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# An Umbrella With Holes: Respect for Non-Derogable Human Rights During Declared States of Emergency, 1996–2004

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**Abstract** This paper examines the effects of non-derogability status for seven human rights during declared states of emergency from 1996 to 2004 in 195 countries. For this purpose, we create several original measures of countries' state of emergency status. Our analysis finds the intended protections from the special legal status of non-derogable rights to be anemic, at best, during declared emergencies. This finding begs a reconsideration of both the utility of the “non-derogable” categorization in both international and municipal law, and the conditions under which declared states of emergency might be justified.

**Keywords** Human rights · International law · Non-derogable rights · Physical integrity rights · Empowerment rights · State of emergency

## Introduction

A number of international treaties spell out the specific obligations of governments to respect the human rights of their citizens. The major assumptions behind the internationally recognized human rights in these treaties are that these rights are: (a)

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inalienable, not being able to be taken away by any state or government; (b) universal, applying to all persons at all times in all places; and (c) interdependent/indivisible, requiring respect for any one as mutual reinforcement for respect of another.<sup>1</sup> While these assumptions would seem to dictate that respect for human rights must be unconditional, international law provides governments an exception, or loophole, whereby governments may deviate from the assumption of unconditional respect for some rights during declared states of emergency. In international law, a government's deviation from its obligations to respect the human rights of its citizens is known as "derogation".

The simple, central question of our exploratory analysis in this paper is "Does a right's status as 'non-derogable' provide the intended protection this special legal status is supposed to afford during a declared state of emergency?" We believe this to be an important inquiry with practical implications for international policymakers. States of emergency are often declared during crises including elements known to be correlates of decreased respect for human rights and, for that reason, the international community created rules to govern state behavior during these times. Therefore, since we would submit that a rule's effectiveness is reduced to the extent that rule's effectiveness is unknown, it is incumbent upon the international community to understand what happens to respect for human rights vis-à-vis special status such as non-derogability during times of declared emergency.

Fitzpatrick's (1994) assertion still rings true that gaining an understanding of the relationship between non-derogability and emergency status is necessary in order to determine whether a distinct monitoring regime is necessary for countries under declared states of emergency. Some would point out that state of emergency declarations are chiefly "deployed blatantly for the sake of persevering authoritarianism" and can point to historical examples like British colonialism and current examples such as Yemen's Ali Abdullah Saleh during the Arab Spring (Erakat 2011, <http://www.jadaliyya.com/pages/index/2051/emergency-laws-the-arab-spring-and-the-struggle-ag>). Indeed, such situations can have serious human rights-related consequences. For example, during Tunisia's 2010–2011 "Jasmine revolution", a state of emergency was declared, whereupon "police repeatedly opened fire on crowds and arrested protesters, journalists, opposition party members, lawyers, and rights advocates, some of whom were reportedly abused in detention" (Arieff 2012, p. 4).

Further, understanding whether a right's status as non-derogable affords protection during a declared state of emergency would make an original contribution to the burgeoning literature on the effectiveness of human rights treaty ratification by states. The findings of this pool of studies are decidedly mixed. While some have found treaty status not to be reliably associated with a state's actual practices (Keith 1999; von Stein 2005; Hafner-Burton and Tsutsui 2007), some have found that being party to a human rights treaty might actually increase violations (Hathaway 2002; Neumayer 2005). Other studies have shown that treaty ratification does affect government behavior, once the strength of state reservations, understandings, and declarations

<sup>1</sup> The principle of universality established in the Universal Declaration of Human Rights (1998) was reaffirmed by the Vienna Declaration and Programme of Action (1993), which was adopted by 171 states and declared that the "universal nature of [human rights] is beyond question".

(RUDs) are taken into account (Landman 2005, Simmons 2009). Over its course, this literature has been refined by evolving from looking at ratification status through a dichotomous lens, to accounting for RUDs, to incorporating domestic politics into the relationship between state and treaty adherence (Neumayer 2007). However, given the mixed findings, the fact that any optimistic findings are conditioned upon on the strength of state reservations, the fact that most states have ratified most available human rights treaties, and that state ratification of a treaty is a fairly fixed feature (states rarely leave human rights treaties<sup>2</sup>), there is unfortunately not a lot of policy-actionable advice resulting from this literature. We neither make nor imply any bold claims to solve all these issues, as whatever our findings in this study, they will add to the extant body of mixed findings, since at this point no single study is likely to reach a universally satisfactory conclusion about international law's effect on respect for human rights. However, we hope that by moving beyond the macro study of treaty ratification itself to focus on a particular procedural issue – state protections of non-derogable rights during declared states of emergency – our study might produce conclusions helpful for monitoring declared emergencies themselves, monitoring human rights respect during emergencies, and assessing the strength of existing legal protections germane to these issues.

## The Derogation Regime

International human rights instruments provide allowances for derogation of respect for the majority of the rights contained in these instruments during declared states of emergency. In practice, the actual qualifications for, and parameters of, state-of-emergency-derogation are defined by treaties, general comments by the United Nations Human Rights Committee, judicial decisions, the work of interested parties such as the International Law Association and the International Bar Association, and domestic statutes. Below, we cover basic information about when derogation is allowed and what rights are affected by the derogation regime.

### When Is Derogation Allowed?

The central legal component on the matter of derogation is Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) (1966), which states that (a) when a government faces an emergency that threatens the life of a nation and (b) where it officially declares an existing state of emergency, it may derogate from its obligations under the Covenant “provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion, or social origin”.

<sup>2</sup> Denunciation of a human rights treaty is extremely rare. Many major international human rights conventions such as the two 1966 International Covenants and regional treaties like the African Charter on Human Rights have no denunciation clause. The American Charter on Human Rights does, although only Trinidad and Tobago has so far denounced the Charter (in 1999), while in 2012 Venezuela formally notified the Organization of American States that it intends to do the same. The European Convention on Human Rights has a denunciation clause, but no state has invoked that privilege.

Following *Cyprus v. Turkey* (1982) [25781/94], we equivocate declarations of “state of emergency” and declarations of martial law:

Article 15 [of the European Convention on Human Rights non-derogation clause] required some formal and public act of derogation such as a declaration of martial law or a state of emergency. When no such act had been proclaimed by the High Contracting Party concerned, Article 15 could not apply. (11(c))

While not explicitly stated in 4(1) of the ICCPR or in other major instruments such as Article 15 of the European Convention on Human Rights (ECHR) (1950) or Article 27 of the American Convention on Human Rights (1978), it is generally understood that derogation from respect for human rights is to be both limited in scope and temporary in application (Henkin et al. 1999). In addition, the extent and nature of derogations are to be proportional to a crisis' actual threat.<sup>3</sup> The International Law Association's *Paris Minimum Standards of Human Rights Norms in a State of Emergency* (hereafter, “Paris Standards”) (1984) details requirements including that the declaration of a state of emergency shall never exceed the period required to “restore normal conditions”, that the emergency should be for a fixed period defined by a constitution, and that extensions should be subject to a priori legislative approval (Lillich 1985, p. 1073). Furthermore, the Paris Standards detail that a state of emergency should only cover that part of a state's territory actually affected and, in doing so, states retain the right to extend the spatial scope of the emergency, as necessary (pp. 1073–1074).

The type of security environment qualifying derogation is clarified by the Siracusa Principles on the Limitation and Derogation Provisions (Fn. 2) in the ICCPR. Here, it is stated that only situations of “exceptional and imminent danger” to the life of the nation apply. In section II.A.39(a)(b), it defines such a threat as one that “affects the whole of the population and either the whole or part of the territory of the State” and “threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant”. For example, the UK has a history of claiming derogation privileges regarding conflict in Northern Ireland, and these claims have been uniformly upheld by courts including the European Court of Human Rights (e.g., *Lawless v. Ireland* 332/57; *Marshall v. United Kingdom* 41571/98) (Livingstone 2002). Recently, a British court found that the post-9/11 international security environment's threat of terrorism qualifies as a sufficient threat for purposes of claiming derogation (Macken 2005, p. 7).

