

Security Sector Governance and Rule of Law Reform

ISSAT Advisory Note

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Why are We Talking about SSG/R and Rule of Law Post-Covid-19?

State of Emergency (SoE) measures are a Rule of Law issue that apply limitations on human rights and basic freedoms, including right to liberty, freedom of association, and freedom of movement in order to enable effective government response to nation-threatening events. Security actors are frontline enforcers of emergency measures; whereas, oversight bodies, such as the parliament, the judiciary and civil society organisations, ensure the accountability of security actors under SoE measures.

The interdependent and mutually reinforcing relationship between Rule of Law (RoL) and Security Sector Governance and Reform (SSG/R) has been analysed in DCAF's [SSR Paper on The Rule of Law and Security Sector Reform: Conceptualizing a Complex Relationship](#). It remains valid today, that SSG/R and Rule of Law reforms are inseparable. Rule of law frameworks provide **functionality, legitimacy, and checks and balances** for the security sector. Without a RoL framework, the State and its institutions would become unresponsive to civilian oversight, as well as, human rights and other legal commitments, in particular for community members who are more vulnerable than others and are in need of legal protection.

Amidst rising concerns about SoE's impact on constitutional democracies, Covid-19 exceptional response measures could lead to a paradigm shift for the Rule of Law around the globe. SoE measures have been declared across stable, developed, developing, fragile, peacebuilding and conflict contexts, thus leading the international community to debate what kind of SSG/R support is possible under these circumstances and whether this crisis will roll back hard fought gains or be a catalyst for positive change. **ISSAT Governing Board Members have a key role to play today in monitoring the scope, need, proportionality and legality of SoEs and their impact on human security. Sustained donor support to SSG/R is essential, including focus on sensitizing security actors on their commitments to human rights and building robust civilian oversight mechanisms and in providing human rights complaint approaches to tackle these emerging security challenges.**

This ISSAT Advisory Note examines State of Emergency under international law, providing ISSAT's Governing Board Members, as well as SSG/R practitioners with the basic understanding of SoEs, their enactment and impact on Rule of Law frameworks, as well as human rights commitments. ISSAT's Members already involved in supporting SSG/R programming, are now supporting sectors that are, in effect, going through a transformation of their roles in line with Covid-19 response imperatives. The repercussions of SoE measures on donors' SSG/R support is expected to become increasingly visible over the coming months. To help ISSAT's Members understand and respond better to this emerging challenge, this Advisory Note provides some programmatic entry points for international assistance to SSG/R and Rule of Law reforms.

What Should ISSAT Members Know about States of Emergency and Security Sector Governance?

States of Emergency, Covid-19 Response and the Rule of Law

States of Emergencies (SoEs) are constitutional (or equivalent) mechanisms invoked by governments during large scale crises that undermine social and political order. SoEs give governments extraordinary powers to address existential threats to public order, including war, political or civil unrest, criminal or terrorist violence, economic emergencies, diseases and natural disasters.

State of Emergency measures have been a critical part of the global response to COVID-19, allowing for the suspension of normal constitutional procedures for the government to regain control over the emergency. SoEs affect the relationship between the branches of government, state security and justice institutions and the community. Any misapplication of SoEs can severely weaken the social contract in place, specifically the state justice and security institutions, with the effect of making it harder to combat the original emergency, but also

triggering entirely new threats and risks. Currently, over 106 countries have declared SoEs, with security institutions directly intruding into personal lives and enforcing confinement measures. Parliaments, the judiciary, non-state organisations and citizens have a collective responsibility towards future generations to safeguard the Rule of law, human rights standards and basic liberties.

The goals of good, democratic SSG/R are efficiency, effectiveness, and accountability of security institutions. These values are more essential than ever during a health emergency, when swift and concerted action is necessary to protect human life on a large scale. The security sector has a key role to play in mitigating the devastating human costs of infectious outbreaks, but it can only succeed if its personnel are trusted and respected by the public, recognized by other actors responding to health emergencies, and held accountable to democratic oversight mechanisms. Failure to do so exacerbates the risks of a public health mission. Therefore, a direct link exists between good security sector governance, security sector reform and development, and the ability of security sector actors to effectively contribute to combatting an outbreak.

