

Human Rights in Times of Emergency

Assessment of State practice in respect to times of emergency*

Christina Binder

Professor of International Law, University of the Bundeswehr Munich
c.binder@unibw.de

Christina M Cerna

Adjunct Professor, Georgetown University
ccerna@comcast.net

Ioana Cismas

Professor, Centre for Applied Human Rights, University of York
ioana.cismas@york.ac.uk

Niels Petersen

Professor of Public Law, International Law and EU Law, University of Münster
niels.petersen@uni-muenster.de

Emanuele Sommario

Associate Professor of International Law, Scuola Superiore Sant'Anna of Pisa
emanuele.sommario@santannapisa.it

Stefan Kadelbach

Professor of Public Law, European Law and International Law, Johann Wolfgang Goethe-University
s.kadelbach@jur.uni-frankfurt.de

* Final Report by the International Law Association Committee on Human Rights in Times of Emergency, presented at the 81st International Law Association Conference in Athens, 25–28 June 2024. Members of the Committee who drafted the present Report are Christina Cerna and Stefan Kadelbach (Chairs); Christina Binder, Ioana Cismas, Niels Petersen and Emanuele Sommario (Rapporteurs). Further members who contributed to the drafting and editing phase are Sarah Cassella, Thomas Kleinlein and Gentian Zyberi. Members who contributed by compiling country or thematic notes (in brackets the topic of the notes) are: William Aceves (United States of America), Ella Allen and Ioana Cismas (Myanmar, Nigeria), Christina Binder (Ecuador), Isabel Cabrita (Hong Kong), Sarah Cassella (France, Italy), Christina M. Cerna (Colombia, Honduras, El Salvador), Aaron Fellmeth (comparative practice of African states), Aaron Fellmeth and Alexis Eisa (Tunisia), Asier Garrido-Muñoz (Nicaragua), Geoff Gilbert (forced displacement), Thomas Kleinlein (Germany), Nadia Kornioti (frozen conflicts), Henrique Lenon Farias Guedes (Brazil), Stephen Marks (India), Karsten Nowrot (Moldova), Belen Olmos Giupponi (Argentina, Paraguay, Perù), Emanuele Sommario (natural and technological disasters), Koji Teraya and Tamitomo Saito (Japan) and Gentian Zyberi (Albania). We thank Fiona Neff, Rebecca Strauch, Oskar Marx and Giulia Bosi for their input and for editing the manuscript.

Contents

- A. Introduction
- B. States of Emergency in Empirical Reality
- C. Conceptual Clarifications
- D. Thresholds, Declaration and Notification, Duration, Control
- E. Non-derogable Rights; Necessity and Proportionality; Non-discrimination
- F. Conclusions

A. Introduction

1. The final report of the International Law Association Committee on Human Rights in Times of Emergency (hereafter, the Committee or CHRTE) critically examines selected State practice on emergency situations with a focus on the last three decades. States have pursued emergency measures in increasingly numerous and diverse contexts. They have done so with or without formally declaring states of emergency and/or notifying relevant United Nations (UN) or regional bodies. As such, the following three types of states of emergency that can be observed in practice will be the focus of the report: declared and notified (derogation), declared (*de jure*), and non-declared (*de facto*) emergencies.¹
2. Over the years, various international bodies have examined states of emergency.² At the ILA, this is the third time a committee has addressed the topic.³ This sustained analytical focus underscores the complexity and centrality of the topic for international human rights law and practice. By analysing State practice, the present report demonstrates the profound impact that states of emergency have on the enjoyment of human rights, the rule of law and democratic governance. It should be read together with the CHRTE's interim report (2020), which identified developments in standard-setting over the last 30 years relating to states of emergency through a review of

1 *De facto* emergencies are discussed at length in paras 20–25. A fourth situation, non-declared but notified state of emergency, while theoretically possible, was not present in the review of state practice conducted for this report and is hence not the focus here.

2 UN Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: the Implications for Human Rights of Situations Known as States of Siege or Emergency (1983), UN Doc E/CN.4/RES/1983/18; European Commission for Democracy through Law (Venice Commission), Report on the Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections (19 June 2020) <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e)> accessed 26 October 2024. Unless otherwise noted, all subsequent URLs referred to in the ensuing footnotes were accessed on the same date (ie 26 October 2024).

3 See International Committee on Human Rights (1979–1982), and the Committee on the Enforcement of Human Rights Law (CEHRL) (1982–1990). The CEHRL adopted the 1984 Paris Minimum Standards of Human Rights in a State of Emergency and the 1990 Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency. See Richard B Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' (1985) 79(4) *American Journal of International Law*, 1072 <<https://doi.org/10.2307/2201848>>; Richard B Lillich, 'Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency' (1991) 85(4) *American Journal of International Law* 716 <<https://doi.org/10.2307/2203279>>.

the practice of UN treaty bodies, regional commissions and courts, and other human rights mechanisms.⁴

3. The report employs a dual lens, **descriptive and normative**. It thus aims to both describe the emergency measures taken by States and their impact on human rights and to assess State practice against procedural and substantive standards developed by regional and international supervisory mechanisms. This analytical endeavour draws on 25 country and thematic notes prepared by Committee members;⁵ the CHRTE's interim report; previous work of ILA Committees on states of emergency, and a review of relevant literature. Since the Committee meeting in Lisbon (2020) at the 80th ILA Biennial International Conference where it presented its interim report, the CHRTE has held intersessional meetings in Frankfurt (2023), organised by Professor Stefan Kadelbach, and in Vienna (2024), convened by Professor Christina Binder. The Committee expresses its deep gratitude to the conveners of these meetings.
4. Following this introduction, the first part of the report documents the empirical reality of states of emergency. While not exhaustive of all situations, it outlines the circumstances in which States have invoked states of emergency over the past three decades (B.1), what type of measures they have taken and with what impact (B.2) and indicates how *de facto* emergencies can be identified (B.3). The second part of the report engages with two interrelated conceptual questions: whether derogation is a right or an obligation of States (C.1), and what standards (should) govern different types of states of emergency (C.2). In its third part (D), the report documents and assesses domestic law and State practice in relation to procedural standards concerning threshold, declaration and notification, duration, and domestic control of states of emergency. The fourth part (E) examines how States' constitutions, legislation, and practice relate to the substantive standards of non-derogability of rights, the principles of necessity and proportionality, and non-discrimination. The fifth (F) and sixth parts (G) entail conclusions and recommendations.

B. States Of Emergency in Empirical Reality

1. What Are the Circumstances in Which States Have Declared States of Emergency?

5. States employ different definitions of the circumstances that might give rise to a state of emergency.⁶ Over the past three decades, paradigmatic situations can be discerned from State practice where states of emergency have been declared to address real or perceived crises. These situations are: i) war/international armed conflicts and non-international armed conflicts;⁷ ii) attempts at violent regime change (*coups d'état*); iii) acts of terrorism and internal turmoil and disturbances; iv) organised crime; v) natural or

4 Committee on Human Rights in Times of Emergency, 'Interim Report: Developments in Standard Setting and Practice (1990–2020)' in ILA, *Report of its Seventy-Ninth Conference, Kyoto, November–December 2020* (2021). For the Committee's founding resolution and history, see paras 3–4 and corresponding footnotes.

5 See list in (n *).

6 The thresholds in domestic law and practice are examined in detail in paras 37–39.

7 In the emergency clauses of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human Rights (ACHR), the European Social Charter and the revised Charter, the term 'war' is used to define the threshold of an emergency situation if it threatens the life of a nation. Most other legal texts use 'armed conflict' as the technical term. For the remainder of the report, we will use the latter term, which then also comprises the term 'war', as used in the emergency clauses of human rights treaties. For an analysis see also Andrew Clapham, *War* (Oxford University Press 2021).

technological disasters, including pandemics and other major health emergencies; vi) financial or economic emergencies; vii) migration.⁸

6. Generally, the executive, who declares the emergency, is empowered to issue decrees in place of the legislature to deal with the emergency. States have adopted a variety of emergency measures in response to different crises. These depend on the nature of the emergency, the legal framework of each jurisdiction, political calculations, and other contextual factors.⁹ Yet, certain measures are typically associated with a given type of real, perceived, or alleged emergency.

2. What Measures Have States Typically Undertaken and with What Impact?

7. Before illustrating the types of measures that have typically been introduced in each of the identified paradigmatic situations, it is important to emphasise that emergency regimes have two types of inter-related impacts. First, emergency measures have a **systemic impact on democratic governance and the rule of law** as, by their very nature, they run counter to the principles of separation of powers and parliamentary and judicial oversight of executive action.¹⁰ Governments often expand their powers by issuing executive orders or decrees while bypassing the normal legislative processes. The decision-making authority is likely to become highly concentrated within the executive branch, sidelining the role of the legislative and, to some extent, the judicial branches. This concentration often limits or even eliminates constitutional and other checks and balances. In the same vein, emergency measures may be enacted swiftly with limited or no debate in parliament. This can result in laws and policies being implemented without the usual scrutiny and safeguards that the ordinary legislative process provides. Moreover, judicial review of executive actions may be delayed or restricted during emergencies.¹¹ Judges may be removed and replaced by provisional judges or judges who are not independent and identify with the policies of the executive. Courts might also be more inclined to defer to the executive branch to ensure rapid responses to the crisis. This might lead to a lack of accountability for decisions made, especially since other accountability mechanisms might be weakened too.
8. Second, emergency measures **negatively affect the enjoyment of individual human rights** as the following analysis of typical measures undertaken in each of the identified paradigmatic situations will show. Crucially, this impact exists *irrespective* of whether the measures themselves are lawful when assessed against domestic and international procedural and substantive standards. In other words, interference with rights in emergency situations is significant and is likely to affect a large number of individuals and/

8 With respect to (vii), the violation of rights that caused the forced displacement then leads to the state that should provide protection declaring the victims to be an 'emergency'.

9 See Sean Molloy, *Emergency Law Responses to Covid-19 and the Impact on Peace and Transition Processes* (International Institute for Democracy and Electoral Assistance 2021) 14–18.

10 Inter-American Commission of Human Rights, *Nicaragua: Concentration of Power and the Undermining of the Rule of Law* (2021), OEA/Ser. L/V/II. Doc 288.

11 For instance, during the COVID-19 emergency in France there was little judicial control in connection with the declaration of the state of health emergency. The latter was declared by Statute n° 2020–290 and, as such, it could have been exposed to constitutional review by the Constitutional Council. However, the Council was not seized *ex ante* about this statute and hence did not subject it to constitutional control. *Ex post* constitutional questions about this statute were only judged months later; see Estelle Chambas and Thomas Perroud, 'France: Legal Response to Covid-19' in Jeff King and Octavio Ferraz and others (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (Oxford University Press 2021).

or specific categories of individuals, *regardless* of whether these interferences ultimately amount to violations of domestic and international human rights law.

9. During **armed conflicts**, States often implement emergency measures to address the challenges posed by the hostilities. The nature of these measures can vary depending on the specific context, the intensity of the conflict, and the legal and institutional frameworks of the States involved. Many of the measures commonly adopted during internal disturbances or *coups d'état* are also prevalent in armed conflict settings. For instance, curfews have been imposed to restrict the movement of civilians during certain hours, in order to maintain public safety or for security reasons.¹² Other measures are more common to armed conflict. For example, conscription has been reintroduced in countries that had previously abolished it to augment the forces needed to quash the opposition.¹³ At times this included child recruitment, a distinct violation of international humanitarian law and human rights law.¹⁴ Authorities have ordered the evacuation of civilians from conflict zones to ensure their safety and well-being or to facilitate military operations.¹⁵ Furthermore, enhanced security measures have been introduced, including surveillance, checkpoints, and heightened border controls, to prevent the infiltration and movement of enemy combatants.¹⁶ Considering the scarcity of goods that is often associated with conflict situations, governments normally implement controls on resources, such as food, fuel, and other essential supplies, including rationing.¹⁷ Authorities have also resorted to expropriation or confiscation of private property, to swiftly acquire control of strategic assets or seize resources deemed critical for the war effort.¹⁸ Additional restrictive measures are more closely connected to the actual hostilities, such as the internment of enemy combatants or civilians deemed sympathetic to

12 In its notice of derogation to the International Covenant on Civil and Political Rights (ICCPR), following the Russian invasion of the country in 2022, Ukraine announced that it would 'introduce a curfew in accordance with the procedure established by the Cabinet of Ministers of Ukraine (ban on staying on the streets and in other public places during a certain period of the day without specially issued permits and certificates)'; Ukraine, Notification under Article 4(3) (28 February 2022), C.N.65.2022. TREATIES-IV.4. A curfew was also imposed by Azerbaijan, during its armed confrontations with Armenia in 2020, see Decree No 1166 of the President of the Republic of Azerbaijan on declaring martial law (27 September 2020).

13 Constant Méheut and Thomas Gibbons-Neff, 'After Two Years of Bloody Fighting, Ukraine Wrestles with Conscription' *New York Times* (28 January 2024); René Lehman, *Conscription as a Human Rights Violation: A Consideration in the Prosecution of Russian Soldiers for Crimes Against Humanity* (McGill Centre for Human Rights and Legal Pluralism 2022) 11.

14 Recruitment and use of children as soldiers is one of the six grave violations against children pursuant to United Nations Secretary-General report on grave violations against children in armed conflict.

15 For example, Israel ordered civilians in Gaza to evacuate to 'safe zones', see Israeli Defense Forces, 'IDF Announcement Sent to the Civilians of Gaza City' (13 October 2023) <<https://www.idf.il/en/mini-sites/idf-press-releases-israel-at-war/october-23-pr/idf-announcement-sent-to-the-civilians-of-gaza-city/>>. See also António Guterres, 'Why Israel Must Reconsider Its Gaza Evacuation Order – UN Secretary-General', *New York Times Op-Ed* (13 October 2023) <<https://www.nytimes.com/2023/10/13/opinion/israel-gaza-united-nations.html>>. Furthermore, Ukraine stated that it might 'evacuate the population if there is a threat to their life or health, as well as material and cultural values, if there is a threat of damage or destruction'; see Ukraine (n 12).

16 For instance, Ukraine claimed the right 'to establish, in accordance with the procedure established by the Cabinet of Ministers of Ukraine, a special regime of entry and exit, to restrict the freedom of movement of citizens, foreigners and stateless persons, as well as the movement of vehicles'; *ibid*.

17 Ukraine has affirmed its right to 'introduce, if necessary, in the manner prescribed by the Cabinet of Ministers of Ukraine, standardized provision of the population with basic food and non-food goods': *ibid*.