It is of great importance that any state of emergency prompting the invocation of Article 4 be *officially declared*. In 2001, the Human Rights Committee charged with interpreting the ICCPR explicitly stated in its *General Comment No. 29* that of the two conditions required to invoke Article 4, official declaration is the most important

<sup>3</sup> See: Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 186 (2003); United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984); *The Paris Minimum Standards of Human Rights Norms In A State Of Emergency*, Committee on the Enforcement of Human Rights Law, International Law Association (1984).

of the two, being "...essential for the maintenance of the principles of legality and the rule of law at times when they are most needed" and so that "the Committee [can] monitor that the laws in question enable and secure compliance with article 4." (Office of the High Commissioner for Human Rights and International Bar Association 2003, p. 822).

### What Kind and How Much Derogation Is Allowed?

Article 4(2) of the ICCPR enumerates a specific list of seven rights from which no derogation in respect is allowed. In summary, these are:

1. (Article 6) Every human being has the inherent right to life. This right shall be protected by the law. No one shall be arbitrarily deprived of his life.
2. (Article 7) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
3. (Article 8) (1) No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited. (2) No one shall be held in servitude.
4. (Article 11) No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.
5. (Article 15) No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed.
6. (Article 16) Everyone shall have the right to recognition everywhere as a person before the law.
7. (Article 18) Everyone shall have the right to freedom of thought, conscience and religion.

This famous list begs two questions. First, does the obligation not to derogate from these rights during a declared state of emergency apply only to treaty parties? No. From even the most conservative viewpoint of justice, at least three of these seven rights (life, torture, and slavery) can very safely be considered as having attained the *jus cogens* status of "higher law" to be followed by all states at all times, no exceptions. Thus the principle of non-derogation of respect for these three rights applies to all states, regardless of their party status to the treaties establishing these rights.<sup>4</sup> However, we would argue that *all* these rights enumerated in 4(2) *can* be treated as customary international law—which is applicable to every state, regardless of any particular state's status as a party or not. Human rights protections can be seen as customary international law via a number of sources. The 1948 Universal Declaration of Human Rights contains all seven of these rights and is considered by many to have attained the status of customary international law in toto (von Bernstorff 2008, p. 913) or, at a minimum, "a serious document with enormous legal repercussions" (p. 916).

<sup>4</sup> The 1969 Vienna Convention on the Law of Treaties defines *jus cogens* as "a norm accepted and recognized by the International Community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." There is currently no single authoritative formulation of a list of *jus cogens* rights.

The two major components in deciding whether any particular rule is part of customary international law are *opinion juris* (what a state believes to be the law) and actual state practice. It is not at all contentious for an international legal scholar to assert that treaty behavior itself can constitute state practice (Guzman 2005–2006, p. 163). Further, the International Court of Justice has found *opinion juris* in UN resolutions, such as the 1970 *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, which includes broad human rights guarantees (p. 154). The UN Charter itself can be construed as guaranteeing all these rights, and according to Charter Article 103, states have the obligation to respect Charter obligations when in contravention with treaty obligations (Liivoja 2008, p. 583). Thus, many mainstream paths exist to assert a variety of human rights as being non-derogable to all states via their inclusion as part of customary international law.

Second, are the 4(2) rights the only rights for which a legal claim of non-derogability might be made successfully? Again, we say “no”. Looking beyond the invocation of customary international law, many international instruments enumerate a greater number of non-derogable rights than does the ICCPR. For example, the Paris Standards explicitly add the right to fair trial, cultural rights of minorities, rights of the family, right to a name, children’s rights, right to a nationality, right to participate in government, and the right to legal remedies such as *habeas corpus*. Article 27(2) of the American Convention on Human Rights also includes family rights, the right to a name, children’s rights, the right to a nationality, and the right to participate in government. Indeed, authoritative sources of international law such as *Human Rights In The Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (Office of the High Commissioner for Human Rights and International Bar Association 2003) invoke a wide array of international instruments beyond the ICCPR in constructing an inclusive list of those rights from which state respect may not derogate.<sup>5</sup>

Boundaries exist, however, as Henkin et al. (1999, p. 326) note that states enjoy a “margin of appreciation” in deciding whether a particular derogation is strictly required. The margin of appreciation doctrine is a legal principle that grants courts flexibility in contextualizing governmental interpretation of human rights-related legal principles. Yet, even under circumstances found otherwise allowable by courts, this margin is a finite space.

On November 11, 2001, the UK issued a prospective derogation order, based on the threat to international peace and security induced by the attacks on the USA on that September 11th. Under this order, the government felt it could derogate from respect for foreigners’ human rights, but not from respect for nationals’ human rights. However, in a 2004 appeal, such stratified derogation was not upheld.<sup>6</sup> The Court found that while it would not challenge the government’s legitimacy of claiming derogation due to the post-9/11 security environment, claims of derogation could not

<sup>5</sup> See especially Chapter 16, “The Administration of Justice During States of Emergency”.

<sup>6</sup> House of Lords Session 2004–2005 [2004] UKHL 56 on appeal from [2002] EWCA Civ 1502A: (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent).



interfere with mandates in both the ECHR and the ICCPR that derogations are not “inconsistent with ... other obligations under international law”:

Article 14 [of the European Convention on Human Rights, which states “enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ...national or social origin...”] would make it unlawful to single out foreign nationals for less favorable treatment in respect of their article 5 rights whether or not the derogation from those rights was “strictly required by the exigencies of the situation.”<sup>7</sup>

### What We Know and What We Need to Know

Two previous studies have examined a related issue: the correlation between the presence of domestic legislation governing states of emergency and government respect for human rights. In a study of 39 countries from 1948 to 1982, Davenport (1996) finds the simple presence of a constitutional clause giving a government the right to declare states of emergency to be reliably associated with decreased political restrictions. Keith and Poe (2004) built upon Davenport’s work, extending the investigation to a category of internationally recognized human rights known as “physical integrity rights”. This category typically includes the rights to freedom from torture, summary execution, forced disappearance, and imprisonment for political beliefs. Their analysis included variables indicating which political actors are constitutionally empowered to declare a state of emergency, whether the constitution specifies a fixed duration for states of emergency, and whether the constitution includes its own list of non-derogable rights.<sup>8</sup> They found that in situations of great domestic turmoil and/or conflict (*but not necessarily an actual declared state of emergency*), states with constitutional clauses governing states of emergency and listing non-derogable rights tend to have worse government respect for physical integrity rights than those without such clauses.

Hafner-Burton et al. (2011) offer a variant of other, earlier, studies with their inquiry into what would make a state self-report derogation during declared and undeclared emergencies. They find that democracies are the regime type most-likely to file a derogation report, “to provide themselves breathing space to respond to domestic crises by suspending individual liberties without breaching their treaty obligations” (p. 703). Neumayer (2012) comes to a similar conclusion. Interestingly, in that study, he claims to “focus on derogations to the ICCPR since this is the only universal of the three international human rights treaties with derogation provisions” (p. 4). However, he labels three rights (freedom of assembly and association, electoral self-determination, and freedom of movement) in his analysis as “non-derogable” that we would argue are clearly *derogable* rights. In fact, the freedoms of assembly and of movement, domestic movement in particular, are quite standardly revoked and/or limited during declared states of emergency.<sup>9</sup>

<sup>7</sup> Fn (3), Baroness Hale of Richmond, p. 234.

<sup>8</sup> Their analysis did not include data about whether a state of emergency was actually declared or what, if any, rights were listed as non-derogable.