States have a wide margin to assess when a situation constitutes an emergency, if the basic parameters of **proportionality, limited duration, parliamentary control** and **judicial oversight** are met. Some guidance is provided by the European Convention of Human Rights (RCHR), which was signed by all of the Member States of the European Council, in addition to the UK. The ECHR [defines](#) a “public emergency threatening the life of the nation” as “an exceptional situation or crisis of emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed.”

Invoking a State of Emergency

There are broadly three legal [basis](#) or [models](#) for using SoE powers. Some countries could also use a combination of these models.

1. **Constitutional Model:** [90% of countries](#) have included emergency clauses within their constitution and most modern constitutions have built-in safeguards such as parliamentary approval and limited duration to restrict the abuse of emergency powers. Many [countries](#) such as Spain, France, Chile, Ecuador, Guatemala, Armenia, Namibia, Moldova and Jordan have invoked a constitutional emergency to combat COVID-19.
2. **Legislative Model:** States can also invoke separate and/or amend existing legislations specifically dealing with health crises and other emergencies to take extraordinary measures. These ordinary legislations can be used to limit certain rights [instead of suspending](#) some constitutional rights entirely through SoEs. [Countries](#) such as India, Germany, Netherlands, Japan and Switzerland have invoked a range of existing legislations not only limited to public health but also disaster and emergency management, and security to combat COVID-19.
3. **Special Emergency Legislation Model:** In countries where the existing legal framework is insufficient to introduce all required COVID-19 measures, emergencies have been accommodated through introducing new laws, such as a special emergency legislation. This model ensures existing constitutional and legal frameworks remain intact while particular adjustments are made through special legislations temporarily. Examples include the UK's [Coronavirus Act 2020](#) and Ireland's [Health \(Preservation and Protection and other Emergency Measures in the Public Interest\) Act 2020](#).

Rationale Behind Choosing a Measure

The motivation or rationale behind the different approaches to combating Covid-19 appears to depend on the following:

- **The availability of ‘emergency provisions’ in constitutions.** Some constitutions do not authorise the declaration of states of emergency (e.g. Denmark); or the perceived crisis has not met the legal criteria for the imposition of a state of emergency (e.g. India);

- **Option to manage crisis through executive decrees.** Some governments have avoided declaring constitutionally authorised emergencies in order to avoid invoking constitutional checks and balances or to exclude the involvement of parliaments and assemblies (e.g. Uganda, Turkey and Poland);
- **Historical considerations.** In some cases, historical considerations and experiences of past abuses of state of emergency may have influenced decisions not to declare a 'state of emergency' (e.g. Germany, South Africa, India and Argentina);
- **Balanced Policy Decision.** The decision in favour of a disaster management approach following a weighing of the possible consequences of the Covid-19 crisis against the impact of a state of emergency (e.g. Sweden, South Africa and the Netherlands);
- **Some measures better than no measures.** Triggering some measures is better than no measures in case of governments which have been reluctant or indifferent to addressing the consequences of Covid-19 (e.g. Mexico).¹

Human Rights Derogations during States of Emergency

SoEs are not illegal mechanisms and tend to involve derogations from international human rights commitments. Most emergency or extraordinary measures taken to protect public health, even [without formally declaring](#) a SoE, will invariably restrict certain human rights. Most international human rights law (IHRL) frameworks, such as the European Convention for the Protection Human Rights and Fundamental Freedoms² ([ECHR](#)) and the International Convention on Civil and Political Rights ([ICCPR](#)) allow for derogations from certain rights during such emergency situations. The UN Human Rights Committee adopted, on the 24th of April 2020, a [Statement](#) on derogations from the Covenant in connection with the COVID-19 pandemic. The African Charter on Human and People's Rights does not allow any derogations. Derogations cannot effect the [substance or essence](#) of the rights, it can only limit their full and effective enjoyment or exercise. When issuing a derogation, a state must notify the UN Secretary General and/or the Secretary General of the Council of Europe as appropriate. It must also ensure that the measures must not be applied in an arbitrary manner.

Following the dramatic spread of COVID-19, not all governments have declared SoEs to legitimise the exceptional measures they are taking to respond to the virus. Emerging trends show that 106 countries have [declared a SoE, 19 have activated or drafted emergency disaster acts, orders or decrees](#), and 23 countries have either made [notifications under Article 15](#) of the European Convention for the Protection Human Rights and Fundamental Freedoms (ECHR), or notified the UN that they have [derogated from the International Convention on Civil and Political Rights \(ICCPR\)](#). The International Union of Judicial Officers published 4 studies on the impact of COVID-19 on the functioning of judicial services in Europe and beyond which have significant information on SoE functioning. A summary is [here](#).

