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EDITORIAL COMMENT

Rethinking Derogations from Human Rights Treaties

By Laurence R. Helfer[*]

Abstract

Numerous governments have responded to the COVID-19 pandemic by declaring states of emergency and restricting individual liberties protected by international law. However, many more states have adopted emergency measures than have formally derogated from human rights conventions. This Editorial Comment critically evaluates the existing system of human rights treaty derogations. It analyzes the system's problems, identifies recent developments that have exacerbated these problems, and proposes a range of reforms in five areas—embeddedness, engagement, information, timing, and scope.

I. Introduction

The COVID-19 pandemic has exposed foundational weaknesses in many international institutions. Among these is the system of derogations that permits states to temporarily restrict some human rights treaties during emergencies.[1]

On the surface, the system of derogations appears to be functioning well. Nearly thirty countries have notified the United Nations, the Council of Europe, or the Organization of American States that they have suspended human rights in an effort to combat the coronavirus—a far larger number than have derogated in response to previous emergencies, including terrorist attacks, armed conflicts, civil unrest, and natural disasters.[2] The most commonly suspended rights—freedom of movement, assembly, and association—are closely linked to pandemic control measures. Most suspensions were initially adopted for one to

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[1] "A derogation of a right or an aspect of a right is its complete or partial elimination as an international obligation." Dominic McGoldrick, *The Interface Between Public Emergency Powers and International Law*, 2 Int'l J. Const. L. 380, 383 (2004).

[2] Niall Coghlan, *Dissecting Covid-19 Derogations*, Verfassungsblog (May 5, 2020), *at* https://verfassungsblog.de/dissecting-covid-19-derogations. For the texts of all derogation notices, see Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), Notifications Under Article 15 of the Convention in the Context of the COVID-19 Pandemic, *at* https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354; Organization of American States, Recent Suspensions of Guarantees Regarding Multilateral Treaties, *at* http://www.oas.org/en/sla/dil/inter_american_treaties_suspension_guarantees.asp; Depositary Notifications (CNs) by the Secretary-General (Search: Treaty Reference IV-4), *at* https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=_en.

three months, and some have already been terminated. Reviewing this information, some scholars have argued that COVID-19 is an "ideal state of emergency"—precisely the sort of crisis that human rights derogations were intended to address.[3]

Yet the current reality belies this sanguine assessment. COVID-19 is a global phenomenon, but the human rights responses to the pandemic have been strikingly diverse. Far more countries have adopted emergency measures than have derogated from human rights treaties. Even states that are parties to the same international agreements and face similar public health threats have sharply divergent responses. Many governments have formally declared states of emergency; others are exercising extraordinary powers informally. Some states have only narrowly restricted civil and political liberties; others have used emergency powers as a pretext to repress dissent and roll back a broad array of fundamental rights.[4]

Variations also exist among derogating states. Most notices of derogation are short simple statements listing which rights have been suspended and for how long, and citing to domestic laws or decrees; only a few states have offered more detailed justifications of their actions. In addition, no international court or monitoring body has yet assessed whether COVID derogations are necessary, proportionate, and temporary. Because some states have since withdrawn or narrowed emergency measures, many suspensions of rights in response to the pandemic may never be reviewed.

The problems extend beyond the current crisis to the system of human rights derogations itself. Although COVID-19 has triggered extensive commentary on that system, the reality is that only three treaties—the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the American Convention on Human Rights (ACHR)—include functioning derogations clauses.[5] These three conventions are among the oldest and most influential human rights agreements, and they establish highly regarded international courts and treaty bodies (hereinafter "tribunals") to monitor state compliance and adjudicate complaints alleging violations. Yet the large majority of global and regional conventions—including those protecting economic and social rights, gender and racial equality, and marginalized groups—lack derogations clauses. The absence of such clauses has not, however, prevented states from invoking emergency powers to violate the rights these treaties protect.[6]

This Editorial Comment identifies and analyzes key problems of the existing system of human rights derogations and suggests potential reforms. The diagnosis of the system's failings draws on a wide range of developments, some concerning derogations and others relating to international human rights law more generally. The reform proposals may strike some readers as controversial. Yet in the present moment—when the UN and regional

[3] Alan Greene, *States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic*, STRASBOURG OBSERVERS (Apr. 1, 2020), *at* https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic.

[4] *See, e.g.*, Cassandra Emmons, *International Human Rights Law and COVID-19 States of Emergency,* VERFASSUNGSBLOG (Apr. 25, 2020), *at* https://verfassungsblog.de/international-human-rights-law-and-covid-19-states-of-emergency; Martin Scheinin, *COVID-19 Symposium: To Derogate or Not to Derogate?*, OPINIO JURIS (Apr. 6, 2020), *at* https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate.

[5] *See* note 50 *infra* (reviewing treaties that contain derogations clauses or protect nonderogable rights).

[6] *See, e.g.*, High Commissioner for Human Rights, Compilation of Statements by Human Rights Treaty Bodies in the Context of COVID-19 (June 19, 2020), *available at* https://www.ohchr.org/Documents/HRBodies/TB/COVID19/External_TB_statements_COVID19.pdf.

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organizations are reviewing the mandates of human rights tribunals; when international institutions face challenges from nationalist populism and threats to the rule of law;[7] and when a global pandemic focuses attention on protecting individual liberties in the face of urgent threats to society—rethinking the rules for derogations during emergencies is both timely and essential.

Part II of this Editorial Comment introduces the existing system of human rights treaty derogations and describes its operation in practice. Part III identifies developments that have exacerbated basic design flaws in that system. Part IV identifies potential reforms in five areas—embeddedness, engagement, information, timing, and scope. Part V briefly concludes.

II. An Overview of Human Rights Treaty Derogations

When a state faces a threat to its security or survival, the pressure to adopt emergency measures—including suspending individual liberties that the state has previously pledged to uphold—is often overwhelming. The drafters of three human rights agreements—the ICCPR, the ECHR, and the ACHR—were aware of these dangers. They recognized that crises provide convenient excuses for officials to expand their powers, dismantle democratic institutions, and repress political opponents. Yet the drafters also accepted that governments have a responsibility to protect their citizens and societies. To balance these competing concerns, the treaties included clauses authorizing states to suspend certain rights during emergencies while subjecting such measures to international notification and monitoring.[8]

A. The Rationales for and Design of Derogation Clauses

Several considerations informed the decision to adopt these provisions. First, "under general international law in time of war States were not strictly bound by conventional obligations unless the convention contained provisions to the contrary"; an explicit treaty provision delineating the scope of permissible suspensions was thus needed "to prevent States from arbitrarily derogating from their obligations in respect of human rights in time of war" or other emergencies.[9]

Second, the treaties' founders doubted the ability of domestic institutions to hold governments accountable for violating individual rights. The measures that executives and legislatures adopt in response to crises often infringe civil and political liberties. Yet judges are often reluctant to second guess the political branches when rights restrictions are challenged in court. Domestic limits on emergency powers—such requiring public proclamation and judicial review of emergency decrees—would thus be insufficient to ensure that rights restrictions were compatible with international law.[10]

[7] For a further discussion, see Laurence R. Helfer, *Populism and International Human Rights Institutions: A Survival Guide*, *in* Human Rights in a Time of Populism: Challenges and Responses 218 (Gerald L. Neuman ed., 2020).

[8] For influential analyses, see Human Rights in Emergencies (Evan J. Criddle ed., 2016); Oren Gross & Fionnuala Ní Aoláin, Law in Times of Crisis: Emergency Powers in Theory and Practice (2006); Joan Fitzpatrick, Human Rights in Crisis: The International System for Protecting Human Rights During States of Emergency (1994).

[9] A. W. Brian Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention 477 (2001).

[10] *See, e.g.*, Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 Yale L.J. 1011 (2003); Emergencies and the Limits of Legality (Victor V. Ramraj ed., 2008).