<sup>9</sup> Further, Hafner-Burton, Helfer, and Fariss (2011) and Neumayer (2012) both employ political violence / armed conflict on the right-hand side of their models, but appear to make no corrections for the fact that this condition is also a criterion for a country-year’s selection as an undeclared state of emergency.

In our view, however, the most crucial question requiring address is not whether governments use their constitutional prerogatives regarding emergencies, or why it is governments file derogation reports. To us, the *pivotal* part of the international derogation regime is what happens to rights, both derogable and non-derogable, during government-declared states of emergency. Understanding this requires detailed state-of-emergency data and an explicit comparison of what happens to derogable and non-derogable rights during types of states of emergency (of which there are many, as we will show below).

## Data and Models

For its analyses, this manuscript uses a database containing information about 195 countries from 1996 to 2004.<sup>10</sup> The sample is representative of all geographic regions and levels of economic development. Our basic unit of analysis is the “country-year”, which represents one country during one year (e.g., Germany 1998 or Japan 2003).

### Measuring State of Emergency

A complete measurement scheme of declared states of emergency would include information about several factors, including temporal length, spatial extent, and substantive scope (those particular rights for which obligations of respect have been explicitly rescinded by a state of emergency declaration). For example, in 2002, declared states of emergency existed in both Turkey and Egypt (US Department of State 2003). However, Turkey’s state of emergency was limited to only the southeast region of the country and was phased out of existence by the year’s end. On the other hand, Egypt’s state of emergency covered the entire country and had been in continuous existence since 1981. In fact, the Egyptian state of emergency was renewed as recently as 2010 (US Department of State 2011) and was only suspended in May 2012 following the removal of Hosni Mubarak from power (CNN Wire Staff 2012).

A dichotomous measurement scheme for state of emergency status indicating only the presence or absence of a declared state of emergency during a given year in a given country would not be capable of differentiating between qualitatively different cases such as Turkey and Egypt in 2002. Therefore, our state of emergency measures attempt to account for this dimensionality by adding information about the spatial and temporal aspects of declared states of emergency. One aspect of state of emergency status we do not include in our measurement scheme is substantive scope. There are a number of methodological issues related to creating a reliable and valid measure of substantive scope. First, states often do not state, a priori, what particular rights for which respect is to be rescinded. Second, while constitutional provisions may suggest the legal parameters of derogation, this *de jure* framework is not guaranteed to affect *de facto* derogation in a declared state of emergency.

To study the relationship between declared states of emergency and levels of government respect for non-derogable human rights, we developed three simple,

<sup>10</sup> The actual number of countries included in any given analysis will vary based on available data.

reliable measures of state of emergency status. First, we created a measure indicating the presence or absence of a declared state of emergency in a given country during a given year:

#### A Declared State of Emergency

- (0) Did not exist at any point during the year
- (1) Existed at some point during the year

We treat those instances where a declared state of emergency is not mentioned at all as scores of zero, or “no declared state of emergency”. Not all states invoke state of emergency using the same terminology, however, so when coding this variable we had to pay close attention to different terminology referring to legally equivalent phenomenon. For example, we also counted the equivalent declarations of “state of internal disturbance” and “state of siege”. As mentioned earlier, we also count declarations of martial law.<sup>11</sup>

Second, for those countries where a declared state of emergency is present, we add two variables to further describe the situation. First, we include a spatial variable:

*The declared state of emergency was:*

- (0) Regional in scope
- (1) National in scope

Finally, we developed a nominal-level variable describing various temporally related scenarios in which a state of emergency may exist in order to enable more-detailed statistical analyses of the first two measures than would be otherwise possible. The construction of the coding scheme for this variable actually forms the first part of our analysis because this list of possible circumstances of declared emergencies was partially derived from systematic research of declared emergencies in our sample of 195 countries from 1996 to 2004. The list is not to be considered exhaustive.

*The declared state of emergency was:*

- (1) Initiated and ended within the same calendar year
- (2) Initiated and continuing at calendar year's end
- (3) Continuing from previous year(s) throughout the calendar year
- (4) Continuing from previous year(s) and ending during calendar year without renewal
- (5) Renewed for an unlimited amount of time
- (6) Renewed for a limited amount of time
- (7) Partially lifted in spatial scope
- (8) Initiated, renewed, and ending within the same calendar year
- (9) Initiated, renewed, and continuing at calendar year's end
- (10) Partially lifted in spatial scope, with the remainder of space under decree remaining for a limited amount of time

<sup>11</sup> We do not assert qualitative equivalences across all these terms, but for coding purposes it is important to note that declarations of any of them satisfy the legal grounds for invoking permissible derogation. Thus, they all count as a “one” in our coding scheme.

- (11) Continued from previous year (s) and ended during calendar year, with limited renewal  
(-999) Not enough information to code

To code a large number of countries across time using these measurement schemes requires a great deal of systematic information about declared states of emergency. We used the annual *US Department of State Country Reports on Human Rights Practices* as our source of information, as this report contains all the necessary information for all countries in the world, over time, to code our indicators (US Department of State).

Moreover, our empirical approach in this paper overcomes two of the chief obstacles Fitzpatrick and the International Lawyers Association (1994) see blocking reliable assessment of the general relationship between declared states of emergency and respect for human rights. First, they suggest the endeavor is problematic for researchers in that a state may declare an emergency in one year, yet continually renew the emergency status even after the situation initially provoking the emergency ceases to exist. However, we maintain that, legally, derogation privileges under international law for a renewed state of emergency are identical as for under a newly declared emergency. The primary importance in an initial inquiry of the relationship at hand is assessing whether a country is under a formal decree, not how long ago the initial emergency decree was made or how long continuous emergency status has been maintained. Even were that not true, however, our multiple-indicator state of emergency measurement scheme allows us to address those two latter issues, nonetheless.

Second, Fitzpatrick et al. note, for example, that prisoners taken during an initial state of emergency may remain in custody during future renewals, and might be missed in assessments of state practices during emergencies because they may not have been arrested during the current declared emergency. However, the human rights data we use (described below) continues to count all political prisoners for as long as they are incarcerated, not just for the year in which they were incarcerated. Thus, ongoing state human rights practices are matched with ongoing emergencies over time.

### Non-Derogable Rights

Included in all lists of non-derogable rights is a sub-category of internationally recognized human rights known as “physical integrity rights”.<sup>12</sup> These rights are “the entitlements individuals have in international law to be free from arbitrary physical harm and coercion by their government” (Cingranelli and Richards 1999, p. 407), and include freedoms from torture, disappearance, extrajudicial killing, and imprisonment for political beliefs. We focus our empirical analyses of non-derogable rights on government respect for this subcategory of rights.

<sup>12</sup> Some refer to these as “personal integrity rights”, but we find “personal” to suggest personhood, in toto. That is, the total personhood implied by “personal integrity rights” suggests a much-broader spectrum of human rights than does the particularly physical sphere of personhood suggested by physical integrity rights.

Our data indicating the level of government respect for physical integrity rights come from the CIRI Human Rights Data Project, which provides standards-based indicators of government respect for 15 internationally recognized human rights for 195 countries from 1981 to 2006 (Cingranelli and Richards 2010). The CIRI physical integrity rights indicators are based on information collected from Amnesty International's *Annual Report* and the US Department of State *Country Reports on Human Rights Practices*. The use of multiple sources of systematic information to reduce bias has become a standard practice in human rights measurement (Poe and Tate 1994).<sup>13</sup> Poe et al. (2001) show that the Amnesty and Department of State reports have become increasingly similar over time in their assessments of respect for physical integrity rights.

