INTERNATIONAL LAW ASSOCIATION
Committee on Human Rights in Times of Emergency

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Professor Kimio Yakushiji (Japan)
Professor Gentian Zyberi (Albania)

I. Interim Report: Developments in Standard Setting and Practice (1990-2020)[1]

A. Introduction

1. When international human rights bodies are faced with the limitation of human rights in states of emergencies, there is a certain tension. On the one hand, genuine emergency situations may call for deferential standards in national security questions and often a wider discretion for governments. On the other hand, governments may invoke a state of emergency as a pretext to pursue other goals, or they pursue legitimate goals in a disproportionate or discriminatory manner – both situations call for safeguards against abuse. History is replete with examples where governments have invoked states of emergency in order to reorder the system of government undemocratically, purge their political enemies, stifle civic dissent, or target in a discriminatory fashion specific groups of individuals. The Committee on Human Rights in Times of Emergency (hereafter, the Committee), established by the International Law Association (ILA) in July 2017, seeks to analyse how international human rights bodies and regional courts deal, and how they should deal, with this tension. The mandate thus has both a descriptive and a normative dimension.

[1] This part of the report was finalized by Niels Petersen and Ioana Cismas. Individual committee members provided contributions for different sections: Karsten Nowrot and Nadia Kornioti (B), Ioana Cismas (C1 and D2), Stefan Kadelbach (C2), Niels Petersen (D1), Michal Balcerzak, Fionnuala Ni Aolain and Maria Varaki (D3), William Aceves, Neza Kogovsek Salamon and Nadia Kornoti (D4), Sarah Cassella (E1), Christina Binder and Christina Cerna (E2), Aaron Fellmeth (E3). Special thanks are due to Asier Garrido-Muñoz, Geoff Gilbert, Thomas Kleinlein, Fionnuala Ni Aolain, Paulo Pinto de Albuquerque, Eva Rieter, Emmanuele Sommario, Isabel Xavier Cabrita, and Gentian Zyberi for comments and suggestions on earlier versions of this report.

2. Human rights in times of emergency is not a new topic for the ILA, having been studied in the 1980s by the ILA Committee on the Enforcement of Human Rights Law (CEHRL). Chaired by Richard B. Lillich, the CEHRL drafted the Paris Minimum Standards of Human Rights in a State of Exception, which were adopted by the 61st Conference of the ILA in 1984.[2] Together with its final report of 1990, the CEHRL also submitted the Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency, drafted by Co-Rapporteur, Joan F. Hartman.[3] The present Committee will build on this important work by taking stock of, and analysing, the roughly thirty years of practice that we have observed since the conclusion of the activities of the ILA CEHRL.

3. According to its mandate,[4] the work of this Committee consists of two parts. The first part, which concludes with this Interim Report, is dedicated to studying the developments in standard setting and practice concerning states of emergency that have occurred over the past thirty years. Twenty-three members of the Committee met at the Scuola Superiore Sant'Anna in Pisa, Italy 24-25 July 2019, to prepare the work assignments for the Interim Report, which aimed at collecting and analysing the practice of both the United Nations (UN) and regional organizations' competent courts, quasi-judicial bodies and other institutions and mechanisms. The Pisa meeting was at the invitation of Committee member, Emanuele Sommario, whom we are enormously grateful to for organising and facilitating the meeting. The Final Report, which will be prepared for the ILA Lisbon Conference in 2022, will take account of the identified international and domestic practice and examine selected case studies of *de jure* (formally declared), *de facto* (not formally declared), notified and non-notified states of emergency (see discussion on terminology *infra* paras. 14-17).

4. This report was drafted in extraordinary times. While the Committee was working on the report, a global pandemic caused by the virus SARS-CoV-2 led many countries all over the world to declare states of emergency, and many also to derogate from human rights treaties. As of 5 May 2020, 36 derogations have been notified to the responsible human rights institutions.[5] The sheer number of declarations of emergency and derogations – all related to the same situation – is unprecedented in times of peace or war. States have implemented emergency measures by closing borders, restricting public life and limiting civil, cultural, economic, political and social rights to an extent unparalleled. The work of the Committee has been directly affected by these measures – a meeting which was planned in Strasbourg in March 2020 to discuss a draft of the Interim Report had to be cancelled. As the events are unfolding before our eyes, it seems too early for a profound analysis of the COVID-19 related measures. As far as possible, the Committee sought to reflect the most important developments and statements of human rights bodies on states of emergencies relating to COVID-19 (up to April 2020). It will address the issue in detail, as an important case study, in its final report to be prepared for the ILA Lisbon Conference in 2022.

5. The structure of this Interim Report is as follows: First, we will briefly summarize the main results of the work of the previous ILA CEHRL (B). Second, the report will focus on some terminological and conceptual preliminaries, notably the distinction between *de jure* and *de facto* and notified and non-notified states of emergencies, respectively, as well as the relationship between non-derogable rights and *jus cogens* (C). As human rights monitoring and adjudication has expanded dramatically since 1990, the report will explore the work of existing and new UN and regional bodies on the substantive and procedural international legal standards relating to invocation, application, effect and duration of states of emergencies, and on which rights are non-derogable. At the universal level, the report will examine the practice of the UN human rights treaty bodies and the UN Human Rights Council (HRCouncil) and its mechanisms. In particular, the report will analyse the work of the UN Human Rights Committee (HRCttee), the practice of the Committee on Economic Social and Cultural Rights (CESCR), the Universal Periodic Review (UPR), and UN Special Procedures (D). At the regional level, the report will explore the practice of the Inter-American system of human rights, the European Convention on Human Rights (ECHR) system, the African Charter on Human and Peoples' Rights (AfCHPR) system, the Association of Southeast Asian Nations (ASEAN) system, the Arab Charter of Human Rights (ArChHR) system and the Organisation of Islamic Cooperation (OIC) system (E). The final part of this report will present some preliminary observations (F).

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[2] Richard B. Lillich, "The Paris Minimum Standards of Human Rights Norms in a State of Emergency", 79 *American Journal of International Law* 4 (1985), 1072.

[3] Richard B. Lillich, "Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency", 85 *American Journal of International Law* 4 (1991), 716.

[4] ILA Committee on Human Rights in Times of Emergency, Mandate, available at https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=3865&StorageFileGuid=50230dc3-1e97-4e9a-852f-121d4cd11edf

[5] Niall Coghlan, Dissecting Covid-19 Derogations, https://verfassungsblog.de/dissecting-covid-19-derogations/ [accessed 2 July 2020].

B. The previous work of the ILA Committee on the Enforcement of Human Rights

6. The work of the present Committee is not without precedent in the history of the ILA. Between 1979 and 1990, the ILA has focused intensively – and productively – on states of emergencies within the institutional framework of the former International Committee on Human Rights (1979 – 1982) as well as the CEHRL (1982 – 1990), adopting a substantive law and an enforcement/monitoring perspective. This bifocal approach resulted in the drafting and adoption of two notable documents: The 1984 Paris Minimum Standards of Human Rights Norms in a State of Emergency and the 1990 Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency.

7. Viewed in retrospect, the efforts undertaken by the ILA in the 1980s to analyse and address the topic of human rights in times of emergency have, somewhat expectedly, not been able to provide a solution to all of the practical and theoretical challenges arising in connection with this still very topical issue. That said, the question of what remains of, and what lessons can be learned from, the work undertaken by the ILA between 1979 and 1990 obviously arises.

8. To begin with, the two practice-oriented documents that emerged as a result of the ILA's previous work, the 1984 Paris Minimum Standards and the 1990 Queensland Guidelines, do not appear to have exercised a decisive influence on the subsequent practice and scholarly discussions on this issue. Most certainly, they – as well as the ILA's previous work more generally – are occasionally addressed in legal literature.[6]

9. Beyond these instruments, a number of empirical, conceptual and doctrinal ideas to be found in the previous work of the ILA undertaken in the 1980s on the issue of human rights in times of emergency deserve special emphasis. First, we note the work conducted to identify necessary or typical characteristics of states of emergency.[7] In its Final Report, when examining in detail case studies, the present Committee will benefit from looking back and reflecting on the respective discussions.

Table 1 – Classification of *de jure* and *de facto* states of emergency[8]

	***De jure* emergency**	***De facto* emergency**
Emergency conditions	(1) **"Good" *de jure* emergency** - Actual emergency conditions - Formal declaration and/or notification	(3) **"Classic" *de facto* emergency** - Actual emergency conditions - No formal declaration and/or notification
No emergency conditions	(2) **"Bad" *de jure* emergency** - No real emergency conditions - Formal declaration and/or notification	(4) **"Ambiguous or potential" *de facto* emergency** - No real emergency conditions - No formal declaration or notification - Sudden change in application of security laws
		(5) **"Institutionalized" emergency** - No real emergency conditions - Lifting of prior formal emergency [declaration] - Simultaneous incorporation of emergency provisions into ordinary law
		(6) **"Ordinary" repression** - No real emergency conditions - No formal declaration or notification - Permanent laws restricting human rights in extreme manner without invocation of emergency powers

10. Second, the detailed recommendations concerning the domestic constitutional and legislative design of procedures applying to states of emergency continue to be relevant. In particular, the recommendations

[6] Detailed analyses of the two instruments, including the activities of the ILA leading to their adoption, were published by authors who were involved in the drafting of these documents, namely the Chairman of the Sub-Committee on the Study of Regional Problems in the Implementation of Human Rights, Subrata Roy Chowdhury, and the Rapporteur of the CEHRL, Joan F. Hartman. See Subrata Roy Chowdhury, *Rule of Law in a State of Emergency – The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (Palgrave Macmillan 1989) and Joan Fitzpatrick, *Human Rights in Crisis – The International System for Protecting Rights during States of Emergency* (UPenn Press 1994).

[7] ILA, Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-Second ILA Conference, Seoul, August 1986 (1987), 108 at 113-114.

[8] Reproduced from the ILA, Report of the Committee on the Enforcement of Human Rights, reprinted in Report of the Sixty-Third ILA Conference, Warsaw, August 1988 (1988), 129, at 145.

highlight a significant role that ought to be played during states of emergencies by the legislative and judicial branches,[9] characterized as notable "additional and significant safeguard[s] against the usurpation of an untrammeled power by the executive" in such situations.[10]

11. Third, the CEHRL developed innovative conceptual ideas relating to the phenomena of *de jure* and *de facto* states of emergency, illustrated in Table 1. Irrespective of whether one considers this classification approach in its entirety compelling, it provides important conceptual guidance for the work of the current ILA Committee.

12. Finally, the ongoing task of identifying and concretizing non-derogable human rights beyond the individual legal entitlements listed in Art. 4 (2) of the International Covenant on Civil and Political Rights (ICCPR), Art. 27 (2) of the American Convention on Human Rights (ACHR) as well as in Art. 15 (2) ECHR and in a number of additional protocols to this treaty, could benefit, among others, from the extensive list of human rights stipulated in the 1984 Paris Minimum Standards and the related commentaries.[11]

C. Terminological & conceptual preliminaries

1. Terminology relating to states of emergency

13. As observed by the CEHRL, states of emergency come in many different shapes and forms – understanding these variations is relevant, not least, for their monitoring by international human rights bodies. Whilst recognizing the diversity of classifications that can be employed to study states of emergencies, two types of classification are particularly important for the purpose of this report.

14. First, there is a fundamental distinction between *de jure* and *de facto* states of emergencies. *De jure* or formal states of emergencies are those proclaimed or declared pursuant to domestic legal provisions. Depending on the constitutional arrangement of each state, these can be declared by authorities at national, federal, regional or local level.[12] *De facto* states of emergency are those situations which are not formally declared as states of emergency, they do not invoke emergency legal provisions as legal basis.[13] This does not, however mean that *de facto* states of emergencies do not rely on law. As the CEHRL noted, "institutionalized emergencies" are characterized by a transfer of emergency provisions into ordinary law and hence the emergency powers linger in all but name; "ordinary repression" can also rely on permanent law that limits severely human rights in a 'rule by law' as opposed to a 'rule of law' scenario.[14] Describing these emergencies as "hidden" or "covert", the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism "affirms that it is not only the title of the legislation that confers emergency status, but also the scope, impact and rights-limiting nature of the legislation which gives it an 'emergency' characteristic."[15] The Rapporteur also identifies, in the context of counter-terrorism, the merger of the formal and *de facto* forms in what she terms as "complex" emergencies.[16]

15. A second distinction that we wish to highlight is that between *notified* and *not notified* states of emergencies. The notification, here, refers to a state's communication (usually a *note verbale* or letter) that is submitted to the relevant international depositary and which signifies that the state wishes to "avail itself of the right of derogation". Such notifications can be made under the provisions of Art. 4 ICCPR, Art. 27 ACHR, Art. 15 ECHR, Art. 30 of the 1961 European Social Charter (ESC) and Art. F of the 1996 revised ESC. A literal reading of the notification provisions in derogation clauses reveals that at stake is *a right* of the state to enter

[9] See ILA, Report of the Committee on the Enforcement of Human Rights, reprinted in: Report of the Sixty-First ILA Conference in Paris in August/September 1984 (1985), 56, at 59-71.
[10] See P.R. Ghandhi, "The Human Rights Committee and Derogation in Public Emergencies", *German Yearbook of International Law* 32 (1989), 323, at 346.
[11] See ILA, Report of the Sixty-First ILA Conference in Paris in August/September 1984 (1985), *supra* note 9, at 71-96.
[12] For example, the US constitutional system provides the possibility for state authorities to declare a state of emergency. See Mitchell F. Crusto, "State of Emergency: An Emergency Constitution Revisited", *Loyola Law Review* 61 (2015), 471.
[13] See Report of the Sixty-Third ILA Conference, Warsaw, August 1988, *supra* note 9, at 148-151.
[14] *Id.*
[15] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism, 1 March 2018, A/HRC/37/52, para. 30 (Hereafter, UNSR on counter-terrorism and human rights).
[16] *Id.*, para. 37.

a derogation,[17] but not an obligation. Hence the notification requirement becomes a requirement if a state chooses to avail itself of the right to derogate.

16. A different interpretation, but not necessarily contradictory, is that which reads into the derogation provisions *an obligation* to notify, and therefore to derogate, placed upon states when their states of emergency have as consequence the actual suspension of rights.[18] Such an interpretation could be construed as being in keeping with the object and purpose of human rights treaties that entail derogation clauses, and the raison d'être of their respective monitoring mechanisms. The argument, which has been made by some human rights mechanisms and scholars, is grounded in pragmatic considerations: derogating states would bring their emergency measures "grey zones", or put differently the *de facto* and complex emergency situations, into the limelight of international supervision.[19] This would (theoretically) translate into greater accountability and insulate emergency measures and their review by human rights mechanisms from those measures and the monitoring and case law during times of normalcy. "To Derogate or Not to Derogate?" is a question that has been the subject of heated debate among scholars in the context of the COVID-19 pandemic.[20] It will offer a context for this Committee to assess in depth in its Final Report, whether states and human rights bodies' practice support derogation as a (qualified) right or a (qualified) obligation.

