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Derogations to Human Rights During a Global Pandemic: Unpacking Normative and Practical Challenges

Roman Girma Teshome

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DEROGATIONS TO HUMAN RIGHTS DURING A GLOBAL PANDEMIC: UNPACKING NORMATIVE AND PRACTICAL CHALLENGES

ROMAN GIRMA TESHOME*

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I. INTRODUCTION

After the World Health Organization (WHO) characterized the COVID-19 outbreak as a “global pandemic,”¹ States responded by taking more restrictive and urgent measures.² These measures ranged from restrictions on public events to partial or total lockdowns,³ which restrict a plethora of human rights.⁴ Additionally, an

1. See WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (deeming the COVID-19 outbreak a “global pandemic” on March 11, 2020).

2. See Federica Paddeu & Freya Jephcott, *COVID-19 and Defences in the Law of State Responsibility: Part I*, EJIL: TALK! (Mar. 17, 2020), <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/> (discussing common measures used by states in response to the COVID-19 pandemic).

3. See *Coronavirus: Travel Restrictions, Border Shutdowns by Country*, AL JAZEERA (June 3, 2020), <https://www.aljazeera.com/news/2020/6/3/coronavirus-travel-restrictions-border-shutdowns-by-country> (detailing a host of restrictive measures taken by countries around the world in response to the COVID-19 pandemic); see, e.g., Phillip Connor, *More Than Nine in Ten People Worldwide Live in Countries with Travel Restrictions amid COVID-19*, PEW RES. CTR. (Apr. 1, 2020), <https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19/> (finding that nine in ten people live in countries with travel restrictions as a result of the COVID-19 pandemic); Angelo Amante & Crispian Balmer, *Italy in Coronavirus Lockdown as Deaths Soar and Economy Fades*, REUTERS (Mar. 10, 2020, 1:58 PM), <https://www.reuters.com/article/us-health-coronavirus-italy/streets-deserted-as-italy-imposes-unprecedented-coronavirus-lockdown-idUSKBN20X11D> (discussing the strict lockdown measures taken in Italy in response to a rapidly climbing death toll from the COVID-19 pandemic).

4. See Alessandra Spadaro, *Do the Containment Measures Taken by Italy in Relation to COVID-19 Comply with Human Rights Law*, EJIL: TALK! (Mar. 16, 2020), <https://www.ejiltalk.org/do-the-containment-measures-taken-by-italy-in-relation-to-covid-19-comply-with-human-rights-law/> [hereinafter *Containment Measures*] (finding that Italy's COVID-19 measures restrict various human rights, but that they are compatible with its human rights obligations); see also Alicia Ely Yamin & Roojin Habibi, *Human Rights and Coronavirus: What's at Stake for Truth, Trust, and Democracy*, HEALTH AND HUM. RTS. J. BLOG (Mar. 1, 2020), <https://www.hhrjournal.org/2020/03/human-rights-and-coronavirus-whats-at-stake-for-truth-trust-and-democracy/> (noting that COVID-19 measures should be taken in consideration of their impact on human rights). See generally U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. & WORLD HEALTH ORG., FACT SHEET NO. 31: THE RIGHT TO HEALTH 22 (2008), <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf> [hereinafter FACT

unprecedented number of States declared a state of emergency to justify these measures;⁵ as of this writing, roughly two-thirds of States declared a state of emergency due to COVID-19 under the International Covenant on Civil and Political Rights (“ICCPR”).⁶

International human rights law allows States to take measures that restrict rights in exceptional circumstances. One of the ways in which States may take such measures is through the derogation regime.⁷ Derogation refers to a temporary suspension of certain rights or aspects of those rights during a state of emergency.⁸ Article 4 of the ICCPR and the respective provisions of various regional human rights instruments allow States to derogate from their human rights obligations during emergencies.⁹ These instruments prescribe certain conditions that States must meet before derogating from their

SHEET NO. 31] (summarizing the general obligations of States with respect to upholding the right to health).

5. See Curtis A. Bradley & Laurence R. Helfer, *Introduction to the International Legal Order and the Global Pandemic*, 114 AM. J. INT’L L. 571, 572 (Oct. 20, 2020) (finding that an unprecedented number of States have derogated from the ICCPR and regional human rights conventions); see also Laurence R. Helfer, *Rethinking Derogations from Human Rights Treaties*, 115 AM. J. INT’L L. 20, 20 (2021) [hereinafter *Rethinking Derogations*] (noting that several states have declared a state of emergency to respond to COVID-19); Martin Scheinin, *COVID-19 Symposium: To Derogate or Not to Derogate*, OPINIOJURIS (Apr. 6, 2020), <http://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/> (finding many states have resorted to using domestic emergency powers to impose COVID-19 restriction measures).

6. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; see *States of Emergencies in Response to the COVID-19 Pandemic*, CTR. FOR CIV. AND POL. RTS., <https://datastudio.google.com/u/0/reporting/1sHT8quopdfavCvSDk7t-zvqKIS0Ljiu0/page/dHMKb> (last visited Dec. 5, 2021) [hereinafter *States of Emergencies*] (providing up-to-date data on states of emergency declared in response to COVID-19).

7. See ICCPR, *supra* note 6, art. 4(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. . .”).

8. See *Human Rights Treaty Bodies - Glossary of Technical Terms Related to the Treaty Bodies*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/Pages/TBGlossary.aspx#derogation> (last visited Dec. 5, 2021) (defining “Derogation”).

9. See ICCPR, *supra* note 6, art. 4.

human rights obligations.¹⁰ These conditions aim to create legal certainty and foreseeability, prevent arbitrariness, restrict the powers of States, and ensure accountability.¹¹ However, COVID-19's novelty and transmissibility highlight some difficulties in the interpretation and implementation of these conditions.¹²

This article seeks to unpack the normative and practical challenges of derogations to human rights during the COVID-19 outbreak with reference to practical examples. The purpose of this article, however, is not to assess whether the COVID-19 pandemic qualifies as a "public emergency that threatens the life of the nation,"¹³ nor to evaluate the compliance of the emergency measures taken during the pandemic with the conditions of derogation. The article has three main sections apart from this introduction. The first section briefly overviews the norms of derogation under international human rights law, principally the U.N. human rights system.¹⁴ The second section briefly discusses emergency measures taken during the COVID-19 pandemic and the corresponding State practices.¹⁵ The third and the principal section of this paper identifies and critically engages with the normative and practical challenges of derogations during the pandemic.¹⁶

10. See U.N. Hum. Rts. Comm., *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add. (Aug. 31, 2001) [hereinafter *CCPR General Comment No. 29*]; ICCPR, *supra* note 6, art. 4.

11. See *Rethinking Derogations*, *supra* note 5, at 22 (noting that the conditions of derogations seek to prevent arbitrariness).

12. See *id.* at 20 (discussing a high degree of diversity in the rights affected by COVID-19 related derogations).

13. See ICCPR, *supra* note 6, art. 4 (enunciating the requirements of derogation).

14. *Infra* Section II.

15. *Infra* Section III.

16. *Infra* Section IV.

II. DEROGATIONS IN INTERNATIONAL HUMAN RIGHTS LAW

A derogation is a temporary suspension of certain human rights or aspects of human rights during a state of emergency.¹⁷ Derogations allow States to unilaterally deviate from their obligations under international human rights frameworks.¹⁸ Article 4 of the ICCPR and the pertinent provisions of the regional human rights frameworks that contain derogation clauses provide for this prerogative of States.¹⁹ Article 4(1) of the ICCPR enunciates:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States 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.²⁰

States must meet certain conditions to derogate from their obligations under the Covenant.²¹ The first condition of derogation is the existence of an emergency that threatens the life of the nation.²² This condition is a high threshold.²³ The emergency situation must

17. See Evan J. Criddle, *Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference*, 45 NETH. Y.B. INT'L L. 197, 198 (2014) (“Derogation clauses likewise permit states to suspend various civil and political rights during public emergencies.”).

18. See *CCPR General Comment No. 29*, *supra* note 10, ¶ 1.

19. See ICCPR, *supra* note 6, art. 4; see also Organization of American States, American Convention on Human Rights art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]; League of Arab States, Arab Charter on Human Rights art. 4, Sept. 15, 1994, [hereinafter Arab Charter], available at: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=3ae6b38540>. The African Charter on Human and Peoples’ Rights, however, does not contain a derogation clause. See generally Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights (“Banjul Charter”), June 27, 1981, 21 I.L.M. 58.

20. ICCPR, *supra* note 6, art 4(1).

21. See *id.*

22. *Id.*; *CCPR General Comment No. 29*, *supra* note 10, ¶ 1.

23. See, e.g., *Lawless v. Ireland*, (Series A, No. 3), ¶ 28, Eur. Ct. H.R. (1961)

have a certain level of gravity and affect a significant portion of the population or threaten the territorial integrity of the State to warrant a derogation.²⁴ The European Court of Human Rights (ECtHR) defines a public emergency as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed.”²⁵ Thus, “[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation”.²⁶

The second condition is that a state of emergency must be officially proclaimed, which is “essential for the maintenance of the principles of legality and rule of law at times when they are most needed.”²⁷ While the manner in which such proclamation can be made depends on the domestic law of the State,²⁸ it needs to clearly specify the scope of the emergency measures to be taken and be accessible to the public.²⁹

For the third condition, emergency measures should be limited “to the extent strictly required by the exigencies of the situation.”³⁰ The material, temporal, and territorial scope of the derogation should be limited to what is necessary to respond to the emergency situation.³¹

(“[T]he natural and customary meaning of the words ‘other public emergency threatening the life of the nation’ is sufficiently clear; whereas they refer to an 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[.]”).

24. See U.N. Comm’n on Hum. Rts., *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, ¶ 39, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984) [hereinafter *Siracusa Principles*] (explaining when a State party may derogate from Article 4 of the ICCPR).

25. *Lawless v. Ireland (Series A, No. 3)*, ¶ 2, Eur. Ct. H.R.; see also *Siracusa Principles*, *supra* note 24, ¶ 39.

26. *CCPR General Comment No. 29*, *supra* note 10, ¶ 3; see also *Siracusa Principles*, *supra* note 24, ¶ 40.

27. *CCPR General Comment No. 29*, *supra* note 10, ¶ 2.

28. *Id.*

29. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 92 (2d ed. 2005) (explaining the requirement of official proclamation).

30. ICCPR, *supra* note 6, art. 4(1); see also *CCPR General Comment No. 29*, *supra* note 10, ¶ 4.

31. See *CCPR General Comment No. 29*, *supra* note 10, ¶ 4; see also *Siracusa*

In the words of the Human Rights Committee,³² “[the] restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant.”³³ Hence, measures of derogation should be necessary to respond to the situation and proportionate to the threat posed by the emergency.³⁴

The fourth condition is that emergency measures should “not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”³⁵ The fifth condition requires that derogations should not be imposed on non-derogable rights listed under Article 4(2), such as the right to life, prohibition of torture, prohibition of slavery, freedom of religion, and the principle of legality.³⁶ Some of these rights are *jus cogens* norms³⁷ and others are non-derogable because, according to the Human Rights Committee, “it can never become necessary to derogate from these rights during a state of emergency.”³⁸ The sixth condition obliges States to comply with their other obligations under international law even in times of emergency.³⁹ Emergency measures should not conflict with these obligations.⁴⁰

The final condition of derogation under the Covenant is the

Principles, *supra* note 24, ¶ 51.

32. The Human Rights Committee is one of the U.N. Treaty bodies. It is established by and mandated to monitor the implementation of the ICCPR. *See* ICCPR, *supra* note 6, art. 28; *see also* *Human Rights Committee: Monitoring Civil and Political Rights*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> (last visited Feb. 5, 2022).

33. *CCPR General Comment No. 29*, *supra* note 10, ¶ 1.

34. *See id.*, ¶ 4.

35. ICCPR, *supra* note 6, art. 4(1).

36. *See id.*, art. 4(2); *see also* *CCPR General Comment No. 29*, *supra* note 10, ¶ 7.

37. *See* Int’l L. Comm’n, Rep. on the Work of its Seventy-First Session, U.N. Doc. A/74/10, 141 (2019) [hereinafter U.N. Report] (discussing *jus cogens* norms).

38. *CCPR General Comment No. 29*, *supra* note 10, ¶ 11.

39. *See* ICCPR, *supra* note 6, art. 4(1); *see also* *CCPR General Comment No. 29*, *supra* note 10, ¶ 9.

40. *See* ICCPR, *supra* note 6, art. 4(1); *see also* *CCPR General Comment No. 29*, *supra* note 10, ¶ 9.

notification requirement.⁴¹ A State derogating from its obligations under the Covenant “shall immediately inform the other States 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.”⁴² This notification requirement allows other State Parties and human rights monitoring bodies to monitor the compatibility of the emergency measures with the norms of the Covenant.⁴³

Overall, States need to strictly comply with these conditions in order to avail themselves of the right of derogation.⁴⁴

III. DEROGATIONS DURING THE COVID-19 PANDEMIC

The COVID-19 pandemic has emerged as a prominent threat to the protection of human rights.⁴⁵ COVID-19 has impacted the realization of several rights, including the right to life⁴⁶ and the right

41. See ICCPR, *supra* note 6, art. 4(3); see also CCPR General Comment No. 29, *supra* note 10, ¶ 17.

42. ICCPR, *supra* note 6, art. 4(3).

43. See CCPR General Comment No. 29, *supra* note 10, ¶ 17.

44. See ICCPR, *supra* note 6, art. 4; see also CCPR General Comment No. 29, *supra* note 10, ¶ 2; Siracusa Principles, *supra* note 24, ¶ 39; see, e.g., Lawless v. Ireland, (Series A, No. 3), ¶ 30, Eur. Ct. H.R. (1961) (explaining that “the Irish Government were justified in declaring that there was a public emergency in the Republic of Ireland threatening the life of the nation and were hence entitled, applying the provisions of Article 15, paragraph 1 (art. 15–1), of Convention for the purposes for which those provisions were made, to take measures derogating from their obligations under the Convention[.]”).

