a legal system might employ to regulate injurious conduct.⁹ First, a legal system could establish bright-line rules to identify and prohibit specific harmful activities in advance. Second, a legal system could establish broad standards and delegate ‘to an administrative, rule-making body... the task of fashioning rules adapted to their special needs.’¹⁰ Third, where ‘it is impossible to identify a class of specific actions to be uniformly done or forborne’, a legal system could establish a broad standard of ‘reasonable’ conduct and require regulated parties to satisfy this standard ‘before it has been’ fully specified by a lawmaking or adjudicatory body.¹¹ The delegation of rule-specifying authority to administrators and courts enables a legal system to tailor the application of open-textured legal standards to specific factual contexts in a more nuanced manner.¹²

Human rights regimes employ a mix of rules and standards to regulate derogation during public emergencies. Some derogation norms are plainly rule-like, including the requirements that states issue an official notice of derogation, refrain from invidious discrimination, and satisfy their other international obligations.¹³ These rules, which limit the choices available to national authorities *ex ante*, advance rule of law values by providing ‘the advantages of predictability, stability, and constraint’.¹⁴ Nonetheless, the heart of human rights derogation regimes consists of open-textured standards that require further specification. When national crises prompt states to consider human rights derogation, the states must decide whether suspending ordinary human rights safeguards is ‘strictly required by the exigencies of the situation.’¹⁵ This strict-necessity standard demands case-specific analysis. In Hart’s typology of regulatory regimes, it raises the question whether national authorities or international treaty bodies should be understood to bear primary responsibility for translating the standard into rules tailored to a particular crisis. Should derogation provisions be understood primarily as delegations of lawmaking authority to states to decide when, and to what extent, derogation is ‘strictly necessary’? Or should these provisions be viewed primarily as delegations to international human courts and commissions, the institutions that are responsible for supervising state human rights compliance?

⁸ See Article 15(1) of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (hereinafter European Convention).

⁹ See generally Hart 2012, Chap. VII.

¹⁰ *Ibid.*, at 131.

¹¹ *Ibid.*, at 132.

¹² See Kaplow 1992, at 559 (distinguishing rules from standards based on ‘whether the law is given content *ex ante* or *ex post*’).

¹³ See, e.g., Article 4 ICCPR.

¹⁴ Schauer 2013, at 1191.

¹⁵ Article 4(1) ICCPR.

International opinion on this question remains divided. Some subscribe to the view that HRL entrusts international treaty bodies with ultimate responsibility for determining how derogation standards apply to particular emergencies. According to this model, human rights derogation reflects a limited concession to ‘reason of state’ (*raison d’etat*)—a safety valve that a state may use when its existential interest in self-preservation clashes with its positive human rights commitments to its people.¹⁶ If a state’s survival as a political community is in jeopardy, the state may derogate from its human rights commitments temporarily to the extent strictly necessary to ensure its own survival. Robust scrutiny by international treaty bodies is necessary, under this account, to mitigate the conflicts of interest arise between public institutions and political elites, whose survival is preserved, and their people, whose derogable human rights are sacrificed, during national crises. By asserting the ultimate prerogative to decide how general derogation standards apply to particular emergencies, international treaty bodies intercede as neutral arbiters between a state and its people to protect the integrity of HRL against erosion in state practice.

A second tradition, realised most fully in the jurisprudence of the European Court of Human Rights (ECtHR), offers a markedly different account of human rights derogation. The second tradition suggests that the purpose of derogation provisions is to empower national authorities to protect human rights *more* effectively, not less. During a genuine public emergency, circumstances may arise where a state’s strict fidelity to some derogable human commitments (e.g., freedom of assembly) might hamper its efforts to protect nonderogable rights (e.g., the right to life). Far from representing a cynical concession to the practical limits of law as a constraint on state power, this second tradition views derogation as a mechanism for optimising human rights protection overall in times where human rights norms temporarily conflict with one another. By entrusting national authorities with responsibility to recalibrate human rights protections for particular public emergencies, this tradition acknowledges the international community’s reliance on national authorities to fully realise HRL’s overarching aspirations. The ECtHR’s controversial ‘margin of appreciation’ doctrine resonates with this account insofar as it invites international treaty bodies to respect national authorities as the primary trustees for humanity.

This chapter explores these two traditions in human rights theory and practice. Section 8.2 considers how the legal standards in human rights derogation provisions might function alternatively as delegations of rulemaking authority to states, on the one hand, or to international treaty bodies, on the other. Section 8.3 defends the view that human rights derogation is best justified as a temporary mechanism for empowering states to protect human rights, rather than as a device for enabling national authorities to advance their interests in a manner that compromises human rights protection. Section 8.4 considers how this rights-optimising conception of human rights derogation should inform the approach that international treaty bodies such as the ECtHR, the Inter-American Court of Human Rights (IACtHR), and the UN Human Rights

¹⁶ See, e.g., The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, reprinted in 7 Human Rights Quarterly 3 1985 (hereinafter Siracusa Principles).

Committee (UNHRC) take in reviewing human rights derogations. Although this article defends the margin of appreciation doctrine, it argues that deference to national authorities should be tempered, if not abandoned altogether, in contexts such as domestic counterinsurgency where conflicts of interest disqualify national authorities from serving as neutral, rights-optimizing trustees for their people. A somewhat counterintuitive lesson of this approach is that the margin of appreciation doctrine may be least justified in national crises where the life of the state itself is most acutely threatened.

8.2 The Resilience of Derogation Standards

Human rights treaties such as the ICCPR, the American Convention, the Arab Charter, and the European Convention are widely understood to employ a multi-step inquiry to determine whether states may derogate from their human rights obligations. The first step is to consider whether the applicable convention designates a particular human rights norm as being subject to derogation.¹⁷ Second, assuming the human rights norm in question is derogable, states are required under each agreement to provide notice concerning the scope of their derogation.¹⁸ Third, each of these agreements contemplates that states may suspend ordinary human rights protections only temporarily during ‘public emergencies’.¹⁹ Fourth, each agreement restricts human rights derogation to circumstances where this extraordinary measure is ‘strictly required’ by the exigencies of the crisis,²⁰ are consistent with their other international obligations, and do not reflect invidious discrimination.²¹

Legal standards comprise the heart of human rights derogation regimes. In determining whether a genuine ‘public emergency’ exists at step three, the ICCPR, the Arab Charter, and the European Convention each permit derogation only when exigent circumstances pose a demonstrable threat to ‘the life of the nation’.²² The American Convention uses a slightly different, but similarly broad formulation, requiring states to show that a ‘war, public danger, or other emergency’ threatens the ‘independence or security of a State Party’.²³ Because these instruments do not define key terms such as ‘life of the nation’, ‘public danger’, or ‘independence and security’, they

¹⁷ See Article 4(1)–(2) Arab Charter; Article 27(1)–(2) American Convention; Article 15(1)–(2) European Convention; Article 4(1)–(2) ICCPR.