17. Finally, there is a question about the intersection of the two categories discussed here. Clearly, there is no problem for a *de jure* state of emergency to be notified – whether this will be assessed, as part of an application or complaint or in the state reporting process, to be a permissible derogation depends on whether the state meets the substantive and procedural requirements discussed in this report. Yet, is a notified *de facto* state of emergency possible? *Prima facie*, it is. However, a state with *de facto* emergency would likely fail to meet the official proclamation limb in Art. 4 (1) ICCPR. Whilst under other treaties proclamation is not a condition, the "prescribed by law" requirement would still need to be met. Where the "grey zones", which rely on ordinary legislation to assume emergency powers may be successful, the "ordinary repression" would have a hard time justifying their measures. As such, there is no overwhelming incentive for states with *de facto* states of emergencies to pursue derogation, despite the fact that they may be the most in need of supervision. This preliminary discussion of terminology will be supplemented in the Final Report by an in-depth analysis of paradigmatic country case studies that fall within these classifications.

2. *Jus cogens* and other principles of identification of non-derogable rights

18. Emergency provisions as they form part of many human rights treaties spell out core guarantees which are not subject to derogation in times of emergency, i.e. they cannot be unilaterally suspended by a state party even in an emergency. One of the reasons why rights are considered non-derogable is that they are deemed so fundamental that they do not allow for any exception or suspension even under grave circumstances.

19. The catalogues of rights covered by these derogation clauses vary with the treaty under consideration. Typically, such clauses are found in treaties guaranteeing civil and political rights.[21] One group of these treaties, such as the ICCPR and the ECHR, spells out only a limited set of non-derogable rights (see below,

[17] According to art. 31 of the Vienna Convention on the Law of Treaties (VCLT), "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." See also, HRCttee which refers to the states' "power of derogation", see HRCttee, General Comment No. 29, States of Emergency (article 4), 31 August 2001, CCPR/C/21/Rev. 11, para. 17; and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, who refers to the right to derogate as the "legally mandated privilege of States", see *supra* note 15, para. 7.

[18] See UNSR on counter-terrorism and human rights, *supra* note 15, para. 22; HRCttee: "The Committee calls upon all State parties that have taken emergency measures in connection with the COVID-19 pandemic that derogate from their obligations under the Covenant to comply without delay with their duty to notify thereof immediately, if they have not already done so." (para 1). However, the HRCttee is of the view that "States parties should not derogate from Covenant rights or rely on a derogation made when they are able to attain their public health or other public policy objectives by invoking the possibility to restrict certain rights, such as article 12 (freedom of movement), article 19 (freedom of expression) or article 21(right to peaceful assembly), in conformity with the provisions for such restrictions set out in the Covenant, or by invoking the possibility of introducing reasonable limitations on certain rights, such as article 9 (right to personal liberty) and article 17 (right to privacy), in accordance with their provisions" (para. 2.c) HRCttee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 30 April 2020, CCPR/C/128/2, para. 1.

[19] See UNSR on counter-terrorism and human rights, *supra* note 15, para. 22. See also A*lan Greene, "*States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic", *Strasbourg Observers*, 1 April 2020, https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/. For a discussion of "black" and "grey legal zones" in relation to states of emergency, see Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Bloomsbury Publishing 2018), pp. 99-161.

[20] The citation is from Martin Scheinin, "COVID-19 Symposium: To Derogate or Not to Derogate?", *Opinio Juris*, 6 April 2020, https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/

[21] The European Social Charter of 1961 and the revised Charter of 1996 entail derogation clauses in article 30 and article F, respectively. Neither clause lists non-derogable rights.

paras. 33 and 82). The principle visible in these conventions that human rights that impact life and dignity are placed under particular protection is reinforced in Art. 2(2) CAT and Art. 1(2) CED, which declare the prohibitions of all practices contrary to these Conventions as non-derogable. In a similar vein, Art. 11 Convention on the Rights of Persons with Disabilities (CRPD) requires states parties to take all necessary measures in situations of war, public danger or natural catastrophes in order to guarantee the protection and safety of persons with disabilities. In a second group of treaties, the list of non-derogable rights is more comprehensive and goes further in scope. This is particularly the case for the ACHR and the ArChHR (see below, paras. 90 and 114). In its 1984 Report, the ILA CEHRL subscribed to a similarly comprehensive list.[22] The AfrChHPR is unique among regional treaties in that, on the interpretation of the African Commission on Human and Peoples' Rights (AfrComHPR), it does not allow for any suspension at all.[23] The common core of rights explicitly recognized in treaties as non-derogable, however, is narrow: it consists of the right to life (with exceptions), the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery, and the prohibition of ex post facto criminal laws.

20. Human rights bodies have repeatedly undertaken to expand the lists of non-derogable rights beyond those which are explicitly spelled out in the treaties (see below, paras. 35-36, 97). The fact that some conventions that aim to protect social, economic and cultural rights do not provide for explicit non-derogation clauses, does not exclude that such rights could be derogated from; yet, the CESCR has declared aspects of these rights to be non-derogable (see *infra*, paras. 55-58).

21. The different catalogues of non-derogable rights in human rights conventions and their expansion in judicial and quasi-judicial practice beg the question how rights resistant to suspension may be identified by criteria other than their explicit listing in treaty law. For that purpose, different rules and principles of international law can be consulted that produce similar legal consequences. Their common denominator is that they take priority over the opposition of individual states, as indeed is the case with the prohibition of derogations.

22. One such rule arguably is the prohibition of reservations.[24] Some human rights treaties rule out reservations contrary to their object and purpose, which would also be impermissible under the residual rule in the Vienna Convention on the Law of Treaties (Art. 19(c) VCLT), whilst others are categorically opposed to any reservations. Examples of the latter provisions are Art. 9 of the 1956 Supplementary Convention on the Abolition of Slavery and Art. 9 of the 1960 Convention against Discrimination in Education. The consequences of prohibited reservations have been controversial in general international law,[25] yet the HRCttee[26], ECtHR[27] and IACtHR[28] invalidated such reserving instruments so that respective state parties remained bound, despite their opposition. However, it may be doubtful whether this rule helps to identify new categories of non-derogable rights, since the candidates thus found are likely to be identical.

23. A further group of guarantees may be those which are to be observed "at any time and in any place", as they are spelled out in Common Art. 3 of the four 1949 Geneva Conventions. Accordingly, the prohibitions of discrimination on grounds of race, colour, religion or faith, sex, birth, wealth or similar criteria; of wanton killings; cruel treatment and torture; the taking of hostages; degrading and humiliating treatment; and executions without previous judgment are binding also in non-international armed conflict. It must be concluded that the same is true of states of emergency. This conclusion reinforces what can be seen in the derogation clauses but would not enlarge substantially the scope of non-derogable rights already recognized.

24. If human rights bodies seek to underline the particular importance of human rights guarantees, they tend to attribute them to the category of *jus cogens* (or peremptory norms of international law).[29] The definition of *jus cogens* in Art. 53 VCLT resonates with the concept of derogation. Accordingly, *jus cogens* are norms "of general international law […] accepted and recognized by the international community of States as a

[22] See ILA, Report of the Sixty-First Conference Paris 1984, *supra* note 9, 56, at 71 et seq.
[23] AfrComHPR, *Commission nationale des droits de l'homme et des libertés v Chad*, Communication No. 74/92 (1995), para. 25.
[24] For the similar question of the relationship of prohibited reservations with peremptory norms, see HRCttee, General Comment No. 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add. 6, para. 10; Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (CUP 2017), at 161-166.
[25] A more consensual position appears to have been achieved in the International Law Commission, Guide to Practice on Reservations to Treaties, UN Doc. A/66/10 (2011).
[26] General Comment No. 24, *supra* note 24, at para. 18.
[27] ECtHR, *Belilos v Switzerland*, App. No. 10328/83, at para. 60.
[28] IACtHR, *Radilla Pacheco v Mexico*, Judgment (Preliminary Objections, Merits, Reparations, and Costs) 23 November 2009, at para 312.
[29] For reference on numerous decisions by human rights courts and criminal tribunals, see Stefan Kadelbach, "Genesis, Function and Identification of *Jus Cogens* Norms", 46 *Netherlands Yearbook of International Law* (2015), 147, at 156-159.

whole as a norm from which no derogation is permitted". A treaty in conflict with *jus cogens* would be invalid. Thus, this category of norms prevents measures adopted by opposing states from deploying legal effects, as do the non-derogation clauses with respect to the suspension of certain human rights. Despite the similarity of the legal consequences attributed to *jus cogens* norms and non-derogable norms, they are not identical.[30] The conditions to be met by a norm to qualify as *jus cogens* are strict: It is (1) a norm of general international law, (2) which is recognized to be non-derogable.[31] Thus, on the one hand, it is widely recognized that derogation clauses may serve only as an indicator for a norm to be *jus cogens*. However, this in itself would not suffice; in addition, the recognition as customary international law – or, for regional human rights protection systems, arguably, as regional custom – is necessary.[32] On the other hand, if a human rights guarantee qualifies as *jus cogens*, it is to be derived from the nullifying effect of this category of norms that derogations from them do not produce legal effects in international law. So far, only a few core obligations have been generally recognized as *jus cogens*.[33] According to the International Court of Justice (ICJ), the prohibitions of genocide and of torture can be so categorized.[34] Further undisputed examples are the right of peoples to self-determination,[35] the prohibition of slavery and the slave trade, the prohibition of severe forms of racial discrimination,[36] and basic principles of international humanitarian law (IHL) as they are spelled out in Common Art. 3 of the 1949 Geneva Conventions.[37] The ILA suggested as early as 1984 in its Paris Minimum Standards of Human Rights Norms in a State of Emergency that the common core of non-derogable rights of the international human rights conventions formed part of international *jus cogens*.[38]

25. The concept of obligations *erga omnes* is closely related to *jus cogens*, but addresses different legal consequences.[39] The term denotes a notion of opposability in the sense that the underlying obligation is owed to the international community of states as a whole so that each state is under an obligation not to recognize advantages acquired by such behaviour as legal, as the ICJ has held in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (hereafter, the Wall Advisory Opinion).[40] At the stage of provisional measures in the recent dispute about the application of the Genocide Convention between the Gambia and Myanmar, the Court has attributed *prima facie* standing before it to a state not directly affected by a violation.[41] The substantive law that produces effects *erga omnes* has been considered to coincide to a large extent with *jus cogens*, although this remains controversial.[42] In any case, even the approach positing that all human rights have *erga omnes* effects, and not just those rights with *jus cogens* status, provides few additional indications as to which rights constitute non-derogable rights.

26. Finally, there is a close connection between *jus cogens* and the core crimes of international criminal law: If a certain conduct amounts to one of these offences, such as war crimes, crimes against humanity, or genocide, there can be no excuse if the perpetrator acts in an official capacity. It follows that no derogations, be they by treaty (*jus cogens*) or unilaterally (suspension of human rights obligations) can be justified. The scope of

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[30] See HRCttee, General Comment No. 29, *supra* note 17, para. 11 ("related […], but not identical"); for a thorough discussion of the mutual relationship see Robert Kolb, *Peremptory International Law – Jus Cogens* 77-80 (Hart 2015).

[31] See International Law Commission, Sixty-Ninth Session, Second Report on *jus cogens*, by Dire Tladi, Special Rapporteur, 16 March 2017, A/CN.4/706, paras. 40 ff.

[32] Cf. Stefan Kadelbach, "*Jus cogens*, Obligations *Erga omnes* and other Rules – The Identification of Fundamental Norms", in Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (Brill 2006), 20, at 30.

[33] For an overview of proposals, see Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006), 53-60.

[34] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, 20 July 2012, para. 99 (torture); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* ICJ, 3 Feb 2015, para. 87, with reference (genocide). Arguably also the prohibition of cruel treatment, in light of its obiter in ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, para 87.

[35] *Case Concerning East Timor*, ICJ, 30 June 1995, para. 29 (*erga omnes* character; for the relation to *jus cogens* see subsequent paragraph).

[36] See the list of *erga omnes* obligations in *Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Second Phase)*, ICJ, 5 Feb 1970, para. 34 (obiter).

[37] See the indirect reference in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)*, ICJ, 27 June 1986, para. 218 ("minimum yardstick […] which […] reflect elementary considerations of humanity").

[38] ILA, Report of the Sixty-First Conference Paris 1984, *supra* note 9, at 69 f.

[39] Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005), at 139-151.

[40] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, adv. op. 9 July 2004, paras. 88 and 155 f.

[41] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, order 23 Jan 2020, pp. 12 f.

[42] Jochen A. Frowein, "Obligations *erga omnes*", in: Rüdiger Wolfrum (ed.), *The Max Planck Encylopedia of Public International Law*, vol. VII (OUP 2012), 916, paras. 9 and 11 (arguing in favour of a substantive overlap). But the issue is still controversial, see Paolo Picone, "The Distinction between *Jus cogens* and Obligations *Erga omnes*", in Enzo Cannizzaro (ed.) *The Law of Treaties Beyond the Vienna Convention* (2011) and Erika de Wet, "*Jus cogens* and Obligations *Erga omnes*", in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013), 554.

the underlying obligations is covered by *jus cogens* but does not reach beyond it. As a consequence, the criminal nature of an act under international law entails that the human rights obligation it violates is non-derogable.

27. The legal consequences of the concepts of *jus cogens*, *erga omnes*, Common Art. 3, core crimes of international law and impermissible reservations may serve as additional criteria for identifying non-derogable norms. However, the limited scope of some of these categories and the contestation of the precise content or the legal effects of others does not always provide greater clarity for distinguishing any clearer the contours of the class of non-derogable rights. Relying on criteria which are intrinsic to the very guarantees from which no derogation is permitted, the more so if they are spelled out at least in some of the derogation clauses, may prove promising. Thus, in this report we examine the expansion of the class of non-derogable rights through reliance by some systems on peremptory norms of international law, on procedural limbs of the rights explicitly spelled out in treaties as non-derogable, on rights which have a close link to non-derogable guarantees such as the prohibition of discrimination, the rights to personal security, a legal remedy and a fair trial, and on arguments relating to the basic subsistence value of some rights.[43]

D. The Practice of UN bodies, institutions and mechanisms

1. The UN Human Rights Committee

28. The HRCttee has dealt with the issue of permissible derogations in time of public emergency in the context of state reports, individual communications, and in its General Comments. Whether derogation measures are or were consistent with the requirements of the ICCPR has been the focus of discussions of state reports including Kyrgyzstan, Laos, Lebanon, Sri Lanka, Syria, Thailand and Israel.[44] Furthermore, the HRCttee has reiterated the different conditions in its recent statement on derogations from the Covenant in connection with the COVID-19 pandemic.[45]

29. The emergency provision of the ICCPR is enshrined in Art. 4 ICCPR.[46] The norm consists of three paragraphs. The first paragraph imposes certain substantive requirements. The second lists non-derogable rights, while the third paragraph puts forward procedural requirements for the invocation and notification of the state of emergency. The following sections will analyse these three parts of the norm more closely, considering the HRCttee's General Comment No. 29 as well as the individual communications dealing with the requirements for applying a state of emergency. It is interesting to note that, in its individual communications, the HRCttee has not accepted a derogation because of a public emergency even once.

a. The substantive requirements

30. Art. 4 (1) ICCPR contains four conditions:

- First, there needs to be a public emergency threatening the life of the nation;
- Second, the derogation from a human rights norm contained in the ICCPR must be proportionate ("strictly required by the exigencies of the situation");
- Third, the derogation must be consistent with other obligations under international law, e.g. IHL in the case of armed conflicts;
- Fourth, it must not involve discrimination on the ground of race, colour, sex, language, religion or social origin.

