

International Aspects of the COVID-19 Health Crisis with Special Regard to Human Rights

BÉRES NÓRA

1. Introduction

This chapter provides an overview of the most significant international aspects of the COVID-19 pandemic, focusing primarily on states of emergency and human rights. After presenting the pandemic as a health and economic crisis, the chapter offers a comprehensive analysis of the derogation clauses of two human rights treaties: Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, hereafter, ECHR or Convention)¹ and Article 4 of the International Covenant on Civil and Political Rights (hereafter, ICCPR or Covenant).² These two treaties were selected because of their impact on the development of European and universal human rights laws and their importance as models for other human rights treaties, such as the European Social Charter (ESC)³ and

1 European Convention on Human Rights, opened for signature November 4, 1950, E.T.S. No. 005, entered into force September 3, 1953. More rights are granted by additional protocols to the Convention (Protocols 1 (E.T.S. No. 009), 4 (E.T.S. No. 046), 6 (E.T.S. No. 114), 7 (E.T.S. No. 117), 12 (E.T.S. No. 177), 13 (E.T.S. No. 187), 14 (C.E.T.S. No. 194), 15 (C.E.T.S. No. 213), and 16 (C.E.T.S. No. 214)).

2 International Covenant on Civil and Political Rights, opened for signature December 19, 1966, 999 U.N.T.S. 171, and 1057 U.N.T.S. 407, entered into force March 23, 1976.

3 European Social Charter (revised), opened for signature May 3, 1996, E.T.S. No. 163, entered into force July 1, 1999. Article 30 of ESC provides the following:

1. In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. Any Contracting Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary-General of the Council of Europe fully informed of the measures taken and the

BÉRES Nóra: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Assistant Lecturer, Faculty of Law, University of Miskolc, Hungary

BÉRES, N. (2022) 'International Aspects of the COVID-19 Health Crisis with Special Regard to Human Rights' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 33-70. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_3

the American Convention on Human Rights (Pact of San José, hereafter, ACHR).⁴ The Central European states examined thoroughly in this book are parties to both of these human rights treaties, so their obligations under international human rights laws should be explained.

	ECHR			ICCPR		
	Ratification	Derogations	COVID-19 Derogations	Ratification	Derogations	COVID-19 Derogations
Austria	September 3, 1958	–	–	September 10, 1978	–	–
Croatia	November 6, 1996	–	–	October 12, 1992 (succession)	–	–
Czech Republic	February 21, 1991	–	–	February 22, 1993 (succession)	–	–
Hungary	November 6, 1990	–	–	January 17, 1974	–	–
Poland	November 26, 1991	–	–	March 18, 1977	February 1, 1982	–
Romania	October 7, 1993	March 18, 2020 April 3, 2020 April 15, 2020 April 22, 2020 April 28, 2020 May 4, 2020 May 13, 2020 May 15, 2020 May 15, 2020	–	December 9, 1974	March 20, 2020 April 21, 2020 May 14, 2020	–

reasons therefore. It shall likewise inform the Secretary-General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

3. The Secretary-General shall in turn inform other Contracting Parties and the Director-General of the International Labour Office of all communications received in accordance with Paragraph 2 of this article.

⁴ American Convention on Human Rights, opened for signature November 22, 1969, 1144 U.N.T.S. 123, entered into force July 18, 1978. Article 27 of the ACHR provides the following:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States' Parties, through the Secretary-General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

INTERNATIONAL ASPECTS OF THE COVID-19 HEALTH CRISIS

	ECHR			ICCPR		
	Ratification	Deroga- tions	COVID-19 Derogations	Ratification	Derogations	COVID-19 Derogations
Serbia	April 3, 2003	April 7, 2020		March 12, 2001 (succession)	March 13, 2003	—
Slovakia	February 21, 1991	—	—	May 28, 1993 (succession)	—	—
Ukraine	November 9, 1995	June 9, 2015	—	November 12, 1973	June 5, 2015 November 27, 2015 July 6, 2016 January 23, 2017 November 26, 2019	—

Table 1

Ratifications of and Derogations from the ECHR and the ICCPR by Central European State

Source: Author's compilation

As for the relevance and the topicality of the chapter's subject matter, in times of the most severe health crisis of the last hundred years⁵ it is no exaggeration to say that issues related to states of emergency are extremely timely. Since the beginning of the COVID-19 pandemic, many states in Europe and worldwide, have declared states of emergency; human rights need exceptional highlights in the shadow of such global health threats.

2. An Unprecedented Emergency: The COVID-19 Crisis as a Health, Economic, and Human Rights Crisis

2.1. The COVID-19 Crisis as a Health Crisis

This is not the first time the international community has responded to a pandemic. However, the COVID-19 pandemic is certainly the most challenging health crisis in recent decades. On January 30, 2020, Director-General Tedros Adhanom Ghebreyesus of the World Health Organization (WHO) declared the COVID-19 outbreak a public health emergency

⁵ See the WHO website for more details [Online]. Available at: https://www.who.int/health-topics/coronavirus#tab=tab_1 (Accessed: May 5, 2021).

of international concern, the highest level of alarm applied by the WHO.⁶ Since then, as a specialized agency of the United Nations (UN), the WHO has sought to overcome the multifaceted hurdles posed by the pandemic. States have turned to the WHO for guidance on handling this previously unknown disease. The WHO responded to the public health emergency with several initiatives, including (i) starting health crisis engagement and delivering supplies;⁷ (ii) sharing clear, accurate, and useful information;⁸ (iii) implementing pandemic strategies on public health measures;⁹ (iv) offering humanitarian assistance for countries contending with humanitarian crises exacerbated by the pandemic;¹⁰ (v) conducting scientific collaboration and global research;¹¹ and (vi) developing tools to fight the virus, such as diagnostics, therapeutics, and vaccines.¹²

During its 74th session, the UN General Assembly adopted key resolutions to tackle the health crisis: (i) a comprehensive and coordinated response to the COVID-19 pandemic;¹³ (ii) a united response against global health threats (combatting COVID-19);¹⁴ and (iii) international cooperation to ensure global access to medicines, vaccines, and medical equipment to address COVID-19.¹⁵ UN system entities have worked together to effectively support countries respond to the pandemic and its impacts under the clear leadership of the WHO.

6 WHO Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV) [Online]. Available at: [https://www.who.int/director-general/speeches/detail/who-director-general-statement-on-ih-er-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/director-general/speeches/detail/who-director-general-statement-on-ih-er-emergency-committee-on-novel-coronavirus-(2019-ncov)) (Accessed: December 16, 2021).

7 Alive digital platform behind the scenes for more effective and transparent country response [Online]. Available at: <https://www.who.int/news-room/feature-stories/detail/a-live-digital-platform-behind-the-scenes-for-more-effective-and-transparent-country-response> (Accessed: December 16, 2021); COVID-19 Supply Chain System [Online]. Available at: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/covid-19-operations> (Accessed: December 16, 2021).

8 A year without precedent: WHO's COVID-19 response [Online]. Available at: <https://www.who.int/news-room/spotlight/a-year-without-precedent-who-s-covid-19-response> (Accessed: December 16, 2021).

9 2019 Novel Coronavirus (2019-nCoV): Strategic Preparedness and Response Plan [Online]. Available at: <https://www.who.int/publications/i/item/strategic-preparedness-and-response-plan-for-the-new-coronavirus> (Accessed: December 16, 2021).

10 United Nations Office for the Coordination of Humanitarian Affairs [Online]. Available at: <https://www.unocha.org/story/un-issues-103b-coronavirus-appeal-and-warns-price-inaction> (Accessed: December 16, 2021).

11 R&D Blueprint and COVID-19 [Online]. Available at: <https://www.who.int/teams/blueprint/covid-19> (Accessed: December 16, 2021); A Coordinated Global Research Roadmap [Online]. Available at: <https://www.who.int/publications/m/item/a-coordinated-global-research-roadmap> (Accessed: December 16, 2021).

12 The Access to COVID-19 Tools (ACT) Accelerator [Online]. Available at: <https://www.who.int/initiatives/act-accelerator> (Accessed: December 16, 2021).

13 UNGA A/74/L.92 (10 September 2020); see also UN Comprehensive Response to COVID-19. Saving Lives, Protecting Societies, Recovering Better [Online]. Available at: <https://www.un.org/sites/un2.un.org/files/un-comprehensive-response-covid-19-2021.pdf> (Accessed: 16 December 2021).

14 UNGA A/74/L.57 (14 April 2020).

15 UNGA A/74/L.56 (8 April 2020).

2.2. The COVID-19 Crisis as an Economic Crisis

COVID-19 has significantly affected the global economy and brought about an unprecedented economic crisis, causing the biggest stock price collapse since 2008. However, by the end of 2020, even though coronavirus cases were still increasing, a partial economic recovery began thanks to economic aid packages and fast-developed vaccines; stock markets returned to and even surpassed pre-crisis levels.

The UN COVID-19 Response and Recovery Fund (hereafter, the Fund) was a major source of economic aid packages. The Fund is a UN inter-agency mechanism established by the UN Secretary-General to help support low- and middle-income member countries to respond to the pandemic and its impacts, including an unprecedented socioeconomic shock.¹⁶ The Fund was built on three pillars: (i) tackling the health crisis; (ii) focusing on the pandemic's social impact, economic response, and recovery; and (iii) helping countries recover. The Fund's operation is based on shared responsibility, global solidarity, and urgent action for people in need. The financial requirements of the Fund were projected at US\$2 billion, with US\$1 billion needed in the first nine months of operation. (These requirements will be reviewed because of the pandemic.) The Fund complements WHO's Strategic Preparedness and Response Plan.

The UN Economic and Social Council (ECOSOC) and its subsidiary bodies immediately shifted focus to address the impacts of the COVID-19 pandemic and find policy solutions to its devastating effects.¹⁷ The core of the ECOSOC's pandemic response has been promoting a robust multilateral response guided by global solidarity, with the longer-term view of ensuring the realizations of the Sustainable Development Goals (SDGs). The 2030 Agenda and the SDGs have been the most viable roadmap for recovery and building resilience.¹⁸

Recognizing that pandemic policies are also economic policies, and there could be no durable end to the economic crisis without an end to the health crisis, the International Monetary Fund (IMF) set proposal targets for defeating COVID-19: (i) vaccinating at least 40% of the population in all countries by the end of 2021 and at least 60% by the first half of 2022; (ii) tracking and insuring against downside risks; and (iii) ensuring widespread testing and tracing, maintaining adequate stocks of therapeutics, and enforcing public health measures

¹⁶ The Secretary-General's UN COVID-19 Response and Recovery Fund [Online]. Available at: <https://unsdg.un.org/sites/default/files/2020-04/COVID19-Response-Recovery-Fund-Document.pdf> (Accessed: December 16, 2021).