18 Ukraine declared that it could 'forcibly expropriate property in private or communal ownership, confiscate property of state enterprises, state economic associations for the needs of the state under the legal regime of martial law': *ibid*.

the insurgency, outside the regulatory framework normally associated with deprivation of liberty. Restrictions identical to those imposed in situations of international armed conflict are commonly imposed during non-international armed conflicts.¹⁹ In armed conflict situations – including those described as intractable, protracted, ‘frozen’ or ‘complex’, as well as disputed or occupied territories facing particular difficulties in cases of emergency other than the ongoing conflict-related emergency – the impact on local populations is compounded.²⁰ For example, during the COVID-19 pandemic, there was little access to information and effective monitoring regarding the effects of conflict and of the state of emergency invoked due to the pandemic.²¹

10. **Coups d'état** are often addressed through emergency measures. In such cases, the authorities typically implement a combination of legal, military, and political measures to impose order. The frequent militarisation of society, the establishment of military courts and the substitution of the armed forces for the civilian police are characteristic of *coup d'état* situations. The specific actions taken can vary depending on the circumstances and the nature of the *coup*, but some common measures include the mobilisation of security forces to impose ‘order’, securing key government buildings and establishing checkpoints.²² Authorities have been reported to engage in killings, enforced disappearances, arrests and detention of individuals suspected of being involved in the coup attempt, including military officers, politicians, and representatives of civil society.²³ Individuals are often prevented from fleeing a country through border closures,²⁴ or deported to a State that accepts them. Political parties and other associations suspected of being implicated in the coup are dissolved, and gatherings are limited or prohibited.²⁵ Governments impose censorship on media outlets to control the flow of information. This has included

19 See, for instance, the measures introduced by Sri Lanka in the context of the armed conflict with the Liberation Tigers of Tamil Eelam, Sri Lanka, Emergency (Miscellaneous Provisions and Powers) Regulation, No 1 of 2005 (13 August 2005).

20 Tatevik Hayrapetyan, ‘Covid-19 creates unique challenges for unrecognised territories: Can a Post-pandemic World Be More Inclusive and Democratic?’ *Emerging Europe* (29 May 2020) <<https://emerging-europe.com/opinion/covid-19-creates-unique-challenges-for-unrecognised-territories-can-a-post-pandemic-world-be-more-inclusive-and-democratic/>>. Cf Jonathan Shkurko, ‘Coronavirus: Akinci Urges WHO to Establish a Direct Communication with North’, *Cyprus Mail* (25 April 2020), <<https://archive.cyprus-mail.com/2020/04/25/coronavirus-akinci-urges-who-to-establish-a-direct-communication-with-north/>>.

21 See, eg, UN Security Council, United Nations Operation in Cyprus – Report of the Secretary-General (2020), UN Doc S/2020/682; UN Security Council, Situation concerning Western Sahara (2020) UN Doc S/2020/938; UN Secretary-General Calls for Global Ceasefire to Focus on Ending the COVID-19 Pandemic (*UN News*, 23 March 2022) <<https://news.un.org/en/story/2020/03/1059972>>.

22 In Honduras, in 2009 the *de facto* authorities that ousted President Zelaya from power adopted a decree announcing that certain guarantees would be suspended and stipulated that the Armed Forces would be participating in operations ‘to maintain the order and security of the Republic’, Executive Decree PCM-M-016–2009 (26 September 2009).

23 One of the measures introduced by the Turkish government after the attempted coup of July 2016 concerns the extension of police powers to detain suspects for up to thirty days without judicial review, Decree No 667, Article 6(1(a)) (23 July 2016).

24 A similar effect was achieved in Türkiye by ordering the cancellation of passports, without court order, of persons being investigated or prosecuted in relation to the coup, see Decree No 667, Article 5.

25 The Turkish authorities ordered the immediate closure of over 2,000 associations, foundations, trade unions, universities, private schools, and other establishments, and the confiscation of their assets; European Commission for Democracy through Law (Venice Commission), Türkiye, Opinion on emergency decree laws Nos 667–676 adopted following the failed coup of 15 July 2016 (12 December 2016) 19 <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-ad\(2016\)037-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-ad(2016)037-e)>.

shutting down or taking control of radio and television stations, blocking websites, and restricting social media, arresting journalists and human rights defenders.²⁶

11. In response to acts of **terrorism** and other types of internal disturbances, States tend to employ emergency powers aimed at addressing perceived or actual threats to public safety and national security. Authorities increase surveillance efforts, both domestically and internationally, to gather intelligence on potential threats.²⁷ This has included monitoring communications, tracking financial transactions, and conducting surveillance on individuals.²⁸ Law enforcement agencies or armed forces brought in to replace the police are granted expanded powers to detain individuals without observing required legal procedures,²⁹ to conduct searches without warrants, and to employ measures to prevent and respond to terrorist activities or other situations of generalised violence. Fair trial standards are usually lowered or even extinguished, including the right to be informed of charges, the right to legal representation, and access to evidence. In the absence of human rights protections for criminal suspects, torture or cruel and inhumane treatment in the course of unsupervised interrogations including in ‘secret detention sites’ pursuant to ‘extraordinary renditions’ has been documented.³⁰ Military courts that do not provide adequate procedural safeguards and judicial remedies have been established to address terrorism cases.³¹ Often mandated by UN Security Council resolutions, governments have frozen the assets of individuals or organisations suspected of supporting or financing terrorist activities, to disrupt the financial networks that sustain terrorist campaigns.³² Measures have also included stricter border controls, increased scrutiny of individuals entering or leaving the country, and preventing the movement

26 During the military coup that took place in Thailand in 2014, the junta applied Martial Law BE 2457 (1914) imposing severe restrictions on media outlets; Amnesty International, ‘Thailand: Attitude adjustment: 100 days under martial law’ (11 September 2014) 31–33, <www.amnesty.org/en/documents/asa39/011/2014/en/>.

27 See eg *Szabó and Vissy v Hungary*, no 37138/14, ECtHR 2016.

28 For instance, on 27 March 2022, at the request of the President, the Legislative Assembly of El Salvador approved Decree No 333, by which it declared a state of emergency throughout the national territory ‘owing to serious disturbances to public order by criminal structures that threaten the life, peace and security of the Salvadoran population’. Among the many measures introduced was the permission to intercept private communications without the necessity of a judicial order. See IACHR, ‘Press Release: IACHR Urges El Salvador to Ensure that Law Enforcement and Any Exceptional Measures Comply with Human Rights’ (20 April 2022) <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/082.asp>.

29 The UK Anti-terrorism, Crime and Security Act 2001, adopted in the wake of the 9/11 attacks against the US, provided for the extended power to arrest and detain foreign nationals suspected of terrorism activities who could neither be tried nor deported from the United Kingdom. The measure was later found by the ECtHR to be incompatible with the ECHR, notwithstanding the presence of a derogation notice that aimed at justifying the practice, see *A and others v UK* [GC], no 3455/05, ECtHR 2009.

30 See eg *El-Masri v The former Yugoslav Republic of Macedonia* [GC], no 39630/09, ECtHR 2012; *Al Nashiri v Poland*, no 28761/11, ECtHR 2014; *Husayn (Abu Zubaydah) v Poland*, no 7511/13, ECtHR 2014; *Nasr and Ghali v Italy*, no 44883/09, ECtHR 2016; *Abu Zubaydah v Lithuania*, no 46454/11, ECtHR 2018; *Al Nashiri v Romania*, no 33234/12, ECtHR 2018.

31 After the 9/11 terrorist attacks, US President GW Bush issued a Military Order titled ‘Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism’ (13 November 2001) that established military commissions, the functioning of which severely undermined fair trial guarantees for suspected terrorists. For a comparison of the rules governing military commissions and international standards, see Human Rights Watch, ‘Human Rights Watch Briefing Paper on U.S. Military Commissions’ (25 June 2003) <www.hrw.org/legacy/background/usa/military-commissions.htm>.

32 Security Council, Counter-Terrorism Committee, ‘Human Rights’ <www.un.org/securitycouncil/ctc/content/human-rights>.

of alleged terrorists across borders.³³ More generally, governments have introduced or enhanced counterterrorism and criminal legislation to address emerging or potential threats. This can involve defining new offences related to terrorism, increasing penalties, and providing law enforcement with additional tools.³⁴ According to the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism such codification of emergency powers into ordinary legislation amounts to the creation of *de facto* emergencies and has insidious, long-term effects on human rights.³⁵

12. While not a new trend, an increase in the use of emergency measures to address **organised crime**, and, in particular, transnational drug trafficking, can be observed. Some of these measures had a transnational impact. For example, US policy regarding the ‘war on drugs’ affected human rights practices of several Latin American States.³⁶ In the Philippines, the Duterte government declared a state of emergency in 2016 in relation to a terrorist attack in Mindanao, which was then used to justify emergency measures in the ‘war on drugs’. This state of emergency remained in force several years later, which led the UN High Commissioner on Human Rights to observe, in a 2020 report, that ‘[i]n the Philippines, what should have been an exceptional state appears to have become normalized.’³⁷ UN and NGO reports documented killings, arbitrary detentions, and closure of civic space as individual and systemic impacts of the ‘warification’ of drugs in the Philippines. Another recent example relates to Ecuador. In 2024, Ecuador declared a 60-day state of emergency in response to the surge in violence linked to organised crime groups. The government characterised the situation as an ‘internal armed conflict’ arguably seeking to justify the lawfulness of its use of force against specific individuals and groups as military targets under international humanitarian law (IHL). Commentators expressed doubts as to whether the degree of organisation of

33 In the case of *Nabil Sayadi and Patricia Vinck v Belgium*, the Human Rights Committee addressed the national implementation of the sanctions regime, set forth in Security Council resolution 1267 (1999), which established a sanctions regime to cover individuals and entities associated with Al-Qaida, Osama bin Laden and/or the Taliban, wherever located. The regime included a ban on travelling outside one’s country of residence. The Committee found that the measure constituted a violation of the authors’ right to freedom of movement under the ICCPR, because both the dismissal of a criminal investigation and the State party delisting requests showed that the restrictions were not necessary to protect national security or public order. See Human Rights Committee, Communication no 1472/2006, *Sayadi and Vinck v Belgium*, UN Doc CCPR/C/94/D/1472/2006, views adopted on 22 October 2008.

34 As a response to inter-ethnic violence between Muslim and Christian communities in parts of Nigeria, the National Assembly passed eight new Emergency Power regulations that granted security forces sweeping new powers including: to conduct a search without a warrant, to prohibit public processions, demonstrations and public meetings, and the power to detain people without a written order. See Human Rights Watch, ‘Revenge in the Name of Religion The Cycle of Violence in Plateau and Kano States’ (May 2005) 46–47. See also Special Rapporteur Fionnula Ní Aoláin, 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 (2018) UN Doc A/HRC/37/52 (hereafter, UN Special Rapporteur on counterterrorism and human rights).

35 UNSR on counterterrorism and human rights, *ibid*.

36 IACHR, Violence, Children and Organized Crime, OEA/Ser. L/V/II. Doc. 40/15, 11 November 2015; IACHR, Third Report on the Human Rights Situation in Colombia, OEA/Ser. L/V/II.102 Doc. 9 rev. 1, 26 February 1999.

37 UN High Commissioner for Human Rights, Situation of human rights in the Philippines, para 43 (see generally paras 43–48) (2020) UN Doc A/HRC/44/22. See also Daniel Wagner and Edsel Tupaz, ‘Duterte’s First 100 Days’ *Huffpost* (7 October 2016) <www.huffpost.com/entry/dutertes-first-100-days_b_12389874>.

each armed group and the minimum level of intensity were met for IHL to be applicable.³⁸ Another example comes from El Salvador, where President Nayib Bukele declared a state of emergency and incarcerated over 77,000 suspected gang members. Under the national state of emergency, constitutional rights were suspended, many arbitrary arrests were based only on unverified tip-offs, and the government had access to individuals' emails, texts and phone calls. The popularity of Bukele's 'war on gangs' was a major factor in his re-election in February 2024 despite the Salvadoran Constitution's prohibition on re-election.³⁹

13. **Natural and technological disasters, including pandemics and other health emergencies** have also given rise to the introduction of emergency measures that interfere with the enjoyment of human rights. The type and scope of such interference hinges on the nature of the calamity, as well as on the capacity of the State to adopt effective preparedness and mitigation measures and to effectively respond to the threat under ordinary law and procedures.⁴⁰ Their aim might be the maintenance of public order and public safety (eg, to evacuate and prevent movement to a highly contaminated area in case of nuclear or chemical fallout),⁴¹ the preservation of public health (for instance, compulsory vaccination to prevent the spreading of a lethal infectious disease),⁴² or the protection of a general or public interest (eg, to expropriate land or goods necessary to tackle the effects of a disaster).⁴³ In some instances, States deemed it necessary to derogate from human rights treaties in order to introduce measures dealing with the consequences of major natural disasters. In Ecuador and Türkiye, for instance, individuals living in areas affected by severe earthquakes were prevented from returning to their homes due to safety considerations.⁴⁴

38 Ezequiel Heffes, 'Crisis en Ecuador: Un "Conflicto Armado Interno" Depende de los Hechos, no de una Declaración Política', *El Diario* (Argentina, 13 January 2024) <www.eldiarioar.com/mundo/crisis-ecuador-conflicto-armado-interno-depende-hechos-no-declaracion-politica_129_10833864.html>.

39 Will Grant, 'El Salvador's president eyes re-election on back of gang crackdown' *BBC News* (San Salvador, 4 February 2024) <www.bbc.com/news/world-latin-america-68195441>.

40 See generally Emanuele Sommario, 'Limitation and Derogation Provisions in International Human Rights Law Treaties and Their Use in Disaster Settings' in Flavia Zorzi Giustiniani and others (eds), *Routledge Handbook of Human Rights and Disasters* (Routledge 2018) 98–118.

41 For instance, in the wake of the March 2011 earthquake which affected the Fukushima nuclear plant, Japanese authorities designated no-access areas based on their proximity to the plant, see Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (2013) UN Doc A/HRC/23/41/Add.3, para 45.

42 In *Solomakhin v Ukraine* the applicant complained about the health damages which he believed were caused by a compulsory vaccination he was obliged to undergo; *Solomakhin v Ukraine*, no 24429/03, ECtHR 2012.

43 See eg *Juan Milla Bermúdez v Honduras*, Case 11.206, Report N 46/96 (on admissibility), OEA/Ser. L/V/II.95 Doc. 7 rev. at 453, 17 October 1996, § 8, describing how local authorities expropriated several portions of private land bordering a river to build protective shelters which would minimise the impact of hurricanes affecting the area.

44 See eg the notice of derogation to the ICCPR filed by Ecuador after an earthquake in 2016, Ecuador: Notification under Article 4 (3) (7 December 2016) C.N.983.2016. TREATIES-IV.4. A similar step was taken by Türkiye after the 2023 earthquake affecting a large part of its southern provinces, when the Government decided to derogate from both the ICCPR and the ECHR, see Türkiye: Notification under Article 4 (3) (10 February 2023) C.N.49.2023. TREATIES-IV.4, and Council of Europe, Notification – JJ9457C Tr. /005–304 – Türkiye (13 February 2023) notifications are available at <www.coe.int/en/web/conventions/notifications>.

