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Enforcing Multilateral Treaties in a Public Emergency: A Note on Limitations and Derogations to The International Human Rights Framework.

Prateek Joinwal¹

Abstract

The outbreak of the novel coronavirus and its impact on the enforcement of human rights have been subjected to a lot of deliberation in the past few months. States around the world have been looking for measures to balance the conflicting interests of guaranteeing citizens their individual rights with that of protecting the health of the general population, most notably by restricting their liability under international law for the breach of the former rights. This endeavour has inevitably revived the debate on the contours of the right of the State(s) to either limit the application of international convention(s) or to derogate from them altogether. In an attempt to test the murky waters surrounding these two inter-related concepts, this paper aims to discuss the avenues available for member States to circumscribe their liabilities under the multilateral treaty regime, with a special focus on the framework of human rights treaties.

Introduction

*"In times of emergency, the rule of law and democracy no longer go hand in hand."*²

The international regime is said to be governed by a framework of mutual legal obligations, hinged upon the interplay of some principles as sacrosanct as respect for State sovereignty and mutual consent.³ One of the most common ways by which States tend to bind themselves to this legal order is by ratifying treaties, which are broadly classified as either *bilateral* or

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² Leïla Choukroune, 'When the State of Exception becomes the Norm, Democracy is on a Tightrope' (*DownToEarth*, 28 April 2020) <<https://www.downtoearth.org.in/blog/governance/when-the-state-of-exception-becomes-the-norm-democracy-is-on-a-tightrope-70734>> accessed 13 May 2021.

³ José A. Cabranes, 'International Law by Consent of the Governed' (2007) 42 Val. U. L. Rev. 119, 122-24; Matthew J. Lister, 'The Legitimizing Role of Consent in International Law' (2011) 317 Faculty Scholarship at Penn Law; 11 Chi. J. Int'l L. 663 (2011) 667-9.

multilateral. While the former tend to bind another State to the provisions enshrined therein, the latter provides a corresponding regime of obligations for all the participating States and is premised on according legitimacy to principles that the member States consider unassailable.⁴ At the same time, the discourse surrounding these multilateral instruments has also been associated with the existence of powers to limit the enforcement of some of these ‘principles’ during times of crisis, or to revoke their applicability altogether.⁵

The international treaty regime has been all too familiar with States’ attempts to either delimit or abrogate their obligations, usually attributing their failure to enforce the same to an ascendant ‘public emergency’ within their borders.⁶ The facets of *limitation* and *derogation* encapsulate the avenues available to member States to restrict their liability.⁷ Upon the onset of the novel coronavirus (‘COVID-19’), States around the world took measures⁸ that impacted their international obligations,⁹ particularly those pertaining to the International Human Rights (‘IHR’) framework.

Could this be deemed to be a manifestation of States’ prerogative to act outside these circumscribing frameworks, in light of Carl Schmitt’s theory of the sovereign deciding on the exception?¹⁰ Clearly, his theory accords the sovereign the power to restore its constitutional order in a state of emergency.¹¹ Does this give member States the discretion to completely negate their international treaty obligations? Although all decisions pertaining to a state of emergency usually lie with the sovereign,¹² the answer to the question is unquestionably in

⁴ R Labardini, ‘Emergency Situations’ in DP Forsythe (ed), *Encyclopedia of Human Rights* (OUP 2009) 128.

⁵ Yogesh K. Tyagi, ‘The Conflict of Law and policy on Reservations to Human Rights Treaties’ (2000) 71 *British Yearbook of International Law* 181, 197-98; Oscar M. Garibaldi, ‘General limitations on Human Rights: The Principle of Legality’ (1976) 17 *Harv. Int’l LJ* 503, 515-17.

⁶ PR Gandhi, ‘The Human Rights Committee and Derogation in Public Emergencies’ (1989) 32 *German Yearbook of International Law* 323, 323-324.

⁷ S. P. Marks, ‘Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts’ in Vasak (ed), *International Dimension of Human Rights* (1984) 177-200.

⁸ World Health Assembly Draft Res. A73/CONF/1 (May 18, 2020); COVID-19 Tracker, *International Centre for Not-for-Profit Law (ICNL)* <<https://www.icnl.org/covid19tracker/>> accessed April 30, 2021 (‘COVID-19 Tracker’).

⁹ Ana Jabauri, ‘State of Emergency: A Shortcut to Authoritarianism’ [2020] *J. of Const. L.* 121, 130.

¹⁰ Leïla Choukroune (n 2).

¹¹ Stephen Humphreys, ‘Legalizing Lawlessness: On Giorgio Agamben’s State of Exception’ (2006) 17 *Euro. J. Int’l. L.* 677, 678.

¹² Carl Schmitt, *Politische Theologie* (8th edn, Duncker & Humblot 2004) 13.

the negative. For most international conventions, and especially those concerning human rights, reject a “*Schmittian state of exception*”¹³ – allowing States to suspend their treaty obligations under the mandate of the convention provision(s) allowing derogation.¹⁴ Essentially, these derogations preclude States from relying on the provisions enshrined in their Constitution as a justification for breaching their IHR obligations, even in states of emergency.¹⁵

Most IHR conventions now have explicit provisions catered towards derogation so as to avoid instances where a member State seeks to completely dispense with its obligations by relying on the *Schmittian* rule of exception.¹⁶ These provisions set strict standards to ensure that they are only used *sparingly*¹⁷ by setting a high threshold for a ‘public emergency’. The focus of this paper shall be restricted to analysing the nuances surrounding the invocation of these provisions, in light of developments concerning COVID-19 on the international plane.

In the first section of this paper, I briefly deal with the different ways in which States may lawfully restrict their liability for breach of their respective treaty obligations. This is followed by an analogisation of these avenues with the current stance of the international community vis-à-vis the invocation of lawful limitations and derogations to IHR treaties. Finally, I shall argue for a mandatory notification obligation which should be fulfilled as a *pre-requisite* to the

¹³Alan Greene, ‘States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic’ (*Strasbourg Observers*, 1 April 2020) <<https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>> accessed April 30, 2021.

¹⁴ Organization of American States (OAS), American Convention on Human Rights, ‘*Pact of San Jose*’, Costa Rica, 22 November 1969 (‘ACHR’), Article 27; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 15; UNGA, International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, S. EXEC. Doc. No. E, 95-2 (1978), 999 U.N.T.S. 171 (‘ICCPR’), Article 4, *et al.*

¹⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980 (‘VCLT’), Article 27; Dominic McGoldrick, ‘The Interface between Public Emergency Powers and International Law’ (2014) 2 *Journal of Constitutional Law* 380, 384; A. Müller, ‘Limitations to and Derogations from Economic, Social and Cultural Rights’ (2009) 9 *Human Rights Law Review* 557, 592.

¹⁶ *Media Rights Agenda v Nigeria* Nos. 105/93-128/94- 130/94-152/96, Decision, Afr. Comm’n on Human and Peoples’ Rights (Afr. Cm. HPR), IT 67-68 (Oct. 31, 1998).

¹⁷ N. Questiaux, ‘Study of the Implications for Human Rights of Recent Developments Concerning Situations

Known as States of Siege or Emergency’ UN Doc. E/CN.4/Sub.2/1982/15 (July 1982); International Commission of Jurists, ‘States of Emergency: Their Impact on Human Rights’ (*Int’l Comm. of Jurists*, 1983) [‘ICJ Study’].

invocation of a lawful derogation, considering the progressive development of the law in this area.