¹⁸ See Article 4(3) Arab Charter; Article 27(3) American Convention; Article 15(3) European Convention; Article 4(3) ICCPR.

¹⁹ See Article 4 Arab Charter; Article 27 American Convention; Article 15(1) European Convention; Article 4(1) ICCPR.

²⁰ See Article 4(1) Arab Charter; Article 27(1) American Convention; Article 15(1) European Convention; Article 4(1) ICCPR.

²¹ See, e.g., Article 4(1) Arab Charter; Article 27(1) American Convention; Article 15(1) European Convention; Article 4(1) ICCPR.

²² See Article 4(1) ICCPR; Article 15(1) European Convention; Article 4(1) Arab Charter.

²³ Article 27(1) American Convention.

force national authorities and international tribunals to exercise judgment in deciding whether a particular national crisis qualifies as a full-fledged ‘public emergency’.

Step four follows a similar pattern. The ICCPR, Arab Charter, and European Convention state simply that the extent of a state’s derogation must be ‘strictly required by the exigencies of the situation’.²⁴ The American Convention also provides that derogation must be ‘strictly required’ to preserve the ‘independence or security of a State Party’.²⁵ These standards do not pre-commit states to any particular responsive measures *ex ante*; they simply invite states to tailor their derogation from human rights norms in response to the unique demands of particular emergencies. Thus, in several crucial respects, the ICCPR, American Convention, Arab Charter, and European Convention all rely on open-textured legal standards to regulate states’ recourse to derogation during public emergencies.²⁶

To be ripe for enforcement, the legal standards that govern human rights derogation require translation into more specific rules. As Hart recognised, this process can proceed along one of two tracks.²⁷ First, derogation standards could function as delegations of rule-making authority to administrative bodies, which would then bear the responsibility to determine how the standards will apply to particular public emergencies. In the context of human rights derogation, this rule-making function could be carried out by international treaty bodies before a crisis arises, or it could be accomplished by national authorities issuing a notice of derogation at the time they confront an emerging crisis. Such measures have the advantage of providing specific guidance to rights-holders before emergency measures are deployed. The obvious disadvantage is that rules established *ex ante* may prove insufficiently supple to adapt to the complex and dynamic challenges that arise during a rapidly evolving crisis. As an alternative to rule-making, derogation standards could be understood as *de facto* delegations to international treaty bodies for post hoc review. This approach may offer less specific direction to national actors and human rights-holders *ex ante*, but it would enable HRL to tailor its rules more closely to the precise contours of a particular problem *ex post*.²⁸

Each of these approaches finds support in the practice of international treaty bodies. Human rights derogation standards have been treated at times as delegations of rule-making authority to international commissions,²⁹ as delegations of

²⁴ Article 4(1) ICCPR.

²⁵ Article 27(1) American Convention.

²⁶ Of course, there are also significant differences between these instruments, including their descriptions of the types of emergencies that support derogation, the information that must be conveyed in a notice of derogation, and the specific human rights norms that they identify as derogable or nonderogable. Other human rights instruments such as the African Charter on Human and Peoples Rights do not contain derogation clauses.

²⁷ See Hart 2012, Chap. VII.

²⁸ Legal standards that resist specification both *ex ante* (through rulemaking) and *ex post* (through adjudication) effectively become non-justiciable political questions.

²⁹ See, e.g., Human Rights Committee, General Comment No. 5: Derogations (Article 4), U.N. Doc. HRI/GEN/1/Rev. 9, May 27, 2008 (hereinafter General Comment 5); Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001 (hereinafter General Comment 29).

rule-making authority to states,³⁰ and as delegations of adjudicatory authority to international human rights tribunals.³¹

Consider first the option of treating derogation standards as delegations for rule-making. None of the major human rights treaties expressly authorises an administrative body to promulgate rules to implement broadly formulated derogation standards. The closest any of these instruments comes to delegating rule-making power is Article 40(4) ICCPR, which authorises the U.N. Human Rights Committee (HRC) to provide ‘general comments’ when states report on their human rights practices.³² The HRC has used its general comment authority on two occasions to clarify the ICCPR’s derogation standards.³³ While not technically an exercise of administrative rule-making, these general comments serve in practice as guidance documents that clarify the HRC’s views regarding the general application of ICCPR standards. For the most part, however, these general comments have preserved the context-sensitive, standard-based structure of Article 4 ICCPR. For example, while the HRC has characterized derogation as an ‘exceptional and temporary’ measure that can be taken only in response to a ‘threat to the life of the nation’,³⁴ it has not defined precisely how a state should ascertain whether a particular disturbance constitutes a ‘threat to the life of the nation’. Nor has the HRC developed bright-line rules for evaluating what measures a state may employ in derogation of its human rights commitments. Instead, the HRC has stated simply that emergency measures must be necessary and proportionate to restore a ‘state of normalcy where full respect for the Covenant can again be secured.’³⁵ These guidelines are quintessential standards that defer the task of context-sensitive rule-specification for downstream actors.³⁶

³⁰ See, e.g., *Murray v. United Kingdom*, No. 14310/88, 28 October 1994, para 90; *Ireland v. the United Kingdom*, ECtHR, No. 5310/71, 18 January 1978, para 207.

³¹ See, e.g., *Habeas Corpus in Emergency Situations* (Articles 27(2) and 7(6) American Convention), IACtHR, Advisory Opinion OC-8/87, 30 January 1987.

³² Article 40(4) ICCPR.

³³ See General Comment 5; General Comment 29.

³⁴ General Comment 5, para 3; General Comment 29, para 2.

³⁵ General Comment 29, paras 1, 3.

³⁶ To the extent that the HRC has introduced bright-line rules for human rights derogation, these rules can be divided into two relatively narrow categories. First, the Committee has endeavored to clarify how nonderogable human rights norms apply to emergencies, affirming, *inter alia*, that the prohibition against ‘unacknowledged detention’ and ‘fundamental requirements of a fair trial’ such as the presumption of innocence ‘must be respected during a state of emergency’. *Ibid.*, paras 13(b) and 16. Second, the HRC has introduced a number of bright-line rules for derogation procedures. According to the HRC, this notice ‘should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law.’ *Ibid.*, para 17. See also General Comment 29, para 2 (emphasising that a ‘State party must have officially proclaimed a state of emergency’ to honor ‘principles of legality and rule of law at times when they are most needed’).

Legal experts have proposed additional norms, principles, and procedures to guide future human rights derogation. See, e.g., *Siracusa Principles*, at 7, paras 23–30 (proposing, *inter alia*, that a crisis must affect the whole population in all or part of a state’s territory, not ‘merely local or relatively isolated threats,’ and threaten a state’s physical integrity or political independence to qualify as a genuine ‘public emergency’).

