

# WITHIN THE MARGIN OF ERROR: DEROGATIONS, LIMITATIONS, & THE ADVANCEMENT OF HUMAN RIGHTS\*

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## ABSTRACT

The article examines the effects of derogation and limitations clauses embodied in human rights instruments. The former allow for temporary deviations that limit or detract from the rights provided by human rights instruments while the latter constitute justifiable restrictions on the exercise of certain rights guaranteed by human rights instruments. In theory, these clauses, collectively referred to as ‘special measures’, aim to strike a balance between the individual’s rights and obligations of the state. However, while they have the capacity to advance human rights in theory, the use of these measures has been problematic in practice. The article delves into the rationale and practice surrounding the taking of the right to derogate and the imposition of limitations. It considers the necessity of the inclusion of these measures in human rights instruments. It examines how they affect the implementation of the rights embodied therein. Lastly, it analyses the effectiveness of the safeguards against abuse. The article notes that the standards for assessing the validity of measures taken by governments and the procedure for monitoring compliance have to be re-evaluated. Moreover, it considers the need for greater institutional oversight.

## I. INTRODUCTION

States have frequently faced exceptional dangers ranging from crises, disturbances, disasters, and conflicts threatening its security or the general welfare of individuals.<sup>1</sup> During these extraordinary circumstances, insisting on

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the utmost protection of individual interests may lead to serious detrimental effects on the welfare of the community.<sup>2</sup> Thus, there is a need to accommodate both the individual rights recognised in international covenants on human rights and the interests of state parties in securing, among others, public order.<sup>3</sup>

This accommodation is reflected in the numerous instruments protecting human rights. Provisions allowing states to resort to derogatory measures have been included in these instruments ‘after much debate and only after including protections against abuse’.<sup>4</sup> These clauses “recognise the primary responsibilities of the state as the protector of society” but accept that in extraordinary situations, certain guarantees may need to be suspended within defined limits.<sup>5</sup> States are allowed, should it become necessary, “to limit the enjoyment of individual rights and freedoms and possibly even to suspend their enjoyment altogether” in order to restore peace and order.<sup>6</sup>

Similarly, these instruments also contain clauses that allow states to put limitations on select human rights under particularly defined circumstances.<sup>7</sup> The inclusion follows from the recognition that the instruments were not intended to be “complete legal regulations” but are to be complemented by national law in providing a system for the protection of

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<sup>1</sup> Mohammad El Zeidy, *The ECHR and States of Emergency: Article 15 – A Domestic Power of Derogation from Human Rights Obligations*, 4 SAN DIEGO INT’L L.J. 277, 278 (2003), citing JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW, 221 (1992).

<sup>2</sup> Christoph Schreuer, *Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights*, 9 YALE J. WORLD PUB. ORD. 113 (1982). See Michael O’Boyle, *Emergency Situations and the Protection of Human Right: A Model Derogation Provision for a Northern Ireland Bill of Rights*, 28 N. IR. LEG. Q. 160 (1977); Koja, *Staatsnotstand, Notstandsrecht und Ausnahmestand in Verfassungen europäischer Staaten*, 37 Universitas 173 (1982).

<sup>3</sup> Zeidy, *supra* note 1.

<sup>4</sup> OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 813 (2003).

<sup>5</sup> Richard Burchill, *When does an Emergency Threaten the Life of the Nation? – Derogations from Human Rights Obligations and the War on International Terrorism*, 8 Y.B. N.Z. JURIS. 99, 100 (2005); P.R. Ghandhi, *The Human Rights Committee and Derogation in Public Emergencies*, 32 GER. Y.B. INT’L L. 323, 327 (1989); Rosalyn Higgins, *Derogations under Human Rights Treaties*, 48 BRIT. Y.B. INT’L L. 281, 315 (1977).

<sup>6</sup> Office of the High Commissioner on Human Rights, *supra* note 4, at 813. See Scott Sheeran, *Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT’L L. 491, 510 (2013); MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 90 (2005 ed.).