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Third, the treaties include limitations, safeguards, and review procedures to deter abuses. Article 4 of the ICCPR is illustrative. When a public emergency that "threatens the life of the nation" is officially proclaimed, Article 4(1) authorizes a state to derogate from certain provisions of the ICCPR, but only "to the extent strictly required by the exigencies of the situation." Article 4(2) adds a further constraint: a state may not suspend certain rights designated as nonderogable, including the prohibitions of murder, torture, and slavery. Article 4(3) requires the derogating country to file a notice with the UN secretary-general listing the rights it has suspended, the reasons for their suspension, and, subsequently, the date when it lifts the emergency measures. The secretary-general circulates this information to other treaty parties and to the UN Human Rights Committee (UNHRC). The UNHRC, in turn, can review the derogation when it examines complaints against the derogating state, analyzes reports filed by that state, and issues general comments interpreting the ICCPR.

In sum, derogation clauses recognize that extraordinary events may require temporary restrictions on human rights that would be unacceptable at other times. These provisions allow states facing internal or external threats "to buy time and legal breathing space from voters, courts, and interest groups to confront crises while signaling to these audiences that rights deviations are temporary and lawful."[11] The limitations and safeguards applicable to derogations—and the formal notifications that states must file—provide vital information to domestic interest groups, treaty partners, and international institutions about which rights are suspended, for what reason, and for how long. Armed with this information, these actors can —at least in principle—challenge rights suspensions that are too capacious, lack adequate justification, or have outlasted the crises that engendered them.

B. Human Rights Derogations in Practice

Over the last six decades more than fifty states—including UN Security Council members, large industrialized nations, and small developing countries—have derogated from at least one human rights treaty. Their derogations responded to a range of emergency situations —armed conflicts, civil wars, insurrections, severe economic shocks, natural disasters, and, most recently, a global public health threat.[12] These rights suspensions can be roughly grouped into three time periods.

During the first period, from the 1950s through the end of the twentieth century, derogations were concentrated in a handful of states, responded to localized civil or political unrest, and generally limited in time and scope. In Europe, derogations were "used almost exclusively by two countries: The United Kingdom . . . in its relations with North Ireland, and Turkey in its dealings with the Kurdish Separatist Movement in the south-east region of the country."[13] In the Americas, Peru was by far the most frequent derogator. Its rights suspensions "spike[d] in the early 1990s, a time of significant domestic unrest" when President Alberto Fujimori "suspended the constitution, shut down the Congress, and purged the

[11] Emilie M. Hafner-Burton, Laurence R. Helfer & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT'L ORG. 673, 675 (2011).

[12] See treaty depository sources cited in note 2 *supra*.

[13] Triestino Mariniello, *Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise Its Immunity System*, 20 GER. L.J. 46, 47 (2019).

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judiciary."[14] During this period, international tribunals interpreted and applied treaty derogations clauses to give wide latitude to governments to decide whether an emergency existed while making more discerning assessments of whether rights suspensions were necessary and proportional.[15]

A shift occurred following the terrorist attacks of September 11, 2001. Numerous governments responded to the threat of transnational terrorism by declaring states of emergencies and suspending individual liberties, especially restrictions on arrest and preventive detention. Unlike earlier crises, however, these extraordinary powers often persisted for years, creating so-called permanent emergencies. Yet, while many countries operated under *de jure* or *de facto* states of exception during the post-9/11 period, they rarely made use of derogations to justify suspending rights.[16] Only the United Kingdom (from 2001 to 2005) and France (from 2015 to 2017) notified derogations in response to transnational terrorist attacks or threats, and even in these countries emergency measures persisted long after the derogations lapsed.[17] Outside of the anti-terrorism context, some states continued, as in the first period, to derogate in response to localized, temporary crises. When reviewing both types of suspensions, the tribunals widened the divergence between two legal doctrines—on the one hand, giving governments broad authority to decide how long emergencies persist, while, on the other, becoming increasingly skeptical of rights restrictions that were disproportionate to the threat.[18]

The emergency measures engendered by the COVID-19 pandemic differ in several respects. For one, these measures were adopted by numerous governments over a few months in 2020 in response to a common global threat. Yet the number of derogating states, at nearly thirty,[19] is far lower than the more than one hundred countries that have imposed pandemic-related restrictions on individual rights.[20]

A second difference concerns the number and diversity of rights affected. Most COVID-19 derogations unsurprisingly focus on freedom of movement, assembly, and association. But states have also restricted the rights to liberty, to respect for private and family life, to a fair trial, to the protection of property, to freedom of expression, and to education.[21] Some

[14] Hafner-Burton, Helfer & Fariss, *supra* note 11, at 679 n. 1. Outside of Europe and the Americas, the ICCPR states parties that have the highest number of derogations are Algeria, Israel, Sri Lanka, and Sudan. *Id.* at 679.

[15] *See, e.g.*, Council of Europe, Guide on Article 15 of the European Convention on Human Rights: Derogation in Time of Emergency (Dec. 31, 2019) [hereinafter Guide on Article 15 of the ECHR]; Habeas Corpus in Emergency Situations, Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8 (1987).

[16] Aniceto Masferrer, *Introduction: Security, Criminal Justice and Human Rights in Countering Terrorism in the Post 9/11 Era*, *in* POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM 1, 9 (Aniceto Masferrer ed., 2012).

[17] Fionnuala Ní Aoláin, *The Cloak and Dagger Game of Derogation*, *in* HUMAN RIGHTS IN EMERGENCIES, *supra* note 8, at 126, 130–31, n. 23; Mariniello, *supra* note 13, at 51–54.

[18] *See, e.g.*, A and Others v. United Kingdom, App. No. 3455/05 (ECtHR Grand Chamber 2009).

[19] As of early May 2020, twelve of twenty-four states parties (50%) had suspended guarantees under the ACHR, while ten of forty-seven states (21%) had derogated from the ECHR. Only fourteen of 173 states parties (8%) had derogated from the ICCPR, and all but two had also derogated from the regional conventions. Coghlan, *supra* note 2. In June and July 2020, Ethiopia, Namibia, Paraguay, Senegal, and Thailand filed notices of derogation from the ICCPR. Depository Notifications, *supra* note 2.

[20] Databases collecting pandemic-related restrictions of human rights include: COVID-19 Civic Freedom Tracker, *at* https://www.icnl.org/covid19tracker; COVID-DEM Infohub, *at* https://www.democratic-decay.org/covid-dem; and Varieties of Democracy (V-Dem) Pandemic Backsliding Project, *at* https://www.v-dem.net/en/our-work/research-projects/pandemic-backsliding.

[21] *See* Coghlan, *supra* note 2, Table 2.

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COVID-19 controls have also infringed nonderogable rights—including the right to life, the prohibition of torture and cruel, inhuman or degrading treatment, and forced labor[22]—and implicated a state's positive human rights obligations, including those relating to economic and social guarantees.[23]

A third difference concerns governments that have invoked the pandemic as an excuse to repress dissent. Many of these violations relate to public health—such as arbitrary arrests and extrajudicial killings during lockdowns or censorship of information about COVID-related infections or deaths.[24] Others range much further afield, perhaps the most infamous being Hungarian emergency laws that give the executive virtually unfettered power to rule by decree.[25]

A final difference concerns the voluminous response to COVID-19 from international institutions. "The 56 United Nations special procedures, 10 U.N. human rights treaty bodies, three principal regional human rights systems . . . have collectively put out more than 150 statements on respecting human rights during the pandemic since late February [2020]."[26] A few of these statements focus on derogations,[27] but the vast majority relate to emergency restrictions of human rights in general and to conventions that do not include derogation or suspension clauses.