On several occasions, human rights courts have used case-by-case adjudication to generate rules for prospective application in future cases. For example, in the *Greek Case (Denmark, Norway, Sweden and the Netherlands v. Greece)*,³⁷ the ECtHR held that a national crisis must satisfy four criteria to qualify as a genuine ‘public emergency’: (1) the threat must be actual or imminent; (2) its effects must involve the whole nation; (3) the continuance of the organised life of the community must be threatened; and (4) the crisis or danger must be exceptional, in the sense that normal limitations on human rights are inadequate.³⁸ Although announced in the course of an adjudicatory proceeding, and formally lacking precedential authority, these criteria were widely perceived to give the European Convention’s derogation regime a harder rule-like edge, providing guidance to states in anticipation of future crises. Subsequent years have witnessed a softening of these rule-like criteria, however, as the ECtHR has reformulated the criteria to maintain a more standard-based derogation regime.

Illustrative of these trends is the ECtHR’s 2009 decision in *A and Others v. United Kingdom*.³⁹ In the wake of the 9/11 terrorist attacks in New York City and Washington, D.C., the United Kingdom declared a public emergency and enacted new legislation, the Anti-terrorism, Crime and Security Act 2001. The purpose of the Act was to address the ‘continuing’ threat that international terrorism posed for residents of the United Kingdom.⁴⁰ To this end, the Act authorised the arrest and prolonged detention of foreign nationals who might pose security threats but who, for one reason or another, could not be removed or deported from the country. Recognising that this measure may be inconsistent with the human ‘right to liberty and security’ as defined in the European Convention, the United Kingdom submitted notice that it ‘had decided to avail itself of the right of derogation.’⁴¹

Eleven individuals later challenged their detention before the ECtHR, arguing that the United Kingdom’s derogation did not satisfy the European Convention because, *inter alia*, the emergency ‘was not of a temporary nature’.⁴² Although neither the European Convention nor the ICCPR expressly requires that public emergencies be ‘temporary’, the ECtHR acknowledged the HRC’s assertion in General Comment No. 29 that measures derogating from the ICCPR ‘must be of an exceptional and temporary nature.’⁴³ Consistent with its prior decisions, however, the Court rejected the petitioners’ assertion that states bear a burden to establish that the exigent circumstances necessitating human rights derogation are temporary. The Court acknowledged that ‘the duration of [an] emergency’ may be

³⁷ *Greek Case*, ECtHR, Nos. 3321/67, 3322/67, 3323/67 and 3344/67, 5 November 1969, para 113.

³⁸ *Greek Case*, ECtHR, Nos. 3321/67, 3322/67, 3323/67 and 3344/67, 5 November 1969.

³⁹ *A & Others v. United Kingdom*, ECtHR, No. 3455/05, 19 February 2009.

⁴⁰ *Ibid.*, para 11.

⁴¹ *Ibid.*

⁴² *Ibid.*, para 175.

⁴³ *Ibid.*, paras 110, 178. See generally General Comment No 29, para 2.

relevant when evaluating the ‘proportionality of [a state’s] response’, but it stressed that even entrenched national crises such as the United Kingdom’s decades-long counter-terrorism campaign in Northern Ireland and Turkey’s longstanding counterinsurgency operations against Kurdish separatists could support derogation if responsive measures were strictly necessary and proportional to the threat.⁴⁴ According to the Court, states do not bear a burden to establish that their emergency measures will be of a fixed duration; they need only commit to lift the emergency measures whenever the threat to ‘the life of the nation’ disappears or the measures taken are no longer strictly necessary and proportional to address the threat. Thus, rather than impose a bright-line temporariness rule that would unduly inhibit states’ capacity to fulfill their responsibility to protect, the Court in *A and Others* wisely focused instead on the principles of necessity and proportionality—context-sensitive legal standards that are more finely attuned to the altruistic legal relationship that HRL ordains.

The Court’s rule-skepticism in *A and Others* was not limited to whether emergency measures must be ‘temporary’. In the course of its decision, the Court also called into question several rule-like features of the European Commission’s four-factor test from the *Greek Case*. For example, the Court offered a flexible interpretation of the requirement that terrorist attacks must be ‘imminent’ to support human rights derogation. Although the United Kingdom made the case that a terrorist attack ‘might be committed without warning at any time’, it did not establish that any particular attack was actually imminent.⁴⁵ Nor could it reasonably do so, given the uncertain nature of the threat. In recognition of this fact, the Court softened the imminence criterion’s edges—giving it a more standard-like character—to permit derogation in response to attacks of an indeterminate, but reasonably foreseeable, character. The Court also rejected the European Commission’s suggestion that exigent circumstances must threaten ‘institutions of government’ or a state’s ‘existence as a political community’ to qualify for human rights derogation. According to the Court, the prospect of significant civilian casualties alone within a single zone of a single city would suffice to demonstrate a threat to ‘the life of the nation’ justifying emergency measures.⁴⁶ In each of these respects, the Court systematically dismantled rules

⁴⁴ *A and Others v. United Kingdom*, ECtHR, No. 3455/05, 19 February 2009, para 178 (citing *Ireland v. United Kingdom*, *Brannigan v. McBride*, and *Marshall v. United Kingdom*).

⁴⁵ *Ibid.*, para 177. For an argument that no threat to the life of the nation was ‘imminent’, see also Hughes 2007, at 54.

⁴⁶ *A and Others v. United Kingdom*, ECtHR, No. 3455/05, 19 February 2009, para 179 (citing the July 2005 suicide bombings in central London). See also Macdonald 1997. ‘The Convention should not be interpreted in a way that prevents states from taking action to avert the aggravation of localized emergencies.’ Macdonald 1997, at 240.

from the *Greek Case*, affirming the need to preserve a more flexible, standard-based approach.⁴⁷

International tribunals have been even less willing to impose fixed rules for determining which particular measures are ‘strictly necessary’ to resolve an emergency. Generally speaking, courts and commissions appear to accept that the ‘strict necessity’ requirement, which constrains state responses to emergencies, is not well-suited to a priori evaluation outside the context of particular emergencies. Thus, despite the international community’s episodic efforts to fashion more determinate rules for human rights derogation, the emergency regimes of the ICCPR, American Convention, Arab Charter, and European Convention remain persistently standard-based at their core.

8.3 Derogation Standards as Delegations

The resiliency of HRL’s derogation standards means that evaluating whether, or to what extent, human rights may be suspended during emergencies continues to be a case-specific inquiry. Rather than develop an exhaustive code of rules to regulate emergencies *ex ante*, HRL allows states to formulate emergency measures in response to the unique circumstances of particular national crises, and it authorises human rights tribunals to review these measures for compliance with the applicable standards. What remains unclear, and deeply controversial, is whether the broad standards in human rights derogation provisions should be understood primarily as delegations of rule-specifying authority to national authorities, the first-responders during times of national crisis, or to international treaty bodies, the institutions charged with supervising state performance. Before answering this question, however, it may be helpful to lay the groundwork by offering some general observations about how HRL uses legal standards to structure the juridical relationship between states and their people.