45. See, e.g., *Containment Measures*, *supra* note 4 (explaining how Italy’s COVID-19 measures implicate numerous human rights obligations). See generally FACT SHEET NO. 31, *supra* note 4 (summarizing the general obligations of States with respect to the right to health). But see Yamin & Habibi, *supra* note 4 (“[T]o date [the] WHO has not issued any substantive guidance on how countries can take public health measures that achieve health protection while respecting human rights.”).

46. See Oona Hathaway et al., *COVID-19 and International Law Series: Human Rights Law – Right to Life*, JUST SEC. (Nov. 18, 2020), <https://www.justsecurity.org/73426/covid-19-and-international-law-series-human-rights-law-right-to-life/> [hereinafter *Human Rights Law – Right to Life*] (providing that the ICCPR’s right to life provision is directly implicated by the COVID-19 pandemic and State actions to protect human life).

to health,⁴⁷ among others.⁴⁸ But the measures taken to halt its spread have also raised a range of human rights concerns.⁴⁹ On the one hand, containing the spread of the virus in itself constitutes a human rights obligation of States since States have positive obligations to protect the rights to life and health.⁵⁰ On the other hand, the pandemic calls for extraordinary measures that may have the effect of restricting a range of human rights.⁵¹ The Human Rights Committee acknowledged these competing obligations in its statement concerning derogations during the pandemic:

The Committee is of the view that, in the face of the COVID-19 pandemic, States parties must take effective measures to protect the right to life and health of all individuals within their territory and all those

47. See FACT SHEET NO. 31, *supra* note 4 (summarizing the general obligations of States with respect to the right to health).

48. See *Human Rights Dimensions of COVID-19 Response*, HUM. RTS. WATCH (Mar. 19, 2020), <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#> [hereinafter *Human Rights Dimensions*] (detailing a number of human rights that are implicated by the COVID-19 pandemic).

49. *Id.*

50. See U.N. Hum. Rts. Comm., *CCPR General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, ¶ 26, U.N. Doc. CCPR/C/GC/35 (Sept. 3, 2019) [hereinafter *CCPR General Comment No. 36*] (specifying that the duty to protect life includes taking measures against life-threatening diseases); see also International Covenant on Economic, Social and Cultural Rights art.12(2)(c), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (clarifying that the steps to be taken by State Parties include those necessary for “[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases[.]”); U.N. Comm. on Econ., Soc. and Cultural Rts., *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, ¶¶ 16, 44(b)–(c), U.N. Doc. E/C.12/2000/4, Aug. 11, 2000 [hereinafter *CESCR General Comment No. 14*] (discussing the right to prevention, treatment, and control of diseases); see also Sarah Joseph, *International Human Rights Law and the Response to the COVID-19 Pandemic*, 11 J. INT’L HUMANITARIAN LEG. STUD. 249, 255 (2020), at 250–52 (2020) (claiming that “States have positive obligations under international human rights law to take steps to combat pandemics . . .” and providing an analysis of relevant international human rights law supporting this assertion).

51. See Alessandra Spadaro, *COVID-19: Testing the Limits of Human Rights*, 11 EUR. J. RISK REG. 317, 319 (2020) (“[P]ublic health measures consisting in the enforcement of social distancing, which are deemed effective in reducing the spread of certain influenza-like diseases, including COVID-19, clash with a number of individual rights.”).

subject to their jurisdiction. It also recognizes that such measures may, in certain circumstances, result in restrictions on the enjoyment of individual rights guaranteed by the Covenant. Furthermore, the Committee acknowledges that States parties confronting the threat of widespread contagion may, on a temporary basis, resort to exceptional emergency powers and invoke their right of derogation from the Covenant under article 4 provided that it is required to protect the life of the nation.⁵²

Accordingly, an unprecedented number of States have declared a state of emergency and derogated from their human rights obligations to take restrictive measures.⁵³ One-hundred and forty-one States declared a state of emergency to respond to the pandemic.⁵⁴ Some States have not officially declared a state of emergency but have still taken measures that can potentially derogate from their obligations under human rights treaties.⁵⁵ Other States have further extended the timeframe of the state of emergency because they did not overcome the public health threat within the originally anticipated time.⁵⁶

The emergency measures include various levels of bans on public gatherings, partial or total lockdowns, travel restrictions, and curfews.⁵⁷ The rights commonly restricted by these measures are,

52. U.N. Hum. Rts. Comm., *Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, ¶ 2, U.N. Doc. CCPR/C/128/2, Apr. 30, 2020 [hereinafter *Statement on Derogations*].

53. *See States of Emergencies*, *supra* note 6 (providing data on states of emergencies declared in response to the pandemic).

54. *See id.*

55. *See Rethinking Derogations*, *supra* note 5, at 21 (“Many governments have formally declared states of emergency; others are exercising extraordinary powers informally.”). *See generally* Niall Coghlan, *Dissecting Covid-19 Derogations*, VERFASSUNGSBLOG (May 5, 2020), <https://verfassungsblog.de/dissecting-covid-19-derogations/#commentform> (examining the decision of some States to transparently notify on their degradation while other States forgo notification).

56. *See, e.g.*, Audrey Lebret, *COVID-19 Pandemic and Derogation to Human Rights*, 7 J. LAW BIOSCIENCE 1, 3 (2020) (“Several states renewed their notifications [of states of emergency] to the Council of Europe and the OAS.”).

57. *See Joseph*, *supra* note 50, at 253 (“The most common measure adopted by States for preventing COVID-19 infection is to impose lockdown measures to prevent person-to-person infection. [. . .] Borders have been closed. Social distancing is mandated, whereby people must keep a certain distance from each other. The reasons for which one is allowed to leave home have been heavily restricted.”).

inter alia, freedom of expression,⁵⁸ freedom of assembly,⁵⁹ freedom of movement,⁶⁰ freedom of association,⁶¹ and the right to privacy.⁶² Overall, several States have resorted to derogations to respond to the COVID-19 pandemic,⁶³ which restricted a plethora of human rights.⁶⁴

58. See *Human Rights Dimensions*, *supra* note 48 (“In a number of countries, governments have failed to uphold the right to freedom of expression, taking actions against journalists and healthcare workers.”); see also Oona Hathaway et al., *COVID-19 and International Law Series: Human Rights Law – Political and Civil Rights*, JUST SEC., (Nov. 24, 2020), <https://www.justsecurity.org/73520/covid-19-and-international-law-series-human-rights-law-civil-and-political-rights/> [hereinafter *Human Rights Law – Political and Civil Rights*] (“[T]he Human Rights Committee recently reaffirmed governments seeking to protect public health can restrict the rights to expression and peaceful assembly to protect individuals from COVID-19.”).

59. See *Human Rights Dimensions*, *supra* note 48 (finding broad quarantines and lockdowns often do not meet objective scientific criteria to justify their imposition and unnecessarily curtail human rights, including freedom of assembly); see, e.g., *Human Rights Law – Political and Civil Rights*, *supra* note 58 (noting that in Hong Kong, the government has taken advantage of the need to prevent the spread of COVID-19 by also constricting political activity, such as by preventing demonstrators from assembling).

60. See, e.g., *Human Rights Law – Political and Civil Rights*, *supra* note 58 (“[R]esponses have included a number of measures to limit public gatherings, constrain freedom of movement, require disclosure of private medical information, and require disclosure of location and contacts.”); see also *Human Rights Dimensions*, *supra* note 48 (discussing travel bans and other restrictions on the freedom of movement).

61. See Joseph, *supra* note 50, at 255–56 (finding that lockdowns imposed to combat COVID-19 interfere with the right to freedom of movement under Article 12 of the ICCPR).

62. See Sharifah Sekalala et al., *Health and Human Rights are Inextricably Linked in the COVID-19 Response*, 5 *BMJ GLOBAL HEALTH* 1, 2–3 (2020) (explaining how expanding surveillance tools beyond traditional public health standards may jeopardize the long-term inviolability of privacy).

63. See Joseph, *supra* note 50, at 255, 266–67 (explaining that States have a responsibility to report instances of derogation to the United Nations, and, as of June 2020, fourteen States have reported derogations as a result of lockdown measures).

64. See *Rethinking Derogations*, *supra* note 5, at 24–25 (“COVID-19 controls have also infringed non-derogable rights—including the right to life, the prohibition of torture and cruel, inhuman or degrading treatment, and forced labor—and implicated a state’s positive human rights obligations, including those relating to economic and social guarantees.”). See generally Cassandra Emmons, *International Human Rights Law and COVID-19 States of Emergency*, VERFASSUNGSBLOG (Apr. 25 2020), <https://verfassungsblog.de/international->

IV. NORMATIVE AND PRACTICAL CHALLENGES OF DEROGATIONS DURING THE PANDEMIC

The emergency measures taken during the pandemic highlight several challenges with which the derogation regime under international human rights law is grappling.⁶⁵ This section explores six normative and practical challenges: (1) the challenges of ensuring legal certainty in uncertain times;⁶⁶ (2) (indirect) discrimination in the application of emergency measures;⁶⁷ (3) the risk of restricting non-derogable rights;⁶⁸ (4) the challenges of potentially derogating from economic, social, and cultural rights;⁶⁹ (5) lack of adequate compliance with the notification procedure;⁷⁰ (6) and using derogations as a pretext for undemocratic practices.⁷¹

A. THE CHALLENGES OF ENSURING LEGAL CERTAINTY IN UNCERTAIN TIMES

As discussed above, human rights instruments prescribe certain conditions that States need to comply with in order to derogate from

human-rights-law-and-covid-19-states-of-emergency/ (discussing the gap in international human rights law concerning public health emergencies).

65. Emmons, *supra* note 64.

66. See Harry Rutter et al., *Managing Uncertainty in the Covid-19 Era*, BMJ PUB. HEALTH (Sept. 1, 2020), <https://www.bmj.com/content/370/bmj.m3349> (explaining that the literature around COVID-19 is constantly evolving, thus State decisions are often decided by misguided and flawed information).

67. See Katharina O. Cathaoir, 'Human Rights in Times of Pandemics: Necessity and Proportionality', in COVID-19 AND HUMAN RIGHTS 35, 35 (Morten Kjaerum et al. eds., 2021) ("[R]acial and ethnic minorities and persons with disabilities are disproportionately impacted by both the virus and restrictions. . .").

68. See *Rethinking Derogations*, *supra* note 5, at 24–25 (noting that some of the COVID-19 measures affected non-derogable rights, listing the right to life, the prohibition on torture and cruel, inhuman or degrading treatment, and forced labor).

69. See Amrei Muller, *Limitations to and Derogations from Economic, Social and Cultural Rights*, 9 HUM. RTS. L. REV. 557, 599 (2009) (noting that the ICESCR does not contain a derogation clause and finding that many arguments permitting derogation from the Covenant are objectionable).

70. See *Statement on Derogations*, *supra* note 52, ¶ 2(b).

71. See *Rethinking Derogations*, *supra* note 5, at 25.

their human rights obligations.⁷² One reason these conditions exist is to create legal certainty and foreseeability.⁷³ Creating legal certainty not only enables individuals and groups to regulate their conduct according to the law but also puts limits on the prerogative of States and fosters accountability.⁷⁴ This certainty is particularly essential in the derogation regime where setting the material, temporal, and territorial contours of the emergency measures is necessary.⁷⁵ However, the medical and epidemiological uncertainties surrounding the virus compromise this objective.⁷⁶ The current section will explore the normative and practical challenges some of these uncertainties create.

As mentioned before, derogation measures need to be necessary and proportionate to respond to the emergency situation.⁷⁷ In other words, “the public emergency should be invoked only insofar and for as long as is strictly necessary to return to a situation of normalcy.”⁷⁸ But when the “exigencies of the situation” are uncertain, assessing the necessity and proportionality of emergency measures can be strenuous.⁷⁹ Given the novelty of the virus and the scientific

72. See *CCPR General Comment No. 29*, *supra* note 10, ¶ 1; see also ICCPR, *supra* note 6, art. 4; Frédéric Mégret, *Nature of Obligations*, in INTERNATIONAL HUMAN RIGHTS LAW 96, 103 (Daniel Moeckli et al. eds., 3rd ed. 2017) (describing the conditions of derogation to human rights).

73. *Rethinking Derogations*, *supra* note 5, at 32.

74. VENICE COMM’N OF THE COUNCIL OF EUR., THE RULE OF LAW CHECKLIST 25–26 (2016), https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

75. *CCPR General Comment No. 29*, *supra* note 10, ¶ 4; Siracusa Principles, *supra* note 24, ¶ 51.

76. See Joelle Grogan & Julinda Beqiraj, *Rule of Law as a Perimeter of Legitimacy for COVID-19 Responses*, VERSASSUNGSBLOG (Apr. 17, 2021), <https://verfassungsblog.de/rule-of-law-as-a-perimeter-of-legitimacy-for-covid-19-responses/> (“In such a continued environment of uncertainty and in effort to avoid the pandemic becoming endemic to the global population, legal certainty as to what the rules are, when they do and do not apply, and how they are to be interpreted by relevant authorities, is essential.”).