14. The *COVID-19 pandemic* posed a historic challenge, with some 7 million persons succumbing to the virus worldwide.⁴⁵ States and international organisations implemented a range of measures to address the disease, and response strategies varied across the globe, depending on factors such as the intensity of the outbreak, healthcare capacity, and socio-economic considerations. These measures severely limited the enjoyment of civil, cultural, economic, political and social rights to an extent that was unprecedented in democratic countries during peacetime. Their impact was widespread both in terms of the rights and the number of individuals affected. Measures adopted to contain the spread of the virus included encouraging or mandating social distancing, and isolation or quarantine measures for those who had contracted or been exposed to the virus.⁴⁶ Lockdowns or stay-at-home orders were imposed to restrict movement and social interactions, especially during the early stages of the pandemic.⁴⁷ In many countries, the use of face masks was required in public spaces to reduce the transmission of respiratory droplets. Testing and contact tracing were ordered to identify and isolate infected individuals and prevent transmission. As soon as the vaccines were developed, mass vaccination campaigns were organised to achieve widespread immunity, with the procedure made compulsory for certain categories of workers.⁴⁸ Protests against compulsory vaccination and the disparagement of public health measures by state officials⁴⁹ frustrated recovery from the pandemic. Public gatherings were either prohibited or subjected to stringent rules.⁵⁰ Bans on public religious services and other gatherings beyond a certain number of participants were imposed.⁵¹ In some jurisdictions ‘health

45 Worldometer, ‘COVID-19 Coronavirus Pandemic’ (13 April 2024) <www.worldometers.info/coronavirus/>.

46 In March 2020, the Parliament of El Salvador declared a state of emergency, imposing a mandatory lockdown, the closure of educational establishments, the mandatory preventive isolation of persons entering the country, and restrictions on the movement of persons. In addition, persons who failed to comply with the mandatory home quarantine ‘without proper justification’ would be taken by the National Civil Police to pandemic containment centres for 30 days, see Legislative Decree no 593 (14 March 2020).

47 On 17 March 2020, France ordered compulsory isolation for the entire population. This nationwide lockdown was extended until 11 May 2020, when a gradual deconfinement started, see Decree n° 2020–260 of 16 March 2020 and Decree n° 2020–548 of 11 May 2020.

48 These categories often included for instance health workers and firefighters. In February 2020, Brazilian Congress passed a law stipulating measures that could be adopted during the public health emergency. These included isolation, quarantine, compulsory tests and compulsory vaccination, see Law n 13.979, Article 3 (6 February 2020); see also Press Release by the Federal Constitutional Court, ‘Unsuccessful Constitutional Complaint Challenging the Obligation for Staff in the Health and Care Sectors to Provide Proof of Vaccination Against COVID-19’ (19 May 2022) <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-042.html>.

49 For example, in the US, President Trump advised the population to take bleach and Ivermectin, Kate Kelland and Raphael Satter, ‘Trump’s COVID-19 disinfectant ideas horrify health experts’ *Reuters* (Washington, 24 April 2020) <www.reuters.com/article/idUSKCN226104/>.

50 In Ecuador, the President declared a state of emergency for the entire territory, suspending among other rights freedom of movement as well as the rights to association and assembly, see Presidential Decree No 1017 (Article 3) (16 March 2020).

51 On 4 March 2020, the Italian government imposed the shutdown of all schools and universities nationwide, see Angela Giuffrida, Lorenzo Tondo and Peter Beaumont, ‘Italy orders closure of all schools and universities due to coronavirus’ *The Guardian* (Rome/Palermo, 4 March 2020).

passes' were introduced, the possession of which was required to gain access to certain public places.⁵² Travel bans were implemented, within and between countries, to control the movement of people and contain the spread of the virus, even if that meant individuals could not seek asylum. Governments discriminated against refugees and asylum seekers with respect to health care and did not act to prevent hate speech and xenophobia.⁵³ In India, for example, the enacted measures led to a loss of daily wages, accommodation and modes of transport, all of which left poorer populations economically and emotionally drained. Many deaths occurred due to starvation, exhaustion, suicide, and other lockdown-related causes, especially in rural communities that were unable to access digital apps that managed the vaccination drive, resulting in these communities being effectively deprived of the vaccines.⁵⁴ Measures were introduced which led to the suspension of criminal, civil or administrative proceedings, to the automatic extension of pre-trial detention (without any decision by a judge),⁵⁵ or to the postponement of elections.⁵⁶ The effectiveness of these measures varied, and public health authorities adjusted their strategies based on the evolving understanding of the virus, its transmission dynamics, and the availability of vaccines.

15. Turning to emergencies invoked in the context of **financial or economic crises**, it has come to be recognised that such predicaments pose challenges to the protection of civil, political, social, and economic rights, as well as to the rule of law, democracy, political stability, or social cohesion.⁵⁷ Austerity measures adopted by States facing dire financial situations have been reviewed by treaty monitoring and adjudicative bodies, including the European Court of Human Rights (ECtHR).⁵⁸ In *Koufaki and ADEDY v Greece*, the Court considered applications lodged after the Greek government had adopted a series of austerity measures, including reductions in the remuneration, benefits, bonuses and retirement pensions of public servants, with a view to reducing public spending and reacting to the economic crisis the country was facing. The applicants maintained that the measures violated their right to property.⁵⁹ The Court declared the applications inadmissible as manifestly ill-founded because the measures had been 'justified by the existence of an exceptional crisis without precedent in recent Greek history'.⁶⁰

52 In France, Law no 2021-689 (31 May 2021) introduced a transitional regime for exiting the public-health state of emergency, which introduced, among other measures, a 'health pass' for international travellers to and from France and for venues hosting large numbers of people (cinemas, theatres, museums, etc) or trade fairs and similar events.

53 See UN High Commissioner for Refugees, 'COVID-19 Global Evaluation Coalition, Joint Evaluation of the Protection of the Rights of Refugees during the COVID-19 Pandemic' (Geneva, July 2022) 40 <www.unhcr.org/research/evalreports/62c6ceca4/es202206-joint-evaluation-protection-rights-refugees-during-co-vid-19-pandemic.html>.

54 Orla Drummond, 'Human Rights in a Crisis: a Legal Analysis' (*PREPARED*, December 2023) 50 <<https://prepared-project.eu/human-rights-emergency/>>.

55 On the basis of Emergency Law no 2020-290 (23 March 2020) enacted to deal with the COVID-19 pandemic, the French government adopted Ordinance no 2020-303 (25 March 2020) for the adaptation of certain rules of criminal procedure. Article 16 of that Ordinance provided, inter alia, for the automatic extension of periods of pre-trial detention.

56 See for instance International Democracy and Electoral Assistance, 'Taking Stock of Regional Democratic Trends in Africa and the Middle East Before and During the COVID-19 Pandemic' (2021) 8-9.

57 Steering Committee for Human Rights (Council of Europe), 'The Impact of the Economic Crisis and Austerity Measures on Human Rights in Europe: Feasibility Study' (2016).

58 See UN High Commissioner for Human Rights, Report on Austerity Measures and Economic and Social Rights (2013).

59 *Koufaki and ADEDY v Greece*, no 57665/12 and 57657/12, ECtHR 2013.

60 *ibid*, § 37.

16. While this sort of crisis is not habitually associated with a state of emergency in the traditional sense of the term, Moldova has recently derogated from the European Convention on Human Rights (ECHR) based on ‘the grave energy crisis’⁶¹ affecting the country, considering that ‘the shortage of natural gas affects directly and immediately the security of the state and of the citizens.’⁶² The measures adopted included establishing a restrictive regime on the purchase and distribution of natural gas, as well as control over the media on issues connected to the crisis. In December 2023, Argentina declared a ‘state of necessity and urgency’ in the face of 160% inflation and 40% of the population living in poverty.⁶³ President Milei presented an economic reform package to Congress, seeking to privatise more than 40 public companies and impose restrictions on the right to assembly and demonstration. In addition, the government said it would slash the value of the peso by more than 50% against the US dollar and announced a raft of other austerity measures that would qualify as a *de facto* emergency.⁶⁴
17. **Migration** has been invoked in recent years as ground for the declaration of states of emergency. This has been the case, for example, in 2021 in Poland ‘due to “immigration crisis” at the Polish-Belarusian border,’⁶⁵ and in 2022 in Chile. The latter declared a state of emergency and submitted a notification under Article 27 of the American Convention on Human Rights (ACHR) justifying a derogation to reduce the high level of ‘migratory irregularity.’⁶⁶ States of emergency have been declared in the United States at city, state and federal levels in relation to ‘an invasion’ of migrants and asylum seekers.⁶⁷ This trend needs to be understood in a political context often marked by populist rhetoric that promises increased securitisation of borders, the criminalisation of ‘people on the move,’ and oftentimes also of those supporting them. Some of the emergency measures seek to secure additional funding from central budgets to address housing, food, and health needs, whereas others are chiefly aimed at stopping or pushing back asylum seekers and migrants. The 2019 Trump Administration’s proclamation of a ‘national emergency

61 Council of Europe, Notification – JJ9324C Tr. /005–286 – Republic of Moldova (25 February 2022).

62 Parliament of the Republic of Moldova, ‘Decision on the declaration of the state of emergency’ (20 January 2022).

63 Emergency Decree No 70/2023, ‘Foundations for the Reconstruction of the Argentine Economy’. Although termed an ‘Emergency Decree’ it was not notified to the OAS, pursuant to Article 27 (3) of the American Convention on Human Rights. See also the state of emergency declared by Argentina in 2002, Ley 25.561, Ley Publica y Reform del Regimen Cambiario (6 January 2002) <<http://servicios.infoleg.gob.ar/infolegInternet/anexos/70000–74999/71477/texact.htm>>.

64 *ibid.*

65 See Mieczysława Zdanowicz, ‘The Migration Crisis on the Polish–Belarusian Border’ (2023) 28(1) *Bialystok Legal Studies* 103–115 <<https://doi.org/10.15290/bsp.2023.28.01.06>>; see also, on this migration crisis and the emergency actions taken then, Elżbieta Karska and others, ‘Human Rights in the European Paradigm of the Protection of Aliens’ (Cardinal Stefan Wyszyński University 2023) 27, 40, 65–66, 78, 97–98; Elżbieta Kuzelewska and Agnieszka Piekutowska, ‘Belarus’ Violation of International Obligations in Connection with Artificial Migration Pressure on the Belarus–European Union Border’ (2023) 28(1) *Bialystok Legal Studies* 39–55 <<https://doi.org/10.15290/bsp.2023.28.01.03>>.

66 Note Verbal notifying the suspension of guarantees from the Permanent Mission of Chile to the OAS, in accordance with Article 27 para 3 of the American Convention on Human Rights (16 February 2022), Note No 53/22, 16, <www.oas.org/es/sla/ddi/docs/tratados_multilaterales_suspencion_garantias_Chile_nota_No_53-2022.pdf>.

67 See Pooja Salhotra and Madeleine Rubin, ‘Gov. Greg Abbott Defends Migrant Tactics in Eagle Pass amid Escalating Legal Battle with Biden Administration’ *The Texas Tribune* (4 February 2024) <www.texastribune.org/2024/02/04/abbott-defends-eagle-pass-tactics/>.

concerning the southern border of the United States' falls in the latter category.⁶⁸ The declaration was justified on the ground that the US-Mexico border is 'a major entry point for criminals, gang members, and illicit narcotics' and ordered the diversion of billions of dollars to construct a wall.⁶⁹

18. Overall, the analysis above shows that emergency measures negatively affect the enjoyment of virtually all internationally protected human rights. While the specific rights affected vary depending on the nature of the emergency, the precise measures taken, the legal framework of the country, and socio-political aspects shaping the implementation of measures, the summary below demonstrates that interferences arise in relation to both derogable and non-derogable rights.⁷⁰
 - a. While non-derogable rights cannot be subject to restrictions as extensively discussed in the Committee's interim report,⁷¹ and States generally do not declare their outright intention to restrict such rights, the violation of these rights nonetheless results from abuse of emergency powers. For example, the right to life is violated when excessive force is used by law enforcement officers in implementing emergency measures, and the prohibition of torture and inhuman or degrading treatment or punishment is flouted in interrogations or due to harsh conditions of detention and *refoulement*.
 - b. The right to personal liberty is limited when emergency powers grant authorities the ability to arbitrarily detain individuals, including preventive detention or holding individuals without charging them.
 - c. The right to a fair trial is violated when emergency regimes allow for the detention of individuals without due process rights, such as the right to be promptly informed of charges, the right to legal representation or the right to an independent and impartial tribunal.
 - d. Relatedly, the right to an effective remedy is impeded by emergency measures that limit or suspend judicial review, making it difficult for individuals to challenge the legality of actions taken.
 - e. The prohibition of discrimination is violated when emergency measures disproportionately target certain groups that share a protected characteristic based on their perceived association with the crisis or by excluding them from emergency responses.
 - f. The enjoyment of economic and social rights, including the protection of the core content⁷² of the rights to food, housing, healthcare, and work have been severely affected by emergency measures.
 - g. The right to private and family life is affected when emergency measures allow for increased surveillance, monitoring, and searches of individuals or their property without the usual legal constraints.
 - h. The right to worship and to practise one's religion was severely restricted by limitations imposed during the COVID-19 emergency, as was, more generally, the right to freedom of assembly. The latter right is often affected in emergencies of a political

68 Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States (15 February 2019) <<https://trumpwhitehouse.archives.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/>>.

69 *ibid*.

70 For an overview of the human rights commonly affected by states of emergency, see also the Observatory of situations of emergency in Venice Commission member States, which references the emergency regimes applicable in nearly fifty States, April 2020–April 2023, <www.venice.coe.int/WebForms/pages/?p=02_EmergencyPowersObservatory&lang=EN>.

71 Committee on Human Rights of Times in Emergency (n 4) paras 18–27 and 125–129.

72 *ibid*, paras 39–58.

- nature, as governments prevent gatherings that, in their assessment, could pose a threat to public safety or exacerbate the crisis.
- i. Individuals' freedom of movement, even when seeking asylum from persecution, is limited by states of emergency that involve curfews, restrictions on travel, or the establishment of checkpoints.
 - j. Freedom of expression and the right to receive information are curtailed when governments impose censorship or restrictions on media and free speech to control the dissemination of information during emergencies.
 - k. The right to political participation is interfered with by the practice of postponing upcoming elections or holding unconstitutional elections in emergency situations.
 - l. The right to property is affected by measures involving expropriation and confiscation pursuant to emergency measures.
19. Finally, this section must note that even in states of emergency, States are under a general positive obligation to protect human rights, and notably non-derogable ones, by taking reasonable measures to address foreseeable threats originating from individuals and non-State actors or from circumstances not attributable to the State.⁷³ An emergency measure, that *interferes* with – but does not *violate* – individual rights, might be called for by the State's positive obligation to protect human rights. For instance, the ECtHR considered compulsory vaccination schemes to be a reasonable measure to fulfil a State's duty to protect the rights to life and to health.⁷⁴ This approach resonates with the possibility of limiting individual rights to protect the rights and freedoms of others. Evidently, for such interference not to amount to a violation, it must comply with the requirements of necessity, proportionality and non-discrimination, even more so if adopted in an emergency situation.