I. Restricting the Enforcement of Treaty Obligations in an Emergency

The provisions enshrined in most IHR conventions are not absolute and allow member States to deal with an occurrence that impedes their ability to safeguard the prescribed rights, by either *limiting* those rights or by lawfully *derogating* from some of the provisions.¹⁸ The focus of this paper, whilst describing the aforementioned concepts, shall be limited to the narrative of the ICCPR and the ECHR. Although both Conventions prescribe express and implied limitations, the scope of such limitations is determined in every case by the interpretation of both the member States and the UN Human Rights Committee or the ‘HRC’ (in ICCPR).¹⁹ The rationale underlying the concept of limitations in the IHR framework is the search for a fair balance between the interests of the individual, on the one hand, and those of the State, on the other.²⁰

In order to prescribe a lawful limitation to a particular Convention right, it is essential for the member State to rely specifically on one of the *legitimate aims* (national security, public health/order, *et al*) enshrined in the Convention, so as to justify a ‘restriction’ of the right. Furthermore, the restriction must be “*prescribed by law*” and one which is considered “*necessary in a democratic society*”.²¹ The invocation of a domestic law restricting a Convention right entails the judicial assessment of both the justification for invoking that law as well as the ‘quality’

¹⁸ Alexandre Kiss, ‘Permissible Limitations on Rights’ in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1980) 290.

¹⁹ UN HRC ‘General Comment 23 on Article 27’ UN Doc. A/49/40, Vol. I, Annex V.

²⁰ Erica Daes, ‘The Individual’s Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the UDHR’ UN Doc. E/CN.4/Sub.2/432/Rev.2 (1983).

²¹ *Al-Nashif v Bulgaria* 36 Eur. HR Rep. 37 (2002) (Eur. Ct. H.R.) [123]; *Moldovy v Moldova* App No. 41827/02, Eur. Ct. H.R. (2007), [36]; *Volokhy v Ukraine* App No. 23543/02, Eur. Ct. H.R. (2006), [52]; ECHR, Art. 9(2), *read with* Arts. 8(2), 10(2), 11(2), and 6(1).

thereof.²² Importantly, limitations are permissible to restrict only some Convention rights, and they should always be “*narrowly tailored*” to the exigencies of the situation.²³

It would be trite to assert that derogations are intended to be used as a measure of last resort,²⁴ where limitations either prove or are predicted to be ineffective to respond to the distress engendered within a State’s borders.²⁵ Alternatively, there may also be instances where derogations become *obligatory* for States, especially since limitations of a particularly long duration are likely to be disproportionate to the aim pursued.²⁶ By contrast, a State’s attempt to derogate from certain rights – such as the right to assemble peacefully and freedom of speech – in instances where limitations are deemed sufficient to safeguard public health,²⁷ would be deemed contrary to the established IHR principles on derogation.²⁸ Although the ramifications of COVID-19 across the world were undoubtedly grave enough to justify derogation from certain rights,²⁹ other disasters may not provide a clear-cut answer to the question whether limitations would adequately address their ill-effects. The following sections aim to elaborate on this aspect.

A. What constitutes a ‘public emergency’ under IHR treaties?

The framework of the ACHR, ICCPR, and the ECHR prescribe provisions allowing derogations from the Conventions’ provisions in a state of ‘emergency’. These are often construed as an aberration from the state of normalcy within the boundaries of member

²² S. Rose-Ackerman & Benjamin Billa, ‘Treaties and National Security’ (2008) 40 Int’l Law & Politics 437, 473.

²³ *Ibid.*, 483.

²⁴ Paul M. Taylor, ‘Article 4: Derogation in Times of Officially Proclaimed Public Emergency’ in *A Commentary on the International Covenant on Civil and Political Rights* (CUP 2020) 107.

²⁵ G. Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (OUP 2014) 71, 107.

²⁶ *Kuimov v Russia* App No. 32147/04, Eur. Ct. H.R. (2009) [96].

²⁷ Alessandra Spadaro, ‘COVID-19: Testing the Limits of Human Rights’ (2020) 11 Eur. J. Int’l. L. 317, 321-22.

²⁸ *Ibid.*

²⁹ Vesna Stefanovska, ‘Derogation of Human Rights Rules in Times of Emergency’ (*Cambridge International Law Journal*, 4 July 2020) <<http://cilj.co.uk/2020/07/04/derogation-of-human-rights-rules-in-times-of-emergency/>> accessed 17 July 2021.

States.³⁰ In fact, several States have relied on these provisions to address situations of hostility within their national boundaries. For instance, Ukraine derogated from both the ICCPR and the ECHR owing to the entry of Russian forces within its borders.³¹ Likewise, France derogated from the ECHR in 2015 following the Paris terrorist attacks,³² and Turkey did the same immediately after a failed military coup.³³ Each treaty body of the aforementioned Conventions has delimited certain factors for ascertaining the existence of an emergency, which are discussed in this sub-section.

In *Lawless*,³⁴ the ECtHR interpreted the term “emergency” within the meaning of Article 15 ECHR as “an exceptional situation or crisis of emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed”³⁵, while adjudging on the issue of the UK’s extra-judicial detention of an IRA member in a military camp located in Ireland. The ambit of the term was however definitely expounded by the European Commission in the *Greek case*.³⁶ It held that an emergency must satisfy four prerequisites to be regarded as a “threat to the nation”: it must (a) be actual/imminent; (b) involve the whole nation; (c) hamper the continuance of the organised life of the community; and (d) cause an exceptional crisis and/or danger.³⁷ With respect to the last factor, the Commission held that the crisis must be such that it renders the ordinary course of *limitation* of rights plainly inapt to tackle the exigency.³⁸

³⁰ Susan Marks, ‘Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights’ (1995) 15 OJLS 69, 85.

³¹ Eur. Consult. Ass., *Note Verbale*, JJ7979C Tr./005-185 (June 10, 2015); Reservations and Declarations for Treaty No.005-Conventions for the Protection of Human Rights and Fundamental Freedoms, Council of Europe <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations>>.

³² Eur. Consult. Ass., *Note Verbale*, JJ8045C Tr./005-191 (Nov. 25, 2015).

³³ Eur. Consult. Ass., *Note Verbale*, JJ8187C Tr./005-191 (July 22, 2016); Press Unit, European Court of Human Rights, *Derogation in Time of Emergency* (ECtHR, August 2018), available at <http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf>.

³⁴ *Lawless v Ireland* App No. 332/57 (A/3), (ECtHR, 1 July 1961).

³⁵ *Ibid* [28]; DG Valentine, ‘The European Court of Human Rights: The Lawless Case’ (1961) 4 ICLQ 899, 903.

³⁶ *Re Greek Case*, App Nos. 3321/67, 3322/67, 3323/67, 3344/67 (ECtHR, 1969).

³⁷ *Ibid* [153]; Report of the European Commission on Human Rights, [1960-61] European Court of Human Rights, Series B, 9; [1961] Yearbook of the European Convention on Human Rights 438.

³⁸ *Ibid*.

However, developments after the *Greek case* in the ECHR regime have pointed towards a much broader notion of emergency. For instance, in *re A v UK*,³⁹ the ECHR rejected Lord Hoffman's view that an emergency required a threat to the life of the nation.⁴⁰ Nor did the threat have to attain the threshold of imperilling the institutions of the State.⁴¹ The Chamber's stance showed that Strasbourg judges did not make their own inquiries as to the validity of a public emergency proclaimed by a member State.⁴² Under the ECHR framework, the member States have been accorded a wide 'margin of appreciation' to determine a particular situation qualifies as an emergency.⁴³ This discretion is accorded to the States on the ground that "[t]he national authorities are in principle better placed than the international judge to decide on the presence of such an emergency."⁴⁴

Owing to this discretion, the ECHR and the European Commission have been reluctant to challenge the State's decision. In fact, it was only in the *Greek case* that the national authority's claim that an emergency existed was overruled.⁴⁵ However, the States' discretion is not absolute and the courts still retain the power to examine the circumstances surrounding the emergency, as argued by McDonald,⁴⁶ having regard *inter alia* to the nature of rights affected and the duration of the emergency.⁴⁷ The ICCPR arguably follows a stricter mechanism for qualifying an emergency as one that "*threatens the life of the nation*". While the HRC has not

³⁹ *A & Others v United Kingdom* App No. 3455/05 (ECtHR, 2 February 2009).