¹⁷ ECOSOC's response to COVID-19 [Online]. Available at: <https://www.un.org/ecosoc/sites/www.un.org.ecosoc/files/files/en/2020doc/ECOSOC-and-COVID-19-compilation-of-actions.pdf> (Accessed: December 16, 2021)

¹⁸ Sustainable Development Goals [Online]. Available at: <https://sdgs.un.org/goals> (Accessed: December 16, 2021).

in places with low vaccine coverage.¹⁹ Besides its proposal targets, the IMF's actions have been focused along several tracks. First, it focused on emergency financing. It temporarily doubled the access to its emergency facilities (the Rapid Credit Facility and the Rapid Financing Instrument) to meet the increased demand for financial assistance from member countries during the crisis. Second, it focused on grants for debt relief. Its Catastrophe Containment and Relief Trust extended debt-service relief related to IMF obligations to 29 of its poorest and most vulnerable member countries, covering the debts falling due between April 2020 and mid-October 2021. Third, it focused on bilateral debt relief. The IMF managing director and the president of the World Bank recognized the heavy burden the crisis was having on low-income countries. Therefore, on March 25, 2020, they called on bilateral creditors to suspend debt service payments from the poorest countries. On April 15, 2020, the G20 agreed to suspend repayment of official bilateral credit from the poorest countries until the end of 2020 (since extended until the end of 2021). Fourth, they focused on calls for a new Special Drawing Rights (SDR) allocation of US\$650 billion. In April 2021, the International Monetary and Finance Committee called on the IMF to make a comprehensive proposal on a new SDR general allocation of US\$650 billion to help meet the long-term global need to supplement reserves and enhance transparency and accountability in SDR reporting and use. Fifth, they focused on enhancing liquidity. The IMF approved a short-term liquidity line to strengthen the global financial safety net. Sixth, they focused on adjusting existing lending arrangements. The IMF augmented existing lending programs to accommodate urgent new needs arising from the pandemic, thereby channeling existing resources toward the cost of medical supplies, equipment, and virus containment. Seventh, they focused on providing policy advice. The IMF monitors economic developments and the impact of the pandemic at the global, regional, and country levels. Thus, it has recommended policies to overcome the crisis, protect the most vulnerable, and set the stage for economic recovery. Finally, it focused on capacity development. In response to the pandemic, the IMF has provided real-time policy advice and capacity development to over 160 countries to address urgent issues, such as cash management, financial supervision, cybersecurity, and economic governance.²⁰

The World Bank Group has also taken steps to contain the spread and impact of COVID-19. It mounted the largest crisis response in its history to help developing countries strengthen their pandemic response. Since the start of the COVID-19 crisis, the World Bank Group has committed over US\$157 billion to fight the impacts of the pandemic. The funds

19 IMF Staff Discussion Note: A Proposal to End the COVID-19 Pandemic [Online]. Available at: <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2021/05/19/A-Proposal-to-End-the-COVID-19-Pandemic-460263> (Accessed: December 16, 2021).

20 The IMF Response to COVID-19 [Online]. Available at: <https://www.imf.org/en/About/FAQ/imf-response-to-covid-19#Q1> (Accessed: December 16, 2021).

committed between April 2020 and June 2021 included over US\$50 billion worth of International Development Association resources on grant and highly concessional terms.²¹ The World Bank Group has tailored its support to countries' pandemic-related health, economic, and social shocks, helping over 100 developing countries save lives and detect, prevent, and respond to COVID-19. The World Bank Group made US\$20 billion available to developing countries to finance the purchase and distribution of COVID-19 vaccines. It also supported the Africa Vaccine Acquisition Task Team initiative to provide desperately needed vaccines to the continent. The World Bank Group's three-stage crisis response—relief, restructuring, and resilient recovery—has focused on four main areas: (i) saving lives; (ii) protecting poor and vulnerable people; (iii) ensuring sustainable business growth and job creation; and (iv) strengthening policies, institutions and investments.²²

2.3. The COVID-19 Crisis as a Human Rights Crisis

COVID-19 has also caused a human rights crisis as more states have declared states of emergency than ever before. Domestic laws cover the regulation of states of emergency.²³ The matter of which conditions constitute a state of emergency is also a matter of the national legislatures' choice under the national jurisdiction.²⁴ However, the limitation of fundamental rights has inherently close ties with derogation from human rights treaties;²⁵ therefore, it has significant international aspects.²⁶

It is necessary to explain the distinction between the limitation of and the derogation from human rights. Generally speaking, human rights treaties apply double terminology. On

21 World Bank Group's \$157 Billion Pandemic Surge Is Largest Crisis Response in Its History [Online]. Available at: <https://www.worldbank.org/en/news/press-release/2021/07/19/world-bank-group-s-157-billion-pandemic-surge-is-largest-crisis-response-in-its-history> (Accessed: December 16, 2021).

22 The World Bank Group's Response to the COVID-19 (Coronavirus) Pandemic [Online]. Available at: <https://www.worldbank.org/en/who-we-are/news/coronavirus-covid19> (Accessed: December 16, 2021).

23 Jurisprudence uses many terms for crises and emergencies, including "public emergency," "state of emergency," "state of siege" (Argentina, Bolivia, Colombia), "state of alarm" (Spain), "economic state of emergency" (Nicaragua), "state of war" (Finland), "state of national necessity" (Madagascar), and "special legal order" (Hungary). This chapter uses the term of "state of emergency" as a generic category, except when international human rights treaties expressly provide different terminology. On the versatile terminology, see UN Doc. A/45/40, Vol. I, § 219; UN Doc. A/57/40, Vol. I, § 34 (Argentina); UN Doc. A/52/40, Vol. I, § 204 (Bolivia); UN Doc. CCPR/C/SR.222, § 3 (Colombia); UN Doc. CCPR/C/SR.142, § 5 (Spain); UN Doc. CCPR/C/SR.442, § 7 (Nicaragua); UN Doc. CCPR/C/SR.170, § 84 (Finland); UN Doc. CCPR/C/SR.83, § 27 (Madagascar).

24 For instance, while European countries with a civil law system apply the model of a "dichotomy," the United States follows the so-called "monist" approach. Mészáros, 2016, p. 37.

25 "Covenant," "convention," or "charter" are the most commonly used specific terms used for international human rights instruments. This chapter, in accordance with the law of treaties, uses "treaty" as a general term referring to all of them. Kende et al., 2014, pp. 174–176.; Kovács, 2016, pp. 103–105.

26 Svensson-McCarthy, 1998, pp. 22–31.

the one hand, they stipulate “peacetime” limitations as a manifestation of the non-absolute nature of human rights and the sensitive balance between the interests of the individual and the public.²⁷ Concerning the treaties analyzed in this chapter, many ECHR and ICCPR rights are subject to expressed or implied limitations. The scope of these limitations is specified in the texts of these treaties and determined by their interpretation by state parties the European Court of Human Rights (ECtHR), and the Human Rights Committee (HRC). Consistent with this, limitations can be permanent.²⁸ The ECHR and the ICCPR allow substantial scope for state parties to respond to a crisis or emergency by limiting specific rights rather than derogating from them.²⁹ On the other hand, these human rights treaties also provide the possibility of derogating.³⁰ Thus, no equal sign can be put between limitations and derogations. The right to derogation means that state parties to these human rights treaties have a temporary opportunity to exempt them from their international obligations in times of emergency. The derogation of a right or an aspect of a right is its complete or partial elimination as an international obligation,³¹ and the primary consequence of exercising this right is that the derogating state may not be held responsible for violating the relevant provisions of such a human rights treaty. At the same time, derogations from absolute rights are prohibited even in times of emergency (more detail is provided on this later).

Rather than hard-and-fast boundaries between limitations and derogations, there seems to be an overlap with similar principles (e.g., proportionality and nondiscrimination) being applicable. However, derogation from some ECHR and the ICCPR obligations in emergency situations is legally distinct from limitations allowed even in normal times under several provisions of the ECHR and the ICCPR. The logic of the ECHR and the ICCPR is that states should limit rights rather than derogate from them if possible.³²

The crisis brought about by the COVID-19 pandemic has required most of the states worldwide to take extraordinary measures to protect the health and well-being of their populations. However, emergency powers should be exercised within the parameters provided by international human rights laws—particularly the ECHR and the ICCPR—as far as Europe and the states examined in this book are concerned. These treaties acknowledge that states may need additional powers to address exceptional situations. Such powers should be time-bound and temporary and aim to restore a state of normalcy as soon as possible. The derogation of certain civil and political rights is only allowed under specific situations of emergency that

27 Daes, 1983, p. 183.

28 McGoldrick, 2004, p. 383.

29 Kiss, 1980, p. 290.

30 Gárdos-Orosz, 2018, pp. 29–30.

31 Higgins, 1976, p. 281.

32 McGoldrick, 2004, p. 384.

“threaten the life of the nation.” Some safeguards must be put in place, including the respect of some fundamental rights that cannot be suspended under any circumstances.

At the same time, states can adopt exceptional measures to protect public interests that may restrict certain human rights even without formally declaring states of emergency. These restrictions must meet the requirements of legality, necessity, proportionality, and nondiscrimination. Derogation from human rights treaties remains off the table. The latter might be one reason for states’ reluctance to rely on derogation clauses. According to recent statistics issued by the Council of Europe (CoE) in 2020, Article 15 (derogation clause) of the ECHR fell under the category of “other articles of the Convention” for violations by article.³³ The COVID-19 pandemic caused a turning point, though.³⁴ In March 2020, ten state parties to the ECHR notified the Secretary-General of the CoE of their decision to use Article 15 of the Convention: Albania, Armenia, Estonia, Georgia, Latvia, the Republic of Moldova, North Macedonia, Romania, Serbia, and San Marino. To date, only nine other state parties to the Convention (Albania, Armenia, France, Georgia, Greece, Ireland, Turkey, Ukraine, and the United Kingdom) have relied on their right to derogation.³⁵

Despite the “derogation wave” generated by the pandemic, applying limitations still seem more appealing for ECHR state parties than triggering Article 15. Recent applications reaching the ECtHR relating to the COVID-19 health crisis are instructive. Although these cases have raised questions under a several provisions of the Convention (the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, the protection of property, and freedom of movement), no case related to concerned the derogation of Convention rights. There were two probable reasons for this: the relatively small number of pandemic-related Article 15 derogations and the relatively short period of time the few derogations were in effect. Nine of the ten derogations were no longer in effect; Georgia retained its notified pandemic-related derogations until January 1, 2022.³⁶

For the cases reaching the ECtHR in the context of the COVID-19 pandemic, the above-mentioned statement seems to be true: no cases were related to derogations, but many related to the limitation of Convention rights.

33 See more details on the CoE website [Online]. Available at: https://www.echr.coe.int/Documents/Facts_Figures_2020_ENG.pdf (Accessed: May 10, 2021)

34 Halpern, 2020, pp. 1–15; Lebret, 2020, pp. 1–15.

35 See more details on the CoE website [Online]. Available at: https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf (Accessed: May 10, 2021).

36 Notification JJ9254C Tr./005-280 (June 30, 2021) Communication related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).