3. How Can De Facto Situations of Emergency Be Identified?

20. Using the existence of emergency conditions or lack thereof as a first criterion, and the absence of a formal declaration as the second, the 1988 ILA CEHRL classified *de facto* emergencies into four categories. Classic *de facto* emergencies are those where the emergency situation exists, but no formal declaration is made, whereas ambiguous/potential and institutionalised *de facto* emergencies, as well as ordinary repression, are all instances that lack emergency conditions.⁷⁵ This classification remains pertinent as 'ideal types', yet the practice of States during the last three decades blurs the lines between these categories of states of emergency. It might be more useful to use process descriptors that can be separately or cumulatively considered as indicia for the existence of a *de facto* state of emergency.
21. First, a *de facto* emergency may begin as a **declared state of emergency that fails to comply with (i) approval or (ii) extension requirements, or that is (iii) used for situations different to those for which it was instituted**. As examined in part D *infra*, domestic emergency laws often provide for formal approval procedures by the

⁷³ Human Rights Committee, General Comment No 36, Right to life (2019) UN Doc CCPR/C/GC/36, paras 21 and 26.

⁷⁴ *Vavřička and others v the Czech Republic* [GC], no 47621 and 5 others, § 282, ECtHR 2021.

⁷⁵ International Law Association, 'Report of the Committee on the Enforcement of Human Rights', reprinted in Report of the Sixty-Third Conference (Warsaw, August 1988) 129, 145. See also Committee on Human Rights in Times of Emergency, Interim Report, Table 1 and para 14.

legislature and entail sunset clauses. For example, during the COVID-19 pandemic in Sudan, the transitional government declared a state of health emergency which, according to the Constitutional Declaration of 2019, required the legislature's approval. However, the parliament had not been formed, and as such the constitutional requirement was not met.⁷⁶ Nonetheless, Sudanese authorities took measures to address the pandemic *and* adopted economic liberalisation measures, which had a particularly profound impact on the enjoyment of core economic and social rights.⁷⁷ In Nigeria, a state of emergency was formally declared to respond to the armed conflict between governmental forces and Boko Haram in May 2013.⁷⁸ In November 2014, the Nigerian House of Representatives denied an extension of the state of emergency, and the Senate remained stalled on the issue.⁷⁹ A 2015 report noted that 'the National Assembly did not renew the state of emergency in Borno, Yobe, and Adamawa states, but its nonrenewal had little to no effect on day-to-day operations in those states.'⁸⁰ Finally, following the 15 July 2016 *coup d'état*, Türkiye declared a state of emergency and derogated from both the ECHR and the ICCPR. During 2016–2018, the Turkish government enacted thirty-two emergency decrees, seventeen of which targeted real and legal persons, and adopted permanent measures relating to them; 125,678 individuals were dismissed from public service, more than 4000 foundations, associations, universities, trade unions, private hospitals, private schools and media outlets were closed down and their assets transferred to the Treasury without cost, compensation or restriction. The decrees also resulted in 1,000 permanent amendments to national laws. The Venice Commission for Democracy through Law noted that while the declaration of state of emergency appeared to be in line with common European standards, 'the Government interpreted its extraordinary powers too extensively and took measures that went beyond what is permitted by the Turkish Constitution and by international law'.⁸¹

22. Second, *de facto* emergencies can be situations where **emergency powers are incorporated into ordinary law**, often in response to perceived or actual immediate threats to public safety and national security, including in the counterterrorism context.⁸² These *de facto* emergencies are characterised by the introduction of new legislation or changes to

76 See discussion in Mohamed Abdelsaman Babiker, 'COVID-19 and Sudan: The Impact on Economic and Social Rights in the Context of a Fragile Democratic Transition and Suspended Constitutionalism' (2021) 65 (S2) *Journal of African Law* 311, 326–327 <<https://doi.org/10.1017/S0021855321000383>>.

77 *ibid.*

78 Note that in November 2013, the Office of the Prosecutor of the International Criminal Court had changed the classification of the situation from an 'internal disturbance' to a 'non-international conflict' as the required level of intensity and level of organisation of the parties to the conflict had been met. See ICC, The Office of the Prosecutor, Report on the Preliminary Examination Activities (2013) para 218.

79 International Centre for Investigative Reporting, 'Reps Reject Jonathan's Request for Extension of Emergency Rule' (21 November 2014) <www.icirnigeria.org/reps-reject-jonathans-request-for-extension-of-emergency-rule/>; 'Senate Fails to Discuss President's Request for Extension of State of Emergency in North East' *Daily Post Nigeria* (26 November 2014) <<https://dailypost.ng/2014/11/26/senate-fails-discuss-presidents-request-extension-state-emergency-north-east/>>; Policy and Legal Advocacy Centre, 'Extension of State of Emergency in the Limbo?' (13 December 2014) <<https://placng.org/Legist/extension-of-state-of-emergency-in-the-limbo/>>.

80 US State Department, 'Nigeria 2015 Human Rights Report' (2015) 1, <<https://2009-2017.state.gov/documents/organization/252927.pdf>>.

81 Venice Commission (n 25) 48.

82 An example is the invocation of emergency powers in reliance on several laws by the Hong Kong Special Administrative Region of the People's Republic of China's government to repress the '2019 anti-extradition protest movement'. For an analysis of the counterterrorism context, see UNSR on counterterrorism and human rights (n 34).

existing law so as to expand, centralise or shift powers into the hands of the executive branch and away from the legislature or judicial branch. The expansion of powers often goes hand in hand with a considerable increase in budgets for law enforcement agencies (and, in particular, intelligence services), as well as the militarisation of government posts. The context of the COVID-19 pandemic also provides examples of the institutionalisation of emergency powers and militarisation of the executive branch that continues to this day in countries such as Sri Lanka, the Philippines, and Romania.⁸³ India provides a variation of an ‘undeclared’ emergency in so far as it centralised enforcement authority in the context of the pandemic in the hands of the federal government, contrary to the Constitutional provision placing public health under federal state authority.⁸⁴

23. Thirdly, *de facto* states of emergency can be situations where **factual emergency conditions exist, the State takes extraordinary measures, yet refuses to formally proclaim a state of emergency**. The Second Chechen War (1999–2009), which was marred by grave violations of human rights and humanitarian law, provides an illustration. The Russian Federation was involved in a non-international armed conflict with a separatist group in Chechnya. As several judgments of the ECtHR attest, Russia did not declare a state of emergency, nor did it notify a derogation under Art 15 ECHR.⁸⁵ Likely, the choice is explained by Russia’s refusal to recognise the existence of an armed conflict, which in turn would have involved the recognition of its obligations under international humanitarian law.⁸⁶ Instead, the legal basis for what Russia called ‘the antiterrorist operation in Chechnya was based on Russian legislation, namely on The Federal Law on Defence of 1996 and The Federal Law on Combating Terrorism of 1998’.⁸⁷
24. For the purposes of the present report, Universal Periodic Review (UPR) documentation for 193 States was reviewed, from the first UPR cycle up to summer 2019. Each document was thoroughly assessed with emphasis on words or phrases that indicated the existence of a state of emergency or related situation, including ‘martial law’, ‘emergency measures’, ‘public emergency’, and ‘state of siege’. Other relevant keywords included ‘crisis’, ‘emergency’, or ‘disaster’. The words ‘unrest’, ‘violence’, ‘conflict’, or ‘revolution’ were also employed where external information suggested the existence of such situations. In cases where the UPR documents were ambiguous or silent as to whether a country had declared a state of emergency, supplemental research was conducted.⁸⁸
25. Most of the UPR reports contained no reference to a state of emergency or related situation, yet a review of external sources revealed several instances where such conditions existed. The UPR documents provided different levels of analysis with respect to these states of emergency. On some occasions, there were in-depth explanations with

83 See the discussion in relation to Sri Lanka and the Philippines in Molloy (n 9), in particular 12, 21, 30; Florin Poenaru, ‘COVID-19 in Romania-the militarization of social life and the banality of death’ (2021) 45(4) *Dialectical Anthropology* 405–417 <<https://doi.org/10.1007/s10624-021-09632-7>>.

84 See Manish Tewari, ‘India’s Fight against Health Emergencies: In Search of a Legal Architecture’ (*ORF Issue Brief No 349*, 24 May 2023) <<https://www.orfonline.org/research/indias-fight-against-health-emergencies-in-search-of-a-legal-architecture-63884>>.

85 See *Isayeva, Yusupova and Bazayeva v Russia*, no 57947/00, 57948/00 and 57949/00, § 125, ECtHR 2005.

86 On Russia’s refusal to apply IHL, see Mark Kramer, ‘Russia, Chechnya, and the Geneva Conventions, 1994–2006: Norms and the Problem of Internalization’ in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?* (Oxford University Press 2017) 174–193.

87 Federico Sperotto, ‘Law in Times of War: The Case of Chechnya’ (2008) 8(2) *Global Jurist* 4–5 <<https://doi.org/10.2202/1934-2640.1250>>.

88 Research sources used include *Google*, *Westlaw News*, *CNN*, *The Guardian*, *BBC*, *The Washington Post*, *Reuters* and news sources germane to the particular country.

several paragraphs addressing the topic. On other occasions, there was only a short discussion limited to one or two sentences. This variation could impact the way readers understand the severity of the state of emergency. The UPR process does not use uniform terminology. The use of the word ‘crisis’ was particularly problematic, as what constitutes a crisis frequently depends on the perspective and long-term experience, standard of living, or other relevant factors unique to each country. Apart from the lack of coherence in the style and level of description among countries, there are some discrepancies among the documents published on the UPR website. Even though it is natural for National Reports to have substantial differences, there should be some consistency among the documents prepared by the United Nations or its agencies.

C. Conceptual Clarifications

26. In its interim report, the Committee differentiated between *notified* and *not notified* states of emergency, whereby the notification 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 has entered a derogation.⁸⁹ 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. In the same report, the Committee noted the continued scholarly debate as to whether notification of a state of emergency is a right or an obligation of States. Here, we seek to provide further conceptual clarification on this issue, which in turn will justify the standards used in this report to assess the lawfulness of State practice in respect to declared and notified, declared and non-notified, and *de facto* states of emergency.

1. Do States Have a Right to Derogate or an Obligation to Derogate?

27. The ICCPR, ACHR, ECHR, ESC and revised ESC contain derogation clauses that are worded in a similar fashion and stipulate that in time of public emergency State Parties ‘*may take measures derogating from their obligations*’ under the respective treaty provided certain procedural and substantive conditions are met.⁹⁰ Each of the five treaties explicitly refers to a State Party’s ‘right of derogation’ which States may ‘avail’ themselves of.⁹¹ **The ordinary meaning of the terms clarifies that at stake is a right of States to derogate**, albeit a right subject to certain conditions.

28. While the choice of whether to derogate or not belongs to the State,⁹² the notification of the derogation becomes a precondition for the State to avail itself of the right to derogate under the emergency exceptions. This is clear based on the wording of the respective provisions (‘shall’)⁹³ as well as from the interpretation and jurisprudence of

89 Committee on Human Rights in Times of Emergency (n 4) para 16.

90 See Art 4(1) ICCPR, Art 27(1) ACHR, Art 15(1) ECHR, ESC, Art 30(1) ESC, Art F.1 Revised ESC (emphasis added).

91 See Art 4(3) ICCPR, Art 27(3) ACHR, Art 15(3) ECHR, Art 30(2) ESC, Art F.2 Revised ESC.

92 Committee on Human Rights in Times of Emergency (n 4) para 15.

93 See eg Art 4(3) ICCPR; Art 15(3) ECHR.

monitoring mechanisms.⁹⁴ Further clarification that derogation is a right of a State, which is linked with the obligation to notify set out in the various derogation clauses, can be deduced from the practice of treaty bodies and regional courts in relation to the COVID-19 pandemic. The Human Rights Committee (HRCtee) called on all States derogating from their obligations under the Covenant ‘to comply without delay with their duty to notify the Secretary-General immediately.’⁹⁵ The 2022 ECtHR Factsheet ‘Derogation in Times of Emergency’ likewise affirms: ‘[...] on a procedural level, the State availing itself of this right of derogation must keep the SG of the CoE fully informed.’⁹⁶ The Inter-American Court of Human Rights (IACtHR) even established a separate violation of the procedural obligation to notify (Art 27(3) ACHR) in *Zambrano v Ecuador* when Ecuador did not live up to its obligation, while affirming the importance of Art 27(3) ACHR.⁹⁷ In line with these considerations, if a State does not notify, it will not enjoy the right to derogate and will remain bound by the (substantive) human rights provisions at stake. This being said, human rights institutions nonetheless take the effective circumstances into account. So, also without a formal derogation, on the basis of a proportionality test, emergency situations may increase a State’s scope for action. This demonstrates that, in international and regional human rights jurisprudence, the difference between a formal derogation and the application of the proportionality test is not clear-cut but rather blurred.

29. State practice also suggests that derogation is a right of States, not an obligation. While practice is heterogeneous, there are far more declarations of states of emergency at domestic levels proclaimed by all types of governments than derogations notified at the international level.⁹⁸ Furthermore, if they notify an international treaty body, they often only notify one body (eg, regional systems) and not all concerned institutions (eg, UN system). Moreover, suspensions are often driven by domestic considerations. As a result, most domestic emergency suspensions of rights do not lead to derogations at the

94 See the Human Rights Committee, which refers to the states’ ‘power of derogation’ and obligation to notify: Human Rights Committee, General Comment No 29, States of Emergency (Article 4) (2001) UN Doc 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, Fionnula Ní Aoláin, who refers to the right to derogate as the ‘legally mandated privilege of States’, see UNSR on counterterrorism and human rights (n 34) para 7.

95 Human Rights Committee, Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic (2020) UN Doc CCPR/C/128/2, para 1 (emphasis added); see also Human Rights Committee, General Comment No 29 (n 94) para 17: ‘In paragraph 3 of article 4, States parties, when they resort to their power of derogation under article 4, commit themselves to a regime of international notification. A State party availing itself of the right of derogation must immediately inform the other States parties, through the UN SG, of the provisions it has derogated from and of the reasons for such measures.’

96 ECtHR, Factsheet ‘Derogation in case of Emergency’ ((as of) February 2022) 1. See also European Commission for Democracy through Law (Venice Commission), Interim Report on the Measures taken in the EU Member States as a Result of the COVID-19 Crisis and their Impact on Democracy, the Rule of Law and Fundamental Rights (8 October 2020) para 84 <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)018-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)018-e)>.

97 *Zambrano Vélez et al v Ecuador*, Series C No 166, IACtHR (4 July 2007) § 70; see also *Caracazo v Venezuela* where the IACtHR held that in addition to various other provisions, also the obligation to notify under Art 27(3) ACHR had been violated since the other states parties had not been informed through the OAS Secretary General of the events in February and March 1989: *Caracazo v Venezuela*, Series C No 58, IACtHR (11 November 1999).