⁴⁰ *Ibid* [179].

⁴¹ *Ibid* [80].

⁴² *Brannigan and McBride v UK* App Nos 14553/89 and 14554/89 (ECtHR, 26 May 1993), [43]; *Aksoy v Turkey* App No. 21987/93, (ECtHR, 18 December 1996), [68]; *Demir & Ors. v Turkey* App. No. 71/1997/855/1062–1064 [43]; *Republic of Ireland v United Kingdom* (ECtHR, Ser. A) No. 25, App No. 5310/71, [207]; *Lawless v Ireland* App No. 332/57 (A/3), (ECtHR, 1 July 1961), [85].

⁴³ Oren Gross & Fionnuala Nì Aolain, 'From Discretion to Scrutiny: Revisiting the Application of the Margin

of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Hum. Rts. Q.* 625.

⁴⁴ *Alpay* App No. 16538/17 [75]; *Altan* App No. 13237/17 [91].

⁴⁵ *Greek Case* (n 36) [18].

⁴⁶ Ronald St. John McDonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights' in A. Giuffré (ed), *International Law at the Time of Codification: Essays in Honour of Robert Ago* (1987) 187, 207.

⁴⁷ *Republic of Ireland v United Kingdom* (ECtHR, Ser. A) No. 25, App No. 5310/71, App No. 5310/71 [207]; *Brannigan and McBride v UK* App No. 14553/89; 14554/89 [43]; *Re Aksoy*, App No. 21987/93 [68].

definitively expounded a definition, it has nevertheless pointed to the fact that “*not every disturbance or catastrophe*”⁴⁸ would qualify as an emergency under Article 4(1) of the ICCPR.

Furthermore, unlike the ECHR, the ICCPR specifically calls for the state of emergency to be of a temporary nature, lasting only until the state of normalcy is restored.⁴⁹ This distinction was endorsed by the ECtHR in *A v UK*, where the Court held that the HRC’s position pertaining to the derogation being “*exceptional and temporary*” was not a pre-requisite under Article 15 of the ECHR.⁵⁰ The HRC has also stated that the ICCPR only recognises a ‘public emergency’ that meets the threshold prescribed under General Comment 29, read with Principles 39, 40 and 41 of the Siracusa Principles.⁵¹

Putting the point more broadly, it has been said that in cases where Article 4 is sought to be invoked by States in the absence of an armed conflict, the onus lies on them to justify the same by reference to the test of ‘*necessity and proportionality*’.⁵² The HRC has often criticised member States for failing to comply with these standard when derogating from the provisions of the ICCPR.⁵³ With respect to the ACHR, a lawful derogation requires an exigency caused by a “*war, public danger, or other emergency that threatens the independence or security of a State Party*”.⁵⁴ Finally, while there is no conspicuous difference in the threshold of emergency set by the ACHR, several scholars have discussed this in detail,⁵⁵ and the underlying rationale remains

⁴⁸ General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), CCPR/C/21/Rev.1/Add.11 (‘General Comment 29’), [3].

⁴⁹ United Nations, Economic and Social Council, ‘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) (‘Siracusa Principles’), Principle 48.

⁵⁰ *A & Others v United Kingdom* App No 3455/05 (ECtHR, 2 February 2009), [178]; *De Becker v Belgium* 1 Eur. H.R. Rep. 43 (1979).

⁵¹ Siracusa Principles, (n 49).

⁵² General Comment 29 (n 48) [3].

⁵³ U.N. Econ. & Soc. Council (‘ECOSOC’), Human Rights Comm., ‘Consideration of the Reports Submitted by States Parties Under Article 40 of the Covenant’, ICCPR: Comments of the HRC – United Republic of Tanzania, U.N. Doc. CCPR/C/79/Add.12 (Dec. 28, 1992) [7]; ECOSOC, Human Rights Comm., ICCPR: Bolivia, U.N. Doc. CCPR/C/79/Add.74 (May 5, 1997) [14]; ECOSOC, Human Rights Comm., ICCPR: Peru, U.N. Doc. CCPR/C/79/Add.67 (July 25, 1996) [11]; ECOSOC, Human Rights Comm., ICCPR: Dominican Republic, U.N. Doc. CCPR/C/79/Add.18 (May 5, 1993) [4].

⁵⁴ ACHR, Article 27(1); Ed Bates, ‘Avoiding Legal Obligations Created by Human Rights Treaties’ (2008) 57 ICLQ 751, 753.

⁵⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (2nd edn, Engel, Kehl, 2005) 83-110; Jaime O., *Human Rights in States of Emergency in International Law* (Clarendon Press 1992); Subrata Chowdhury, *Rule of Law in State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (Pinter, 1989).

that States must not employ the derogation provisions to unjustly avoid their human rights obligations.

B. Curtailing Liabilities in a Public Emergency: To Limit or To Derogate?

The principles of derogation and limitation are usually resorted to when member State(s) have to address an 'emergency' within their borders. The exigencies and uncertainties associated with such unprecedented occurrences are what justify a State's departure from its IHR obligations, but the same must always be tested on the touchstone of '*necessity*' and '*proportionality*'.⁵⁶ It would be rather superfluous at this juncture to assert that the boundary between the two concepts is porous: in most cases, there tends to be an overlap since both are broadly governed by the same principles.⁵⁷

In this respect, the developments in the ICCPR regime assume special significance. The HRC has already raised concerns in the past, pertaining to the dwindling importance given by states to the requirement of 'proportionality' in limiting and derogating from Convention provisions.⁵⁸ The most profound instances of criticism arose upon consideration of the periodic reports sent by Spain and Sri Lanka. While the former involved a limitation on key elements of Articles 9 and 14 of the ICCPR by virtue of Spain's Organic Law 8/1984,⁵⁹ the latter entailed a deliberation on the effects of the Prevention of Terrorism Act 1979 on Article 15 of the ICCPR.⁶⁰

Under the ICCPR regime, derogations and limitations are considered on a very different plane, as the member States are allowed to limit some rights even in the absence of an

⁵⁶ Gerald L. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stan. L. Rev.* 1863, 1884-85; General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), CCPR/C/21/Rev.1/Add.11 ('General Comment 29'), [4]; *A & Others v. United Kingdom*, App No 3455/05 (ECtHR, 2 February 2009) [184].

⁵⁷ Paul Sieghart, *The International Law of Human Rights* (OUP 1983) 110-18; Rosalyn Higgins, 'Derogations under Human Rights Treaties' (1978) 48 *British Yearbook of International Law* 281; Joan Hartman, 'Derogations from Human Rights Treaties in Public Emergencies' (1981) 22 *Harv. Int' L. J.* 1, 6-7; Leslie Green, 'Derogations of Human Rights in Emergency Situations' (1978) 16 *Canada Yearbook of International Law* 92.

⁵⁸ General Comment 29 (n 48) [4] citing Israel (1998), UN Doc. CCPR/C/79/Add.93, [11].

⁵⁹ UN Doc. CCPR/C/SR.586, [34]-[44]; UN Doc. CCPR/C/SR.587, [1]-[33].