<sup>7</sup> Oscar Garibaldi, *General Limitations on Human Rights: The Principle of Legality*, 8,17 HARV. INT’L L.J. 503, 504 (1976).

human rights.<sup>8</sup> These “limitation clauses” provide a “highly flexible means of balancing the various interests involved in particular cases.”<sup>9</sup> As applied by convention organs, “they have proven useful when deferring to the domestic authorities” decisions while “preserving the convention machinery as an ultimate safeguard in the event of clearly unjustified restrictions.”<sup>10</sup>

Of course, there are dangers associated with these *special measures*. There has been widespread practice among states of invoking public emergencies or other state interests and derogating from or imposing limitations on human rights.<sup>11</sup> In these situations, serious violations were observed to have been committed.<sup>12</sup> Thus, while individual rights are not absolute and states are accorded a certain degree of leeway, the international community recognises the need to “guard against spurious invocations of community interests to excuse violations of human rights.”<sup>13</sup>

Moreover, it has been equally noted that human rights bodies have been unable to effectively adjudicate the propriety of the special measures imposed by states.<sup>14</sup> This is exacerbated by the fact that international jurisprudence on the matter has been inconsistent and divergent.<sup>15</sup> Worse, it has been “underpinned by excessive judicial deference and abdication of the legal review of states’ often dubious claims of a state of emergency.”<sup>16</sup>

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<sup>8</sup> *Id.* at 503.

<sup>9</sup> Berend Hovius, *The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter*, 17 OTTAWA L. REV. 213, 260 (1985). See Stefan Sottiaux, “Bad tendencies” in the ECiHR’s “Hate Speech” Jurisprudence, 7 EUR. CONST. L. REV. 40, 42 (2018); Kathleen Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, U. ILL. L. REV. 789, 797 (1996); OWEN FISS, *THE IRONY OF FREE SPEECH* 15 (1996); Nazila Ghanea, *Expression and Hate Speech in the ICCPR: Compatible or Clashing*, 5 RELIGION & HUM. RTS. 171, 178 (2010) citing Caitlin, *A Proposal for Regulating Hate Speech in the United States: Balancing Rights Under the International Covenant on Civil and Political Rights*, 69 NOTRE DAME L. REV. 777 (1994); Anne Showalter, *Resolving the Tension between Free Speech and Hate Speech: Assessing the Global Convergence Hypothesis*, 26 DUKE J. COMP. & INT’L L. 377, 380 (2016).

<sup>10</sup> *Id.*

<sup>11</sup> Sheeran, *supra* note 6, at 510 citing Nowak, *supra* note 6, at 90.

<sup>12</sup> *Id.* at 492, citing Leandro Despouy, Special Rapporteur, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency: Tenth Annual Report*, ¶¶ 20, 33, 48, E/CN.4/Sub.2/1997/19 (1997); See JOHN FITZPATRICK, *HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY* 1 (1994).

<sup>13</sup> Schreuer, *supra* note 2, at 113, citing MYRES MCDUGAL, HAROLD LASSWELL, & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 413–15 (1980).

<sup>14</sup> Brendan Mangan, *Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform*, 10 HUM. RTS. Q. 372, 372 (1988).

<sup>15</sup> Sheeran, *supra* note 6, at 491.

<sup>16</sup> *Id.*

It is within this context that the article examines the effects of these special measures. It submits that these measures, whether they be in the form of derogations or limitations, have the capacity to advance human rights in theory but have been problematic in practice. Conceptually, these measures provide a balance between state responsibility and individual rights. They provide wide latitude to governments to implement human rights and to harmonise them with other prevailing interests. Nonetheless, improvements in the safeguards have to be made including the clarification of the standards for these special measures and the provision of effective procedures for compliance and monitoring. *Parts II* and *III* of the article examine the concepts of derogations and limitations respectively and their availability under various instruments. *Part IV* delves into the necessity of these special measures and how they advance human rights. Lastly, *Part V* analyses the effectiveness of the safeguards against abuse.

## II. DEROGATIONS

Derogation measures are temporary deviations that limit or detract from the rights provided by human rights instruments.<sup>17</sup> These allow states to suspend certain individual rights under exceptional circumstances.<sup>18</sup> What constitutes these “exceptional circumstances” vary from instrument to instrument.<sup>19</sup> Under the International Covenant on Civil and Political Rights (“ICCPR”) these are referred to as “times of public emergency which [threaten] the life of the nation.”<sup>20</sup> The European Convention on Human Rights (“ECHR”) employs a similar “operative phrase” which is “time of war or other public emergency threatening the life of the nation.”<sup>21</sup> On the other hand, the American Convention on Human Rights (“ACHR”) “outlines a wider variety of situations” that include “[times] of war, public danger, or other emergencies that [threaten] the independence or security of a [state].”<sup>22</sup>

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<sup>17</sup> Melkamu Tolera, *Absence of a Derogation Clause Under the African Charter and the Position of the African Commission*, 4 BAHIR DAR U.J.L. 229, 231 (2014); *Id.* at 231.

