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Emergency Law Responses to Covid-19 and the Impact on Peace and Transition Processes

Seventh Edinburgh Dialogue on Post-Conflict Constitution-Building, 2020



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Sean Molloy

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Contents

Acknowledgements	6
1. Introduction	7
1.1. States of emergency, Covid-19, and peace processes and transitions	7
1.2. Key questions for conflict-affected settings	8
1.3. Structure of the report	9
2. Emergency law responses in the context of Covid-19	10
2.1. The constitutional model	10
2.2. The legislative model	11
2.3. Ambiguous groundings	12
3. What explains choices of emergency law responses in conflict-affected settings in transition?	14
3.1. The legal frameworks in place	14
3.2. Political calculations and institutional safeguards	14
3.3. Histories of emergency regimes	15
3.4. Pandemic unpredictability	16
3.5. Level of conflict and impact of Covid-19	16
3.6. The political settlement	16
3.7. Summary	17
4. How have emergency law responses affected transitions?	18
4.1. Executive powers and institutional safeguards	19
4.2. Disproportionate encroachment on rights	20
4.3. Securitization of the state	21
4.4. Opportunities for non-state actors to exploit	22
4.5. Discussion: deepening conflict fault lines	23
5. Elections	24
5.1. Complicating peaceful transfers of power	26

6. Substate governance in conflict-affected states in transition	27
6.1. Hindering ongoing or potential territorial arrangements	27
6.2. The emergency law response of the central state	27
6.3. Competing legal arrangements	28
6.4. Taking power from the peripheries	28
6.5. Capacity issues	29
6.6. Summary—unbalancing fragile territorial power sharing	29
7. Findings and recommendations	30
References	32
Annex. Agenda	36
About the author	38
About International IDEA	39

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1. Introduction

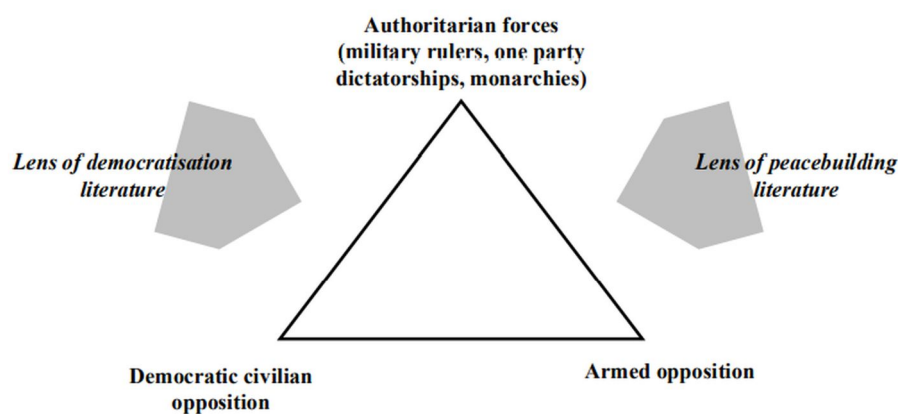
On 9–10 December 2020, International IDEA, together with the Edinburgh Centre for Constitutional Law and the Political Settlements Research Programme at the University of Edinburgh, and with financial support from the UK Foreign, Commonwealth & Development Office, hosted the Seventh Edinburgh Dialogue on Post-Conflict Constitution-Building. The event considered the ways in which Covid-19 pandemic emergency law responses have affected peace and transition processes in conflict-affected countries.

1.1. States of emergency, Covid-19, and peace processes and transitions

The World Health Organization declared the outbreak of the Covid-19 pandemic on 11 March 2020. This global health crisis demanded a quick, decisive and efficient response by governments to protect lives, curb the spread of the virus and prevent public health systems from being overwhelmed (Ginsburg and Versteeg 2020; Grogan 2020). Governments in many countries have triggered emergency legal frameworks to disable some ordinary (democratic) procedures and set aside standard political and legal accountability mechanisms as part of their Covid-19 response. Elections have been postponed and sometimes cancelled, and central governments have assumed enhanced responsibilities, which have often included powers otherwise designated to local or regional governments. While the impacts of both the pandemic and the responses to the contagion have been felt globally, they often have quite different consequences in countries attempting peace and democratic transition processes.

This report defines countries that have (or have had) peace and democratic transition processes as those with conflict resolution processes underway, those that are in the early stages of implementing a peace settlement, and those that are post-conflict but where the legacies of past conflict remain politically salient and liable to reversal. The Seventh Edinburgh Dialogue focused on societies undergoing ‘twin transitions’, which are loosely defined here as societies in which intertwined yet distinct transitions from authoritarianism to democracy, and from conflict to peace, are being attempted simultaneously. The former can be defined as political processes that attempt to establish or renew democratic participation in place of authoritarianism, while the latter typically involve an attempt to forge a ceasefire and a new political settlement between conflict protagonists. Such twin transitions frequently involve a distinct triangle of actors, as Figure 1 drawn from the work of the Political Settlements Research Programme’s Jan Pospisil and Monalisa Adhikari (n.d.) demonstrates.

Figure 1. Actors in twin transitions



Source: Pospisil, J. and Adhikari, M. 'Twin transitions: critical junctures of democratization and peacebuilding', [n.d.], unpublished.

The Dialogue examined a number of case studies of states that have experienced (or are undergoing) twin transitions, including Ethiopia, Central African Republic, Myanmar, Nepal and Sri Lanka (the latter does not involve a negotiated settlement, or any straightforward transition). These countries are at different stages of transition, which enables useful insights on the potential impact of Covid-19 in societies with various experiences of democracy and peacebuilding. This report also draws on a range of other conflict-affected settings in order to consider the potential ramifications of responses to Covid-19 on both conflict and democracy more generally. The Dialogue was driven by a range of questions and considerations that are relevant for all conflict-affected settings (and often all countries more generally), but particularly emphasize transitions.

1.2. Key questions for conflict-affected settings

The Seventh Edinburgh Dialogue focused on four key questions.

1. What kind of emergency law responses to Covid-19 have been adopted in conflict-affected settings? Why have particular responses been adopted over others, and what have been the effects of emergency powers on conflict dynamics? Have emergency law responses attempted to improve (or been successful at improving) relationships in these settings? What has been the role of institutions? Have courts and parliaments been able to curb executive overreach, and what has been significant in terms of the wider conflict dynamics? For countries at the formative stages of transition or those still experiencing conflict, has Covid-19 affected the process? Does the level of conflict influence a country's approach to adopting an emergency law?
2. Covid-19 has significantly disrupted electoral democracy in general, but given the complicated issues pertaining to the sequencing of elections as part of a transition (see, e.g., Paris 2004; Alihodžić and Matatu 2019) how has this affected transitional countries? What impact has Covid-19 had on scheduled elections and/or the need to extend terms of office in case of a delay? What is the relationship between Covid-19, conflict dynamics, and elections and extensions? Has the severity of the pandemic in

particular countries played a role in whether postponement has been considered or not?

3. Many conflict-affected states experience transitions in which different types of conflict and political settlement challenges operate at the central state and sublevels. Covid-19 emergency responses have the potential to impact the relationship between the centre and periphery as well as the political autonomy of substate entities. In conflict-affected settings, additional questions emerge regarding (a) how centre–periphery dynamics in twin transitions have been impacted by Covid-19 and (b) the role of non-state actors in these processes. Have opportunities arisen for substate governments to demonstrate leadership and the capacity to respond to the contagion specifically and emergencies more generally? Has the pandemic presented opportunities for these actors, particularly in the peripheries, to enhance their legitimacy by demonstrating leadership and capacity where the government has been unable or unwilling to do so? Have states’ responses shifted the dynamics or relative leverage of these groups, and/or altered the credibility between these groups and formal/state actors?
4. There is always the risk that emergency powers will become normalized or permanent. This risk may be compounded by the social, economic and political disenfranchisement resulting from emergency measures in conflict-affected countries. Covid-19 is putting pressure along pre-existing fault lines in many post-conflict and transitioning states. How much of the emergency legal response to Covid-19 is likely to become permanent, or at least to endure beyond the immediate exigencies of dealing with the pandemic? What implications does this have for longer-term conflict resolution dynamics? When and how should donor or third-party states supporting conflict resolution understand and respond to prolongation as a threat to democratization and conflict resolution?