In sum, the use of derogations in response to COVID-19 is only one facet of a much broader set of restrictions and violations of human rights during the pandemic. For a mechanism designed to constrain the suspension of individual liberties during emergencies through international disclosure and oversight, the derogations regime appears to be having only a modest impact.

III. Problems with the Existing Derogations Regime

Part II provided an overview of the design and operation of human rights treaty derogations. This Part identifies and analyzes the problems of the derogations regime.

[22] Kanstantsin Dzehtsiarou, *COVID-19 and the European Convention on Human Rights*, Strasbourg Observers (Mar. 27, 2020), *at* https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights.

[23] *The State's Positive Obligations Under IHRL During the Coronavirus Outbreak*, Strasbourg Observers (May 5, 2020), *at* https://strasbourgobservers.com/2020/04/29/announcement-webinar-the-states-positive-obligations-under-ihrl-during-the-coronavirus-outbreak-5-may.

[24] *See, e.g.*, Nina Sun, *Applying Siracusa: A Call for a General Comment on Public Health Emergencies*, Health & Hum. Rts. J. Blog (Apr. 23, 2020), *at* https://www.hhrjournal.org/2020/04/applying-siracusa-a-call-for-a-general-comment-on-public-health-emergencies.

[25] Selam Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, N.Y. Times (Mar. 30, 2020), *at* https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html.

[26] Lisa Reinsberg, *Mapping the Proliferation of Human Rights Bodies' Guidance on COVID-19 Mitigation*, Just Security (May 22, 2020), *at* https://www.justsecurity.org/70170/mapping-the-proliferation-of-human-rights-bodies-guidance-on-covid-19-mitigation; *see also* Inter-American Commission on Human Rights, Res. No. 4/2020 Human Rights of Persons with COVID-19 (July 27, 2020), *available at* https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-20-en.pdf.

[27] *See, e.g.*, UNHRC, Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, para. 2, CCPR/C/128/2 (Apr. 24, 2020) [hereinafter UNHRC COVID Statement].

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A. Developments Within the Derogations System: From the Inception of an Emergency to International Review

The difficulties begin when a state first confronts a "public emergency threatening the life of the nation."[28] All domestic legal systems establish rules and procedures for governments to respond to such crises, including by restricting individual liberties. Most countries empower the executive to adopt emergency measures, with national variations relating to the extent of legislative involvement, whether an emergency must be officially declared, and when, how, and by whom emergency powers can be terminated.[29]

However, no national constitution requires the government to derogate when it suspends individual liberties in response to a crisis, let alone ties the legality of suspensions to the filing of a derogation notice.[30] States may nevertheless choose to derogate from the ICCPR or a regional human rights treaty. For example, established democracies that derogate do so "with a specific goal in mind: to flag potentially unpopular rights restrictions, to spin the bad news in their favor, and to signal to judges and to domestic interest groups who push for treaty compliance that emergency restrictions are necessary, temporary, and lawful."[31] Yet the reality is that emergency rights suspensions by all types of governments are far larger than the subset of suspensions subject to international derogations.[32]

Next consider the actions of states that do derogate. In principle, notifications must be immediate; in reality, notifications are often filed weeks or months after the adoption of emergency measures.[33] More troublingly, the content of the notices has been criticized as "too general, too brief, and [lacking] a clear indication of what articles have been suspended."[34] Coronavirus derogations are a modest improvement in this regard. Most notices identify which rights have been suspended, the law that authorizes their suspension, and how long emergency measures will last. Yet these filings reveal two other shortcomings—a failure to explain "why [a] derogation is necessary in the circumstances," and an assumption that satisfying domestic rules for emergency measures necessarily fulfills the requirements for suspending rights under international law.[35]

Further difficulties emerge once a state has filed a derogation notice. As one UN human rights expert recently lamented, "treaty depositories and the human rights bodies monitoring

[28] ECHR, Art. 15, Nov. 4, 1950, ETS 5. Similar formulations appear in: ACHR, Art. 27, June 27, 1981, 21 ILM 58; and ICCPR, Art. 4, Dec. 16, 1966, 999 UNTS 171.

[29] *See, e.g.*, Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic* (Virginia Public Law and Legal Theory Research Paper No. 2020-52, University of Chicago, Public Law Working Paper No. 747, July 26, 2020), *available at* https://ssrn.com/abstract=3608974.

[30] Only Armenia references derogations in its constitution. Const. of Armenia, ch. 2, Art. 76 (1995) (rev. 2015) (providing for temporary suspension of certain human rights "subject to the international commitments undertaken with respect to derogations from commitments in emergency situations or during martial law"). A few other constitutions include safeguards similar to treaty derogation clauses but do not mention derogations. *See, e.g.*, Const. of Georgia, ch. 8, Art. 71(4) (1995) (rev. 2018); Const. of Mexico, ch. 1, Art. 29 (1917) (rev. 2015).

[31] Hafner-Burton, Helfer & Fariss, *supra* note 11, at 675.

[32] Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, para. 27, UN Doc. A/HRC/37/52 (Feb. 28, 2018) (report by Fionnuala Ní Aoláin) [hereinafter Ní Aoláin Report].

[33] UNHRC, General Comment No. 29: States of Emergency, para. 17, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter General Comment No. 29].

[34] Jaime Oràà, Human Rights in States of Emergency in International Law 77 (1992).

[35] Coghlan, *supra* note 2.

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the implementation of the treaties have rarely taken the notification as a basis for robust engagement with States."[36] The depositories in particular usually view the notification process as a box-checking exercise, recording and publishing whatever information the government provides.

In the absence of a mechanism for engaging derogating states at the time of notification, international review of emergency rights suspensions generally does not occur until a complaint challenging them reaches the European Court of Human Rights (ECtHR) or the Inter-American human rights tribunals, or until the UNHRC reviews an individual petition against a derogating state or examines its periodic report under the ICCPR. Due to longstanding delays in these processes, several years elapse before the tribunals can assess the legality of derogations. Review often occurs long after emergency measures have been lifted, and in some instances—such as derogations from the ECHR or ACHR that do not trigger individual complaints—it never occurs at all.[37]

These delays notwithstanding, international tribunals have developed extensive case law on derogations. Two aspects of that jurisprudence are noteworthy, each of which points toward a very different scope of international review. First, the tribunals give wide latitude to governments to determine whether a public emergency exists, to identify the nature of the threat, and to fashion an appropriate response.[38] They also recognize that emergencies may continue for years, leading a state to extend a derogation or to file serial derogations in response to changing circumstances.[39]

A second doctrine concerns the restrictions on human rights suspensions that a state can adopt in response to a crisis. These restrictions are grounded in the text of the derogations clauses, the most important of which permits rights suspensions only "to the extent strictly required by the exigencies of the situation."[40] The clauses also designate certain rights as non-derogable, placing them beyond the reach of emergency measures and implying a more robust role for the tribunals in policing those boundaries.[41]

The tribunals have interpreted these provisions expansively. When evaluating necessity and proportionality, for example, the tribunals consider whether suspensions are limited in time and scope, consistent with the government's proffered objectives, discriminate unjustifiably between different groups, include safeguards to limit potential abuses, and whether need for a derogation was kept under review.[42] In principle, these assessments are only prospective; in practice, the tribunals consider circumstances or information that emerged after

[36] Ní Aoláin Report, *supra* note 32, para. 26.

[37] Kushtrim Istrefi & Stefan Salomon, *Entrenched Derogations from the European Convention on Human Rights and the Emergence of Non-judicial Supervision of Derogations*, 22 AUSTRIAN REV. INT'L & EUR. L. 7, 22–23 (2017).

[38] *E.g.*, Ireland v. United Kingdom, App. No. 5310/71, para. 207 (ECtHR 1978) ("By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it.").

[39] *See* Hafner-Burton, Helfer & Fariss, *supra* note 11, at 697–701 (analyzing "serial derogations" by Colombia, Israel, Turkey, Venezuela, and the United Kingdom); Marshall v. United Kingdom, App. No. 41571/98 (ECtHR 2001) (upholding detention without judicial review in reliance on a derogation filed ten years earlier).