<sup>18</sup> OREN GROSS, LAW IN A TIME OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 257 (2006); Frederick Cowell, *Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR*, 1 BIRKBECK. L. REV. 135, 136 (2013); DIANE DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES 252 (2012).

<sup>19</sup> *Id.* at 257.

<sup>20</sup> International Covenant on Civil and Political Rights art. 4, Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>21</sup> Gross, *supra* note 18, at 257, *citing* European Convention for the Protection of Human Rights and Fundamental Freedoms, *as amended*, art. 15, Nov. 4, 1950.

<sup>22</sup> *Id.*, *citing* American Convention on Human Rights art. 27, Nov. 22, 1950.

Derogation clauses, however, do not provide a blanket authority to adjust or suspend the operation of rights protected by these human rights instruments.<sup>23</sup> These measures must conform to the conditions and limits provided by the covenants.<sup>24</sup> These actions are further envisioned to be strictly and closely monitored by the bodies administering the instruments.<sup>25</sup> After all, these measures do not operate as a shield for the “cynical and calculated destruction of the rights” provided by the covenants.<sup>26</sup>

As such, states cannot merely invoke the existence of exceptional circumstances to evade the obligations that it has undertaken.<sup>27</sup> A state availing itself of the option to derogate from its human rights obligations has to immediately inform other states of its intention to do so.<sup>28</sup> In particular, it has to provide information regarding three matters: “the provisions from which it has derogated; the reasons by which it was actuated; and the date on which it terminates such derogation.”<sup>29</sup> This notification is essential to allow the bodies administering the human rights to use instruments to assess whether the measures taken by the state “were strictly required by the exigencies of the situation.”<sup>30</sup> The notification also permits other states to evaluate the compliance of the state with the requirements of the relevant instrument.<sup>31</sup> Moreover, the state must point to a domestic procedure to inform their population of the existence of the emergency. This requirement mirrors the general requirement for permissible limitations to human rights to be “prescribed by law.”<sup>32</sup> Nonetheless, failure to comply with the procedural obligations “will not necessarily deprive [states] of its [option] to

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<sup>23</sup> PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 160 (2013).

<sup>24</sup> *Id.*

<sup>25</sup> SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES MATERIALS AND COMMENTARY 910 (2013 ed.).

<sup>26</sup> *Id.*, citing Ghandhi, *supra* note 5, at 323.

<sup>27</sup> Human Rights Committee, U.N. DOC. 34/78, A/36/40 (1981); Landinelli Silva v. Uru., ¶ 8.3; 64/1979, CCPR/C/OP/1 (H.R.C. 1982); Salgar de Montejo v. Colom., ¶ 10.3.

<sup>28</sup> Human Rights Committee, General Comment No. 29: Derogations during State of Emergency Article 4 (Aug. 21, 2001), ¶ 17.

<sup>29</sup> Ghandhi, *supra* note 5, at 332.

<sup>30</sup> Human Rights Committee, *supra* note 28, at ¶ 17.

<sup>31</sup> *Id.*

<sup>32</sup> Joseph & Castan, *supra* note 25, at 919, citing Human Rights Committee, Concluding Observations on Azerbaijan (1994), ¶ 7; Human Rights Committee, Concluding Observations on Nepal, (1995), ¶ 9; Human Rights Committee Concluding Observations on Zambia (1996), ¶ 11; Human Rights Committee, Concluding Observations on Morocco (2004), ¶ 10.

derogation.<sup>33</sup> However, non-compliance may be taken as *prima facie* evidence of bad faith.<sup>34</sup>

States also have to comply with substantive requirements that generally involve the following: the existence of an emergency; proportionality of measures; conformity with other international law obligations; non-discrimination; and observance of non-derogable rights. First, the emergency must be actual or imminent such that “the continuance of the organised life of the community must be threatened.”<sup>35</sup> The crisis or danger must be exceptional such that it affects a state’s “physical integrity, political independence or territorial integrity, or the existence or function of indispensable institutions designed to protect human rights.”<sup>36</sup> Second, the measure must be proportional and should be only “to the extent strictly required” by the circumstances.<sup>37</sup> In relation to this, the measure taken may only be taken for as long as the threat to the life of the nation exists.<sup>38</sup> Third, the measure must not be inconsistent with the state’s other international law obligations.<sup>39</sup> Thus, the privilege may not be exercised if the taking of the measure entails a breach of the state’s other international obligations.<sup>40</sup> Fourth, the measures may not discriminate solely on the ground of race,