1.3. Structure of the report

This report proceeds as follows. Chapter 2 examines the different ways in which emergency law responses can be instituted with reference to conflict-affected settings. After outlining models of emergency powers, chapter 3 considers some of the potential reasons underlying why states have opted for different approaches. Chapter 4 examines how emergency law responses have affected transitions. Chapter 5 assesses the potential impacts of delayed elections in conflict-affected settings. Chapter 6 explores the effects of Covid-19 responses on relations between the state and substate actors, and chapter 7 outlines a number of key findings and recommendations.

2. Emergency law responses in the context of Covid-19

A state of emergency is the special legal regime of powers and rules that is brought into operation when a country is facing a grave threat. Normal laws are often circumvented under a state of emergency, and special and extraordinary measures are enacted (Kouroutakis and Ranchordás 2016: 31). Covid-19 responses have indicated different ways of institutionalising an emergency response. Three main approaches to enacting emergency measures in response to Covid-19 were discussed: (1) rely on constitutional provisions that permit emergency approaches; (2) interpret existing legislation to provide the basis for emergency measures or adopt new legislation; and (3) legally ambiguous approaches that have a less explicit legal basis, such as executive measures that lack (or appear to lack) a specific legal grounding. The rest of the chapter discusses each approach in turn.

2.1. The constitutional model

Constitutions often, but not always, define the situations that can trigger a legal state of emergency. Such grounds commonly include war, insurrection, threats to national security and natural disaster—and sometimes health emergencies. For instance, **Madagascar** declared a two-week State of Health Emergency on 21 March 2020, based on article 61 of the Constitution. Where health-related grounds are not expressly addressed in the constitution, provisions have sometimes been interpreted to include a health emergency (for example in **Colombia** under article 213 of the 1991 Constitution, because the pandemic constituted a serious disruption of the public order that imminently threatened the state's institutional stability and security or citizens' peaceful coexistence). Other states have lacked the constitutional basis for declaring a state of emergency to respond to Covid-19.

In the context of the pandemic, states of emergency differ in terms of the procedures that need to be followed and the substance of both what constitutes an emergency and the scope of authorized government action, but each authorizes a range of flexible powers and corresponding measures to address the pandemic. Grogan (2020) identifies four common elements of constitutional provisions on a state of emergency: (1) conditions for its declaration; (2) a delegation of power; (3) limitations on its use; and (4) provisions for legislative or judicial oversight. For instance, the constitution might require parliament to authorize a state of emergency either before it can be declared or within a specified period of time following the declaration. For instance, article 88 of **Liberia's** Constitution states that:

The President shall, immediately upon the declaration of a state of emergency, but not later than seven days thereafter, lay before the Legislature at its regular session or at a specially convened session, the facts and circumstances leading to such declaration. The Legislature shall within seventy-two hours, by joint resolution voted by two-thirds of the membership of each house, decide whether the proclamation of a state of emergency is justified or whether the measures taken thereunder are appropriate.

Similarly, article 29(3) of **Sierra Leone's** Constitution stipulates that a state of emergency expires after 21 days if it is not approved by parliament. Constitutions frequently place temporal constraints on a state of emergency to prevent their normalization, and parliaments may be required to approve any proposed extensions, sometimes through an increased majority approval threshold. In **Mozambique**, article 284 of the Constitution specifies that a state of emergency can have a maximum length of 30 days and can be extended up to three times.

Courts and parliaments can be entrusted to scrutinize both procedural compliance and substantive measures adopted under a state of emergency. Under the constitutional model, the scope of emergency powers can also be constrained. For instance, while in most cases some derogation of rights is permitted, constitutions will frequently include a subset of rights that cannot be ignored regardless of the emergency. To illustrate, article 286 of **Mozambique's** Constitution provides that 'The declaration of a state of siege or emergency may in no case limit or suspend the rights to life, personal integrity, civil capacity and citizenship, non-retroactivity of criminal law, the right of defence of defendants and freedom of religion.' In theory, declaring a state of emergency ensures that emergency powers are assumed and exercised within a legal framework, albeit one that differs from the normal constitutional arrangements. Examples of conflict-affected states in transition that have adopted a state of emergency in response to Covid-19 include Chad, Colombia and Ethiopia.

2.2. The legislative model

Some states have relied on ordinary legislation to provide the legal foundation for emergency measures, either alone or in combination with a constitutional state of emergency. In much the same way as a constitution, an act or statute can confer wide-ranging powers on the executive or specific institutions to adopt emergency measures. In response to the unique set of circumstances raised by the contagion, some states have opted to pass new legislation to provide the basis for a range of emergency measures. For example, after initially declaring a state of emergency, the government of **Papua New Guinea** passed the National Pandemic Act of 2020.

Alternatively, some states have interpreted existing laws as providing the basis for emergency responses to the pandemic. Many countries have relied on public health laws to enable sweeping powers for detention, quarantine and even lockdown. For example, the **Kenyan** Public Health Act of 1921 is the country's primary legislation applicable to public health crises. It authorizes public health authorities, particularly the Minister of Health, to take various actions during public health crises, including declaring a disease a 'notifiable infectious disease' or a 'formidable epidemic, endemic or infectious disease' and taking the necessary prevention and suppression measures to fight it. In **Myanmar**, the main legal bases for measures such as curfew orders and the restriction of rights has been section 14 of the Prevention and Control of Communicable Diseases Law and section 144 of the Criminal Procedure Code. In **Nepal**, the primary legal grounding for emergency measures has been the 1964 Infectious Disease Act. The **South African** Disaster Management Act of 2002 has been used to legally justify many of the country's emergency responses. Other countries have relied

on laws that cover disasters or public order more generally (such as the **Zimbabwe** Civil Protection Act of 1989).

A defining feature of the legislative model is that ‘however unusual it may be, emergency legislation remains ordinary within the framework of the constitutional system: it is an act of the legislature working within its normal competence’ (Ferejohn and Pasquino 2004: 215). In theory, using legislation ought to ensure compliance with overriding public law and rule of law principles. For example, such laws ought to incorporate formal values such as clarity, non-retroactivity, publicity, universality of reach, and the possibility of compliance and congruence between expressed law and official enforcement. Legislation should include limits on executive power, for instance in the form of sunset clauses, which are statutory provisions enacted for a limited time and expire unless they are extended. For example, **Kenya’s** Public Order (State Curfew) Act of March 26 (1), which contains provisions for a countrywide curfew, was initially declared for a period of 30 days. All later extensions of the emergency measures had a limit date. Legislation must also ordinarily be drafted and applied in non-discriminatory ways. Enabling legislation promulgated in response to Covid-19 has often been fast-tracked and therefore lacks the level of scrutiny that would normally be expected. Under the legislative model, *ex post* scrutiny of legislation can ensure that the responses are proportionate and protect human rights. One important point is that in the context of Covid-19, the extent to which existing legislation provides the basis for the types of measures that have been adopted is often uncertain.

2.3. Ambiguous groundings

Some countries have assumed and exercised emergency powers without a clear legislative or constitutional foundation. For instance, in the **Central African Republic**, the National Assembly did not enact any special or ad hoc legal measures to support these measures. President Touadéra exercised de facto exceptional powers during the early stage of the Covid-19 crisis. In **Rwanda**, national and local lockdowns have been implemented on the basis of presidential statements and Cabinet resolutions without requiring parliamentary approval or formal allowances as set out in the Constitution. **Somalia** has taken measures to combat Covid-19 without referencing specific legal instruments. During the early stages of the pandemic, the **Sri Lankan** Government imposed an island-wide lockdown with no clear legal basis to justify the measures taken. Subsequent measures adopted in Sri Lanka such as the pervasive deployment of the serving military and the ad hoc appointment of senior ex-military personnel to civil administration roles have raised serious concerns that the pandemic is increasing the militarization of the government. This raises questions as to the legality of emergency measures subsequently enacted. Indeed, there is a danger that without a pre-established legal framework, governments’ power will be unconstrained and unregulated.