Legal theorists have long recognised that a legal system’s choice between rules and standards is not merely a technical question of efficient regulatory design, but may also reflect a normative vision for the parties’ legal relationship. For example, Duncan Kennedy has argued that the distinction between rules and standards

⁴⁷ One plausible reading of *A and Others* is that the decision collapses steps three and four of the Court’s traditional analysis for evaluating human rights derogation into a single inquiry: states may derogate from their human rights commitments whenever such measures are ‘strictly required’ to guarantee basic security under the rule of law for their people. On this reading, whether a ‘public emergency’ exists is no longer an independent legal requirement but a legal conclusion that follows from the application of HRL’s strict-necessity standard. Under the logic of *A and Others*, therefore, a crisis constitutes a genuine ‘public emergency’ if derogation is strictly necessary to satisfy the state’s sovereign responsibility to protect its people. Cf. Sheeran 2013, at 553 (proposing that courts treat the existence of a ‘public emergency’ as a political question).

reflects a jurisprudential divide between legal regimes that are based on a spirit of ‘individualism’ versus those that are based on a spirit of ‘altruism’.⁴⁸ In regimes based on individualism, regulated parties are free to pursue their own ends, subject only to constraints that they or their sovereign affirmatively impose *ex ante*. Generally speaking, the common law of contract is an individualistic regime. Contracting parties are presumed to engage in ‘arms-length’ negotiation, each pursuing their own interests, and each bound to pursue their counterparty’s interest only to the extent that discrete duties have been specified by agreement in advance. Beyond these contractual duties, contracting parties are free to pursue their own self-interest; they bear no obligation to make further accommodations for the changing interests of their counterparty.

A jurisprudence of altruism, in contrast, views regulated parties as bearing relational obligations of affirmative devotion to use entrusted authority to pursue others’ ends, not merely their own. The paradigmatic private-law example of a jurisprudence of altruism is the law of fiduciaries, which requires regulated parties to use their discretionary power over the legal or practical interests of their beneficiaries for the exclusive benefit of their beneficiaries.⁴⁹ As Daniel Markovits has explained, fiduciaries are retained to take *initiative* on behalf of their beneficiaries, not merely to comply with rules fixed *ex ante*. Hence,

[f]iduciary duties of loyalty and care ... reflect a natural response to the structural problems out of which fiduciary relations generally arise. A fiduciary relation becomes appealing partly because a principal requires her agent to act in ways that she cannot substantially specify *ex ante* and cannot directly evaluate *ex post*. In such cases, fiduciary obligation substitutes for the specification of contract duties and the verification of performance.⁵⁰

Because fiduciary relationships are dynamic, and because the temptations for opportunism and shirking that arise in such relationships cannot be fully specified in advance, the law relies on standards to fill in the details *ex post*. On this view, standards are the tools that legal systems employ to encode a jurisprudence of altruism.

Of course, identifying rules with individualism and standards with altruism is too tidy, and Kennedy’s thesis has been justly criticised for over-simplifying the rule/standard dynamic. As critics have noted, individualist regimes commonly deploy standards in contexts where the complexity or uncertainty of a particular environment would prevent rules from safeguarding the parties’ respective interests. Conversely, altruist regimes often use rules to underscore parties’ other-regarding obligations and enhance coordination.⁵¹ Indeed, arguably the defining feature of fiduciary relationships is a bright-line rule: the ‘duty of loyalty’, which prohibits fiduciaries from engaging in self-interested transactions without their

⁴⁸ See Kennedy 1976, at 1714–1724.

⁴⁹ Markovits 2014.

⁵⁰ *Ibid.*

⁵¹ Schlag 1985, at 420.

beneficiaries' consent.⁵² Like individualistic regimes, altruistic regimes also commonly employ rules to set technical or procedural baselines that facilitate external monitoring and judicial review.⁵³ Thus, the mere fact that a particular legal regime employs rules or standards does not, in and of itself, establish that it has an individualistic or altruistic character.

Although Kennedy's claim about the relationship between legal standards and altruism is problematic, it does offer an important insight: when individualistic and altruistic regimes deploy legal standards, they take very different approaches to downstream rule-production. In individualistic regimes, neither party authorises the other to define how open-ended legal standards apply in particular circumstances; rather, legal standards serve as delegations of authority exclusively to courts to resolve any disputes between the parties about the interpretation or application of law. In contrast, legal standards operate very differently in altruistic regimes, which entrust one party with discretionary power to take initiative for the benefit of another. In altruistic regimes, parties and courts serve as co-delegates of rule-making power: the entrusted party (e.g., corporate officer, administrative agency) bears primary responsibility for translating broad legal standards into administrable rules, but courts supervise to address abuses of this discretion. Courts routinely accord a measure of deference, therefore, when they review the entrusted party's actions. For example, U.S. courts review corporate officers' compliance with the 'duty of care' very deferentially, thereby affirming that corporate officers—not courts—are primarily responsible for determining what measures are best calculated to advance the interests of their shareholders.⁵⁴ Similarly, in administrative law, national courts tend to pay considerable deference to administrative agencies, treating ambiguous standards in legislation as delegations of authority to agencies to decide what measures are best suited to advance public interests.⁵⁵ Individualistic and altruistic legal regimes thus reflect different assumptions about whether standards reflect delegations of authority to the parties, to courts, or both.

Does HRL reflect a jurisprudence of individualism or altruism? Human rights obligations are often characterised as individualistic constraints on states' sovereign independence. When states covenant to refrain from outrages against human dignity such as arbitrary detention, forced disappearance, and torture, they purportedly assume obligations that have an objective character. HRL does not confer discretion on national authorities to decide once and for all what these obligations entail; although states will necessarily take the first cut at these questions, HRL

⁵² See Restatement (Second) of Agency, 1958, § 387 (describing fiduciaries' obligation to beneficiaries primarily as a duty 'to act solely for the benefit of the principal in all matters connected with his agency').

⁵³ See Kaplow 1992, at 563–564.

⁵⁴ For discussing the business-judgment rule in corporate law, see *Aronson v. Lewis*, 473 A.2d 805, 1 March 1984, at 812.

⁵⁵ See, e.g., *Chevron U.S.A., Inc. v. National Res. Defense Council, Inc.*, 467 U.S. 837, 1984, at 843–844.

commits the ultimate responsibility for defining the content and application of HRL norms to international courts and commissions.