The CIRI project provides disaggregated ordinal indicators of government respect for each of the aforementioned physical integrity rights on the following three-point ordinal scale: (0) frequent violations, (1) some violations, (2) no violations (Cingranelli and Richards 2008). An interrater reliability analysis (using Krippendorff's r-bar statistic) of the 2004 CIRI physical integrity data demonstrated an overall reliability of 0.926.<sup>14</sup>

### Derogable Rights

For purposes of comparison, we include in our analyses three rights from which international law allows derogation. These are freedom of assembly and association, freedom of foreign movement, and electoral self-determination. The CIRI project calls these types of substantive and procedural democratic freedoms "empowerment rights" (Cingranelli and Richards 2008), and we use one CIRI indicator of each of the three aforementioned rights in our analyses. Like the derogable rights indicators, these are ordinal indicators ranging from one (no respect) to two (full respect).

### Alternative Hypotheses

For our analyses, we also collected information about factors other than a declared state of emergency that have been shown to be associated with the level of government respect for physical integrity rights. A large number of studies over some time have demonstrated these factors' association with respect for physical integrity rights. These factors are *regime type* (Mitchell and McCormick 1988; Poe et al. 1999), *domestic conflict* (Davenport and Armstrong 2004; Keith 1999; Poe and Tate 1994), *interstate conflict* (Abouharb and Cingranelli 2006, 2007; Hafner-Burton and Tsutsui 2005), *level of macroeconomic development* (Keith 2002; Poe et al. 1999), and *population size* (Henderson 1993; Poe et al. 1999).

Our measure of regime type is the *Polity IV Project's* Revised Combined Polity Score, a 21-point ordinal scale ranging from -10 (autocracy) to +10 (highest level of institutional democracy) (Marshall and Jaggers 2005, 2006). Our data on domestic and interstate conflict were taken from the *Centre for the Study of Civil War's Uppsala/PRIO Armed Conflicts Dataset* (Gleditsch et al. 2002). In particular, we

<sup>13</sup> Here, a "systematic" source of information is one that offers information about the same set of rights in every country in the world.

<sup>14</sup> <http://www.humanrightsdata.org/documentation/reliability2004.xls>

used the monadic data from Version 3-2005b of this dataset, adjusted to create an ordinal scale varying from 0 to 2 as suggested by Strand et al. (2005). Our measure of economic development is a state's gross domestic product per capita based on purchasing power parity in constant US \$2000. These data, along with population size data, come from the Penn World Table 6.2 (Heston et al. 2006).

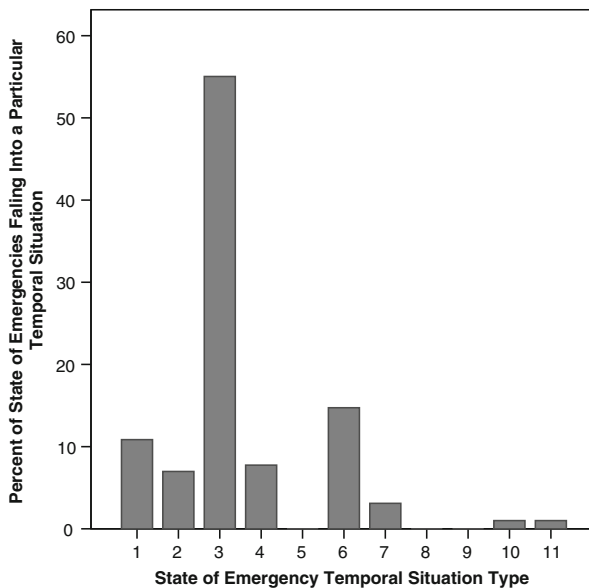
Finally, given the importance of the ICCPR (1966) in establishing the list of non-derogable rights, we control for ICCPR ratification in our regression models, using a measure taken from Landman (2005). This measure is coded as "2" if a state has ratified the ICCPR by the time of the year in question, "1" if the state has signed, but not ratified the ICCPR, and "0" if the state has neither signed nor ratified the ICCPR.

### Findings

Table 1 shows the occurrence of declared states of emergency in our sample of countries during 1996–2004. In the majority of country-years in our sample (91 %), no declared state of emergency existed. Almost two thirds (65 %) of the declared states of emergency in our sample were national in spatial scope. Seven states in our sample were under a declared state of emergency during the entire period under study: Algeria, Brunei, Burma, Egypt, Israel, Syria, and the UK. Appendix A lists all of the country-years in our sample

**Table 1** Occurrence and types of declared states of emergency

<i>Declared state of emergency status</i>		
	Frequency	Percent
No declared state of emergency	1,345	90.82
Declared state of emergency	136	9.18
<i>N</i>	1,481	
<i>Declared state of emergency spatial scope</i>		
	Frequency	Percent
Regional state of emergency	47	34.56
National state of emergency	89	65.44
<i>N</i>	136	
<i>Declared state of emergency regional distribution</i>		
	Number of country years	
Africa	29	
Asia	68	
Europe	18	
Latin America and The Caribbean	15	
North America	4	
Oceania	2	
<i>N</i>	136	



**Fig. 1** Occurrences of declared states of emergency by temporal situation. *1* Initiated and ended within the same calendar year. *2* Initiated and continuing at calendar year's end. *3* Continuing from previous year(s) throughout the calendar year. *4* Continuing from previous year(s) and ending during calendar year without renewal. *5* Renewed for an unlimited amount of time. *6* Renewed for a limited amount of time. *7* Partially lifted in spatial scope. *8* Initiated, renewed, and ending within the same calendar year. *9* Initiated, renewed, and continuing at calendar year's end. *10* Partially lifted in spatial scope, with the remainder of space under decree remaining for a limited amount of time. *11* Continued from previous year(s) and ended during calendar year, with limited renewal

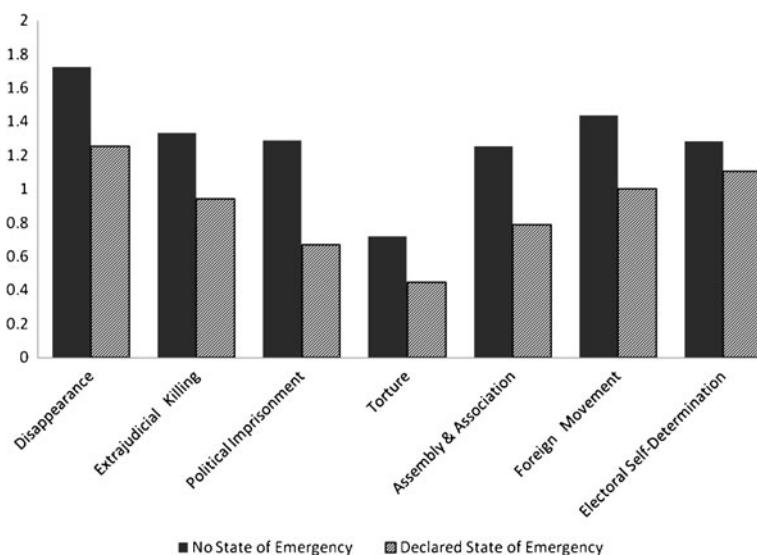
that were under declared states of emergency. Of all the country-years under declared emergencies, Asia saw the most (68) by far, with Africa coming in second (29).<sup>15</sup>

Figure 1 shows the distribution of state of emergency cases among various temporal scenarios.<sup>16</sup> Once again, the nominal variable behind this figure was created both a priori, thinking about possibilities, and empirically, using actual cases from our coding experience to expand the list. The vertical bars show the percentage of emergency-decree cases falling into a particular value of that indicator. Far and away, the most common temporal scenario, representing 55 % of the emergency-decree cases, was (3) "Continuing from previous year(s) throughout the calendar year." In these cases, a declared emergency was already in effect as of January 1st of the calendar year being coded, and remained in effect as of December 31 of that same year. This is perhaps not surprising, as 46 % of the emergency-decree country-years in our sample were the product of seven countries that were under a declared emergency continually through the sample's 1996–2004 time period.