77. *CCPR General Comment No. 29*, *supra* note 10, ¶¶ 4–5.

78. Mégret, *supra* note 72, at 113; *Statement on Derogations*, *supra* note 52, ¶ 2(b).

79. See Rutter et al., *supra* note 66, at 1 (explaining that uncertainty inevitably affects decision-making or law making).

uncertainty surrounding it, what is necessary to respond to the situation has not always been clear.⁸⁰ As Charles F. Manski rightly described the impact of the uncertainties surrounding COVID-19 on policymaking:

[The formation] of COVID-19 policy must cope with substantial uncertainties about the nature of the disease, the dynamics of transmission, and behavioral responses. Data uncertainties limit our knowledge of the past trajectory and current state of the pandemic. Data and modeling uncertainties limit our ability to predict the impacts of alternative policies.⁸¹

When the pandemic began and when research on the virus was at an infant stage, States did not have sufficient and conclusive information about the measures they needed to take to contain the spread of the virus or the effectiveness of such measures.⁸² Thus, States had to navigate uncharted waters and test out different responses as they went.⁸³ This ‘trial and error’ approach undermines

80. See Lebet, *supra* note 56, at 8 (explaining how States are constantly learning from the experiences from other nations in order to evaluate proportionality of lockdown measures); see, e.g., Warren Pearce, *Trouble in the Trough: How Uncertainties were Downplayed in the UK's Science Advice on Covid-19*, 7 HUMANITARIAN & SOC. SCI. COMM'N 1, 1–4 (2020) (finding inconsistencies between scientific data surrounding COVID-19's doubling rate and public representation of the data by UK media sources); see also Mark Pennington, *Hayek on Complexity, Uncertainty and Pandemic Response*, 34 REV. AUSTRIAN ECON. 203, 206–208 (2020) (“In the context of health objectives there are complex and uncertain trade-offs to be made between the possible reduction of deaths from the coronavirus that might follow lockdown measures and the possible increased deaths arising from illnesses that might go undiagnosed or untreated because of such measures.”).

81. Charles F. Manski, *Forming COVID-19 Policy Under Uncertainty*, 11 J. BENEFIT-COST ANALYSIS 341, 342 (2020); see also Meimei Wang & Stefen Flessa, *Modelling Covid-19 Under Uncertainty: What Can We Expect?*, 21 EUR. J. HEALTH ECON. 665, 665 (2020) (recognizing the seismic risks of improper public policy decision-making); Rutter et al., *supra* note 66, at 1 (explaining that policymakers must come to terms with scientific ambiguity around COVID-19 rather than feign certainty and present uncertain data as facts).

82. See Grogan & Beqiraj, *supra* note 76 (“The early stages of the pandemic were marked by extreme uncertainty, in its virality, transmission and the effectiveness of strategies and advice to mitigate both risk and exposure.”).

83. See Helier Cheung, *Coronavirus: Why Attitudes to Masks Have Changed Around the World*, BBC NEWS (July 13, 2020), <https://www.bbc.com/news/world-53394525> (showing how the public has quickly adapted to COVID-19 measures

the certainty, specificity, and limited scope of emergency measures that derogation demands.⁸⁴ It creates difficulties in determining the material, territorial, and temporal scope of the derogation as will be discussed below.⁸⁵

Derogations need to specify the material scope of the proposed emergency measures.⁸⁶ These measures have to be relevant, effective, and the least intrusive alternatives available to respond to the emergency.⁸⁷ Indeed, “[e]ach measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger.”⁸⁸ Determining the material scope of derogations is challenging in uncertain situations such as the COVID-19 pandemic.⁸⁹ The fact that States in similar or comparable situations took different measures exacerbates the challenge of determining the material scope.⁹⁰ It does

despite the constantly changing rhetoric around COVID-19).

84. See Joelle Grogan, *Rule of Law and COVID-19: The Need for Clarity, Certainty, Transparency and Coordination*, LSE BRITISH POL. & POL’Y (Oct. 26, 2020), <https://blogs.lse.ac.uk/politicsandpolicy/rule-of-law-and-covid19/> (“Legal uncertainty has characterised much of the government’s COVID-19 response; the lack of clarity and the absence of long-term strategizing has also often served to undermine policy and compliance.”).

85. See Lebret, *supra* note 56, at 7–8 (describing different approaches to lockdown measures taken by neighboring nations and IACHR’s duty to ensure proportionality of these measures).

86. CCPR General Comment No. 29, *supra* note 10, ¶ 4.

87. *Emergency Measures and COVID-19 Guidance*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Apr. 27, 2020), https://www.ohchr.org/Documents/Events/EmergencyMeasures_Covid19.pdf [hereinafter *Emergency Measures*]; CCPR General Comment No. 29, *supra* note 10, ¶¶ 4–5.

88. Siracusa Principles, *supra* note 24, ¶ 54.

89. Cf. Lebret, *supra* note 56 at 7–8 (“While several European states applied the principle of precaution, others, like Sweden, chose not to lockdown despite the controversy.”).

90. *Id.* at 8; see also Thomas Hale et al., *Variation in Government Responses to COVID19* 3 (Blavatnik Sch. Gov’t Working Paper No. 10, 2020), <https://www.bsg.ox.ac.uk/research/publications/variation-government-responses-covid-19> (explaining how similarly situated nations established a wide range of COVID-19 restrictions not only across borders, but within local boundaries); see, e.g., *How do Coronavirus Containment Measures Vary Across Europe?*, THE GUARDIAN (Mar. 16, 2020), <https://www.theguardian.com/world/2020/mar/12/how-do-coronavirus->

not help that public health organizations repeatedly changed their recommendations on the necessary and effective measures for containing the spread of COVID-19.⁹¹ For example, at the early stages of the outbreak, wearing a mask was unnecessary.⁹² But in the later stages of the pandemic, wearing a mask in public spaces became not only necessary but mandatory in several countries.⁹³ This change in official policy compromises the level of legal certainty expected from emergency decrees, albeit it is understandable that changes will occur as scientific knowledge of COVID-19 evolves.⁹⁴

In addition, the territorial scope of the derogation needs to be delimited; emergency measures should be limited to the territories of the State where the public emergency exists.⁹⁵ However, emergency measures taken in one area can have potential effects on other areas where emergency measures are not officially proclaimed, especially for emergency measures such as travel restrictions and lockdowns.⁹⁶

containment-measures-vary-across-europe?CMP=Share_iOSApp_Other (illustrating the lockdown measures taken by European nations throughout the course of a single day at the outset of the pandemic); Julian W. Tang, *COVID-19: Interpreting Scientific Evidence – Uncertainty, Confusion and Delays*, 20 BMC INFECTIOUS DISEASES 1–3 (2020) (comparing the implementation of masks mandates in Asian nations—where masking is prevalent because of airborne pollutions—to mandates in European nations).

91. See *Science Advice in Times of COVID-19*, OECD, <https://www.oecd.org/sti/science-technology-innovation-outlook/Science-advice-COVID/> (last visited Dec. 5, 2021) (describing the disconnect between policymaker's need for certainty, and the scientific community's constantly evolving rhetoric).

92. See Cheung, *supra* note 83 (noting that the WHO initially campaigned against mask usage).

93. Tang, *supra* note 90, at 2; Cheung, *supra* note 83.

94. See Lebre, *supra* note 56, at 7–8 (“The debates initially started off with various statements to the effect that ‘masks don’t work—don’t buy them!’, which eventually changed to the more recent mandatory order that ‘masks must be worn in shops and on public transport’.”).

95. *CCPR General Comment No. 29*, *supra* note 10, ¶ 4.

96. It is evident that lockdowns and travel restrictions affect not only those living in the territories where these measures are imposed but also those living in other territories and planning to travel to the former for different reasons or those who depend on mobility and tourism to earn their living. This cross-border effect has been seen both domestically and internationally. See Catherine Smith, *Meet the British Expats Stuck Abroad: ‘I May as Well Live on Mars’*, EURONEWS (July 12, 2021), <https://www.euronews.com/travel/2021/07/12/meet-the-british-expats-stuck-abroad-i-may-as-well-live-on-mars> (describing the inconsistencies in

The key question is whether the territorial scope requirement only pertains to the purpose of emergency measures or if it also extends to the effect of emergency measures. What happens when the effect of emergency measures extends beyond the territories where the state of emergency is officially proclaimed? International human rights law as it stands today does not conclusively answer this question.⁹⁷ In any case, although this inadvertent and mostly inevitable cross-border effect of emergency measures might not affect the validity of the derogation *per se*,⁹⁸ it has emerged as one of the practical challenges of limiting the scope of a state of emergency during the pandemic.⁹⁹

Derogations need to be time limited as well.¹⁰⁰ A state of emergency should only stay in place for as long as the public emergency exists.¹⁰¹ What makes this pandemic so uncertain and unpredictable is that we do not know when normalcy will be restored

COVID-19 response policies amongst nations, and its direct effect on travel—especially for those whose employment relies on travel between nations); *see also* *COVID-19 and Employment in the Tourism Sector: Impact and Response in Asia and the Pacific*, INT’L LABOUR ORG. 3–4 (Apr. 24, 2020), https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/briefingnote/wcms_742664.pdf [hereinafter *COVID-19 and Employment*].

97. These are emerging questions neither the General Comment No. 29 nor the Siracuse Principles address. *See* *CCPR General Comment No. 29*, *supra* note 10, ¶ 2; *see also* Siracusa Principles, *supra* note 24, ¶ 39. The statements adopted by human rights monitoring bodies in relation to the COVID-19 pandemic also do not deal with these questions. *See* *COVID-19 and Human Rights Treaty Bodies: Statements*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Sept. 2020), <https://www.ohchr.org/EN/HRBodies/Pages/COVID-19-and-TreatyBodies.aspx>.

98. *See* *Emergency Measures*, *supra* note 87 (asserting that restrictions on the freedom of movement for public health reasons are acceptable so long as they are not applied arbitrarily).

99. *See, e.g.*, Hanne Beirens et al., *When Emergency Measures Become the Norm: Post-Coronavirus Prospects for the Schengen Zone*, MIGRATION POL’Y INST. (Aug. 2020), <https://www.migrationpolicy.org/news/post-covid-prospects-border-free-schengen-zone> (“Scenes of backed-up borders and checkpoints would have been unthinkable just five years ago. Yet today, the unilateral reintroduction of border checks and border closures has become an accepted part of Member States’ toolkits to respond to cross-border emergencies.”).

100. *See* *CCPR General Comment No. 29*, *supra* note 10, ¶ 4 (stating that derogations need to be limited in duration).

101. *See id.* (defining duration as being determined by the durations of the state of emergency); *Emergency Measures*, *supra* note 87.

or when the public health emergency will end.¹⁰² Besides, it is not clear what level of normalcy the emergency measures aim to achieve—a return to life before the pandemic or a life where the measures mitigate the dangers of COVID-19.¹⁰³ It is thus difficult to ascertain how long a state of emergency may be necessary.¹⁰⁴ While this might also be true for other emergency situations, the exceptionalism of COVID-19 exacerbates this difficulty.¹⁰⁵

It is important to recognize that the derogation regime is in place to respond to uncertain and trying times that the ordinary application of laws cannot avert.¹⁰⁶ Indeed, “derogations are a rational response to . . . uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties.”¹⁰⁷ Some level of uncertainty is expected and justified in emergency situations.¹⁰⁸ But when the uncertainty casts doubt on the very validity of derogations, it undermines the restrictive scope of emergency measures in particular and the protection of human rights in general.¹⁰⁹

102. See Joe Myers, *When Will Life Return to ‘Pre-COVID Normal’?*, WORLD ECON. F (Apr. 12, 2021), <https://www.weforum.org/agenda/2021/04/normal-pre-covid-post-pandemic/> (explaining that the timeline to return to “pre-COVID normal” varies widely across the world).

103. See Andrew Duffy, *The New Normal: Don’t Expect a Return to Pre-Pandemic Life, Experts Say*, TIMES COLONIST (Mar. 14, 2021), <https://www.timescolonist.com/islander/the-new-normal-don-t-expect-a-return-to-pre-pandemic-life-experts-say-1.24294201> (predicting the effects of COVID-19 will be long-term).

104. Cf. Kushtrim Istrefi & Isabel Humburg, *To Notify or Not to Notify: Derogations from Human Rights Treaties*, OPINIOJURIS (Apr. 18, 2020), <http://opiniojuris.org/2020/04/18/to-notify-or-not-to-notify-derogations-from-human-rights-treaties/> (stating that the duration of States’ derogations from their human rights obligations based on a state of emergency created by COVID-19 is unknown).

105. See *id.* (noting that it is unknown for how long the COVID-19 related derogations will last).

106. See Emilie M. Hafner-Burton et al., *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT’L ORG. 673, 680 (2011) (explaining that derogations are a legal response to uncertainty).