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<sup>33</sup> *Id.* at 921 citing Human Rights Committee, 8/77, A/35/40 (1977); Human Rights Committee, Weismann v. Uru., Communication 4/77, A/35/40, ¶ 15 (1977); Human Rights Committee, Torres Ramírez v. Uru., Communication 44/79, A/35/40, ¶ 17 (1977); Human Rights Committee, Pietrarroia v. Uru., ¶ 14. See Human Rights Committee, Polay Campos v. Peru Communication 577/94, (1997); Human Rights Committee, Aber v. Alegria, Communication 1439/05 (2007); Brannigan v. U.K., Eur. Ct. H.R., App. 14553/89, 14554/89 ¶ 43 (May 25, 1993).

<sup>34</sup> Schreuer, *supra* note 2, at 120. See Higgins, *supra* note 5, at 290–293.

<sup>35</sup> Gross, *supra* note 18, at 249; Scott Dolezal, *The Systematic Failure to Interpret Article IV of the International Covenant on Civil and Political Rights: Is There a Public Emergency in Nigeria?*, 15 AM. U. INT’L. L. REV. 1163, 1187–88 (2000), citing *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR*, 7 HUM. RTS. Q. 1, Principle 41 (1985); *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT’L L. 1072, Principle 39 (1985).

<sup>36</sup> *Id.*; See Desierto, *supra* note 18, at 247, citing MARC BOSSUYT, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 81–102 (1987); Joseph & Castan, *supra* note 25, at 911, citing Nowak, *supra* note 6, at 91; Weismann v. Uru., *supra* note 33; Human Rights Committee, Milan Sequiera v. Uru., Communication 1/6, A/35/60 (1977); Pietrarroia v. Uru., *supra* note 33; Habeas Corpus in Emergency Situations, Advisory Opinion, OC-8/97, Inter-Am. Ct. H.R., (ser. A), 33 (1987).

<sup>37</sup> Human Rights Committee, *supra* note 28, at ¶¶ 4, 5; *Siracusa Principles*, *supra* note 35, Principle 54; Joseph & Castan, *supra* note 25, at 912, citing Joseph Sarah, *Human Rights Committee: General Comment 29, (Toonen v. Australia)*, HUM. RTS. L. REV. 81, 97 (2002); Human Rights Committee, 15<sup>th</sup> Session, Communication 488/92, CCPR/C/50/D, ¶ 8.3 (1994).

<sup>38</sup> Joseph & Castan, *supra* note 25, at 913. See McGoldrick, *The Interface Between Public Emergency Powers and International Law*, 2 INT’L J. CONST. L. 380, 384 (2004).

<sup>39</sup> Human Rights Committee, *supra* note 28, at ¶ 9.

<sup>40</sup> *Id.*

colour, gender, language, religion, or social origin.<sup>41</sup> Lastly, while there is no hierarchy concerning the importance of rights, there are certain rights the operation of which may not be suspended even in times of emergency.<sup>42</sup>

However, not all human rights instruments contain derogation clauses. For instance, the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) does not contain an equivalent of the derogation clause under the ICCPR.<sup>43</sup> It has been submitted that “the absence of a derogation clause can only be understood to mean that the suspension of economic, social and cultural rights is not permitted.”<sup>44</sup> Where “public emergency necessitates special measures infringing on economic, social or cultural rights,” these measures could be made by appealing to the limitations inherent in existing rights and without the need of justifying such under the concept of derogation.<sup>45</sup> Moreover, “derogations are seen as irrelevant to economic and social rights treaties, whose provisions are far more malleable than those of civil and political rights agreements.”<sup>46</sup>

Similarly, such kind of a clause is also absent in the other fundamental human rights treaties under the UN system such as the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), and Convention

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<sup>41</sup> Joseph & Castan, *supra* note 25, at 915; Nowak, *supra* note 6, at 99–100; Higgins, *supra* note 5, at 287.

<sup>42</sup> Human Rights Committee, *supra* note 28, at ¶¶ 7, 10, 11; Joseph & Castan, *supra* note 25, at 916; Human Rights Committee, *Giri v. Nepal*, Communication 1671/2008, ¶ 7.9 (2011).