¹ E Velasco, Mexico: Emergency Powers and COVID-19, *Verfassungsblog* (2020) available at <https://verfassungsblog.de/mexico-emergency-powers-and-covid-19/> (last visited 17 May 2020).

² This note focuses on the ECHR rather than any other regional mechanisms because they have not developed as much jurisprudence or guidelines. For example, The African Charter of Human and People's Rights does not contain a derogation clause and its Court has only recently become active. Further, the Arab Charter of Human Rights has been strongly criticised by the international community for being incompatible with internationally recognised standards for human rights. In addition its court is not in function, with its Statute awaiting a sufficient number of ratifications by State parties.

The Most Common Abuses of the Constitutional and Legal Process

- Imposing far-reaching limitations on fundamental rights through measures of executive character (seen in most countries);
- Extensive use of executive law-making providing sweeping powers to functionaries, which have often been abused;
- Defying the requirement of mandatory publication of regulations in Government;
- Imposing states of emergency with no expiry date and allowing for indefinite emergencies;
- Disproportionate securitisation with military personnel assuming control of the decision-making process.

What is the Impact of States of Emergency on Stability and Rule of Law?

Since end of March 2020, several governments have suspended their human rights obligations and have invoked special powers that would normally be considered infringements on liberty. The current cluster of responses within SoEs include **school closures; travel bans; bans on public gatherings; work-place closures; measures aimed at creating social distancing; public information campaigns; emergency investment in healthcare systems; and the enactment of extensive emergency legislation to implement these and other measures.**

These measures, if misused, could have serious long-lasting implications on human rights and basic freedoms, constitutional democracies, the rule of law and international stability.

Heavy securitisation of state responses

Security institutions – often armed forces – are increasingly being called upon to use unjustified force to implement SoE measures. In certain contexts, after a SoE is [declared](#), [shoot-to-kill orders](#) have been given to law enforcement agencies for those breaking curfew with mass arrest carried out to date and recently martial law has been [threatened](#) to intensify emergency measures.

Aggravation of conflict and instability

Regimes under undue stress due to the crisis often threaten to diminish democratic principles, leaving large vulnerable populations at risk. In addition, where pre-existing conflict ravages or discriminatory treatment lurks, COVID-19 is likely to aggravate conflict and instability. As the UN Secretary General warned, COVID-19 poses a “significant threat to the maintenance of international peace and security — potentially leading to an increase in social unrest and violence that would greatly undermine our ability to fight the disease.”

Aggravation of food insecurity

Ineffective COVID-19 response planning and SoE measures will likely have a significant impact on food insecure countries. The Executive Director of the World Food Programme has [warned](#) of “multiple famines of biblical proportions within a few short months” in the fall-out of COVID-19 and added that a “hunger pandemic” would follow compounding the effects of COVID-19, citing “135 million people facing crisis levels of hunger or worse”.

Political exploitation of the crisis

SoEs, in response to COVID-19, can be used by political leaders to amass sweeping powers bypassing normal legislative oversight. SoE powers are being repurposed for numerous agendas, including, increasing social and political control, prohibiting rallies, tracking dissidents, expelling entire communities and cancelling elections.

Media restrictions and breaches of the right to information

Media restrictions and incursions began to emerge in response to COVID-19 even prior to the pandemic being declared. Indeed there have been many instances of restrictive laws being introduced to curtail media freedom and many journalists and scientists reporting on COVID-19 have been questioned, arrested or have disappeared, including in China, Iran, and Russia, amongst others. (This threat is closely linked to the human right to information which is outlined below.)

Hindering democratic electoral milestones

With more than [70 national elections](#) scheduled until the end of year worldwide, the risks connected to elections will depend on the degree of disruption caused by COVID-19. Generally, associated risks can include reduced voter turnout, disproportionate or uneven turnout due to restrictions placed on certain segments of the population, which could overall undermine the legitimacy of the electoral process. As the [Venice Commission](#) has pointed out, there is no formal rule in international law preventing states from holding elections in emergency situations, however, it is clear that states may not be able to meet the constitutional and international standards on free and fair elections. As of 15 April 2020, [84 electoral postponements](#) were recorded in 47 countries in response to COVID-19.