[40] ECHR, *supra* note 28, Art. 15; ACHR, *supra* note 28, Art. 27; ICCPR, *supra* note 28, Art. 4.

[41] Derogations must also not violate a state's other international law obligations. *See* Part III(B) *infra*.

[42] Guide on Article 15 of the ECHR, *supra* note 15, paras. 21–22.

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suspensions were adopted,[43] and their review becomes "more stringent[]" the longer a derogation lasts.[44] Some tribunals suggest that states should respond to crises by applying ordinary limitations on rights, thus avoiding the need to derogate in the first instance.[45] Others assert that states cannot limit derogable rights that provide "procedural safeguards" whose suspension would "circumvent the protection of non-derogable rights."[46]

Case law and general comments on derogations thus afford governments wide deference to determine whether an emergency exists while significantly limiting the measures they can deploy to suspend rights during a crisis. The result is a bifurcated jurisprudence that often validates the declaration of an extraordinary threat while constraining the options available to respond to it.[47]

B. Developments Outside of the Derogations System

Three broader trends reinforce the problems created by the existing system of derogations: the adoption of numerous human rights conventions that lack explicit suspension provisions; a significant evolution in how those conventions are interpreted; and the decisions of international tribunals expanding the obligations of states parties to the ECHR, ACHR, and ICCPR with respect to nonderogable rights.

First, the UN and regional organizations have adopted numerous human rights treaties over the previous half century. These conventions focus on the rights of vulnerable, marginalized, and minority groups; protect certain rights in greater detail; or occasionally codify new rights. Broadly categorized, these treaties seek to "ma[k]e more concrete the [earlier conventions'] focus on 'everyone.'"[48] There is thus a significant degree of overlap among the rights protected in the newer and older human rights agreements.

Yet older and more recent human rights instruments differ in their approach to emergencies. Only four newer conventions include derogation clauses, and they appear to have never been invoked.[49] Several other newer treaties—the optional protocols proscribing capital punishment, as well as UN and regional conventions outlawing torture and enforced disappearances—protect rights that are expressly nonderogable or require compliance even in

[43] *See Ireland v. United Kingdom*, *supra* note 38, para. 214; Vassilis P. Tzevelekos, *Herd Immunity and Lockdown: The Legitimacy of National Policies Against the Pandemic and Judicial Self-Restraint by the ECtHR*, Strasbourg Observers (May 11, 2020), *at* https://strasbourgobservers.com/2020/05/11/herd-immunity-and-lockdown-the-legitimacy-of-national-policies-against-the-pandemic-and-judicial-self-restraint-by-the-ecthr.

[44] Baş v. Turkey, App. No. 66448/17, para. 224 (ECtHR 2020).

[45] General Comment No. 29, *supra* note 33, para. 5.

[46] *Id.*, para. 15; *see also* UNHRC, General Comment No. 35, Article 9 (Liberty and Security of Person), para. 67, CCPR/C/GC/35 (2014) ("The procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.").

[47] Expert studies on derogations and emergency measures include: Siracusa Principles on the Limitation and Derogation of Provisions in the [ICCPR], UN Doc. E/CN.4/1985/4, Annex (1985); Richard Lillich, *Current Developments: The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AJIL 1072 (1985). The International Law Association is expected to issue a report on the topic. *See* ILA Committee on Human Rights in Times of Emergency, *at* https://www.ila-hq.org/index.php/committees.

[48] Hurst Hannum, Rescuing Human Rights: A Radically Moderate Approach 58 (2019).

[49] Arab Charter on Human Rights, Art. 4, Sept. 15, 1994; European Social Charter (Revised), Art. F, May 3, 1996, ETS 163; Framework Convention for the Protection of National Minorities, Art. 19, Feb. 1, 1995, ETS 157; European Convention on the Participation of Foreigners in Public Life at the Local Level, Art. 9, Feb. 5, 1992, ETS 144.

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exceptional circumstances.[50] But the large majority of global and regional human rights treaties—more than eighty in total—lack a provision authorizing derogations or suspensions during emergencies.[51]

Seen from one perspective, this turn away from derogation clauses reflects the progressive development of international law. According to this view, states have become more willing to join human rights treaties and more comfortable with review by international tribunals. Many countries have also responded to exceptional situations by suspending individual liberties protected in domestic as well as international law. Yet states have refrained from including derogations clauses in most human rights conventions and have ratified those conventions in large numbers.

This progressive development argument overlooks the fact that all derogations provisions contain savings clauses that limit emergency rights suspensions to "measures . . . not inconsistent with [a state's] other obligations under international law."[52] Formally, these savings clauses make explicit what is already implicit—that a state's derogation from one treaty does not diminish its commitments under other treaties or customary international law.[53] From a practical perspective, however, the savings clauses—when viewed in light of the many human rights agreements *without* suspension provisions—make derogations from conventions that *permit* derogations far less impactful. For example, domestic violence has increased sharply during COVID-19 lockdowns. A state that justifies its reduced ability to prevent or investigate such violence during the pandemic with a derogation from the right to respect for private and family life in the ICCPR gains little if it remains bound by the same or even broader obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[54]

A second assumption underlying the progressive development argument is that human rights agreements are static and self-contained. In reality, they are neither. The exclusion of derogations clauses from many treaties was premised on an understanding that is no longer accurate, as conventions drafted in vague language have become far more prescriptive. The boundaries between treaties have also become more porous. Most notably, the Inter-American Court of Human Rights (IACtHR), ECtHR, and UNHRC have interpreted nonderogable civil and political rights to encompass economic and social rights, positive

[50] Second Optional Protocol to the [ICCPR] Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 1642 UNTS 414; Protocol No. 6 to the [ECHR] concerning the Abolition of the Death Penalty, Mar. 1, 1985, ETS 114; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, Dec. 15, 1989, UN Doc. A/Res/44/144; Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, OAS TS 67; International Convention for the Protection of All Persons from Enforced Disappearances, Dec. 20, 2006; Inter-American Convention on Forced Disappearance of Persons, June 9, 1994; *see also* Convention on the Rights of Persons with Disabilities, Art. 11, Jan. 24, 2007, UN Doc. A/Res/61/106 ("States Parties shall take . . . all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.").

[51] This number is based on a comprehensive collection of international instruments by the University of Minnesota Human Rights Library, available at http://hrlibrary.umn.edu/instree/ainstls1.htm. It excludes from that collection nonbinding documents as well as treaties on humanitarian law, labor law, and counterterrorism.

[52] ECHR, *supra* note 28, Art. 15; ACHR, *supra* note 28, Art. 27; ICCPR, *supra* note 28, Art. 4.

[53] UNHRC COVID Statement, *supra* note 27, para. 2(d).

[54] CEDAW, Guidance Note on CEDAW and COVID-19, para. 3 (Apr. 22, 2020) (noting increase in domestic violence during the pandemic and asserting that states "have a due diligence obligation to prevent and protect women from, and hold perpetrators accountable for" such violence).

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obligations, and other international instruments. In so doing, the tribunals have vastly expanded the rights that are "off limits" to suspensions during emergencies.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides a striking example of how human rights treaties have evolved.[55] The ICECSR lacks a provision on derogations or suspensions. The principal rationales for its absence are the "more flexible and accommodating nature" of state obligations in the ICESCR and the inclusion of a general limitations clause that does not distinguish between emergencies and ordinary situations.[56] These two features arguably make a derogations provision unnecessary.