<sup>43</sup> International Covenant on Economic, Social, and Cultural Rights, 993 U.N.T.S. 3, Jan. 3, 1976; Desierto, *supra* note 18, at 248; BEN SAUL, DAVID KINLEY, & JACQUELINE MOWBRAY, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS* 258–59, 262 (2014), *citing* Ssenyonjo, *Economic, Social and Cultural Rights*, in *INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND* 49, 77 (Baderin & Ssenyonjo ed. 2010); Committee on Economic, Social, and Cultural Rights, General Comment No. 14, E/C12/2000/4 (Aug. 11, 2000), ¶ 47; Committee on Economic, Social, and Cultural Rights, General Comment No. 15, E/C12/2005/4 (Aug. 11, 2005), ¶ 17.

<sup>44</sup> Saul, Kinley, & Mowbray, *supra* note 43, at 258.

<sup>45</sup> *Id.* at 260, 262. *See* Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. 136, ¶ 136 (2004).

<sup>46</sup> Emilie Hafner-Burton *et al.*, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT’L ORG. 673, 675 (2011) *citing* MARIA CARMONA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS* 295 (2003).

on the Rights of Persons with Disabilities (“CRPD”).<sup>47</sup> The “omission [appears to] emphasise the utmost normative importance of the rights contained in these treaties and the drafters’ preference not to permit their circumvention even in times of public emergencies.”<sup>48</sup> The drafters of the treaties are said to have “agreed that certain fundamental liberties [...] were non-derogable because they were ‘indispensable for the protection of the human being.’”<sup>49</sup>

Notably, the African Charter on Human and Peoples’ Rights (“ACHPR”) also does not incorporate a derogation clause.<sup>50</sup> The reason for such an exclusion is not immediately apparent although theories have been submitted ranging from the view that the drafters did not intend to allow states to derogate from the instrument;<sup>51</sup> did not want to encourage the use of emergency powers;<sup>52</sup> or recognised the relative lack of supervisory powers of the instrument’s commission.<sup>53</sup>

### III. LIMITATIONS

In contrast with derogation measures, *limitation clauses* constitute justifiable restrictions on the exercise of certain rights guaranteed by human rights instruments in ordinary circumstances.<sup>54</sup> These clauses are

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<sup>47</sup> Desierto, *supra* note 18, at 248 *citing* International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of Persons with Disabilities, Dec. 6, 2006, 2515 U.N.T.S. 3.

<sup>48</sup> Desierto, *supra* note 18; *See* Egon Schwelb, *The International Convention on the Elimination of all Forms of Racial Discrimination*, 15 INT’L & COMP L.Q. 4, 996 (1966); Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT’L L. 1, 97 (2004); Michael Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT’L L. 211 (1997).

<sup>49</sup> Hafner-Burton et al., *supra* note 46, at 675.

<sup>50</sup> African Charter on Human and Peoples’ Rights, June 27, 1981, 21 ILM 58.

<sup>51</sup> Office of the High Commissioner on Human Rights, *supra* note 4, at 816, *citing* African Commission on Human and Peoples’ Rights, *Commission Nationale des Droits de l’Homme et des Libertés v Chad*, 74/92, ¶ 40 (1995).

<sup>52</sup> Cowell, *supra* note 18, at 153, *citing*, Constitutional Rights Project v. Nigeria, 60/91, ¶¶ 41–42 (A.C.H.P.R 2000); Bronwen Manby, *Civil and Political Rights in the African Charter on Human and Peoples Rights: Articles 1-7*, in THE AFRICAN CHARTER OF HUMAN PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE, 176 (Evans & Murray ed., 2008).

<sup>53</sup> *Id.*

<sup>54</sup> Daniel O’Donnell, *Commentary by the Rapporteur on Derogation*, 7 HUM. RTS. Q. 23 (1985). *See also* ANNA-LENA SVENSSON-MCCARTHY, INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION – WITH SPECIAL REFERENCE TO THE TRAVAUX