EMERGENCY POWERS IN CENTRAL AND EASTERN EUROPE

Procedural aspects	
Article 34 Victim status	<i>Le Mailloux v. France</i> (no. 18108/20)— <i>inadmissible</i> The application amounted to an <i>actio popularis</i> .
Article 35(1) and (3) Exhaustion of domestic remedies	<i>Zambrano v. France</i> (no. 41994/21)— <i>inadmissible</i> Inadmissible for several reasons, including (1) the failure to exhaust the domestic remedies and (2) it amounted to an abuse of the right to individual application
Substantial aspects	
	<p><i>Feilazoo v. Malta</i> (no. 6865/19)—<i>Chamber judgment, March 11, 2021</i> Additional quarantine after the isolation period in immigration detention amounted to the violation of Article 3 (prohibition of inhuman or degrading treatment).</p> <p><i>Ünsal and Timtik v. Turkey</i> (no. 36331/20)—<i>inadmissible</i> Compatibility of the conditions of detention; manifestly ill-founded application</p> <p><i>Hafeez v. the United Kingdom</i> (no. 14198/20)—<i>pending</i> Risk of life imprisonment without parole and inadequate conditions of detention due to the COVID-19 pandemic in case of extradition to the United States</p> <p><i>Maratsis and Others v. Greece</i> (no. 30335/20) and <i>Vasilakis and Others v. Greece</i> (no. 30379/20)—<i>applications communicated to the Greek government on February 25, 2021</i> Detention of HIV-positive prisoners in the context of COVID-19</p> <p>Articles 2–3 Right to life, prohibition of torture</p> <p><i>Fenech v. Malta</i> (no. 19090/20)—<i>complaints communicated to the Greek government on April 16, 2021</i> Detention on remand on suspicion of murder; suspension of criminal proceedings for three months; several unsuccessful applications for bail</p> <p><i>Vlamis and Others v. Greece</i> (no. 29655/20) and four other applications (nos. 29689/20, 30240/20, 30418/20 and 30574/20)—<i>application communicated to the Greek government on April 16, 2021</i> Detention in prison and lack of preventive measures</p> <p><i>Rus v. Russia</i> (no. 2610/21)—<i>application communicated to the Romanian government on June 11, 2021</i> COVID-19 infection while in prison</p> <p><i>Riela v. Italy</i> (no. 17378/20)—<i>application communicated to the Italian government on May 5, 2021</i> Absence of adequate medical treatment for the applicant's multiple diseases and inadequate protection from the risk of contracting COVID-19</p> <p><i>Faia v. Italy</i> (no. 17378/20)—<i>application communicated to the Italian government on May 5, 2021</i> Incompatibility of the applicant's medical condition and serious disability with detention in a correctional facility; inadequate protection from the risk of contracting COVID-19</p>

INTERNATIONAL ASPECTS OF THE COVID-19 HEALTH CRISIS

<p>Article 5 Right to liberty and security</p>	<p><i>Fenech v. Malta</i>—see above under right to life and prohibition of torture</p> <p><i>Terheş v. Romania</i> (no. 49933/20)—<i>inadmissible</i></p> <p>The case concerned the lockdown ordered by the Romanian government in the spring of 2020 to tackle the COVID-19 pandemic, which entailed restrictions on leaving one's home.</p>
<p>Article 6 Right to a fair trial</p>	<p><i>Association of orthodox ecclesiastical obedience v. Greece</i> (no. 52104/20)—see below under freedom of religion</p> <p><i>Avagyan v. Russia</i> (no. 36911/20)—<i>pending</i></p> <p>Instagram comment saying no real cases of COVID-19 in the region where the applicant lived; disseminating untrue information; sentenced to a fine</p> <p><i>Bah v. the Netherlands</i> (no. 35751/20)—<i>inadmissible</i></p> <p>This case concerned the impossibility for the applicant, a Guinean national, to be heard in immigration detention appeal in person or by teleconference or videoconference due to initial infrastructure problems in COVID-19 pandemic.</p> <p><i>Khokhlov v. Cyprus</i> (no. 53114/20)—<i>application communicated to the Cypriot government on February 10, 2021</i></p> <p>This application concerned the applicant's ongoing detention since October 2018 for the purpose of his extradition to Russia to stand trial.</p> <p><i>Ait Oufella v. France</i> (no. 51860/20) and three other applications—<i>application communicated to the French government on September 13, 2021</i></p> <p>These four applications concerned pre-trial detentions extended automatically without any decision by a judge in the context of emergency legislation at the start of the COVID-19 pandemic.</p>
<p>Article 8 Right to respect for private and family life</p>	<p><i>D.C. v. Italy</i> (no. 17289/20)—<i>October 15, 2020 (decision—striking out)</i></p> <p>The applicant complained that the Italian authorities had not taken provisional and urgent measures to ensure the maintenance of the family tie with his five-year-old daughter during the confinement.</p> <p><i>Thevenon v. France</i> (no. 46061/21)—<i>application communicated to the French government on October 7, 2021</i></p> <p>The case concerned mandatory vaccination for certain professions.</p>

EMERGENCY POWERS IN CENTRAL AND EASTERN EUROPE

<p>Article 9 Freedom of religion</p>	<p><i>Spînu v. Romania</i> (no. 29443/20)—application communicated to the Romanian government on October 1, 2020 Moral and religious assistance to prisoners was interrupted.</p> <p><i>Association of orthodox ecclesiastical obedience v. Greece</i> (no. 52104/20)—application communicated to the Greek government on February 25, 2021 This case concerned the prohibition on collective worship in the context of COVID-19.</p> <p><i>Magdić v. Croatia</i> (no. 17578/20)—application communicated to the Croatian government on May 31, 2021 Alleged breach of freedom of religion, assembly, and movement.</p>
<p>Article 10 Freedom of expression</p>	<p><i>Avagyan v. Russia</i> (no. 36911/20)—see above, right to a fair trial</p>
<p>Article 11 Freedom of assembly and association</p>	<p><i>Communauté genevoise d'astion syndicale (CGAS) v. Switzerland</i> (no. 21881/20)—application communicated to the Swiss Government on September 11, 2020 This case concerned the ban on demonstrations in the context of the COVID-19 pandemic.</p> <p><i>Magdić v. Croatia</i> (no. 17578/20)—see above under freedom of religion</p>
<p>Protocol No. 1, Article 1 Protection of property</p>	<p><i>Toromag, s.r.o. v. Slovakia and four other applications</i> (nos. 41217/20, 41253/20, 41263/20, 41271/20, and 49716/20)—applications communicated to the Slovakian government on December 5, 2020 Closing of fitness centers for four months to prevent of the propagation of the COVID-19; pecuniary damages incurred and loss of future income</p>
<p>Protocol No. 4, Article 2 Freedom of movement</p>	<p><i>Magdić v. Croatia</i> (no. 17578/20)—see above under freedom of religion</p>

Table 2
The ECtHR and the COVID 19 Health Crisis: Table of Cases
Source: Author's compilation

Human rights treaties usually have a derogation clause that enables state parties to unilaterally derogate from some of their substantive obligations under the respective treaty. Derogation clauses are of great significance to the general integrity of these treaties and the protection of human rights in times when individuals might be especially vulnerable to authoritarian actions by the state.³⁷ Not every human rights treaty provides a derogation clause.

³⁷ Harris et al., 2018, pp. 823–824.

INTERNATIONAL ASPECTS OF THE COVID-19 HEALTH CRISIS

Universal	1.	ICCPR (1966)	Derogation clause: Article 4(1)–(3)	Absolute rights: Article 6: Right to life Article 7: Prohibition of torture or cruel, inhuman, or degrading treatment or punishment Article 8(1)–(2): Prohibition of slavery, slave trade, and servitude Article 11: imprisonment/contractual obligations Article 15: <i>Nullum crimen sine lege, nulla poena sine lege</i> Article 16: Recognition of everyone as person before the law Article 18: Freedom of thought, conscience, and religion	
	2.	ICESCR (1966)	–	–	
Regional	3.	European	ECHR (1950)	Derogation clause: Article 15(1)–(3)	Absolute rights: Article 2: Right to life Article 3: Prohibition of torture Article 4: Prohibition of slavery and forced labor Article 7: No punishment without law
	4.		Revised ESC (1996)	Derogation clause: Part V Article F	–
	5.	American	ACHR ³⁸ (1969)	Derogation clause: Article 27	Absolute rights: Article 3: Right to judicial personality Article 4: Right to life Article 5: Right to humane treatment Article 6: Freedom from slavery Article 9: freedom from <i>ex post facto</i> laws Article 12: Freedom of conscience and religion Article 17: Rights of the family Article 18: Right to a name Article 19: Rights of the child Article 20: Right to nationality Article 23: Right to participate in government Judicial guarantees essential for the protection of such rights

38 On the American approach, see Nugraha, 2017, pp. 200–201.

Regional	6.	Arabic	Revised Arab Charter on Human Rights ³⁹ (2004)	Derogation clause: Article 4(1)	Absolute rights: Article 5: Right to life Article 8: Prohibition of torture Article 9: Prohibition of medical or scientific experimentation Article 10: Prohibition of slavery and trafficking in human beings Article 13: Right to a fair trial Article 14(6): Entitlement to a competent court and right to lawful detention Article 15: <i>Nullum crimen sine lege, nulla poena sine lege</i> Article 18: Imprisonment for debts Article 19: <i>Ne bis in idem</i> Article 20: Right to human dignity of detainees Article 22: Recognition as a person before the law Article 27: No one may be arbitrarily or unlawfully prevented from leaving any country Article 28: Right to seek political asylum Article 29: Right to nationality Article 30: Right to freedom of thought, conscience, and religion
	7.	African	ACHPR (1981)	–	–

Table 3

Derogation Clauses in Human Rights Treaties: First and Second Generation of Human Rights

Source: Author's compilation

3. Article 15 of the ECHR

As with domestic law, drafting the concept of “public emergency” under human rights treaties can be challenging. It might be even more challenging at the international level than at the national level, considering the high number of ratifications needed to enter the treaty into force. The high number of ratifications always necessitates a comprehensive compromise among the states that is not easy to achieve.

The derogation clauses in the draft provisions of a treaty cannot be too extensive, which would greenlight states’ abuses, nor too restrictive, which would exclude reasonable scenarios

³⁹ League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, entered into force March 15, 2008.

such as wars, terrorism, natural disasters, industrial accidents, mass demonstrations, or pandemics as grounds for a state of emergency. The concept of “public emergency” needs to achieve a delicate balance between the rule of law and the lack of foreseeability.⁴⁰ Consider this from the International Law Association:

[State of emergency] is neither desirable nor possible to stipulate in what particular type or types of events will automatically constitute a public emergency within the meaning of the terms; each case has to be judged on its own merits taking into account the overriding concern for the continuance of a democratic society.⁴¹

Incorporating this doctrine into a treaty subjects it to legal requirements, a goal consistent with the emphasis on legalism in international conventions. The general objective of human rights treaties of providing a minimum level of protection is also at the core of the state of emergency provisions in the ECHR and the ICCPR.⁴² Even though the ICCPR was opened for signature 16 years later than the ECHR, Article 4 of the UN Draft Covenant on Human Rights (which later became Article 4 of the Covenant) had served as the basis for Article 15 of the Convention.⁴³ To analyze the derogation clause of the ECHR, we need to get acquainted with the text of this provision. Article 15 of the Convention provides the following:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (Paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the

⁴⁰ As Alexander Hamilton wrote, “It is impossible to foresee or to define the extent and variety of national exigencies and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed” (Hamilton, 1960, p. 153).