⁶⁰ UN Doc. CCPR/C/SR.471-73; UN Doc. CCPR/C/SR.477; see for reference UN Doc. A/39/40 [251].

emergency.⁶¹ The ICCPR thus encourages member States to limit rights rather than completely derogate from them. Based on this principle, States such as Iraq,⁶² Mexico,⁶³ and Cyprus,⁶⁴ have in the past addressed the exigencies accruing out of a state of emergency by simply limiting the application of ICCPR provisions.⁶⁵ Similarly, the ECHR regime has fettered the limitations that may be placed on individual liberty by enumerating specific guidelines for such restrictions.⁶⁶

At this juncture, it must be noted that the gravity of a threat notwithstanding, certain rights are immune from both limitation and derogation within the IHR regime. Even amidst the numerous measures taken by States to combat COVID-19,⁶⁷ no State would be permitted to suspend the right to hold an opinion and the right to information – two facets of the right to freedom of speech and expression.⁶⁸ Many believe that it was China's failure adequately to uphold these rights that ultimately led to a delayed international response to combat the spread of the virus.⁶⁹ In that regard, innumerable organisations, including the World Health Organisation, had underscored the importance of preserving the public's right to information,⁷⁰ since it was crucial for the populace to sensitise themselves to the risks posed by the virus, in their endeavour to formulate strategies to mitigate it.⁷¹

⁶¹ General Comment 29 (n 48) [5].

⁶² See UN Doc. A/46/40 [618]-[56].

⁶³ See UN Doc. A/54/40, Vol. I [324].

⁶⁴ See UN Doc. A/34/40, (1979) [383].

⁶⁵ Angelika Siehr, 'Derogation Measures under Article 4 ICCPR, with Special Consideration of the War against International Terrorism' (2004) 47 GYIL 545; Dominic McGoldrick, 'The Interface between Public Emergency Powers and International Law' (2014) 2 Int. J. Const. L. 380, 383-85.

⁶⁶ Jelena Pejic, 'The European Court of Human Rights' *Al-Jedda* Judgment: The Oversight of International Humanitarian Law' (2011) 93 ICRC Rev. 837, 839-40; *Al-Jedda v United Kingdom* App No. 27021/08, 2011 Eur. Ct. H.R. 1092 [99]-[100], [110] (Grand Chamber); *Hassan v United Kingdom* App No. 29750/09, 2014 Eur. Ct. H.R. [96]-[107] (Grand Chamber).

⁶⁷ Stephen Thomas & Eric C. Ip, 'COVID-19 Emergency measures and the impending Authoritarian Pandemic' (2020) 7(1) Journal of Law and the Biosciences 1, 6-21.

⁶⁸ Dominika Bychawska-Siniarska, 'Protecting the Right to Freedom of Expression under the European Convention on Human Rights – A Handbook for Legal Practitioners' [2017] Council of Europe 1, 8-14.

⁶⁹ Alessandra Spadaro, 'COVID-19: Testing the Limits of Human Rights' (2020) 11 Eur. J. Int'l. L. 317, 322.

⁷⁰ 'IDUAI 2020: UNESCO calls to strengthen Legal Guarantees for Access to Information in times of Crises' (UNESCO, 8 October 2020) <<https://en.unesco.org/news/iduai-2020-unesco-calls-strengthen-legal-guarantees-access-information-times-crises>> accessed 17 July 2021.

⁷¹ World Health Organization, 'Responding to community spread of COVID-19: Interim Guidance' (WHO, 2020) <<https://reliefweb.int/report/world/responding-community-spread-covid-19-interim-guidance-7-march-2020>> accessed 15 July 2021.

Further, it is often wrongly believed that limiting rights is always better than derogating therefrom. Recent practice has demonstrated that a State's wilful refusal to derogate from the rights enshrined in the ECHR and/or the ICCPR does not necessarily imply that its measures were less deleterious to its IHR obligations.⁷² This was reflected in the responses to COVID-19, with States such as Spain deliberately choosing not to derogate from both the ICCPR and ECHR despite enforcing one of the strictest lockdowns in the Council of Europe.⁷³ With the declaration of a "state of alarm",⁷⁴ all citizens were forced within the confines of their homes for as long as forty-three days, thereby impacting a host of rights guaranteed under the ICCPR.⁷⁵ Owing to the gravity of these measures, the Constitutional Court of Spain has adjudged the lockdown imposed by the State in 2020 to be unconstitutional.⁷⁶

The importance of the 'oversight mechanism', envisioned under the procedural pre-requisites of derogation, assumes particular importance in such instances, as a way to prevent the executive from enforcing arbitrary regulations to respond to an emergency. Accordingly, this paper argues for mandating the same in the next section.

II. Derogating from IHR Covenants: a detailed analysis

Provisions aiming to allow member States to derogate temporarily from some Convention rights have been commonplace in most IHR treaties. One of the first Conventions to adopt

⁷² OSCE, 'Human Dimension Commitments and State Responses to the Covid-19 Pandemic' [2020] Office for Democratic Institutions and Human Rights (ODIHR) 1, 30.

⁷³ Fundamental Rights Agency, 'Country Study for Spain – Coronavirus pandemic in the EU – Fundamental Rights Implications' [2020] European Union 1, 3.

⁷⁴ Jessica Mouza et al, 'What will happen when Spain's state of alarm expires? Supreme Court set to take key role with express rulings' (*El Pais*, 6 May 2021) <<https://english.elpais.com/society/2021-05-06/what-will-happen-when-spains-state-of-alarm-expires-supreme-court-set-to-take-key-role-with-express-rulings.html>> accessed 17 July 2021.

⁷⁵ José Brownrigg-Gleeson, 'The Strictest in Europe: How Spain dealt with the Lockdown' (*Raidió Teilifís Éireann*, 5 May 2020) <<https://www.rte.ie/brainstorm/2020/0505/1136544-spain-coronavirus-lockdown-restrictions>> accessed 17 July 2021.

⁷⁶ Alyssa McMurtry, 'Court Rules Spain's strict 2020 Coronavirus Lockdown Illegal' (*Anadolu Agency*, 14 July 2021) <<https://www.aa.com.tr/en/europe/court-rules-spain-s-strict-2020-coronavirus-lockdown-illegal/2304721> accessed> 17 July 2021; Joseph Wilson, 'Spain's Top Court Rules Pandemic Lockdown Unconstitutional' (*AP News*, 15 July 2021) <<https://apnews.com/article/europe-business-health-government-and-politics-courts-a0a36ebadb24600e122e2f1fb035011c>> accessed 17 July 2021.

such a provision was the ECHR.⁷⁷ The ICCPR,⁷⁸ the ACHR,⁷⁹ and the Arab Charter of Human Rights followed suit.⁸⁰ While the essence of such provisions remains the same across the Conventions, there remain some procedural disparities insofar as the clause of the ICCPR calls for the emergency to be “officially proclaimed”; and the clause(s) of both the ACHR and the ICCPR contain an express “non-discrimination” clause that is absent in the ECHR.⁸¹ It must also be noted that there are still some IHR treaties that do not contain an express derogation clause, such as the UDHR and the African Charter of Human Rights.⁸²

The absence of a derogation clause in the African Charter had raised concerns where a State that is a member of both the ICCPR and the African Charter seeks to address an emergency within its borders. In such a case, would the State still be bound by all the provisions of the African Charter? While one school of thought believes that the State was required to act strictly within the contours of the *limitation* clause enshrined in Article 27(2) of the Charter,⁸³ another school of thought proclaims that the African Charter did not consider the restriction of fundamental rights as an avenue that could help the State in addressing the exigencies engendered by the emergency. In their view, the legitimate exercise of human rights could never impede the democratic process and thus, the same was to be furthered by the member States at all times.