31. In its General Comment, the HRCttee places a particular emphasis on the principle of proportionality, which will often be at the core of an analysis under Art. 4 ICCPR.[47] It is often difficult to dispute the claim of a state party that there is a public emergency threatening the life of the nation because states commonly are granted considerable discretion with regard to their assessment of questions of national security. That makes

[43] See also ILA Report 1984, *supra* note 9, at 71-93 and ILA Final Report on Monitoring States of Emergency: Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency (Queensland Guidelines), in: ILA, *Report of the Sixty-Fourth Conference held at Broadbeach, Queensland 1990*, Sydney 1991, 229, at 233 f.; HRCttee, General Comment No. 29, *supra* note 17, at para. 13.

[44] More generally see William A. Schabas, in: Manfred Nowak (ed.), CCPR Commentary (N.P. Engel, 3rd ed. 2019), 87, at 105-107.

[45] HRCttee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 30 April 2020, CCPR/C/128/2.

[46] For a general discussion of Article 4 see *id*.

[47] HRCttee, General Comment No. 29, *supra* note 17, at paras. 4-5.

it all the more important to review whether the measure applied by the state was indeed a proportionate response to the emergency.

32. This is largely confirmed by the practice of the individual communications. In most cases in which derogable rights were concerned the HRCttee rejected a derogation because the state party had failed to argue or explain why the specific measure was required to address the emergency. While the wording of the reasoning varies, the essence is the same: the HRCttee noted the "absence of any pertinent explanations from the State party",[48] observed that states failed to specify "the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and [to demonstrate] that these derogations are strictly required"[49], argued that "no attempt was made [… to] show that such derogations were strictly necessary"[50] or found that the "Government has not made any submissions of fact or law to justify such derogation".[51]

b. Non-derogable rights

33. Art. 4 (2) ICCPR explicitly lists certain non-derogable rights. These are:

- The right to life (Art. 6 ICCPR)
- The prohibition of torture, and cruel, inhuman or degrading treatment or punishment (Art. 7 ICCPR)
- The prohibition of slavery and servitude (Art. 8 (1) and (2) ICCPR)
- The prohibition to imprison an individual merely on the ground of inability to fulfil a contractual obligation (Art. 11 ICCPR)
- The principle of nulla poena sine lege (Art. 15 ICCPR)
- The recognition as a person before the law (Art. 16 ICCPR)
- The freedom of thought, conscience and religion (Art. 18 ICCPR)

34. The rationale of such non-derogable rights is twofold.[52] First, the values of these rights are deemed so important that they must be respected even in a case of a public emergency. These rights are often also peremptory norms of international law.[53] Second, it is often inconceivable how violating these rights could possibly help the state address the public emergency so that non-derogation is a natural result of the proportionality requirement contained in paragraph one.

35. Based on these two rationales, the HRCttee has considerably expanded the list of non-derogable rights beyond the ones explicitly mentioned in Art. 4 (2) ICCPR in its General Comment No. 29:

- First, the HRCttee argues that there are "elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances".[54]
- Second, the HRCttee includes Art. 10 ICCPR in the list of non-derogable rights because of its close connection to the concept of human dignity and the (non-derogable) prohibition of torture in Art. 7 ICCPR.[55]
- Third, prohibitions on taking hostages, abductions or unacknowledged detentions are not subject to derogation.[56] The HRCttee argues that this is justified because of their status as general norms of international law. Moreover, it is also difficult to conceive how these actions could be a proportionate response to an emergency.
- Fourth, rights of persons belonging to minorities are not subject to derogation because of the explicit prohibition of discrimination contained in Art. 4 (1) ICCPR.[57]
- Fifth, deportations or forcible population transfers may not be justified in a state of emergency because the HRCttee considers them crimes against humanity.[58]

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[48] HRCttee, Communication No. 1863/2009, *Dev Bahardur Maharjan* (9 July 2012), para. 8.6; HRCttee, Communication No. 1761/2008, *Yubraj Giri* (24 March 2011), para. 7.8.
[49] HRCttee, Communication No. 933/2000, *Adrien Mudyo Busyo et al.* (31 July 2003), para. 5.2; see also HRCttee, Communication No. 628/1995, *Tae Hoon Park* (20 Oct. 1998), para. 10.3.
[50] HRCttee, Communication No. 34/1978, *Landinelli Silva et al.* (8 Apr. 1981), para. 8.2.
[51] HRCttee, Communication No. 44/1979, *Pietraroia* (27 March 1981), para. 14; HRCttee, Communication No. 33/1978, *Buffo Carballal* (27 March 1981), para. 11; HRCttee, Communication No. 37/1978, *Soriano de Bouton* (27 March 1981), para. 12; HRCttee, Communication No. 8/1977, *Garcia Lanza de Netto* (3 Apr. 1980), para. 15.
[52] Similarly, General Comment No. 29, *supra* note 17, at para. 11. See also above, para. 18.
[53] *Id*. On the relationship between non-derogable rights and *jus cogens*, see above, paras. 18-27.
[54] General Comment No. 29, *supra* note 17, at para. 8.
[55] *Id*., at para. 13.
[56] *Id*.
[57] *Id*.
[58] *Id*.

- Finally, the HRCttee argues that the right to an effective remedy against violations of the Convention (Art. 2 [3][a] ICCPR) is non-derogable because it deems it to be a "treaty obligation inherent in the Covenant as a whole".[59]

36. In its individual communications, the HRCttee also refers at times to non-derogable rights, which are not explicitly mentioned in Art. 4 (2) ICCPR. However, the individual communications do not add any non-derogable right to those already mentioned in the General Comment. In particular, the HRCttee argued that state parties had to comply with Art. 2 (3)(a) ICCPR and establish an appropriate judicial and administrative mechanism to address alleged violations "even during a state of emergency".[60] Furthermore, it argued that the guarantee of treatment with humanity and dignity during arrest established by Art. 10 ICCPR was not subject to derogation.[61] The reasoning in these cases is usually apodictic and does not go beyond a reference to General Comment No. 29.

c. Procedural requirement

37. Finally, Art. 4 (3) ICCPR establishes a procedural requirement, according to which the public emergency must be explicitly notified. This communication must be submitted to the UN Secretary-General and mention the rights from which the party derogates, the reasons for the derogation and the date on which the derogation will be terminated. In its statement regarding COVID-19, the HRCttee urged states not to derogate formally from the Covenant if they were able to attain the public health objectives by making use of the justification clauses allowing to restrict certain rights.[62]

38. The procedural requirement has occasionally played a role in individual communications. For example, in *Tae Hoon Park*, the HRCttee rejected South Korea's reliance on the emergency exception because the state had not notified the derogation.[63] Moreover, the HRCttee rejected the invocation of a state of emergency by the state party in *Orlando Fals Borda* because the relevant provision of the ICCPR was not covered by the declaration of the State party under Art. 4 (3) ICCPR.[64]

2. The Committee on Economic Social and Cultural Rights and other UN treaty bodies monitoring social rights

39. The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain a derogation clause equivalent to Art. 4 of the ICCPR. The *travaux préparatoires* do not disclose whether the necessity or desirability of such a provision had been considered by the drafters.[65] Similarly, a derogation clause is absent from other core international human rights treaties that proclaim socio-economic rights alongside civil and political rights, i.e. the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the CRPD. The1961 ESC and the 1996 revised ESC are the only socio-economic rights instruments that include a derogation clause, which however has remained largely dormant.[66]

40. Scholars have sought to identify possible reasons for the absence of a derogation clause from the ICESCR. The nature of the rights contained in the ICESCR – many of which can be described as "subsistence rights" and are "inherently linked to the non-derogable right to life and the right to freedom from torture and inhuman and degrading treatment"[67] – would make the case for their derogation "inherently less

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[59] *Id*., para. 14.
[60] HRCttee, Communication No. 1863/2009, *Dev Bahardur Maharjan* (9 July 2012), para. 8.8; HRCttee, Communication No. 1761/2008, *Yubraj Giri* (24 March 2011), para. 7.10.
[61] HRCttee, Communication No. 1761/2008, *Yubraj Giri* (24 March 2011), para. 7.9.
[62] HRCttee, Statement regarding COVID-19, *supra* note 45, consideration 2c.
[63] HRCttee, Communication No. 628/1995, *Tae Hoon Park* (3 Nov. 1998), para. 10.4.
[64] HRCttee, Communication No. R.11/46, *Orlando Fals Borda* (27 July 1981), para. 13.2.
[65] Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the ICESCR", 9 *Human Rights Quarterly* 2 (1987), 156, at 217.
[66] *It is interesting to note that while a significant number of states had derogated from the ECHR in the context of COVID-19 (10 states as of 24 April 2020), not one had sought a derogation from the European Social Charter or the revised Charter. See Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=oC00wpDO*
[67] Manisuli Ssenyonjo, "Reflections on state obligations with respect to economic, social and cultural rights in international human rights law", 15 *The International Journal of Human Rights* 6 (2011), 969, at 990 – 991.

compelling".[68] The dominant argument in literature refers to the ICESCR's general limitation clause (Art. 4) and the progressive realisation provision (Art. 2 (1)), which would be sufficiently flexible to accommodate emergency situations.[69] The flexibility provided by these clauses would then preclude the need for derogations. Be that as it may, the silence of a treaty in respect to derogations is not *per se* determinative of whether these are permitted or prohibited.[70] The UN treaty bodies' practice pertaining to the protection of socio-economic rights in times of emergency converge towards: proclaiming the continued applicability of socio-economic rights treaties (therefore rejecting a *general* derogation from these rights); affirming narrow interpretations of the general limitation and progressive realisation clauses; and stating the non-derogability of core content obligations. Taken together, these aspects provide some substantive safeguards for the realisation of socio-economic rights in times of emergency, yet uncertainties remain as shall be discussed in the following passages.

a. Continued application of socio-economic rights instruments in times of emergency

41. In its respective General Comments on the prohibition of forced evictions,[71] and the rights to food,[72] water,[73] health,[74] the CESCR expressly notes that states' (core content) obligations relating to these rights continue to apply in times of armed conflicts, natural disasters and other emergency situations. In 2020, in the Statement on COVID-19, the CESCR reinforces that state parties remain bound by ICESCR obligations (not restricted to core content obligations) when responding to health emergencies.[75] Whilst a contextual analysis will be needed to understand whether a violation of a socio-economic right has occurred, all three dimensions of correlative state obligations – to respect, protect and fulfil – may be engaged in times of emergency.[76]

42. Individual communications have not provided the CESCR with ample opportunity to pronounce itself extensively on the topic of socio-economic rights and emergency situations. Nonetheless, the above discussed interpretative practice, affirming the continued relevance of the ICESCR during times of emergency, is upheld in a number of Concluding Observations on states parties' periodic reports.[77] In its 2004 Wall Advisory Opinion, the ICJ relied, *inter alia*, on the CESCR's Concluding Observations on Israel's state report[78] to find that the ICESCR applied in times of armed conflict. Specifically, the Court held that the construction of the wall in the Occupied Palestinian Territories and its associated regime "impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living" entailed in the ICESCR and the CRC.[79]

43. UN treaty bodies monitoring the implementation of the CEDAW, CRC and CRPD have emphasised the continued applicability of these instruments in times of emergency.[80]

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[68] Alston and Quinn, *supra* note 65, at 217.
[69] See Amrei Mueller, "Limitations to and Derogations from Economic, Social and Cultural Rights", 9 *Human Rights Law Review*, 4, (2009), 557, at 594; Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP, 2011), at 467; Giles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (OUP 2014), at 85.
[70] See Ssenyonjo, *supra* note 67, at 989 – 990 and Alston and Quinn, *supra* note 65, at 217-219.
[71] CESCR, General Comment No. 7: The right to adequate housing (art. 11(1) of the Covenant): Forced Evictions, E/1998/22, 20 May 1997, para. 5.
[72] CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11), 12 May 1999, E/C.12/1999/5, paras. 6 and 12
[73] CESCR, General Comment No. 15: The right to water (arts. 11 and 12), 20 January 2003, E/C.12/2002/11, para. 22.
[74] CESCR, General Comment No. 14: The right to highest attainable standard of health (article 12) 11 August 2000, E/C.12/2000/4, para. 47.
[75] See CESCR, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, 6 April 2020, E/C.12/2020/1, para. 10 ff.
[76] See, e.g., CESCR, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22, para. 59; CESCR, General Comment No. 19, The right to social security (art. 9), 4 February 2008, E/C.12/GC/19, para. 50.
[77] For a discussion of CESCR Concluding Observations relating to armed conflict situations, see Eibe Riedel, 'Economic, Social and Cultural Rights in Armed Conflict', in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014), 441-469, at 449-552.
[78] See ICJ, *Wall* Advisory Opinion, *supra* note 40, para. 112.
[79] *Id*., 130, 134-6.
[80] CEDAW, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, 1 November 2013, CEDAW/C/GC/30, para. 2 and 73.c. CRC Committee, COVID-19 Statement, 8 April 2020, available at https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1_Global/INT_CRC_STA_9095_E.pdf; see also CRC Committee, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, para. 73. CRPD Committee, General Comment No. 4 on the right to inclusive education, CRPD/C/GC/4, 25 November 2016, para. 14.

b. Limitations of socio-economic rights: substantive safeguards

44. Whilst there is ample support in the practice of UN treaty bodies for the continued application of socio-economic rights treaties in times of emergency, states may rely on limitation clauses to restrict their obligations, provided certain substantive conditions are strictly met.[81] The drafters' intention had been for Art. 4 to be applied to limitations on socio-economic rights, which do not relate to resource constraints – the latter were to be regulated by means of Art. 2(1) instead.[82] As the CESCR's monitoring practice on Art. 4 is scarce, the interpretation of the three conditions of legality, compatibility and legitimacy must be pieced together based on relevant information from General Comments, the *travaux préparatoires*, and by relying on analogical reasoning.

45. First, the condition of legality ("determined by law") requires restrictions to be provided by accessible civil or common law, the effects of which should be foreseeable, and not contravene the rule of law.[83] Second, the requirement that restrictions on ICESCR rights must be "compatible with the nature of these rights" is a unique standard among limitation clauses of human rights treaties. The nature of some socio-economic rights as subsistence rights – which, as noted above, may have resulted in the absence of a derogation clause from the ICESCR – bars restrictions that would affect these rights' core content, minimum essential levels, or their essence.[84] Third, the legitimate aim, which may be invoked under Art. 4 by states seeking to limit rights refers to the promotion of general welfare – by singling out one sole aim, the provision marks a departure from specific and general limitation clauses in other treaties. "General welfare" arguably designates a narrowly interpretable standard of "economic and social wellbeing".[85] A purely majoritarian interpretation that simply equates the term "general" with the majority of the population, whilst discounting the interests of "vulnerable" or "marginalised" individuals and groups, seems to be irreconcilable with the interpretative practice of the CESCR. The Committee has consistently emphasised that in realising socio-economic rights special attention must be paid to vulnerable groups.[86] As such, a state facing armed conflict, terrorist attacks or threats, or economic crisis would have to demonstrate that the goals of restoring public order, preserving national security, or pursuing economic development are identical with the promotion of general welfare.[87] In light of the narrow reading of the term, demonstrating this equivalence appears to carry a heavy burden of proof for states.