Table 1. Examples of initial emergency law responses in conflict-affected settings

Country	Constitutional state of emergency	Amended, existing or new legislation	Uncertain
Cambodia			X
Central African Republic			X
Colombia	X		
Democratic Republic of Congo	X		
Ethiopia	X		
Iraq			X
Kenya		X	
Mali	X		
Mozambique	X		
Myanmar		X	
Nepal		X	
Nigeria		X	
Rwanda			X
Serbia	X		
Somalia			X
South Africa		X	
South Sudan			X
Sri Lanka			X
Sudan	X		

3. What explains choices of emergency law responses in conflict-affected settings in transition?

There is no overarching explanation of why conflict-affected states in transition, or indeed any state, have adopted a particular legal approach. There are a range of factors underlying such choices; some of which may be applicable to all countries, others may be more specific to conflict-affected and transitioning societies, and still others particular to the context in question. Decision-makers in each setting are likely to have multiple reasons, which are informed by the distinct histories, legal traditions, institutional strengths and structures, political ecosystem, prevalence of the pandemic and perhaps even level of conflict in the country. This chapter outlines possible drivers underlying the choice of legal framework(s).

3.1. The legal frameworks in place

A country's emergency law response is determined by the available legal options. In some cases, states do not have a constitutional provision to declare a 'state of emergency'. In other cases, the pandemic did not constitute an 'emergency' within constitutionally permitted grounds. In such scenarios, the instrument adopted to facilitate emergency measures might be explained by the inability to resort to a constitutional state of emergency. For example, in **Uganda**, the constitutional grounds to declare a state of emergency (section 110) do not include disease; it therefore based its response on the Public Health Act of Uganda (Cap 281, 2000).

3.2. Political calculations and institutional safeguards

The overview of the enabling bases for emergency law responses suggests that, at least in theory, different levels of oversight are associated with different models. This might explain the attractiveness of certain emergency law responses over others. For instance, a state might wish to ensure that it acts—and is perceived to act—in ways that are constitutionally sound and adhere to the rule of law. To this end, declaring a state of emergency can trigger a set of procedural constraints and oversight mechanisms that could facilitate such legitimacy. As noted by Lührmann and Rooney (2020: 8):

If the use of such emergency powers is constrained to truly existential threats to the nation, or if the state returns to its standard institutions after the emergency subsides, the state of emergency has performed its function well, and democracy has remained unchallenged.

Similarly, existing legislation may be advantageous or even necessary from a democratic legitimacy perspective because it is enacted during normal institutional operations and under normal procedures for deliberation and review. At the same time, invoking a state of emergency can trigger a set of procedural constraints and oversight mechanisms that some executives wish to avoid. A recent report by International IDEA (2020b: 7) concluded that most governments in East Africa have primarily utilized legislative measures and executive orders to deal with the health crisis owing to ‘a reluctance to utilize constitutional authority to declare states of emergency, as these often presumably involve greater levels of parliamentary oversight’. Similarly, in **South Sudan**, government measures were not announced within the context of a state of emergency in terms of article 189(1) or 101(e) of the Transitional Constitution, 2011 (as amended). Acting under these articles would have required legislative approval since it would constitute a state of emergency. Instead, the country’s response has been grounded in decrees without parliamentary approval.

Some states have not declared a state of emergency due to political unwillingness, where leaders downplay or underestimate the threat of Covid-19. A study by Meyer (2020) found that populist leaders of some of the largest democracies have not taken the pandemic seriously enough. The governments of Timor-Leste (O’Connor 2020) and Indonesia (Al Jazeera 2020a) have been condemned for being unresponsive in the context of Covid-19, which further endangers the society. In transitioning societies, there may be an impetus to assure those who are critical of the government and/or any peace settlement that the situation is under control. As developed below, in some cases the pandemic has provided opportunities for non-state actors to increase their legitimacy and support in their response to the contagion. This could motivate state actors to downplay the virus to limit the space for other actors to step in. The primary point for the present purposes is that, alongside public health-related concerns, executives have had to weigh a range of factors and interests, including economic aspects.

Similar calculations might surround decisions to rely on legislation. While a legislative basis for emergency response may be advantageous or even necessary because it is enacted under a normal institutional framework, this might also explain why alternative approaches are adopted. For instance, where existing legislation is used but amended, the more limited capacity to review and debate amendments (for example in **Nepal**) might contribute to this choice being made over a state of emergency declaration, not least because of differences in the level of oversight applied to the two types of frameworks. In the same vein, countries that have acted without a clear legal basis (such as **Cambodia**, **Sri Lanka** and **South Sudan**) might have done so in order to limit the executive’s accountability to oversight institutions—primarily parliament and the courts—as generally demanded under both states of emergency and legislation frameworks.

3.3. Histories of emergency regimes

Many societies have past experience of emergency powers, which might influence the approach adopted. Lührmann and Rooney (2020: 4) assess that ‘the decision to implement [a state of emergency] derives from historical experiences such as international conflict, internal discord, and economic crisis, amongst myriad other factors’. Certain approaches might also be characteristic of individual states in line with their legal traditions. In Latin American states such as **Colombia** and **El Salvador**, it is common to declare a state of

emergency in response to a crisis. Yet states of emergency have a long history of being unevenly applied to national minorities and political opponents in conflict-affected settings and more generally (Bell 2020). These histories could explain decisions about whether to adopt new legislation or rely on existing laws. Given the spectrum of responses observed around the world, it is difficult to draw general conclusions about the origins of emergency law response choices.

3.4. Pandemic unpredictability

The emergency law response might also be dictated by the pandemic itself. This can be demonstrated by examining the variations in legal responses of various countries as the severity of the pandemic has evolved. **Angola**, for instance, declared a state of emergency on 27 March, enacted through Presidential Decree no. 81/20 of 25 March. This was in line with the state of emergency legal framework as laid down in the country's Constitution and in Law 17/91 of 11 May 1991. It was extended three times through presidential decrees, and remained in place until 25 May, and was then terminated. From then on, a state of public calamity became effective, enacted by presidential decree (Lexology 2020).

3.5. Level of conflict and impact of Covid-19

A country's emergency law response might be affected by the relationship between the level of conflict and the impact of the pandemic. For example, high levels of conflict and low prevalence and impacts of Covid-19 might deter the declaration of a state of emergency. Where conflict is still ongoing or specific areas of conflict remain, this becomes an important factor in the emergency law response. Dialogue participants observed that Covid-19 has not featured in the same ways in **Yemen** and **Syria** as in other settings. This might be explained by various factors, including a lack of verifiable data on rates of Covid-19 infections and deaths, as well as the fact that conflict is still ongoing in many parts of the country, which limits the government's reach and capacity to enforce laws and rules; in any case, broad executive powers tend to operate with little constitutional constraint. Therefore, there are competing priorities, and declaring a state of emergency might simply have been deemed less pressing than other matters or even undercut perceptions of government capacity. By contrast, low levels of conflict but a high impact from the pandemic might warrant triggering a constitutional state of emergency. The two dimensions introduce possible connections between the level of conflict and the perceived importance of (and capacity to address) the pandemic.

3.6. The political settlement

The nature of the political settlement in place may also influence the decision to adopt a particular approach. In identity-based conflicts, for instance, the political settlement can often involve some degree of power sharing between former conflict protagonists. **Bosnia and Herzegovina's** power-sharing arrangement included an executive grand coalition at the federal level. In such instances, the approach to the emergency adopted may be shaped, to some degree, by political negotiations or contestations within the established political framework. This can be contrasted with other contexts in which power has been concentrated in the hands of a single executive office holder, when bottom-up pressure might be a factor. The two substate political entities that comprise Bosnia and Herzegovina (the Republic of Srpska and the Federation of Bosnia and Herzegovina), declared a state of emergency in line with their substate constitutions prior to the federal government's nationwide declaration. The former did so on 4 March 2020, while on 17 March 2020 the latter

declared a 'state of natural disaster' to enable coordination of emergency activities between its two autonomous regions.