This account of HRL as an individualistic regime is plausible in some respects, but it is difficult to square with some core features of HRL. While it is certainly true that states bear negative duties under HRL to respect various human rights prohibitions, and these duties are facially compatible with a jurisprudence of individualism, these duties are equally compatible with a jurisprudence of altruism.⁵⁶ Moreover, HRL also places states under affirmative duties to protect and fulfill human rights—duties that require national authorities to set aside their own self-interest to pursue the interests of their people. This is most obviously true for economic, social, and cultural rights, which commit states to use the resources at their disposal to develop and implement a coordinated plan for advancing the economic, social, and cultural well-being of their people.⁵⁷ But it is equally true of civil and political rights. Under the ICCPR, for example, it is not enough for states to refrain from imposing slavery upon their people; they must also ‘ensure’ respect for the prohibition by adopting laws that prohibit slavery and by prosecuting violations of these laws within their jurisdictions.⁵⁸ States are expected to take initiative to develop institutions, policies, and procedures in order to satisfy the ICCPR’s directive that ‘[n]o one shall be held in slavery’, ‘servitude’, or ‘forced or compulsory labor’.⁵⁹ The case law developed by the ECtHR supports this altruistic vision by requiring states to take action so that the beneficiaries of the rights and freedoms enshrined in the Convention are able to enjoy these legal protections effectively.⁶⁰ In practice, of course, eradicating slavery and other forms of human trafficking has proven to be a thorny challenge for even the most affluent and conscientious states. Nonetheless, like agents or trustees in private fiduciary law, states under HRL bear broad obligations of affirmative devotion to use their powers and resources altruistically to protect and fulfill human rights to achieve the progressive realisation of these objectives for their people. Thus, the positive, programmatic character of states’ obligations to respect, protect, and fulfill human rights undercuts the idea that HRL can be captured fully by a jurisprudence of individualism.

Despite these features of HRL, some human rights lawyers have characterised derogation provisions in individualistic terms.⁶¹ The purpose of derogation clauses, under this account, is to address the conflicts of interest that arise when national

⁵⁶ See Fox-Decent and Criddle 2009 explaining how nonderogable human rights norms are consistent with a fiduciary conception of state authority under HRL.

⁵⁷ Article 2(1) ICESCR.

⁵⁸ Article 2 ICCPR.

⁵⁹ Article 8 ICCPR.

⁶⁰ See, e.g., *Marckx v. Belgium*, ECtHR, 6833/74, 13 June 1979, para 31 (explaining that the European Convention ‘does not merely compel the State to abstain from ... interference [with family life]’ but also imposes ‘positive obligations inherent in an effective “respect” for family life’).

⁶¹ See, e.g., Chowdhury 1989, at 58–59 (observing that the International Commission of Jurists considered it ‘axiomatic that, for the protection of human rights, the greatest possible degree of judicial control should be striven for’).

crises jeopardise states' existential interest in self-preservation. By permitting national authorities to invoke 'the life of the nation'⁶² or the 'independence or security of a State Party'⁶³ as a trump card against certain human rights claims during public emergencies, HRL enables them to modify their legal obligations in settings where the conflict between their own (individualistic) interests and their (altruistic) legal obligations to their people are in greatest tension. Approached from this perspective, treating derogation standards as delegations to national authorities would make little sense, because it would invite national authorities to serve as judges and parties to the same cause. Instead, there would be a particularly strong case for international tribunals to conduct searching, independent review of human rights derogations to decide for themselves whether state derogations are strictly necessary to preserve the 'life', 'independence', or 'security' of the state.

This understanding of human rights derogation as a concession to *raison d'état*, while superficially plausible, has failed to attract much support among international lawyers. Few subscribe to the idea that national authorities may use derogation as a device *solely* for self-preservation, deliberately disregarding their general obligations to respect, protect, and fulfill human rights for the benefit of their people. Instead, the dominant view has been that derogation standards such as 'the life of the nation' must be defined according to *human* interests, not the interests of national authorities *per se*.⁶⁴ Far from releasing states to pursue their own independent objectives, international human rights treaties contemplate that states will use derogation solely for other-regarding purposes, suspending human rights protections only to the extent strictly necessary to re-establish their capacity to protect and fulfill human rights for their people. During a time of war, for example, a state may find it necessary to impose curfews or deny access to public roads temporarily in a departure from the human 'right to liberty of movement' to ensure that military personnel and supplies can travel swiftly to respond to attacks and deliver assistance to those in need.⁶⁵ When states take initiative in this manner to protect their people, their temporary derogation from other human rights commitments such as freedom of movement or expression may fit commodiously within a jurisprudence of altruism. Human rights derogation provisions and limitation provisions thus share a common structure, entrusting states with responsibility to narrow the scope of protection temporarily for some of their people where such measures are strictly necessary to 'secur[e] due recognition and respect for the rights and freedoms of others.'⁶⁶ By committing responsibility to states in this

⁶² See Article 4(1) ICCPR; Article 15(1) European Convention; Article 4(1) Arab Charter.

⁶³ Article 27(1) American Convention.

⁶⁴ See, e.g., Siracusa Principles, para 39. These Principles suggest that human rights derogation is permissible only to safeguard 'the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant'.

⁶⁵ See Article 12(1) ICCPR.

⁶⁶ Article 29(2) of the 1948 Universal Declaration of Human Rights, UNGA Res. 217 A(III), 10 December 1948.

fashion, HRL situates states not only as subjects of HRL, but also, as temporary co-authors of HRL during public emergencies.

In light of these features, HRL standards have often been understood as delegating discretionary power primarily to national authorities, with international treaty bodies occupying a secondary and subsidiary position.⁶⁷ By entrusting states with responsibility to take initiative for protecting and fulfilling the human rights of their people, HRL frames the relationship between states and their people in altruistic terms that are inconsistent with a rule-based legal framework. While some hard rules such as the prohibition against torture may be consistent with a jurisprudence of altruism,⁶⁸ the whole point of human rights derogation is to enable states to protect their people in contexts where HRL's reliance on rules (e.g., negative duties to respect human rights) could prevent states from maintaining the conditions necessary for the protection and fulfilment of human rights for all. A derogation regime that relied upon rules to define when a 'public emergency' existed would simply replicate the rule-rigidity problem that the derogation regime itself was designed to solve. Moreover, as a practical matter, any effort to devise comprehensive rules for human rights derogation must come to grips with the fact that, in Alexander Hamilton's words, 'it is impossible to foresee or to define the extent and variety of national emergencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite.'⁶⁹ The error costs associated with a rule-bound regime are therefore likely to be unacceptably high 'relative to the performance of a fully informed and fully competent decisionmaker using a standard.'⁷⁰ If derogation is strictly necessary to maximise human rights protection during an emergency, shackling states to legal rules established *ex ante* has the potential to unduly compromise their ability to protect their people. To the extent, therefore, that HRL entrusts states with responsibility to act altruistically for the benefit of their people, it also demands a derogation regime with the flexibility and dynamism that only standards can supply.