98 See Laurence R Helfer, ‘Rethinking Derogations from Human Rights Treaties’ (2021) 115(1) *American Journal of International Law* 20, 26 <<https://doi.org/10.1017/ajil.2020.92>>.

international level.⁹⁹ Especially the COVID-19 emergency measures analysis¹⁰⁰ shows that the majority of States and, among them, many with very drastic emergency measures, did not enter derogations, whereas a few, and with less drastic measures, did so.

30. While there may be positive dimensions of notifications of derogations, such as greater transparency and the avoidance of a normalisation of the emergency,¹⁰¹ these effects are not always self-evident. For example, the added layer of transparency is conditioned by the clarity of the notifications to allow for international monitoring. Vague derogations – in terms of timing or content – do not enhance individual protection in times of emergency but rather the contrary.¹⁰² One argument might be that it is harder to detail or delineate the exact scope of derogations in some newer emergency circumstances, such as the beginning of the COVID-19 pandemic in early 2020. The Committee is not convinced that this argument holds true of situations that States have had to deal with previously and repeatedly, such as *coups d'état* or terrorism. It is also disinclined to see any paradigmatic emergency situation as *ab initio* vague or diffuse. Finally, a condition for the effectiveness of notifications is that treaty-monitoring bodies engage in a robust review of States' derogations rather than in a mere bureaucratic exercise.¹⁰³

2. What Standards Should Govern the Assessment of Different Types of States of Emergency?

31. From the above discussion, it is clear that declared and notified states of emergency are, by definition, an exercise of a State's intention to avail itself of the right to derogate under relevant treaties. As such, declared and notified states of emergency are governed by the derogation provisions of respective treaties, specifically the notification requirement, other procedural requirements, and substantive standards.
32. The right of States to derogate from human rights treaty provisions may or may not be exercised. However, even if States decide not to derogate, substantive requirements comparable to the standards of the derogation clause, such as the temporality of measures, may be read into the application of proportionality in the justification analysis. Consequently, the necessity and proportionality standard against which declared and *de facto* emergency measures must be assessed is at least as strict – but possibly stricter – than that against which notified emergencies are judged. This is so because the very purpose of derogations is to afford a certain leeway to States in adopting and implementing measures that are necessary to address an emergency situation. An in-depth examination is provided in part E of this report.

⁹⁹ *ibid.*, 31.

¹⁰⁰ See eg Veronika Haász and Melinda Szappanyos, 'Derogations from the ICCPR and Guide to the Duty of Notification: Apropos the COVID-19 Pandemic' (2022) 25(1) *Austrian Review of International and European Law* 37–64 <<https://doi.org/10.1163/15736512-02501002>>; see also Niall Coghlan, 'Dissecting Covid-19 Derogations' (*Verfassungsblog*, 5 May 2020) <<https://verfassungsblog.de/dissecting-covid-19-derogations/>>.

¹⁰¹ See *infra* paras 65–71.

¹⁰² See Coghlan (n 100).

¹⁰³ Helfer (n 98) 27, referring to UNSR on counterterrorism and human rights (n 34) paras 26–27. The only engagement would thus be when a complaint is brought before human rights monitoring institutions.

D. Thresholds, Declaration and Notification, Duration, Control

33. According to the database of the Comparative Constitutions Project (CCP), more than 90% of the constitutions contained in the database have special emergency provisions.¹⁰⁴ Two-thirds of the constitutions also allow for suspension of constitutional rights.¹⁰⁵ As noted in section B, in addition to, or instead of, constitutional law, some states regulate emergencies through general or situation-specific ordinary legislation.¹⁰⁶ The design of constitutional and legislative provisions often differs significantly as to the situation in which an emergency can be invoked. This concerns threshold, duration, and the extent to which states can suspend constitutional rights. Importantly, domestic constitutional law very rarely makes reference to, and is often not coterminous with, international human rights treaty provisions.
34. In some States with a federal system, legislation provides emergency powers to state prime ministers, governors and/or mayors, such as in Australia, New Zealand and the United States. There is little scholarly engagement and no systematic international monitoring of emergency measures adopted by authorities at the sub-national level (federal states, cities). This omission is particularly stark given that international human rights law treaties are generally understood to be binding on State Parties as a whole, meaning that ‘public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party.’¹⁰⁷
35. Among the States that either do not have an emergency exception in their constitution or that do not allow for suspension of constitutional rights are Canada, Japan, and the United States. This does not exclude that states of emergency are declared. However, governments have to comply with constitutional rights even in emergency situations. Yet, the presence of an emergency might justify the restriction of certain constitutional rights under the general justification framework.

Are Domestic Law and State Practice Relating to Procedural Aspects Consistent with the Interpretation of Regional and International Human Rights Supervisory Mechanisms?

36. The analysis in this section will review the extent to which domestic law and the practice of States are consistent with (a) threshold, (b) declaration of state of emergency and notification of derogation, (c) duration, and (d) domestic control of the emergency.¹⁰⁸

104 Zachary Elkins and Tom Ginsburg, ‘Characteristics of National Constitutions, Version 4.0’ (*Comparative Constitutions Project*, last modified 24 October 2022) <<https://comparativeconstitutionsproject.org/>>. According to the database, 166 of 180 constitutions contained an emergency provision in 2021.

105 *ibid.* According to the data, 123 constitutions authorised a derogation from constitutional rights.

106 In the context of the COVID-19 pandemic a number of states relied on existing public health laws to provide a legal basis for emergency responses (eg Kenya, Nepal), or have passed new specific legislation such as the National Pandemic Act 2020 of Papua New Guinea. See Molloy (n 9) 11.

107 Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 4.

108 The focus lies on the human rights system at the international level (ICCPR), and the European (ECHR, ESC) and Inter-American systems (ACHR) at the regional level, as these treaty regimes have emergency provisions. Note that also Article 4 of the Arab Charter on Human Rights permits derogations in time of emergency, yet there is no meaningful practice that can be reviewed. The substantive requirements of the norm closely resemble those in other human rights treaties. The African Banjul Charter does not have a specific derogation clause. For details, see the Committee on Human Rights in Times of Emergency (n 4) paras 105–109.

a) Threshold

37. Constitutions vary as regards conditions that may trigger a state of emergency. Some constitutions reflect the wording in international human rights treaties, for example the constitutions of Cyprus, France, Lesotho, Namibia and South Africa.¹⁰⁹ Most constitutions include states of war or internal unrest, while many also allow for emergency measures in cases of natural disasters. Some constitutions provide greater specification, as is the case with India's constitution where a provision for financial emergencies can be found.¹¹⁰ Yet others entail vague provisions.¹¹¹ Finally, some constitutions do not have an emergency framework – some European post-totalitarian constitutions, such as the Italian one, were deemed to be 'generally suspicious of possible deviations from the ordinary framework of Constitutional safeguards'.¹¹² As noted earlier, ad hoc ordinary laws are also enacted to cope with emergencies, including terrorism or organised crime.¹¹³ As regards the assessment of conformity with international standards, much thus depends on the relevant implementing practice at the domestic level.
38. The threshold requirement in the state of emergency provisions of international and regional human rights treaties that permits derogation is worded similarly and is rather straightforward. Article 4(1) ICCPR refers to a 'public emergency threatening the life of the nation' and is the only provision that requires an official proclamation of the emergency. Article 15(1) ECHR and Article F (Part V) rev ESC refer to 'time of war or other public emergency threatening the life of the nation'. The slightly more permissively termed Article 27(1) ACHR, allowing for derogation in case of 'war, public danger, or other emergency' and merely referring to necessary threats to 'the independence or security of a state' with no requirement that, as in other human rights instruments, the emergency 'threaten the life of the nation', was interpreted by the IACtHR and concretised through strict proportionality requirements. The threshold applicable to activate the derogation clause is in all of the mentioned human rights treaties relatively high.
39. In a historical perspective, States have responded to a range of emergency situations, international armed conflicts, civil wars, insurrections, severe economic shocks, natural disasters and, most recently, a public health crisis on a global scale. According to Helfer, roughly three time periods may be identified in the state of emergency practice. The first phase, from the 1950s to the late 1990s, focused on responses to localised civil and political unrest; the second, which started after the 2001 terrorist attacks, saw the instauration of 'permanent emergencies' (or, differently put, institutionalised, hidden,

109 See generally Alan Greene, 'Types and Effects of Emergency' in Rainer Grote and others (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2023) para 10ff for further reference.

110 See eg Article 360 of the Indian Constitution ('financial emergency').

111 See eg Article 96 of the Constitution of the Republic of Chad (threat to the 'Institutions of the Republic' or the 'fulfilment of international commitments'); Article 412 of the Constitution of Myanmar (situation that 'endangers the lives, shelter or property of the public'). See also Greene (n 109) para 6: "Emergency" is therefore often defined by constitutions in a broad manner or not defined at all. An example is Article 154 of the Egyptian Constitution, which merely states that "the President of the Republic declares, after consultation with the Cabinet, a state of emergency in the manner regulated by law" (Constitution of the Arab Republic of Egypt: 18 January 2014 (Egypt)). See Haász and Szappanyos (n 100) 54 with reference to the respective concerns of the Human Rights Committee.

112 See Giacomo DelleDonne, 'History and Concepts of Emergency' in Rainer Grote and others (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2023) para 15, with reference to the Italian Constitution of 1947, as amended in 2012.

113 *ibid.*

complex *de facto* emergencies); and the third, which started in 2020, was dominated by emergencies during the COVID-19 pandemic.¹¹⁴

b) Declaration of emergency and notification of derogation

40. As regards the declaration of an emergency at the domestic level, the proclamation must be made in good faith.¹¹⁵ More specifically, in the inter-American system, a State may not declare a state of emergency to undermine a democratic form of government: ‘The Inter-American Commission, from very early in its history, recognized the importance of maintaining the rule of law and constitutional norms during states of emergency. Thus, from its beginning, it stated that the fundamental requisite for declaring states of emergency was that they can only be invoked for the preservation of democracy.’¹¹⁶
41. As regards the formal conditions for derogations from international human rights treaties, the ICCPR requires an official proclamation of the emergency by a public authority pursuant to internal constitutional requirements.¹¹⁷ As to the requirements for derogation notifications, the respective provisions (Art 4 ICCPR, Art 15 ECHR, Art 27 ACHR, Part V Art F ESC) require States to i) officially notify the respective treaty regime about any derogation; ii) indicate the reasons for the derogation; and iii) submit a notification when the derogation is terminated.¹¹⁸ The interpretative practice of international and regional human rights monitoring bodies has concretised these requirements by stating that derogation notifications are to be filed *immediately* after the decision to derogate and with requisite detail, ie, containing, in addition to the reasons and date of termination, the measures taken to address the situation and the provisions from which they derogate.¹¹⁹
42. State practice is varied as regards declarations and derogations in situations of emergency. First, many States which internally declared states of emergency did *not* derogate at the international level.¹²⁰ According to Helfer, the ‘reality is that emergency rights

114 See Helfer (n 98) 23ff; see furthermore Haász and Szappanyos (n 100) as regards COVID-19.

115 American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1985) para 62.

116 Comisión Interamericana de Derechos Humanos, ‘COMPENDIO: Institucionalidad Democrática, Estado de Derecho y Derechos Humanos – ESTÁNDARES INTERAMERICANOS’ (30 November 2023) 75 (author’s translation) <www.oas.org/es/cidh/informes/pdfs/2023/Compendio_Institucionalidad_Democratica_DDHH.pdf>.

117 See in this sense Human Rights Committee, General Comment No 29 (n 94) para 2: ‘... When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers.’

118 See Haász and Szappanyos (n 100) 42ff for details.

119 See eg Human Rights Committee, General Comment No 29 (n 94) para 17: ‘In view of the summary character of many of the notifications received in the past, the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law. Additional notifications are required if the State party subsequently takes further measures under article 4, for instance by extending the duration of a state of emergency. The requirement of immediate notification applies equally in relation to the termination of the derogation ...’. See also Committee on Human Rights in Times of Emergency (n 4) paras 84, 92. See Haász and Szappanyos (n 100) 44, 55 for further reference.

120 Cf Coghlan (n 100) in relation to COVID-19 derogations, criticising the patchy practice: not all states indicate the provisions from which they derogate. See also Haász and Szappanyos (n 100) 48, as regards derogations from the ICCPR in relation to COVID-19, noting that only 15 out of 22 States informed about the measures they took.

suspensions [at the domestic level] by all types of governments are far larger than the subset of suspensions subject to international derogations.¹²¹ *A fortiori*, this applies to those *de facto* emergencies that do not invoke emergency legal provisions as the legal basis at the domestic level.¹²²

43. Second, some States enter derogations to one treaty but not others. Of the ten States that derogated from the ACHR in relation to COVID-19, only four – Chile, Ecuador, Guatemala and Peru – filed notifications with the UN in relation to the ICCPR, suggesting that these States take their obligations under the regional regime more seriously than under the UN treaty.¹²³
44. Third, information provided by governments in notifications is inconsistent and does not properly comply with the requirements of timeliness (or promptness) and detail. Notifications are not filed immediately after a State declares the emergency, but often weeks or months later.¹²⁴ This was also observed in the study on derogations under the ICCPR in the context of the COVID-19 pandemic.¹²⁵ Finally, scholarship engages critically with derogation notifications for being ‘too general, too brief, and lacking a clear indication of what articles have been suspended’.¹²⁶ It is noteworthy that, in relation to the COVID-19 pandemic notifications, slightly greater detail had been provided by States.¹²⁷

c) Duration

45. In terms of the duration of the state of emergency, in principle, international law imposes stringent requirements. The temporal dimension of emergencies is closely linked to the threat at stake. States of emergency are only permissible during such times as the emergency exists.
46. Constitutions often contain specific procedural safeguards regarding duration that go beyond what is required by international human rights treaties. For example, many constitutions have sunset clauses – that is, fixed time limits for states of emergency that can only be extended through specific procedures.¹²⁸
47. However, domestic practice has frequently tended to stretch the length of emergencies. In Europe, Ireland was in an official state of emergency for almost 56 years (1936–1995). In some States in the Middle East and North Africa region, emergencies have lasted for years or even decades. Notably, Greene notes that the abuse of permanent emergency powers, as was the case in Egypt, was one of the catalysts of the Arab Spring.¹²⁹ In the 50-year period from 1945 to 1995, Colombia was almost permanently under a state of emergency. Similarly, Alfredo Stroessner ruled Paraguay as a dictator under a state of emergency from 1954 to 1989. Algeria lifted its 19-year state of emergency only in 2011,

121 Helfer (n 98) 26; see also Haász and Szappanyos (n 100) 55.

122 See Committee of Human Rights in Times of Emergency (n 4) para 13ff.

123 Organisation of American States, ‘Suspensión de Garantías recientes en materia de Tratados Multilaterales’ <www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_suspencion_garantias.asp>.