Over the last three decades, however, the Committee on Economic, Social and Cultural Rights has adopted a series of general comments that have transformed a convention once widely viewed as aspirational into a treaty that is "unmistakably mandatory and subject to immediate enforcement in whole or in substantial part."[57] The Committee has also narrowly construed the ICESCR's general limitations clause, requiring states to adopt the least restrictive means available when limiting rights.[58] Most importantly, it has labeled minimum essential levels of the rights to food, water, housing, and health as "core obligations" that "are non-derogable [and] continue to exist in situations of conflict, emergency and natural disaster."[59] These interpretations constrain the ability of states to restrict these rights, even during crises that severely diminish the financial resources and institutional support available for social programs.

The eroding boundaries between human rights treaties are reflected in the case law of international tribunals expansively interpreting nonderogable rights. The IACtHR, for example, has held that the right to life extends beyond arbitrary deprivations by state actors to include the right to a dignified or decent existence.[60] States must take "positive, concrete measures" to fulfill this right, "especially in the case of persons who are vulnerable and at risk."[61] The Court has gone further in recent judgments, holding that "the fundamental right to life will never be meaningful and effective without nutrition, water, health care, housing, education, and ancestral lands."[62] The UNHRC's 2018 general comment on the right to life follows a

[55] For additional examples, see Laurence R. Helfer, *Pushback Against Supervisory Systems: Lessons for the ILO from International Human Rights Institutions*, *in* ILO 100 – Law for Social Justice 257, 260–62 (George Politakis Tomi Kohiyama & Thomas Lieby eds., 2019).

[56] Manisuli Ssenyonjo, Economic, Social and Cultural Rights in International Law 40 (2009) (quoting Philip Alston & Gerald 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)). ICESCR Article 4 permits states parties to impose "only . . . such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

[57] Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AJIL 462, 491 (2004).

[58] *E.g.*, ESCR Committee, General Comment 14: The Right to the Highest Attainable Standard of Health, para. 42, UN Doc. E/C.12/2000/4 (2000).

[59] *E.g.*, ESCR Committee, Statement on Poverty and the ICESCR, para. 18, UN Doc. E/C.12/1/Add.59 (2001).

[60] Jo M. Pasqualucci, *The Right to a Dignified Life (*Vida Digna*): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System*, 31 Hastings Int'l & Comp. L. Rev. 1 (2008).

[61] Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, para. 162 (2005).

[62] Thomas M. Antkowiak, *A "Dignified Life" and the Resurgence of Social Rights,* 18 Nw. J. Hum Rts. 1, 4 (2020).

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similarly ambitious trajectory.[63] In addition to detailed analyses of abortion, euthanasia, the death penalty, and threats from nonstate actors, the general comment embraces the evolutionary interpretations of other human rights bodies and calls on states to adopt "measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health-care, electricity and sanitation."[64] The ECtHR has been comparatively more circumspect in infusing economic and social rights into the right to life, but the Court has not shied away from augmenting other nonderogable rights. For example, it has interpreted the ban on slavery, servitude, and forced or compulsory labor to include trafficking in persons;[65] applied an evolutionary approach to determine the types of mistreatment that qualify as torture or cruel, inhuman or degrading treatment;[66] and imposed positive obligations on states to develop a practical and effective legal framework to prevent, investigate, and punish such mistreatment by public and private actors.[67]

In sum, the three developments discussed in this Section—the indirect linkage of human rights treaties without derogation clauses to conventions that permit suspensions, the evolution of the ICESCR to include minimum core obligations that apply even in exceptional situations, and case law expanding nonderogable rights to include positive obligations and economic and social guarantees—have vastly enlarged the scope and reach of international human rights law applicable during emergencies without, however, concomitantly enlarging state authority to suspend rights during such crises.

C. Consequences for States' Incentive to Derogate

The problematic design and operation of derogations clauses, together with the expansion of human rights treaties and jurisprudence, create problematic incentives for states that confront terrorist attacks, civil unrest, natural disasters, pandemics, and other crises. Consider the perspective of executive branch officials who confront these threats. Domestic legal and political considerations—such as whether rights suspensions are constitutional, have legislative support, or will be challenged in court—are likely to be foremost in the minds of these officials. This focus is reinforced by the fact that the decision to suspend rights domestically is often unconnected to the obligation to disclose those suspensions internationally. As a result, most emergency rights suspensions are never the subject of derogations.

The disincentive to participate fully and effectively in the derogations system exists even for states that file notices justifying emergency measures. Treaty depositories do not help governments to decide whether a derogation is necessary and, if it is, how to promote consistency with international limits on rights suspensions. With a paucity of guidance and information, and facing significant time constraints, the path of least resistance for derogating states may be to piggyback international notifications onto domestic rights suspensions—a pattern common for COVID-19 derogations.

[63] UNHRC, General Comment No. 36 on Article 6 of the [ICCPR] on the Right to Life, CCPR/C/GC/36 (2018).

[64] *Id.*, para. 26; *see also* Sarah Joseph, *Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36*, 19 HUM. RTS. L. REV. 347, 356–59 (2019).

[65] Rantsev v. Cyprus and Russia, App. No. 25965/04, para. 282 (ECtHR 2010).

[66] Selmouni v. France, App. No. 25803/94, para. 101 (ECtHR Grand Chamber 2001).

[67] Volodina v. Russia, App. No. 41261/17, para. 77 (ECtHR 2019).

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Yet this approach has considerable risks. Domestic and international limits on exigent powers often differ, for example in terms of whether an emergency must be officially proclaimed, how long exceptional measures last, and whether certain liberties can never be suspended. These divergences have become more acute in recent years as the tribunals have expansively interpreted nonderogable rights. Moreover, due to the subject matter overlap among human rights agreements, even a state that scrupulously adheres to the limits on suspensions in the ICCPR, ECHR, or ACHR may nevertheless violate one of the dozens of human rights treaties that do not permit derogations.

In the absence of a procedure for reviewing derogation notices at the time they are filed, these risks may not manifest for months or years. But when suspensions are challenged before national courts or international tribunals, the failure to adhere to treaty-based limits on derogations increases the likelihood of a finding that the state has violated international law. Jurists will likely give the government broad deference as to whether it faced an emergency situation. But with the benefit of hindsight and after a crisis has ebbed or ended, they will often second guess the necessity of restrictions, hypothesize less intrusive measures to achieve the state's objectives, or identify other international commitments that the derogating state has breached.

The "puzzle of derogations," therefore, is not "why states are not making greater use of a justificatory regime to validate the use of exceptional powers under international law."[68] The puzzle is why states make as much use of that regime as they do. For if the outcome of an international notification that publicizes and justifies human rights suspensions is a finding that a state has nevertheless breached its treaty obligations, a state may reasonably conclude that the less legally and politically risky course is to suspend rights domestically and eschew derogations altogether.

IV. Redesigning Derogations

Any proposal to reform the system of human rights derogations must confront an apparent paradox. On the one hand, derogations are a type of "escape clause" found in many treaties.[69] Such clauses reduce uncertainty and provide flexibility for states to manage the risks of international agreements. For human rights conventions, derogations "provide a safety valve for the enormous pressures that governments face to repress individual liberties during times of crisis."[70] Yet "experience has shown that the gravest violations of human rights tend to occur in the context of states of emergency."[71] By condoning violations during crises, derogations threaten to undermine the *raison d'être* of international human rights law.

A. Normative Baselines and Counterfactuals

Striking a balance between these competing perspectives requires a normative baseline about the purposes of derogations as well as a counterfactual about how states would behave

[68] Ní Aoláin, *supra* note 17, at 127–28.

[69] Laurence R. Helfer, *Flexibility in International Agreements*, *in* Interdisciplinary Perspectives on International Law and International Relations 175, 186 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013); Gerald L. Neuman, *Constrained Derogation in Positive Human Rights Regimes*, *in* Human Rights in Emergencies, *supra* note 8, at 15, 21 (describing derogations as a "safety valve").

[70] Hafner-Burton, Helfer & Fariss, *supra* note 11, at 674–75.