What Should SSG/R Donors be Currently Monitoring?

Despite OHCHR's call to avoid States' overreach of security measures in their response to the coronavirus outbreak, the current application of States of Emergency under Covid-19 circumstances has highlighted many potential areas of concern for SSG/R which require close monitoring, these include:

- Excess Use of power by law enforcement institutions;
- The [suspension of elections](#);
- [Prison sentences](#) for breaking curfews or quarantine;
- [Public health precautions](#) and social distancing measures in detention facilities;
- [The deployment of the military in a law enforcement capacity](#);
- Excessive media control, e.g. [intimidation of journalists](#) for criticising government responses;
- [Prison visits being banned](#), at times indefinitely;
- Delays in delivery of justice due to court closures across several countries including criminal jury trials in some instances.
- Invasive surveillance systems;
- Sweeping changes in how state institutions work to respond to a crisis which might be lingering, at least in the foreseeable future, through its public health and economic effects. Many of these legislative changes have been passed in days – [with few of the normal sunset provisions typically seen in emergency legislation](#) – implementing [sweeping changes in the way governments typically work](#). Early evidence suggests that many of these new laws will remain in place long after the pandemic is over.

What are the SSG/R Contributions to the Current Challenges?

Support Rule of Law Reforms and Political Anchoring of SSG/R

Governments may use their new powers under SoE measures to target political opposition and crack down on any outlying dissent. SSG/R donors should play a more active role in supporting the Rule of Law through monitoring government actions under SoEs and challenge inappropriate actions impacting good governance principles (see checklists in annex). SSG/R is a political process which needs continuity and a national will for reform, as well as national commitment to the importance of oversight and accountability functions without which the accountability, independence and professionalism of the security sector are likely to erode.

Integrate SoEs as a Core Element of SSG/R Reforms

SoEs should become a core element of SSG programming. This could include developing (or where appropriate, updating and strengthening) and disseminating SoE Guidelines, including: criteria for security and justice sector relevant best practice; gender responsive strategies; consolidated advice on derogations; advocacy tools to ensure transparent dissemination of SoE measures to the public; clear guidance on how to ensure oversight and seek accountability where necessary; and clear guidance on how security sectors should interpret and implement new measures.

Support Security Sector Institutions' Awareness of their Role under SoEs

Security institutions were a key player in enforcing lockdown and social distancing measures during the Covid-19 crisis. Disasters and emergencies tend to cause the breakdown of socioeconomic systems leading to civil unrest and an increase in criminal activities such as looting, theft and break-ins, as well as fueling black markets, smuggling and human trafficking. The maintenance of law and order is more difficult when faced with mass protests and social unrest, due to resource shortages, lockdowns and mass casualties. Similarly, the maintenance of minimal procedural standards throughout the penal chain might be compromised. SSG programming must focus on the role of law enforcement agencies, raising awareness on their role under SoEs and the limits of their powers, including: Advocating and disseminate accessible guidelines and best practice on SoEs based on the international law.

Transparency and Access to Information Should be a SSG/R Priority

Preventative measures limiting inaccurate Covid-19 reporting could lead to unjustified crack-down on media and limiting the rightful access to information. In several countries, publishing or communicating “false news” about any official involved with enforcing the national lockdown, or about any private individual with the effect of harming the state’s enforcement of the lockdown, has become liable to a penalty fine or prison sentence (sometimes up to 20 years) or both. Going forward, SSG programming needs to start better integrating access to information, communication and transparency aspects into its focus areas in order to curtail this risk and ensure adequate safeguards are in place.

Prioritise Support to Building Civil-Military Relations

The military could be required to maintain public order in disaster and emergency situations, ensure the implementation of disaster response measures such as lockdowns, and protect critical infrastructure responsible for vital public services such as, electricity and water supply. This does not come without risk, in particular when the military’s added value is not invested in the right way. For example, while the military has significant experience setting up camps, it might have less experience administering these camps for civilian refugees or IDP population or use consultative processes that include elders and informal leaders. Further, it is crucial to acknowledge that the effectiveness of the military’s engagement is dependent on the general trust between population and its security services. A lack of trust can significantly hamper the effectiveness of service delivery, as well as its relevance. Going forward, SSG programming needs to dedicate resources towards civilian-military relations to regulate military crisis response and maintain oversight of its actions.