⁴¹ Gross, 1998, p. 439.

⁴² Van der Sloot, 2014, p. 322.

⁴³ *Travaux préparatoires* on Article 15 of the ECHR, Appendix I, p. 10 [Online]. Available at: [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART15-DH\(56\)4-EN1675477.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART15-DH(56)4-EN1675477.pdf) (Accessed: May 5, 2021).

Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Under exceptional circumstances, Article 15 affords state parties to the ECHR the possibility of derogating from their obligation to secure certain rights and freedoms under the Convention in a temporary, limited, and supervised manner. The underlying policy is to provide for limited noncompliance to obviate the need for more far-reaching limitations of human rights. In the absence of such a legal safety valve, states might hesitate to join the ECHR or might attach more significant reservations to their accession.⁴⁴

The application of the derogation clause of the Convention must meet the following substantive and procedural criteria: (i) the right to derogate can be invoked only in time of war or other public emergency threatening the life of the nation (Article 15 (1)); (ii) a state party to the Convention may take measures derogating from its obligations under the ECHR only to the extent strictly required by the exigencies of the situation (Article 15 (1)); (iii) any derogations may not be inconsistent with the state's other obligations under international law (Article 15 (1)), as previously mentioned; (iv) certain rights under the ECHR do not allow any derogation (Article 15 (2)): Right to life (Article 2), prohibition of torture and inhuman or degrading treatment or punishment (Article 3), prohibition of slavery or servitude (Article 4), the rule of "no punishment without law" (Article 7), abolishing death penalty in peacetime (Article 1 of Protocol No. 6) and in all circumstances (Article 1 Protocol No. 13), and the right not to be tried or punished twice (the *ne bis in idem* principle) (Protocol No. 7);⁴⁵ (v) the state party to the Convention availing itself of this right of derogation must keep the Secretary-General of the CoE fully informed (Article 15 (3)).

While Article 15 (1)–(2) stipulates the substantive requirements, Article 15 (3) enshrines a procedural one. For the very first time, these criteria were explicitly formulated by the ECtHR in *Lawless v. Ireland*.⁴⁶

[T]he Government of any High Contracting Party has the right, in case of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention other than those named in Article 15, Paragraph 2, provided that

44 Schreuer, 1982, p. 115.

45 The effect of Article 15(2) (and the corresponding nonderogation clauses in Protocol 6, Protocol 7, and Protocol 13) is that the rights to which they refer continue to apply during any time of war or public emergency, irrespective of any derogation made by a contracting state. See Gárdos-Orosz, 2020, p. 8.

46 Suspected of being a member of the Irish Republican Army, the applicant alleged that he had been held from July–December 1957 in a military detention camp in Ireland without being brought before judge during the relevant period. For the facts of the case, see *Lawless v. Ireland* (no. 3.), 1961. See also Lorz, 2003, pp. 88–90.

such measures are strictly limited to what is required by the exigencies of the situation and also that they do not conflict with other obligations under international law.⁴⁷

3.1. Article 15 (1): The Terms of Valid Derogations

As pointed out above, Article 15(1) sets out three substantial requirements for a valid derogation from the Convention: (i) there must be a time of war or other public emergency threatening the life of the nation; (ii) the measures taken in this context must not go beyond the extent strictly required by the exigencies of the situation; and (iii) the measures taken in this context must not be inconsistent with the state's other obligations under international law.

3.2. Article 15(1): "In Time of War or Other Public Emergency Threatening the Life of the Nation"

It is for the ECtHR to interpret the ECHR and each element of Article 15, including what can constitute "war" or "public emergency."⁴⁸ Although the Court has thus far never been required to interpret the concept of "war" under the Convention, presumably any substantial violence or unrest short of war would likely to fall within the scope of a "public emergency threatening the life of the nation." Besides, the term "war" in Article 15(1) is not problematic because a close reading of the language of Article 15(1), with special attention to the phrase "other public emergency," supports the proposition that "war" is meant to be one example of a "public emergency" justifying derogations.

In the first case regarding Article 15 of the ECHR, *Greece v. the United Kingdom*,⁴⁹ the British government invoked a state of emergency on the territory of Cyprus, then part of its empire, although this was disputed by Greece. The European Commission of Human Rights argued that "the government concerned retains, within certain limits, its discretion in appreciating the threat to the life of the nation," a discretion that it held to be subjected to critical European supervision. The customary meaning of "public emergency" was scrutinized in *Lawless v. Ireland*:

[A]n exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.⁵⁰

47 *Lawless v. Ireland* (no. 3.), 1961, § 22.

48 Harris et al., 2018, p. 829.

49 *Greece v. the United Kingdom*, 1958, § 136.

50 *Lawless v. Ireland* (no. 3.), 1961, § 28. In *Lawless v. Ireland*, the majority agreed that there were no grounds for limiting the meaning of the phrase "in time of war" to cover only a total war. Thus, it could also cover less comprehensive war situations providing they threatened the life of the nation. El Zeidy, 2003, p. 283.

What should a crisis or an emergency be like? A crisis or an emergency should be actual and imminent. It was established in *Ireland v. the United Kingdom*⁵¹ and in *Aksoy v. Turkey*⁵² that even a crisis or an emergency that concerns only a particular region of a state could amount to a “public emergency threatening the life of the nation.”⁵³ With regard to actual or imminent, under international law, a state of emergency of a preventive nature is not justified. Therefore, it is not acceptable for states to derogate from human rights to face possible exceptional situations that have not yet arisen. The emergency must be present or at least imminent.⁵⁴ This was also clarified by the European Commission of Human Rights in the “Greek case”:⁵⁵

[W]ith regard to the actual or imminent character of the emergency, it imposes a limitation in time, that is to say, the legitimacy of a derogation undertaken at a certain date depends upon there being a public emergency, actual or imminent at that date.⁵⁵

Additionally, it was also formulated in the “Greek case” that the crisis or emergency (i) must be actual or imminent; (ii) its effects must involve the whole nation; (iii) the continuance of the organized life of the community must be threatened; and (iv) the crisis or danger

51 To combat what the respondent government described as “the longest and most violent terrorist campaign witnessed in either part of the island of Ireland,” the authorities in Northern Ireland had exercised from August 1971 until December 1975 a series of extrajudicial powers of arrest, detention, and internment. The United Kingdom government sent the CoE’s Secretary-General six derogation notices concerning those powers during that period. The Irish Government argued that the extrajudicial measures of deprivation of liberty were not fully compatible with Article 15 and breached Article 5 (right to liberty and security) of the ECHR. See the facts of the case: *Greece v. the United Kingdom*, 1958.

52 Since 1985, serious disturbances had raged in southeastern Turkey between the security forces and members of the PKK. At the time the ECtHR examined the case, ten of the eleven provinces of that part of Turkey had been subjected since 1987 to emergency rule. The applicant alleged that his detention in 1992 on suspicion of aiding and abetting PKK terrorists had been illegal. The Turkish Government stated that there had been no violation of Article 5 (right to liberty and security) of the ECHR considering Turkey’s derogation notification in 1990 in accordance with Article 15 of the ECHR. They argued that the public emergency in southeastern Turkey had threatened the nation. That assertion was not disputed by the applicant, although he asserted that it was a question for the ECHR organs to address. See the facts of the case: *Aksoy v. Turkey*, 1996.

53 *Ireland v. the United Kingdom*, 1978, § 205; *Aksoy v. Turkey*, 1996, § 70.

54 Oraá, 1992, p. 27.

55 On April 21, 1967, a revolutionary (military) government overthrew the regime in Greece. The following month the new government informed the CoE’s Secretary General, under Article 15 of the ECHR, that they had suspended certain rights under the Greek Constitution. In their application, the Danish, Norwegian, Swedish and Dutch governments alleged that the Greek government had violated number of ECHR provisions and that it had not been shown that the conditions laid down in Article 15 for derogation measures had been fulfilled. Greece argued that the European Commission of Human Rights was not competent to examine the situation under Article 15 on the ground that it could not control the actions by which a revolutionary government maintained itself power. See the facts of the case: *Denmark, Norway, Sweden and the Netherlands v. Greece*, Commission Report, 1969.

must be exceptional in that the normal measures permitted by the ECHR for the maintenance of public safety, health, and order were plainly inadequate.⁵⁶ In *Khlebik v. Ukraine*, when a derogation had been made, the ECtHR declined to assess whether the situation in question was covered by a valid derogation on the grounds that the parties to the proceedings before it had not so requested.⁵⁷

In connection with the duration of the crisis or of the emergency, the Court has never explicitly incorporated the condition of temporariness. Moreover, it demonstrated that the meaning of “public emergency” within Article 15(1) might last for many years—as was asserted *A. and Others v. the United Kingdom*⁵⁸ in terms of the security situation after the September 11, 2001 (hereafter, 9/11), terrorist attacks committed by al Qaeda against the United States.⁵⁹

In deciding whether a “public emergency” existed or not, the ECtHR basically deferred to the assessment of national authorities in *Ireland v. the United Kingdom*:

[I]t falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation,” to determine whether that life is threatened by a “public emergency.”⁶⁰

The rationale behind the Court’s reasoning was that national authorities were, in principle, better placed than an international judge to assess both the presence of such an emergency and the nature and scope of the derogations necessary to avert it. The latter means state parties to the Convention have considerable discretion when deciding the existence of a “public emergency.”⁶¹ However, the domestic margin of appreciation might be accompanied by ECtHR supervision.⁶² At the same time, national authorities’ assessments are not unlimited. In the “Greek case,” based on the evidence before it in the case brought against Greece in response to the “colonels” coup in 1967, the European Commission of Human Rights found that there was no public emergency that justified the derogation made.⁶³ It is noteworthy

⁵⁶ *Denmark, Norway, Sweden and the Netherlands v. Greece*, Commission Report, 1969, § 153; Harris et al., 2018, p. 830.

⁵⁷ *Khlebik v. Ukraine*, 2017, § 82.

⁵⁸ *A. and Others v. the United Kingdom*, 2009, § 178.

⁵⁹ The British government contended that the events of 11 September 2001 demonstrated that al Qaeda-inspired international terrorists “had the intention and capacity to mount attacks against civilian targets on an unprecedented scale,” and that “their fanaticism, ruthless and determination” made it difficult for the state to prevent such attacks. See the facts of the case: *A. and Others v. the United Kingdom*, 2009.

⁶⁰ *Ireland v. the United Kingdom*, 1978, § 207.

⁶¹ Criddle and Fox-Decent, 2012, pp. 71–73.

⁶² *Mehmet Hasan Altan v. Turkey*, 2018, § 91; *Brannigan and McBride v. the United Kingdom*, 1993, § 43.