107. *Id.*

108. See *id.* (explaining that derogations are a rational response to domestic political uncertainty).

109. See *Emergency Measures*, *supra* note 87 (outlining the exceptional and

B. TRACING (INDIRECT) DISCRIMINATION IN EMERGENCY MEASURES

As mentioned before, one of the conditions of derogations is that measures taken during the state of emergency should not involve discrimination based on any of the protected grounds, i.e., race, color, sex, religion, and social origin.¹¹⁰ Discrimination pertains to any differential treatment based on one or more of these grounds that has the purpose and/or effect of impairing the equal enjoyment of rights.¹¹¹ Generally, discrimination can be formal (*de jure*) or substantive (*de facto*) depending on where the differential treatment emanated from—law or practice, respectively—and direct or indirect discrimination based on how the unfavorable treatment manifests.¹¹² “[N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”¹¹³ This section seeks to depict how the emergency measures taken during the pandemic potentially constitute discrimination.

Not only does COVID-19 disproportionately affect marginalized and vulnerable groups but the measures taken to curb the spread of

restrictive nature of derogations in international human rights law).

110. See ICCPR, *supra* note 6, art. 4(1) (providing that emergency measures should not involve discrimination); see also CCPR General Comment No. 29, *supra* note 10, ¶ 8 (reiterating that derogations should not involve discrimination based on any of the protected grounds).

111. See U.N. Hum. Rts. Comm., *CCPR General Comment No. 18: Non-discrimination*, ¶ 6, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 10, 1989) [hereinafter *CCPR General Comment No. 18*] (defining discrimination to be distinction based on race and other factors); see also U.N. Comm. on Econ., Soc. & Cultural Rts., *CESCR General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, ¶ 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶¶ 8–10, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter *CESCR General Comment No. 20*] (defining discrimination to be any restriction which has the intention or effect of nullifying or impairing enjoyment or exercise of rights).

112. See Int’l Comm’n Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, ¶ 11 (Jan. 26, 1997) [hereinafter *Maastricht Guidelines*] (defining formal, substantive, direct, and indirect discrimination).

113. *CESCR General Comment No. 20*, *supra* note 111, ¶¶ 8–10.

the virus also hit socioeconomically marginalized groups the hardest.¹¹⁴ For example, the closure of businesses is severely felt by small business owners,¹¹⁵ lockdowns disproportionately affect those that earn their living from informal sectors,¹¹⁶ and the closure of schools and the introduction of online education disadvantage children who do not have access to the internet or electricity.¹¹⁷ Moreover, all these measures generally are more difficult on women, children, the elderly, and other vulnerable groups.¹¹⁸ The measures taken during the pandemic also intensify the existing challenges these groups face, such as domestic violence and early or underage marriage.¹¹⁹

Several reports have shown an exponential increase in gender-

114. See Cathaoir, *supra* note 67, at 35 (explaining that historically poor and vulnerable groups are particularly impacted by COVID-19).

115. See Comm. on Econ., Social and Cultural Rts. Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights, ¶ 5, U.N. Doc. E/C.12/2020/1 (Apr. 6, 2020) [hereinafter CESCR Statement on COVID-19] (explaining that some small business can no longer conduct business).

116. See INT'L LABOUR ORG., ILO MONITOR: COVID-19 AND THE WORLD OF WORK 17 (7th ed. 2021), https://www.ilo.org/wcmsp5/groups/public/---dgreports/-dcomm/documents/briefingnote/wcms_767028.pdf (explaining that COVID-19 disproportionately impacts those who are self-employed); see also CESCR Statement on COVID-19, *supra* note 115, ¶ 5 (explaining that workers in the gig-economy are severely affected by the COVID-19 crisis).

117. See Martha F. Davis, 'The Human (Rights) Costs of Inequality: Snapshots from the Pandemic' in COVID-19 AND HUMAN RIGHTS 68, 69–71 (Morten Kjaerum et al. eds., 2021) (providing data regarding lack of internet among children); see also CESCR Statement on COVID-19, *supra* note 115, ¶ 7 (noting that closing schools in areas where there is unequal access to affordable internet services and technology carries the risk of deepening educational inequalities). See generally *COVID-19: Are Children Able to Continue Learning During School Closures?: A Global Analysis of the Potential Reach of Remote Learning Policies*, UNICEF (Aug. 2020), <https://data.unicef.org/resources/remote-learning-reachability-factsheet/> (providing data regarding methods used to reach students with limited access to technology).

118. See Lebret, *supra* note 56, at 9–15 (noting that in cases of self-confinement, women and children are particularly affected by domestic violence)

119. See *Rethinking Derogation*, *supra* note 5, at 29 (stating that domestic violence has sharply increased during COVID-19); see also Davis, *supra* note 117, at 70 (stating that in many places where girls who would typically be in school were being married off to lessen the burden on the family).

based violence due to the lockdown and quarantine measures.¹²⁰ As Jang and Farise rightly note:

Lockdowns have been one of the globally supported measures to prevent the spread of COVID-19 and mitigate its impact on public health. What this means for many women and girls, however, is that they are trapped at home with abusive spouses, partners and family members with limited access to support services, if any.¹²¹

Moreover, the economic impacts of these measures are harder on women.¹²² For instance, the measures taken to halt the spread of the pandemic has resulted in a higher increase of unemployment among women as compared to men.¹²³

120. See *UN Chief Calls for Domestic Violence 'Ceasefire' Amid 'Horrible Global Surge'*, U.N. NEWS (Apr. 6, 2020), <https://news.un.org/en/story/2020/04/1061052> (identifying an increase in domestic violence in both developed and developing nations); see also CESCR Statement on COVID-19, *supra* note 115, ¶ 8 (explaining that COVID-19 creates increased risks of deepening gender equality because caring for the sick disproportionately falls on women); Lebret, *supra* note 56, at 9 (showing significant increases in domestic violence during the COVID-19 pandemic); Talha Burki, *The Indirect Impact of COVID-19 on Women*, 20 LANCET INFECTIOUS DISEASES 904, 904 (2020) (referencing a thirty percent increase in domestic violence in France during COVID-19).

121. See Boram Jang & Khanyo Farise, *Gender Based Violence During the COVID-19 Pandemic and Economic, Social and Cultural Rights*, OPINIOJURIS (Apr. 23, 2020), <http://opiniojuris.org/2020/04/23/gender-based-violence-during-the-covid-19-pandemic-and-economic-social-and-cultural-rights/> (connecting domestic violence to violations of economic, social, and cultural rights).

122. Cf. Zarizana Abdul Aziz & Janina Moussa, *COVID-19 and Violence Against Women: Unprecedented Impacts and Suggestions for Mitigation*, in COVID-19 AND HUMAN RIGHTS 101, 106 (Morten Kjaerum et al. eds., 2021) (noting that loss of income results in more women being trapped in violent homes).

123. See *COVID-19 and its Economic Toll on Women: The Story Behind the Numbers*, U.N. WOMEN (Sept. 16, 2020), <https://www.unwomen.org/en/news/stories/2020/9/feature-covid-19-economic-impacts-on-women> (stating that women owned businesses will be hit hardest by the pandemic); see also GINETTE AZCONA ET AL., U.N. WOMEN, FROM INSIGHTS TO ACTION: GENDER EQUALITY IN THE WAKE OF COVID-19 5 (2020), <https://www.unwomen.org/en/digital-library/publications/2020/09/gender-equality-in-the-wake-of-covid-19> (showing that out of self-employed workers in Europe and Central Asia twenty-five percent of women and twenty-one percent of men have lost their jobs since the start of the pandemic); cf. Burki, *supra* note 120, at 904 (identifying that in most developing countries, the informal sector constitutes

The pandemic also disproportionately affects indigenous communities.¹²⁴ The emergency measures taken during the pandemic have had a far-reaching impact on the social, economic, and cultural life of indigenous communities around the world.¹²⁵ Indigenous peoples that earn their living from informal sectors, such as tourism, seasonal work, and markets, have been severely affected by the lockdown and other measures exposing them to food insecurity and extreme poverty.¹²⁶ The closure of schools and the switch to remote learning via the internet and TV channels severely limits access to education for indigenous children as they often do not have access to the internet or electricity.¹²⁷ Moreover, the emergency measures taken during the pandemic disrupt the traditional practices and way of life of indigenous peoples on which their very existence as distinct communities depends.¹²⁸ While these measures might be necessary, their formulation and implementation often fail to take into account the distinct culture and way of life of indigenous peoples and to involve them in the decision-making process.¹²⁹ COVID-19

two-thirds of the employment of women).

124. See *UN/DESA Policy Brief #70: The Impact of COVID-19 on Indigenous Peoples*, U.N. DEP'T OF ECON. & SOC. AFF. ECON. ANALYSIS, (May 8, 2020), <https://www.un.org/development/desa/dpad/publication/un-desa-policy-brief-70-the-impact-of-covid-19-on-indigenous-peoples/> (addressing significantly higher rates of communicable and non-communicable diseases, high mortality rates and lower life expectancies among indigenous communities as unique COVID-19 threats).

125. See *id.*

126. See *id.*; see, e.g., THE INT'L WORK GROUP FOR INDIGENOUS AFF. & THE INT'L LABOUR ORG., *THE IMPACT OF COVID-19 ON INDIGENOUS COMMUNITIES: INSIGHTS FROM THE INDIGENOUS NAVIGATOR* 32–34, 37–38 (Nick Hennin ed., 2020), https://www.ilo.org/gender/Informationresources/Publications/WCMS_757475/lang-en/index.htm [hereinafter ILO REPORT] (highlighting how informal labor sectors require more migrancy and increased volatility during times of low access to transportation).

127. See ILO REPORT, *supra* note 126, at 35 (stating that indigenous students lost access to education during COVID-19 lockdowns as a result of less access to internet).

128. See *id.* at 39 (pointing to COVID-19's disruption of traditional indigenous social practices).

129. See U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., *COVID-19 AND INDIGENOUS PEOPLES' RIGHTS* 4 (2020), https://www.ohchr.org/Documents/Issues/IPeoples/OHCHRGuidance_COVID19_

responses in several countries have failed to follow an indigenous rights-based approach,¹³⁰ which exacerbates the disproportionate impacts of emergency measures on these groups.¹³¹ These disproportionate impacts coupled with the historical and ongoing marginalization of indigenous communities affect the equal enjoyment of rights.¹³²

Most of these emergency measures are neutral at their face value or seldom involve direct discrimination.¹³³ However, these measures create or perpetuate inequalities as discussed above.¹³⁴ The question is whether the requirement of non-discrimination under the derogation regime also extends to indirect discriminations—the “laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of [rights].”¹³⁵ Roslyn Higgins, a former Human Rights Committee member, argues that the term “solely” under Article 4(1) indicates “that derogations which inadvertently discriminate may, if the other conditions are met, be lawful.”¹³⁶ This narrow interpretation suggests that Article 4 does not

IndigenouspeoplesRights.pdf (showing States’ failure to consult indigenous populations before instituting COVID-19 measures that will impact indigenous populations).

130. See ILO REPORT, *supra* note 126, at 42 (observing States are failing to adopt specific policies and at times neglecting even to include indigenous peoples in general COVID-19 responses).

131. See COVID-19 AND INDIGENOUS PEOPLES’ RIGHTS, *supra* note 129, at 4 (identifying geographic remoteness of many indigenous people from medical care).

132. See *id.* at 4 (identifying geographic remoteness of many indigenous people from medical care and existing disadvantages to marginalized communities).

133. See Paul Gready, *The Implications of and Responses to COVID-19: Localizing Human Rights in the City of York*, 12 J. HUM. RTS. PRACT. 250, 252–53 (2020) (addressing inadvertent discrimination arising out of “neutral” measures that disproportionately affect marginalized people).

134. See *id.* at 253 (highlighting inequality in access to health care, and through indirect, contextual and structural discrimination).

135. See CESCR *General Comment No. 20*, *supra* note 111, ¶ 10(b) (defining indirect discrimination).

136. ROSALYN HIGGINS, THEMES AND THEORIES 461 (2009); see also Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 83 (Louis Henkin ed., 1981) (quoting Higgins).

prohibit indirect discrimination.¹³⁷ Nevertheless, most of the indirect discriminations elucidated above can arguably be mitigated, if not avoided, with inclusive, targeted, and participatory measures that take into account the specific circumstances of vulnerable groups.¹³⁸ Hence, derogations should not give unlimited leeway to States in this regard.¹³⁹

In any case, whether or not the disproportionate effects of the emergency measures amount to indirect discrimination should be assessed on a case-by-case basis. This assessment should be made by taking into account the reasonableness and objectivity of the measure as well as the steps taken by the State to prevent discrimination.¹⁴⁰ However, it is evident that the emergency measures taken during the pandemic have a disproportionate impact on marginalized groups, which potentially amounts to indirect discrimination based on one or more of the protected grounds.¹⁴¹

In some cases, emergency measures or their implementation involve overt differential treatment potentially amounting to direct discrimination.¹⁴² For example, reports have shown that Bulgarian authorities subjected predominantly Roma neighborhoods to harsher restrictions than other areas.¹⁴³ Additionally, sanctions for violating emergency measures disproportionately affected marginalized groups and minorities.¹⁴⁴ Overall, direct and indirect discrimination

137. See HIGGINS, *supra* note 136, at 461 (highlighting the word “solely”).

138. See *Discrimination, Inequality, and Poverty—A Human Rights Perspective*, HUM. RTS. WATCH (Jan 11, 2013, 7:01 PM), <https://www.hrw.org/news/2013/01/11/discrimination-inequality-and-poverty-human-rights-perspective> (recommending a targeted approach to mitigating discrimination against marginalized communities).

139. See *id.* (suggesting that States have an obligation to tailor laws to prevent direct and indirect discrimination against marginalized groups).