Twenty percent of our cases were onset cases. Among these, only 11 % were declared emergencies that began and ended within a single calendar year. Seven percent were onsets that continued at year's end. All cases of emergency-status renewal were

<sup>15</sup> Regions were defined using the numeric region identifier from the United Nations Statistics Division (<http://unstats.un.org/unsd/methods/m49/m49regin.htm>).

<sup>16</sup> The *N* here is depressed to 130, as there was insufficient evidence to categorize six of the emergency-status cases.



**Fig. 2** Mean levels of government respect for human rights by state of emergency status

continuing cases, and all renewals had some temporal limitation. In only 19 % of cases did a state of emergency come to an official end, without renewal.

Figure 2 shows mean levels of respect for four non-derogable human rights (disappearance, extrajudicial killing, political imprisonment, and torture) and three derogable rights (assembly and association, foreign movement, and electoral self-determination) for those country years with a declared state of emergency (striped bars) and those without (black bars).<sup>17</sup> In the case of all seven human rights indicators, those country-years *without* a declared state of emergency manifested higher levels of government respect. The largest difference was in the area of political imprisonment, with the smallest difference relating to electoral self-determination. Difference-of-means tests showed six of these seven differences to be statistically significant, with the exception being electoral self-determination.

It is interesting that respect for non-derogable rights was reliably lower in those situations during which international law prohibits derogation of respect for both derogable and non-derogable rights. Bolivia provides a clear case example. In both 1999 and 2001, Bolivia received a seven (out of a possible perfect eight, indicating full respect) on the CIRI Physical Integrity Rights Index. However, in 2000, there was a brief declared state of siege and Bolivia received a reduced score of four that year on the CIRI scale. Individually, respect for freedom from extrajudicial killing dropped from a perfect two to a one, as did respect for the right against political imprisonment, with respect for the right against torture dropping from a one to a zero. The US State Department Country Report on Human Rights for Bolivia in 2000 stated:

In April, violent demonstrations and road blockages broke out in Cochabamba over a controversial municipal water project, and unrelated protests occurred

<sup>17</sup> The *N* of emergency-status states is 135 rather than 136, as in our data Iraq 2004 is counted as under a state of emergency, but we did not have human rights information about that country-year.



across the country, leading to the deaths of protesters as well as members of the security forces; commerce was brought to a virtual halt. On April 8, President Banzer declared a state of siege, which Congress approved on April 13. The stage of siege ended on April 20. Nongovernmental human rights organizations criticized the state of siege and the killings, injuries, and preventive detentions that took place during it. Violent demonstrations and other confrontations due to an unrelated list of grievances against the Government also took place in September and October, and resulted in the deaths of up to 10 civilians, 4 security officials, and the spouse of 1 of the security officials. There were a number of allegations of torture. There were credible reports of abuses by police, including use of excessive force, petty theft, extortion, and improper arrests. Investigations of alleged official abuses were slow. (US State Department 2000)

While certainly not a conclusive test, what we know so far bodes poorly in terms of the power of the non-derogability legal principle being able to protect primary human rights.

Table 2 examines mean levels of respect for our set of non-derogable rights during declared states of emergency, separated into three categories describing the temporal situation of each such country-year. These three categories were created using the

**Table 2** Mean levels of respect for non-derogable human rights by declared state of emergency temporal situation

	<i>The declared state of emergency was...</i>		
	Initiated in current year	Continued from previous year	Renewed for a limited time
<b>Non-derogable rights</b>			
Disappearance	1.22 (0.90)	<b>1.31</b> (0.84)	1.30 (0.86)
Extrajudicial killing	0.74 (0.69)	1.05 (0.76)	<b>1.10</b> (0.79)
Political imprisonment	<b>0.87</b> (0.87)	0.66 (0.80)	0.75 (0.85)
Torture	0.43 (0.66)	0.42 (0.63)	<b>0.75</b> (0.85)
<b>Derogable rights</b>			
Assembly and association	<b>1.04</b> (0.78)	0.77 (0.79)	0.50 (0.76)
Foreign movement	<b>1.17</b> (0.76)	0.92 (0.74)	0.85 (0.75)
Electoral self-determination	<b>1.35</b> (0.78)	1.03 (0.88)	0.90 (0.97)
Column <i>N</i>	23	83	20

Figures in parentheses are standard deviations

values from the temporal scenario indicator used to create Fig. 1. The “Initiated in Current Year” category was constructed using scenarios 1, 2, 8, and 9. The “Continued from Previous Year” category was constructed using scenarios 3, 4, and 11. The “Renewed for a Limited Time” category was constructed using scenarios 5, 6, and 10. These three categories in Table 2 are illustrative rather than exhaustive, as there were a few country-years that did not fall into these categories.

The boldfaced means in Table 2 represent the highest mean level of respect for each of the seven rights in the rows. The general lesson from Table 2 regarding the relationship between temporal situation and respect for particular non-derogable rights is that it varies across rights and scenarios. For half these rights, greatest respect was seen most often where a declared state of emergency had been renewed for a limited time. For political imprisonment, the right shown by Fig. 2 to manifest the greatest difference in respect between state-of-emergency-years and those with none, there appears to be a degradation effect over time, as the most respect for this right is seen in the year of an emergency’s onset, and it declines in continuation years. On the other hand, the greatest respect for derogable rights was uniformly seen where an emergency was initiated in the current country-year.

Table 2 leads to an interesting hypothesis regarding the role of government sensitivity to announcements of emergency status that is beyond the scope of this study but worth mentioning, we believe. The fact that country-years experiencing a limited renewal of the emergency have more respect than carry-over years might indicate some degree sensitivity (relating to factors domestic and/or international) on a government’s part around the time of the announcement of an emergency. Later on, after the initial news has worn off somewhat, repression gains momentum. This threshold effect should be testable with events data.

Table 3 shows the results from several ordered logit regression analyses investigating the association between state of emergency status and respect for derogable and non-derogable rights, simultaneously considering several other factors that could be affecting these rights. Because our dependent variables are ordinal, ordered logit is used to estimate these models. All standard errors reported in parentheses are “robust” standard errors, which have been adjusted for country-specific clustering. These standard errors account for the fact that while observations are assumed to be independent across countries, they are not necessarily assumed to be independent within countries in the panel data.<sup>18</sup> All models in Table 3 are statistically improved from their null counterparts (where all slopes are assumed to be zero).

Among non-derogable rights, when controlling for other factors, a declared state of emergency is only seen to be reliably associated with respect for the

<sup>18</sup> Many quantitative human rights studies also include a lagged dependent variable to control for possible serial correlation. However, Achen (2000) demonstrates that the threat from serial correlation is to the standard errors, as coefficients remain unbiased in a reasonably large sample. Therefore, properly applied clustered sandwich standard errors should correct this potential bias. Furthermore, he establishes that a lagged variable can “artificially” dominate and bias a regression no matter the number of exogenous variables and no matter the true amount of explanatory power of the lagged term. Ill-effects are most likely when variables are heavily trended.