3.7. Summary

The range of potential emergency law responses adopted in conflict-affected states in transition reflect wider global trends and country-by-country variations (see Grogan 2020). While the precise reasons for adopting a particular approach are difficult to pinpoint, there are a number of common characteristics. Executives in conflict-affected settings might also have had to consider additional factors, such as ongoing conflict or the system of government and constitutional arrangements agreed in a political settlement forged to end or contain the conflict. In all cases, the precise motivations for the choice of emergency law response are context specific. Future research should explore these motivations.

4. How have emergency law responses affected transitions?

The pandemic triggered early optimism in conflict-affected settings, which envisioned potential intrastate and transnational opportunities for collaboration and mutual assistance to combat the virus (Bell 2020; Polo 2020). Such views partly stemmed from previous experience with the way in which external shocks—variously termed critical junctures, windows or opportunities, or constitutional moments—have sometimes brought opposing factions together in pursuit of a higher objective. Examples include the 2015 earthquake in Nepal, which created a sense of urgency that motivated the country’s political parties to come to an agreement on the new constitutional dispensation following the failure of past negotiations, and the 2004 Asian tsunami which renewed the resolve of parties to the long-standing conflict in Aceh, Indonesia to forge a negotiated settlement. The ways in which emergency powers are used can either support or hinder transitions. For instance, when executive measures are necessary, proportionate and non-discriminatory, transitions can be supported by demonstrating the government’s willingness to protect its citizens. Where decision-making is inclusive of political opponents and civil society, executive measures can be used to reflect the goals and aspirations of democratic deliberation.

Nevertheless, emergency powers carry risks regardless of the type of emergency. These include the risk of government inaction such that, despite emergency powers, adequate steps are not taken to tackle the virus, or certain sections of society are ignored. They also include the risk of normalizing emergency powers, a problem known as ‘the normalization of the exception’ because the exception has become the norm and the distinction between normal and exceptional conditions has broken down (Welikala 2020a; Gross 1998; Ní Aoláin and Gross 2006). A recent Freedom House study shows that democracy and human rights have deteriorated in 80 countries since the pandemic began (Repucci and Slipowitz 2020).

While these dangers exist for all societies, conflict-affected states in transition face additional complexities. For instance, they often have significant fault lines: executive actions are therefore likely to cause a backlash among supporters, the opposition and non-state actors. A history of conflict can also heighten the impact of emergency measures, particularly those that involve a significant transfer of power to the centre or the military. The stage of constitutionalism and democracy will also affect the extent to which executive measures can be curtailed. Therefore, alongside the normal concerns associated with emergency law responses during emergencies, the wider context and backdrop of transition magnifies potential issues. The discussion below considers a number of widely identifiable trends in the use of emergency powers from the perspective of twin transitions.

4.1. Executive powers and institutional safeguards

Some leaders have sought to utilize the pandemic to further entrench pre-existing authoritarian tendencies. In **Sri Lanka**, for instance, the president flatly refused to recall the parliament that had been dissolved ahead of elections, even though the Constitution clearly requires such a recall in circumstances such as a pandemic. The Supreme Court, in what appears to be an act of extreme deference to the executive during a pandemic, also denied leave to proceed with multiple challenges to the president's refusal to act according to the Constitution. The result was that the pandemic facilitated an executive takeover of the state.

There is also a danger that expanded executive powers might become normalized in less visible ways. For instance, much of the pandemic-related legislation passed in countries around the world does not include sunset clauses, and is therefore of uncertain duration. The underlying legal instrument in **Nepal** is still being used to adopt national-level responses with no provisions on termination. Governments can also adopt various—and often fast-tracked—legal instruments as the pandemic persists, which could entrench emergency powers. While the risk of expanding and normalizing emergency powers is not unique to countries in transition, there are additional problems associated with these developments working against negotiated settlements that are often predicated on a redistribution of power.

Box 1. Examples of courts constraining emergency powers

In Brazil, the Constitutional Court has intervened to prevent President Bolsonaro from understating the risks associated with Covid-19. In Kosovo, the Constitutional Court ruled that the government could address the pandemic through ordinary law rather than resorting to emergency law. In El Salvador, the Supreme Court ruled in May 2020 that President Nayib Bukele had overstepped his powers by declaring a state of emergency in order to extend stringent lockdown measures without congressional approval. The Constitutional Court of Bosnia and Herzegovina concluded that prohibiting the movement of persons under 18 years of age and over 65 on the territory of the Federation of Bosnia and Herzegovina violates the right to freedom of movement under article II(3) (m) of the Constitution of Bosnia and Herzegovina and article 2 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The potential to misuse or abuse emergency powers emphasizes the importance of strong institutions. There are numerous examples of institutions, such as courts, curbing emergency powers during the pandemic (see Box 1). However, the institutional apparatus is often weak in conflict-affected settings in transition, providing insufficient scrutiny of the executive. The reasons for limited oversight vary. For example, as discussed above, in some cases institutional oversight incapacity might be explained by the choice of legal framework. Where emergency powers are assumed outside of a constitutional or legislative framework, there is less scope for legislatures and courts to limit the activities of the executive. Some oversight limitations result from the pandemic itself, since it has restricted the ability of parliaments around the world to convene and conduct business in person, including in conflict-affected settings in transition. In some countries, parliaments have been formally suspended or dissolved. **North Macedonia's** parliament did not convene between its dissolution on 12 February and the snap election on 15 July. By the time of the election, the country's president had declared a state of emergency five times, allowing the caretaker government to rule by decree.

A key aim in transitioning societies is to establish effective checks and balances on power. However, the evolving nature of this process can hinder institutions' capacity to effectively

constrain executive power even in normal circumstances, but particularly when faced with exogenous shocks. For example, in the **Democratic Republic of Congo**, observers have criticized the Constitutional Court for failing to rule unconstitutional the president's failure to obtain approval for a state of emergency from both the Senate and the National Assembly, as required by law (Makunya 2020). In other cases, the limited role of institutional oversight can be explained by the lack of progress in establishing the institutions necessary to contain executive action. For instance, a State of Health Emergency was declared in **Sudan**, supported by articles 40–41 of the Constitution. The declaration of a state of emergency is not legitimate if the Legislative Council does not ratify it. However, Sudan does not have a legislature and therefore the emergency response could not be approved as required by its Constitution.

4.2. Disproportionate encroachment on rights

Although some degree of rights restrictions is necessary and legitimate in response to the contagion, in transitioning societies, infringements on rights can be a point of tension and potentially conflict. Human rights guarantees are often a central feature of both democracy-building and peace processes (Parlevliet 2017). Joshi, Lee and MacGinty (2014) find that at least 90 per cent of comprehensive peace agreements include provisions related to at least one of the following: human rights, refugees/internally displaced persons, or minority/indigenous rights. The institutionalization of human rights is partially driven by a belief in the power of these normative concepts to address historical exclusions, marginalization and/or indifference (Bell 2017).

Human rights protections are therefore a central feature of transitions to both democracy and peace. For instance, horizontal inequalities between groups, whereby certain sections of the population have their rights protected while others are marginalized, can be a conflict trigger. Human rights violations are often, if not always, a cause and consequence of conflict. Peace negotiations therefore place human rights centre stage to ensure that the same violations which precipitated, and may arise from a renewal of conflict, are not replicated, in addition to ensuring the function of human rights as a bulwark against state and non-state actors' excesses. Yet expanded executive powers in emergency situations can lead to human rights violations, which is particularly significant in contexts in which such violations are understood to have implications for the conflict landscape. There are reported cases of infringements on the rights to freedom of expression, assembly, privacy, and liberty in contexts such as Central African Republic, Ethiopia, Kenya, Nepal, and Sri Lanka.

In conflict-affected settings in transition, indifference, discrimination or favouritism—particularly towards a particular group—can also hamper transitions by increasing existing tensions. Dialogue participants reported disparity in the support offered by **Sri Lanka's** ruling elite to Prime Minister Rajapaksa's base compared to that offered to minority areas, especially in the north, which are being ignored. Assistance schemes are centralized and decided by a task force headed by the military that focuses on groups loyal to the Prime Minister. Religious discrimination is also taking place, particularly against Muslim burial practices (Kolvani et al. 2020: 3). In **Ethiopia**, the national emergency ended in September 2020, but the public health measures continue, including significant restrictions on public meetings. These measures tend to disproportionately affect the opposition because of selective enforcement. In other cases, marginalization and discrimination can hamper salient aspects of the transition, even decades after the negotiated settlement. In **Bosnia Herzegovina**, for instance, there are reports of discrimination against refugees (Kolvani et al. 2020), though their protection and return was a central component of the Dayton Peace Agreement.