140. See *CCPR General Comment No. 18*, *supra* note 111, ¶ 13 (advocating for a case-by-case approach).

141. See SARAH REPUCCI & AMY SLIPOWITZ, *DEMOCRACY UNDER LOCKDOWN: THE IMPACT OF COVID-19 ON THE GLOBAL STRUGGLE FOR FREEDOM 10* (Freedom House pub., 2020), <https://freedomhouse.org/report/special-report/2020/democracy-under-lockdown> (noting that abuses of power disproportionately impact marginalized people).

142. See, e.g., *id.* at 10 (criticizing Bulgarian policies openly discriminating against Romany people).

143. See *id.*

144. See, e.g., *id.* (identifying sanctions in the UK and Turkey that target

have tainted the emergency measures taken in response to the COVID-19 pandemic.

C. PUTTING NON-DEROGABLE RIGHTS AT RISK?

As mentioned before, Article 4(2) of the Covenant lists certain rights from which States cannot derogate.¹⁴⁵ This section will explain how the emergency measures potentially affect some of these non-derogable rights.

One of the non-derogable rights listed under Article 4(2) of the Covenant is freedom of religion.¹⁴⁶ Recognized under Article 18 of the ICCPR,¹⁴⁷ freedom of religion involves two major elements: freedom of belief and freedom to manifest religion.¹⁴⁸ Freedom of belief is an absolute right that States cannot restrict under any circumstances,¹⁴⁹ whereas States can subject freedom to manifest religion to justified limitations.¹⁵⁰ When it comes to derogations, however, the freedom of belief and the freedom to manifest religion are non-derogable rights.¹⁵¹ The Human Rights Committee affirmed

minority populations).

145. See ICCPR, *supra* note 6, art. 4(2) (listing non-derogable rights).

146. See *id.*, art. 4(2) (including Article 18, governing religious freedom).

147. See *id.*, art. 18 (providing for religious freedom).

148. See *id.* (establishing right of belief and right of manifestation); see also U.N. Hum. Rts. Comm., *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Jul. 30, 1993) [hereinafter *CCPR General Comment No. 22*] (distinguishing the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief and rejecting all limitations on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice).

149. See ICCPR, *supra* note 6, art. 18(2) ("No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice."); see also *CCPR General Comment No. 22*, *supra* note 148 (rejecting all limitations on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice).

150. See ICCPR, *supra* note 6, art. 18(3) (establishing that the right of manifestation of religion can be reasonably limited); see also *CCPR General Comment No. 22*, *supra* note 148 (enabling justifiable limits on manifestation of religion or belief).

151. See ICCPR, *supra* note 6, art. 4(2) (establishing, inter alia, that the rights under Article 18 of the ICCPR—which governs the rights to freedom of thought, conscience, and religion—cannot be derogated from under the provisions of Article 4 of the ICCPR).

that “[e]ven in times of most serious public emergencies, States that interfere with the freedom to manifest one’s religion or belief must justify their actions by referring to the requirements specified in [A]rticle 18, paragraph 3.”¹⁵² The Committee also considered freedom of religion as one of the rights where “it can never become necessary to derogate from . . . during a state of emergency.”¹⁵³ Nevertheless, some of the emergency measures proposed and taken by States during the COVID-19 pandemic inevitably have the purpose and/or effect of derogating from the freedom to manifest religion.¹⁵⁴ Before depicting how these emergency measures restrict freedom of religion it is imperative to ask what freedom to manifest religion constitutes.¹⁵⁵

As the provision notes, “[t]he freedom to manifest religion or belief may be exercised ‘either individually or in community with others and in public or private[.]’”¹⁵⁶ This right protects a range of activities and practices.¹⁵⁷ Most organized religions involve regular worships and rituals exercised in larger groups, which are protected under the Covenant.¹⁵⁸ For most religions, fellowship with others and community engagements are regarded as an integral part of their belief.¹⁵⁹ Thus, the collective exercise of this right is recognized under the Covenant.¹⁶⁰

152. *CCPR General Comment No. 29*, *supra* note 10, ¶ 7; *see also* ICCPR, *supra* note 6, art. 18(3) (establishing that the right of manifestation of religion can be reasonably limited).

153. *CCPR General Comment No. 29*, *supra* note 10, ¶ 7 (clarifying that the permissibility of restrictions is independent of the issue of derogability).

154. *See, e.g.*, Georgia Alida Du Plessis, *COVID-19 and Limitations to the International Right to Freedom of Religion or Belief*, 63 J. CHURCH STATE 619, 630 (2020) (detailing how the measures taken during COVID-19 affect freedom of religion).

155. *See CCPR General Comment No. 22*, *supra* note 148, ¶ 4 (explaining the freedom to manifest religion).

156. *Id.* (quoting ICCPR art. 18(1)); ICCPR, *supra* note 6, art. 18(1).

157. *See CCPR General Comment No. 22*, *supra* note 148, ¶ 4 (quoting ICCPR art. 18(1)).

158. *See* ICCPR, *supra* note 6, art. 18(1) (protecting regular worship rituals); *see also* *CCPR General Comment No. 22*, *supra* note 148, ¶ 4 (recognizing the often-communal nature of worship).

159. *See* Du Plessis, *supra* note 154, at 627 (asserting the importance of communal worship).

160. *See also* *CCPR General Comment No. 22*, *supra* note 148, ¶ 1 (highlighting

In light of these normative elements of the right, some of the emergency measures taken by States, such as lockdowns and bans on public gatherings, inevitably restrict the right to manifest religion.¹⁶¹ Freedom to manifest religion and freedom of assembly are closely intertwined,¹⁶² and hence, a derogation from the latter can potentially restrict the former.¹⁶³ Moreover, the state of emergency measures taken by several countries, such as Argentina,¹⁶⁴ Australia,¹⁶⁵ Belgium,¹⁶⁶ Chile,¹⁶⁷ Ecuador,¹⁶⁸ France,¹⁶⁹ Italy,¹⁷⁰ New Zealand,¹⁷¹

that the collective right to worship cannot be derogated).

161. See Du Plessis, *supra* note 154, at 626 (noting that social distancing limits freedom to practice religious beliefs); see also Joseph, *supra* note 50, at 255 (specifying that bans on religious gatherings curtail rights).

162. See Du Plessis, *supra* note 154, at 627 (linking freedom of religious manifestation with freedom of assembly); see also Heiner Bielefeldt, *Freedom of Religion or Belief—A Human Right under Pressure*, 1 OXFORD J.L. RELIG. 15, 23 (2012) (noting the interdependence of rights like assembly and religion).

163. See Du Plessis, *supra* note 154, at 627–28 (connecting derogation from freedom of assembly to restriction of freedom of religion).

164. See Inés San Martín, *10 Arrested in Argentina for Clandestine Mass Violating Corona-Lockdown Rules*, CRUX (May 7, 2020), <https://cruxnow.com/church-in-the-americas/2020/05/10-arrested-in-argentina-for-clandestine-mass-violating-corona-lockdown-rules/> (showing emergency measures in Argentina).

165. See *NSW Government Announces Targets for Easing of COVID-19 Restrictions*, CATH. ARCHDIOCESE OF SYDNEY, (Sept. 9, 2021), <https://www.sydneycatholic.org> (showing emergency measures in Australia).

166. See *Belgian Churches Suspend Mass as Virus Spreads*, BUS. STANDARD, (Mar. 12, 2020), https://www.business-standard.com/article/pti-stories/belgian-churches-suspend-mass-as-virus-spreads-120031201733_1.html (showing emergency measures in Belgium).

167. See Inés San Martín, *Chilean Bishop Calls for Civil Disobedience over Mass Restrictions*, CRUX, (Mar. 17, 2021), <https://cruxnow.com/church-in-the-americas/2021/03/chilean-bishop-calls-for-civil-disobedience-over-mass-restrictions> (showing emergency measures in Chile).

168. See *COVID-19 and Compassion's Work in Ecuador*, COMPASSION (July 27, 2021), <https://www.compassion.com/crisis/covid-19/ecuador-covid19.htm> (showing emergency measures in Ecuador).

169. See Nicolas Pinault, *France's Catholics Protest Lockdown Measures*, VOA, (Nov. 18, 2020, 12:06 PM), <https://www.voanews.com/europe/frances-catholics-protest-lockdown-measures> (showing emergency measures in France).

170. See Philip Pullella, *Rome Catholic Churches Ordered Closed Due to Coronavirus, Unprecedented in Modern Times*, REUTERS, (Mar. 12, 2020, 3:15 PM), <https://www.reuters.com/article/us-health-coronavirus-italy-rome->

Peru,¹⁷² and South Africa,¹⁷³ explicitly include the closure of places of worship.¹⁷⁴ These measures particularly restrict the collective exercise of the right.¹⁷⁵ Hence, COVID-19 highlights a situation where it may be necessary to derogate from this right contrary to the Committee's assertion.¹⁷⁶ As mentioned before, the freedom to manifest religion is not an absolute right, and it can be limited based on Article 18(3) of the Covenant.¹⁷⁷ But the question remains—what if one of the three requirements of limitation is not fulfilled? For instance, what if the State did not have a preexisting law that provides for the limitation in question?¹⁷⁸ Can States derogate from the freedom of religion in these exceptional cases?¹⁷⁹ These hypotheticals are where the normative gap and the practical

churche/rome-catholic-churches-ordered-closed-due-to-coronavirus-unprecedented-in-modern-times-idUSKBN20Z3BU (showing emergency measures in Italy).

171. See *New Zealand Bishops Pause In-Person Worship as Country Enters Lockdown*, ENS (Aug. 20, 2021), <https://www.episcopalnewsservice.org/2021/08/20/new-zealand-bishops-pause-in-person-worship-as-country-enters-lockdown/> (showing emergency measures in New Zealand).

172. See *Peruvian Bishops Ask for Loosening of Church Restrictions*, CNA (Mar. 21, 2021), <https://www.catholicnewsagency.com/news/246957/peruvian-bishops-ask-for-loosening-of-church-restrictions> (showing emergency measures in Peru).

173. See *COVID-19 and its Effects on Churches in South Africa*, CHRISTIAN RECORDER (June 12, 2020), <https://www.thechristianrecorder.com/covid-19-and-its-effects-on-churches-in-south-africa/> (showing emergency measures in South Africa).

174. *States of Emergencies*, *supra* note 6 (listing States that have imposed states of emergency in response to the COVID-19 pandemic and the measures they have taken); see also Gayle Manchin & James Carr, *COVID-19 Symposium: Don't Let Religious Freedom Become a Casualty of Coronavirus*, OPINIOJURIS (Apr. 6, 2020), <http://opiniojuris.org/2020/04/06/covid-19-symposium-dont-let-religious-freedom-become-a-casualty-of-coronavirus/> (listing Saudi Arabia, Vatican City, United Arab Emirates, and Tajikistan as additional countries closing religious institutions in response to the COVID-19 pandemic).

175. See Du Plessis, *supra* note 154, at 628 (explaining how COVID-19 emergency measures may restrict freedom to manifest religion).

176. See *CCPR General Comment No. 29*, *supra* note 10, ¶ 11 (noting that derogation from freedom of religion would never become necessary).

177. See *ICCPR*, *supra* note 6, art. 18(3) (establishing that the right of manifestation of religion can be reasonably limited).

178. See *id.*

179. See *id.*

challenge lies. Moreover, the current situation nullifies the Committee's assumption that there would never be a situation where it is necessary to derogate from this right.¹⁸⁰

The American Convention on Human Rights also lists freedom of conscience and religion as one of the non-derogable rights.¹⁸¹ Conversely, freedom of religion is not one of the non-derogable rights listed under Article 15(2)¹⁸² and Article 4(C) of the European Convention on Human Rights and the Arab Charter on Human Rights, respectively.¹⁸³ This variance of norms also attests that the justification for making the right to freedom of religion non-derogable is not self-evident despite what the Human Rights Committee contended.¹⁸⁴

Apart from those rights listed under Article 4(2) of the Covenant, the Committee has also identified certain rights or their aspects for which derogation is unacceptable.¹⁸⁵ One of these rights is the right to effective remedies envisaged under Article 2(3) of the Covenant.¹⁸⁶ This provision requires States to ensure access to effective remedies on which the realization of all other rights recognized under the Covenant hinges.¹⁸⁷ Thus, States need to put in

180. See *CCPR General Comment No. 29*, *supra* note 10, ¶ 11 (stating that there can never be a situation where derogation from the right to freedom of religion would be necessary).

181. ACHR, *supra* note 19, art. 27(2).

182. European Convention on Human Rights art. 15(2), Nov. 4, 1950 [hereinafter ECHR] (outlining that the only non-derogable rights are those provided in articles 2, 3, 4, and 7 of the Convention).

183. *Id.*, art. 15(2); see also Arab Charter, *supra* note 19, art. 4(C) (enshrining that “limitations or derogations shall not affect the prohibitions on torture and degrading [treatment], the return to [one’s] country, political asylum, trial, the prohibition against [double jeopardy], and the principle of the legality of the crime and punishment.”).

184. See *CCPR General Comment No. 29*, *supra* note 10, ¶ 11 (stating that the justification for making the right to freedom of religion non-derogable is that “it can never become necessary to derogate from [this right] during a state of emergency”).

185. See *id.* ¶ 11 (outlining additional articles that include non-derogable rights).

186. See *id.* (stating that Article 2(3) requires a State party to provide remedies for violations of the ICCPR provisions); see also ICCPR, *supra* note 6, art. 4. (outlining articles from which States cannot derogate).