46. In its Statement on COVID-19, the CESCR appears to acknowledge that combating the public health crisis posed by the new coronavirus can be construed as promoting the general welfare, which therefore can engage the provisions of Art. 4. Yet, the Committee also stresses that Art. 4 requires a proportionality analysis of the limiting measures across three dimensions: necessity, suitability, and strict proportionality.[88] In 2010, the CESCR recommended, "based on the principles of necessity and proportionality" that Algeria lift "the emergency situation, in place since 1992 insofar as it has negative effects on the enjoyment of economic, social and cultural rights (art. 4 and 5)."[89]

47. The CERD and CEDAW do not entail any general limitation clauses. The object and purpose of these instruments is to "eliminate discrimination" defined as any distinction, exclusion or restriction on the basis of race, colour, national or ethnic origin and sex, respectively.[90] Limitation clauses which would allow state

[81] In General Comment 14, the CESCR provides its interpretation of the general tenor of the limitation clause in Art. 4: the clause "primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States." CESCR, General General Comment No. 14, *supra* note 74, para. 28.
[82] Amrei Mueller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law*, (Martinus Nijhoff Publishers 2013), a6 129.
[83] Id., pp. 123-124 and Alston and Quinn, *supra* note 65, at 199-200.
[84] See Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003), p. 280-281, and discussion *infra* paras. 16-17.
[85] The term has not been defined by the CESCR. Alston and Quinn rely on the *travaux préparatoires* of the ICESCR and the UDHR to propose this reading, which has been subsequently embraced by other scholars. See Alston and Quinn, *supra* note 65, at 202-203.
[86] See, for example, CESCR, General Comment No. 3, The Nature of States Parties' Obligations (Art. 2, Para. 1), (Contained in Document E/1991/23), 14 December 1990, para 12. For a detailed discussion of "vulnerability" in the CESCR practice see Ivona Truscan, *The Notion of Vulnerable Groups in International Human Rights Law*, PhD Thesis (IHEID 2015). Note also that according to the Limburg Principles, the term shall be interpreted to mean "furthering the well-being of the people *as a whole*". [Emphasis added]. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Commission on Human Rights, Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva, 8 January 1987, E/CN.4/1987/17.
[87] See, for example, CESCR, General Comment No. 14, *supra* note 74, para. 28.
[88] CESCR, Statement on COVID-19, *supra* note 75, para. 11.
[89] CESCR, Concluding Observations: Algeria, 7 June 2010, E/C.12/DZA/CO.4, para. 23.
[90] CERD, art. 1.1; CEDAW, art. 1.

parties to restrict their contracted commitments aimed at eliminating discrimination so defined would, prima facie, collide with the raison d'être of these treaties.[91]

c. Progressive realisation: substantive safeguards

48. Art. 2 (1) ICESCR entails a progressive realisation clause. In interpreting Art. 2 (1), the CESCR has sought to strike a balance between the reality of (varied) resource constraints – which may be particularly stark in times of emergency – and the object and purpose of the ICESCR, which is the full realisation of socio-economic rights. The CESCR has established that Art. 2 (1) gives rise to some immediate obligations. The obligation "to take steps" is an obligation of immediate effect, which can be discharged through the adoption of legislation, judicial or other remedies, administrative, financial, educational, and social measures.[92] In General Comment No. 3, the Committee introduces the notion of "deliberately retrogressive measures", yet provides no specification on the concept. The lack of a definition, and the CESCR's loose use of terminology (retrogressive v regressive v steps backward, deliberately v deliberate retrogressive measures) has left the concept in a "murky" state and may have contributed to its underuse in monitoring.[93] Be that as it may, retrogression is generally understood to refer to an "erosion of progress"[94] or "step back"[95] in the protection of socio-economic rights.

49. The interpretative practice post-1998 evidences a general presumption for the impermissibility of deliberately retrogressive measures,96 which holds true, in the Committee's view, also in times of emergency.97 In General Comment No 3, the Committee stipulates three conditions in respect to deliberately retrogressive measures; they: "[1] would require the most careful consideration and [2] would need to be fully justified by reference to the totality of the rights provided for in the Covenant and [3] in the context of the full use of the maximum available resources."98 Put differently, the obligation not to take deliberately retrogressive measures is not absolute – except in respect to the core content of rights. Yet the permissibility of such measures depends on the ability of the state party to provide evidence that it meets the above outlined conditions.

50. In General Comment No. 19 on the right to social security, the CESCR provides the fullest iteration of factors, which it would consider in assessing whether deliberately retrogressive measures are permissible. The assessment would consider whether

- The justification for the measure was reasonable
- Alternatives were comprehensively explored
- Genuine participation of affected groups in examining the proposed measure and alternatives had taken place
- The measures were directly or indirectly discriminatory[99]
- The measures will have a "sustained impact" or "unreasonable impact" on the right or whether "an individual or group is deprived of access to the minimum essential level", i.e. whether the measure affects the core content of the right

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[91] Nonetheless, some States parties to the CEDAW have sought to exclude or alter their obligations under the treaty through controversial reservations. See CEDAW Committee, Statement on Reservations to the Convention on the Elimination of All Forms of Discrimination against Women, A/53/38/Rev.1. The CRC provides specific limitation clauses on qualified civil and political rights, whereas socio-economic rights are subject to progressive realisation; the CRC Committee has drawn on the interpretative practice of the CESCR in respect to the latter. See CRC Committee, General Comment No. 19 on public budgeting for the realization of children's rights (art. 4), 29 July 2016, CRC/C/GC/19, para. 31.

[92] CESCR, General Comment No. 3, *supra* note 86, paras. 1-7.

[93] See Warwick, "Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights", 19 *Human Rights Law Review* 3 (2019), 467, at 468-471; Aoife Nolan, Nicholas J. Lousiani and Christian Courtis, "Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights" in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014), at 133-135.

[94] Id., at 468.

[95] Sepulveda, *supra* note 84, at 323.

[96] See CESCR, General Comment No. 13, The Right to Education (Art. 13), E/C.12/1999/10, 8 December 1999, para. 45; CESCR, General Comment No. 14, *supra* note 74, para. 42; CESCR, General Comment No. 18, The right to work, 6 February 2006, E/C.12/GC/18, para. 34; CESCR, General Comment No. 19, *supra* note 76, para. 19. Sepulveda notes that the CESCR's monitoring of retrogressive measures has received an impetus after the adoption of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. See Sepulveda, *supra* note 84, 326.

[97] CESCR, Concluding Observations: Democratic Republic of Congo, 16 December 2009, E/C.12/COD/CO/4, para. 16.

[98] CESCR, General Comment No. 3, *supra* note 86, para. 9.

[99] Note that the prohibition of discrimination (Art. 2.2) is another obligation of immediate effect under the ICESCR. See Id., para.2.2 and CESCR, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2), 2 July 2009, E/C.12/GC/20, para. 7.

- Domestic independent review exists.[100]

51. The reason for resource scarcity appears to play a significant role in the assessment of justification of the retrogressive measures.[101] An unwilling v unable scenario – or rather a spectrum with the two extremes – can be discerned from the "objective criteria" which the CESCR outlines in a Statement occasioned by the drafting of the Optional Protocol.[102] As such, a certain discretion appears to be afforded to states facing situations of emergency, such as armed conflict or natural disaster, or economic recession. However, mere reliance on the emergency situation to justify retrogression would appear to be insufficient – the assessment would need to engage with the other criteria and factors identified above. For example, in its Concluding Observation on the report of the Democratic Republic of Congo, the CESCR noted that "retrogressive measures cannot be justified solely on the basis of the existence of an emergency, including an armed conflict."[103]

52. More recently, in a Letter of the CESCR Chairperson addressed to state parties to the Covenant, the CESCR outlined criteria for assessing retrogression relating to austerity measures in the context of economic and financial crisis.[104]

> "First, the policy must be a temporary measure covering only the period of crisis. Second, the policy must be necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights. Third, the policy must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected. Fourth, the policy must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organization, and ensure the protection of this core content at all times."[105]

53. Since 2012, the CESCR has used these criteria in assessing the state reports of Spain, Iceland, New Zealand and Iraq.[106] In *Ben Djazia et al v Spain*, relying on the outlined test, the Committee found that Spain "has not convincingly explained why it was necessary to adopt the retrogressive measure … which resulted in a reduction of the amount of social housing precisely at a time when demand for it was greater owing to the economic crisis."[107]

54. Three observations are relevant. First, the non-retrogression criteria applicable to economic and financial crises are strikingly similar to those we find in derogation clauses: necessity, proportionality, non-discrimination, non-derogability of certain (aspects of) rights, and temporality. The main, yet important difference relates to the absence of a notification requirement. Second, it would therefore appear that the CESCR – and possibly the CRC Committee[108] – consider economic and financial crises akin to emergency situations, given the severe implications these events (may) have on resource availability and thus on the full realisation of socio-economic rights. Third, at this stage, the outlined test seems not to have been applied to other situations of emergency, such as armed conflicts, natural disasters or epidemics that (may) have similar implications on a state's resource availability. Should this become the case, the CESCR would be interpreting

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[100] CESCR, General Comment No. 19, *supra* note 76, para. 19. Nolan et al interpret these factors as a specification of the criteria outlined in General Comment No. 3 pertaining to "whether a retrogressive measure was justifiable in terms of the Covenant". Nolan et al, *supra* note 93, at 135. Warwick considers these to be factors subsumed to an *additional* criterion ("does the CESCR find (despite a strong presumption against permissibility), and considering the following factors, that retrogression was impermissible"), thus on top of those outlined in General Comment 3. Warwick, *supra* note 93, at 478-480.

[101] See discussion in Mueller, *supra* note at 82, 131-132.

[102] The identified factors are: "(a) The country's level of development; (b) The severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant; (c) The country's current economic situation, in particular whether the country was undergoing a period of economic recession; (d) The existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict; (e) Whether the State party had sought to identify low-cost options; and (f) Whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason." CESCR, Statement – An evaluation of the obligation to take steps to the "maximum of available resources under an Optional Protocol to the Covenant, 10 May 2007, E/C.12/2007/1, para. 10.

[103] CESCR, Concluding Observations: Democratic Republic of Congo, *supra* note 97, para. 16.

[104] On the legal status of this document, see Nolan et al, *supra* note 93, at138.

[105] CESCR Chairperson Letter to State parties, 16 May 2012, CESCR/48th/SP/MAB/SW, available at https://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf

[106] See CESCR, Concluding Observations: Spain, 6 June 2012, E/C.12/ESP/CO/5, paras. 8, 12, 17 and 25 April 2018, E/C.12/ESP/CO/6, para. 14; Iceland, 11 December 2012, E/C.12/ISL/CO/3, paras. 6, 17, 18; New Zealand, 11 December 2012, E/C.12/NZL/CO/3, para. 17; Iraq, 27 October 2015, E/C.12/IRQ/CO/4, para. 16. For a discussion see Nolan et al, s*upra* note 93, at 138-139.

[107] CESCR, *Mohamed Ben Djazia and Naouel Bellili*, Communication No. 5/2015, 21 July 2017, E/C.12/61/D/5/2015, para. 17.6.

[108] The CESCR's non-retrogression test applicable during the economic and financial crises has been emulated by the CRC Committee in its General Comment No. 19, *supra* note 91, para. 31.

the Covenant in a manner which provides for an implied derogation clause covering emergency situations more broadly.

d. Non-derogable minimum core content obligations

55. In General Comment No. 3, the CESCR proclaimed "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party"[109]. The concept of minimum core obligations and their non-derogability, whilst not explicit in the ICESCR, are grounded simultaneously in the subsistence nature of many socio-economic rights and the object and purpose of the Covenant. As such, the Committee notes:

> A State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.[110]

56. Starting with General Comment No. 12 on the right to food in 1999,[111] the CESCR has consistently identified core content obligations. These comprise variations of the following obligations: i) to ensure access to minimum levels of a right; ii) non-discriminatory access, "especially for disadvantaged and marginalized individuals and groups"; iii) to respect and protect from third party interferences the existing access to a right; iv) to adopt and implement national strategies and action plans; v) to monitor the extent of realisation of a right.[112] The CRC Committee has employed the notion of "core obligations" in some of its general comments on socio-economic rights,[113] but not in others, an ambiguity, which has been suggested, may reflect lingering conceptual uncertainties.[114]

57. The non-derogability of core content obligations is consistently emphasised in the interpretative practice of the CESCR. To illustrate, in General Comment No. 16, the Committee notes "Article 3 [on the equality of men and women in enjoyment of all economic, social and cultural rights] sets a non-derogable standard for compliance with the obligations of States parties as set out in articles 6 through 15 of ICESCR."[115] In the Statement on poverty and the ICESCR of 2001, the Committee emphasises "[f]or the avoidance of any misunderstanding", that "core content obligations are non-derogable [and] continue to exist in situations of conflict, emergency and natural disaster".[116] The CESCR's practice of implying non-derogable obligations in the absence an explicit treaty provision is not without precedent as discussed in this report.

58. The CESCR's insistence on the non-derogability of core content obligations may seem paradoxical. As the Committee recognises that *only some* obligations are non-derogable (the core content obligations), the logical inference is that other aspects may be subject to derogation. Another reading argues that that "[i]n the absence of a derogation clause, the meaning of the terminology employed [non-derogable] should be interpreted in its conventional sense as indicating that such an obligation is of an absolute nature and therefore cannot be restricted under any circumstances."[117] The argument however is not supported by the (albeit inconsistent) practice of the CESCR, which appears to accept that even non-derogable core content obligations are subject to progressive realisation and conditional on resources availability,[118] and therefore not absolute. Analogical

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[109] CESCR, General Comment 3, para. 10.
[110] *Id*.
[111] CESCR, General Comment No. 12, *supra* note 72, para. 6.
[112] See for example, CESCR, General Comment No. 19, *supra* note 76, para. 59.
[113] CRC Committee, General Comment No. 15, *supra* note 80, para. 73.
[114] In particular, the uncertainty remains concerning whether *universal* minimum levels of a right must be ensured or a *national* minimum. A too expansive understanding of universal core content obligations may lead to the practical impossibility for many developing states or those facing emergency situations to meet their obligations; a too modest approach will provide developed states with insufficient incentives to advance socio-economic rights. See Christian Courtis and John Tobin, "Article 28: The Right to Education" in John Tobin (ed), *The UN Convention on the Rights of the Child. A Commentary* (OUP 2019), 1056-1115.
[115] CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), 11 August 2005, E/C.12/2005/4, para. 17.
[116] CESCR, Statement - 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, 10 May 2001, E/C.12/2001/10, para. 18.
[117] Giacca, *supra* note 69, p. 85.
[118] Contrast CESCR, General Comment No. 3, para. 10: "it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned" & General Comment No. 19, para 60, with General Comment No. 14, para. 47: "It should be stressed that a State party cannot justify, under any circumstances whatsoever, its non-compliance with the core obligations set out in paragraph 47 above, which are non-derogable" and CESCR, General Comment 15, para. 40.

reasoning would also not support this conclusion, as some non-derogable rights, expressly included in derogation clauses in other human rights treaties or implied by monitoring bodies, are not absolute.[119]

3. UN Human Rights Council and Universal Periodic Review

59. The UPR process is cyclical, and so far there have been three cycles: 2008-2011, 2012-16, and 2017-2021.[120] This section examines whether states had a *de jure* or *de facto* state of emergency or related situation and how the UPR process addressed these.[121] It also examines whether countries have sought to derogate from human rights obligations as a result of the state of emergency or related situation.