**Table 3** Ordered logit estimates of government respect for non-derogable and derogable human rights: state of emergency status

	Non-derogable rights				Derogable rights			
	Disappearance	Extrajudicial killing	Political imprisonment	Torture	Assembly and association	Foreign movement	Electoral self-determination	
Declared state of emergency	-0.299 (0.274)	0.059 (0.368)	-1.043* (0.559) [0.352]	-0.374 (0.348)	-0.805** (0.328) [0.447]	-0.953** (0.435) [0.386]	0.189 (0.524)	
ICCPR ratification	-0.119 (0.228)	0.087 (0.170)	-0.087 (0.164)	-0.242 (0.188)	0.449* (0.236) [1.567]	-0.194 (0.212)	0.992*** (0.231) [2.696]	
Domestic conflict	-1.936*** (0.219) [0.144]	-1.347*** (0.247) [0.260]	-0.900*** (0.343) [0.407]	-0.843*** (0.314) [0.430]	-0.127 (0.223)	-0.245 (0.274)	-0.227 (0.277)	
Polity	0.113 (0.174)	-0.181 (0.124)	0.120 (0.105)	-0.171* (0.093) [0.843]	0.305*** (0.025) [0.881]	0.271*** (0.026) [1.311]		
Polity <sup>2</sup>	-0.002 (0.008)	0.009 (0.006)	0.005 (0.005)	0.011*** (0.004) [1.011]				
National wealth	1.323*** (0.391) [3.756]	1.516*** (0.351) [4.553]	0.648** (0.326) [1.911]	0.999*** (0.341) [2.716]	-0.148 (0.270)	-0.424 (0.350)	1.624*** (0.267) [5.071]	
Population	-0.978*** (0.257) [0.376]	-1.172*** (0.225) [0.310]	-1.345*** (0.204) [0.260]	-1.005*** (0.170) [0.366]	-0.756*** (0.241) [0.469]	-0.455 (0.278)	0.100 (0.252)	
Log likelihood	-604.466	-985.518	-873.708	-967.874	-849.845	-851.297	-1,090.31	
Prob> $\chi^2$	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	
N	1,226	1,226	1,226	1,226	1,226	1,226	1,226	

Figures in parentheses are Huber-White standard errors, adjusted for country-specific clustering. Figures in brackets are odds ratios

\*\*\* $p \leq 0.01$ ; \*\*  $p \leq 0.05$ ; \*  $p \leq 0.10$

right not to be imprisoned for political beliefs. The negative coefficient tells us that moving from no emergency to a declared state of emergency decreases the odds of full respect for the right not to be imprisoned for political beliefs. In brackets in Table 3 are odds ratios, which give the change in odds of being in the topmost category of the dependent variable per a one-unit change in each independent variable. For example, the odds ratio for political imprisonment is 0.352. This means that the odds of full respect for this right are smaller by a factor of 0.35 during a decreed emergency, as opposed to no such emergency. Substantively, this is a quite large effect – reducing the odds of full respect to approximately one third of what they would have been otherwise.

The derogable rights section of Table 3 demonstrates that assembly and association, as well as foreign movement, reliably decline in years where there is a declared state of emergency. The odds of full respect for these two rights are smaller by factors of 0.45 and 0.39, respectively, during a decreed emergency than the odds of such respect in the absence of such an emergency.

Regime type is modeled quadratically in our derogable rights models to account for the fact that the relationship between respect for physical integrity rights and democracy is nonlinear when looking across the whole range of the Polity scale (Davenport and Armstrong 2004; Regan and Henderson 2002).<sup>19</sup> Also taken into account is the premise that nascent democracies are expected to show lower levels of violation of this type of rights than would non-democracies (Fein 1995). The three positive terms for the quadratic components indicate a convex relationship, although there are differences. While both polity terms are significant only in the torture model, both the extrajudicial killing and torture models exhibit a form consistent with the expectation that, as democracy increases, there may be a short-term increase in violations of these rights. However, respect in both of these cases is expected to increase along with later, higher levels of democracy. For political imprisonment, we see little evidence of such a non-monotonic relationship as Polity and its squared term are both positively, albeit non-significantly, related to respect for this right. We suspect that regime type's failure to even approach significance with respect to disappearance is a function of the rarity of disappearances across countries in this time period. As expected, higher levels of democratization are seen in our non-derogable models to increase respect for these rights. We do not include regime type in our "electoral self-determination" model to avoid effects of that relationship being a "tautology" given the institutional indicator (Polity) that we use for regime type.

In our non-derogable models, our control variables all perform as expected. When significant, domestic conflict and population size are seen to be associated with reduced respect for these rights, and greater national wealth expected to be associated with greater respect for these rights. The same goes for the derogable models, with the notable exception that domestic conflict always falls short of significance for this subset of rights. Further, while ICCPR ratification appears to have no significant

<sup>19</sup> Davenport and Armstrong's (2004) findings suggest that, below a certain level, democracy has no effect on respect for physical integrity rights; however, at high levels of democracy, there appears to be a linear, positive relationship between the two. Nevertheless, this finding suggests a nonlinear relationship across the entire Polity scale. In our findings, such a relationship would be represented by a lack of significance on the additive Polity term and a positive, significant coefficient for the squared Polity term.

effect on government respect for non-derogable rights, respect for freedom of assembly and association and electoral self-determination both seem to be significantly higher in states that have ratified the ICCPR.<sup>20</sup>

Figure 3 illustrates the main results of Table 3 for the three rights found to be reliably associated with declared-state-of-emergency status. The plot shows the estimated change in the predicted probability of demonstrating the highest level of respect for each of the listed rights given the declaration of a state of emergency in an otherwise average state, i.e. a state where all other independent variables take on their relevant mean or modal values. As demonstrated by the 90 % confidence bands around each predicted change, it appears that the declaration of a state of emergency is expected to yield a significantly lower likelihood of respect for each of these rights. Further, the estimated magnitude of each of these reductions in the probability of high respect is rather large. The predicted probability 0.53 that an otherwise average state under no state of emergency demonstrates the highest level of respect for the right to be free from political imprisonment is approximately 0.53; under a declared state of emergency, that same state is estimated to have only a 0.29 probability of demonstrating such respect, a reduction of approximately 0.24. Likewise, the same state's predicted probability of high respect for the right to assembly and association fall from 0.28 to 0.15 under a state of emergency, while the state's probability of high respect for freedom of foreign movement falls from 0.57 to 0.34.

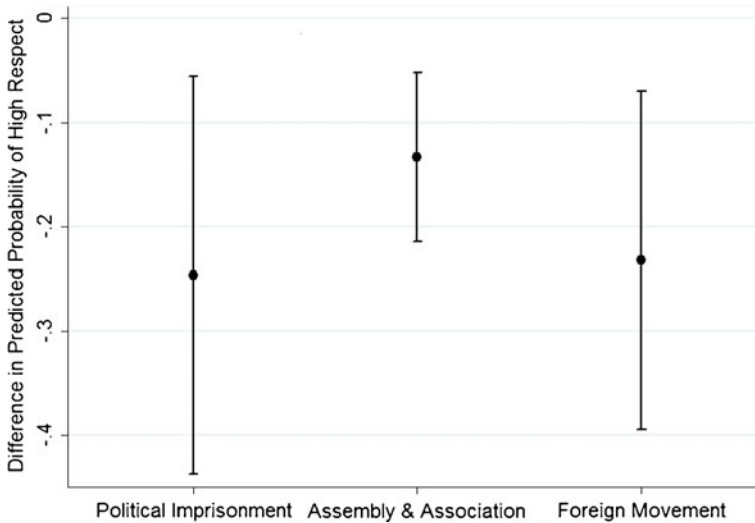
However, while those rights are significantly affected by the declaration of a state of emergency in our models, we cannot say that these rights are *more* affected by such emergencies simply on the basis of their coefficients' significance. Thus, in order to determine if some rights are truly more affected by declared states of emergency than others, we use the method suggested by Paternoster *et al* (1998) to conduct a series of difference of means tests to determine if the various coefficients on the declared state of emergency variable across models are significantly different from one another.<sup>21</sup> The *z* scores resulting from these tests are presented in Table 4. The right to be free from extrajudicial killing is the only non-derogable right found to be significantly less affected by states of emergency than the derogable rights to foreign movement and association. Further, the effect of a declared state of emergency on respect for the non-derogable right to freedom from political imprisonment just falls short of demonstrating a significant difference with the effect of such emergencies on extrajudicial killing. Thus, non-derogability

<sup>20</sup> This may provide further support for the view that non-derogable rights have obtained *jus cogens* status in international law, i.e. ratification of the ICCPR may not be necessary in order to hold a state responsible for violations of these rights. Further, according to robustness tests, the substantive results for the state of emergency variable do not change if the sample is limited to only those states that have ratified the ICCPR, suggesting that ratification of the ICCPR does not make a state respond differently than other states following a declared state of emergencies. The results of these tests may be viewed in the online appendix.