Authoritarian tendencies overlap with pre-existing vulnerabilities and the marginalization of certain groups and interact in unpredictable ways. For instance, Ní Aoláin (2020) has identified how the policing of adherence to pandemic-related regulations has exacerbated discriminatory patterns of abuse in the use of force. Noting epidemiological evidence across states, Ní Aoláin contends that Covid-19 is causing disproportionate deaths among minorities and other historically vulnerable groups. This raises the prospect that ‘the tools of the surveillance state and the use-of-force capacity of government would be further mobilized against those communities, who already distrust law enforcement and other security forces and have long histories of harm at their hands’ (Ní Aoláin 2020). The omission of executive intervention, either in general or towards specific sections of the population, can significantly undermine the perceived legitimacy of the state.

4.3. Securitization of the state

Many countries have increased the role of the military in their response to Covid-19. In some cases, this represents an extension of pre-pandemic efforts to further militarize civilian roles. For instance, the **Philippine** government’s pandemic response has been highly militarized: the security forces have detained thousands of people for violating curfew and have killed many individuals. President Duterte has deployed police and military forces to enforce emergency measures; the military is ordered to kill violators of lockdown rules (Patel 2020). In **Sri Lanka**, the Government has accelerated efforts to populate government roles with military figures. Health decisions are now made by those who have experience fighting a war, but have no health administration experience. Many of these individuals played a key role in the war efforts, and several face serious allegations of human rights violations. Therefore, all key individuals with decision-making power are either military or former military and are very closely aligned with the president and his regiment. Where pandemic response efforts are dominated by security personnel, this often means they are led by and focused on men; women are not only excluded from decision-making spaces and processes; women’s specific needs in relation to the pandemic, as well as those of sexual and gender minorities, are often ignored (Campbell and Jolliffe 2020: 3).

In other cases, the use of the security apparatus is problematic due to the roles played by the military during and prior to conflict and potential disruptions to ongoing security sector reform efforts. For instance, an unfinished aspect of **Nepal’s** peace process has been democratizing the army. Processes have focused on ensuring civilian control of the army and its compliance with human rights. However, the government has relied heavily on the army in its response to Covid-19. The army, rather than the Health Ministry, was put in charge of procuring medical supplies, setting up and managing quarantine centres, and transporting people, among other tasks. **South Sudan’s** Covid-19 response has been led by a High-Level Taskforce chaired by the President and deputized by First Vice President Dr Riek Machar. The taskforce includes national security services, the Ministry of Interior and the defence forces, the role of which is to enforce measures adopted by the taskforce including controlling borders and enforcing compliance with testing and contact tracing. Similarly, in **Sudan** differences between civilian and military leaders in the transitional, power-sharing government are growing. The military has been consolidating its authority through restrictive security measures that went into effect in April 2020, including a ban on public gatherings and protests around the country, with particularly harsh restrictions imposed in the capital, Khartoum. Covid-19 has also brought chaos to Sudan’s troubled economy, which has damaged the transitional government’s credibility and popularity.

Alongside the increased role of security personnel in the pandemic response, the nature of military interventions also raises important human rights concerns. Once again, the securitization of the state is not unique to conflict-affected settings in transition. There are

examples of repressive security apparatus responses from countries that have transitioned to democracy. For instance, in **Kenya**, the police have killed at least 15 people—including a 13-year-old boy standing on the balcony of his family's home—to enforce the dawn-to-dusk curfew instituted at the beginning of the outbreak (Al Jazeera 2020b). However, in conflict-affected states undergoing transition or conflict-affected states more generally, state security forces have negative connotations of both conflict and eras presiding the onset of violence. When understood against the backdrop and histories of conflict, such repressive actions can undermine state institutions and prevent a break with the past.

Finally, the increased role of the security apparatus in the pandemic response can affect ongoing peace processes, particularly where a conflict is ongoing. Hege (2020) assesses that **Colombia's** police and military have become overstretched after taking on a range of new roles related to the pandemic. They have also been rocked by several prominent scandals, and rural communities view them as potential transmitters of the virus, which further undermines trust (Hege 2020).

Although many countries called upon their security forces to help manage the pandemic, securitizing the fight against the contagion can also erode the quest to build constitutionalism and peace in transitioning settings. Poor governance of the security sector is often a source of conflict and a key obstacle to peacebuilding. Security forces are often the agents of state repression and have been associated with major human rights abuses. Democratization is often impossible without a transformation of the security sector's institutions and methods of oversight and control. Security sector reform is therefore a key aspect of transitions, and a country's use of its security apparatus must be understood in context.

4.4. Opportunities for non-state actors to exploit

While all societies have tensions and fault lines between groups, in conflict-affected settings these can manifest as actors and groups willing to challenge the state. Governments in many conflict-affected countries are struggling to handle the health crisis and have been forced to divert resources away from counterinsurgency efforts. In some settings, rebel groups have used this as an opportunity to step up attacks against a weakened opponent, including by undermining the government's health response by targeting hospitals and healthcare workers (Polo 2020). For instance, the so-called Islamic State has ramped up its activities in both **Iraq** and **Syria** (Mustasilta 2020). Similarly, the Houthi movement in **Yemen** has weaponized the pandemic as an opportunity for new recruitments, taking advantage of the Saudi ceasefire declared in a bid to stem the spread of the virus (Schiavi 2020). In **Colombia**, the pandemic only intensified the country's myriad subnational conflict dynamics. Armed groups and criminal networks have adapted quickly to changing circumstances, seizing on the national quarantine to fortify their control over communities in their own localized and brutally repressive lockdowns under the guise of preventing the spread of the virus (Hege 2020).

The approach of non-state actors can itself be a reaction to government inaction or overly repressive responses. Militias, parastatal groups and other non-state actors are seizing opportunities to increase support and credibility by exploiting the inadequacies of state responses (Blanc, Brown and Press 2020). Heavy-handed or repressive government responses can fuel pre-existing fault lines contributing to political grievances deriving from perceived inequalities and marginalization, which can be gamed to gain support from the civilian population. The perceived weakness or inadequacies of state responses can also create opportunities for non-state actors or de facto authorities to fill governance gaps by spreading health information and enforcing quarantines for residents returning from abroad, as well as establishing public health information teams, dispensary campaigns and even quarantine

centres (Asal, Flanigan and Szekely 2020). In some instances, this creates vacuums for illicit organizations.

In conflict-affected states in transition, the dynamics between state and non-state actors generated by existing fault lines can play out in unpredictable ways. As part of its response, the **Myanmar** Government formed a coordination and cooperation committee to work with ethnic armed organizations (EAOs) in the fight against Covid-19. Importantly, given the country's history with military rule and the broad constitutional powers granted to the military to engage in politics and domestic affairs, the civilian authorities have led the response to the pandemic. By reacting quickly and seeking to include ethnic minorities, the approach is reported to have garnered broad popular support for civilian leaders, including among many ethnic minorities. The procedural and institutional approach to the pandemic in Myanmar has shifted the dynamics of civilian government–EAO relations and trust in a positive direction that, at least before the military coup of 1 February 2021, might have helped strength the peace process over the long term.

Paradoxically, the increased governance functions of non-state actors can also present opportunities to build bridges with state actors. For instance, some EAOs in **Myanmar** have well-established parallel administrations in their areas of influence, which include their own police forces, border agencies and prison systems; some also have their own health departments. Accordingly, some EAOs have set up Covid-19 committee structures that are responsible for leading public health responses in their areas of influence, and they have strengthened border security in an attempt to control the spread of the disease (Campbell and Jolliffe 2020: 5). The state could use this institutional capacity and reach and integrate it into broader pandemic response frameworks.