[71] European Commission for Democracy Through Law, Compilation of Venice Commission Opinions and Reports on States of Emergency, CDL-PI(2020)003, at 5 (Apr. 16, 2020).

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if there were no mechanism to suspend rights. For some scholars, derogations are at best a necessary evil. They fear that states are eager to abuse suspensions clauses to justify widespread rights violations, normalize extraordinary powers, and permanently repress individual liberties.[72] The implicit counterfactual underlying this view is that a state unable to derogate will have no choice but to adhere fully, or nearly so, to the human rights treaties it has ratified.

A different and more realistic counterfactual is that without an escape option, governments would be more, not less, likely to repress human rights during emergencies. Even in ordinary periods, officials often seek to prevent the disclosure of potential rights violations, to deter their verification, and to deny responsibility when incriminating facts emerge.[73] The need for quick and effective responses to a crisis makes the desire to obfuscate or downplay violations more acute. By providing a mechanism to formalize the decision to suspend certain rights, publicize that decision, explain why suspensions are necessary, and indicate how long they will remain in effect, derogations reduce the likelihood of infringing rights surreptitiously. But exercising this escape option comes at a cost. A government that provides this information in a derogation notice puts its credibility on the line by making official, public assertions about the nature of the crisis and the scope and duration of emergency restrictions. This information provides benchmarks for other actors—voters, interest groups, national courts, international tribunals, and other states—to hold governments accountable if they disregard or exceeds those parameters.

Derogations thus aim to reduce human rights violations during emergencies *relative to the level of violations that would have occurred without such a mechanism*. A suspension provision that is too lax will do little to improve this metric, acting as a kind of "get out jail free" card that condones repression. Yet a derogation clause that is too constraining is equally problematic, discouraging states from invoking the mechanism—and the credibility and monitoring costs it imposes—and instead encouraging surreptitious violations. The key is to design a system that maximizes participation by states, incentivizes appropriate disclosures, enhances accountability and oversight, and encourages a return to normalcy as soon as reasonably possible.

B. Reforms

This Section identifies five areas where the existing system of derogations can be improved —embeddedness, engagement, information, timing, and scope. Many of the proposals discussed below can be implemented by governments voluntarily or by treaty depositories acting under their existing authority. Others will require collective action, such as international guidelines, best practices or, most significantly, revising human rights treaties to codify new rules for derogations.

1. Embeddedness

Compliance is a perennial concern for international law, and especially for human rights treaties. In the context of derogations, an initial act of noncompliance occurs whenever a state

[72] *See* Gross & Ní Aolain, *supra* note 8, at 264–68, 324–25.

[73] *See, e.g.*, Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL. STUD. 83 (2002); BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).

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party to the ACHR, ECHR, or ICCPR suspends internationally protected rights without filing the requisite notification with a treaty depository. As explained above, the failure to notify is more the rule than the exception, including during the COVID-19 pandemic.

One way to remedy this omission would be to embed the treaty notification requirement in domestic rules and procedures for suspending rights. The requirement could, for example, be added to the emergency powers chapter of a constitution, to a statute that specifies which branches of government can suspend individual liberties, or to the administrative regulations of a foreign ministry.[74] Notice could be required before rights suspensions take effect or within a predetermined period thereafter. The precise mechanism for linking the two processes is less important than the fact of linkage itself. The goal is not to tie the government's hands at the outset of a crisis, but rather to establish a domestic mechanism that requires officials to file an international notice in the first instance.

A benefit of domestic embeddedness as a reform proposal is that it can be adopted by any state. Suggestions for linking domestic rights suspensions to international notifications could also be included in guidelines prepared by treaty depositories. Lastly, if human rights conventions are revised to implement other derogation reforms, states could include an obligation to embed the notice requirement in domestic law while giving governments discretion concerning the details.

2. Engagement

Treaty depositories need to reenvision how they respond to the filing of derogation notices. Rather than simply recording and circulating whatever information a state submits, depositories should offer to confer with government officials over the nature of the crisis, the need for emergency measures, and the scope and duration of rights suspensions. Such engagement should seek to clarify the human rights consequences of emergency measures and help states make informed decisions about whether and how to derogate.

The European system has gone furthest toward an engagement approach. In 2018, the Parliamentary Assembly of the Council of Europe adopted a resolution on states of emergency and derogations that included a proposal for the secretary general of the Council to:

> as depository of the [European] Convention, provide advice to any State Party considering the possibility of derogating on whether derogation is necessary and, if so, how to limit strictly its scope;
>
> open an inquiry under Article 52 of the Convention in relation to any State that derogates from the Convention;
>
> on the basis of information provided in response to such an inquiry, engage in dialogue with the State concerned with a view to ensuring the compatibility of the state of emergency with Convention standards, whilst respecting the legal competence of the [ECtHR].[75]

[74] For a rare example of a domestic state of emergency law that requires derogation, see Act No. 21-18 of 25 May 2018 (Dominican Republic), Art. 17, *available at* https://treaties.un.org/doc/Publication/CN/2020/CN.327.2020-Eng.pdf.

[75] Parliamentary Assembly, Council of Eur., Res. 2209 (2018): State of Emergency – Proportionality Issues Concerning Derogations Under Article 15 of the ECHR, paras. 20(1)–20(3) (Apr. 24, 2018) [hereinafter Res. 2209].

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The resolution envisioned two distinct roles for the secretary general—advisory and supervisory. As a treaty depository, the secretary general would advise governments regarding derogations and emergency measures. The ECHR does not require states to confer with the secretary general prior to file a derogation notice, but the depository has provided such advice several times over the past two decades.[76] Moreover, in responding to a common threat—such as COVID-19—all states "have a genuine interest to learn whether derogations are suitable . . . [and] what specific measures could be considered necessary and proportionate."[77] Although the Committee of Ministers, the Council of Europe's executive body, declined to issue a formal recommendation "identifying legal standards and good practice" on derogations,[78] nothing prevents the secretary general from continuing to engage with governments informally, or from issuing guidelines on whether suspensions have proven to be unnecessary or ineffective in practice. These steps may lead a government to reconsider emergency measures or to narrow their scope.

The secretary general's supervisory role is based on Article 52 of the ECHR, which requires a state to furnish, in response to an official request, "an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention." The secretary general has yet to initiate an Article 52 inquiry concerning a derogation. However, in March 2020 she issued a letter to Hungary—which adopted capacious emergency laws in response to COVID-19 but did not derogate from the ECHR—emphasizing "that the measures which member states take in the present exceptional circumstances of the pandemic must comply with both national constitutions and international standards," and offering to assist Hungary in meeting its human rights commitments.[79]

Neither the ICCPR nor the ACHR creates a mechanism for the UN secretary-general, the UN High Commissioner for Human Rights, or the Organization of American States to launch similar inquiries. These powers could be granted by amending the two treaties, but such revisions may not be necessary. Treaty depositories can, consistent with their existing competences, review derogation notices, request additional information from states, and provide informal advice to government officials. The Inter-American Commission and the UNHRC could also exercise their protective mandates to proactively investigate emergency situations covered by a derogation.[80]

[76] Parliamentary Assembly, Council of Eur., Doc. 14506, Report of the Committee on Legal Affairs and Human Rights, para. 103 (Feb. 27, 2018).

[77] Kushtrim Istrefi, *Supervision of Derogations in the Wake of COVID-19: A Litmus Test for the Secretary General of the Council of Europe*, EJIL:*TALK!* (Apr. 6, 2020), *at* https://www.ejiltalk.org/supervision-of-derogations-in-the-wake-of-covid-19-a-litmus-test-for-the-secretary-general-of-the-council-of-europe.

[78] Parliamentary Assembly, Council of Eur., Committee of Ministers, Reply to Rec. 2125 (2018), para. 6, Doc. 14770 (Dec. 5, 2018).