⁶⁷ See Shany 2005, at 915, arguing that the choice of standards 'marks a preference for pluralism and diversity over uniformity in law-application, and the empowerment of decentralized national decision-makers at the expense of their international counterparts'.

⁶⁸ Evan Fox-Decent and I have argued elsewhere that the nonderogable character of the prohibition against torture is consistent with a spirit of altruism because a state that violated this norm could not plausibly claim to treat its people as equal beneficiaries under the rule of law. See Criddle and Fox-Decent 2012, at 55–56. Even the prohibition against torture cannot be reduced entirely to bright-line rules, however, because it is difficult to specify *ex ante* precisely how states should allocate their resources to enforce the prohibition within their jurisdictions.

⁶⁹ Hamilton 1787; cf. Kaplow 1992, at 564 (observing that standards are better suited than rules to govern 'heterogeneous behavior, in which each type of relevant activity may be rare').

⁷⁰ Vermeule 2000, at 92.

8.4 Deference for an Altruistic Regime

If legal standards are indispensable tools for regulating human rights derogation, how should international law translate these standards into rules? Should derogation standards be understood primarily as delegations of rule-making authority to international courts and commissions? Or should they be construed as delegations to states to develop ‘rules adapted to their special needs’?⁷¹

How a particular legal regime translates legal standards into rules reveals much about its jurisprudential commitments. Individualistic regimes tend to reject the idea that standards authorise a regulated party to fashion rules of its own design. In relationships governed by ordinary contractual principles, for example, the exercise of unilateral rule-making power by either party would undermine the regime’s underlying premise of normative individualism. Responsibility therefore falls to the courts to translate the legal standards enshrined in contracts into discrete rules that would govern the respective rights and liabilities of the parties.

The same cannot be said of legal regimes that are premised on a jurisprudence of altruism. Because altruistic regimes entrust a party with discretionary power for the purpose of enabling the entrusted party to take initiative affirmatively for the benefit of another, the entrusted party serves as the primary delegate for realising the aspirations that are encoded in legal standards.⁷² In altruistic regimes, legal standards carve out a space within which the entrusted party may exercise discretionary power for the benefit of others.⁷³ Courts, in contrast, play a comparatively modest, subsidiary role in altruistic regimes. Courts are not responsible for translating legal standards into specific rules, thereby directing precisely how an entrusted party should exercise discretionary power; rather, courts are tasked with merely policing the outer limits of an entrusted party’s rule-making power. Judicial intervention becomes necessary where there has been a manifest abuse of discretion—for example, where an entrusted party has ignored or unreasonably applied relevant standards, has engaged in self-interested behaviour, has declined to treat their beneficiaries even-handedly, or has employed a patently inadequate decision-making process.

Taken at face value, some pronouncements from international human rights courts appear to reject the altruistic approach in favour of judicial administration of derogation standards. In *Brannigan and McBride v. United Kingdom*, for example, the ECtHR explained that ‘judicial control of interference by the executive with the individual’s right to liberty ... is implied by one of the fundamental principles of a democratic society, namely the rule of law.’⁷⁴ Hence, ‘it is ultimately

⁷¹ Hart 2012, at 131.

⁷² In U.S. law, these principles are evident in fields as diverse as the law of fiduciaries and administrative law. See Criddle 2006.

⁷³ Cf. Smith and Lee 2014 (characterising fiduciary discretion as a decision-making space); Strauss 2012 (defining the Chevron doctrine in U.S. administrative law in these terms).

⁷⁴ *Brannigan and McBride v. United Kingdom*, ECtHR, Nos. 14553/89, 14554/89, 25 May 1993, para 48.

for the Court to rule whether the measures were “strictly required”, including (1) whether a derogating measure ‘was a genuine response to the emergency situation’, (2) whether ‘it was fully justified by the special circumstances of the emergency’, and (3) whether ‘adequate safeguards were provided against abuse’.⁷⁵ Taken out of context, statements such as these may convey the (false) impression that the ECtHR views itself as the sole delegate for translating the European Convention’s general standards into rules applicable to specific contexts.

The better view, however, is that the ECtHR’s ‘margin of appreciation’ jurisprudence reflects a jurisprudence of altruism. Under the margin of appreciation doctrine, human rights bodies supervise state responses to public emergencies, but states take the lead in modifying the European Convention’s general regime to address grave threats to the human rights of their people.⁷⁶ In *Brannigan and McBride*, for example, the Court emphasised that ‘it falls to each Contracting State, with its responsibility for “the life of [its] nation,” to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency.’⁷⁷ The Court recognised, in short, that international law charges states with primary responsibility for determining how HRL’s general safeguards should be modified in contexts where unwavering adherence to these safeguards would prevent the state from protecting its people from grave threats. Hence,

[i]t is not the Court’s role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to [preserve the life of the nation] on the one hand, and respecting individual rights on the other.⁷⁸

Under the margin of appreciation doctrine, it is national authorities, not the ECtHR, that are entrusted with primary responsibility for designing temporary

⁷⁵ *A and Others v. United Kingdom*, ECtHR, No. 3455/05, 19 February 2009, para 184.

⁷⁶ See *Case ‘Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium’ v. Belgium*, ECtHR, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23 July 1968, paras 33–34 (emphasising the subsidiary character of the Court’s oversight function).

⁷⁷ *Brannigan and McBride v. United Kingdom*, ECtHR, Nos. 14553/89, 14554/89, 25 May 1993, para 43. See also *A and Others v. United Kingdom*, ECtHR, No. 3455/05, 19 February 2009, para 174 (‘The object and purpose underlying the [European] Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction.’).

⁷⁸ *Brannigan and McBride v. United Kingdom*, ECtHR, Nos. 14553/89, 14554/89, 25 May 1993, para 59 (citing *Ireland v. United Kingdom* and *Klass and Others v. Germany*); cf. *Handyside v. United Kingdom*, ECtHR, No. 5493/72, 7 December 1976, at 22 (noting that the ECtHR cannot assume the role of national courts and legislatures when balancing conflicting interests); *Case ‘Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium’ v. Belgium*, ECtHR, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23 July 1968, paras 34–35 (stating that the court cannot assume the role of national authorities). Commentators have observed that the margin of appreciation doctrine has its genesis in continental administrative law—another area where discretionary power is entrusted to institutions for altruistic purposes subject to obligations of reasoned justification. See, e.g., Gross and Ní Aoláin 2001, at 626.

human rights regimes that are adapted to the demands of particular public emergencies.