60. The analysis in this section is based on data from the HRCouncil's UPR website.[122] It comprises information until the end of January 2020. In total, 193 countries were reviewed. For most of the studied states, there was no reference to any state of emergency, martial law, or related situation in the UPR documents.[123] On some occasions, a state of emergency was identified through the UPR process.[124] However, there were several occasions where external sources revealed the existence of a state of emergency even though the UPR documents failed to address this.[125] Several countries did experience a state of emergency although the nature of the emergencies varied. Most states of emergency were initiated as a result of civil strife, terrorism, or armed conflict, and less often in response to natural disasters. The UPR documents provided different levels of analysis with respect to these states of emergency. However, even brief references to a state of emergency do not necessarily imply that the situation was insignificant. Instead, the brevity could simply reflect the limited information available or attempts by governments to minimize the significance or obscure the existence of such situations.

61. Governments adopted different measures within the framework of states of emergency. In some instances, governments conferred "sweeping powers" on military authorities, which allowed them to ban demonstrations or required prior authorization for demonstrations.[126] Protestors who failed to comply with the authorization requirements were subject to criminal prosecution.[127] In these states of emergency, governments often arrested, detained, and sometimes charged protestors.[128] In the majority of countries, states of emergency led to "numerous human rights violations, including arbitrary arrests and detentions and the disproportionate use of force"[129], going beyond what was necessary to address the situation.

62. During states of emergency triggered by civil unrest, it was not uncommon for governments to suspend freedom of expression in the forms of protests, print and internet publications, and other media outlets.[130] Governments also went as far as restricting movement, freedom of association, and speech rights.[131] In some states of emergency, governments established special courts that were not required to abide by human rights safeguards.[132] In some cases, civil society organisations (CSOs) alleged that governments tortured

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[119] For example, art. 18, ICCPR is a qualified right yet included in the Covenant's derogation clause. Art. 14 is limited, not included in the derogation clause, yet aspects of it are implied to be non-derogable by the HRCttee. See HRCttee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, para. 6.

[120] See generally Edward R. McMahon and Elissa Johnson, *Evolution Not Revolution: The First Two Cycles of the UN Human Rights Council Universal Periodic Review Mechanism* (FES 2016).

[121] There is a growing literature on the UPR process. See, e.g., Damian Etone, "Theoretical Challenges to Understanding the Potential Impact of the Universal Periodic Review Mechanism: Revisiting Theoretical Approaches to State Human Rights Compliance", 18 *Journal of Human Rights* 36 (2019), 36; Rochelle Terman and Erik Voeten, "The Relational Politics of Shame: Evidence from the Universal Periodic Review", 13 *The Review of International Organizations* 1 (2018), 1.

[122] United Nations Human Rights Council, Universal Periodic Review, https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx.

[123] It should be noted that some countries have adopted legislation to create the equivalent of permanent states of emergency, thereby vitiating the need to make formal pronouncements.

[124] For example, Sudan did not acknowledge the existence of a state of emergency even though it has been identified in the UPR process. See, e.g., HRCouncil, Report of the Working Group on the Universal Periodic Review: Sudan, 11 July 2011, A/HRC/18/16, para. 83.57.

[125] This extrinsic evidence was derived from general news sources, such as Google, Westlaw News, CNN, the Guardian, BBC, The Washington Post, Reuters, and news sources germane to the particular country.

[126] HRCouncil, Summary of Other Stakeholders' Submissions on Algeria, Report of the Office of the United Nations High Commissioner for Human Rights, 20 February 2017, A/HRC/WG.6/27/DZA/3, para. 38.

[127] *Id.*

[128] HRCouncil, OHCHR Compilation: Armenia, 19 February 2010, A/HRC/WG.6/8/ARM/, para. 22.

[129] HRCouncil, OHCHR Compilation: Djibouti, 19 February 2018, A/HRC/WG.6/30/DJI/3, para. 12; see also HRCouncil, OHCHR Compilation: Ecuador, 6 March 2008, A/HRC/WG.6/1/ECU/3, para. 27.

[130] HRCouncil, OHCHR Summary: Armenia, 5 February 2019, A/HRC/WG.6/8/ARM/3, para. 40; see also HRCouncil, OHCHR Compilation: Fiji, 26 August 2014, A/HRC/WG.6/20/FJI/1, para. 49.

[131] HRCouncil, OHCHR Compilation: Bangladesh, 24 November 2008, A/HRC/WG.6/4/BGD/3, para. 3; see also HRCouncil, OHCHR Compilation: Chad, 23 February 2009, A/HRC/WG.6/5/TCD/3, para. 39.

[132] HRCouncil, OHCHR Compilation: Bahrain, 8 March 2012, A/HRC/WG.6/13/BHR/3, para. 4.

detainees.[133] Furthermore, governments often implemented curfews and house arrest orders. In some extreme cases, governments introduced administrative security camps.[134]

63. In their UPR submissions, a number of states explained that their national constitutions authorized the declaration of "states of emergency" that may affect civil or political rights. Such rights usually included the freedom of expression or the freedom of assembly, and limitations with regard to the right to a fair trial or protection from arbitrary arrest.[135] On the other hand, several states indicated that fundamental rights remained protected under their national constitutions even in the event of a state of emergency.[136]

64. The involvement of CSOs in the UPR process is of vital importance.[137] Undoubtedly, CSOs may frequently be best equipped to scrutinise progress on the implementation of human rights in a given state. However, more information is needed to assess their impact in the UPR process because there is no formal comparative mechanism between a state's National Report (prepared by the government) and the Stakeholders' Summary (compiling information from CSOs).[138] It should also be noted that some CSOs face risks in participating within the UPR process. In 2019, for example, the UN Secretary-General published a report addressing the issue of "intimidation and reprisals against those seeking to cooperate or having cooperated" with the UN "in the field of human rights."[139] Thus, there are real concerns on how CSOs can participate free of threats and intimidation. This is especially the case in states which place constraints on freedoms of expression and assembly.[140] Another factor that may influence CSOs' participation in the UPR process refers to the government's lack of meaningful engagement with the civil society sector. Lack of capacity is also an important consideration, particularly for small, local CSOs which may not have the resources to effectively participate in consultations with international monitoring mechanisms, or lack the expertise or the support to enable their meaningful participation in the process.

4. UN Special Procedures

65. The system of UN Special Procedures (hereinafter, SPs) includes mandates of Special Rapporteurs, Independent Experts and Working Groups that are nominated by the HRCouncil. While no SP deals exclusively with human rights in times of emergency, an acute state of emergency with a severe human rights impact could lead to a HRCouncil resolution establishing a country rapporteur. States of emergency can lead to responses from thematic SPs. Recent examples include statements by SPs emphasizing the multifaceted impacts of COVID-19 emergency measures on human rights and specific groups of rights-holders.[141] The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stressed the importance of the proportionality requirement in assessing responses to the public health emergencies and warned that the latter will rarely justify the suppression of the freedoms of expression and information.[142] Similarly, the UN Expert on the rights to freedoms of peaceful assembly and of association cautioned against using a public health emergency as a pretext to restrict freedom of assembly and association.[143] The Special Rapporteur on extrajudicial, summary or arbitrary executions underscored the non-derogability of the right to life, and highlighted that an emergency could never be a reason to take life arbitrarily.[144]

66. SPs rely on a number of working methods – urgent appeals, allegation letters, thematic studies, expert consultations, country reports pursuant to visits – that can also be effectively used to respond to a situation

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[133] HRCouncil, OHCHR Compilation 1: Bahrain, 20 February 2017, A/HRC/WG.6/27/BHR/3, para. 7.
[134] HRCouncil, National Report : Algeria, 18 April 2012, A/HRC/WG.6/13/DZA/1, para. 99.
[135] *See e.g.*, HRCouncil, National Report: Malawi, 21 October 2010, A/HRC/WG.6/MWI/, para. 18,
[136] *See, e.g.*, HRCouncil, Report of the Working Group on the Universal Periodic Review: Maldives, 31 July 2015, A/HRC/30/8, para. 8.
[137] The UPR website provides a special section on "Civil Society Engagement." HRCouncil, 3rd UPR Cycle: Contributions and Participation of "Other Stakeholders" in the UPR (May 22, 2017), https://www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx.
[138] F. McGaughey, 'Advancing, Retreating or Stepping on Each Other's Toes? The Role of Non-Governmental Organisations in United Nations Human Rights Treaty Body Reporting and the Universal Period Review' (2017) 35 *Australian Year Book of International Law* 187
[139] HRCouncil, Report of the Secretary-General, Cooperation with the United Nations, its representatives and mechanisms in the field of human rights', Advance Edited Version, 9 September 2019, A/HRC/42/30, para. 1.
[140] *See e.g.,* PACE, Resolution 2226(2018), New restrictions on NGO activities in Council of Europe member States (adopted 27 June 2018) http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24943&lang=en.
[141] See "Covid-19 and Special Procedures" https://www.ohchr.org/EN/HRBodies/SP/Pages/COVID-19-and-Special-Procedures.aspx
[142] HRCouncil, Report of the UN Special Rapporteur on the promotion of the right to freedom of opinion and expression, A/71/373.
[143] UN expert on the rights to freedoms of peaceful assembly and of association, States responses to Covid 19 threat should not halt freedoms of assembly and association, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E.
[144] UN Special Rapporteur on extrajudicial, summary or arbitrary executions, https://www.ohchr.org/Documents/Issues/Executions/HumanRightsDispatch1.pdf.

of emergency. At the same time, the work of SPs can be impeded in states of emergencies because states commonly use them as a reason to deny, postpone or cancel country visits.

67. The Working Group on Enforced and Involuntary Disappearances (WGEID) and the Working Group on Arbitrary Detention (WGAD) have adopted general comments and deliberations within the scope of their respective mandates with relevance to emergency situations. For example, the WGEID affirmed the non-derogability of the right of relatives to know the truth of the fate and whereabouts of the disappeared persons.[145] Similarly, the WGAD declared that "the right to habeas corpus is not subject to any exceptions or derogations even in the context of armed conflict" as it "constitutes the ultimate guarantee of individual liberty and provides the possibility to contest the legality of any form and measure of deprivation of liberty."[146] It also declared that the prohibition of arbitrary deprivation of liberty is a "peremptory norm (*jus cogens*) of international law from which no derogation is permitted" in a 2012 report and reiterated this in a later opinion on an individual complaint.[147]

68. Counter-terrorism measures are one area of particular concern where states of emergency have often come into conflict with the protection of human rights. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has issued a comprehensive report addressing the relationship between states of emergency and counter-terrorism law and practice, with a particular focus on state practice since 2001.[148] The Special Rapporteur identified new post-9/11 emergency practices and their adverse human rights related effects. She notes that UN Security Council Resolution 1373 and subsequent resolutions, which require states to adopt far-reaching counter-terrorism legislation "enable, extend [,] validate" , and essentially produce *de facto* states of emergency in multiple states.[149] The Report generally recognized that some terrorist acts and the actions of terrorist organizations could create necessary and sufficient conditions to activate the threshold of emergency under both national and international law, subject to the requirements of legality, proportionality and non-discrimination. Nevertheless, random acts of terrorism, while egregious and harm producing, may not reach the necessary thresholds or pose the scale of threat sufficient to activate emergency powers. Each state must individually demonstrate that it experiences the level and scope of threat to necessitate the use of emergency powers. Many states have robust, effective and highly functional legal systems that are capable and designed to withstand a range of challenges, including those posed by violent, politically motivated offenders. Thus, terrorism may trigger the conditions of emergency, but that does not mean that states must *per se* use emergency powers to regulate terrorism.

E. The Practice of Regional Bodies, Institutions and Mechanisms

1. The European Convention of Human Rights system

69. The ECtHR has dealt with derogations pursuant to Art. 15 ECHR in many cases during the last thirty years.[150] The main situations giving rise to emergency notifications were terrorist attacks, threats of terrorist attacks, a context of armed conflict, occupation and support of opposition armed groups, and an attempted military coup. Because terrorist threats can create a long-lasting emergency situation, the case law pertaining to "interferences" with human rights permitted under certain conditions by some provisions of the ECHR are also of interest for this report. The ECtHR did not indicate clearly the criteria separating temporary derogations during times of emergency from interferences justified by national security imperatives. The majority of cases concern violations of Arts. 5 (right to liberty and security) and 6 (right to a fair trial) of the Convention, but often applicants invoke also breaches of Arts. 10 (freedom of expression) and 3 (prohibition of torture and inhuman or degrading treatment).