“conceptually narrower than derogation and were designed to meet specific objectives to a specific extent and for certain democratically justifiable purposes.”<sup>55</sup> They recognise that “human rights are not absolute” and that the individual has duties to the community in exercising the rights and freedoms granted to him including the respect for the rights of others.<sup>56</sup> This being the case, a right may be limited in order to prevent conflict with other rights. Limitations, which appear in most human rights instruments such as that of the ICCPR, ICESCR, ECHR, ACHR, and ACHPR,<sup>57</sup> are “prudent measures designed to protect public goods and the rights of others without undermining essential human rights that provide the foundation for a dignity-based society.”<sup>58</sup> These provisions allow states to “balance individual rights and public interests” within pre-defined permissible restrictions and subject to the determination of monitoring bodies that serve as the “ultimate safeguard in the event of clearly unjustified restrictions.”<sup>59</sup>

The collective need sought to be protected varies from instrument to instrument but they nevertheless share some similarities. One objective commonly sought to be secured by human rights instruments is the protection of the rights and reputations of others. By *rights*, what is meant are the other rights included in the covenants and more generally, in international human rights law.<sup>60</sup> The term *reputation* pertains to the restriction, as in the case of the freedom of expression, justifiable to protect the character of others as in the

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PRÉPARATOIRES AND CASE-LAW OF THE INTERNATIONAL MONITORING ORGANS 721(1998). See Sara Stapleton, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 NYU J. INT'L L. & POL. 535 (1999).

<sup>55</sup> Fionnuala Ní Aoláin, Special Rapporteur, *Report 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*, A/HRC/37/52 (2018), ¶ 8.

<sup>56</sup> Abdi Ali, *Derogation from Constitutional Rights and Its Implication under the African Charter on Human and People's Rights*, 17 L. DEM. & DEV. 78, 90 (2013) citing ALEX CONTE & RICHARD BURCHILL, *DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 43–51 (2009). See Garibaldi, *supra* note 7, at 517.

<sup>57</sup> LOUISE DOSWALD-BECK, *HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM* 71 (2011). See ICCPR, arts. 12, 18, 19, 21, 22; ICESCR, arts 4, 5; ECHR, arts 8–11; ACHR, arts. 12, 13, 15, 16, 22; ACHPR, arts. 8, 9, 11, 12, 13, 14, 27(2).

<sup>58</sup> Aoláin, *supra* note 55, at ¶ 8.

<sup>59</sup> Sheeran, *supra* note 6, at 505; Hovius, *supra* note 9, at 260.

<sup>60</sup> Human Rights Committee, General Comment No. 34: Freedom of Opinion and Expression Art. 19, (Sept. 12, 2011) ¶ 28. See Human Rights Committee, *Ballantyne v. Can.*, Communication 359/1989, (1993); Human Rights Committee, *Jong-Cheol v. S. Kor.*, Communication 968/2001, (2005); Human Rights Committee, *Svetik v. Belr.*, Communication No. 927/00 (2004); Human Rights Committee, *Shchetko v. Belr.*, Communication 1009/2001 (2006).

cases of defamation and libel.<sup>61</sup> Another objective, *national security* or *collective security*, is invoked as a restriction should there be a threat to the political independence or the territorial integrity of the state.<sup>62</sup> In contrast, the protection of *public order* is “a broader concept than national security and may be defined as the sum of rules which ensure the peaceful and effective functioning of society.”<sup>63</sup> The concept of *morals* pertains to the many “social, philosophical, and religious traditions.”<sup>64</sup> Consequently, the limitations imposed for the purpose of protecting morals “must be based on principles not deriving exclusively from a single tradition.”<sup>65</sup> Thus, it should reflect a pluralistic view of society rather than a single religion or culture.<sup>66</sup>

Still, another form of limitation pertains to the prohibition against the abuse of rights enshrined in human rights instruments. For instance, article 5(1) of the ICESCR and ICCPR “prohibits the abuse of one right to destroy another.”<sup>67</sup> A similar text appears in article 17 of the ECHR and article 29 of

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<sup>61</sup> Joseph & Castan, *supra* note 25, at 610. *See* Human Rights Committee, Rafael Marques de Morais v. Angl., Communication 1128/2002 (2005); Human Rights Committee, Adonis v. Phil., Communication 1815/2008 (2012).

<sup>62</sup> Joseph & Castan, *supra* note 25, at 612; Human Rights Committee, MA v. Ital., Communication 117/81 A/39/40 (1984); Human Rights Committee, Singh Bhinder v. Can. Communication 208/1986, (1988); Human Rights Committee, Kim v. S. Kor., Communication 512/1992 (1995); Human Rights Committee, Malakhovsky v. Belr., Communication 1207/2003 (2005); Human Rights Committee, Prince v. S. Afr., Communication 1476/2006 (2007); Human Rights Committee, A.K. v. Uzb., Communication 1233/2004 (2009); Human Rights Committee, Sing. v. Fr., Communication 1876/2009 (2011).