⁶³ *Denmark, Norway, Sweden and the Netherlands v. Greece*, Commission Report, 1969, §§ 159–165, 207.

that there was no dispute on the existence of a “public emergency” in the abovementioned cases concerning Northern Ireland and southeast Turkey, whereas the existence of a “public emergency” was disputed in detail in the “Greek case” on the attempted derogation by the military government in Greece.

As far as valid reasons for a “public emergency” are concerned, terrorism serves as a classic example. In *Ireland v. the United Kingdom*,⁶⁴ terrorism in Northern Ireland met the threshold of “public emergency,” as the Court asserted:

Particularly far-reaching and acute danger for territorial integrity of the United Kingdom, the institutions of the six counties [Northern Ireland] and the lives of the province’s inhabitants.⁶⁴

Other cases where terrorism also proved to be a valid basis for a “public emergency” were *Aksoy v. Turkey*⁶⁵ and the Kurdistan Workers’ Party’s terrorist activity in southeastern Turkey; *A. and Others v. the United Kingdom*⁶⁶ and the imminent threat of serious terrorist attacks in the United Kingdom after 9/11; and *Mehmet Hasan Altan v. Turkey*⁶⁷ and the attempted military coup in Turkey in 2016.

3.3. Article 15(1): “Measures...to the Extent Strictly Required by the Exigencies of the Situation”

“Strictly required” suggests a test more demanding than “necessary” under other articles of the ECHR, which requires that states show a pressing social need for their measures of limitation.⁶⁸ Under the international and especially the European approaches, national states have considerable discretion in interpreting and applying the rights and doctrines incorporated in the treaties. This latitude in judgment was attributed to them even with regard to invoking the state of necessity. This is evident in the special position of Article 15 of the ECHR, which does not speak of measures that are “necessary,” a phrase used in other articles of the Convention (among others), regarding the limitation of the rights to privacy and the freedom of speech; instead, it holds that they must be “strictly required.”⁶⁹

As noted in *Ireland v. the United Kingdom*,⁷⁰ the limits on the Court’s review powers are “particularly apparent” where Article 15 of the ECHR is concerned. Nonetheless, states do

⁶⁴ *Ireland v. the United Kingdom*, 1993, §§ 205, 212.

⁶⁵ *Aksoy v. Turkey*, 1996, § 70.

⁶⁶ *A. and Others v. the United Kingdom*, 2009, § 181.

⁶⁷ Turkey continued to detain the applicant despite a January 11, 2018, order from Turkey’s Constitutional Court for his release for alleged support of the 2016 attempted military coup. *Mehmet Hasan Altan v. Turkey*, 2018, §§ 91–91.

⁶⁸ Harris et al., 2018, p. 838.

⁶⁹ Van der Sloot, 2014, pp. 322–323.

⁷⁰ *Ireland v. the United Kingdom*, 1978, § 207.

not enjoy unlimited freedom in this respect. The ECtHR is entitled to rule on whether states have gone beyond the “extent strictly required by the exigencies” of the situation. The Court established that the existence of a “public emergency threatening the life of the nation” must not serve as a pretext for limiting freedom of political debate; measures taken should seek to protect the democratic order from the threats to it; and efforts should be made to safeguard the values of a democratic society.⁷¹

When assessing whether a state has gone beyond what is “strictly required by the exigencies of the situation,” the ECtHR gives appropriate weight to factors such as the nature of the rights affected by the derogation, the circumstances leading to it, and the duration of the emergency situation⁷² (e.g., whether ordinary laws would have sufficed to address the dangers posed by the public emergency,⁷³ whether the measures taken were a genuine response to an emergency situation,⁷⁴ whether the measures were used for the purpose for which they were granted,⁷⁵ whether judicial control over the measures was practicable,⁷⁶ etc.) All these factors are normally considered not retrospectively but on the basis of the “conditions and circumstances reigning when [the measures] were originally taken and subsequently applied.”⁷⁷ Notwithstanding, in *A. and Others v. the United Kingdom*⁷⁸ the ECtHR ruled that regardless of whether there was a public emergency, the Court was not precluded from considering information that came to light subsequently.⁷⁹

In *Baş v. Turkey*,⁸⁰ a judgment delivered in 2020, the ECtHR also addressed considerations that the application of Article 15 gradually becomes less forceful and relevant as a “public emergency threatening the life of the nation,” while still persisting, declines in intensity. The Court asserted that the exigency criterion must be applied more stringently with the passage of time. In another judgment delivered in December 2020, *Pişkin v. Turkey*,⁸¹ the Court pointed out that even in the framework of a state of emergency, the fundamental principle of the rule of law had to prevail.

71 *Mehmet Hasan Altan v. Turkey*, 2018, § 210.

72 *Brannigan v. McBride v. the United Kingdom*, 1993, § 43; *A. and Others v. the United Kingdom*, 2009, § 173.

73 *Lawless v. Ireland* (no. 3), 1961, § 36; *Ireland v. the United Kingdom*, 1978, § 212.

74 *Brannigan v. McBride v. the United Kingdom*, 1993, § 51.

75 *Lawless v. Ireland* (no. 3), 1961, § 38.

76 *Aksoy v. Turkey*, 1996, § 78.

77 *Ireland v. the United Kingdom*, 1978, § 214.

78 *A. and Others v. the United Kingdom*, 2009, § 177.

79 In that case, the ECtHR noted the bombings and attempted bombings in London in July 2005, which took place years after the notification and derogation in 2001.

80 This case concerned the attempted military coup in Turkey in 2016. *Baş v. Turkey*, 2020, § 224.

81 *Pişkin v. Turkey*, 2020, § 153.

3.4. Article 15(1): “Other Obligations Under International Law”

The third part of Article 15(1) concerns “other obligations under international law.” It reinforces the general principle of Article 53⁸² of the Convention and is addressed by the ECtHR of its own motion, if necessary,⁸³ even if only to observe that it has not found any inconsistency. Not surprisingly, relevant case law of the Court demonstrates Article 4 of the ICCPR was analyzed in light of “other obligation under international law” most of the time.

In *Brannigan and McBride v. the United Kingdom*, the ECtHR rejected the applicant’s submission that an official proclamation was a requirement for a valid derogation under Article 4 of the ICCPR,⁸⁴ and the absence of that proclamation meant the United Kingdom’s derogation was not consistent with its obligations under international law. In that case, the Court found that it was not its role to seek to define authoritatively the meaning of the terms “officially proclaimed” under Article 4 of the ICCPR.⁸⁵ In *Marshall v. the United Kingdom*,⁸⁶ the applicant referred to the decision of the HRC that the emergency provisions in Northern Ireland were “excessive,” arguing that the withdrawal of the derogation made under Article 4 of the ICCPR should be envisaged. However, the ECtHR rejected this argument, stating that it found nothing in the references to suggest that the government of the United Kingdom must be considered in breach of its obligations under ICCPR by maintaining its derogation after 1995.

3.5. The Procedural Criterion of Article 15(3): Notification Requirements

Besides its substantive elements, the derogation clause of the ECHR adds a procedural one. Article 15(3) of the Convention enshrines an obligation for availing states parties to keep the Secretary-General of the CoE fully informed. The primary purpose of that part of Article 15 is to make the derogation public. The ECHR is a system of collective enforcement, and through the Secretary-General, the other state parties to the Convention are also become informed of the derogation. Resolution 56(16) of the Committee of Ministers provides that

82 ECHR Article 53: “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.”

83 *Lawless v. Ireland* (no. 3), 1961, § 40.

84 In its relevant part, Article 4(1) of the ICCPR provides the following: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed [...]”

85 *Brannigan v. McBride v. the United Kingdom*, 1993, §§ 67–73.

86 *Marshall v. the United Kingdom*, 2001, pp. 11–12. The applicant in *Marshall v. the United Kingdom* questioned the continuing validity of the derogation, saying it would normally infringe Article 15(3). The applicant argued that by this stage there was no longer a genuine “public emergency” for the purposes of Article 15(1), given the significant improvement in the security situation in Northern Ireland at the time. The application was rejected at the admissibility stage by the ECtHR. Harris et al., 2018, p. 836.

any information transmitted to the Secretary-General in pursuance of Article 15(3) must be communicated by the Secretary-General to other state parties as soon as possible.⁸⁷

In *Cyprus v. Turkey*,⁸⁸ the European Commission of Human Rights ruled that in the absence of an official and public notice of derogation, Article 15 does not apply to the measures taken by the respondent state. To meet the threshold of notification, the state concerned must write a letter on all relevant measures, attach copies of the legal texts under which the emergency measures would be taken, and explain their purpose.⁸⁹ The question of whether a notification by a state complies with the formal requirements provided by Article 15(3) will be examined by the ECtHR *motu proprio*, even if it has not been contested by any of the other parties.⁹⁰

In *Brannigan and McBride v. the United Kingdom*, the Court also emphasized that Article 15(3) implied a requirement of permanent review of the need for emergency measures.⁹¹ Interestingly, the latter case regarded the same emergency measures as *Brogan and Others v. the United Kingdom* five years earlier. In that latter case, the government had not invoked a state of emergency. Subsequently, the ECtHR considered the derogation from certain liberties protected by the ECHR as a violation. Instead of revoking these measures, the British government left them intact and tried to legitimize them by relying on the state of emergency. Consequently, there was a huge delay in the notification of the emergency measures to the Secretary-General. Nevertheless, the Court ruled that the notification in 1988 regarding measures that entered into force in 1974 did not exceed the reasonable period of time since they were qualified as emergency measures only later on.⁹²

4. Article 4 of the ICCPR

As Angelika Siehr notes, “Article 4 is a key provision of the International Covenant on Civil and Political Rights and its implementation is a touchstone for the crucial question whether human rights are taken seriously in the most critical situations.”⁹³ The *travaux préparatoires* of the ICCPR reveal that by June 1949, the United Nations Commission on Human Rights had

87 *Greece v. the United Kingdom*, 1958, § 158.

88 The case concerned the situation in Northern Cyprus after the 1974 Turkish invasion and the de facto separation of the Mediterranean island. *Cyprus v. Turkey*, 1983, §§ 66–68.

89 *Lawless v. Ireland* (no. 3), 1961, § 47; *Denmark, Norway, Sweden, and the Netherlands v. Greece*, Commission Report, 1969, § 81 (1)–(2).

90 *Aksoy v. Turkey*, 1996, §§ 85–86.

91 *Brannigan and McBride v. the United Kingdom*, 1993, § 54.

92 *Brogan and Others v. the United Kingdom*, 1988, § 48; Van der Sloot, 2014, p. 329.