This paper does not conform to either view; for, in any case, the absence of a derogation clause in the African Charter might prove to be detrimental to the interests of member States in the long run. Firstly, by failing to establish a minimum standard for the enforcement of human rights, the African Charter essentially places all the rights it enshrines on the same footing. Although this tends to improve the homogeneity of the Charter, it nevertheless places drastic impediments for member States by requiring them to uphold every right in an emergency.

⁷⁷ Gerald L. Neuman, ‘Constrained Derogation in Positive Human Rights Regimes’ (2017) QMUL J. 15, 15-16.

⁷⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Article 4.

⁷⁹ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, Article 27.

⁸⁰ League of Arab States, Arab Charter on Human Rights, May 22, 2004, entered into force, Mar. 15, 2008, reprinted in 12 Int’l Hum. Rts. Rep. 893 (2005), Article 4.

⁸¹ Gerald L. Neuman (n 77) 16.

⁸² African Charter of Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217.

⁸³ Ibid, Article 27(2): “...shall be exercised with due regard to the rights of others, collective security, morality and common interest”.

This might, in turn, have a chilling effect on states' willingness to accede to the Charter. Secondly, the homogeneity of the Charter and the creation of a fixed standard of enforcement might be antithetical to the constitutional standards of some of its member States. In such cases, the States may be forced to accord primacy to their constitutional guidelines over their international obligations under the African Charter.

With respect to the derogation framework envisaged under the ECHR and the ICCPR, this is based on the interplay of the four determinative factors of *necessity, proportionality, inviolability, and temporality*.⁸⁴ The ICCPR further imposes the additional obligations of proclaiming the emergency officially⁸⁵ and informing all the other State parties of the derogation via the UN Secretary-General.⁸⁶ Official proclamations under the ICCPR are regarded as safeguards against spurious and/or *ex post facto* attempts to invoke their right to derogate.⁸⁷

Furthermore, the organs of the Convention ultimately have the discretion to make the final call as to whether a State has lawfully derogated from the provisions of the Conventions. This has been reaffirmed in several cases,⁸⁸ and the existing literature has highlighted the conditions pertaining to a lawful derogation under the ECHR.⁸⁹ Regarding the mechanism envisaged under the ICCPR, the HRC had expounded on the same in its General Comment 5 which was revised in 2001 via the General Comment 29, since the contours of limitations and derogations were expanded by the adoption of the 'Siracusa Principles'⁹⁰ by the UN in 1984.⁹¹

⁸⁴ Laurent Sermet, 'The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights: A Critical Discussion' (2007) 7 Afr. Hum. Rts. L. J. 142, 153.

⁸⁵ Susan Marks, 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights' (1995) 15 OJLS 69, 81.

⁸⁶ General Comment 29 (n 48) [8].

⁸⁷ UN Doc E/CN.4/Sub.2/1991/28/Rev.1.

⁸⁸ *Ireland v UK* Publ Eur Ct HR, Ser A, No 25 [207]; *Brannigan & McBride v UK* (1994) 17 ECHR 539 [47]; Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerp 2006) 1073.

⁸⁹ Christoph Schreuer, 'Derogation of Human Rights in Situations of Public Emergency' (1982) Yale J. World Pub. Ord. 113; Jan-Peter Loof, Crisis Situations, 'Counter-Terrorism and Derogation from the European Convention of Human Rights: A Threat Analysis' in Antoine Buyse (ed), *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict* (2010) 35; Peter Duffy, 'Note on Article 15 of the European Convention on Human Rights' in Daniel Prémont (ed), *Droits Intangibles et Etats D'Exception* (1996) 203, 206-07; Stefan Kirchner, 'Human Rights Guarantees During States of Emergency' (2010) 3 Baltic J. L. & Pol. 1.

⁹⁰ Siracusa Principles (n 49).

⁹¹ General Comment No. 5: Article 4 (Derogations), 31 July 1981, replaced by General Comment 29 in 2001.

Most derogation provisions in the Conventions also list certain non-derogable provisions, which can never be derogated from by the member States, even in cases of emergencies.

While the ECHR does not permit derogations from rights prescribed under Articles 2, 3, 4(1) and 7,⁹² the ACHR lists eleven such non-derogable rights.⁹³ Similarly, the ICCPR prescribes seven non-derogable rights within its framework. Although not explicitly stated within the text of the treaty, it is still settled that the derogation must be both “*limited in scope*” as well as “*temporary in application*”, and the measures must be strictly proportionate to the “*exigencies of the situation*”.⁹⁴ As indicated by the ‘Paris Minimum Standards’⁹⁵ adopted by the International Law Association, the derogation measures must be adopted in an attempt to restore the “*state of normalcy*” within the member State’s national borders,⁹⁶ and the same must be read in line with the ICCPR’s ‘object and purpose’ of committing to the virtues of democratic governance, as highlighted in Articles 1, 2, 5 and 25 of the Covenant.⁹⁷

In light of COVID-19, the right to assemble peacefully,⁹⁸ freedom of movement,⁹⁹ personal autonomy, and freedom from unwarranted interference in privacy,¹⁰⁰ were some of the rights that member States derogated from to respond to the public health crisis. As the first State to formally derogate from Article 21 of the ICCPR and Article 15 of the ACHR respectively, Guatemala notified a month-long derogation.¹⁰¹ However, this period was continuously

⁹² ECHR, Article 15(2).

⁹³ ACHR, Article 27(2).

⁹⁴ Protocol Additional I to the Geneva Convention of 1977, came into force on 7 December 1978, U.N. Doc. A/32/144/Annex I (1977), in ILM vol.16, (1977), at 1391; Protocol Additional II to the Geneva Conventions of 1949 came into force on 7 December 1978, U.N. Doc.A/32/144/Annex II (1977), ILM vol.16 (1977), at 1442.

⁹⁵ International Law Association, ‘The Paris Minimum Standards of Human Rights Norms in a State of Emergency’ Committee on the Enforcement of Human Rights Law – ILA (1984).

⁹⁶ Evan Criddle (ed), *Human Rights in Emergencies* (CUP 2016) 240; Jaime Oraá, *Human Rights in States of Emergency in International Law – Oxford Monographs in International Law* 345 (Clarendon Press 1992).

⁹⁷ Joan Hartman, ‘Working Paper for the Committee of Experts on the Article 4 Derogation Provision’ (1985) 7 Hum. Rts Q. 89, 91; *Salgar de Montejó v Colombia* CCPR/C/OP/1 at 127 (1985), 24 March 1982 [7.2].

⁹⁸ ICCPR, Article 21; ECHR, Article 11.

⁹⁹ ICCPR, Article 12.

¹⁰⁰ *Ibid*, Article 17.

¹⁰¹ Niall Coghlan, ‘Dissecting COVID-19 Derogations’ (*Verfassungsblog*, 5 May 2020) <<https://verfassungsblog.de/dissecting-covid-19-derogations/>> accessed 17 July 2021.

extended by notification to the ICCPR Depository.¹⁰² The practice of prolonging the period of COVID-19-induced derogations was followed by multiple States, such as Peru, Latvia, Armenia, Estonia, and Georgia.¹⁰³ In that regard, it seems apposite to note that while Estonia and Armenia withdrew their derogations on 18 May 2020 and 16 September 2020 respectively, thus restoring the full-scale applicability of the IHR covenants,¹⁰⁴ Georgia extended its derogation again until July 1, 2021.¹⁰⁵

Apart from the disparity in the length of the derogations, there was also some inconsistency in the rights that were suspended. While most States only suspended the freedom of movement and assembly, Columbia, in its derogation of 4 June 2020, suspended a host of rights guaranteed under Articles 12, 13, 19, and 21 of the ACHR.¹⁰⁶ Soon thereafter, the Dominican Republic also suspended various rights under the ICCPR, in addition to the right to freedom of assembly. Further, many States have prolonged their derogations by the regular promulgation of executive decrees,¹⁰⁷ a practice condemned for its tendency to normalise authoritarian responses even when the state of normalcy has been restored domestically.¹⁰⁸

Broadly, despite the varied responses to an emergency, the abuse of State power in situations of crisis could be averted as long as IHR bodies are allowed to oversee the measures taken to address the crisis. This again underscores the central argument of this paper on the

¹⁰² UN Treaties Collection, Status of Treaties Database, 'Chapter IV, 4, Notifications under Article 4(3) of the Covenant (Derogations)' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 17 July 2021.