187. See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW

place “appropriate judicial and administrative mechanisms” at the domestic level to redress any violation of the Covenant rights.¹⁸⁸ While States can make necessary adjustments to remedial procedures during a state of emergency, they need to generally comply with their obligations under Article 2(3).¹⁸⁹ Some of the emergency measures taken in response to the pandemic certainly affect access to effective remedies, such as the closure of courts and administrative tribunals, as well as logistical difficulties created by other measures, including lockdowns and travel restrictions.¹⁹⁰ For instance, Israel temporarily closed courts supposedly to contain the spread of the virus.¹⁹¹

Derogations from certain rights, such as the right to fair trials, will inevitably affect the provision of remedies.¹⁹² While the right to a fair trial is not listed among non-derogable rights, an exclusion that

17 (3rd ed. 2015) (explaining that without remedies and enforcement measures, there are no rights); e.g., *Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defense Rights in Europe*, FAIR TRIALS (July 15, 2020), <https://www.fairtrials.org/publication/beyond-emergency-covid-19-pandemic> [hereinafter *Beyond the Emergency*] (providing an example of how European courts were inconsistent in their adoption of remote platforms for courts after in-person courts were shut down due to COVID-19).

188. U.N. Hum Rts. Comm., *CCPR General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter *CCPR General Comment No. 31*].

189. See SHELTON, *supra* note 187, at 17 (noting that denying access to tribunals is considered the denial of justice); see also *CCPR General Comment No. 29*, *supra* note 10, ¶ 15 (stating that restrictions on procedural safeguards should not circumvent the protection of non-derogable rights).

190. See SHELTON, *supra* note 187, at 17 (explaining that the right to effective remedies includes a procedural aspect, which guarantees access to independent and impartial institutions, such as courts); see also *Beyond the Emergency*, *supra* note 187 (explaining that emergency measures, such as lockdowns, quarantines, and closure of courts inevitably disrupt this access).

191. See David M. Halbfinger & Isabel Kershner, *Netanyahu's Bold Moves: Fighting a Virus or Risking Democracy?*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/world/middleeast/israel-virus-netanyahu.html> (reporting that Israel's prime minister shut down courts in response to COVID-19).

192. See SHELTON, *supra* note 187, at 17 (noting that without access to fair trials, victims will not have access to remedies for violations of their basic rights); see also *CCPR General Comment No. 29*, *supra* note 10, ¶ 15 (noting the importance of procedural guarantees, including fair trial rights, during a state of emergency).

scholars highly criticize,¹⁹³ it is inextricably linked to the right to effective remedies and other non-derogable rights.¹⁹⁴ Moreover, some aspects of the right to a fair trial are guaranteed even in times of war,¹⁹⁵ and there is “no justification for derogation from these guarantees during other emergency situations.”¹⁹⁶ The Committee also reiterated in its statement concerning COVID-19 that derogations from due process guarantees and from the right to judicial access are impermissible during public health emergencies.¹⁹⁷ Contrary to this admonition, Estonia remarked in the notification it submitted to the Secretary-General that the emergency measures it is taking to contain the spread of the virus might involve a derogation from Article 14 of the ICCPR, the right to a fair trial.¹⁹⁸ It is not evident from the notification why such derogation is

193. See SHELTON, *supra* note 187, at 17 (arguing that refusing access to fair trials is a manifestation of the denial of justice).

194. See Siracusa Principles, *supra* note 24, ¶ 70 (providing that “the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency.”); see also *CCPR General Comment No. 29*, *supra* note 10, ¶¶ 15–16 (proving that procedural guarantees often include judicial guarantees and procedural guarantees may never be subject to restrictions that circumvent the protection of non-derogable rights); U.N. Hum. Rts. Comm., *CCPR General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to Fair Trial*, ¶ 6, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter *CCPR General Comment No. 32*] (stating that the guarantee of a fair trial may never be subject to measures of derogation that would compromise the protection of non-derogable rights).

195. See U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., *BASIC HUMAN RIGHTS REFERENCE GUIDE: RIGHT TO A FAIR TRIAL AND DUE PROCESS IN THE CONTEXT OF COUNTERING TERRORISM* 8–9 (2014) (stating that certain requirements must be ensured for the right to a fair trial even in situations where derogation to this right is allowed).

196. *CCPR General Comment No. 29*, *supra* note 10, ¶ 16.

197. See *Statement on Derogations*, *supra* note 52, ¶ 2(d) (outlining all the provisions of the ICCPR that are non-derogable during a state of emergency).

198. See Permanent Mission of the Republic of Estonia to the United Nations, Letter dated Mar. 20, 2020 from the Permanent Mission of the Republic of Estonia to the United Nations addressed to Secretary-General, U.N. Doc. C.N.113.2020.TREATIES-IV.4 (listing the articles of the ICCPR Estonia may derogate from); see also Istrefi & Humburg, *supra* note 104 (providing a list of countries that have submitted notifications of derogations under the ICCPR, including Estonia).

necessary to respond to the pandemic.¹⁹⁹ However, as established above, it is safe to say that derogations from Article 14 of the Covenant—which guarantees, inter alia, equality before the courts, a presumption of innocence, a speedy trial, and the right to appeal²⁰⁰—is seldom justified under international human rights law.²⁰¹

In a nutshell, the emergency measures taken to contain the spread of the virus can potentially put non-derogable rights at risk, a challenge the derogation regime is grappling with.²⁰²

D. DEROGATIONS FROM ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE NORMATIVE GAP AND PRACTICAL CHALLENGES

Apart from civil and political rights, several States have also derogated from economic, social and cultural rights (hereinafter “ESC rights” or “socio-economic rights”) including, inter alia, the right to education and the right to work.²⁰³ While most of these emergency decrees do not specifically refer to ESC rights, they constitute de facto derogation to some of these rights.²⁰⁴ Some of the emergency measures taken during the COVID-19 pandemic, such as lockdowns and the closure of schools and businesses, have the effect of restricting socio-economic rights.²⁰⁵ These derogations pose both

199. See Istrefi & Humburg, *supra* note 104 (explaining that of the thirty-one States that have registered derogations under multiple human rights treaties, only a handful have specified from which provisions they are derogating).

200. See ICCPR, *supra* note 6, art. 14.

201. See *CCPR General Comment No. 29*, *supra* note 10, ¶ 16; see also *Statement on Derogations*, *supra* note 52, ¶ 2(d).

202. See *Rethinking Derogations*, *supra* note 5, at 24–25.

203. See *Rethinking Derogations*, *supra* note 5, at 21; see also ICESCR, *supra* note 50, arts. 7 & 13.

204. See generally *States of Emergencies*, *supra* note 6 (showing the comprehensive list of States that derogated from the ICCPR and the specific measures they have taken to do so); *Depositary Notifications (CNs) by the Secretary-General*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/CNs.aspx?cnTab=tab2&clang=_en (last visited Dec. 7, 2021) (listing notifications of derogations submitted by States, which include the rights they have derogated from).

205. CESCR Statement on COVID-19, *supra* note 115, at 3–7 (describing how the measures taken affect ESC rights); see also Sarah Joseph, *A Timeline of COVID 19 and Human Rights: Fortresses, Shutdowns, Quarantines, and Timely Testing*, GRIFFITH NEWS (May 1, 2020), <https://news.griffith.edu.au/2020/05/01/a-timeline-of-covid-19-and-human-rights-fortresses-shutdowns-quarantines-and->

normative and practical challenges, which this section sheds a light upon.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not include a derogation clause.²⁰⁶ While the *travaux préparatoires* of the Covenant does not indicate a discussion on this issue,²⁰⁷ scholars have offered a few reasons for the lack of a derogation clause under the Covenant.²⁰⁸ These reasons include the peculiar nature of State obligations socio-economic rights entail that leaves a certain latitude for States, the nature of these rights, and the existence of a general limitation clause that can also be used in emergency situations.²⁰⁹ The obligations of States under the Covenant are qualified by the principles of “progressive realization” and “availability of resources.”²¹⁰ According to Article 2(1), States are obliged to take appropriate steps “to the maximum of [their] available resources, with a view to achieving progressively the full realization of [ESC] rights.”²¹¹ On the one hand, this provision, which embodies both obligations of conduct and result, requires

timely-testing/ (explaining the effect of COVID-19 measures on socio-economic rights).

206. See Manisuli Ssenyonjo, *Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law*, 15 INT’L. J. HUM. RTS. 969, 990 (2011) (discussing the absence of a derogation clause in the ICESCR).

207. See GILLES GIACCA, ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ARMED CONFLICT 84 (2014) (discussing reasons why there is an absence of a derogation clause); see also Ssenyonjo, *supra* note 206, at 990 (stating the “travaux préparatoires of the ICESCR do not reveal any specific discussion on the issue of whether or not a derogation clause was considered necessary, or even appropriate.”); Muller, *supra* note 69, at 591 (stating the travaux préparatoires do not include a discussion on derogations.).

208. See Ssenyonjo, *supra* note 206, at 990 (discussing reasons why a derogation clause was not included in the ICESCR); see also Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 217 (1987) (discussing reasons for the omission of the derogation clause).

209. *Id.*

210. See ICESCR, *supra* note 50, art. 2(1); see also U.N. Comm. on Econ., Soc. and Cultural Rts., *CESCR General Comment No. 3: The Nature of States Parties’ Obligations, (Art. 2, Para. 1, of the Covenant)*, ¶ 9, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter *CESCR General Comment No. 3*].

211. ICESCR, *supra* note 50, art. 2(1).

States to take positive measures and progressively move towards the full realization of ESC rights.²¹² On the other hand, it allows States to reasonably justify a lack of immediate and full realization of socio-economic rights based on resource constraints and the notion of progressive realization.²¹³ In exceptional cases, even retrogressive measures, which are prohibited in principle,²¹⁴ can be “justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”²¹⁵ Thus, exceptional situations, such as economic recession, natural disasters, and armed conflicts can be used to justify retrogressive measures.²¹⁶ The nature of State obligations envisaged under the Covenant takes into account the economic and other difficulties States may face and recognizes the possibility of not realizing these rights in exceptional circumstances, which can offset the lack of a derogation clause.²¹⁷

The other reason that supposedly led to the non-inclusion of a derogation clause under the ICESCR is the nature of ESC rights.²¹⁸ Some of these rights are “subsistence rights” that the very survival of a human person depends upon.²¹⁹ They have the same characteristics

212. See *CESCR General Comment No. 3*, *supra* note 210, ¶ 9.

213. See *id.*

214. See U.N. High Commissioner for Human Rights, *Protection of Economic, Social and Cultural Rights in Conflict*, ¶¶ 23–26, U.N. Doc. E/2015/59 (May 19, 2015) (explaining the prohibition on retrogressive measures, which are defined as those measures “that, directly or indirectly, [lead] to a backward movement in the enjoyment of the rights recognized in the [ICESCR].”). In principle, these measures are prohibited and are considered as a *prima facie* violation of the right in question.

215. *CESCR General Comment No. 3*, *supra* note 210, ¶ 9.

216. See Muller, *supra* note 69, at 586 (discussing situations where retrogressive measures can be justified); see also Comm. on Econ., Soc. and Cultural Rts., *An Evaluation of the Obligations to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant*, ¶ 10, U.N. Doc. E/C.12/2007/1 (Sept. 21, 2007) (detailing the standards used by the Committee to evaluate the compliance of the State with its obligations under the Covenant).

217. *Id.*

218. See Muller, *supra* note 69, at 599 (discussing rights that should not be denied even during times of emergency).

219. See *id.* at 593 (stating “with regard to subsistence rights, it is hard to imagine a situation in which it is necessary to deny people their rights to food, health care or basic shelter in order to maintain or restore the public order indispensable for the protection of human rights.”); see also GIACCA, *supra* note

as the non-derogable rights listed under Article 4(2) of the ICCPR.²²⁰ According to Muller:

[I]t is hard to imagine a situation in which it is necessary to deny people their rights to food, health care or basic shelter in order to maintain or restore the public order indispensable for the protection of human rights. Nor is it easily imaginable that derogations from rights to basic health care and basic food can ever be regarded as proportionate, however strong the threat to the nation is.²²¹

The other ESC rights, such as the rights to work and education, are also intrinsically linked to these subsistence rights,²²² albeit some commentators argue that derogation from the former set of rights can be justified.²²³ Overall, the very nature of ESC rights arguably makes derogations unnecessary and disproportionate.²²⁴

Moreover, the general limitation clause provided under Article 4 of the Covenant can also serve the purpose of derogations—restricting rights during extraordinary circumstances or emergency

207, at 84 (stating guarantees like rights to food, housing, or health constitute” are in their core, subsistence-rights); Ssenyonjo, *supra* note 206, at 991 (stating subsistence rights are rights that are inherently linked to the non-derogable right to life and the right to freedom from torture and inhuman and degrading treatment).

220. See Muller, *supra* note 69, at 593 (discussion derogation of rights during times of emergency).

221. *Id.* at 593 (discussing subsistence rights during times of emergency).

222. See *id.* at 594; see also Joseph, *supra* note 50, at 249, 268 (discussing States and their derogation of rights during emergency periods).

223. See Muller, *supra* note 69, at 592 (stating “the right to education would be derogated from in order to protect the ‘more essential’ right to life,” and “human rights standards cannot always be the same in times of emergency as in normal times.”); see also GIACCA, *supra* note 207, at 74 (discussing possibilities to derogation of labor rights).