<sup>63</sup> Joseph & Castan, *supra* note 25, at 618, *citing* Lockwood Jr, Finn, & Jubinsky, *Working Paper for the Committee of Experts on Limitation Provisions*, 7 HUM. RTS. Q. 35, 57–59 (1985); *See* Human Rights Committee, Mukong v. Cameroon, Communication 458/1991(1994); Human Rights Committee, Coeriel v. Neth., Communication 453/91 (1994); Human Rights Committee, Gauthier v. Can., Communication 633/1995 (1999); Human Rights Committee, Baban v. Austl., Communication 1014/2001 (2003); Human Rights Committee, Coleman v. Austl., Communication 1157/2003 (2006).

<sup>64</sup> Human Rights Committee, *supra* note 62, at ¶ 48; Concluding Observations on Kuwait, CCPR/C/KWT/CO/2, ¶ 24 (2011). *See* Human Rights Committee, Länsman v. Fin., Communication 511/1992, ¶ 9.4 (1994). *See also* Human Rights Committee, Herzber v. Fin., Communication 61/1979 (1983); Human Rights Committee, Delgado Paez v. Colom., Communication 195/1985 (1990).

<sup>65</sup> *Id.*

<sup>66</sup> *See* Human Rights Committee, CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), ¶ 8 (July 30, 1993).

<sup>67</sup> Saul, Kinley, & Mowbray, *supra* note 43, at 240; PAULIEN DE MORREE, RIGHTS AND WRONGS UNDER THE ECHR: THE PROHIBITION OF ABUSE OF RIGHTS IN ARTICLE 17 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 104 (2016); MARIA MAGDALENA SEPÚLVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 304 (2003).

the ACHR.<sup>68</sup> Thus, much like states “may never use the limitation clauses” to such an “extent that the very substance of those rights and freedoms would be annihilated,” individuals are equally “barred from availing themselves of the same rights and freedoms with a view to overthrowing the regime of the rule of law [that] constitutes the basic philosophy of the covenant.”<sup>69</sup> The restriction relates to the concept of “disqualification measures” that make a claim under a right enshrined under the instruments inadmissible if it is incompatible with the provisions of the covenants.<sup>70</sup> Simply, it aims to prevent groups and individuals from claiming protection under the rights and freedoms secured by conventions while at the same time destroying the other rights and freedoms secured by the same.<sup>71</sup>

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<sup>68</sup> Thomas Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences* 30 AM. U. L. REV. 155, 156 (1980); *See* *Lawless v. Ir.*, Eur. Ct. H.R., (No. 3) App. 332/57 (July 1, 1961), ¶ 7; *Benjamin v. Trin. & Tobago*, Inter-Am. Ct. H.R., ¶ 81 (Sept. 1, 2001); *Constantine v. Trin. & Tobago*, ¶ 63 (Sept. 1, 2001); *Hilaire v. Trin. & Tobago*, ¶ m64 (Sept. 1, 2001).

<sup>69</sup> Human Rights Committee, *Lopez Burgos v. Uru.*, Communication R12/52, Appendix, ¶ 1 (1981).

<sup>70</sup> Fernandez, *Regulating Philippine Internet Hate Speech: Between the Approach of the UN Human Rights Committee and the European Court of Human Rights and that of the US Supreme Court*, 22 MEDIA & ARTS L. REV. (2019), *citing* Human Rights Committee, *JRT v. Can.*, Communication 104/1981 (1983), ¶ 8(b); 1868/2009 CCPR/C/99/D/1868/2009 (4 September 2010) (*Andersen v. Den.*), ¶ 4.3; *See* 550/1993, CCPR/C/58/D (19 July 1995) (*Faurisson v. France*), ¶ 7.4.