4.5. Discussion: deepening conflict fault lines

Although transitioning societies are a diverse category with different states at different stages of transition, these contexts are arguably more vulnerable to the effects of emergency measures. This is partly due to their particular histories of conflict and the potential for ongoing violence. However, it is also the result of fault lines: executive measures invoke different context-based reactions and are interpreted through a particular lens. Moreover, even in societies not experiencing twin transitions, Covid-19 could risk exposing these fault lines and making a regression from peace to conflict or democracy to authoritarianism more likely. The **Myanmar** case also demonstrates the unpredictability of conflict-affected settings. Across the globe, state institutions have shown themselves to be both willing and capable of limiting executive overreach and underreach. Prior studies have demonstrated that a primary determinant of how emergency powers will be used is the existence of capable institutional safeguards (Grogan 2020). However, in transitioning societies, this raises questions about the state of transition, as well as the institutional framework as part of these efforts to progress. In addition, conflict-affected settings in transition are susceptible to wider trends including democratic regression and the difficulties raised by the pandemic such as institutional oversight.

5. Elections

The pandemic has affected elections globally. On the one hand, there is a democratic imperative to hold elections on a periodic basis in line with the timetable set by law and to ensure that government—at all levels—has the legitimacy that comes from a democratic mandate. On the other hand, governments have the responsibility to protect lives by following the guidance of health authorities and creating a safe environment that enables people to exercise their right to vote without risking their health (Banbury 2020).

In transitioning societies, elections are instrumental in conferring legitimacy on a government and are frequently viewed as the end goal of any negotiated transition and a key step towards democratization (Alihodžić and Matatu 2019). Since the end of the Cold War, they have become the primary mechanism for regulating political contestation among conflict parties emerging from civil war through a negotiated settlement. Given the salience of elections in transitioning societies, there are competing perspectives on the effect of using emergency measures to suspend or delay them. Some argue that delaying elections can support democracy because of lower turnouts as a result of the pandemic and the fact that transitioning societies will likely struggle to deal with the risks they pose to the population. Others maintain that carrying on with elections can guarantee democracy by ensuring that leaders are popularly elected. Both arguments can be defended from a democracy standpoint.

Table 2. Examples of elections held during the pandemic

Country: type of election	Date the election was held
Mali: General elections	29 March 2020
Myanmar: General elections	8 November 2020
Burkina Faso: General elections	22 November 2020
Central African Republic: Presidential and legislative election	27 December 2020
Niger: Presidential and legislative election	27 December 2020

Source: International IDEA, 'Global overview of COVID-19: Impact on elections', 8 March 2020a, <<https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>>, accessed 8 March 2021.

However, elections also interact with conflict dynamics in unpredictable ways. Covid-19 dynamics have been an important part of the context, if not always a decisive element. **Ethiopia's** National Electoral Board announced on 31 March 2020 that the parliamentary elections scheduled for 29 August 2020 would need to be postponed due to Covid-19. On

10 April, parliament approved a five-month state of emergency that gave the executive sweeping powers to battle the virus. The delay has had a significant impact on the country's post-conflict transition. When Prime Minister Abiy Ahmed ran for office, he promised reconciliation for all Ethiopians. The opposition demanded to be politically involved in the transition period leading up to the next elections but was given no formal role. By postponing the general elections indefinitely, the current government and parliament will remain in power until the end of the pandemic. Although citizens broadly understand that postponement was necessary, they interpreted it as particularly beneficial to the federal ruling party. Some opposition groups, particularly the Tigray's People's Liberation Front (TPLF), maintained that the decision was 'gamed'. This has exacerbated tensions between the federal government and the Tigray politicians, who resigned after accusing Abiy of authoritarian tendencies. Moreover, the authorities' decision to provide no formal role for opposition groups during the interim governance of the country (pending elections) exacerbated tension with leaders of the principal Oromo opposition (the biggest region in the country where the government was expected to face tense competition). The delayed elections therefore fed into a volatile political climate and provided the catalyst for renewed conflict.

Myanmar's elections were held on schedule; the National League for Democracy (NLD) won in a landslide. The NLD's handling of the pandemic is thought to be partly responsible for its victory, as was party leader Aung San Suu Kyi's popularity among the majority of the population, and the perception that the NLD is the only effective option to continue the transition(s). However, this victory reflected the significant deterioration of the military's influence in the country and led to the January 2021 military coup. These examples demonstrate the unpredictability of transitioning societies and the potential for fault lines to emerge.

Table 3. Examples of countries that have delayed elections during the pandemic

	Originally scheduled	Rescheduled	Held?
North Macedonia: Parliamentary elections	12 April 2020	15 July 2020	Yes
Sri Lanka: Parliamentary elections	25 April 2020	5 August 2020	Yes
Autonomous Bougainville Papua New Guinea: General elections	June 2020	12 August–1 September 2020	Yes
Kenya: County Assembly and National Assembly by-elections	June–July 2020	15 December 2020	Yes
Ethiopia: Parliamentary election	29 August 2020	5 June 2021	
Indonesia: Regional (local) elections	23 September 2020	9 December 2020	Yes
Zimbabwe: Legislative and council by-elections	5 December 2020	2021	
Chad: Legislative elections	13 December 2020	24 October 2021	

Source: International IDEA, 'Global overview of COVID-19: Impact on elections', 8 March 2020a, <<https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>>, accessed 13 March 2021.

Decisions to delay elections often call into question both the legality of the decision and its constitutional implications. For instance, **Sri Lankan** President Rajapaksa took office with an opposition-majority parliament. He dissolved parliament on 2 March, which is permitted under Sri Lanka's Constitution, and called for new elections on 25 April. However, article 70(5) of the Constitution stipulates that the first meeting of the new parliament must be held within three months of the election. The elections were pushed back to 20 June, and again to 5 August, due to Covid-19. Opposition parties and civil society representatives

challenged the revised date through at least eight petitions, flagging possible public health risks in holding polls during the pandemic. Citing article 70(5) of Sri Lanka's Constitution, they argued the Parliament had to be summoned not later than three months after the proclamation dissolving the House (by 2 June) to avert a 'constitutional crisis'. The top court dismissed the petitions, which warned that the failure to summon parliament would produce a constitutional crisis (Srinivasan 2020). The delay in holding elections left Sri Lanka without a functioning parliament—and the Rajapaksas without any check on their power—for over five months (Welikala 2020b).

In the **Central African Republic** (CAR), presidential and legislative elections were due in December 2020 and March 2021, respectively. By March 2020, it was evident that due to Covid-19, it may not be possible to hold the elections within the constitutionally required deadline. The 2016 Constitution, however, imposes a two-term limit on the president and prohibits any form of extension (article 35); it also prohibits amendments to the term limit provisions (article 153). To prevent a potential constitutional and power vacuum due to a failure to hold elections on time during the pandemic, legislators from the majority party, including the deputy speaker of the National Assembly, proposed constitutional amendments under the notion of 'force majeure' (Vohito 2020). They sought to amend article 36, which defines how long before the end of the incumbent's term presidential elections must be held, and article 68, which prescribes the period within which legislative elections must be held. The proposed amendments received the support of two-thirds of members of the National Assembly and were formally endorsed in the Cabinet on 15 May. The draft amendments were then submitted for review to the Constitutional Court, as is required under constitutional amendment procedures. The court ruled that the Constitution includes 'constitutional locks' that prevent any amendments to the number or duration of presidential terms. Thus, unlike the example from Sri Lanka, the CAR's Constitutional Court acted as a safety valve on emergency power. However, the example illustrates problems associated with incomplete constitutions, which must be updated to cover new emergencies.

5.1. Complicating peaceful transfers of power

Elections in the context of Covid-19 can be understood in four ways. First, from a democracy-building perspective, elections are a central feature of transitions from conflict to peace. Delayed elections therefore stall a salient mechanism for allocating power that is often central to the peace deal. Second, decisions related to elections are merely another avenue through which conflict manifests in non-violent ways. The existence of fault lines ensures that decisions to either proceed or delay elections will be interpreted through different lenses. In some cases, these fault lines have escalated to violence, as the Ethiopian case demonstrates. Third, issues around elections in the context of Covid-19 expose limitations or grey areas in regard to constitutional frameworks. The constitutions of both Ethiopia and the CAR did not account for emergency situations such as a pandemic during which elections might not be possible. Finally, from these uncertainties, state institutions can demonstrate their capacity and willingness to contain executive measures when interpreted as constitutionally unsound.