124 Cf Helfer (n 98) 26. See also Haász and Szappanyos (n 100) 47ff.

125 Haász and Szappanyos (n 100) 48.

126 Helfer (n 98) 26, citing Jaime Orúa, *Human Rights in States of Emergency in International Law* (Oxford University Press 1992) 77.

127 *ibid*, 77.

128 See eg Arts 136, 138 of the Brazilian Constitution; Art 164 of the Constitution of Ecuador; Art 16 of the Constitution of the French Republic; Art 154 of the Constitution of Egypt.

129 For example, in Egypt: see Greene (n 109) para 24.

after a period of popular protest. The state of emergency proclaimed in Syria, in 1963, remained in force until 2011 and was then normalised. In 1987, Türkiye declared a state of emergency in the face of escalating terrorist attacks, which was lifted in the last two provinces only in 2002. Israel has been in a permanent emergency since 1948.¹³⁰ All this seems to be difficult to square with international and regional human rights standards, as well as domestic constitutional provisions, that envisage a limited duration for states of emergency.¹³¹

d) Domestic control

48. Especially in light of the frequently long duration of emergencies that can be witnessed in the practice of some States, the salience of domestic control and internal checks and balances increases. Thus, the more entrenched and permanent declared emergencies become, the more important effective domestic safeguards are. These relate to upholding democratic standards through the separation of powers and checks and balances, such as the review of the emergency by the legislature (parliamentary review), and to upholding individual rights through fair trial standards, including access to an effective remedy before an independent court. The independence of the judiciary is a major systemic safeguard against the abuse of emergency powers.
49. During the COVID-19 pandemic, specific challenges arose. It was essential for States to improve accountability measures and enable individuals affected by rights violations to speak out about these abuses as they happened. With the transition of courtrooms to online platforms and the shutdown of government offices, it became necessary to implement protections to guarantee the human rights of individuals who might have been unable to access judicial or administrative processes via the internet. The provision of remedies for injustice and the reinforcement of accountability, including holding corporations accountable, are vital not just for addressing and correcting pandemic-related abuses but also for preventing future violations of human rights.¹³²
50. International monitoring institutions have keenly insisted on domestic safeguards. The HRCttee has expanded the list of non-derogable rights in Article 4 ICCPR in General Comment No 29 (2001) to also comprise judicial guarantees.¹³³ Likewise, the IACtHR has long considered the ‘judicial guarantees essential for the protection of [the extensive

¹³⁰ See Delledonne (n 112) para 26.

¹³¹ Generally speaking, treaty monitoring institutions seem to have been generally rather generous though. See eg Helfer (n 98) 27.

¹³² See UN Working Group on the issue of human rights and transnational corporations and other business enterprises, *The Coronavirus Disease Pandemic: Lessons Learned and Moving Forward* (2022) (Chairperson-Rapporteur: Elzbieta Karska) UN Doc A/HRC/50/40, 20, para 37.

¹³³ Human Rights Committee (n 94) paras 14 (right to a remedy) and 15 (judicial guarantees protecting non-derogable rights). See also American Association for the International Commission of Jurists (n 115) para 55: ‘The national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.’ The Siracusa Principles also refer to the necessarily effective remedy (ibid, para 56). See also Human Rights Committee (n 95) para 2 (d), stating in relation to the COVID-19 pandemic that states parties ‘... can[not] deviate from the non-derogable provisions of the Covenant [...] or from other rights that are essential for upholding the non-derogable rights [...] and for ensuring respect for the rule of law and the principle of legality even in times of public emergency, including the right of access to court, due process guarantees and right of victims to obtain an effective remedy’.

list of non-derogable listed in Article 27(2)^{134]} rights’ as non-derogable. The IACtHR underlined the non-derogability of habeas corpus in emergency situations in a 1987 advisory opinion,¹³⁵ as well as in its case law, especially in several cases against Peru.¹³⁶ Slightly less exigent is the ECtHR, which at times also holds non-judicial remedies to be sufficient.¹³⁷ In sum, the domestic guarantees required during states of emergency by international and regional human rights monitoring bodies, especially as regards fair trial, separation of powers, the rule of law and independent courts, remain stringent during emergencies to protect human rights and democracy.

51. Constitutions provide for domestic safeguards for states of emergency at various stages. These relate, first, to the declaration of the emergency. While most domestic constitutions vest the power to declare a state of emergency in the executive (President or Prime Minister), this declaration must often be reviewed within a specified time limit by the legislature.¹³⁸ A possible judicial review of the emergency declaration, conversely, is generally foreseen only *ex post*.¹³⁹
52. During the state of emergency, the maintenance of a minimum number of checks and balances is usually aspired to. Some constitutions provide, for instance, that the legislature must not be dissolved during the state of emergency. This mitigates, at least institutionally speaking, the potential for abuse.¹⁴⁰ Furthermore, constitutions are written to curb the power of the executive during an emergency by prohibiting certain actions, such as changes to the constitution, or by requiring a mandatory review by the Constitutional Court.¹⁴¹
53. Judicial control at the domestic level, generally foreseen *ex post*, may either relate to the declaration of the emergency (which is rare, as the authority proclaiming the emergency usually enjoys a wide discretion) or, more frequently, to acts taken during the

134 Of most interest for this study is the list of non-derogable rights contained in Article 27(2) ACHR, which is more extensive than the lists in other human rights instruments (Article 4(2) ICCPR and Article 15(2) ECHR).

135 See eg *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, IACtHR (30 January 1987) §§ 38ff.

136 See *Galindo Cárdenas et al v Perú*, Preliminary Objections, Merits, Reparations and Costs, Judgment IACtHR (2 October 2015); *Castillo Petruzzi et al v Perú*, Merits, Reparations and Costs, Judgment IACtHR (30 May 1999).

137 See *Lawless v Ireland (no 3)*, no 332/57, § 36, ECtHR 1961; see also *Ireland v the United Kingdom*, no 5310/71, § 220 ECtHR 1978; *Brannigan and Mc Bride v UK*, no 14553/89, §§ 55ff, ECtHR 1993; Matthias Lukan, ‘Art. 15 EMRK’ in Benjamin Kneihns and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (Verlag Österreich 2013) para 19. While this line of jurisprudence was not explicitly confirmed in more recent cases, it was not contradicted either. Some cases against Türkiye in the context of the country’s 2016 declaration of a state of emergency touched upon the question of habeas corpus, without however providing any explicit answers. See *Alparslan Altan v Türkiye*, no 12778/17, §§ 147–148, ECtHR 2017; *Mehmet Hasan Altan v Turkey*, no 13237/17, § 140, ECtHR 2018; *Şahin Alpay v Türkiye*, no 16538/17, § 119, ECtHR 2018. Note also that certain procedural safeguards may be derived from the procedural limb of non-derogable rights such as the prohibition of torture and the according obligation of States parties, eg, to investigate allegations of ill-treatment. (*Elçi and Others v Turkey*, no 23145/93, §§ 632, 648–649, ECtHR 2003).

138 See eg Constitution of the Republic of India of 1950 as amended in 2016, which requires the declaration of the emergency by the executive to be reviewed by the legislature.

139 In Colombia, however, in accordance with Articles 214–6 and 215 of the Constitution, the Government must send the legislative decrees to the Constitutional Court on the day after they were issued, so that the Court may determine whether they are constitutional.

140 This provision is to be found, for example, in the Constitution of the Russian Federation. In this sense, see Greene (n 109) para 15.

141 See eg Article 173 of the Constitution of the Kingdom of Thailand.

emergency. For example, while the House of Lords accepted that a state of emergency existed in the UK following the 9/11 terrorist attacks, it held that the measures taken by the State in lieu of this declaration – *de facto* detention without trial of non-UK suspected terrorists – were not proportionate to the exigencies of the situation.¹⁴² While State practice differs, domestic judicial review generally tends to engage critically with specific acts, rather than calling into question the existence of the state of emergency itself.

E. Non-Derogable Rights; Necessity and Proportionality; Non-Discrimination

1. How Do Emergency Measures Introduced by States Relate to the Standards of Non-derogability, Necessity/Proportionality, and Non-discrimination?
54. The occurrence of an emergency situation, however serious, does not imply that authorities have *carte blanche* in choosing what measures to introduce in order to tackle it. As has been highlighted in the interim report,¹⁴³ there can be no suspension of rights that are considered ‘inalienable’ or ‘intangibile’ and are (a) non-derogable under the relevant human rights treaties; nor may emergency measures run counter to international humanitarian law, peremptory norms of international law, or procedural guarantees underpinning the protection of non-derogable rights. In addition, the overarching principles of necessity and proportionality limit the action that may be taken. Especially when a derogation from human rights treaties is notified, the measures introduced can only be those that are ‘strictly required by the exigencies of the situation’. This implies that justification permitted under the different provisions of the treaty for the maintenance of public safety, health, order, or for other legitimate purposes must be plainly inadequate to respond to the situation at hand. Only then is the introduction of derogatory emergency measures justified (b). In addition, emergency measures must not be discriminatory in that they disproportionately affect certain groups of people based on characteristics such as race, gender, age, disability, or other protected attributes (c). The following paragraphs will review domestic provisions, State and judicial practice related to these legal standards.
 55. The substantive requirements for suspension of constitutional rights often differ from the ones contained in international human rights treaties, with domestic constitutions sometimes having less stringent requirements. Some constitutions identify certain rights as non-derogable or limit the rights for which a suspension is possible,¹⁴⁴ others require emergency measures to be proportionate,¹⁴⁵ and yet other constitutional texts do not explicitly contain substantial limits to the suspension of fundamental rights.¹⁴⁶

142 UKHL 71, *A v Secretary of State for the Home Department* (2005); *A and Others v UK* [GC] (n 29). See generally Greene (n 109) para 21ff.

143 Committee on Human Rights in Times of Emergency (n 4) para 728ff.

144 See eg Art 175 Albanian Constitution; Art 186 of the 1986 Constitution of Nicaragua; Art 45 of the Constitution of Nigeria; Art 165 of the Constitution of Ecuador. See also Art 115c(2) of the German Basic Law (introducing very limited opportunities for derogation).

145 See eg Art 175(4) of the Albanian Constitution; Art 164 of the Constitution of Ecuador; see also Art 45 of the Constitution of Nigeria (requiring ‘reasonable justification’).

146 See eg Art 23 of the Argentine Constitution; Art 137 of the Peruvian Constitution; Arts 358, 359 of the Indian Constitution; Art 414 of the Constitution of Myanmar; see also Art 59 of the Constitution of Burkina Faso that authorises the president to take the necessary measures without imposing any substantive limits.

a) Non-derogability

56. It should be noted that it is rather uncommon for governments to attempt to derogate from provisions listed as non-derogable in human rights treaties that are binding on them. Nonetheless, some notifications do raise concerns in this respect. For instance, Ukraine's notification in 2015 includes the right to an effective remedy among the rights derogated from.¹⁴⁷ While not explicitly listed among those considered non-derogable under Art 4(2) of the Covenant, the HRCtee maintains that it cannot be derogated from as it 'constitutes a treaty obligation inherent in the Covenant as a whole'.¹⁴⁸
57. One strategy which States employ to attempt to circumvent the prohibition on suspending non-derogable rights is to assert that certain conduct does not fall within the ambit of such provisions. For instance, as a response to the 9/11 terrorist attacks, the United States introduced a series of harsh interrogation techniques, claiming they would not be incompatible with the substantive provisions of the Convention Against Torture.¹⁴⁹ The Committee Against Torture rejected the claims, pointing out that practices such as 'waterboarding', 'short shackling' and using dogs to induce fear, constituted torture or cruel, inhuman or degrading treatment or punishment.¹⁵⁰
58. Even if not expressly derogated from, the right to life, freedom from torture and other non-derogable rights may be violated in the implementation of certain emergency regimes. In March 2022, El Salvador declared a state of emergency 'owing to serious disturbances to public order by criminal structures that threaten the life, peace and security of the Salvadoran population'.¹⁵¹ In an attempt to crack down on criminal gangs, the government introduced draconian measures in detention facilities, depriving detainees of adequate clothing, light, bedding, access to the outdoors, food, and water, which are incompatible with the prohibition on torture and inhuman and degrading treatment or punishment, as well as the non-derogable core content of a range of socio-economic rights.¹⁵² More generally, repressive measures adopted to contain political protest during emergencies may lead to excessive use of force by law enforcement authorities, leading to violations of the right to life and freedom from torture.¹⁵³

b) Necessity and proportionality

59. Turning to the principles of necessity and proportionality, before introducing derogation measures States should assess if the situation can be addressed by using **ordinary**

147 Council of Europe, Notification JJ7979C Tr. /005-185 – Ukraine (10 June 2015).

148 Human Rights Committee (n 94) para 14.

149 US Department of Justice Office of Legal Counsel, Steven G Bradbury (Principal Deputy Assistant Attorney General), Memorandum regarding Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees to John A Rizzo, Acting General Counsel, CIA (10 May 2005).

150 UN Committee against Torture, Concluding observations (2006) UN Doc CAT/C/USA/CO/2 para 24.

151 UN, C.N.96.2022. TREATIES-IV.4, El Salvador: Notification under Article 4(3) (27 March 2022).

152 NN, 'El Salvador: Broad 'State of Emergency' Risks Abuse' (*Human Rights Watch*, 29 March 2022) <www.hrw.org/news/2022/03/29/el-salvador-broad-state-emergency-risks-abuse-0>. For non-derogability and socio-economic rights, see the Committee on Human Rights in Times of Emergency (n 4) paras 39-58, 127-131.

153 Inter-American Commission on Human Rights, Nicaragua: Concentration of Power and the Undermining of the Rule of Law, OEA/Ser. L/V/II. Doc. 288 (2021) 19.

limitations to rights, or what we call in this report the justification test. This review was conducted by many States Parties to the ECHR in determining whether the emergency response to the COVID-19 pandemic required a suspension of their treaty obligations or whether the measures could be justified under existing treaty limitations.¹⁵⁴ Belgium considered that measures restricting freedom of assembly, freedom of movement, and the right to education were necessary and proportionate to the risks for public health and thus could be justified under the ordinary limitations of these rights as provided in the ECHR – as such Belgium did not seek to derogate from the ECHR.¹⁵⁵ Lithuania considered derogating from the Convention in relation to the wide-ranging measures in force between March and June 2020, but concluded that it was unnecessary as the protection of health was sufficient justification under the limitation clauses of the affected rights and freedoms. While the authorities of different States may reach dissimilar conclusions on the matter, carrying out such a preliminary necessity and proportionality assessment might prove decisive in fulfilling the duty to verify whether such measures are indeed necessary.