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[145] WGEID, General Comment on the right to the truth in relation to enforced disappearance, A/HRC/16/48, paras. 2 and 4. See also Committee on Enforced Disappearances, Concluding observations: Spain, CED/C/ESP/CO/1, para. 26.
[146] WGAD, A/HRC/19/57, 26 December 2011, para. 77.
[147] WGAD, A/HRC/22/44, 24 December 2012, paras. 42-51; Opinion No. 89/2017 concerning Ammar al Baluchi (USA) 20-24 November 2017, paras. 36 and 69.
[148] HRCouncil, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism, 1 March 2018, A/HRC/37/52
[149] *Id.*, paras. 65-66 and 79.
[150] For a list of the main cases see the ECtHR factsheet on "Derogation in time of emergency" at https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf.

a. The substantive requirements

70. The substantive requirements on Art. 15(1) ECHR are similar to the ones found in Art. 4 ICCPR or Art. 27 ACHR:

> "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

71. The norm thus contains three substantive requirements:

- First, there must be a "time of war" or "other public emergency threatening the of the nation";
- Second, the derogation measures must be "strictly required by the exigencies of the situation";
- Third, the measures must consistent with the concerned state's "other obligations under international law"

72. The ECtHR has not given any definition of the "time of war" but seems to resort to the definition of armed conflict found in IHL. Furthermore, in cases of international armed conflicts, the Court interprets the provisions of the Convention in light of IHL even if the concerned state has not formally derogated from the Convention.[151]

73. The notion "public emergency threatening the life of the nation" is consistently interpreted by the Court with reference to its definition articulated in *Lawless*: "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".[152]

74. Concerning the territorial scope, the emergency has to arise or at least to produce its effects within the territory of a state party.[153] Derogation measures are not applicable outside the territory or region to which the emergency is linked.[154] With regard to the temporal scope, case law supports the interpretation that while the emergency must be exceptional, it does not have to be temporary and may extend over several years.[155] Furthermore, while the threat must be imminent the Court has interpreted this requirement broadly.[156]

75. According to the consistent case law of the ECtHR, a state is in a better position compared to the "international judge" to assess an emergency situation that it is facing, and thus generally enjoys a wide margin of appreciation; yet, the Court retains the residual role of supervision and makes the final assessment.[157] Whilst the ECtHR assesses the existence of an emergency situation *ex tunc*, it can take subsequent elements into account.[158] In its case law, the Court has not once rejected a state party's qualification of a situation as a public emergency.[159]

76. The Court has recognized the following categories of emergency situations:

- Terrorist activities (Ireland, United Kingdom, Turkey);
- Imminent threat of terrorist attacks (United Kingdom) even if the Court finds "striking" that the UK was the only state to claim a derogation after 9/11;[160]
- Attempted military coup (Turkey).[161]
- Occupation and support of opposition armed groups (Ukraine) [162]

77. The requirement that emergency measures must be "strictly required by the exigencies of the situation" has been interpreted by the Court to include a condition of legality, thus procedures must be prescribed by law.[163]

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[151] ECtHR, *Hassan v. the United Kingdom* [GC] App. no. 29750/09 paras. 101 et seq.
[152] ECtHR, *Lawless v. Ireland*, App. No. 332/57.
[153] ECtHR, *Hassan v. the United Kingdom*, *supra* note 151, para. 40.
[154] ECtHR, *Sakik and others v. Turkey*, para. 39; confirmed in ECtHR, *Sadak v. Turkey*, App. Nos. 25142/94 and 27099/95, para. 56, ECtHR, *Yurttas v. Turkey*, App. Nos. nos. 25143/94 and 27098/95, para. 58, ECtHR*, Abdülsamet Yaman v. Turkey*, App. no. 32446/96, para. 69.
[155] ECtHR, *A. and others v. the United Kingdom* [GC], App. Np. no. 3455/05, para. 178.
[156] *Id*., para. 177.
[157] ECtHR, *Mehmet Hasan Altan v. Turkey*, App. no. 13237/17, para. 91.
[158] ECtHR, *A. and others v. the United Kingdom*, *supra* note 155, para. 177.
[159] However, the European Commission of Human Rights has rejected Greece's qualification of a situation as a public emergency in R *Denmark, Norway, Sweden and the Netherlands v Greece (The Greek Case)*, App. nos. 3321/67, 3322/67, 3323/67, 3344/67, Commission Report, paras. 159-165 and 207.
[160] *A. and others v. the United Kingdom* [GC], *supra* note 155, at para. 180.
[161] ECtHR, *Mehmet Asan Haltan v. Turkey*, *supra* note 157, para. 93.
[162] ECtHR, *Ukraine v Russia*, App. No. 8019/16.
[163] ECtHR, *Mehmet Asan Haltan v. Turkey*, *supra* note 157, para. 140.

In addition, the ECtHR uses a three-tiered proportionality test in order to assess the lawfulness of the derogation measures.

78. First, the measure must pursue a legitimate aim. It entails an appreciation of the good faith of the state in the initial decision and in the execution of the derogation measures. In *A. and others v. the United Kingdom*, the Court found a problem of adequacy of the measure because the derogation concerned only aliens while the terrorist threat came from British citizens as well.[164] This inconsistency reveals the inadequacy of the derogation measure. A measure taken according to a law that has legal consequences reaching far beyond this situation is not "strictly required" by it.[165] Measures taken before the declaration of a state of emergency are not covered by Art. 15.[166]

79. Second, the ECtHR reviews whether another measure that would have had a less adverse impact on the applicant's rights would have been as effective in pursuing the legitimate aim of the state. It examines, for example, whether ordinary laws would have been sufficient.[167]

80. Finally, the derogation measure must be proportionate *stricto sensu*, that is, the Court performs a balancing between the benefit of the derogation measure and the level of infringement of the Convention right. The ECtHR takes into account several criteria in this balancing test:

- The nature and importance of the affected right;[168]
- The evolution of the measures according to the situation;[169]
- The existence of judicial control and of specific safeguards;[170]
- Specific efforts of the state in order to safeguard the rights pertaining to a democratic society such as pluralism and freedom of expression.[171]

81. The state enjoys a margin of appreciation concerning the lawfulness of the derogation measures, which is, however, less broad than the margin of appreciation relating to the qualification of the emergency situation. If a domestic court had already found a derogation to unlawful, the control of the ECtHR is limited to a misinterpretation or misapplication of Art. 15.[172]

b. Non-derogable rights

82. According to the provisions of the Convention and of various protocols, the following rights are non-derogable:

- The right to life, unless the death results from a lawful act of war (Art. 2 ECHR);
- The prohibition of torture and inhuman and degrading treatment (Art. 3 ECHR);
- The prohibition of slavery (Art.4 (1) ECHR);
- *Nulla poena sine lege* (Art. 7 ECHR);
- The partial abolition of the death penalty (Protocol 6);
- The principle of *ne bis in idem* (Art. 4 Protocol 7);
- The complete abolition of the death penalty (Protocol 13).

83. This list has not explicitly been extended by the jurisprudence of the ECtHR. However, the ECtHR has interpreted the scope of Arts. 2 and 3 ECHR broadly, notably, by developing a procedural head. Under this procedural requirement, states parties violate the right to life or the prohibition of torture if they fail to take adequate procedural safeguards or to conduct an effective investigation of an allegation.[173]

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[164] ECtHR, *A. and others v. the United Kingdom*, *supra* note 155, paras. 186 and 190.
[165] ECtHR, *Alparslan Altan v. Turkey*, App. no. no 12778/17, para. 118.
[166] ECtHR, *Khlebik v. Ukraine*, App. no. no. 2945/16, para. 65.
[167] ECtHR, *Brannigan and McBride v. the United Kingdom*, para. 58.
[168] ECtHR, *A. and others v. the United Kingdom*, *supra* note 155, para. 173; ECtHR, *Aksoy v. Turkey,* para. 78.
[169] ECtHR, *Brannigan and McBride v. the United Kingdom*, para. 54.
[170] ECtHR, *Aksoy v. Turkey*, *supra* note 168, para. 83.
[171] ECtHR, *Mehmet Asan Haltan v. Turkey*, *supra* note 157, para. 210; ECtHR *Sahin Alpay v. Turkey*, App. no. 16538/17, para. 180.
[172] ECtHR, *A. and others v. the United Kingdom*, *supra* note 155, para. 174: "the domestic courts are part of the "national authorities" to which the Court affords a wide margin of appreciation under Article 15. In the unusual circumstances of the present case, where the highest domestic court has examined the issues relating to the State's derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable."
[173] See, e.g., ECtHR, *Öcalan v. Turkey (No. 2)*, App. No. 24069/03, paras. 98, 106 f.; ECtHR, *Hentschel and Stark v. Germany*, App. No. 47274/15. In *Šilih v Slovenia* (para. 159), the ECtHR has found that "the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of

c. Procedural requirements

84. The state wishing to take derogation measures must make a written notification with the relevant legislation attached to the Secretary General of the Council of Europe. It has to be made before the measures are taken or at least without an unjustifiable delay. Art. 15 is not applicable without this notification. The Secretary General must be kept fully informed of all the measures taken, of their evolution and of their withdrawal.[174] The ECtHR examines *proprio motu* if the notification complies with all these requirements.[175]

d. Emergency considerations in the interpretation of Convention rights

aa. Emergency situations in the justification analysis

85. The derogation provision of Art. 15 is, in principle, clearly distinct from the justifications for limitations on human rights based on national security, territorial integrity and public safety reasons and provided by several provisions of the Convention. In the latter cases, the interference is dealt with in the justification analysis. By contrast, if Art. 15 allows for a derogation, the Court first reviews whether a right has been violated. Only if this has been the case, does it examine the lawfulness of the derogation measures. However, the acceptance of non-temporary (continuous) terrorist threats as emergency situations, according to Art. 15, has created a certain "grey zone" between a limitation of a Convention right in "normal times" and a derogation in exceptional situations.[176] The standard of review that the ECtHR exercises in this situation is very similar to the review of derogations under Art. 15: the state enjoys a wide margin of appreciation in order to qualify the threat to national security, pursuant to which the Court uses a three-tiered test to evaluate the lawfulness of the measures. It thus analyses their adequacy to pursue a legitimate aim, their "necessity in a democratic society" (including whether the state has imposed necessary safeguard measures against abuses) and their proportionality in the light of the seriousness of the interference with the affected right.

bb. Interpretation of rights in light of national security needs

86. While some Convention rights do not contain a broad justification clause allowing for limitations based on national security concerns, the Court nonetheless interprets them in light of national security needs of states in the context of the fight against terrorism.[177] This concerns, in particular, Art. 2 (interferences with the right to life), Art. 3 (determination of the existence of an inhumane or degrading treatment), Art. 5 (limits to the right to liberty and security), and Art. 6 (limits to the right to a fair trial). The ECtHR has taken into account the existence of a public emergency as a "contextual factor" in interpreting the Convention's rights even outside of Art. 15 ECHR.[178]

2. The Inter-American system of human rights

87. The IACtHR is concerned with the implementation of the American Convention on Human Rights (ACHR), whereas the IAComHR has a dual function: applying the 1948 American Declaration on the Rights and Duties of Man (hereafter, the American Declaration) to all OAS member states that have not ratified or acceded to the ACHR and applying the ACHR to those states that are a party thereto.[179] In the following, this report will first deal with the text of the ACHR. Subsequently, it will analyse the case law of the IACtHR and then the practice of the IAComHR.

Article 2 it can give rise to a finding of a separate and independent 'interference' [...] In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date."

[174] ECtHR, *Mehmet Asan Altan v. Turkey*, para. 89, ECtHR, *Sahin Alpay v. Turkey*, *supra* note 171, para. 73.

[175] ECtHR, *Aksoy v. Turkey*, para. 86.

[176] See ECtHR, *Sher and Others v. the United Kingdom*; ECtHR, *Döner and Others v. Turkey*.

[177] ECtHR, *Ramirez Sanchez v. France* [GC]; ECtHR, *Ibrahim and Others v. the United Kingdom* [GC].

[178] ECtHR, *Alparslan Altan v. Turkey*, *supra* note 165, para. 147.

[179] The 24 States parties to the ACHR as of 2 February 2020, are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname Uruguay and Venezuela. The 11 non-States parties to the ACHR that fall under the American Declaration are: Antigua and Barbuda, Bahamas, Belize, Canada, Cuba, Guyana, St Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Trinidad and Tobago and United States.

a. The normative elements of Art. 27 ACHR

88. The derogation clause of the ACHR is contained in Art. 27. The norm consists of three parts. The first paragraph contains the substantial elements for a declaration of a state of emergency. It outlines four conditions:

- First, there must be a war, public danger, or other emergency that threatens the independence or security of the state;
- Second, the derogation of a human rights norm must be proportionate; it must be strictly required by the exigencies of the situation as regards the extent and period of the derogation;
- Third, the derogation must not be inconsistent with other obligations under international law such as obligations under consular and diplomatic law (especially immunities) or humanitarian law in case of armed conflicts;
- Fourth, the measure must be non-discriminatory; *i.e.* it must not involve discrimination on the ground of race, colour, sex, language, religion, or social origin.

89. The threshold for a state of emergency as established in Art 27 (1) ACHR, the *jus ad tumultum*, is somehow more permissive than in the ICCPR and in the ECHR. Specifically, Art 27 (1) permits derogation in case of "war, public danger, or other emergency" whereas Art 4 (1) ICCPR only refers to "public emergency", and Art 15(1) ECHR to "war" and "public emergency". Also, Art 27 (1) merely refers to necessary threats to "the independence or security of a state" whereas, according to Art 4 (1) ICCPR and Art 15 (1) ECHR, the emergency has to "threaten the life of the nation" and must be, according to Art 4 (1) ICCPR, also officially proclaimed. As will be shown below, the IACtHR has interpreted Art 27 (1) ACHR in a way as to concretise these elements through strict proportionality requirements. Consequently, the textual difference of the *jus ad tumultum* to the ICCPR and the ECHR does not lead to a difference in the practical application.

90. The second paragraph of Art 27 ACHR contains a list of non-derogable rights. Since the ACHR was drafted considerably after the ICCPR and the ECHR, the list of non-derogable rights in Art 27 (2) is more extensive than the comparable lists in Art 4(2) ICCPR and in Art 15(2) ECHR. On the one hand, the list of non-derogable rights comprises substantive rights:

- The right to juridical personality (Art. 3);
- The right to life (Art. 4);
- The right to humane treatment (Art. 5);
- The freedom from slavery (Art. 6);
- The freedom from *ex post facto* laws (Art. 9);
- The freedom of conscience and religion (Art. 12);
- The rights of the child (Art. 19);
- The right to nationality (Art. 20) as well as
- The right to participate in government (Art. 23).

91. At the same time, the judicial guarantees essential for the protection of these rights are explicitly established as non-derogable. Therefore, the effective judicial protection of the substantive provisions must be maintained also during states of emergency.

92. The third paragraph of Art 27 ACHR contains the procedural obligation of a state party "availing itself of the right of suspension" to notify the other state parties of the ACHR through the Secretary General of the Organization of American States (OAS). The declaration must contain information on the provisions which should be suspended, the reasons for the suspension and the duration of the suspension, *i.e.* when the suspension will be terminated. The OAS Department of Public International Law publishes a list of declarations of suspension on its website which lists all derogations back to 2014.[180] It shows that suspensions are rather frequent with, *e.g.,* Peru, Ecuador, Guatemala, Chile and Jamaica having derogated at least once from their guarantees under the ACHR in 2018 and 2019. The necessary notification of the other state parties through the OAS Secretary General enables an international supervision of the relevant suspensions.

[180] http://www.oas.org/en/sla/dil/inter_american_treaties_suspension_guarantees.asp (Accessed 20 June 2020).

b. The Case Law of the Inter-American Court of Human Rights (IACtHR)

aa. Substantive requirements

93. The IACtHR has upheld and detailed the conditions for derogation of Art 27 ACHR in contentious cases as well as in advisory opinions. Emblematic cases are *Zambrano v Ecuador* (2007)[181] as well as several cases against Peru.[182] Key advisory opinions are those on *Habeas Corpus* in Emergency Situations (1987)[183] and on Judicial Guarantees in States of Emergency (1987),[184] which were initiated by the IAComHR.

94. In several cases, the IACtHR has dealt with the general nature of Art 27 ACHR and the scope of guarantees incorporated therein. The Court clarified for instance the meaning of "suspension" and argued that it only refers to the suspension of the "full and effective exercise of rights", not the "suspension of guarantees in the absolute".[185] The IACtHR also outlined in its Advisory Opinion on *Habeas Corpus in Emergency Situations* the general function of Art 27 ACHR as "provision for exceptional situations only" and thus affirmed the high threshold of Art 27 (1).[186] Furthermore, the IACtHR emphasised the necessary link between the "principle of legality, democratic institutions and the rule of law" which must be upheld also during states of emergency.[187] Therefore, according to the case law of the IACtHR, general principles, institutional and procedural safeguards place limits on a state's emergency powers. They also provide guidance to interpret the somehow broader elements of Art 27 (1) ACHR.