6. Substate governance in conflict-affected states in transition

When the origins of conflict revolve around identity, territorial power sharing is a device that is often used in peace settlements. These arrangements, which can involve federalism, autonomy or devolution, seek to stave off demands for secession while enabling substate entities to govern themselves. External shocks can undermine or test the relationship between the state and substate entities. Given the salience of these arrangements to peace, the potential for violence or undoing constitutional settlements are always risks.

6.1. Hindering ongoing or potential territorial arrangements

While Covid-19 has raised a range of issues relating to the relationship between central governments and subnational actors generally, the potential for conflict related to identity raises complexities in conflict-affected settings. In some countries undergoing transition, Covid-19 has hampered efforts to reach or implement the negotiated settlement. In **Somalia**, for instance, Blanc (2020) observes that political processes have further slowed as the pandemic has spread, including the dialogues between the federal government and the federal member states, which are necessary for the country's federal system to function. This highlights a more general difficulty related to peacebuilding and conflict mediation: where face-to-face contact is not possible, technological deficiencies that limit the ability to convene online can also hamper progress. Similarly, in **South Sudan** the delay in establishing a Unity Government has hindered the development of regional governance structures and contributed to the vacuum in governance. In other cases, transitions at substate levels are occurring alongside the pandemic. The Bangsamoro Autonomous Region in Muslim Mindanao, a new devolved administration in the southern **Philippines**, was one year into a complex transition period when the Covid-19 pandemic hit.

6.2. The emergency law response of the central state

Tensions can also emerge when the emergency law response is predicated on laws that predate the political settlement. In **Nepal**, federalism emerged as a hard-fought agenda of the peace process, which was codified in the 2015 Constitution. Yet the country's federalization process remains incomplete, and many political parties continue to be 'reluctant federalists' that are averse to fundamentally transforming the centralized system. Nepal enacted its Disaster Risk Reduction and Management Act of 2017 as one of the first sectoral federal laws after the promulgation of the Constitution. The act defines pandemics as non-natural

disasters and sets out the institutional mechanisms for disaster management from the federal to the local level, specifying very clear roles and responsibilities for each level of government (Karki 2020). Yet in response to Covid-19, the Nepali Government invoked the Infectious Disease Control Act of 1964, which has a broad legal grounding that lacks specificity and does not clearly define what is permitted. Most importantly, the act does not specify the distribution of powers among different levels of government, which has made it difficult to implement in the new federal system.

6.3. Competing legal arrangements

Problems can stem from complex political and constitutional arrangements on multi-level governance set up in a political settlement. For instance, **Bosnia and Herzegovina's** fragmented state structure has made crisis management more of a challenge, as the country failed to establish a central organization to coordinate the crisis response. This has resulted in competing overlapping legal frameworks and no clear understanding of which laws prevail. Territorial power-sharing arrangements can thus contribute to confusion about which laws apply and complicate coordination between different layers of governance. Ibezim-Ohaeri (2020) notes that in **Nigeria**, the maze of Covid-19-focused legal frameworks enacted at the federal and state levels is brewing political tension and jurisdictional confusion, which has locked the federal government into conflict with some of the constituent states of the republic. In **Mexico**, uncoordinated actions taken at the state and local levels, such as banning the sale of alcohol and instituting curfews, have created a complex web of contradictory laws.

6.4. Taking power from the peripheries

When emergency powers transfer power from substate units to the central state, this can damage relationships between different layers of government, particularly when the sharing of competences is a central component of the broader negotiated settlement or peace process. An example is **Ethiopia's** regional elections. The balance of power between the federal and state governments in Ethiopia was central to the popular movement that precipitated the transition. Following the changes in leadership at the national level, the TPLF sought to maximize its regional autonomy from the national government. The tensions emanating from the pandemic emergency played into this contestation over the balance of power.

The emergency measures were largely led by the national government; there were no contestations over whether the national government had the mandate to take the necessary health measures. The TPLF also took other measures at the state level, but this was not contested by the federal authorities. The other regions took minimal measures that lasted for a short period. Because the national government took the lead, the coordination was generally achieved through its leadership. However, a key bone of contention emerged when the TPLF rejected the national government's decision to postpone regional elections, arguing that decisions about regional elections should be taken at the regional rather than federal level. The TPLF adopted a new electoral law that established an election commission and organized regional elections in defiance of federal authorities in September 2020. The federal government then decided to direct federal transfers to local governments of Tigray, rather than the regional government. The TPLF announced that this constituted a 'declaration of war', and threatened not to recognize federal authorities. The TPLF considers the postponement of elections in general as illegitimate and unconstitutional, and it had already said it would not recognize the federal government after the end of its original term. So this threat of derecognition preceded the federal cut of subsidies.

All of this precipitated the civil war that erupted in November 2020. Following the defeat of the TPLF forces, the federal government established a transitional government in Tigray, which is expected to lead the region until elections can be held. This can also be seen in contexts experiencing devolution rather than federalism. As pre-existing or latent fault lines re-emerge in some settings, Covid-19 could serve as a catalyst for renewed conflict. This appears to have been the case in Ethiopia and Myanmar.

6.5. Capacity issues

The pandemic has also exposed difficulties in substate arrangements related to capacity. For instance, the 2010 Constitution of **Kenya** reconfigured the balance of power by devolving authority and responsibilities from the national government to 47 elected county governments—creating a two-tier governance system. Health is a fully devolved function in Kenya but has been a recurring point of tension since the process of devolution began. A lack of resources—in terms of both financing and administrative capacity—has also been a major issue in key service delivery sectors, such as health; county governments are ill equipped to manage complex tasks such as dealing with this pandemic.

6.6. Summary—unbalancing fragile territorial power sharing

The pandemic and the response to it risk undermining existing territorial power-sharing arrangements. These risks revolve around the central state assuming responsibilities that are normally exercised by the substate entity. Limitations in existing arrangements are also exposed, including how overlapping jurisdictions are constructed under the law in multi-layered governance arrangements, the lack of coordination between different legal responses and the limited capacity of subnational entities to respond to crises. In some settings, the pandemic appears to have hindered transitions towards a constitutional and political settlement on devolved governance and regional autonomy, or progress in implementing an agreed settlement.

7. Findings and recommendations

What then for conflict-affected states in transition going forward? In some cases, Covid-19 and/or the responses to it have been a catalyst for renewed conflict. Myanmar is again under a military regime. Ethiopia descended into conflict in December 2020 but has since renewed peace. While Covid-19 was not the central cause in either, it may have been a contributory factor by exacerbating, tangentially or directly, pre-pandemic fault lines. The Sri Lankan Government hoarded the credit for the pandemic response through the absence of parliamentary and judicial scrutiny to win a two-thirds majority in delayed parliamentary elections. It then used that majority to enact a constitutional amendment that formalized its executive aggrandizement. Tensions continue around the process of federalism in Nepal, and the Philippines is continuing towards deconsolidating democracy. In Iraq and Syria, non-state actors have been able to exploit the governments' distraction with the pandemic response to increase attacks and undermine transitions.

In identifying potential areas of tension that pandemic response has exposed, the Dialogue highlighted five suggestions on how to emerge from the pandemic in ways that reduce the potential for existing fault lines to undermine transitions in the future.

- First, the pandemic has exposed limits and gaps in existing legal frameworks. In some cases, epidemics are not covered in constitutional provisions on emergency response, which limits decision-makers' options. In others, outdated legislation has been exploited to engage in an emergency response that benefits the incumbent powers. There is an opportunity to update these legal groundings and to harmonize legal frameworks to ensure that a rule-of-law-based response can be adopted in the future. Similarly, there are opportunities to amend legislation to address the possibility that elections cannot be held, and to require electoral management bodies to take the necessary steps to plan for and mitigate the risks of future disruptions. In either case, the process of legal reform can help define the boundaries of emergency power in ways that are clear and constitutional.
- Second, the pandemic has exposed difficulties in some situations of multi-layered governance, particularly where arrangements are complex and identity driven, and provides an opportunity to address these weaknesses. Efforts could be focused on redrafting laws or clarifying constitutional arrangements on issues of overlapping jurisdiction and distribution of powers. This process should entail properly delineating responsibilities, addressing the lack of intergovernmental coordination mechanisms and institutions and their capacity, and building the capacity of substate entities to respond to external shocks.