60. Even when formal derogations to treaties are entered, the use of emergency powers can breach the principle of proportionality. In the aftermath of the attempted *coup d'état* in Türkiye in 2016, two journalists were arrested on suspicion of being members of the organisation that had staged the coup and were kept for months in pre-trial detention based on weak evidence.¹⁵⁶ The Turkish government had availed itself of the right to derogate from its obligations under human rights treaties, maintaining that the measure was thus justified. The ECtHR agreed with the finding of the Turkish Constitutional Court – dismissed by the responding government – which held that the guarantees of the right to liberty would be meaningless if it were accepted that people could be placed in pre-trial detention without strong evidence that they had committed an offence. Accordingly, even taking into account the existence of a genuine emergency, it found that the applicant's deprivation of liberty was 'disproportionate to the strict exigencies of the situation'.¹⁵⁷
61. The principle of **proportionality also has a geographic dimension** irrespective of whether we have a formal derogation, requiring that the applicability of the exceptional measures introduced is limited to the areas that are directly affected by the emergency. In the context of the armed conflict with Russia, Ukraine had in 2015 limited the scope of its derogation to the contested territories (ie, the Crimean Peninsula and the eastern regions of Ukraine), listing them in its notifications under the ECHR¹⁵⁸ and the ICCPR.¹⁵⁹ The territorial scope of the derogation was extended in March 2022 covering the whole territory of Ukraine, in connection with Russia's widespread military offensive.¹⁶⁰ It has

154 Council of Europe, Steering Committee for Human Rights (CDDH), Report on Member States' Practice in Relation to Derogations from the ECHR in Situations of Crisis (22 December 2022).

155 *ibid.*

156 *Alpay v Turkey* (n 137); *Altan v Turkey* (n 137).

157 *Alpay v Turkey* (n 137) §140.

158 Council of Europe, Notification JJ8034C Tr. /005–186 – Ukraine (5 November 2015); Notification JJ8172C Tr. /005–190 – Ukraine (1 July 2016); Notification JJ8318C Tr. /005–205 – Ukraine (2 February 2017).

159 UN, C.N.416.2015. TREATIES-IV.4 Ukraine: Notification under Article 4(3) (5 June 2015); UN, C.N.502.2016. TREATIES-IV.4 Ukraine: Notification under Article 4(3) (6 July 2016); UN, C.N.612.2019. TREATIES-IV.4 Ukraine: Notification under Article 4(3) (23 January 2017).

160 Council of Europe, Notification JJ9325C Tr. /005–287 – Ukraine (2 March 2022); UN, C.N.65.2022. TREATIES-IV.4 Ukraine: Notification under Article 4(3) (1 March 2022).

also a **temporal dimension**: exceptional measures are only permitted for as long as they are necessary to address the emergency.¹⁶¹

c) Non-discrimination

62. Turning to non-discrimination, violations of this prohibition may originate in the way in which an emergency measure has been devised. Following the 9/11 terrorist attacks, the British government considered the United Kingdom to be under threat from a number of foreign nationals present in the country who were providing a support network for extremist Islamist terrorist operations. Since some of these individuals could not be deported because they risked ill-treatment in their country of origin, the government extended their detention under an anti-terrorism act.¹⁶² The ECtHR found the measure to be discriminatory and, therefore, not strictly required by the exigencies of the situation. In particular, the measure failed to adequately address the problem, as threats to national security originated both from foreign and British citizens. By directing it only against the former section of the population, the authorities had imposed a disproportionate burden on one group of suspected terrorists, discriminating unjustifiably between nationals and non-nationals.¹⁶³
63. The principle of non-discrimination may also be violated in the concrete implementation of a certain restrictive measure. For instance, the curfews that were introduced by the military junta in Honduras in 2009, in the context of a *coup d'état*, were applied selectively, only affecting one part of the population.¹⁶⁴ According to the IACHR, thousands of persons were trapped between military roadblocks while the measure was in place, without any justification or cause. More importantly, 'enforcement of the curfew was not uniform throughout the national territory [...] as certain persons were allowed to move about during curfew hours, which meant that enforcement was selective and thereby discriminatory'.¹⁶⁵

2. What Differences Can Be Observed Between Different Types of States of Emergency?

64. In this report, we have differentiated between three types of emergencies: i) declared and notified states of emergency; ii) states of emergency that are internally declared, but not notified to an international treaty monitoring body; and iii) *de facto* states of emergency that are neither internally declared nor notified to an international monitoring body.

161 *Bas v Turkey*, no 66448/17, § 224, ECtHR 2020: 'However, the Court considers that the reasoning adopted by the Constitutional Court in the case of Aydın Yavuz and Others – which the Court itself has accepted – inevitably becomes less relevant with the passage of time, in view of the changing circumstances. While it is true that the difficulties with which the country, and specifically its judicial system, had to contend in the first few months after the coup attempt were such as to justify a derogation under Article 15 of the Convention, the same considerations have gradually become less forceful and relevant as the public emergency threatening the life of the nation, while still persisting, has declined in intensity. The exigency criterion must therefore be applied more stringent.'

162 *A and Others v UK*, (n 29) §10.

163 *ibid.*, §§ 186 and 190.

164 The *de facto* authorities declared a state of siege, establishing curfew hours, and substantially restricting freedom of movement, assembly and expression, see Executive Decree No 011–2009 (30 June 2009).

165 Inter-American Commission on Human Rights, Honduras: Human Rights and the Coup d'état (2009) § 222.

States react very differently to an emergency situation. This was illustrated by the response of different States to the COVID-19 pandemic: 107 States internally declared an emergency, while only 31 notified it to an international treaty monitoring body.¹⁶⁶ The other States neither declared nor notified an emergency, although they were facing largely the same challenges, which they addressed through emergency measures – at stake are thus *de facto* emergencies.¹⁶⁷

65. This diverging practice raises two questions: First, is it desirable that States declare and notify an emergency in an emergency situation? In the early days of the pandemic, the HRCttee stated that it would be preferable for States to deal with the challenges posed by COVID-19 within the usual parameters permitting restrictions on fundamental rights.¹⁶⁸ Nevertheless, the non-declaration and lack of notification of an emergency may restrict the ability to monitor the situation. Therefore, we will first address the impact of an emergency declaration and derogation notification on human rights (a). Second, it is not obvious that the declaration and notification of an emergency situation makes a difference as to how this situation is legally evaluated. Even if States declare an emergency, courts usually perform a proportionality analysis of the States' responses.¹⁶⁹ Therefore, we will analyse whether the declaration and notification of an emergency actually makes a difference in the practice of international human rights courts and tribunals evaluating such a situation (b).

a) Impact on human rights of emergency declaration and notification

66. The impact on human rights of declaring an emergency domestically and notifying it internationally can potentially be both positive and negative. Opponents of emergency clauses fear that the declaration of an emergency undermines human rights standards.¹⁷⁰ A real or imagined emergency can be used to restrict human rights. As outlined in paras 7–18, even when authorities do not abuse emergency powers, interferences with rights in the context of states of emergency can be wide-ranging.
67. The recommendation of the HRCttee to deal with the challenges posed by COVID-19 without declaring an emergency, if possible,¹⁷¹ was possibly guided by a fear that emergency rhetoric makes individuals and courts more likely to accept the necessity of emergency measures even if they go beyond what is required to address the emergency situation. This fear is strengthened by emergency clauses in some domestic constitutions that adopt broad definitions of emergencies and/or allow for the restriction of

166 Stefan Kadelbach, 'Menschenrechte in Zeiten des Notstands' in Philipp B Donath and others (eds), *Der Schutz des Individuums durch das Recht: Festschrift für Rainer Hofmann zum 70. Geburtstag* (Springer 2023) 260.

167 See eg the discussion concerning the Central African Republic, Rwanda, Somalia and Sri Lanka, in Molloy (n 9) 12.

168 Human Rights Committee, Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic (n 95) para 2(c).

169 Committee on Human Rights in Times of Emergency (n 4) para 31.

170 See eg Oren Gross, 'Once More unto the Breach: The Systemic Failure of Applying the European Convention of Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law* 437, 491.

171 Human Rights Committee, Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic (n 95) para 2(c).

- fundamental rights without imposing effective limits.¹⁷² However, international human rights treaties do contain certain legal safeguards that may partly alleviate this concern.¹⁷³
68. The declaration and notification of states of emergency also have potential advantages. Substantively, they help to avoid the ‘normalisation’ of an emergency.¹⁷⁴ If the exceptional measures are limited to the existence of an emergency, then they can also be limited in time, and there is less of a chance that the emergency will lead to a permanent lowering in human rights standards. For example, Germany introduced changes to its criminal procedure code in response to a left-wing terrorist threat in the 1970s, while not formally declaring an emergency.¹⁷⁵ However, this argument has certain drawbacks. First, the limits of an emergency situation are often difficult to determine. Certain threats can last for years and decades, and during the COVID-19 pandemic, we have seen a gradual normalisation – the virus has not vanished, but it poses a significantly reduced systemic risk than in the early days of the pandemic. Therefore, a flexible proportionality test in the justification analysis might be better able to capture these nuances than the inflexible binarity of the concept of emergency.
69. The most important advantage of a declaration and notification might therefore be a procedural one. If a State formally declares a state of emergency and enters a derogation, it is easier to monitor its consequent practice. Among the international human rights monitoring mechanisms, there are the UPR and the UN Special Procedures of the UN Human Rights Council,¹⁷⁶ or the reporting processes under specific human rights treaties and their treaty bodies, such as the UN HRCttee. From 1996 to 2016, the Inter-American Commission on Human Rights included States that had declared states of emergency in Chapter IV of its Annual Report as countries that required stricter scrutiny.¹⁷⁷ Since 2017, the declaration of a state of emergency is not required for a State to be included in Chapter IV. This is particularly good practice as it also captures non-notified and *de facto* states of emergency – the latter posing a specific challenge for monitoring at both international and domestic levels. Finally, it should be noted that these international reporting and monitoring procedures depend, to a significant extent, on the information that is provided by domestic civil society organisations, national human rights institutions, international NGOs, as well as input provided by States themselves.
70. Internally, there are several potential institutions that can serve as checks in an emergency situation. First, procedures that are set up by constitutions and domestic law provide checks on executive powers. As noted previously, emergency declarations often have to be approved¹⁷⁸ and reviewed by parliament or other institutions after the lapse

172 See Section D.

173 However, see also Gross (n 170) 491–498, who is sceptical about the effectiveness of international human rights treaty mechanisms in cases of emergencies.

174 See eg Ernst-Wolfgang Böckenförde, ‘Der verdrängte Ausnahmezustand’ (1978) 31 *Neue Juristische Wochenschrift* 1881; Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing 2018) 1–32.

175 See Hartmut Wächtler, ‘Dokumente und Materialien zur Kontaktsperre für Verteidiger’ (1977) 10(4) *Kritische Justiz* 395–400; Tristan Barczak, *Der nervöse Staat* (Mohr Siebeck 2020) 325 <<https://doi.org/10.1628/978-3-16-160746-2>>.

176 Committee of Human Rights in Times of Emergency (n 4) paras 59–64.

177 Inter-American Commission on Human Rights, Annual Report (2016) Chapter IV.A.

178 See eg Art 172 of the Albanian Constitution; Art 166 of the Constitution of Ecuador; Art 115a of the German Basic Law (requiring a two-third majority in both houses of parliament); Art 172 of the Constitution of the Kingdom of Thailand; Art 61 of the Argentine Constitution.

of certain time limits.¹⁷⁹ However, one has to wonder how effective these institutional checks are in practice. Gross discusses the rally-around-the-flag phenomenon, where institutions tasked with monitoring are less critical with their review of emergency measures than they would be in ‘normal’ times.¹⁸⁰

71. Second, domestic constitutional courts may provide a certain measure of control in emergency situations. During the COVID-19 pandemic, constitutional courts in some countries acted as an effective counterbalance to the executive; these include the Constitutional Court of Ecuador¹⁸¹ and the Brazilian Federal Supreme Court.¹⁸² Finally, civil society organisations and national human rights institutions play an important role in highlighting human rights violations and abuses. Yet, the beneficial role of domestic courts and civil society organisations in monitoring the human rights situation probably does not depend on the formal declaration of an emergency or its notification at the international level, although both these processes might come to spotlight the need for heightened attention. On the other hand, the declaration of an emergency and derogation might also have the contrary effect, contributing to a rally-around-the-flag phenomenon that can diminish the critical role of these actors.¹⁸³

b) The strictness of the necessity and proportionality tests and implications

72. Do international human rights courts and tribunals privilege States that have declared and notified an emergency in the analysis of the measures adopted to combat the emergency? Answering this question about the level of strictness is not straightforward. Courts perform a necessity and proportionality analysis as a condition for the validity of a State’s derogation from treaty provisions. Yet, a necessity and proportionality analysis is also part of the general justification test in many treaty systems. The ECtHR has explicitly acknowledged in several judgments that a factual (notified or non-notified) emergency is a ‘contextual factor’ that is to be taken into account in the justification analysis irrespective of whether a derogation notification under Article 15 ECHR exists.¹⁸⁴
73. Conceptually, differences between the necessity and proportionality analysis within the framework of a state of emergency and that within the justification test can emerge on two levels. On the one hand, justification clauses may impose stricter requirements that may go beyond a mere analysis of necessity and proportionality. For example, Article 5(1) ECHR imposes specific substantial conditions on a deprivation of liberty. If a State derogates from this guarantee on the basis of Article 15 ECHR, then it may, in principle, also impose measures that do not meet any of the exceptions included in the justification clause of Article 5 ECHR. Nevertheless, it would still have to show that

179 See eg Art 172 of the Albanian Constitution; Art 96 of the Constitution of the Republic of Chad; Art 230–232 of the Polish Constitution. See also Art 16 of the French Constitution (providing for the possibility of judicial review after 30 days).

180 Gross (n 170) 491ff.

181 See Corte Constitucional del Ecuador (CC), Boletín Jurisprudencial, Edición especial COVID-19, Marzo-Septiembre 2020.

182 See Brazilian Federal Supreme Court, Case Law Compilation COVID-19, October 2020; Case Law Compilation COVID-19, Vol I, 2nd edn, May 2021.

183 See Gross (n 170) 491ff (arguing that domestic courts are affected by this phenomenon).

184 See eg *Bas v Turkey* (n 161) §§ 115, 199, 221.

such a deviation is indeed a proportionate response to the emergency situation.¹⁸⁵ On the other hand, the declaration and notification of an emergency may make a difference with regard to the level of deference that the Court applies. It might grant a wider margin of appreciation to States that have declared and notified a state of emergency than to States that have not declared an emergency.