93 Siehr, 2004, p. 545.

adopted Article 4, practically in its final version. The ECHR, adopted the following year, borrowed the derogation clause from the draft Covenant,⁹⁴ resulting in the similar wording of both clauses.⁹⁵ The ICCPR also expressly recognized that there could be emergency situations in which derogation from ICCPR rights could be justified. In terms of historical experience and international practice, that is a realistic view.⁹⁶

Before starting the detailed analysis, it is useful to cite Article 4 of the ICCPR in full:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from Articles 6, 7, 8 (Paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Under the ICCPR system of protection for human rights, Article 4 of the Covenant is of great significance for two reasons. One, it allows for a state party unilaterally to temporarily derogate from a part of its obligations under the ICCPR. Two, Article 4 subjects this very measure of derogation and its material consequences to a specific regime of safeguards.⁹⁷

⁹⁴ It is not only the ECHR that was inspired by the draft covenant of the United Nations Commission on Human Rights. The ACHR also borrowed the definition from the draft covenant for its own derogation clause (Article 27). For more detail on the drafting process of the ACHR, see Raisz, 2009, pp. 19–23.

⁹⁵ Oraá, 1992, p. 221.

⁹⁶ See Meron, 1987, pp. 50–55.

⁹⁷ In 2001, the HRC issued a general comment on whether state parties could narrow human rights in cases of emergency by derogating from their treaty obligations in accordance with Article 4 of the Covenant. United Nations, ICCPR, Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), adopted at the 1950th meeting on July 24, 2001, CCPR/C/21/Rev.1/Add.11. (hereafter: General Comment No. 29), p. 2.

Before a state party moves to invoke Article 4 of the Covenant, two fundamental criteria must be met: (i) the situation must amount to a public emergency that threatens the life of the nation (as under the ECHR); and (ii) the state party must have officially proclaimed a state of emergency. The latter requirement, a different element compared to the ECHR, maintains the principle of legality and of rule of law.⁹⁸

When proclaiming a state of emergency with consequences that could entail derogation from any provision of the ICCPR, states must act within their national constitutional laws that govern such proclamations and the exercise of emergency powers. Then, it is the task of the HRC to monitor the laws in question with respect to whether they enable and secure compliance with Article 4.⁹⁹ To allow the HRC to perform its task, state parties to the Covenant have to submit their reports under Article 40,¹⁰⁰ providing sufficient and precise information about their practice in the field of state of emergency.

4.1. Substantive Requirements: Article 4(1) and Article 4(2)

a) Article 4(1): Public Emergency that Threatens the Life of the Nation

The existence of a situation amounting to a “public emergency that threatens the life of the nation” is a fundamental condition that must be met before a state party invokes Article 4 of the Covenant. Because there has thus far been no attempt by the HRC to provide an abstract definition of or criterion for a “public emergency,” we have to use examples to outline

⁹⁸ For an interpretation of the limbs of Article 4 of the ICCPR, see American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* [Online]. Available at: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> (Accessed: December 10, 2021).

⁹⁹ Lamm, 2018, pp. 117–127.

¹⁰⁰ Article 40 of the ICCPR:

1. The State Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The State Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with Paragraph 4 of this article.

this concept. What constitutes a “public emergency that threatens the life of the nation” under the Covenant?

As with Article 15 of the ECHR, not every disturbance or catastrophe qualifies as a “public emergency” under Article 4(1) of the ICCPR. For example, during international and domestic armed conflicts, the rules of international humanitarian law apply to prevent the abuse of a state’s emergency power besides Article 5(1)¹⁰¹ of the Covenant. At the same time, wars are clearly included in the “implied” cases of public emergency, even though the notion of war per se was not included in Article 4 because of this argument:

The Covenant should not envisage, even by implication, the possibility of war, as the United Nations was established with the object of preventing war.¹⁰²

If state parties to the ICCPR consider invoking Article 4 in situations other than an armed conflict, they have to carefully consider the justification, explaining why such a measure is necessary and legitimate in the circumstances. While economic circumstances per se might not justify a derogation, their consequences might. The case of Ecuador demonstrated a derogation on the basis of a state of emergency declared for the country’s entire territory. Ecuador adopted measures to address the adverse consequences of the economic crisis affecting the republic, which had created a situation of serious internal unrest. The state of emergency was lifted after one week.¹⁰³

A “public emergency” must threaten the life of the nation as a special criterion under Article 4(1). Reference to “life of the nation” was preferred to terms referring to the “people” because of doubts about whether or not the latter expression denoted all people or just some of them. As previously mentioned, in *Lawless v. Ireland*, the ECtHR considered that the natural and customary meaning of “public emergency threatening the life of the nation” was sufficiently clear. The threat to the “life of the nation” could be to the physical population,¹⁰⁴ its

¹⁰¹ Article 5 (1) of the ICCPR:

Nothing in the present Covenant may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

¹⁰² UN Doc. A/2929, ch.5, §§ 35–47; UN Doc. A/5655, §§ 37–56.

¹⁰³ UN Doc. A/56/40, Vol. I, § 33. There was a similar derogation in 1999, UN Doc. A/55/40 Vol. I, § 30.

¹⁰⁴ In 2001, Guatemala derogated on the basis of 78 extremely dangerous prisoners escaping from a maximum-security prison because numerous Guatemalan citizens had acted as witnesses in their trials or filed complaints against them. Those citizens were said to be subject to threats and intimidation by the escaped prisoners. UN Doc. A/56/40, Vol. I, § 34.

territorial integrity,¹⁰⁵ or the state organs function.¹⁰⁶ However, the specific crisis or emergency could be geographically limited and still affect the whole population. In 2001, Sudan justified the extension of a state of emergency by the “exceptional circumstances prevailing in some regions” of the country considered to represent a serious threat to the stability and security of the country.¹⁰⁷ In 2002, Peru derogated on the basis of a state of emergency in the province of Arequipa.¹⁰⁸

b) Article 4(1): The Existence of the Emergency Shall Be Officially Proclaimed

The second fundamental criterion that has to be satisfied before Article 4 of the Covenant can be invoked is that a state of emergency must have been officially proclaimed.¹⁰⁹ This condition protects the principles of legality and the rule of law when they are most needed.¹¹⁰ The specific aims of this element are maintaining transparency, preventing arbitrary derogations, and reducing de facto emergencies.¹¹¹

Article 4 of the ICCPR does not specify which state organ should proclaim a state of emergency. In practice, it is a matter for the executive or the legislature. HRC case law demonstrates that states are asked how a “public emergency” is officially proclaimed, who is entitled to make the proclamation, on what grounds, and by what procedures.¹¹² Was the official proclamation of a state of emergency a precondition to the constitutionality or legality of the measures taken thereunder?¹¹³ Particular attention has been directed to the circumstances that permit the proclamation of a public emergency—for example, political, social, economic factors, or natural disasters.¹¹⁴

Article 4 of the ICCPR has been considered in a number of the HRC’s views under the Optional Protocol of the Covenant.¹¹⁵ Many of those views concerned the situation in Uruguay in the 1970s and 1980s, where multiple violations of rights under the ICCPR were alleged. The communications generally concerned the application of “prompt security measures” under

105 In 1999, Namibia derogated on the basis of a state of emergency in the Caprivi region, which it submitted threatened the life of the nation and the constitutional order. UN Doc. A/55/40, Vol. I, § 29.

106 See Symposium, *The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR*, 7 Human Rights Quarterly, 1 (1985).

107 UN Doc. A/57/40, Vol. I, § 32.

108 UN Doc. A/57/40, Vol. I, § 35.

109 Orúa, 1992, pp. 34–57.

110 General Comment No. 29, *States of Emergency (Article 4)*.

111 McGoldrick, 2004, p. 396.

112 UN Doc. CCPR/C/SR.29, § 6 (Tunisia).

113 UN Doc. CCPR/C/SR.170, § 58 (Finland).

114 UN Doc. CCPR/C/SR.84, § 11 (Madagascar); UN Doc. CCPR/C/SR.258, § 48 (Italy); UN Doc. CCPR/C/SR.222, § 3 (Colombia).

115 Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature December 16, 1966. 999 U.N.T.S. 171, entered into force March 23, 1976.

the state of emergency in Uruguay. Uruguay has often made general reference to the state of emergency in its submissions. The established approach of the HRC is exemplified by its view in *Ramirez v. Uruguay*:

The Human Rights Committee has considered whether any acts and treatment, which are prima facie not in conformity with the Covenant, could for any reason be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, including the Prompt Security Measures. However, the Covenant (Article 4) does not allow national measures derogating from its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow derogation under any circumstances.¹¹⁶

This view clearly indicates that the HRC will consider ex officio the possible application of Article 4 even when the state party does not specifically rely upon it.¹¹⁷

c) Article 4(1): Limited to the Extent Strictly Required by the Exigencies of the Situation

It is also common in Article 4 of the ICCPR and Article 15 of the ECHR that they set forth a fundamental requirement that such emergency measures are limited to the “extent strictly required by the exigencies of the situation,” which criterion is related to the duration, geographical coverage, and material scope of these emergency measures. In practice, this will ensure that no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behavior of a state party.¹¹⁸ Even though derogation from some ICCPR rights under Article 4 is clearly distinct from the limitations applicable even in normal times, the principle of proportionality also appears at the derogation clause through the obligation to limit any derogations to the “extent strictly required by the exigencies of the situation.” The principle of proportionality requires that state parties to the Covenant provide careful justification for their decision to proclaim a state of emergency and for any specific measures based on such a proclamation.

¹¹⁶ UN Doc. A/35/40, 121, § 17.

¹¹⁷ The HRC did not consider the possibility of derogation being a justification in *De Polay v. Peru*, UN Doc. A/53/40, Vol. II, Annex XI, F (trial by faceless judges, instituted to prevent judges from being targeted by terrorist groups, violated Article 14 of the ICCPR (fair trial)). The HRC expressed the same view in its Concluding Observations on Peru in 1996, see UN Doc. A/51/40, Vol. I, §§ 350, 363.

¹¹⁸ McGoldrick, 2004, pp. 407–408.

Concerning the standpoint of the HRC, the possibility of restricting certain Covenant rights is generally sufficient, even during a crisis or emergency, and no derogation from the ICCPR would be justified by the exigencies of the situation in question.¹¹⁹ Therefore, state parties must provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If the limitation of the relevant rights would be sufficient, then derogation from them would not be justified, according to the HRC:

If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (Article 12) or freedom of assembly (Article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.¹²⁰

The principles of proportionality and necessity were applied in *Silva v. Uruguay*, where the HRC considered the situation on the assumption that a state of emergency existed in Uruguay. It expressed the view that even on that assumption it could not see

[W]hat ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political rights for a period as long as 15 years. This measure applies to everyone, without distinction as to whether he sought to promote his political opinions by peaceful means or by resorting to, or advocating the use of, violent means. The Government of Uruguay has failed to show the interdiction of any kind of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom.¹²¹

119 General Comment No. 29, States of Emergency (Article 4), p. 3.

120 General Comment No. 29, States of Emergency (Article 4), p. 5.

121 UN Doc. A/36/40, 130.

Here, the HRC assessed the actions of the state party in terms of the necessity and proportionality of the measures applied. The onus is on the state party to justify its measures in those terms. On the basis of the foregoing, the HRC expressed the view that the prohibition on the complainants unreasonably restricted their rights under Article 25¹²² of the ICCPR; therefore, the state party was under an obligation to take steps to enable the citizens to participate again in the nation's political life.

d) Article 4 (1): Non-Discrimination

One spectacular distinction from Article 15 of the ECHR is that Article 4(1) of the ICCPR provides that one of the conditions necessary to justify any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, color, sex, language, religion, or social origin. Although Article 26¹²³ of the ICCPR and other nondiscrimination-related provisions of the Covenant are not listed under Article 4(2), there are elements of nondiscrimination that cannot be derogated from under a public emergency.