¹⁰³ Ibid.

¹⁰⁴ 'Derogations by States Parties from Article 21 ICCPR, Article 11 ECHR, and Article 15 ACHR on the Basis of the COVID-19 Pandemic' (*Right of Assembly*, 3 May 2021) <https://www.rightofassembly.info/assets/downloads/Derogations_by_States_Parties_from_the_right_to_assembly_on_the_Basis_of_the_COVID_19_Pandemic.pdf> accessed 17 July 2021.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ See, e.g., Decree No. 683-20 of 30 November 2020, Decree No. 6-21 of 8 January 2021 (Dominican Republic); Decree No. 4331 of 15 November 2020, Decree No. 4455 of 6 December 2020, Decree No. 4525 of 18 December 2020 (Paraguay).

¹⁰⁸ 'Navigating the Fog of COVID-19: Critical Vulnerabilities and Impacts of Emergencies on Governance' (NDI, 11 May 2021) <<https://www.ndi.org/our-stories/navigating-fog-covid-19-critical-vulnerabilities-and-impacts-emergencies-governance>> accessed 17 July 2021; Afsoun Afsahi et al, 'Democracy in a Global Emergency: Five Lessons from the COVID-19 Pandemic' (2020) 7 *Democratic Theory* 1, 2-4; Eman M. Rashwan, 'Egypt Under COVID-19: Normalizing Emergency' (*IACL-IADC Blog*, 14 July 2020) <<https://blog-iacl-aidc.org/2020-posts/2020/7/14/egypt-under-covid-19-normalizing-emergency>> accessed 17 July 2021.

importance of complying with the notification obligations, the following section discusses this facet in detail and argues for mandatory notification alongside the substantive obligations associated with derogation.

III. The Role of Procedural Obligations in the Derogation Regime: Advocating for Stricter Compliance

The procedural obligations imposed on member states as a pre-requisite to derogate from Convention rights vary depending on the treaty framework. For instance, the ICCPR regime establishes procedural obligations that differ from those prescribed under the ECHR. First, the notification mechanism under the ECHR only requires member States to inform the ‘Secretary General of the Council of Europe’ (Sec-Gen) of the derogating “*measures*”.¹⁰⁹ The ICCPR however, under Article 4(3) demands that member States clearly specify the rights of the Convention from which they seek to derogate. A similar mechanism obtains under the ACHR.

Moreover, while the States have to notify the Sec-Gen under Article 15(3) of the ECHR, in ICCPR, they must inform all the other member States about the derogation through the UN Secretary-General.¹¹⁰ The notifications have not been mandated to be “*immediate*” under the ECHR regime,¹¹¹ while this is a necessary aspect of the mechanism under the ICCPR.¹¹² The ECHR has been quite flexible in this regard. In *Lawless*, the Commission accepted an Irish notification of derogation that was submitted after twelve days, and even though it neither stated the reasons justifying the derogation nor the provisions from which the derogation was sought.¹¹³ A similar reasoning was adopted by the Court in the *Alpay* and *Altan* cases, in which

¹⁰⁹ Greek Case, (n 36) [43]-[46].

¹¹⁰ Stefan Kirchner, ‘Human Rights Guarantees During States of Emergency: The European Convention on Human Rights’ (2010) 3 *Baltic Journal of Law and Politics* 1, 13.

¹¹¹ *Ibid* 14-15.

¹¹² General Comment 29 (n 48) [2].

¹¹³ *Lawless v Ireland* App No 332/57 (A/3), (ECtHR, 1 July 1961) [47].

the Turkish notification was said to comply with Article 15(3) even when it just stated that the relevant measures “*may involve derogation*”.¹¹⁴

In any case, the rationale of the notification mechanism is set to uphold the sanctity of the principle of legality and the rule of law. By calling for advance notifications of derogations, the treaty bodies get an opportunity to review the legality of the proclamation of the state of emergency.¹¹⁵ This, in turn, helps to prevent States entering derogation simply to evade their liability for the breach of international human rights obligations. As stated in paragraph 17 of the General Comment 29, State parties “*commit themselves to a regime of international notification*”¹¹⁶ whenever they seek to rely on Article 4 of the ICCPR. In the same vein, the Siracusa Principles state that the procedural obligations are to be satisfied prior to the implementation of the derogation.¹¹⁷ In its Concluding Observations, the HRC had stressed that the procedure under Article 4(1) is indispensable for States wishing to rely on the derogation mechanism in Article 4.¹¹⁸

A. Compliance with Procedural Derogation Requirements: Lessons from COVID-19-induced derogations

At this juncture, it is apposite to assess States’ adherence to these procedural obligations in light of the COVID-19-induced derogations. It must be noted that only two instances of derogation premised on ‘public-health concerns’ had been reported before COVID-19 – effected by Guatemala and Georgia, to mitigate the spread of H1N1 (2009)¹¹⁹ and Bird-flu

¹¹⁴ *Re Alpay* App. No. 16538/17, [73]; *Re Altan*, App. No. 13237/17 [89].

¹¹⁵ Christopher Gawronski, ‘Human Rights and COVID-19: Human Rights Obligations of States during the COVID-19 Pandemic’ (*Geneva International Centre for Justice – GICJ*, 16 April 2020), <<https://www.gicj.org/positions-opinions/gicj-positions-and-opinions/1786-human-rights-and-covid-19-human-rights-obligations-of-states-during-the-covid-19-pandemic>> accessed May 13, 2021.

¹¹⁶ General Comment 29 (n 48) [17].

¹¹⁷ Siracusa Principles (n 49), Principles 64–65

¹¹⁸ Consolidated Guidelines for State Reports under the ICCPR, CCPR/C/66/GUI/Rev.2, A/56/40, Vol. I, Annex III (2000); Sweden A/33/40 (1978), [72]; Chile A/39/40 (1984), [437]; Suriname CCPR/CO/80/SUR (2004), [9]; San Marino A/45/40 (1990), [434]; Libya CCPR/C/LBY/CO/4 (2007), [12].

¹¹⁹ Eric Richardson & Colleen Devine, ‘Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights’ (2020) 42 *Mich. J. Int’l L.* 105, 122.

(2006)¹²⁰ respectively, both of which were fairly limited in scope and relatively inconsequential in comparison to the derogations implemented after the onset of COVID-19. Thus, the unsettled state of the principles demarcating the dividing line between ‘limiting’ and ‘derogating’ from IHR obligations was exacerbated by the lack of State practice on derogations aiming to alleviate a domestic public health emergency.

Perhaps unsurprisingly, the derogations implemented to combat the pandemic varied not only in their scope and duration, but also in their uniformity across regional IHR treaties – reaffirming the grossly unsettled position of the law on restricting IHR obligations. First, of the 107 countries that had promulgated emergency declarations within their borders as of 21 June 2021,¹²¹ only few¹²² notified the UN Secretary-General of their intention to derogate. Under the ECHR, the number is even lower, comprising mostly Eastern European States such as Albania, Georgia, Latvia, Romania, Estonia, and Serbia,¹²³ arguably owing to the weaker procedural obligations prescribed therein. As indicated, the failure to notify IHR bodies of an intended derogation brings about several problems: a) it hampers the oversight mechanism envisioned under the relevant IHR regime,¹²⁴ b) it makes it difficult to assess whether the State is acting under the limitations specific to some rights or instead derogating therefrom,¹²⁵ and finally, c) it prevents member States from objecting to the derogation.¹²⁶ This is illustrated by

¹²⁰ Natasha Holcroft-Emmess, ‘Coronavirus: States Derogating to Suspend Human Rights Obligations’ (*OxHRH Blog*, 27 March 2020) <<https://ohrh.law.ox.ac.uk/coronavirus-states-derogating-to-suspend-human-rights-obligations/>> accessed 17 June 2021.