224. See GIACCA, *supra* note 207, at 74 (stating there are several reasons for the absence of a derogation clause in the ICESCR); see also Muller, *supra* note 69, at 558, 568 (“Arguments against permitting states to derogate from the ICESCR point to the fact that it seems to be inherently far less justified or necessary to suspend ESC rights in times of emergency, given the purpose of derogations. Especially with regard to subsistence rights, it is hard to imagine a situation in which it is necessary to deny people their rights to food, health care or basic shelter in order to maintain or restore the public order indispensable for the protection of human rights.”).

situations that affect the general public.²²⁵ Hence, the drafters seemingly have opted not to include a derogation clause under the Covenant for these reasons.²²⁶

The lack of a derogation clause under the Covenant raises two main questions: whether a derogation from ESC rights is permissible and, if so, what the conditions of derogations are and how they should be implemented. The Committee on Economic, Social and Cultural Rights (CESCR) has not conclusively determined whether a derogation from these rights is generally permitted, nor has it provided guidance as to how a derogation from socio-economic rights is assessed and applied.²²⁷ Rather, the Committee has frequently stressed that States cannot derogate from the core contents of these rights.²²⁸ Thus, a derogation from the non-core contents of ESC rights is arguably permissible.²²⁹ Indeed, a reasonable argument can be made in favor of the possibility of derogation from these rights, at least to their non-core contents, in extraordinary

225. See Muller, *supra* note 69, at 594 (stating “the general limitation clause of the ICESCR (Article 4) enables states to respond flexibly to an emergency situation”); see also Joseph, *supra* note 50, at 268 (considering States’ derogations to rights during COVID-19 and other emergencies).

226. See Ssenyonjo, *supra* note 206, at 990–91 (discussing reasons why drafters omitted a derogation clause); see also Muller, *supra* note 69, at 592 (discussing reasons for the omission of a derogation clause).

227. See GIACCA, *supra* note 207, at 74 (discussing State practice which shows a “general tendency for states to report that there are possibilities to derogate from” some rights, like labor rights, under the ICESCR); see also Muller, *supra* note 69, at 568 (stating that the Committee has not provided guidance to States on limitations and derogations).

228. CESCR *General Comment No. 14*, *supra* note 50, at 47 (stressing that a State cannot justify non-compliance with the core content of the right); see also U.N. Comm. on Econ., Soc. and Cultural Rts., CESCR *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, ¶ 40, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) (reiterating that the core contents of the right are non-derogable); U.N. Comm. on Econ., Soc. and Cultural Rts., *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: Poverty and the International Covenant on Economic, Social, and Cultural Rights*, ¶¶ 16–18, U.N. Doc. E/C.12/2001/10 (May 10, 2001) (stating that the core contents of these rights are non-derogable); Ssenyonjo, *supra* note 206, at 990 (stating that the core contents of ESC rights cannot be derogated from).

229. See Ssenyonjo, *supra* note 206, at 990–91 (explaining the argument that the non-core content of these rights can be derogable); see also Muller, *supra* note 69, at 592 (discussing the permission to derogate from human rights treaties that do not contain a derogation clause).

circumstances, such as a global pandemic.²³⁰ Nevertheless, human rights monitoring bodies, particularly the CESCR, have not provided interpretative guidance as to the application of derogation on these rights and the safeguards that need to be provided along the way. One could argue that the norms on derogation under the ICCPR and the interpretation of the Human Rights Committee can be analogously applied to derogations from ESC rights.²³¹ Nevertheless, this argument overlooks the inherent differences between the nature of these two sets of rights, which led to the non-inclusion of a derogation clause in the ICESCR in the first place.²³² These differences also call for a distinct framework of derogations, evincing a glaring normative gap in the possibility and applications of derogations to ESC rights, at least in the U.N. human rights system.

On the other hand, this normative gap has not attracted much attention in the past since there have not been many cases where derogations from the ESC rights were necessary except for the rights related to trade unions and strikes under Article 8 of the Covenant.²³³ As mentioned before, States have used the nature and scope of state obligations that these rights entail as well as the general limitation clause to justify possible restrictions on ESC rights during emergency situations.²³⁴ For instance, although the European Social

230. See Alston & Quinn, *supra* note 208, at 219 (stating that “where the situation appears to be sufficiently grave as to warrant derogation, the absence of a specific derogation clause from the Covenant should not be interpreted as foreclosing such a possibility”).

231. See Muller, *supra* note 69, at 597.

232. See Muller, *supra* note 69, at 597 (discussing derogations to certain civil and political rights and States’ tendencies concerning derogations from the ICESCR).

233. See ICESCR, *supra* note 50, art. 8. The right to form and join trade unions under Article 8 of the ICESCR is one of the rights frequently derogated from. This phenomenon is understandable because of the associative and expressive nature of this right and its resemblance to civil and political rights against which a derogation is possible. See Muller, *supra* note 69, at 597 (stating that derogations from the right to form and join trade unions are common during states of emergency).

234. See Muller, *supra* note 69, at 593–94 (describing States’ approaches and practices with regard to treaties that do not contain derogation clauses).

Charter contains a derogation clause, States have never invoked the clause.²³⁵ States seem to find it unnecessary to derogate from their obligations under the Charter even when they have declared a state of emergency and derogated from their obligations under the European Convention on Human Rights.²³⁶ This also explains why little attention is paid to derogations from socio-economic rights in the academic literature.

The COVID-19 pandemic has created a situation that arguably necessitated derogations from ESC rights, which highlights the normative gap identified above. The emergency measures taken by States as a response to the pandemic inevitably affect ESC rights including some of their core contents.²³⁷ For instance, one of the core contents of the right to education is access to “free and compulsory primary education.”²³⁸ But the closure of schools manifestly restricts this right, particularly in places where an alternative form of education or remote learning is not available.²³⁹ One could argue that given the unprecedented nature of the pandemic and the exigencies of the situation, some of these measures that restrict the core contents of the right are reasonable and justified.²⁴⁰ Indeed, in some of these cases, States might not have other less restrictive alternatives. Nevertheless, a derogation from the core contents of ESC rights has no legal basis,²⁴¹ albeit it appears to be necessary in exceptional

235. See *id.* at 593 (discussing why it is not justified for States to derogate from the ICESCR and impede some subsistence rights); see also Istrefi & Humburg, *supra* note 104 (discussing States’ notifications of derogation, and the uncertainty surrounding derogation following COVID-19).

236. See Muller, *supra* note 69, at 593–94.

237. See Abdulla Azizi, *Derogation of Human Rights and Freedoms in RNM during the State of Emergency Caused by COVID-19*, 15 SEEU REV. 24, 26 (2020) (detailing the ways in which measures against COVID-19 have affected basic human rights).

238. ICESCR, *supra* note 50, art. 13(2)(a); see also U.N. Comm. on Econ., Soc. and Cultural Rts., *CESCR General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, ¶ 51, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter *CESCR General Comment No. 13*].

239. See Azizi, *supra* note 237, at 26 (explaining that because not all children had access to education technology during the pandemic, inclusive education was not possible).

240. See *id.* (acknowledging the initial strong support for emergency measures that restricted movement).

241. As discussed before, States cannot derogate from the core contents of ESC

circumstances such as a global pandemic. Moreover, the existing normative gap and the lack of normative guidance from the human rights monitoring bodies leave wide discretion to States, which compromises the restrictive nature of derogations and opens a door for abuse.

Conversely, one could argue that these emergency measures can be justified based on the limitation clause provided under Article 4 of the Covenant.²⁴² However, this assertion raises two important issues. Article 4 of the Covenant enunciates three requirements that need to be fulfilled for a justified limitation to be imposed on the rights provided under the Covenant: the limitation must be provided by law, necessary to promote “the general welfare in a democratic society,” and “compatible with the nature of these rights.”²⁴³ The first issue relates to the requirement of legality, which requires limitations to be provided by a pre-existing, clear, and accessible law.²⁴⁴ What if there is no domestic law that provides for limitations on the rights in question? Can the emergency decree satisfy the requirement of legality under the limitation clause?²⁴⁵ The other issue pertains to the second condition of limitations under Article 4: compatibility with the nature of the right.²⁴⁶ This condition requires that limitation should not be incompatible with the very objective and essence of

rights. *See, e.g.*, Ssenyonjo, *supra* note 206, at 990.

242. ICESCR, *supra* note 50, art. 4.

243. *Id.*

244. *See* U.N. Comm’n. on Hum. Rts., Note Verbale dated Dec. 5, 1986 from the Permanent Mission of the Netherlands to the U.N. Office at Geneva addressed to the Centre for Hum. Rts. (“Limburg Principles”), ¶ 50, U.N. Doc. E/CN.4/1987/17 (Jan. 8, 1987) [hereinafter Limburg Principles] (requiring that legal rules limiting the exercise of rights be clear and accessible); Alston & Quinn, *supra* note 208, at 200 (outlining the prerequisites of foreseeability and accessibility for a restriction to be “determined by law”); Muller, *supra* note 69, at 578–79 (detailing the criteria for a limitation to be “determined by law”).

245. *Compare* BEN SAUL ET AL., SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 257–58 (2014) (discussing the legality of limitations of economic, social, and cultural rights) with GIACCA, *supra* note 207, at 82 (suggesting that the approaches of the CESCR and the African Commission indicate that derogation from obligations under the ICESCR and ACHPR are not permissible).

246. ICESCR, *supra* note 50, art. 4.

the right.²⁴⁷ Consequently, justified limitations cannot be imposed on the core contents of these rights.²⁴⁸ As mentioned before, some of the measures taken during the pandemic restrict these minimum core contents, making them unjustified limitations.²⁴⁹ Even assuming that these measures are necessary to promote general welfare and are proportionate to the public interest pursued, they will fall short of satisfying all the requirements of limitations.²⁵⁰

In its statement regarding COVID-19, the CESCR did not provide a clear answer to these normative and practical questions.²⁵¹ Rather, the Committee stated that measures taken to respond to the pandemic that have the effect of limiting the rights provided under the Covenant need to comply with Article 4 of the Covenant—the general limitation clause.²⁵² The Committee further asserted that “[e]mergency measures and powers adopted by States parties to address the pandemic should not be abused, and should be lifted as soon as they are no longer necessary for protecting public health.”²⁵³ It is not clear from this statement whether or not the emergency measures are assessed using the criteria of the general limitation clause.²⁵⁴

If States cannot use derogations to restrict ESC rights in general and their minimum core contents in particular or impose legitimate limitations by employing the general limitation clause, how can they justify some of the emergency measures they have taken to respond

247. See SAUL ET AL., *supra* note 247, at 257–58 (noting the requirement that limitations should still be compatible with the nature of the rights).

248. See *id.* (introducing minimum core rights under the ICESCR); see also GIACCA, *supra* note 207, at 82 (explaining the relationship between minimum core obligations and the “nature of these rights”).

249. See generally CESCR Statement on COVID-19, *supra* note 115, ¶ 11 (recommending that all measures adopted to limit rights during the COVID-19 pandemic must be necessary and limited).

250. See SAUL ET AL., *supra* note 247, at 257–58 (elaborating that a limitation cannot be justified if it infringes on the minimum core rights under the Convention).

251. See CESCR Statement on COVID-19, *supra* note 115, ¶ 11.

252. *Id.* (recommending that measures limiting the rights in the ICESCR must comply with Article 4).

253. *Id.*

254. See generally *id.* (failing to discuss the manner in which limiting measures will be analyzed).

to the pandemic? This question still awaits an answer by future legal developments in the derogation and limitation regime or by the interpretation of human rights monitoring bodies. Overall, the COVID-19 outbreak and the measures that ensued have highlighted the normative and practical challenges of derogating from ESC rights.

E. OBLIGATION TO NOTIFY: MANDATORY OR OPTIONAL?

As mentioned before, States need to notify the international community through the U.N. Secretary-General when they declare a state of emergency.²⁵⁵ Such notification should clearly articulate the emergency measures to be taken and the reasons behind those measures.²⁵⁶ However, several States have failed to duly notify the Secretary-General regarding the emergency measures they have taken.²⁵⁷ The global pandemic is not the first time States have failed to comply with the notification procedure.²⁵⁸ Nevertheless, given the unprecedented number of States that declared the state of emergency in the same period, the pandemic has magnified this problem.²⁵⁹ Out of the 141 States that have derogated from their obligations under the ICCPR, only twenty-three of them submitted notifications to the Secretary-General.²⁶⁰

255. See ICCPR, *supra* note 6, art. 4(3); see also Istrefi & Humburg, *supra* note 104 (discussing the notification requirement for derogations).

256. See CCPR General Comment No. 29, *supra* note 10, ¶ 17 (outlining international notification requirements).

257. Compare *States of Emergencies*, *supra* note 6 (listing which States have notified the United Nations of their states of emergency due to COVID-19), with *Depositary Notifications (CNs) by the Secretary-General*, *supra* note 204 (listing the depository notifications received by the Secretary-General).

258. E.g., Istrefi & Humburg, *supra* note 104 (noting that States often fail to comply with the notification requirement and, for example, that no State has ever complied with the European Social Charter's notification requirement).

259. *Rethinking Derogations from Human Rights Treaties*, *supra* note 5 (indicating that the number of States that declared a state of emergency during the pandemic is significantly larger than that of other emergency situations in the past, such as armed conflict, natural disasters, and terrorist attacks); see also *States of Emergencies*, *supra* note 6 (listing which States have declared states of emergencies and which of them have notified the United Nations of their declarations).