95. In the Advisory Opinion on *Habeas Corpus,* the IACtHR elaborated on the necessary proportionality of measures:

> "Since Article 27 (1) [of the Convention] envisages different situations and since, moreover, the measures that may be taken in any of these emergencies must be tailored to 'the exigencies of the situation,' it is clear that what might be permissible in one type of emergency would not be lawful in another. The lawfulness of the measures taken to deal with each of the special situations referred to in Article 27 (1) will depend, moreover, upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures."[188]

96. The necessary proportionality of emergency measures was also affirmed in *Zambrano v Ecuador*, where the IACtHR established a violation of *(inter alia*) Art 27 (1) ACHR by Ecuador on the basis that its declaration of emergency was broad and general.[189] Through this reference to the necessary proportionality of measures, the IACtHR concretizes the somehow broader wording of Art 27 (1) ACHR in its case law. It can thus safely be assumed that in the interpretation by the IACtHR, the threshold of Art 27 (1) ACHR does not differ from Art 4 (1) CCPR and Art 15 (1) ECHR but is similarly restrictive.

bb. Art 27 (2) ACHR – non derogable rights

97. The IACtHR's case law is most detailed in its findings on non-derogable rights, more particularly on relevant due process guarantees during states of emergency. From the IACtHR first case, it established that under Art 1(1) states have the obligation to investigate, prosecute and punish those responsible for human rights violations. Unlike in the ECHR system, this obligation to investigate and the necessity of access to justice, especially in the case of a forced disappearance, are considered peremptory norms, not a "procedural" limb of the right to life or personal integrity. Direct access to justice is considered by the Inter-American system as a fundamental pillar of human rights protection.[190] As such, the Court confirmed already in its Advisory Opinion in 1987 that the specific remedy of *habeas corpus* (recourse to a court in case of deprivation of liberty to decide upon the lawfulness of arrest or detention) (Art 7 (6) ACHR) and the general remedy of *amparo* (right to recourse in case of general violations of fundamental rights) (Art 25(1) ACHR) were non-

[181] IACtHR, *Case of Zambrano and Others v. Ecuador* (4 July 2007), Series C n° 166.
[182] See e.g. IACtHR, *Galindo Cárdenas et al. v. Perú*, Preliminary Objections, Merits, Reparations and Costs, Judgment, 2 October 2015; IACtHR, *Castillo Petruzzi et al. v. Perú*, Merits, Reparations and Costs, 30 May 1999.
[183] IACtHR, *Habeas Corpus in Emergency Situations* (Arts. 27.2, 25.1 and 7.6 American Convention of Human Rights), Advisory Opinion OC-8/87 (30 January 1987).
[184] IACtHR, *Judicial Guarantees in States of Emergency* (Arts. 27.2, 25 and 8 American Convention of Human Rights), Advisory Opinion OC-9/87 (6 October 1987).
[185] IACtHR, *Habeas Corpus*, *supra* note 183, para. 18.
[186] *Id*., para. 21.
[187] *Id*., para. 24.
[188] *Id*., para. 27.
[189] IACtHR, *Zambrano*, *supra* note 181, para. 52 [Emphasis added].
[190] IACtHR, *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, 29 November 2006, para. 160.,

derogable.[191] According to the IACtHR, the judicial guarantees set forth in Art 7 (6), 8(1) and 25(1) ACHR were all necessary to ensure the full and effective exercise of the rights and freedoms protected in Art 27 ACHR. The IACtHR considered Art 8 (due process/fair trial) and Art 25 (access to justice) as the appropriate means to investigate and eventually prosecute and punish those responsible for the violation of human rights and Art 8 was introduced in cases such as *La Cantuta*, to indicate that a military trial (in lieu of an ordinary court) would not be considered a trial by an impartial and independent court in accordance with the requirements of Art. 8. The IACtHR considers the principle of equality and non-discrimination to be a norm of *jus cogens*,[192] which may therefore imply its non-derogability.

cc. Art 27 (3) ACHR – notification requirements

98. The IACtHR dealt with the obligation to notify of Art 27 (3) ACHR. In *Zambrano v Ecuador*, the Court outlined the importance of Art 27 (3) ACHR and the duty to notify in general terms:

> "The Court considers that the international obligation of States Parties to the American Convention under Article 27 (3) constitutes a mechanism within the framework of the notion of collective guarantee underlying this treaty, which aim and purpose is the protection of human beings. Such obligation also constitutes a safeguard to prevent the abuse of the exceptional powers of the suspension of guarantees and allows other State Parties to evaluate if the scope of this suspension is consistent with the provisions of the Convention. Therefore, the non-compliance of this duty to inform implies a breach of the obligation set forth in Article 27 (3). […]"[193]

99. The Inter-American Court also established violations of the obligation to notify (Art 27 (3) ACHR) in its own right, for example in *Caracazo v Venezuela*[194] and in *Zambrano v Ecuador*[195] because the other states parties had not been (immediately) informed through the OAS Secretary General of the respective states of emergency.

dd. Summary

100. In summary, for the Inter-American Court Article 27 (3) specifically prohibits derogation from "judicial guarantees essential for the protection of such [non-derogable] rights." These judicial guarantees, known as "amparo," "tutela," and "habeas corpus" are found in constitutions throughout the Americas. Consequently, the "emergency clause" of the ACHR is not only composed of substantive guarantees, such as the prohibition of torture, the prohibition of slavery or the freedom of religion but also of procedural judicial guarantees that enable the protection of these substantive guarantees. These judicial guarantees, like the substantive guarantees, may not be derogated from during times of emergency.

c. The Practice of the Inter-American Commission of Human Rights

101. During the first three decades of the IAComHR's existence, it dealt with human rights violations in countries in crisis by carrying out on-site visits and preparing country reports on the human rights situation in these countries. In some cases, such as Chile, it was denied access but prepared the country report based on available information. Early country reports followed situations of internal armed conflict, as in El Salvador (1978), Nicaragua (1978), Chile (1974, 1977 and 1985), Argentina (1980) and Guatemala (1981, 1983, 1985).

102. For more than 20 years, the Commission included in its Annual Report to the OAS General Assembly a chapter on the worst violators of human rights in the hemisphere. Following complaints from states that objected to their inclusion, in 1996, the Commission devised criteria to justify the inclusion in Chapter V (eventually Chapter IV) of its Annual Report.

103. Initially, in 1996, the IAComHR established four criteria[196] and added a fifth in 1997[197]:

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[191] IACtHR, *Habeas Corpus*, *supra* note 1835, para 44.
[192] IACtHR, *Atala Riffo and Daughters v Chile*, Judgment 24 February 2012, para. 79.
[193] IACtHR, *Zambrano*, *supra* note 181, para. 70.
[194] IACtHR, *Caracazo v. Venezuela*, Merits, 11 November 1999.
[195] IACtHR, *Zambrano*, *supra* note 181, para. 71.
[196] IACHR, Annual Report 1997, Chapter V (available at: http://www.cidh.org/annualrep/97eng/chap.5.htm).
[197] IACHR, Annual Report 1998, Chapter IV, (available at: http://www.cidh.org/annualrep/98eng/Chapter%20IV%20Cuba.htm#CHAPTER%20IV).

- The first criterion refers to states, which are ruled by governments that have not been chosen by secret ballot in honest, periodic and free popular elections in accordance with accepted international standards;
- The second criterion concerns states where the free exercise of rights contained in the ACHR or the American Declaration have been effectively suspended, in whole or part, by virtue of the imposition of exceptional measures, such as a state of emergency, state of siege, prompt security measures. In the Commission's 1996 Annual Report, for example, Colombia and Peru were included because they had imposed a state of emergency.[198]
- The third criterion includes states engaging in mass and gross violations of human rights such as extrajudicial executions, torture and forced disappearance;
- The fourth criterion concerns those states, which are in a process of transition from any of the above three situations.
- The fifth criterion refers to structural or temporary situations that may jeopardize enjoyment of human rights in a democratic government; this includes, for example, grave situations of violence that prevent the proper application of the rule of law. In 1997, for example, Haiti was included under this rubric.[199]

104. In 2018, the Commission decided to divide Chapter IV into two parts: A and B. Part A includes all OAS member states and part B focuses on the selected worst violators.[200] In 2019, the Commission focused on Cuba, Nicaragua and Venezuela in Part B. For Part A the Commission requested information from all 35 OAS member states and only 15 responded: Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Paraguay and Peru. In the Part A survey, five countries were under a state of emergency, primarily for rising crime: Chile, Ecuador, Guatemala, Honduras and Jamaica. These five countries were not included in Part B of Chapter IV of the Annual Report despite the requirement in Art 59 (6) (b) of the Commission's Rules of Procedure that countries under a state of emergency be included therein. Cuba, Nicaragua and Venezuela were included in Part B of Chapter IV and both Nicaragua and Venezuela were under a state of emergency, which was extensively discussed. In some of its reports, the Commission has challenged the respective state's classification of situations as a state of emergency; its practice demonstrates that it is less inclined than other international human rights mechanisms to accord wide discretion to states.[201]

3. The African Charter on Human and Peoples' Rights system

105. Unlike other international human rights instruments, such as the ICCPR, ACHR and ECHR, the AfCHPR (or Banjul Charter) contains no derogation clause for times of emergency. The AfComHPR considers this omission intentional and justified. According to the Commission, the normal exercise of human rights does not present any danger to a democratic state that would justify extraordinary limitations on those rights.[202] The Commission thus flatly rejects the legality of derogations during states of emergency or even civil wars.[203]

106. Although the Banjul Charter does not contain a general clause explicitly authorizing state parties to limit human rights proportionately in pursuit of legitimate aims, such as the protection of public safety, human health and welfare or the human rights of others, it does provide for individual duties in Art. 27 (2): "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." The African jurisprudence has not interpreted this "clawback clause" literally. As individuals are not consensual parties to international treaties and therefore cannot be bound by them, the jurisprudence of both the Commission and the AfCrtHPR has interpreted Article 27 as implicitly authorizing states to limit human rights,[204] however subject to strict conditions of legality, legitimacy and proportionality:

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[198] IACHR, Annual Report 1996, Chapter V.
[199] IACHR, Annual Report 1997, Chapter V.
[200] IACHR, Annual Report 2018, Chapter IV (Available at: http://www.oas.org/en/iachr/docs/annual/2018/docs/IA2018cap4A-en.pdf).
[201] See, e.g., IACHR, Country report of Colombia (1999), paras. 65-67.
[202] AfComHPR, *Amnesty International v. Sudan*, Communication No. 48/90-50/91-52/91-89/93 (1999), paras. 79 et seq.
[203] *See*, *e.g.,* AfComHPR, *Sudan Human Rights Organisation v The Sudan*, Communication No. 279/03 & *Centre on Housing Rights and Evictions v The Sudan*, Communication No. 296/05, (2009), para. 167; AfComHPR, *Commission nationale des droits de l'homme et des libertés v Chad*, see *supra* note 22, para. 21.
[204] *See, e.g.*, AfComHPR, *Media Rights Agenda and Constitutional Rights Project vs. Nigeria*, Communications 105/93, 128/94, 130/94, 152/96, Twelfth Activity Report 1998-1999, Annex V, paras. 41-42; AfComHPR, *Amnesty International v. Sudan*, *supra* note 202, para. 80.

"The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained....Even more important, a limitation may never have as a consequence that the right itself becomes illusory."[205]

107. Consistent with the jurisprudence of other international human rights mechanisms, the Commission and the Court have upheld state restrictions on human rights only when such restrictions "are prescribed by law, serve a legitimate purpose and are necessary and proportional as may be expected in a democratic society."[206] By its relative nature, proportionality analysis lends itself to granting states greater latitude to restrict human rights during extreme conditions, such as a state of emergency threatening the life of the nation. In its quasi-judicial practice, the AfComHPR does not shown itself particularly generous towards states invoking leniency based on grounds of emergency and has proceeded to apply the above-outlined conditions strictly. In *Commission Nationale des Droits de l'Hommme et Libertes v Chad*, the AfComHPR notes: "even with a civil war in Chad [derogation] cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter."[207] In *SRHO & COHRE v Sudan*, the Commission recalled its Chad decision and dismissed the state party's claim for greater discretion given the state of emergency it was facing, concluding that Sudan violated several provisions the AfCHPR in respect to civilians in Darfur.[208]

108. The absence of procedural safeguards should be noted. In the ICCPR, for example, derogation is accompanied by mandatory procedural formalities, such as giving notice of the invocation of the right of derogation to other parties. No such formalities are required when a state limits a human right. Moreover, there appears to be no authoritative list of non-derogable human rights adopted in the jurisprudence of the African system to date.[209]

109. Finally, a case decided by the Economic Community of West African States (ECOWAS) Court of Justice dealing with a state of emergency under the AfCHPR should be noted. The case concerned a national emergency declared by the newly elected president of Côte d'Ivoire, Alassane Ouattara, when supporters of the outgoing president, Laurent Gbagbo, tried to prevent the latter's removal from power. The government detained Gbagbo's wife and son, who had refused to leave the presidential residence. The two complained to the ECOWAS Court of Justice that the arrest and detention violated their human rights. When Côte d'Ivoire justified the detentions because of the declared national emergency, the ECOWAS court simply argued that states could not invoke an emergency as an excuse for violating the applicants' rights as the Banjul Charter did not authorize any emergency derogations.[210]

4. The Association of Southeast Asian Nations system

110. The principal human rights document of ASEAN is the non-binding ASEAN Declaration on Human Rights (ADHR), which was drafted by the ASEAN Intergovernmental Commission on Human Rights (AICHR) and adopted in November 2012 with the Phnom Penh Statement on the Adoption of the Declaration signed by ASEAN leaders. The AICHR members are nominated by their respective governments, and report to the ASEAN Foreign Ministers. The Commission holds two regular meetings per year and additional meetings when necessary, and decision-making is based on consultation and consensus. The AICHR is not a human rights monitoring body formed of independent experts.[211]

111. The ADHR does not contain an emergency exception. It does contain a general limitation clause in general principle 8. As a general limitation clause, referring to a wide range of aims, and apparently covering all the rights in the Declaration, it appears to also allow for limitations to rights that are non-derogable in human rights treaties.[212] Indeed, practice shows that ASEAN governments enjoy broad discretion when exercising emergency powers, as such powers are a politically sensitive issue. For example, when Myanmar declared a

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[205] AfComHPR, *Media Rights Agenda and Constitutional Rights Project vs. Nigeria*, *supra* note 204, paras. 69–70. See also F. Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, (Leiden: Martinus Nijhoff, 2003), at 430–437.

[206] AfCtHPR *Umuhoza v. Rwanda*, Judgment of 24 November 2017, paras. 133-34; AfCtHPR, *Konaté v. Burkina Faso*, Judgment of 5 December 2014, paras. 145-66; AfComHPR, *Media Rights Agenda and Constitutional Rights Project vs. Nigeria*, *supra* note 204, paras. 68-69; AfComHPR, General Comment No. 3, 57th Session, at 10 (Nov. 4-18, 2015).

[207] AfComHPR, *Commission nationale des droits de l'homme et des libertés v Chad*, see *supra* note 22, para. 25.

[208] AfComHPR, *Sudan Human Rights Organisation v The Sudan*, *supra* note 203, paras. 167-168.

[209] *See* Laurent Sermet, "The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights: A Critical Discussion, 7 *African Human Rights Law Journal* (2007), 142, at 153. That said, even the HRCttee has not felt bound by the text of the ICCPR and has incorporated non-derogable rights not listed in the ICCPR into its interpretation of article 4.

[210] ECOWAS Community Court, *Gbagbo v. Côte d'Ivoire*, Judgment of 22 February 2013 (merits).