[79] Letter from Council of Europe Secretary General Marija Pejčinović Burić to Viktor Orbán, Prime Minister of Hungary (Mar. 24, 2020), *at* https://www.coe.int/en/web/portal/-/secretary-general-writes-to-victor-orban-regarding-covid-19-state-of-emergency-in-hungary.

[80] The Inter-American Commission regularly issues precautionary measures in response to serious and urgent human rights violations, and it has done so during the COVID-19 pandemic. *See* Int'l Justice Resource Ctr., *Inter-American Commission Issues Precautionary Measures as COVID-19 Threatens Indigenous Communities* (July 22, 2020), *at* https://ijrcenter.org/2020/07/22/inter-american-commission-issues-precautionary-measures-as-covid-19-threatens-indigenous-communities. The UNHRC has occasionally adopted special decisions requesting, as a matter of urgency, a report on the human rights situation in a state party. In future, both procedures could be applied to review derogations.

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3. *Information*

To remedy the informational deficiencies in derogation notices, scholars and treaty bodies have long argued that a state must, in addition to identifying the specific rights suspended, provide "a description of measures taken, copies of relevant texts, and a concise historical summary of the events leading up to the declaration of the state of emergency which have caused [it] to perceive a threat to the life of the nation."[81] A state must also file supplementary notifications if it modifies or extends emergency measures, temporally or geographically.[82]

Although not required by existing law, the accountability function of derogations would be enhanced if states disclosed which domestic institutions are authorized to review emergency measures and when such evaluations are likely to occur. The content of appropriate derogation notices could also be made more accessible to governments by compiling user-friendly guidelines or best practices with appropriate examples, similar to the "Rule of Law Checklist" issued by the Venice Commission.[83]

A more expansive role for treaty depositories would involve distributing comparative statistics concerning derogations. Such disclosures may reveal patterns as to which states are derogating and which rights they are suspending, pressuring governments to reconsider outlier emergency measures or surreptitious suspensions. One might argue that there is no need for depositories to disseminate this information since academics and NGOs collect and analyze state responses to emergencies in close to real time.[84] Yet documents prepared by an international body, especially when paired with crisis-specific recommendations or best practices, are likely to be create more pressure on governments than these unofficial sources.

As previously explained, the ICCPR, ACHR, and ECHR require derogating states to file notifications when rights suspensions end.[85] Treaty depositories should actively publicize this information, which tends to attract less attention from the media and civil society. Broader awareness of terminations may also help to deter permanent emergencies, especially for crises affecting multiple states, such as COVID-19.

A more ambitious reform proposal would restrict how long derogations can remain in effect. At present, the treaties do not limit the duration of derogations or prevent their renewal. Rather than imposing an international time constraint, a more nuanced approach would recommend (or, in the case of treaty revisions, require) that states disclose the duration of emergency measures under domestic law. The literature on domestic emergencies emphasizes the importance of sunset clauses to deter executive officials from perpetuating extraordinary powers, often by requiring review and reauthorization by the legislature.[86] Yet because

[81] Joan Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, 7 HUM. RTS. Q. 89, 101 (1985).

[82] General Comment No. 29, *supra* note 33, para. 17.

[83] European Commission for Democracy Through Law (Venice Commission), *Rule of Law Checklist* (Mar. 11–12, 2016), *available at* https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

[84] *See* sources cited in note 20, *supra*.

[85] ACHR Article 27 requires states to notify "the date set for the termination" of a suspension. In practice, states regularly inform the OAS when they terminate suspensions. *See* OAS, Recent Suspensions of Guarantees, *supra* note 2.

[86] *See, e.g.*, Antonios Kouroutakis & Sofia Ranchordás, *Snoozing Democracy: Sunset Clauses, De-juridification, and Emergencies*, 25 MINN. J. INT'L L. 29 (2016); Jonathan W. Kuyper, *Designing Institutions for Global Democracy: Flexibility Through Escape Clauses and Sunset Provisions*, 6 ETH. & GLOB. POL. 195 (2013).

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a decision to continue the suspension of rights internationally is decoupled from domestic constraints on emergency powers, nothing prevents the executive from extending a treaty derogation even when the legislature has abrogated emergency rights restrictions at home. Disclosure of applicable sunset clauses, and of decisions to invoke them, would enhance the accountability function of derogations and pressure states to terminate derogations that are no longer authorized domestically.

4. Timing

Timing problems pervade the existing system of derogations. Two are especially noteworthy. First, as explained above, states must provide immediate notice of rights suspensions, but this obligation is often honored in the breach. Recognizing this reality, the European tribunals have "ruled that two weeks of delay in depositing a notice is accept[able,] but four months [is] too late."[87] Yet no tribunal has held that a late notice precludes a state from derogating, a conclusion that would likely doom many rights suspensions.

Is an outer time limit is desirable? Such a limit would encourage states to submit notices when emergencies are still fresh and could be the subject of fruitful dialogue with treaty depositories. It would also penalize states that suspend rights domestically and file international notifications only as an afterthought. Yet an outer limit fails to take account of the diverse nature of emergencies, or that the initial response to a crisis should focus on adopting domestic measures rather than completing a bureaucratic exercise. It may therefore be preferable for the tribunals to preserve the possibility of invalidating a late notice but reserve such a finding for exceptional situations, such as when a notification is filed after a crisis has ended or when emergency measures first come to light during international litigation or the state reporting process.

Another approach would be to create positive incentives for states, when reasonably possible, to file a notice of intention to derogate *before* adopting emergency measures. Advance disclosures are not required under existing law, but they might be considered as mitigating factors by a tribunal reviewing the legality of suspensions, especially if the government narrows emergency measures to take account of guidance from treaty depositories or international expert bodies.

A second timing issue concerns the multiyear interval between the adoption of emergency rights suspensions and the review of those measures by international tribunals. One reason for this delay is that individuals must exhaust available and effective domestic remedies before filing a complaint with the ECtHR, IACtHR, or the UNHRC. Even during exigent circumstances, the exhaustion rule serves an important function—it directs challenges to emergency laws to national courts, which are likely to be familiar with the local context and can provide speedy relief. As previously noted, however, courts are often wary of second guessing rights restrictions, especially early in a crisis. Yet in countries where human rights treaties have been incorporated into constitutions or statutes or are given direct effect, the normative and functional rationales for exhaustion may outweigh these risks.[88]

[87] Kushtrim Istrefi, *To Notify or Not to Notify: Derogations from Human Rights Treaties*, OPINIO JURIS (Apr. 18, 2020), *at* https://opiniojuris.org/2020/04/18/to-notify-or-not-to-notify-derogations-from-human-rights-treaties.

[88] For further discussion, see Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125 (2008).

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Litigants have sometimes temporarily bypassed the domestic exhaustion requirement by asking a tribunal to order provisional or precautionary measures. The standards for granting such interim relief likely apply to at least some emergency rights suspensions.[89] In appropriate cases, therefore, a tribunal reviewing a provisional measures request might consider the validity of a derogation, for example if the request is closely connected to a suspended right. However, because precautionary measures are expedited procedures that seek to prevent irreparable harm and preserve the status quo in extreme cases, they are inappropriate for comprehensively assessing challenges to the legality of a derogation or an emergency measure.

Litigants will nevertheless urge the tribunals to issue such orders. In May 2020, for example, the president of the IACtHR issued urgent measures to Panama to protect the life and health of migrants held in detention centers from the spread of COVID-19.[90] Controversially, the order did not concern a pending case but rather a judgment issued a decade earlier that Panama had not fully implemented. The order also applied not only to the applicant in that case but to all similarly situated migrants.[91]

There are other ways to reduce delays in international adjudication of derogations challenges. For example, the ECtHR follows a priority policy that determines how quickly it reviews different categories of cases. The policy does not expedite disputes involving emergency measures, and scholars have debated whether the Court should do so in response to the coronavirus.[92] Yet even if the ECtHR were to prioritize challenges to derogations, the current backlog of pending cases would likely result in only a modest time savings.