Criticism has been directed at national provisions that appear to violate this. For example, Article 23(3)(d) of the Constitution of Barbados was objected to because it allowed distinctions to be made in terms of a public emergency on some prohibited grounds.¹²⁴ Only measures that discriminate “solely” on the prohibited grounds are excluded. Intentional or direct discrimination is covered, but not measures that indirectly impact particular groups.¹²⁵ The grounds of prohibited discrimination are shorter than those in Article 2 of the ICCPR (the general guarantee of ICCPR rights). The omitted grounds are “political or other opinion,” “national origin,” “property,” “birth,” and “other status.” The absence of a reference to “other status” (as in Articles 2 and 26 of the ICCPR) means that the enumerated grounds of discrimination are exhaustive.¹²⁶

122 Article 25 of the ICCPR:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

123 Article 26 of the ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

124 UN Doc. CCPR/C/SR.265, § 6 (Barbados). See also the second periodic report of Barbados, UN Doc. CCPR/C/42/Add. 3, pp. 4–5.

125 Higgins, 1976, p. 287.

126 UN Doc. A/2929, Ch. 5, § 44.

e) Article 4(1): Other Obligations Under International Law

Article 4(1) also sets forth a substantive criterion of derogation, similar to Article 15 of the ECHR, and enshrines that no measures derogating from the provisions of the Covenant may be inconsistent with the state party's other obligations under international law, especially humanitarian law.¹²⁷ These obligations under international law encompass not only treaties but also other sources of international law such as customary law or general principles of civilized nations.¹²⁸

In terms of humanitarian law and nonderogable rights, safeguards related to derogation are based on the principle of legality and rule of law inherent in the ICCPR as a whole. Therefore, some elements of the right to a fair trial (only a court may try and convict a person for a crime, presumption of innocence, etc.) are explicitly guaranteed under international humanitarian law during an international or noninternational armed conflict. Therefore, the HRC found no justification for derogation from these guarantees during emergency situations and was of the opinion that the principle of legality and rule of law required that fundamental elements of the right to a fair trial must be respected, even during a state of emergency.¹²⁹ The HRC's reasoning in General Comment No. 29 was based on two pillars: (i) the Committee drew a parallel between human rights standards applicable in times of emergency and international humanitarian law applicable during armed conflicts; and (ii) the notion of derogation (within the meaning of Article 4 of the Covenant) was mirrored in other international legal concepts (such as international crimes and *jus cogens*¹³⁰).¹³¹

f) Article 4(2): Nonderogable Rights

Article 4(2) of the ICCPR explicitly provides that no derogation may be made from absolute rights under the Covenant under any circumstances. These absolute rights are these: (i) the right to life (Article 6); (ii) the prohibition of torture or cruel, inhuman, or degrading punishment or medical or scientific experimentation without consent (Article 7); (iii) the prohibition of slavery, slave trade, and servitude (Article 8 (1)–(2)); (iv) the prohibition of imprisonment because of inability to fulfill a contractual obligation (Article 11); (v) the principle of legality in the field of criminal law (Article 15); (vi) the recognition of everyone as a person before the law (Article 16); and (vii) the freedom of thought, conscience, and religion (Article

127 Under the term "humanitarian law," the 1949 Geneva Conventions and their three Additional Protocols must be met. For an overview, see the website of the International Committee of the Red Cross [Online]. Available at: <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> (Accessed: 5 May 2021).

128 General Comment No. 29, States of Emergency (Article 4), p. 4.

129 General Comment No. 29, States of Emergency (Article 4), p. 6.

130 On *jus cogens*, see Csapó, 2020, pp. 25–43.

131 Oliver, 2004, p. 406.

18). The same applies to Article 6 of the Second Optional Protocol to the Covenant¹³² that enshrines the abolition of death penalty.

These abovementioned rights became nonderogable just by being listed under Article 4(2) of the ICCPR. At the same time, the qualification of a right as absolute or nonderogable under the Covenant does not mean that no limitations could ever be justified. It only demonstrates that the possibility of limitations is independent of derogation. The enumeration of nonderogable rights under Article 4(2) is not identical with but related to certain human rights obligations bearing the status of peremptory norms of international law (*jus cogens*),¹³³ such as the prohibition of torture or cruel, inhuman, or degrading treatment or the prohibition of slavery, slave trade, and servitude. Nevertheless, some other rights of the Covenant (not peremptory norms) were also included in the list of nonderogable provisions by interpretation of the Committee because it can become under no circumstances necessary to derogate from these rights even during a crisis or emergency.

4.2. Procedural Requirement: Article 4(3): Notification of Derogation

In addition to substantial criteria, there is also a procedural precondition for the derogation from human rights under the ICCPR; when state parties to the Covenant resort to their power of derogation under Article 4, they commit themselves to a regime of international notification. The HRC has consistently referred to the requirements of Article 4(3) of the ICCPR and stressed that they are not a “mere formality.”¹³⁴

The notification of the UN Secretary-General is of a paramount importance for two reasons: (i) the discharge of the HRC’s functions, particularly in assessing whether the measures taken by the state party were “strictly required by the exigencies of the situation”; and (ii) the permission of other state parties to monitor compliance with the provisions of the Covenant. The requirement of immediate notification applies equally to the termination of derogation. These obligations have not always been respected. State parties have failed to notify other state parties through the UN Secretary-General of a proclamation of a state of emergency and the resulting measures of derogation from one or more provisions of the Covenant. State parties have also been known to neglect to submit a notification of territorial or other changes in the exercise of their emergency powers. Sometimes, the existence of a state

132 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming the Abolition of the Death Penalty, opened for signature December 15, 1989, 1642 U.N.T.S. 414, entered into force July 11, 1991.

133 According to Articles 53 and 64 of the 1969 Vienna Convention, the concept of *jus cogens* or “peremptory” norms means that states may not derogate by treaty arrangement from these norms. See the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, entered into force January 27, 1980.

134 UN Doc. CCPR/C/SR.469, § 19 (El Salvador); UN Doc. CCPR/C/SR.355, § 24 (Uruguay).

of emergency and the question of whether a state party has derogated from provisions of the ICCPR have come to the attention of the HRC only incidentally in the course of the consideration of a state party's report. The HRC emphasizes the obligation of immediate international notification whenever a state party takes measures derogating from its obligations under the Covenant. The duty of the HRC to monitor the law and practice of a state party for compliance with Article 4 does not depend on whether that state party has submitted a notification.¹³⁵

Although states send derogation notices to the UN Secretary-General, the notices are then sent to the relevant treaty bodies. The HRC notes that compliance with Article 4(3) permits other state parties to monitor compliance with the provisions of the Covenant. They could do this by an interstate application under Articles 41 and 42 of the ICCPR. However, this has never occurred. In practice, the significance of the derogation notices for the HRC has been in relation to the reporting procedure and Optional Protocol of the ICCPR.

5. Concluding Remarks

This chapter provided a brief analysis of the multifaceted COVID-19 crisis, including its health and economic aspects; the crisis management of the WHO, UN, IMF, and World Bank Group; and the human rights aspects of the pandemic. It primarily focused states of emergency. The complexity of the coronavirus crisis necessitates our careful attention to human rights issues.

A comparison of the derogation clauses of the ECHR and the ICCPR identifies the following consequences as the most significant ones. The uncanny resemblance between Article 15 of the Convention and Article 4 of the Covenant is not coincidental. As *travaux préparatoires* of the ECHR have demonstrated, the draft version of the ICCPR's derogation clause, adopted in 1949, served as an example during the codification of Article 15. Thus, these human rights treaties are closely linked, and these strong ties show up in the interpretation of these provisions.

Case law from the ECtHR (or occasionally the European Commission of Human Rights in older case analyses) and the HRC can help with the authentic interpretation of the Convention and the Covenant. The research elaborated in this chapter established the following prepositions.

Considering the relevant case law, the number of Article 15 (ECHR) and Article 4 (ICCPR) derogations and cases have been small compared to other articles (e.g., Articles 3 or 6 of the

¹³⁵ General Comment No. 29, States of Emergency (Article 4), p. 7.

Convention). Given the leeway offered them by peacetime limitations, governments would rather limit than derogate—especially in cases of internal disorder, where there is a risk that the government’s opponents will use an emergency derogation as evidence of the effectiveness of their campaign against the authorities. However, state parties to the ECHR and ICCPR usually find enough flexibility in the treaty standards to accommodate any exceptional measures for public emergency purposes. Thanks to this leeway, they simply apply peacetime limitations instead of invoking Article 15 (ECHR) and Article 4 (ICCPR) even in time of public emergency.

Derogations from human rights work as a last resort, and only exceptional circumstances might support their application. The ECtHR and the HRC both consider limiting human rights as a “default” tool, even in times of crisis or emergency, so derogations might only be done when limitations are no longer sufficient. Due consideration must be given to the principles of legality, necessity, and proportionality (and nondiscrimination under the ICCPR) when limiting human rights at the time of public emergency. *Legality* means that the limitation must be “provided by law,” which must not be arbitrary or unreasonable; it must be clear and accessible to the public. *Necessity* means that the limitation must be imperative to protect one of the permissible grounds stated in the ECHR or the ICCPR and must respond to a pressing social need. *Proportionality* means that the restriction must be proportionate to the interest at stake; it must be appropriate to achieve its protective function; and it must be the least-intrusive option among those that might achieve the desired result. Finally, the principle of nondiscrimination under the Covenant means that no restriction can discriminate or be contrary to international human rights law provisions.

It is a very delicate task for the ECtHR and the HRC to assess whether a respondent state correctly and in good faith identified the conditions for a “public emergency.” Therefore, it is not astonishing that the case law of the ECtHR demonstrates that states enjoy a wide margin of appreciation in deciding the existence of a “public emergency” under Article 15, which has led some to question the effectiveness of Strasbourg review in this context. In only one instance (the “Greek case”) has the European Commission of Human Rights disagreed with a respondent state about the very existence of a “public emergency.” At the same time, the states’ wide margin of appreciation can be accompanied by international supervision. Nevertheless, the ECtHR has a very sensitive role in Article 15 cases, since any review by the Court gives necessarily green light to criticisms that it re-evaluates crisis decisions by governments with the comfort of a hindsight.