74. Yet, if we look at the practice of international human rights courts and quasi-judicial bodies, the declaration and notification of a state of emergency do not seem to make a difference in the decisions of the IACtHR and HRCttee. Both mechanisms have been rather strict with the application of the preconditions for the emergency exceptions in Article 4 ICCPR and Article 27 ACHR. Neither the HRCttee nor the IACtHR have ever found emergency measures to be justified on the basis of the emergency provisions of the respective human rights treaties.¹⁸⁶ The HRCttee either held that the State invoking the derogation had not sufficiently justified its claim,¹⁸⁷ that the measure was not strictly necessary to address the emergency,¹⁸⁸ or that the measure concerned a non-derogable treaty provision.¹⁸⁹ The IACtHR has greatly expanded the list of non-derogable rights and thus reduced the scope of rights from which it was possible to derogate in the first place.¹⁹⁰ However, even in cases concerning rights for which a derogation was, in principle, possible, the IACtHR has applied a rather strict proportionality standard.¹⁹¹
75. The picture is more complicated when it comes to the ECtHR. A recent obiter dictum in *Communauté genevoise d'actions syndicale* regarding restrictions to freedom of assembly during the COVID-19 pandemic suggests that the Court might assess measures during a notified emergency more leniently.¹⁹² The Court noted that Switzerland had not made use of the derogation under Article 15 ECHR and argued 'it was required

185 But see *Hassan v United Kingdom* [GC], no 29750/09, § 102, ECtHR 2014, where the ECtHR accepted that in situations of international armed conflict, the safeguards under the Convention need to be interpreted against the background of the provisions of international humanitarian law, concluding that the grounds of permitted deprivation of liberty set out under Article 5 should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court's decision may be interpreted to mean that detention measures explicitly authorised under IHL are *ipso facto* proportionate responses to the emergency posed by an international armed conflict.

186 See the empirical study by Max Milas, 'Menschenrechte im Notstand: Ein rechtsempirischer Vergleich der menschenrechtlichen Spruchpraxis' (PhD thesis, on file).

187 Human Rights Committee, Communication no 8/1977, *Garcia Lanza de Netto v Uruguay* (1980) UN Doc CCPR/C/OP/1 para 15; Communication no 37/1978, *Soriano de Bouton v Uruguay* (1981) UN Doc CCPR/C/12/D/37/1978 para 12; Communication no 44/1979, *Pietrarroia v Uruguay* (1981) UN Doc CCPR/C/12/D/44/1979 para 14; Communication no 33/1978, *Buffo Carballal v Uruguay* (1981) UN Doc CCPR/C/12/D/33/1978 para 11; Communication no 1761/2008, *Yubraj Giri v Nepal* (2011) UN Doc CCPR/C/101/D/1761/2008 para 7.8; Communication no 1863/2009, *Dev Bahardur Maharjan v Nepal* (2012) UN Doc CCPR/C/105/D/1863/2009 para 8.6.

188 Human Rights Committee, Communication no 34/1978, *Landinelli Silva et al v Uruguay* (1981) UN Doc CCPR/C/12/D/34/1978 para 8.2; Communication no 628/1995, *Tae Hoon Park v Republic of Korea* (1998) UN Doc CCPR/C/64/D/628/1995 para 10.3; Communication no 933/2000, *Adrien Mudyo Busyo et al v Democratic Republic of Congo* (2003) UN Doc CCPR/C/78/D/933/2000 para 5.2.

189 Human Rights Committee, Communication No 2980/2017, *Ismet Özçelik et al* (2019) UN Doc CCPR/C/125/D/2980/2017 para 9.2.

190 IACtHR (n 135); *Judicial Guarantees in States of Emergency*. Advisory Opinion OC-9/87, IACtHR (6 October 1987).

191 IACtHR (n 136); *Zambrano Vélez et al v Ecuador*, Merits, Reparations and Costs. Judgment IACtHR (4 July 2007).

192 *CGAS v Switzerland*, no 21881/20, ECtHR 2022.

- [...] *to comply fully* with the requirements of Article 11.¹⁹³ The Court found that the restriction imposed on freedom of assembly in the present case was not justified because it was disproportionate.¹⁹⁴ However, it is unclear whether it would have come to a different conclusion if Switzerland had entered a derogation to the Convention.
76. Traditionally, the ECtHR has granted States a ‘wide margin of appreciation’ in cases in which they have derogated.¹⁹⁵ This applies, in particular, to the qualification of the emergency situation. Nevertheless, the Court has taken into account a *de facto* emergency as a factor in the proportionality test in the justification analysis on several occasions.¹⁹⁶ For example, the case of *Brogan* concerned measures of the United Kingdom against ‘the threat posed by organised terrorism’ in Northern Ireland.¹⁹⁷ Even though the situation was not covered by a derogation according to Article 15 ECHR, the ECtHR still found that ‘[t]his does not, however, preclude proper account being taken of the background circumstances of the case’.¹⁹⁸
77. Nevertheless, the early case law suggests a difference in the ECtHR’s approach to situations with a notified and a non-notified emergency. In *Brogan*, the Court had found no violation of Article 5 (1) ECHR (the right to liberty), but held that Article 5(3) ECHR had been violated because the applicants had not been brought ‘promptly’ before a judge.¹⁹⁹ When a similar issue arose a few years later in *Brannigan and McBride*, the Court referred to *Brogan* and indicated that Article 5(3) ECHR had, in principle, been violated.²⁰⁰ However, in *Brannigan and McBride*, the UK had derogated from the Convention under Article 15 ECHR. The Court held that the lack of judicial review of a short detention measure was a proportionate response to the emergency situation that was within the government’s margin of appreciation.²⁰¹ Contrary to *Brogan*, the Court did not find a violation of Article 5(3) ECHR.²⁰²
78. However, the ECtHR has applied a stricter proportionality standard in its more recent jurisprudence when assessing emergency measures.²⁰³ There are several high-profile cases in which the Court has found that the measures to address an emergency situation were not proportionate.²⁰⁴ Therefore, it seems that the Court is not more likely to

193 *ibid*, para 90, original text (emphasis added): ‘Elle était dès lors, tenue (...) *de se conformer pleinement* aux exigences de l’article 11’.

194 *ibid*, para 91.

195 *Ireland v United Kingdom* (n 137) § 207; *Brannigan and McBride v United Kingdom* (n 137) § 43; *A and Others v United Kingdom* (n 29) §184; *Mehmet Hasan Altan v Turkey* (n 137) § 91; *Bas v Turkey* (n 161) § 196.

196 See eg *Brogan and Others v United Kingdom*, no 11209/84, § 48, ECtHR 1988; *Hassan v United Kingdom* (n 185) § 103; ECtHR, *Bas v Turkey* (n 161) §§ 115, 199, 221.

197 *Brogan and Others v United Kingdom* (n 196) § 48.

198 *ibid*, § 48.

199 *ibid*, §§ 49–62.

200 *Brannigan and McBride v United Kingdom* (n 137) § 37.

201 *ibid*, §§ 58–60.

202 *ibid*, § 66.

203 See eg Michael O’Boyle, ‘Emergency Government and Derogation under the ECHR’ (2016) 16 *European Human Rights Law Review* 331, 339; Monika Polzin, ‘Der verrechtlichte Ausnahmezustand: Art. 15 EMRK und die Rolle des Europäischen Gerichtshofs für Menschenrechte’ (2018) 78 *Heidelberg Journal of International Law* 634, 644; Heike Krieger, ‘Notstand’ in Oliver Dörr and others (eds), *Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (2022) paras 12, 15; Kadelbach (n 166) 265.

204 *Aksoy v Turkey*, no 21987/93, §§ 71–84, ECtHR 1996; *A and Others v United Kingdom* (n 29) §§ 182–190; *Mehmet Hasan Altan v Turkey* (n 137) § 140; *Sahin Alpay v Turkey* (n 137) §§180–184; *Bas v Turkey* (n 161) §§159–161, 196–201, 230. In a recent case against Armenia, the ECtHR even denied the existence of an emergency situation: see *Dareskizb v Armenia*, no 61737/08, §§ 59–62, ECtHR 2021, §§ 59–62.

accept emergency measures as justified in cases of a declared and notified emergency. At least, the range of situations where the notification of an emergency would make a difference in the assessment of the ECtHR appears to be rather narrow.²⁰⁵

F. Conclusions

79. We observe great diversity in State practice regarding the situations that are claimed to give rise to states of emergency: war/armed conflict, *coups d'état*, acts of terrorism, organised crime, natural and technological disasters, including pandemics and other health emergencies (eg, the COVID-19 pandemic), financial or economic crises, and migration.
80. Considerable diversity can also be noted with respect to the form that states of emergency take. We documented emergencies that were declared at the domestic level and notified to the relevant international authorities (derogation), domestically declared emergencies (*de jure*), and non-declared (*de facto*) emergencies. *De jure* and *de facto* emergencies are the most prevalent forms of states of emergency encountered in State practice.
81. Given the difficulty in detecting *de facto* emergencies, the report suggests a number of process descriptors that can be used to identify them. First, a *de facto* emergency may begin as a declared state of emergency that fails to comply with approval or extension requirements, or that is used for situations different from those for which it was instituted. Second, *de facto* emergencies can be situations where emergency powers are incorporated into ordinary law. Third, *de facto* states of emergency can be situations where factual emergency conditions exist, the State takes extraordinary measures, yet fails to formally proclaim a state of emergency.
82. Regardless of which form of state emergency is at issue – derogation, *de jure*, *de facto* – and irrespective of whether measures taken pursuant to them are ultimately found to be compatible with international human rights standards, this report has demonstrated that they have a profound impact on a broad range of human rights and a systemic impact on democratic governance and the rule of law.
83. As the interim report has shown, in cases engaging treaty derogation clauses, international and regional human rights bodies have developed standards on threshold, declaration of emergency and notification of derogation, duration, domestic safeguards as well as on non-derogable rights, necessity and proportionality and non-discrimination. As regards derogations from international human rights treaties, the HRCtee and the IACtHR tend to apply stricter standards as regards procedural requirements and necessity of judicial remedies, which are held to be non-derogable. The ECtHR, conversely, at times also considers non-judicial remedies to be sufficient.
84. The present report has made two crucial findings concerning the standards applicable to States that have not derogated from international human rights treaty obligations,

205 Cf the assessments of Kadelbach (n 166) 266 (arguing that there is an approximation, but no identity of assessment standards) and Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12(10) *German Law Journal* 1766 <<https://doi.org/10.1017/S2071832200017557>> (arguing that 'a state of emergency is viewed no differently than any other ground that may limit the absolute vindication of a right'). See also Milas (n 186).

including because such a possibility is not provided by the instruments themselves,²⁰⁶ and those that employ *de facto* emergencies. First, even in these situations, States are bound by standards on threshold, duration, domestic control, non-discrimination, as well as proportionality *per se*, which are read into the necessity and proportionality requirement of the justification analysis. The salience of these common standards must be understood against the diverse constitutional and legislative practice of States relating to emergency situations. Second, States cannot evade non-derogability of certain rights by opting not to enter a formal derogation – thus, even in declared, but non-notified, and *de facto* situations of emergency, non-derogable rights remain non-derogable. Any other understanding is unsupported by the general rules of treaty interpretation, and would be entirely contrary to the object and purpose of the treaty. However, to the extent that restrictions of the non-derogable right are possible under a justification clause, the latter continues to apply even in emergency situations.

85. This report has demonstrated that the review of emergency measures by international bodies is usually very strict, regardless of whether States have derogated or not. The HRCtee and the IACtHR have never found a measure to be justified under the emergency provision in case of derogation. In particular, the inter-American system has greatly expanded the list of non-derogable rights beyond the list in Article 27 ACHR; including, for example, due process and judicial remedies as non-derogable rights. Furthermore, in the inter-American system, a state of emergency may only be declared to preserve the democratic form of government of the State. The picture is less clear for the ECtHR. While the ECtHR has traditionally afforded a ‘wide margin of appreciation’ to derogating States, it has more recently shown a tendency to apply a stricter standard of review in situations in which States have derogated under Article 15 ECHR.
86. The prevalence of *de jure* and *de facto* states of emergency poses particular challenges. Similar to declared emergencies, *de facto* emergencies can negatively affect the enjoyment of civil, political and socio-economic rights. It is their systemic impact which may be more profound: *de facto* states of emergency contribute to the perpetuation of threats, the normalisation of exceptional measures, and the securitisation and militarisation of political, social, and economic life. It also poses challenges for monitoring by international bodies, a reality which this Committee seeks to address in its recommendations.

G. Recommendations

87. **Preliminary assessments:** States considering declaring a state of emergency at the national level and/or entering derogations to treaties should conduct a preliminary assessment of the measures they intend to take with a view to establishing whether:
- i) they can be accommodated by ordinary limitation clauses on rights,
 - ii) they undermine the rule of law and principles of democratic governance.

In respect to the first limb, the assessment must pay due regard to the fact that certain rights are non-derogable under any circumstances, and that emergency measures, just

²⁰⁶ Such as from the African Charter on Human and Peoples’ Rights and the International Covenant on Economic, Social and Cultural Rights. In this context, see the African Commission’s ‘Guidelines on adhering to human and peoples’ rights under the African Charter in the context of states of emergency or disaster’ adopted during the African Commission’s 74th Ordinary Private Session, held virtually from 21 February–7 March 2023.

like each and every interference with rights in normal times, are subject to necessity and proportionality standards, including threshold, duration, domestic control, non-discrimination standards, and proportionality per se. Under the second limb, States should assess whether the measures affect the principles of separation of powers and parliamentary and judicial oversight of executive action.

88. To facilitate this preliminary assessment, States should engage in prompt consultations with domestic legislatures, national human rights institutions, civil society organisations, and, whenever possible, international expert bodies. The outcome of the assessment and course of action pursued – to address the situation through a declaration of emergency, a derogation from one or more treaties, or to adopt new or adapt existing legislation – should be transparently justified in a public report.
89. A similar assessment should be conducted by **sub-national authorities** (State prime ministers, governors, mayors) who are empowered to take emergency measures.
90. **Notification of derogations:** When invoking derogation clauses, States must ensure that their notice of derogation includes all essential information to keep other States Parties, monitoring bodies, and domestic and international civil society organisations fully informed about the nature of the emergency and the measures implemented to address it. This should encompass details regarding the emergency legal and administrative framework, a list of the treaty provisions from which it has derogated, and the specified date of termination for the derogation.
91. **Monitoring of states of emergency and derogations at the international level:**
 - a) When receiving a notice of derogation, the Secretary-General of the relevant international organisation should request additional information from the derogating State, if deemed necessary, to assess the nature and scope of the derogation.
 - b) UN treaty bodies – whether they monitor treaties that allow for derogations or not – should require all State Parties to report on the notified, *de jure* (including at sub-national level), and *de facto* emergencies as part of their periodic review obligations. Information on states of emergency, including an assessment of their impact on human rights and on the rule of law and democratic governance (see para 86 above) can be included as part of the ‘common core document’ and should be regularly updated.
 - c) A condition for the effectiveness of notifications is that treaty-monitoring bodies engage in a robust review of States’ derogations rather than in a mere bureaucratic exercise.
 - d) Reporting on states of emergencies should be formally included as part of the UPR process. This can be achieved by amending the technical guidance provided to States, UN entities and civil society stakeholders, for inclusion in their respective documents, the national report, compilation of UN information, and the summary of stakeholders’ information.
 - e) Based on their mandate, special procedures of the Human Rights Council should follow closely situations of emergency regardless of the existence of a formal derogation.