Support Parliaments Adapt to New Challenges and Continue Oversight Functions

Parliaments [should not](#) be dissolved or superseded during a SoE. It should have the power to assent to, and oversee the right to declare, extend or end a SoE. The Parliament has a key role to play in the oversight of SoE measures. Contrary to good practice, there have been instances of parliaments being dissolved initially such as in [New Zealand](#) and [Sri Lanka](#) as part of their SoEs, and [even more examples of parliaments fully or partially adjourned](#), at exactly the time they are most needed. SSG/R Donors should support positive practices of parliaments exercising their oversight function amidst COVID-19 induced adjournments such as:

- The implementation of robust parliamentary and [select committees](#) such as in the UK, where [13 committees have been established](#) to date, in addition to a [Rapid Consultation Commissioned by the Civil Justice Council](#);
- [Adaptations to voting procedures](#) including electronic, remote and proxy voting, ensuring democratic processes do not cease altogether;
- Use of technology to enable [select and parliamentary committees working remotely](#);
- [Logistical moves](#) such as in **Switzerland** where sittings were moved to a Bern conference centre to ensure social distancing can remain during in-person sittings;
- [Extension of time limits](#) for governments to respond to questions as in **New Zealand**;
- [Limits on the numbers of MPs](#) and persons permitted in debates, e.g. **Ireland, The Netherlands** and **Sweden**.

Support the Judiciary to Adapt to New Challenges and Continue its Functions

Where the role of the parliament has been curtailed, SSG programming needs to focus on the role of the judiciary to hold the executive to account becomes critical. The judiciary must also not be hindered from its independent function to act as a check on abuse of power by the executive and parliament. Fair trial rights must continue to be guaranteed. The following five examples highlight the crucial role of judicial oversight to date during COVID-19.

- In **Kosovo**, the Constitutional Courts have already been called upon, effectively issuing a [decision](#) declaring a number of Government's SoE restrictions as non-compliant with limitations on the Fundamental Rights and Freedoms set out in their Constitution. The Court decided to postpone the entry into force of its decision, highlighting [the discretionary power of judges and the appropriate separation of powers](#).
- In **Israel**, after the introduction of emergency surveillance regulations and the imposition of quarantine to prevent the spread of COVID-19, the [Israeli Supreme Court](#) issued an order suspending the enforcement of quarantine violations detected through surveillance technology and required the appropriate committees to supervise the implementation of such measures.
- In **Brazil**, the President, despite advice from public health authorities on the necessity for self-isolation, had continued advocating through political propaganda against quarantine measures issuing a decree exempting places of worship. [On 27 March 2020](#), Brazil's Federal Court blocked the decree and the following day in its decision [banned the government from disseminating propaganda](#) against confinement measures aimed at curbing the spread of COVID-19.
- In **Uganda**, [the Constitutional Court swiftly ruled](#) that wide discretionary powers granted to the police to stop or prevent public meetings, imposed in response to COVID-19 under Uganda's Public Order Management Act 2013, [were unconstitutional](#). Uganda's Human Rights Network had successfully brought the case against the Attorney General.

Invest in Non-state Accountability

At the non-state level, CSOs and the media play an important role by highlighting state transgressions. Over the last few months, there are examples of their role having been [effective](#) over the recent weeks. The international community supporting SSG, needs to ensure that CSOs and media operate freely to opine on government actions being taken under the SoE. It can do this through educating civil society organisations on SoEs, rule of law and human rights and basic freedoms. Refer to annexes 1 to 3 for some examples of checklists and guidelines for monitoring the legality of SoEs and respect of Human Rights derogations.

Make Gender Based Violence Response a Priority for the Police and Judiciary

It is evident that COVID-19 has disproportionate effects on women and girls. Donors should prepare and plan for an increase in GBV and integrate prevention efforts and services. [Rates of violence](#) for those in abusive relationships under quarantine have increased; gender-based violence (GBV) victims have less access to support services including shelters and court closures; female health workers carry heavier burdens with care-giving responsibilities at home; access to services for women living in poverty in fragile and conflict affected states (FCAS) has decreased hampering [their ability to feed their families](#) as international support is compromised. [UN Women amongst others](#) have produced comprehensive sets of recommendations.