<sup>21</sup> The equation used to calculate these *Z* scores, taken from Paternoster *et al* (1998), is

$$Z = \frac{\beta_1 - \beta_2}{\sqrt{\sigma_{\beta_1}^2 + \sigma_{\beta_2}^2}},$$

i.e., the difference between the two coefficients divided by the square root of the sum of their squared standard errors.



**Fig. 3** Estimated change in the predicted probability of high respect ( $Y=2$ ) for selected rights during a declared state of emergency (90 % confidence interval)

appears to protect citizens from increases in extrajudicial killing during declared states of emergency, but that protection may be coming at the cost of increased political imprisonment.

Table 5 is similar in most ways to the construction of Table 3, with the important exception that it considers only those cases where (a) there was a declared state of emergency, and (b) enough information existed to code whether that emergency was regional or national in scope.<sup>22</sup> Thus, the “Spatial Scope of Declared Emergency” is a dichotomous indicator which takes on a value of 0 where the emergency was declared regional and a value of 1 where the emergency was declared national. As in Table 3, all estimated models are improved from their null counterparts.

In Table 4, among the non-derogable rights, only extrajudicial killing is reliably associated with a declared emergency’s scope. The coefficient tells us that a national emergency bodes worse for respect for this right than does a regional emergency, with the odds for full respect being less than a third (given an odds ratio of 0.28) that of a regional emergency. Two of the derogable rights are affected by scope and, like extrajudicial killing, negatively so. Both foreign movement and electoral self-determination are associated with worse respect in nationalized, as opposed to regional, declared emergencies. The odds ratios tell us that, in a nationalized emergency, the odds of full respect for these rights are approximately one quarter (0.24) and one tenth (0.12), respectively, the odds of such respect were there only a regional

<sup>22</sup> For economy of representation and because the  $N$ s for analysis for a stratified analysis would be even smaller than that in Table 7, we chose to use this indicator as ordinal in nature, rather than including separate dichotomous variables to represent regional and national scopes of emergency. However, we did try analyses using dummy variables for spatial scope and the story told by Table 7 remained essentially the same.

**Table 4** Difference of means tests on the ordered logit coefficients of declared state of emergency (Z scores)

	Disappearance	Extrajudicial killing	Political imprisonment	Torture	Assembly and association	Foreign movement	Electoral self-determination
Disappearance	0						
Extrajudicial killing	0.780	0					
Political imprisonment	-1.195	-1.647	0				
Torture	-0.169	-0.855	1.016	0			
Association	-1.183	-1.753*	0.367	-0.901	0		
Foreign movement	-0.169	-1.776*	0.127	-1.039	-0.271	0	
Electoral self-determination	0.825	0.203	1.608	0.895	1.608	1.677*	0

\* $p \leq 0.10$

**Table 5** Ordered logit estimates of government respect for non-derogable and derogable human rights: spatial scope of emergency

	Non-derogable rights					Derogable rights		
	Disappearance	Extrajudicial killing	Political imprisonment	Torture	Assembly and association	Foreign movement	Electoral self-determination	
Spatial scope of declared emergency	-0.905 (0.661)	-1.269** (0.568) [0.281]	-0.598 (0.480)	-0.555 (0.534)	-0.276 (0.692)	-1.427** (0.640) [0.240]	-2.065*** (0.478) [0.127]	
ICCPR Ratification	0.684* (0.386) [1.981]	0.995*** (0.293) [2.704]	-0.167 (0.311)	0.418 (0.532)	1.095*** (0.274) [2.990]	0.009 (0.451)	-0.160 (0.544)	
Domestic conflict	-2.209*** (0.415) [0.110]	-1.599*** (0.309) [0.202]	-1.150*** (0.406) [0.317]	-1.275** (0.542) [0.279]	0.274 (0.291)	0.542** (0.255) [1.720]	0.211 (0.298)	
Polity	0.301 (0.226)	-0.187 (0.202)	0.536* (0.304) [1.710]	0.239 (0.290)	0.377*** (0.070) [1.458]	0.281*** (0.063) [1.324]		
Polity <sup>2</sup>	-0.016 (0.011)	0.002 (0.009)	-0.020 (0.013)	-0.007 (0.014)				
National wealth	2.734*** (0.733) [15.39]	1.955*** (0.707) [7.062]	1.450* (0.823) [4.263]	1.018 (1.208)	-0.833 (0.635)	-0.125 (0.737)	3.271*** (0.625) [26.33]	
Population	-1.407** (0.566) [0.245]	-0.872** (0.417) [0.418]	-0.655** (0.314) [0.519]	-0.507 (0.509)	-0.695 (0.505)	-0.824 (0.528)	-0.396 (0.591)	
Log likelihood	-75.81	-89.03	-88.82	-64.34	-77.10	-77.98	-80.27	
Prob> $\chi^2$	0.0000	0.0000	0.0000	0.0045	0.0000	0.0000	0.0000	
N	109	109	109	109	109	109	109	

Figures in parentheses are Huber-White standard errors; figures in brackets are odds ratios

\*\*\* $p \leq 0.01$ ; \*\* $p \leq 0.05$ ; \* $p \leq 0.10$



emergency. We think this makes sense, as it would take a greater, nationalized, threat for a government to legitimize the suspension of respect for foreign travel and democratic mechanisms than it would to reduce respect for something like assembly and association.

The control variables tell expected stories in Fig. 3, with population size and conflict associated with lesser rights-respect, and national wealth associated with greater respect. The notable exception is that domestic conflict is seen to be reliably associated with high levels of respect for foreign movement. This finding points to the fact that moderate-to-high amounts of internal conflict do not necessarily force the closure of borders in countries such as Colombia, the Philippines, and Sri Lanka. Finally, it is interesting that, when confined to the sample of states under a declared state of emergency, states that have ratified the ICCPR demonstrate higher respect for the rights to be free from disappearance and killing. Robustness tests that limit the sample to only states that have ratified the ICCPR indicate, however, that this effect does not significantly lessen the negative effect of a national state of emergency on extrajudicial killing found here.<sup>23</sup>

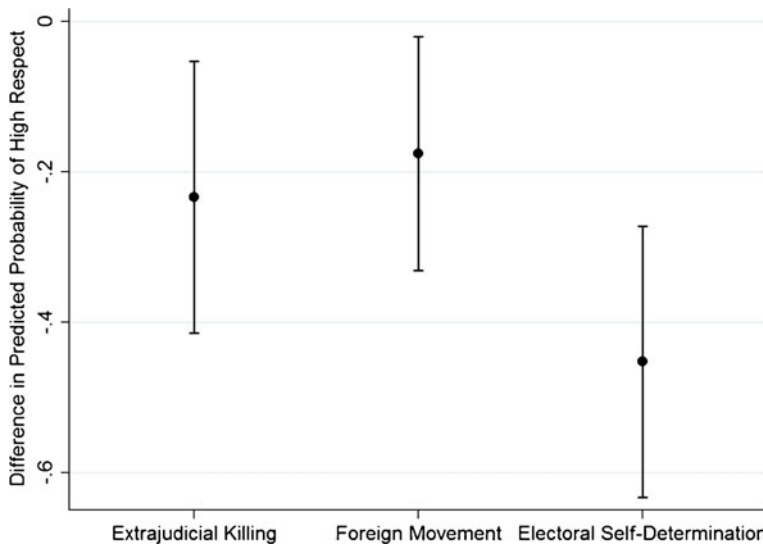
Figure 4 shows the estimated difference in the predicted probability of demonstrating the highest level of respect for each of the listed rights, given the declaration of a national (rather than a regional) state of emergency in an otherwise average country, i.e., a country where all other independent variables take on their relevant mean or modal values. In each case, the predicted probability of fully respecting the right in question is significantly reduced by the declaration of a national, rather than a regional, state of emergency. Indeed, the predicted probability of demonstrating the highest level of respect for freedom from extrajudicial killing drops from 0.38 under a regional state of emergency to 0.15 during a national emergency. Likewise, the predicted probability of full freedom of movement falls from 0.25 during a regional state of emergency to 0.7 during a national emergency, while the probability of demonstrating the highest level of respect for electoral self-determination falls from 0.82 to 0.37.