¹²¹ ‘COVID-19 Civic Freedom Tracker’ (ICNL) <<https://www.icnl.org/covid19tracker/>> accessed 17 June 2021.

¹²² UN Treaties Collection, Status of Treaties Database, ‘Chapter IV, 4, Notifications under Article 4(3) of the Covenant (Derogations)’ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 18 June 2021; Ana Zdravkovic, ‘COVID-19 Pandemic: Requiem for Human Rights?’ (*Sylff Association*, 9 April 2021) <https://www.sylff.org/news_voices/28960/> accessed 18 June 2021 (“Argentina, Armenia, Azerbaijan, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Georgia, Guatemala, Kyrgyzstan, Latvia, Namibia, Paraguay, Peru, the Republic of Moldova, Romania, San Marino, Senegal, Thailand”).

¹²³ Audrey Lebret, ‘COVID-19 Pandemic and Derogation to Human Rights’ [2020] *Journal of Law and the Biosciences* 1, 3.

¹²⁴ General Comment 29 (n 48) [17]; Eric Richardson & Colleen Devine, ‘Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights’ (2020) 42 *Mich. J. Int’l L.* 105, 111.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, 125; Emilie M. Hafner-Burton et al., ‘Emergency and Escape: Explaining Derogations from Human Rights Treaties’ (2011) 65 *Int’l Org.* 673, 677.

the fact that States such as Bulgaria, Hungary, Kazakhstan, Luxembourg, Portugal, Spain and Slovakia opined that their restrictive measures amounted to limitations.¹²⁷ Secondly, the COVID-19 narrative highlighted regional disparities in complying with procedural obligations. While North Macedonia, Albania, and Serbia notified their derogation from the ECHR, they failed to provide any notice of their derogation from the ICCPR.¹²⁸ Likewise, although States like Honduras, Bolivia, Jamaica, and Panama notified the Secretary-General about their proposed derogation from the ACHR, they did not notify the UN Secretary-General of any derogation from the ICCPR.¹²⁹ As Zdravkovic points out, a State cannot lawfully derogate from a right in either of these international conventions without breaching a corresponding right protected by the other.¹³⁰ Further, since ICCPR does not recognise the doctrine of ‘margin of appreciation’,¹³¹ regional disparities in the implementation of the derogation framework would engender procedural irregularities for States that are signatories to multiple conventions, apart from holding them liable under the derogation framework of the ICCPR.

B. Tracing the Development of Derogation Law

It must be recalled that HRC’s General Comments and the Siracusa Principles, albeit soft-law instruments, provide influential guidance to interpret the text of the treaty,¹³² and they have repeatedly called for strict compliance with the procedural derogation obligations.¹³³ In that

¹²⁷ OSCE, ‘Human Dimension Commitments and State Responses to the Covid-19 Pandemic’ [2020] Office for Democratic Institutions and Human Rights 1, 25.

¹²⁸ Ana Zdravkovic (n 122).

¹²⁹ ‘Derogations by States Parties from Article 21 ICCPR, Article 11 ECHR, and Article 15 ACHR on the Basis of the COVID-19 Pandemic’ (*Right of Assembly*, 11 November 2020) <[https://www.rightofassembly.info/assets/downloads/Derogations_from_the_Right_of_Peaceful_Assembly_\(at_11_November_2020\).pdf](https://www.rightofassembly.info/assets/downloads/Derogations_from_the_Right_of_Peaceful_Assembly_(at_11_November_2020).pdf)> accessed 17 June 2021.

¹³⁰ Ana Zdravkovic (n 122).

¹³¹ Dominick McGoldrick, ‘A Defense of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee’ (2015) 65 ICLQ 21, 21.

¹³² Lottie Lane, ‘The Horizontal Effect of International Human Rights Law in Practice’ (2018) 5 Eur. Comp. L. & Governance J. 5, 11; Tracy Slagle et al., ‘Lessons from Africa: Developing a Global Human Rights framework for Tuberculosis control and Prevention’ (2014) 14 BMC Int’l. Health & Hum. Rts. 1, 2.

¹³³ General Comment 29 (n 48), [17] citing Concluding Observations on Mexico (1999), CCPR/C/79/Add.109, [12]; India (1997), CCPR/C/79/Add.81, [19]; Russian Federation (1995),

regard, the HRC adopted the *Consolidated Guidelines for State Reports*, highlighting the form of the notification to be filed under Article 4. It states that “[t]he date, extent and effect of, and procedures for imposing and for lifting any derogation under article 4 should be fully explained in relation to every article of the Covenant affected by the derogation.”¹³⁴ The adoption of these Guidelines was driven by the fact that very few States seemed to provide the requisite information on Article 4 derogations, and thus, the Guidelines sought to prescribe a standard procedure for such notifications. Clearly, even in the notification mechanism, the ICCPR seems to take a stricter line than that adopted under the ECHR. However, are these procedural obligations a *pre-requisite* to the promulgation of a lawful derogation?

While this question has not been definitely addressed by any treaty body, it was considered by the HRC in passing in *Silva v. Uruguay*,¹³⁵ where it was held that a State is not precluded from relying on an otherwise lawful derogation [which complies with clauses (1) and (2) of Article 4] simply because it has failed to comply with the procedural obligation imposed on by Article 4(3). The operative paragraph on the HRC’s view on this issue is reproduced below:

*“Although the substantive right to take derogation measures may not depend on a formal notification being made pursuant to article 4(3) of the Covenant, the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4(1) of the Covenant in proceedings under the Protocol.”*¹³⁶

This passage suggests that the onus is on the State to furnish information and establish the legality of the proclamation of the emergency within its borders. The HRC has nonetheless consistently stated that the notification mechanism under the ICCPR should not be relegated to the status of a “*mere formality*”¹³⁷ by the member States. It is settled law that the failure to notify will not render the proposed derogation unlawful, as long as it is in consonance with the substantive obligations of the particular Convention. However, owing to its significance in allowing the HRC to monitor State practices, there has been a ‘progressive development

CCPR/C/79/Add.54, [27]; Lebanon (1997), CCPR/C/79/Add.78, [10]; Cameroon (1994) CCPR/C/79/Add.33, [7]; Peru (1992) CCPR/C/79/Add.8, [10].

¹³⁴ UN Doc. A/56/40, Vol. I, Annex III (as amended at the seventieth session, October–November 2000 (CCPR/C/GUI/Rev.2)), C3.

¹³⁵ *Silva v Uruguay* UN Doc. A/36/40, 130.

¹³⁶ *Ibid* [8.3].