- Third, in such contexts as South Sudan and Somalia, but also Nepal, the pandemic could galvanize the process of moving towards a negotiated decentralized system of governance. As countries such as the Philippines and Sri Lanka undermine transitions towards democracy, opposition may continue to grow, pushing for reform and change. Therefore, recognizing the problems associated with systems in transition could provide the impetus for further democratization, particularly from civil society. This could include working with political party representatives to understand the legal framework that may be used in emergencies, and its limitations, as well as the issues (e.g. related to rights or the rule of law) they need to pay special attention to.
- Fourth, in conflict-affected situations, particularly those in which increased autonomy for identity-based groups is integral to a negotiated transition, the pandemic has reshaped incentives and the relative positions of state and non-state parties to the process. In some cases, pandemic responses have galvanized effective coordination among territorially concentrated opposition forces and the central government. In others, non-state actors have exploited the divided attentions and strained resources of formal state authorities to increase violence and undermine the transition. Parties to negotiations can learn from the mutual and distinct challenges associated with the pandemic response when seeking to forge peace agreements and concretize stagnated decentralization or federalization processes. While loopholes for exploitation during exogenous shocks can never be entirely closed, the pandemic experience highlights the importance and urgency of redoubling efforts to strengthen coordination mechanisms between these stakeholders, and to enhance relevant state logistical capacities and networks to mitigate the risk that future shocks will undermine governance credibility.
- Finally, the pandemic has brought into stark relief the continued existence of fault lines that, despite progress in building peace or democracy, remain—and retain the capacity to resurface as contentious, partisan conflict drivers. In recognizing the potential for these fault lines to undermine transitions, renewed efforts can focus on building institutional mechanisms for reconciliation and cooperation between groups, and on entrenching, as appropriate, constitutional and other safeguards to mitigate the risk that dominant parties will unilaterally and opportunistically undermine long-standing political settlements and erode democratic conventions.

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Annex. Agenda

DAY ONE: 9 December 2020	
Time	Session
14:00–14:15	<p>Welcome</p> <p>Christine Bell, Professor of Constitutional Law; Director, Global Justice Academy, Edinburgh University Asanga Welikala, Director, Edinburgh Centre for Constitutional Law Kimana Zulueta-Fülscher, Acting Head, Constitution-Building Programme, International IDEA</p>
14:15–15:15	<p>Session I: Introductions to the conceptual framework on the interaction between the way in which conflict-affected countries have dealt with the Covid-19 emergency and the development of existing transitions to peace and democracy</p> <p>Moderator: Sumit Bisarya, Constitutions Advisor, United Nations Department for Peacebuilding and Political Affairs</p> <p>Christine Bell, Professor of Constitutional Law; Director, Global Justice Academy, Edinburgh University Joelle Grogan, Senior Lecturer in law at Middlesex University London, coordinator of the Symposium on COVID-19 and states of emergency, hosted by the Verfassungsblog on Matters Constitutional and Democracy Reporting International Fionnuala Ni Aolain, holds the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Regents Professor and Robina Chair in Law, Public Policy, and Society, University of Minnesota; Professor, Queen's University of Belfast, School of Law, Northern Ireland</p>
15:15–15:30	Break
15:30–17:30	<p>Session II: Typology of emergency law responses to Covid-19 and its impact on conflict dynamics (including long-term conflict resolution dynamics)</p> <p>While Covid-19 has elicited different types of responses from different countries, in this panel we will explore case studies in an attempt to develop a taxonomy of emergency law responses for conflict-affected countries. What are key determinants for emergency law responses and the way they have been institutionalized in different country contexts, and how have these impacted both conflict dynamics and transitions to both peace and democracy? Beyond this, what is the likelihood of specific emergency legal responses becoming encroached, and what is the impact of such an encroachment on conflict resolution/transformation dynamics?</p> <p>Moderator: Tom Ginsburg, Leo Spitz Professor of International Law, Ludwig and Hilde Wolf Research Scholar, Professor of Political Science, University of Chicago</p> <p>Case studies: Marcus Brand, Head of Mission, International IDEA Myanmar Sonia Vohito, coordinator of the Africa Project of The Global Initiative to End Corporal Punishment, and PhD candidate at the University of Pretoria, South Africa (Central African Republic) Meaghan Fitzgerald, Deputy Head of the Democratization Department at OSCE Office for Democratic Institutions and Human Rights (ODIHR)</p>

DAY TWO: 10 December 2020	
Time	Session
14:00– 16:00	<p>Session III: Emergency law responses to Covid-19 and specific impact on (i) electoral democracy; and (ii) relationships between the centre and the periphery</p> <p>This panel will explore the additional impact of Covid-19 on scheduled elections, and thereby on conflict dynamics, and whether the level of virulence of the pandemic may or not have played a role in considering election postponement. Beyond elections, this panel will also explore ways in which dealing with the pandemic may have impacted the relationship between the centre and the periphery, in terms of coordination or centralization of power, and how the latter may influence broader conflict dynamics but also decentralization in the framework of broader peace processes.</p> <p>Moderator: Jason Gluck, Policy Specialist, Political Dialogues and Constitutional Processes, at the Rule of Law, Security and Human Rights for Sustainable Peace and Development Team, Crises Bureau, United Nations Development Programme</p> <p>Case studies: Adem Abebe, Constitution Building Advisor, International IDEA (Ethiopia) Monalisa Adhikari, Researcher at the Political Settlement Research Programme (Nepal) Bhavani Fonseka, Senior Researcher at the Centre for Policy Alternatives and an Attorney-at-Law (Sri Lanka)</p>
16:00– 16:15	Break
16:15– 17:15	<p>Session IV: Concluding remarks and closing</p> <p>This final session will focus on factors that may contribute particularly in conflict-affected settings to a particular legal response in the context of a pandemic, based on the case studies presented, but also on other cases that may have been mentioned throughout the webinar. Are conflict-affected settings fundamentally different in their response to Covid-19 than other countries? And what can we say about the impact of Covid-19 on their ‘twin transitions’ to peace and democracy?</p> <p>Panellists: Christine Bell Tom Ginsburg Joelle Grogan</p>

About the author

Sean Molloy is a Lecturer at Northumbria Law School and an affiliate of the Political Settlements Research Programme, University of Edinburgh. He holds a PhD from Edinburgh University and degrees from Queen's University, Belfast, University of Ulster and Liverpool John Moore's. Sean teaches various public law and criminal law courses, as well as delivering training on police powers to police trainees at Durham Constabulary. He has published in the areas of international human rights law, constitutional law and transitional justice, and authored numerous reports on peace agreements.

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

What do we do?

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work.

International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on good international democratic practices; offers technical assistance and capacity-building on democratic reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

Where do we work?

Our headquarters is located in Stockholm, and we have regional and country offices in Africa, the Asia-Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

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The World Health Organization declared the outbreak of the Covid-19 pandemic on 11 March 2020. This global health crisis demanded a quick, decisive and efficient response by governments to protect lives, curb the spread of the virus and prevent public health systems from being overwhelmed.

This report explores the way governments undergoing transitions to peace and democracy have triggered emergency legal frameworks to disable some ordinary (democratic) procedures and set aside standard political and legal accountability mechanisms as part of their Covid-19 response. It also provides information about where elections have been postponed or cancelled, and central governments have assumed enhanced responsibilities, which have often included powers otherwise designated to local or regional governments. While the impacts of both the pandemic and the responses to the contagion have been felt globally, they often have quite different consequences in countries attempting peace and democratic transition processes.

In December 2020, International IDEA—together with the Edinburgh Centre for Constitutional Law, the Global Justice Academy and the Political Settlements Research Programme at the University of Edinburgh, and with financial support from the UK Foreign, Commonwealth & Development Office (FCDO)—hosted the Seventh Edinburgh Dialogue on Post-Conflict Constitution-Building. The Edinburgh Dialogue is an annual event that brings together experts and practitioners from the fields of constitution-building, conflict resolution and mediation to advance research on a specific issue in post-conflict constitution-building.



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