It should be noted, however, that this extreme difference between the probabilities of full respect for electoral self-determination is driven by countries that do well on respect for this right but who also had declared regional emergencies. Such countries include Colombia, Indonesia, Turkey, and the UK.

## Discussion/Conclusion

In this paper, we empirically examined the degree to which declared states of emergency affect the level of government respect for non-derogable and

<sup>23</sup> In fact, those robustness tests indicate that ICCPR ratifying states demonstrate lower respect for other non-derogable rights, namely political imprisonment and torture, during national states of emergency than during emergencies that are limited in spatial scope. The results of these robustness tests can be viewed in the online appendix.



**Fig. 4** Estimated difference in the predicted probability of high respect ( $Y=2$ ) between regional and national states of emergency (90 % confidence interval)

derogable human rights. Our analysis finds the intended protections from the special legal status of non-derogable rights to be anemic, at best, during declared emergencies. Government respect for all four non-derogable rights studied was significantly lower during declared states of emergency than during times when no such emergency had been declared. Furthermore, comparatively, government respect for non-derogable rights was not demonstrably higher than that shown for derogable rights during states of emergency in most cases. Indeed, according to our ordered logit analyses, the only non-derogable right to be significantly less susceptible to violation during declared states of emergency was freedom from extrajudicial killing, while respect for freedom from political imprisonment appeared to worsen during such periods. Further, within the sample of states that have declared a state of emergency, respect for freedom from extrajudicial killing was significantly decreased by an increased spatial scope of emergency, suggesting that even this right was susceptible to increased violation under certain types of declared emergencies.

These findings beg the greater question of whether the value of the derogability/non-derogability classification itself is challenged. That is, do we fool ourselves thinking that, through mere categorization, we can create fences around those rights considered “essential”, “basic”, or “primary”? Our reply in the negative is akin to the classic example that simply because murder persists in spite of laws prohibiting it, this does not make us reconsider outlawing murder; instead, we would seek to improve both extant law and (perhaps, *especially*) its enforcement.

To categorize a right as “non-derogable” in international law makes an important statement about the value placed by the international community of states on that right’s ability to protect human dignity, relative to other rights.

Indeed, reductionist rights foundationalists such as Ignatieff (2001) would point out that the type of short-list of rights created by this practice is exactly what is needed to increase the ability to induce both acceptance of the right's universality and, consequentially, its ultimate respect.<sup>24</sup> However, the findings in this paper show that simply labeling a right as "non-derogable" is insufficient to protect its respect during the very type of event the label is supposed to provide added protection—a declared state of emergency. What to do? We should not want to give up and throw out the baby with the bathwater, so to speak, simply because we find governments to be systematically ignoring one important component of the international human rights regime.

Since the property of non-derogability is supposed to be most important during times of great national stress (e.g., a declared state of emergency), our findings provide one possible avenue for making non-derogability work—at least during declared emergencies. This path focuses on improved monitoring/enforcement rather than an indictment of the derogability distinction itself. For some time, policymakers have pondered whether a distinct monitoring regime is necessary for countries under a state of emergency (see Fitzpatrick 1994). Such a regime is warranted, we argue, by the fact that there appears to be very few differences in the way governments behave towards derogable and non-derogable rights in a state of emergency, which points towards the need for increased governmental accountability for rights-related actions during these times. A monitoring regime could certainly help do that.

Further, the fact that governments disregard the non-derogable status of rights during emergencies, when combined with the not-surprising-possibility that many of these emergencies were simple excuses to further consolidate power by restricting the enjoyment of a wide variety of rights<sup>25</sup> raises the question of "What should be the acceptable bar of national stress necessary to legitimize a state of emergency?" From what we have seen, it appears that only in extremis cases should qualify as legitimizing a declared emergency. This is especially the case in the absence of a monitoring mechanism for states of emergency as, otherwise, governments are likely going to continue to violate derogable as well as non-derogable rights.

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<sup>24</sup> Those who maintain the strict interdivisibility and interdependence of rights view the creation of such reductionist (or essentialist) short-lists as an impossible task.

<sup>25</sup> While we are willing to acknowledge that the spatial and temporal extent of a state of emergency may, at times, be beyond the control of the government and may be directly related to the particular crisis at hand, these factors may also be manipulated by states attempting to take advantage of the ability to derogate from their international obligations beyond the region or time of such derogations' necessity.

## Appendix A

Countries in data sample under declared states of emergency, 1996–2004

Albania	1997	Egypt	2001
Algeria	1996	Egypt	2002
Algeria	1997	Egypt	2003
Algeria	1998	Egypt	2004
Algeria	1999	Fiji	2000
Algeria	2000	Fiji	2001
Algeria	2001	Ghana	2002
Algeria	2002	Ghana	2003
Algeria	2003	Ghana	2004
Bolivia	2000	Indonesia	2000
Brunei	1996	Indonesia	2001
Brunei	1997	Indonesia	2002
Brunei	1998	Indonesia	2003
Brunei	1999	Indonesia	2004
Brunei	2000	Iraq	2004
Brunei	2001	Israel	1996
Brunei	2002	Israel	1997
Brunei	2003	Israel	1998
Brunei	2004	Israel	1999
Burma	1996	Israel	2000
Burma	1997	Israel	2001
Burma	1998	Israel	2002
Burma	1999	Israel	2003
Burma	2000	Israel	2004
Burma	2001	Jamaica	2004
Burma	2002	Liberia	2002
Burma	2003	Madagascar	2002
Burma	2004	Maldives	2004
Colombia	1996	Moldova	1996
Colombia	1997	Moldova	1997
Colombia	2002	Moldova	1998
Colombia	2003	Moldova	1999
Ecuador	2001	Moldova	2000
Ecuador	2002	Moldova	2001
Egypt	1996	Namibia	1999
Egypt	1997	Nepal	2001
Egypt	1998	Nepal	2002
Egypt	1999	Niger	1996
Egypt	2000	Nigeria	1998

Nigeria	1999	Syria	2000
Nigeria	2004	Syria	2001
Pakistan	2002	Syria	2002
Peru	1996	Syria	2003
Peru	1997	Syria	2004
Peru	1998	Turkey	1996
Peru	1999	Turkey	1997
Peru	2000	Turkey	1998
Peru	2003	Turkey	1999
Serbia and Montenegro	1999	Turkey	2000
Serbia and Montenegro	2003	Turkey	2001
Sierra Leone	2001	Turkey	2002
Sierra Leone	2002	Uganda	2001
Sri Lanka	1996	UK	1996
Sri Lanka	1997	UK	1997
Sri Lanka	1998	UK	1998
Sri Lanka	1999	UK	1999
Sri Lanka	2000	UK	2000
Sri Lanka	2001	UK	2001
Sudan	1999	UK	2002
Sudan	2000	UK	2003
Sudan	2001	UK	2004
Sudan	2002	USA	2001
Sudan	2003	USA	2002
Sudan	2004	USA	2003
Syria	1996	USA	2004
Syria	1997	Venezuela	1999
Syria	1998	Zambia	1997
Syria	1999	Zambia	1998

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