¹³⁷ UN Doc. CCPR/C/SR.469 [19] (El Salvador); *See*, UN Doc. CCPR/C/SR.355 [24] (Uruguay).

of the law' towards mandating the notification procedure under the framework of the ICCPR;¹³⁸ in several of its Concluding Observations, the HRC could be seen to remind member States of their obligations to notify.¹³⁹

C. Implications of a Fragmented Procedural Regime

The HRC had already condemned the “under-use” of derogations by States whilst dealing with emergencies within their borders.¹⁴⁰ There exists a widespread misconception amongst States that ‘derogating’ from IHR obligation(s) amounts to a breach, leaving ‘limitation’ as the only lawful prerogative available to them during public health emergencies.¹⁴¹ However, this notion is clearly incorrect and some even regard derogations as the “*most appropriate tool*”¹⁴² for managing emergencies, since the lack of international oversight in the case of limitations often leads to unduly prolonged *de facto* emergencies.¹⁴³ This is evidenced by the situation in Turkey, where the laws passed in pursuance of the emergency following the attempted coup have now been embedded in its legal regime.¹⁴⁴ A continued failure to

¹³⁸ Martin Scheinin, ‘COVID-19 Symposium: To Derogate or Not to Derogate?’ (*OpinioJuris*, 6 April 2020) <<http://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>> accessed April 30, 2021; Natasha Holcroft-Emmess, ‘Derogating to Deal with COVID-19: State Practice and Thoughts on the Need for Notification’ (*EJIL:TALK!*, 10 April 2020) <<https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/>> accessed 13 May 2021; Dr. Mariela Morales Antoniazzi & Silvia Steininger, ‘How to Protect Human Rights in Times of Corona? Lessons from the Inter-American Human Rights System’ (*EJIL-TALK!*, 1 May 2020) <<https://www.ejiltalk.org/how-to-protect-human-rights-in-times-of-corona-lessons-from-the-inter-american-human-rights-system/>> accessed 13 May 2021.

¹³⁹ Concluding Observations on Guatemala, U.N. Doc. CCPR/C/CO/72/GUA (2001) [11]; Thailand, U.N. Doc. CCPR/C/84/THA (2005) [13]; Zambia, U.N. Doc. CCPR/C/ZMB/CO/3 (2007) [15]; Madagascar, U.N. Doc. CCPR/C/MDG/CO/3 [13].

¹⁴⁰ Dominic McGoldrick, ‘The Interface between Public Emergency Powers and International Law’ (2014) 2 *Int. J. Const. L.* 380, 384-85.

¹⁴¹ Sanja Jovicic, ‘COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights’ (2021) 21 *ERA Forum* 545, 547-48.

¹⁴² *Ibid.*

¹⁴³ ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism’ UN Doc. A/HRC/37/52 (1 March 2018) [27].

¹⁴⁴ Stuart Wallace, ‘Derogations from the European Convention on Human Rights: The Case for Reform’ (2020) 20 *Human Rights Law Review* 769, 776.

derogate has been argued to have a ‘ratcheting effect’ which incentivises increasingly authoritarian responses by the State.¹⁴⁵

Interestingly, while the perils associated with the under-use of derogations have always been apparent, derogations issued during the pandemic have also brought the ramifications of an increased reliance on this ‘escape mechanism’ to the forefront. In that regard, Latvia was particularly quick to notify the UN of its COVID-induced derogation on 16 March 2020, arguing that it was impossible for it to individually assess limitations during the pandemic.¹⁴⁶ Estonia issued a notice of a wide derogation soon thereafter, covering Article(s) 5, 6, 8, and 11 of the ECHR *inter alia*. However, despite its derogation, the measures it enforced domestically were much less onerous than those introduced by non-derogating States such as England, as pointed out by Stuart Wallace.¹⁴⁷

Likewise, Spain did not provide a notice of derogation to the UN Secretary-General despite imposing one of the strictest lockdowns in the Council of Europe.¹⁴⁸ Finally, the fragmented practice concerning the adoption of COVID-19-induced derogations highlights that there exists widespread uncertainty about the point at which a derogation is required under the ICCPR. This has led to a situation where parties sometimes use derogation as a ‘safety net’¹⁴⁹, and under-use it in others. Further, parties have also been neglecting the procedural

¹⁴⁵ Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (2018) 206.

¹⁴⁶ UN Treaties Collection, Status of Treaties Database, ‘Chapter IV, 4, Notifications under Article 4(3) of the Covenant (Derogations)’ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 18 June 2021.

¹⁴⁷ Stuart Wallace, ‘Derogations from the European Convention on Human Rights: The Case for Reform’ (2020) 20 *Human Rights Law Review* 769, 779; Hoar, ‘A Disproportionate Interference: The Coronavirus Regulations and the ECHR’, (*UK Human Rights Blog*, 21 April 2020) <ukhumanrightsblog.com/2020/04/21/a-disproportionate-interferencethe-coronavirus-regulations-and-the-echr-francis-hoar> accessed 16 June 2021.

¹⁴⁸ OSCE, ‘Human Dimension Commitments and State Responses to the Covid-19 Pandemic’ [2020] Office for Democratic Institutions and Human Rights 1, 2.

¹⁴⁹ Emanuele Sommario, ‘Limitation and Derogation Provisions in International Human Rights Law Treaties and Their Use in Disaster Settings’ in Flavia Zorzi Giustiniani et al (eds.), *Handbook of Human Rights and Disasters* (Routledge 2018) 98, 113.

obligations to avoid international oversight over its domestic affairs – all of which is likely to disrupt the balance of reciprocal obligations envisioned in IHR conventions.¹⁵⁰

Conclusion

The focus of this paper was to delimit the scope of limitations and derogations in light of the developments in the framework of ICCPR and ECHR. In the Covid-19 landscape, States have been forced to adopt extreme measures both domestically and internationally¹⁵¹ in their efforts to address the spread of the virus. This has engendered a pressing need for international oversight by human rights bodies, to assure that the measures do not end up breaching the international obligations of the States. However, unless derogating states follow the procedural guidelines of notification, the international oversight will continue to be adversely affected.

Unless the States notify their derogations expeditiously, it remains unclear whether a particular State is seeking to rely on the *limitations* enshrined in the Convention or is instead *derogating* from its provisions. This scenario might also allow authoritarian regimes to unjustly breach their human rights obligations under the guise of an emergency that has been illegally proclaimed.¹⁵² As per the ICNL Report, at the time of writing, over 94 countries have passed emergency declarations, 46 of which affect the *right to freedom of expression* and 128 different legislations have been passed that directly affect the *right to freedom of assembly*.¹⁵³

¹⁵⁰ Eric Richardson & Colleen Devine, 'Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights' (2020) 42 Mich. J. Int'l L. 105, 125.

¹⁵¹ 'COVID-19: A Human Rights Checklist' (*Human Rights Watch*, 14 April 2020) <<https://www.hrw.org/news/2020/04/14/covid-19-human-rights-checklist>> accessed 13 May 2021.

¹⁵² Michele Collazzo & Alexandra Tyan, 'Emergency Powers, COVID-19 and the New Challenge for Human Rights' (*IAI*, 27 June 2020) <<https://www.iai.it/en/pubblicazioni/emergency-powers-covid-19-and-new-challenge-human-rights>> accessed 13 May 2021; V. Fietta, 'The United Nations Human Rights Committee does not give States a carte blanche to violate their human rights obligations in response to the COVID-19' (*Lexology*, 12 May 2020) <<https://www.lexology.com/library/detail.aspx?g=e6ecfb70-9be2-4af2-b0c0-31d33ceb830b>> accessed 13 May 2021.

¹⁵³ The International Center for Not-for-Profit Law, 'COVID-19 Tracker' <<https://www.icnl.org/covid19tracker/>> accessed 13 May 2021.

This unquestionably calls for a mandatory notification mechanism to allow the treaty bodies to effectively scrutinise all laws that have been passed by member States to respond to the COVID-19 pandemic. The regime of derogation and limitations to human right treaties had been established with the aim of balancing the conflicting interests of individuals with the needs of the State. Unless strict measures are undertaken to enforce compliance with the regime of notification, the entire framework might be relegated to a conduit for member States to dispense with their obligations while depriving citizens of their Convention rights.