A faster route to international review would be to authorize intergovernmental bodies or treaty depositories to request a preliminary ruling or an advisory opinion from a tribunal. The Council of Europe recently created a procedure for national high courts to seek advisory opinions from the ECtHR.[93] This could be expanded to allow international institutions to ask a tribunal to assess the validity of a derogation. Whether the benefits of creating such a referral mechanism outweigh the costs depends on many factors—such as the number of pending cases, whether tribunal members serve in a full- or part-time capacity, and whether to expedite review of derogations versus other serious human rights violations—that may vary across treaty regimes.

5. Scope

A fifth reform concerns the substantive scope of derogations. Key questions here include whether derogations are inferior to ordinary exceptions, whether to modify tribunal

[89] For example, the IACtHR may adopt provisional measures "in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons." ACHR, *supra* note 28, Art. 63.2.

[90] Resolución de la Presidenta de la Corte Interamericana de Derechos Humanos, Adopción de Medidas Urgentes, Caso Vélez Loor v. Panamá (May 26, 2020), *available at* http://www.corteidh.or.cr/docs/medidas/velez_se_01.pdf.

[91] Melina Girardi Fachin & Bruna Nowak, *Pandemic Rulings: Between Dialogues and Shortcuts at the Inter-American Court of Human Rights*, INT'L J. CONST. L. BLOG (July 9, 2020), *at* http://www.iconnectblog.com/2020/07/pandemic-rulings-between-dialogues-and-shortcuts-at-the-inter-american-court-of-human-rights.

[92] Kanstantsin Dzehtsiarou, *What Can the European Court of Human Rights Do in the Time of Crisis?*, STRASBOURG OBSERVERS (Apr. 14, 2020), *at* https://strasbourgobservers.com/2020/04/14/what-can-the-european-court-of-human-rights-do-in-the-time-of-crisis.

[93] Council of Europe, Explanatory Report to Protocol No. 16 to the [ECHR] (Oct. 2, 2013), *at* https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383e.

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expansions of nonderogable rights, and whether to add a derogations clause to other human rights treaties.

The first issue follows from the recognition that most derogable rights are not absolute. Consider freedom of movement, one of the rights most commonly suspended in response to COVID-19. This right "may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others."[94] Interpreted broadly, this limitations clause arguably provides sufficient flexibility to impose quarantines and lockdowns during pandemics. Differing views over the applicability of such clauses may explain why states facing the same threats from COVID-19 adopted similar domestic control measures but widely divergent approaches to derogations.

Are such ordinary restrictions preferable to derogations? The Parliamentary Assembly, the UNHRC, and some scholars think so, asserting that "[n]ormal measures or restrictions . . . for the maintenance of public safety, health and order must be plainly inadequate before derogatory, emergency measures are permissible."[95] Others disagree, criticizing "the argument that everything can and should be accommodated through the proportionality test" as rendering derogations "a dead-letter and, in so doing, eradicat[ing their] quarantining effect and potentially increas[ing] the possibility of exceptional powers becoming normalised."[96]

The public disclosure and accountability goals of derogations favor encouraging states to notify and explain exceptional suspensions rather than attempting to shoehorn emergency measures into general limitations or exceptions clauses. The tribunals have yet to address this issue. Outside of the emergency context, however, the ECtHR has characterized quarantines as "temporary measure[s], to be discontinued as soon as circumstances permit" and noted that "severe and lasting restrictions . . . are particularly likely to be disproportionate."[97] This suggests that prolonged lockdowns and other long-term polices to control COVID-19 and other pandemics may require a derogation to be lawful.

A second area of potential reform concerns the significant expansion of nonderogable rights to include minimum economic and social guarantees and affirmative obligations. The tribunals developed these capacious interpretations in the context of ordinary rights violations. They have yet to consider how the interpretations apply to emergencies and, in particular, whether a state can suspend the interpretive extension of a nonderogable right even if it cannot suspend the core of the right. Given the widely held view that human rights treaties are living instruments,[98] it seems likely that the tribunals will find at least some of these expansions applicable to pandemic-related restrictions. Yet if, as noted above, the tribunals have concluded that certain *derogable* rights implicitly include nonderogable elements, so too expanded *nonderogable* rights may include some derogable dimensions.

The final and most contentious scope issue concerns whether to add a derogations clause to human rights treaties that do not currently include one. Scholars have debated whether

[94] ACHR, *supra* note 28, Art. 22(3). The ICCPR and ECHR contain similar clauses.

[95] Res. 2209, *supra* note 75, para. 4; *see also* UNHRC, General Comment No. 37 (Article 21: Right of Peaceful Assembly), para. 96, CCPR/C/GC/37 (2020) ("State parties must not rely on derogation from the right of peaceful assembly if they can attain their objectives by imposing restrictions in terms of article 21.").

[96] Greene, *supra* note 3.

[97] Kuimov v. Russia, App. No. 32147/04, para. 96 (ECtHR 2009).

[98] Helfer, *supra* note 55, at 260.

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conventions such as the African Charter and the ICESCR implicitly permit states to suspend certain rights during emergencies. They have also highlighted the many states parties that have restricted rights during crises, suggesting that the omission of these clauses has not deterred the exercise of emergency powers.[99] Revising these and other conventions could provide an opportunity to limit states from claiming an implied and ill-defined discretion to suspend rights in favor of appropriately limited suspensions that are subject to restrictions, monitoring, and oversight.

The savings clauses in the derogations provisions of the ACHR, ECHR, and ICCPR may create another catalyst for treaty revisions. As previously explained, these clauses create links to other human rights instruments, substantially restricting the scope of derogations. The tribunals have yet to invoke a savings clause to invalidate a state's derogation or to find a suspension inconsistent with other human rights conventions.[100] Adding a derogation clause to those conventions but tailoring emergency suspensions to the particulars of each instrument could preempt this issue. On the other hand, any treaty revision initiative—especially in the current geopolitical climate—risks opening a Pandora's box that could significantly weaken human rights protections.

V. Conclusion

This Editorial Comment uses the occasion of the COVID-19 pandemic to review the existing system of derogations from human rights treaties during emergencies. It analyzes the many problems that currently plague the derogations regime and identifies a broad range of potential reforms.

These proposals seek to open a conversation about institutional change. Adopting comprehensive reforms will be difficult, but some beneficial steps can be taken without such measures. For example, states can embed the requirement to file derogation notices in domestic law, international expert bodies can issue nonbinding guidelines and best practices, and treaty depositories can engage in a dialogue with governments over the necessity and scope of emergency rights suspensions. In addition, the possibility of combining proposals—such as those that impose additional constraints on states in some areas but provide greater leeway in others—may expand the political space for more comprehensive reforms. The goal of any institutional change should be to incentivize states to participate in a system that provides sufficient flexibility to respond to genuine crises and threats while enhancing the informational, oversight, and accountability functions of derogations. The reforms should also seek to pressure governments to minimize emergency rights suspensions and to narrow and remove those suspensions as soon as reasonably possible.

[99] *See, e.g.*, Abdi Jibril Ali, *Derogation from Constitutional Rights and Its Implication Under the African Charter on Human and Peoples' Rights*, 17 L., Democracy & Dev. 78, 82–90 (2013); Amrei Müller, The Relationship Between Economic, Social and Cultural Rights and International Humanitarian Law 111–48 (2013).

[100] *See* Brannigan and McBride v. United Kingdom, App. Nos. 14553/89, 14554/89, paras. 68–73 (ECtHR 1993) (rejecting the claim that a derogation from the ECHR was invalid under the treaty's savings clause because the government failed to "officially proclaim[]" an emergency as required by the ICCPR's derogation clause).

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