This conception of the margin of appreciation doctrine marks a significant departure from other leading accounts of the doctrine. Some legal scholars have argued that the primary purpose of the margin of appreciation doctrine is to accommodate moral pluralism through democratic policy-making.⁷⁹ Others have argued that the Court employs the margin of appreciation as an accommodation to principles of comity, reflecting the Court's felt need 'to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority.'⁸⁰ Yet, another strain of legal scholarship suggests that deference is warranted because national authorities, '[b]y reason of their direct and continuous contact with the pressing needs of the moment, ... are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.'⁸¹ While these considerations all support deference, none is sufficient to justify the margin of appreciation doctrine. Concerns about democratic legitimacy, comity, and comparative institutional competence are plainly inadequate to support deference to national authorities if HRL entrusts international treaty bodies alone with authority to determine whether human rights derogation satisfies the applicable legal standards. Deference to national authorities is justified only to the extent that HRL entrusts national authorities as the primary agents for deciding what measures are necessary to protect and fulfill human rights during emergencies.

If HRL's derogation standards commit rule-making power to states in the first instance, should human rights bodies abstain from reviewing state emergency measures?⁸² International courts have wisely resisted this option. Human rights treaties contemplate that international courts and commissions will play a key role in supervising public emergencies to ensure that national authorities do not flagrantly abuse their derogation authority.⁸³ Deference under the margin of appreciation does not necessarily mean wholesale abdication to national authorities. As the ECtHR explained in *Handyside v. United Kingdom*, '[t]he domestic margin of appreciation ... goes hand in hand with a European supervision.'⁸⁴ This principle finds expression, as well, in Protocol 15 amending the European Convention.⁸⁵

⁷⁹ See, e.g., Benvenisti 1999, at 844; Mahoney 1998.

⁸⁰ MacDonald 1993, at 123. See also Shany 2005, at 918.

⁸¹ *Brannigan and McBride v. United Kingdom*, ECtHR, Nos. 14553/89, 14554/89, 25 May 1993, para 59. Orin Gross and Fionnuala Ní Aoláin have challenged the view that during emergencies national authorities are better positioned than international tribunals to evaluate the need for emergency measures; see Gross and Ní Aoláin 2001, at 638.

⁸² See Sheeran 2013, at 495.

⁸³ See *Brogan and Others v. United Kingdom*, ECtHR, Nos. 11209/84, 11234/84, 11266/84, 11386/85, 29 November 1988, para 58.

⁸⁴ *Handyside v. United Kingdom*, ECtHR, No. 5493/72, 7 December 1976, paras 47–48.

⁸⁵ Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, 24 April 2013.

Protocol 15 '[a]ffirm[s] that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation'. At the same time, however, Protocol 15 also stresses that states-parties remain 'subject to the supervisory jurisdiction of the [ECtHR]'.⁸⁶ Even under the margin of appreciation's deferential standard, the 'burden lies on [states] to justify their acts' during judicial review.⁸⁷

The absence of such a reasoned justification is a sufficient ground for finding a violation of the Convention. For example, in *Brannigan & McBride v. United Kingdom*, the Court held that the United Kingdom had abused its emergency powers by prolonging the detention and interrogation of two residents of Northern Ireland without an adequate justification.⁸⁸ Likewise, in *Aksoy v. Turkey*, the Court reasoned that a two-week delay in presenting a citizen-detainee before a judge 'exceeded the Government's margin of appreciation' because it 'could not be said to be strictly required by the exigencies of the situation.'⁸⁹ In each of these settings, the Court recognised the legitimacy of states' primary role in fashioning temporary emergency measures from the European Convention's raw standards, but it also underscored that states must be prepared to offer reasonable justifications that are worthy of respect.⁹⁰ These decisions underscore the principle that states ultimately bear the burden to establish a plausible factual predicate for any purported 'threat to the life of the nation' and to explain why the measures they have taken to deal with the crisis are reasonable applications of relevant derogation standards.

A corollary of this duty of reasoned justification is that the *degree* of deference accorded to national authorities under the margin of appreciation doctrine may depend upon the rationality and thoroughness of a state's legal rationale. An explanation that does not take into account all of the relevant legal standards, ignores key facts, or reaches a conclusion inconsistent with established law will qualify for judicial censure.⁹¹ A state that fails to provide a rational justification for human rights derogation would fail to meet its obligations as neutral arbiter between the conflicting human rights claims of its people.⁹²

⁸⁶ *Ibid.* Article 1.

⁸⁷ *Murray v. United Kingdom*, ECtHR, 14310/88, 28 October 1994, para 38.

⁸⁸ *Brannigan and McBride v. United Kingdom*, ECtHR, Nos. 14553/89, 14554/89, 25 May 1993, para 48.

⁸⁹ *Aksoy v. Turkey*, ECtHR, No. 21987/93, 18 December 1996.

⁹⁰ Cf. Gross 1998, at 498 (expressing concern about 'the pernicious use of the [margin of appreciation] doctrine to avoid conducting an independent examination of the evidence').

⁹¹ See Shany 2005, at 927 (suggesting other factors).

⁹² See *Landinelli Silva v. Uruguay*, HRC, Comm. No. 34/1978, 8 April 1981 para 8.3 (emphasising that states are 'duty-bound to give a sufficiently detailed account of the relevant facts' to facilitate review, and that '[i]f the respondent Government does not furnish the required Justification itself, ... the Human Rights Committee cannot conclude that valid reasons exist to legitimate a departure from the normal legal regime prescribed by the Covenant').

Another limitation on the margin of appreciation doctrine follows from the idea that HRL enlists national authorities to author temporary regimes for the protection of human rights during public emergencies: international courts and commissions should withhold deference to state derogation decisions where there are compelling reasons to believe that national authorities did not qualify as neutral arbiters. A common feature of altruistic regimes is that judicial deference is predicated on a presumption that parties have acted impartially, according due regard to the interests of all of their beneficiaries without regard to their own self-interest. Where a party has discriminated arbitrarily against some of its beneficiaries or has engaged in self-interested transactions, courts will set aside the party's decision or require disgorgement of any ill-gotten gains.⁹³ In a similar spirit, HRL prohibits states from derogating from their human rights commitments in a manner that reflects discrimination against a protected group. When states suspend derogable human rights such as freedom of expression, movement, or association, such action must be facially neutral and reflect due regard for the potential disparate impact that it may have against vulnerable groups or individuals.⁹⁴ If emergency measures transgress these principles, the margin of appreciation doctrine simply does not apply.

Application of the margin of appreciation may also be inappropriate if national authorities have demonstrated a consistent disregard in the past for their basic human rights commitments. Although derogation provisions may empower altruistic governments to protect human rights more effectively during public emergencies, they may also furnish a pretext for tyrannical governments to limit human rights protections without good cause. In deciding whether to defer to state derogations, international courts need not cast a blind eye on clear evidence that national authorities have demonstrated a flagrant and systematic disregard for the human rights of their people in other contexts.