[211] On the AICHR, see generally Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights* (CUP 2011).

[212] Yet, note that the clause seems to be qualified by ADHR, principle 40.

long state of emergency in Rakhine state (2012-2016) or Thailand declared a state of emergency after the military coup d'état in 2014, the AICHR and other ASEAN institutions remained largely silent.

5. The Arab Charter of Human Rights system

112. The revised ArChHR was adopted by the League of Arab States in 2004 and entered into force on 16 March 2008.[213] The Arab Human Rights Committee (ArHRC), composed of seven members, was established to monitor the implementation of the ArCHR. The Committee reviews state reports and issues Concluding Observations.[214]

113. Article 4 of the ArChHR permits derogations in time of emergency. The substantive requirements of the norm closely resemble those in other human rights treaties, such as the ICCPR, the ECHR or the ACHR. In particular, derogations are allowed under the following four conditions:

- Exceptional situation of emergency which threatens the life of the nation;
- Proportionality of the derogration measure ("strictly required by the exigencies of the situation");
- Consistency with other obligations under international law;
- No discrimination based on race, colour, sex, language, religion or social origin.

114. Paragraph 2 contains an extensive list of non-derogable rights. These are:

- The right to life (Art. 5 ArCHR);
- The prohibition of torture (Art. 8 ArCHR);
- The prohibition to force someone to be subject in medical or scientific experiments (art. 9);
- The prohibition of slavery (Art. 10 ArCHR);
- The right to a fair trial (Art. 13 ArCHR);
- The right to petition a competent court in case of a deprivation of liberty (art. 14, para. 6);
- The guarantee of *nulla poena sine lege* (Art. 15 ArCHR);
- The prohibition to imprison an individual because they are unable to pay their debts (art. 18)
- The guarantee of *ne bis in idem* (Art. 19 ArCHR);
- The prohibition to mistreat prisoners (Art. 20 ArCHR);
- The right to recognition as a person before the law (Art. 22 ArCHR);
- The freedom of movement and the right to leave a country (Art. 27 ArCHR);
- The right to seek political asylum (Art. 28 ArCHR);
- The right to nationality (Art. 29 ArCHR);
- Freedom of thought, conscience, and religion (Art. 30 ArCHR).

115. Finally, any derogation must be notified to Secretary-General of the League of Arab States.

6. The Organisation of Islamic Cooperation system

116. The OIC has adopted the Cairo Declaration on Human Rights in Islam in 1990. The Cairo Declaration is considered non-binding. It does not contain a derogation clause for times of emergency, however Art. 20 stipulates that states are not permitted to promulgate "emergency laws that would provide executive authority" for arresting an individual "without legitimate reason …, or restrict his freedom, to exile or to punish him… to subject him to physical or psychological torture or to any form of maltreatment, cruelty or indignity […or] to medical or scientific experiments without his consent or at the risk of his health or of his life."

117. Art. 24 entails a general sharia limitation clause, according to which all rights and freedoms entailed in the Declaration "are subject to Islamic Sharia". Depending on the substantive sharia interpretation embraced by states that regard Islamic law as a source of law, Art. 20 may therefore be qualified. It has been observed that the Cairo Declaration accommodates interpretations of sharia by OIC member states that may collide

[213] Of the 22 member states of the Arab League (Syria is currently suspended), 15 have ratified the revised ArabChHR, and 2 have signed and not ratified. These are: Algeria (2006), Bahrain (2006), Egypt (2019), Iraq (2013), Jordan (2004), Kuwait (2013), Lebanon (2011), Libya (2006), Morocco (signed 2004, not yet ratified), Palestine (2007), Qatar (2009), Saudi Arabia (2009), Sudan (2013), Syria (2007) Tunisia (signed 2004, not yet ratified), the United Arab Emirates (2008), and Yemen (2008).

[214] For a general assessment of the ArCHR and the ArHRC, see Mervat Rishmawi, "The Arab Charter on Human Rights and the League of Arab States: An Update", 10 *Human Rights Law Review* 1 (2010), 169.

with human rights standards and "while it is not a binding instrument, it might legitimize human rights abuse in those states which interpret sharia in a manner that falls short of universal human rights standards."[215]

118. The OIC Covenant on the Rights of the Child in Islam (CRCI) is a legally binding instrument adopted in June 2005, which however has not entered into force. The CRCI does not entail a derogation clause. Interestingly, the OIC Independent Permanent Human Rights Commission,[216] recommended in its April 2017 thematic session that a review of the CRCI should "Emphasize the need for special care, protection and promotion of the rights of children in all settings including the situations of armed conflict, natural and man-made disasters and other humanitarian emergencies".[217]

F. Preliminary Results

119. During these extraordinary times, we witness states of emergencies that are unprecedented in the sheer number, variety of forms, and amplitude of scope. Yet, the work of the CEHRL, which was concluded some thirty years ago, serves to demonstrate that states of emergency – *de jure, de facto*, notified, non-notified, and intersections of these categories – have been a constant presence in the lives of many an individual and group. Human rights mechanisms at international and regional levels, some founded in the wake of World War II, others more recently established, are called up to strike a balance between fulfilling their raison d'être, the protection of civil, cultural, economic, social and political rights, whilst ensuring that states possess the ability to manage emergency experiences.

120. In these concluding remarks, we wish to synthesize the preceding analysis and draw the attention to three different aspects. First, we look at how the various human rights mechanisms have interpreted the substantive requirements that conditions an emergency exception's assessment as permissible or lawful under human rights instruments. The practice is quite uniform in this respect, focusing primarily on the proportionality requirement that is included in all emergency clauses. Second, and by contrast, the practice regarding the range and principles of identification of non-derogable rights diverges across the different human rights systems. This is, to a certain extent, conditioned by the provisions of each treaty in part, yet also resultant from differing interpretative practices. Finally, we draw a conclusion concerning the treatment of states of emergency in the justification analysis if either the emergency has not been declared and/or notified, or if the respective treaty does not contain an emergency exception.

1. Substantive Requirements

121. If human rights treaties have a derogation clause for emergency situations, the substantive requirements for a derogation are fairly similar across the different treaties:

- First, there needs to be an emergency situation. The wording differs slightly between the different treaties: most human rights treaties require a public emergency which threatens the life of the nation or – in case of the ACHR – the independence or security of a state party; the ECHR and the ACHR also provide the additional specification of war as an emergency situation;
- Second, all human rights treaties contain a proportionality requirement ("strictly required by the exigencies of the situation");
- Third, the measures which are imposed in order to address the emergency have to be consistent with the concerned state's other obligations under international law;
- Finally, some treaties add a fourth requirement that the emergency measures must not be discriminatory on the grounds of certain protected characteristics, such as race, colour, sex, language, religion or social origin/wealth.

122. In practice, most international courts and tribunals have given states a rather broad discretion when it comes to the identification of an emergency situation. However, the Inter-American system, and in particular the Commission, has been less generous in the discretion offered to states to qualify situations as states of emergency. The determinant factor of the emergency analysis is usually the proportionality test, in which

[215] Ioana Cismas, *Religious Actors and International Law* (OUP 2014), at 284.
[216] On the mandate and structure of this body see *Id.*, at 296-304.
[217] OIC-IPHRC, 13th Session, Outcome Document of Thematic Debate on "Revisiting the OIC Covenant on the Rights of Child in Islam to Reinforce the Rights of Children in Member States", 19 April 2017.

international human rights bodies have proven to be much less deferential. There are many cases in which state measures addressing an emergency were found to be disproportionate.

123. This finding is not surprising. International courts and tribunals, some suggest, are not necessarily best-placed to challenge a state's evaluations of a threat to its very life. On the one hand, the protection of national security belongs to the core elements of the exercise of sovereign power. A recognition of the principles of democratic decision-making, upon which some emergency decisions rest – yet others do not –, may also play a role in the analysis. On the other hand, one cannot begrudge international and regional human rights mechanisms if they embrace a certain dose of pragmatism – they will be aware of the socio-political and economic climate in which they have to function. The flexible proportionality test seems to be a more contextually-appropriate way to determine whether restrictions to human rights were imposed for addressing an emergency or rather serve as a pretext or cover for human rights violations. The proportionality analysis is also better tuned to reveal the finer details of emergency measures: when they go too far in material, spatial or temporal (in some systems) scope, when they affect disproportionately certain groups, and when they are not best suited to achieve the end of the emergency situation.

124. The final two criteria, the respect for other international law obligations and the prohibition of discrimination, have not played a major role in the case law of international human rights bodies relating to states of emergencies. Again, this is not surprising. It is difficult to imagine that a discriminatory measure would pass the muster of the proportionality test. This is illustrated by the Grand Chamber decision of the ECtHR in the Belmarsh case, in which the UK had established anti-terrorist measures, which only targeted foreigners, even though there was no indication that the terrorist threat from British citizens was less severe.[218] While the derogation clause of the ECHR (Art. 15) does not prohibit discrimination, the ECtHR considered the imposed security measure disproportionate *because it was discriminatory*.[219] Nevertheless, this does not mean that the non-discrimination requirement is superfluous. It may sometimes be useful to stress the particular inadequacy of the response or the harm it produces to specific groups by highlighting that it was implemented in a discriminatory manner.

2. Non-derogable rights

125. Regardless of whether the substantive requirements for an emergency derogation are fulfilled, there are some human rights from which a derogation is not possible under any circumstances. While the practice regarding the substantive emergency requirements has been rather uniform across different human rights treaties, there is considerable variation when it comes to the list of non-derogable rights. The ECHR has a rather short list of non-derogable rights, which contain the core guarantees of the right to life (including the prohibition of the death penalty, but with the exception of deaths resulting from lawful acts of war) and the prohibitions of torture and slavery as well as the criminal procedure guarantees of *ne bis in idem* and *nulla poena sine lege*. At the other end of the spectrum, we find the ArCHR which contains an extensive list of non-derogable rights, containing a total of 15 different guarantees.

126. There is not only considerable variation with regard to the list of non-derogable rights in the treaty texts, but also concerning the case law and other interpretative practices of individual human rights bodies. The IACtHR and the HRCttee have explicitly extended the number of non-derogable rights quite considerably. The IACtHR has primarily focused on judicial guarantees, such as access to justice, the obligation to investigate, prosecute and punish those responsible for forced disappearances and other human rights violations and the right to a fair, impartial trial. The HRCttee has developed an even more extensive list in its General Comment No. 29, comprising also some substantive guarantees, such as the prohibition of non-discrimination and of enforced disappearances. In this manner, the ICCPR system of non-derogable rights approaches the more expansive list of the ACHR system. These human rights bodies expanded the catalogue of non-derogable rights as a result of the necessity of dealing with human rights situations and the lack of protection in the lists of non-derogable rights in the state of emergency provisions of the respective treaties and the situation of impunity that existed in many countries. The ECtHR has not explicitly added any non-derogable rights to the ones expressly listed in Art. 15 ECHR and the additional protocols. Yet, it has significantly extended the scope of certain non-derogable rights by creating procedural heads under Arts. 2 and 3 ECHR. Thus, in an implicit manner, the evolution of these procedural obligations comes close to the judicial guarantees that the IACtHR considers form part of *jus cogens*.

[218] ECtHR, *A. and others v. the United Kingdom*, *supra* note 155
[219] *Id*., paras. 186 and 190

127. How then to make sense of the different approaches of the various human rights bodies for identifying either explicitly or implicitly non-derogable rights? Non-derogable rights are usually justified for three reasons. First, they represent values that are so fundamental that no conceivable emergency could justify a violation. These rights usually also form part of *jus cogens* (see above, paras. 18-27), such as, for example, the prohibitions of torture and slavery. A second and related rationale refers to the subsistence nature of some rights. This has been the approach embraced by the CESCR, when it affirmed the non-derogability of obligations relating to the core content of socio-economic rights. There cannot be a dignified life, the argument goes, without the enjoyment of minimum levels of food, water, sanitation, healthcare, shelter, education, and social security (see above, paras. 55-58). Third, certain rights might also be qualified as non-derogable because it seems unconceivable that their restriction could possibly address an emergency situation. Retroactive criminal sanctions, enforced disappearances or violations of the right to a fair trial will rarely be effective measures to address an emergency. Instead, it is quite likely that derogations from these rights are always a pretext.

128. This last consideration might explain some of the differences between the approaches of the ECtHR on the one hand and the IACtHR or the HRCttee on the other. If the derogation from certain rights is always unnecessary to address an emergency, it would at the same time be disproportionate – the substantive outcome thus may be the same. It may merely be a matter of style and institutional setting whether the issue is addressed in a categorical manner by adding to the list of non-derogable rights or by focusing on the individual circumstances of a case in the context of the proportionality test.

129. Despite the different approaches supervisory bodies may adopt, their overarching guiding principle seems to be a *sense of necessity* to preserve the fundamentals of the human rights system even in, or *in particular* in times of emergency. Interestingly, the difference in interpretative practice is probably less significant than it appears *prima facie*, given that the surveyed systems will rarely come to different results.

3. Emergency situations and limitation clauses

130. Some human rights treaties do not contain any derogation clauses expressly permitting suspension in case of an emergency. Nevertheless, this does not mean that it is impossible to derogate from specific rights or to restrict rights in times of emergency.

131. The CECSR, whilst proclaiming the continued application of the Covenant in emergency situations (including armed conflict, civil strike, natural disaster and the COVID-19 pandemic), appears to have implied a clause akin to derogation provisions specifically for situations of recession pursuant to (severe) economic and financial crises. The impact of such situations may severely restrict the resource availability necessary for state parties to achieve the full realisation of socio-economic rights under Art. 2(1) ICESCR. In this sense, and for the purpose of the Covenant, financial and economic crisis seem to be regarded as states of emergency. The clause derived by the CESCR comprises strict conditions of necessity, proportionality, non-discrimination, temporality, and non-derogability of core content obligations. Outside recessions, the Committee has developed (perhaps too) elaborate criteria and factors to assess the progressive realisation of socio-economic rights, including considerations relating to a state's inability or unwillingness to perform its treaty obligations. Finally, while insufficiently used, the limitation clause in Art. 4 ICESCR is applicable to states of emergency and sets a high threshold for states to demonstrate the permissibility of their restrictions (see above, para. 39-58).

132. The African system's mechanisms have taken a different approach. The AfComHPR has rejected outright the possibility of any derogation from the Banjul Charter. Instead, it has assessed emergency measures restricting human rights under Art. 27 AfCHPR, a clawback clause interpreted as a general limitations provision. It has subjected emergency measures to a proportionality test, not dissimilar to that employed by other human rights mechanisms.

133. Finally, it should be noted that general limitation clauses may, absent a derogation clause, be a basis for assessment of emergency measures under human rights treaties. The practice of human rights mechanisms has also demonstrated that non-notified *de facto* emergencies can be assessed through specific limitation clauses on rights or interferences analysis (see above, paras. 85-86). Be that as it may, limitation clauses lack, by default, procedural safeguards such as the requirement of proclamation or notification which derogations have. As such, they would not *prima facie* advance the transparency and heightened international scrutiny much needed in times of emergency. They would also not insulate emergency case law from jurisprudence on limitations to rights in times of normalcy; wider discretion, given the emergency situation, may potentially translate in a lowering of assessment standards beyond these situations.