260. See *States of Emergencies*, *supra* note 6; see also *Depositary Notifications*

The notification procedure is not without any effect.²⁶¹ It is meant to serve as an accountability procedure since it allows other States and human rights monitoring bodies to evaluate the compliance of these emergency measures with human rights norms.²⁶² This reinforces the importance of peer review, naming and shaming, and scrutiny by human rights bodies as important enforcement mechanisms in international human rights law.²⁶³ The lack of notification disrupts this accountability framework and enforcement tool.²⁶⁴ Indeed, the lack of notification has sparked a debate on whether or not the failure to comply with the notification procedures nullifies the validity of the derogation.²⁶⁵ Some commentators argue that notification is and should be a mandatory requirement for States to avail themselves of the right to derogation for several reasons.²⁶⁶ First, as mentioned before, the notification requirement serves as an international accountability framework,²⁶⁷ which ultimately contributes to better protection of human rights.²⁶⁸ Second, it fosters

(CNs) by the Secretary-General, *supra* note 204 (listing the depository notifications by the Secretary-General).

261. See Natasha Holcroft-Emmess, *Derogating to Deal with COVID-19: State Practice and Thoughts on the Need for Notification*, EJIL: TALK! (Apr. 10, 2020), <https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/> (arguing that notification allows for transparency and prevents unnecessary restrictions).

262. See *CCPR General Comment No. 29*, *supra* note 10, ¶ 17 (elaborating that notification allows both the Committee and other States to monitor compliance with the Covenant).

263. See Holcroft-Emmess, *supra* note 261 (explaining the positive effects of notification); see also Stoyan Panov, *To Derogate (and Notify), or Not to Derogate (and Not to Notify), that is the Question!: An Analysis of the Legal Framework of the COVID-19 State of Emergency in the Republic of Bulgaria and ECHR Practice*, 18–19 (re:constitution, Working Paper 1/2020, 2020) (explaining that the purpose of the notification requirement is for enforcement).

264. See Holcroft-Emmess, *supra* note 261 (positing that absent notification it will be impossible to know whether a restriction goes beyond the scope of permissible restrictions).

265. See *id.*; see also Panov, *supra* note 263, at 18–19 (pointing to indicators of the obligatory nature of the notification requirement).

266. See, e.g., Holcroft-Emmess, *supra* note 261 (arguing that notification should be a requirement for derogation); Panov, *supra* note 263, at 18–19 (pointing to indicators of the obligatory nature of the notification requirement).

267. See Holcroft-Emmess, *supra* note 261 (highlighting the transparency that results from notification).

268. See *id.*; see also *CCPR General Comment No. 29*, *supra* note 10, ¶ 17

transparency and adherence to the rule of law.²⁶⁹ Third, the notification procedure helps to distinguish between unjustified limitations and derogations as the line between the limitation and derogation regimes can be obscure at times.²⁷⁰ Thus, notification is arguably an indispensable prerequisite for a valid derogation to human rights.²⁷¹ On the other hand, others contend that while notification is essential for monitoring emergency measures, a lack of notification does not affect the validity of the derogation as such.²⁷²

The Human Rights Committee seems to agree with the latter position.²⁷³ In the case of *Landinelli Silva v. Uruguay*, the Committee indicated that a State's substantive right of derogation is not contingent on the procedural requirement of notification.²⁷⁴ A lack of notification does not necessarily deprive a State of its right to derogate.²⁷⁵ However, the Committee stressed that a State availing itself of derogation needs to provide sufficient information to enable the Committee to undertake its mandate of assessing the compliance of the State with the norms of the Covenant.²⁷⁶ The Committee

(noting that notification allows for more accountability between States and before the Committee); Panov, *supra* note 263, at 18–19 (explaining that notification upholds principles of accessibility and foreseeability).

269. See Holcroft-Emmess, *supra* note 261 (highlighting the transparency that results from notification).

270. See *id.* (stressing that notification can help differentiate between a justified limitation and a limitation that goes beyond the permissible scope).

271. See Jorge Landinelli Silva v. Uruguay, Hum. Rts. Comm. Twelfth Sess., ¶ 8.3, Communication No 34/1978; U.N. Doc CCPR/C/12/D/34/1978; U.N. Sales No. E.8 4.XIV.2 (Apr. 8, 1981) (voicing the Human Rights Committee's opinion that States are obligated to give relevant facts under Article 4(1)).

272. See Dominic McGoldrick, *The Interface between Public Emergency Powers and International Law*, 2 INT'L J. CONST. L. 380, 423 (2004) (arguing that there is no evidence that derogations made without notification were invalid because of the failure to notify).

273. See *Landinelli Silva v. Uruguay*, *supra* note 271, ¶ 8.3 (clarifying that the substantive right to derogate is not dependent on formal notification).

274. *Id.*

275. See *id.* But see *CCPR General Comment No. 29*, *supra* note 10, ¶ 17 (noting the obligation to immediately notify despite lack of respect from certain State parties); see also *Statement on Derogations*, *supra* note 52, ¶ 2(a) (pointing out that States must immediately notify upon implementation of derogations).

276. See *Landinelli Silva v. Uruguay*, *supra* note 271, ¶ 8.3 (noting that while

explained:

Although the sovereign right of a State party to declare a state of emergency is not questioned, yet, in the specific context of the present communication, the Human Rights Committee is of the opinion that a State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant. Although the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to article 4(3) of the Covenant, the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4(1) of the Covenant in proceedings under the Optional Protocol.²⁷⁷

In addition, States should not merely inform the Secretary General about the declaration of emergency but also provide sufficient information about what emergency measures they are taking and the reasons for those measures along with relevant documentation.²⁷⁸ Contrary to this requirement, some of the notifications filed by States lack the specificity and detailed information required by the notification procedure.²⁷⁹ For instance, a number of States generally referred to WHO's characterization of the outbreak as a global pandemic as a reason for derogation.²⁸⁰ Nevertheless, the reason for derogation should take into account the specific circumstances and context of the country, as the threat COVID-19 poses is not the same in every country, and this should be clearly communicated in the notification.²⁸¹ Overall, the notification of a state of emergency should contain specific and sufficient information as to the measures taken and the reasons thereof.²⁸²

the right to derogate may not depend on formal notification, States are still obligated to provide clear justification).

277. *Id.*

278. *See CCPR General Comment No. 29, supra* note 10, ¶ 17 (elaborating that notification should include “full information” about measures and “a clear explanation” of the reasons for them).

279. *See id.* (noting that some States have failed to comply with the notification requirements).

280. *See Istrefi & Humburg, supra* note 104 (noting that States referred to the WHO's characterization of the pandemic as a justification in their notifications).

281. *See id.* (noting that most States submitted notifications with insufficient information).

282. *See CCPR General Comment No. 29, supra* note 10, ¶ 17; *see also Landinelli Silva v. Uruguay, supra* note 271, ¶ 8.3 (explaining the requirements for

F. USING A GLOBAL PANDEMIC AS A PRETEXT FOR UNDEMOCRATIC PRACTICES

Similar to other emergency situations in the past, a state of emergency during the pandemic has been used for undemocratic practices, particularly by authoritarian States.²⁸³ In the past several months, emergency measures declared to respond to COVID-19 have been used for the purpose and effect of stifling dissenting voices, cracking down on political opponents, and maintaining a grip on power.²⁸⁴ Reports of increased censorship, unjustified surveillance, illegitimate restrictions on freedom of speech, and persecution of journalists tainted the emergency measures taken in several countries.²⁸⁵ Several States, such as Bolivia, Sri Lanka, Hong Kong, and Ethiopia, have definitely and indefinitely postponed national elections,²⁸⁶ decisions from which strong criticism ensued.²⁸⁷ States

States to invoke Article 4(1) of the ICCPR to derogate from their obligations).

283. See Stephen Thomson and Eric C. Ip, COVID-19 emergency measures and the impending authoritarian pandemic, 7(1) *J. Law Biosci.* 1, 4 (2020) (detailing how the pandemic has been used for authoritarian practices); see also Selam Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html> (revealing that governments are using the pandemic as cover to introduce authoritarian controls over their populations); see also Repucci & Slipowitz, *supra* note 141, at 9–10 (noting actions taken by Sri Lanka, Burundi, Ethiopia, and Bolivia in relation to nationwide elections during the pandemic); *Global Overview of COVID-19: Impact on Elections*, IDEA (Aug. 31, 2021), <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections> (cataloguing the elections held and postponed during the COVID-19 pandemic).

284. Gebrekidan, *supra* note 283 (explaining how States have implemented authoritarian and repressive emergency measures in response to COVID-19).

285. See *id.* (suggesting States across all political systems are using the pandemic to seize unrelated powers with few safeguards); see, e.g., David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 *AM. J. INT'L L.* 608, 611–12 (2020) (detailing the restrictive emergency measures imposed by Hungary).

286. See Gebrekidan, *supra* note 283 (providing examples of States that postponed their elections due to COVID-19); see also Repucci & Slipowitz, *supra* note 141, at 9–10 (elaborating on election-related measures taken by States in response to the pandemic); *Global Overview of COVID-19: Impact on Elections*, *supra* note 283 (cataloguing the elections held and postponed during the COVID-19 pandemic); Thomson & Ip, *supra* note 283, at 23 (highlighting the anti-

like Hungary have used emergency laws to grant unfettered power to the executive.²⁸⁸

Freedom House's report on the impact of COVID-19 on democracy and freedom concluded that:

Since the coronavirus outbreak began, the condition of democracy and human rights has grown worse in 80 countries. Governments have responded by engaging in abuses of power, silencing their critics, and weakening or shuttering important institutions, often undermining the very systems of accountability needed to protect public health.²⁸⁹

The report also showed that, out of 192 countries covered by the report, ninety-one countries experienced a decline in media freedom and fifty-nine countries evidenced police violence in relation to the pandemic.²⁹⁰ Moreover, restrictions on ethnic and religious minorities have increased in a number of States.²⁹¹ Abuse of power by government officials and lack or disruption of accountability frameworks have further exacerbated the effect of these unjustifiably restrictive measures.²⁹² A state of emergency is used to justify these repressive measures in several countries.²⁹³ Overall, the assault on democracy and freedom is one of the practical challenges witnessed

democratic effects of emergency powers used by States in response to COVID-19).

287. Repucci & Slipowitz, *supra* note 141, at 9–10 (noting the harsh ratings given by Freedom House to those States that abused their power in response to COVID-19).

288. *See* Gebrekidan, *supra* note 283 (pointing to a new Hungarian law granting the Prime Minister the sole power to end the state of emergency declared as a result of COVID-19); *see also Rethinking Derogation*, *supra* note 5, at 25 (stressing that the Hungarian emergency laws “give the executive virtually unfettered power”); Pozen & Lane Scheppele, *supra* note 285, at 611–12 (elaborating that Prime Minister Orban eliminated constraints on the executive's power under states of emergency).

289. Repucci & Slipowitz, *supra* note 141, at 1.

290. *Id.* at 3.

291. *See* Karima Bennoune, “Lest We Should Sleep”: Covid-19 and Human Rights, 114 AM. J. INT'L. L. 666, 666–69 (2020) (noting that COVID-19 has negatively affected human rights).

292. *See* Repucci & Slipowitz, *supra* note 141, at 3 (describing increased police violence, repression of political activists, lawyers, rights defenders, doctors, and journalists since COVID-19).

293. *See* Thomson & Ip, *supra* note 283, at 23 (highlighting the authoritarian measures implemented by States in response to COVID-19).

during the pandemic.

V. CONCLUSION

The COVID-19 outbreak, and the measures taken to contain its spread have created and highlighted challenges in the interpretation and application of various areas of international law. International human rights law has not been immune from this either. “In a season of great uncertainty, one thing is clear: COVID-19 is a cataclysm for human rights and a foundational challenge to international human rights law.”²⁹⁴ The pandemic not only magnified the existing challenges the human rights system is grappling with but also created new challenges in the interpretation and implementation of human rights norms. One of the areas in which these challenges have been evident is the derogation regime.

This article has identified and critically dealt with the normative and practical challenges of derogations to human rights during the pandemic. It is imperative to recognize the extraordinary nature of COVID-19 and the challenges of realizing all human rights during a global pandemic of such severity. However, despite the gravity of the situation, States’ responses should not be immune to critical scrutiny. Moreover, the normative and institutional frameworks as well as the implementation of international human rights law should be critically evaluated to aid future legal developments.

To this end, the paper has identified certain normative and practical challenges in the interpretation and application of the norms on derogation during a global public health emergency. These include the challenges of ensuring legal certainty in uncertain times, (indirect) discrimination in the application of emergency measures, the risk of restricting non-derogable rights, the challenges of potentially derogating from ESC rights, the lack of adequate compliance with the notification procedure, and using derogations as a pretext for undemocratic practices. Some of these challenges are created by COVID-19 exceptionalism, which the drafters of the relevant human rights frameworks could not reasonably anticipate.

294. Bennoune, *supra* note 291, at 666.

Indeed, international human rights frameworks are drafted in such a way as to allow evolving and contextual interpretation. Extreme departures from the text of the law, however, undermines the exceptional and restrictive nature of emergency measures. Additionally, the conditions of derogations elucidated in the paper aim to limit the powers of States and foster accountability, among others, which some of the challenges identified hereinabove compromise. Hence, it is imperative to address these normative and practical challenges to ensure the full protection of human rights and create a system that can stand in the face of contemporary calamities.