Annex 1 : Checklists for Monitoring States of Emergency

Assessment tools for States of Emergency have been developed to ensure their optimal functioning. The [SLIP Principles](#), as an example, clarify that SoEs must be scrutinised, lawful, impermanent, and proportionate. The Council of Europe has recently released a comprehensive [Toolkit on Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis](#). If States of Emergency are not monitored closely, they can easily promulgate an unravelling of national governance framework and compound the crisis brought about by the original emergency with longer-term more serious implications for democracy, rule of law, human rights and basic freedoms. [Global Right Compliance \(GRC\)](#) has developed the “[Global Right Compliance SoE Checklist](#)”. It provides the international community, including non-state actors with 6 specific questions in order to assess the validity of governments’ response under SoE conditions.

States of Emergency CHECK LIST

‘THE 6 ‘C’s’

Context Analysis: Did the context, at the outset and currently justify a SoE declaration? Constant assessment of the conditions in country operating under a SoEs is necessary to determine the past and present validity of the SoE.

Correct Declaration: Was the SoE, derogation under IHRL or other legal framework, used to enable emergency powers, correctly declared and notified to the appropriate bodies? Expert legal advice can be requested to determine this.

Constant Oversight and Review: Is ongoing [oversight and review](#) of the SoE available? This engages civil society organisations (CSOs), media, parliament and the judiciary. Was the parliament allowed to keep functioning? Parliament [should not](#) be dissolved or superseded during a SoE, their role is [critical to avoid abuse](#). They should have the power to assent to, and oversee the right, to declare, extend or end a SoE. The judiciary must also not be hindered from its independent function to act as a check on abuse of power by the executive or the parliament. Fair trial rights must continue to be guaranteed. Is the judiciary able to undertake this role? Finally, can CSOs and media operate freely to opine on government actions being taken under the SoE?

Compliance with International Law: Notwithstanding the demands of these exceptional times, [rule of law principles](#) can and should govern the policy response to this crisis in which IHRL provides the leading framework. SoEs must comply with international law and states’ international and domestic legal obligations.

Conditional on emergency context: SoE measures are conditional on the emergency context existing. SoE measures must be impermanent, and strictly time -imited with clear [sunset clauses](#). Emergency rule cannot last longer than the emergency itself should not lead to a “new unjustified normal” once the emergency is over.

Proportionate to the risk: SoE must correspond to the risk, they must be “proportionate” to the risk and must not go further than necessary to fulfil their purpose. Proportionality is [fundamental requirement](#) for SoE measures, particularly those that involve derogations from IHRL.

Annex 2 : Criteria to Assess the Legality of States of Emergency

To monitor the legality of SoEs, **eight criteria** emerge across [European](#) and [International frameworks](#) and act as **essential safeguards** to ensure SoEs remain lawful. The following eight criteria are interlinked and the failure to adopt one can often lead to breaches of the others.

CRITERIA FOR LEGAL MONITORING STATES OF EMERGENCIES

1. A **real or imminent danger** or threat of an exceptional nature affecting the whole nation.
2. An **official and public declaration** of the State or measures of emergency.
3. Emergency measures, including derogations, limitations and restrictions, should be **strictly proportional** to the danger and least intrusive to achieve the desired public health goals.
4. Severity, duration, and geographical scope must be to the extent **strictly necessary** to deal with the threat.
5. The restrictions and emergency powers must be **provided by law** and non-discriminatory.
6. Emergency measures, including derogations, should be subject to and periodic review and **parliamentary scrutiny**.
7. **Judicial oversight** and recourse to courts against SoE measures should be permitted and fair trial rights guaranteed.
8. **The inviolability or intangibility of some rights**, such as the right to life, the prohibition from torture and the principle of legality in criminal law, cannot be derogated from even during SoE and continue to apply in all situations.

Annex 3: Criteria for Permitting Derogations of Human Rights

The below set of criteria form **best practice benchmarks** for the appropriate functioning of SoEs. They are equally important, largely interconnected and they cannot be compromised or asymmetrically applied. **An asymmetric or incomplete application of the criteria could lead to a slippery unravelling of the rule of law.** SoEs either operate legally or illegally – they are binary. There can be no “pick and mix” approach to the application of their criteria for functioning.

CRITERIA FOR PERMITTING DEROGATIONS OF HUMAN RIGHTS

Like SoEs, derogations are permitted when they are **officially and publicly declared, legal** and consistent with other obligations under international law, **necessary, proportionate** and **non-discriminatory**, and be a **right which can be derogated from**.