When may a state party to the ECHR or the ICCPR validly derogate? What are the similarities between these human rights treaties’ derogation clauses? As the first element of the definition, the crisis or emergency must be actual and present or at least imminent; no preventive measures are acceptable under these treaties. The crisis or emergency must also affect the

whole population of the respective state and threaten the continuance of organized life. The last criterion is connected with the *ultima ratio* nature of state of emergency: normal measures are not adequate anymore, so exceptional steps must be taken. It is also crucial that a “public emergency” be strictly required by the exigencies of the situation. The language of both Article 15 of the ECHR and Article 4 of the ICCPR imply that “strictly required” means a higher threshold than simple necessity. Even though states’ margin of appreciation is wide when it comes to establishing the existence of a “public emergency,” it is not unlimited.

What are the key elements of a strictly required public emergency? These are the nature of the rights affected, the circumstances leading to the derogations, the duration of the emergency, the genuine nature of the state’s response, the purpose of the measures, and the possibility of judicial control over the measures taken. Of course, these factors do not make up an exhaustive list, as demonstrated by the ECtHR in *Baş v. Turkey* in 2020, where the Court ruled that the exigency criterion should be applied more stringently with the passage of time as intensity of the emergency declines.

It is also common in Article 15 of the ECHR and Article 4 of the ICCPR that both treaties have a procedural element under their derogation clause—specifically, the notification of the CoE and UN secretaries-general. The aim of the notification obligation is to make the derogation public. As collective systems dedicated to the protection of human rights, other state parties need to be aware of the derogations made by other state parties. In *Cyprus v. Turkey*, the European Commission of Human Rights established the essential nature of this requirement and ruled that in the absence of an official and public notice of derogation, Article 15 does not apply to the measures taken by the respondent state.

Although the final text of Article 15 of the ECHR was based on the draft version of Article 4 of the ICCPR, the articles differ on some points. For example, the ICCPR holds that notification must be sent “immediately” after the proclamation of the state of emergency, and the notice of revocation of the emergency measures must take place “on the date on which it terminates.” The ECHR lacks such time indications. Additionally, the ICCPR further requires an indication of the rights derogated from by the emergency measures, whereas the ECHR uses the more general phrase that the Secretary-General must be “fully informed.” The criterion of nondiscrimination only shows up in the provisions of the Covenant. It is also a remarkable that the lists of nonderogable rights differ. The “list” of the Covenant is longer. The ECHR lists these so-called absolute rights: the right to life; the prohibition of torture or inhuman or degrading treatment or punishment; the prohibition of slavery or servitude; the rule of “no punishment without law”; the abolition of the death penalty; and the right not to be tried or punished twice. The ICCPR lists these so-called absolute rights: the right to life; the prohibition of torture or cruel, inhuman, or degrading punishment or medical or scientific experimentation without consent; the prohibition of slavery, slave trade, and servitude; the

prohibition of imprisonment because of inability to fulfill a contractual obligation; the principle of legality in the field of criminal law; the recognition of everyone as a person before the law; the freedom of thought, conscience, and religion; and the abolition of death penalty. Finally, Article 4(1) of the ICCPR holds that the state of emergency must be officially proclaimed. Article 15 of the ECHR lacks such a requirement.

Based on these findings, the essential nature of human rights treaties in time of state of emergency cannot be disputed. The analyzed treaties, the ECHR and the ICCPR, through the interpretation of the ECtHR and the HRC, outline a clear and comprehensive framework applicable for the sake of protection of human rights when individuals get into especially vulnerable situations and become subjects of state-of-emergency regulations in their country. Case law on the international supervisory bodies demonstrates that, in accordance with national constitutional law, states enjoy broad discretion over the field of “martial law.” At the same time, case law also warns these states to comply with international human rights standards at the same place as domestic law when declaring a state of emergency.

6. Bibliography

- Criddle, E. J., Fox-Decent, E. (2012) ‘Human Rights, Emergencies, and the Rule of Law’, *Human Rights Quarterly*, 34(1), pp. 39–87; <https://doi.org/10.1353/hrq.2012.0001>
- Csapó, Zs. (2020) “[...] és amelyet csak a nemzetközi jognak az ugyanilyen jellegű későbbi szabályával lehet megváltoztatni”. Az 1969. évi bécsi egyezmény és a *ius cogens* módosíthatósága’, *Állam- és Jogtudomány*, 61(1), pp. 25–43.
- Daes, E. A. (1983) *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 [Online]. Available at: <https://digitallibrary.un.org/record/52410?ln=en> (Accessed: 31 May 2021).
- El Zeidy, M. (2003) ‘The ECHR and States of Emergency: Article 15 – A Domestic Power of Derogation from Human Rights Obligations’, *San Diego International Law Journal*, 4(1), pp. 277–318.
- Gárdos-Orosz, F. (2018) ‘Alapvető jogok korlátozása’ in Lamm, V. (ed.) *Emberi Jogi Enciklopédia*. Budapest: HVG-ORAC
- Gárdos-Orosz, F. (2020) ‘Az alapjogok korlátozása’ in Jakab, A., Könczöl, M., Menyhárd, A., Sulyok, G. (eds.) *Internetes Jogtudományi Enciklopédia* [Online]. Available at: <https://ijoten.hu/szocikk/az-alapjogok-korlatozasa> (Accessed: 1 April 2021)
- Gross, O. (1998) ‘Once More unto the Brach: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’, *Yale Journal of International Law*, 23(1), pp. 437–501.

- Halpern, M. S. (2020) 'State Obligations under Public International Law during Pandemics', *EILR Recent Developments*, 35(2), pp. 1–15.
- Hamilton, A. (1961) 'The Federalist' in Rossiter, C. (ed.) *The Federalist Papers*. New York: Penguin
- Harris, D., O'Boyle, M., Bates, E., Buckley, C. (2018) *Law of the European Convention on Human Rights*. 4th Oxford: Oxford University Press; <https://doi.org/10.1093/he/9780198785163.001.0001>
- Higgins, R. (1976) 'Derogations under Human Rights Treaties', *British Yearbook of International Law*, 48(1), pp. 281–319; <https://doi.org/10.1093/bybil/48.1.281>
- Kende, T., Nagy, B., Sonnevend, P., Valki, L. (2014) *Nemzetközi jog*. Budapest: Wolters Kluwer CompLex; <https://doi.org/10.55413/9789632956312>
- Kiss, A. (1980) 'Permissible Limitations on Rights', in Henkin L. (ed.) *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York: Columbia University Press
- Kovács, P. (2016) *Nemzetközi közjog*. Budapest: Osiris
- Lamm, V. (2018) 'Egyezségokmányok. Gazdasági, Szociális és Kulturális Jogok Nemzetközi Egyezségokmánya, Polgári és Politikai Jogok Nemzetközi Egyezségokmánya' in Lamm, V. (ed.) *Emberi Jogi Enciklopédia*. Budapest: HVG-ORAC
- Lamm, V. (2018) 'ENSZ Emberi Jogi Szerződési Bizottságok' in Lamm, V. (ed.) *Emberi Jogi Enciklopédia*. Budapest: HVG-ORAC
- Lebret, A. (2020) 'COVID-19 Pandemic and Derogation to Human Rights', *Journal of Law and the Biosciences*, 7(1), pp. 1–15; <https://doi.org/10.1093/jlb/ljaa015>
- Lorz, R. A. (2003) 'Possible Derogations from Civil and Political Rights under Article 4 of the ICCPR', *Israel Yearbook on Human Rights*, 33(1), pp. 85–103; https://doi.org/10.1163/9789047413134_006
- McGoldrick, D. (2004) 'The Interface Between Public Emergency Powers and International Law', *Oxford University Press and New York University School of Law*, 2004/2, pp. 380–429; <https://doi.org/10.1093/icon/2.2.380>
- Meron, T. (1987) *Human Rights in Strife: Their International Protection*. The Hague: Grotius Publications Limited.
- Mészáros, G. (2016) 'A „szabályozatlan” kivételes állapot amerikai modellje: tévút vagy kövendő példa?' *Fundamentum*, 2016/2–4, pp. 37–55.
- Nugraha, I. Y. (2017) 'Human Rights Derogations During Coup Situations', *The International Journal of Human Rights*, 22(2) pp. 194–206; <https://doi.org/10.1080/13642987.2017.1359551>
- Oliver, C. (2004) 'Revisiting General Comment No. 29 of the United Nations Human Rights Committee: About Fair Trial Rights and Derogations in Time of Emergency', *Leiden Journal of International Law*, 17(1), pp. 405–419; <https://doi.org/10.1017/S0922156504001876>
- Oraá, J. (1992) *Human Rights in States of Emergency in International Law*. Oxford: Oxford University Press

- Raisz, A. (2009) *Az Emberi Jogok Európai és Amerikaiközi Bíróságának egymásra hatása (PhD értekezés)*. Miskolc: Miskolci Egyetem Deák Ferenc Állam- és Jogtudományi Doktori Iskola
- Schreuer, C. (1982) 'Derogations of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights', *Yale Journal of World Public Order*, 9(1), pp. 113–132.
- Siehr, A. (2004) 'Derogation Measures under Article 4 ICCPR, with Special Consideration of the »War Against International Terrorism«', *German Yearbook of International Law*, 47(1), pp. 545–593.
- Svensson-McCarthy, A. (1998) *The International Law of Human Rights and States of Exception*. Leiden: Brill
- Van der Sloot, B. (2014) 'Is All Fair in Love and War? An Analysis of the Case Law on Article 15 ECHR', *Military Law and the Law of War Review*, 53(2), pp. 319–358.

Annex: Table of Cases

ECtHR	A. and Others v. the United Kingdom	3455/05 Judgment	19.2.2009
ECtHR	Aksoy v. Turkey	100/1995/606/694 Judgment	18.12.1996
ECtHR	Baş v. Turkey	66448/17 Judgment	3.3.2020
ECtHR	Brannigan and McBride v. the United Kingdom	14553/89, 14554/89 Judgments	26.5.1993
ECtHR	Brogan and Others v. the United Kingdom	11209/84; 11234/84; 11266/84; 11386/85 Judgments	29.11.1988
ECtHR	Cyprus v. Turkey	9940–9944/82 Commission Decision	6.12.1983
ECtHR	Denmark, Norway, Sweden and the Netherlands v. Greece ("The Greek Case")	3321/67, 3322/67, 3323/67, 3344/67 Commission Decisions	5.11.1969
ECtHR	Greece v. the United Kingdom	176/56 Commission Decision	7.2.1958
ECtHR	Ireland v. the United Kingdom	5310/71 Judgment	18.1.1978
HRC	Jorge Landinelli Silva, Luis E. Echave Zas, Omar Patron Zeballos, Niurka Sala Fernandez and Rafael Guarga Ferro v. Uruguay	UN Doc. A/36/40	8.4.1981
ECtHR	Khlebig v. Ukraine	2945/16 Judgment	25.7.2017
ECtHR	Lawless v. Ireland (no. 3)	332/57 Judgment	1.7.1961
ECtHR	Marshall v. the United Kingdom	41571/98 Decision on Admissibility	10.7.2001
ECtHR	Mehmet Hasan Altan v. Turkey	13237/17 Judgment	20.3.2018
ECtHR	Pişkin v. Turkey	33399/18 Judgment	15.12.2020
HRC	William Torres Ramirez v. Uruguay	UN Doc. A/35/40	23.7.1980