Similarly, international courts and commissions should temper the margin of appreciation doctrine's application in contexts where there are good reasons to believe that national authorities' concerns about self-preservation are likely to render them unreliable agents for protecting the human rights of their people. To determine how much deference national authorities should receive under this standard, international tribunals should consider the extent to which emergency conditions generate conflicts between the interests of national authorities and their people. In a national crisis involving a threat of future terrorist attacks against civilian targets such as universities, power plants, or sports stadiums, international tribunals may have relatively little cause for concern about national authorities' ability to serve as impartial arbiters in designing temporary human rights regimes. Absent evidence of discrimination, international tribunals may reasonably

⁹³ See, e.g., *Snepp v. United States*, 444 U.S. 507, 19 February 1980, at 515.

⁹⁴ See Hennebel 2011, at 60 (observing that in the jurisprudence of the Inter-American Court of Human Rights, vulnerable groups that historically have been the subject of discrimination such as children, women, indigenous groups, and disabled persons receive 'stronger protection').

presume that when states derogate from their human rights commitments, their overarching purpose is to protect and fulfill human rights for their people. Conversely, when the threat to ‘the life of the nation’ comes from a domestic insurgency that seeks to overthrow the government itself, national institutions may experience greater temptation to pursue their own self-preservation in a manner that is not ‘strictly necessary’. While some deference to national authorities might still be warranted based on their greater familiarity with facts on the ground, international tribunals should review the state’s responsive measures closely to ensure that national authorities do not become effectively judge and party to the same cause. Whether international tribunals should pay deference to national authorities thus depends on the character of the public emergency. The greater the peril that a crisis poses to a government’s self-preservation, the greater may be the justification for declaring a public emergency to maintain public order. On the other hand, the more a crisis threatens a government’s survival, the greater the threat that a government’s choice of responsive measures may be infected by institutional self-interest, and thus the weaker the case may be for international tribunals to defer to the government’s choice of responsive measures.

These dynamics may help to explain and justify differences in the application of the margin of appreciation doctrine between the European and inter-American human rights systems. Unlike the ECtHR, the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court on Human Rights (IACtHR) have not applied the margin of appreciation doctrine consistently in their jurisprudence.⁹⁵ The IACtHR’s unwillingness to apply a deferential standard of review arguably reflects the fact that the IACtHR began its work at a time when much of Latin America was ruled by unelected military dictators and the Court’s docket was flooded with cases of states using torture, forced disappearances, and extrajudicial killing to suppress political dissent.⁹⁶ Indeed, the IACtHR has frankly acknowledged that it views human rights derogation with a jaundiced eye:

It cannot be denied that under certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a democratic society. The Court cannot, however, ignore the fact that abuses may result from the application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27 [of the American Convention] and the principles contained in other relevant international instruments. This has, in fact, been the experience of our hemisphere.⁹⁷

Given this sobering experience, it should come as no surprise that the IACtHR has been reluctant to treat national authorities as altruistic agents for their people during times of crisis. If national authorities are perceived to use human rights

⁹⁵ See Legg 2012, at 31 (observing that the IACtHR lacks ‘a well-established doctrine of deference’ and that “a number of cases seem to imply that there will be no deference to states”).

⁹⁶ See, e.g., Candia 2014; Contreras 2012, at 28.

⁹⁷ Habeas Corpus in Emergency Situations (Articles 27(2) and 7(6) of the American Convention on Human Rights), IACtHR, Advisory Opinion OC-8/87, 30 January 1987, para 20.

derogation for self-interested purposes—to enhance their own leverage against domestic insurgents or political opponents, often during national crises of their own creation—the trust necessary to sustain a margin of appreciation cannot reasonably be sustained. A jurisprudence of individualism focused on rules, rather than a standard-based jurisprudence of altruism, naturally becomes the operative regulatory paradigm.⁹⁸

The experience of the IACtHR illustrates why the margin of appreciation doctrine should not be treated as all-or-nothing proposition. While human rights derogation may be designed to empower states to protect human rights more effectively overall during public emergencies, international tribunals need not turn a blind eye when states are manifestly unprepared to perform this role. There is little reason for international tribunals to apply a margin of appreciation, for example, if national authorities within a particular state have manifested clear disregard for the interests of their people by engaging in a consistent pattern of grave human rights abuse. Similarly, the presumption that states derogate for altruistic purposes should be set aside in settings such as domestic counterinsurgency operations where national authorities' emergency measures are susceptible to concerns for self-preservation. Although the altruistic character of HRL often means granting a healthy margin of appreciation to national authorities, it may require international tribunals to withhold deference where past oppression or conflicts of interest disqualify national authorities from presenting themselves as neutral, rights-optimising trustees for their people. In these settings, international tribunals will be best positioned to determine whether the measures a state has taken in response to a public emergency are 'strictly required by the exigencies of the situation.'⁹⁹

8.5 Conclusion

The idea that international law needs to develop more concrete rules for human rights derogation has become a common refrain in legal scholarship. Given the frequency with which states abuse their emergency powers during national crises, the yearning for more determinate rules to constrain state discretion is understandable. There are good reasons, however, why the international community continues to employ open-textured standards to regulate human rights derogation.

⁹⁸ This may help to explain why the IACtHR has developed a more rule-focused jurisprudence than its European counterpart, including recognition of a greater number of human rights norms as 'regional jus cogens.' See, e.g., *Roach and Pinkerton*, Case 9647, IACHR, Resolution No 3/87, OEA/ser.L./V./II.71, doc. 9 rev. 1, 22 September 1987, at 168–170 (characterising 'execution of children' as a jus cogens norm); cf. Schauer 2013, at 1191–1193 (noting that 'rules can empower criticism in ways that standards do not').

Similarly, it has been suggested that the absence of a derogation provision in the African Charter on Human and Peoples Rights reflects a 'historical legacy both in colonial and postcolonial societies' in which emergency powers were abused. See Cowell 2013, at 153.

⁹⁹ Article 4(1) ICCPR.

By authorising states to decide when and how to derogate from their international obligations, HRL entrusts states with primary responsibility to determine what measures are necessary to protect and fulfill human rights for their people during national crises. Broad derogation standards are the mechanism HRL employs to structure its jurisprudence of altruism, empowering states to design temporary human rights regimes that are tailored to the specific exigencies of particular national crises. The role of human rights tribunals, in contrast, is more limited: to ensure that states do not abuse their discretionary power by imposing self-serving, discriminatory, or arbitrary and capricious limitations on human rights. The controversial margin of appreciation doctrine honors this entrustment of authority, ensuring that international tribunals give a healthy measure of deference to the context-sensitive judgments of national decision-makers during temporary crises. Judicial deference to national authorities should not, however, be applied indiscriminately. If national authorities fail to support their human rights derogations with reasoned deliberation, if their behavior reflects a pattern of abusive conduct, or if their altruistic mission has been compromised by conflicts of interest, international tribunals should not hesitate to withhold deference. Thus, a state's authority to derogate from human rights guarantees during public emergencies is conditioned upon the state serving as a faithful trustee for its people.

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