<sup>71</sup> Raphael Pangalangan, Gemmo Fernandez, & Ruby Tugade, *Marcosian Atrocities: Historical Revisionism and the Legal Constrains on Forgetting*, 19 ASIA-PACIFIC J. HUM. RTS. & L. 140, 187 (2019), *citing* Paolo Lobba, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, 26 EUR. J. OF INT'L L. 237, 240 (2015); *Glimmerveen v. Neth.*, App. 8348/78, 8406/78, Eur. Comm'n H.R., (1979); *Kühnen v. Fed. Rep. Ger.*, Eur. Ct. H.R., App. 12194/86, ¶ 1 (May 12, 1988); *Walendy v. Ger.*, Eur. Ct. H.R., App. 21128/92 (Jan. 11, 1995); *Remer v. Ger.*, Eur. Ct. H.R., App. 25096/94 (Sept. 6, 1995); *Nationaldemokratische Partei Deutschlands v. Ger.*, Eur. Ct. H.R., App. 25992/94 (Nov. 29, 1995); *Rebhandl v. Austria*, Eur. Ct. H.R., App. 24398/94 (Jan. 16, 1996); *Hennicke v. Ger.*, Eur. Ct. H.R., App. 34889/97 (May 21, 1997); *Nachtmann v. Austria*, Eur. Ct. H.R., App. 36773/97 (Sept. 9, 1998); *Lehideux v. Fr.*, Eur. Ct. H.R., App. 55/1997/839/1045, ¶¶ 47, 53 (Sept. 23, 1998); *Witzsch v. Ger.*, Eur. Ct. H.R., App. 41448/98 (Apr. 20, 1999); *Garaudy v. France*, Eur. Ct. H.R., App. 65831/01, ¶ 28 (June 24, 2003); *Witzsch v. Ger.*, Eur. Ct. H.R., App. 7485/03, ¶ 3 (Dec. 13, 2005).

#### IV. SPECIAL MEASURES IN THEORY

##### A. Necessity of Special Measures

As previously mentioned, the inclusion of *special measures* was not an issue during the drafting of the aforementioned instruments as in the case of the ICCPR. For instance, concerns have been forwarded in the case of derogatory measures for fears that human rights may be arbitrarily suspended under the plea of national emergency.<sup>72</sup> It was “recognised that crises provide convenient excuses for governments to enhance their powers, dismantle democratic institutions, and repress political opponents.”<sup>73</sup> Despite the reservations raised, support subsequently materialised in view of the recognition of the “responsibility of states towards the members of the community of nations for any measures derogating from human rights and fundamental freedoms.”<sup>74</sup> In the end, specific limitations for certain rights were put in place along with a derogation clause whose exercise was limited to specified circumstances, the taking of which was subjected to a specified procedure.<sup>75</sup>

The inclusion of these measures may be said to be in accord with the principle that “the duty of protection on the part of the government, either by the general principles of international law or by special agreement of the treaties, only goes as far as permitted by possibility.”<sup>76</sup> The state should not be made liable for wrongful acts that are not within its control. Thus, the standard that governments must adhere to “is context specific,” “dependent on the substantive international legal rule at issue,” and “corresponds to the means at its disposal.”<sup>77</sup> Special measures then form the basis for the

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<sup>72</sup> Committee on Human Rights, Summary Record of the 127<sup>th</sup> Meeting, CHR, 5<sup>th</sup> Sess., E/CN.4/SR.127 (Jun. 17, 1949), 7; Summary Record of the 126<sup>th</sup> Meeting, CHR, 5<sup>th</sup> Sess., E/CN.4/SR.126 (Jun. 17, 1949), 3, 6, 8; Summary Record of the 195<sup>th</sup> Meeting, CHR, 6<sup>th</sup> Sess., E/CN.4/SR.195 (May 29, 1950), 3, 5, 6, 8; Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation E/CN.4/82/Rev.1 (1948), 5, 21–22; Collation of the Comments of Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation E/CN.4/85 (1948), 50–51; See Joan Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, 7 HUM. RTS. Q. 89, 57 (1985).

<sup>73</sup> Hafner-Burton *et al.*, *supra* note 46, at 676.

<sup>74</sup> Committee on Human Rights, *supra* note 72, at 11.

<sup>75</sup> Office of the High Commissioner on Human Rights, *supra* note 4, at 817.

<sup>76</sup> BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 219 (1953), *citing* Salvador Prats, 29 RIAA 187, 196 (1868).

<sup>77</sup> Spanish Zone of Morocco, Gr. Brit./Sp., 2 RIAA 615, 644 (1925). See also Montijo (*U.S. v. Colombia*), Moore, ii, Arbitrations 1421, 1444 (1874). See JAMES CRAWFORD ET AL., THE LAW OF STATE RESPONSIBILITY 729 (2010).

limitation of liability of states when it is necessary to derogate or limit certain rights.<sup>78</sup> They provide a “safety valve” for the “enormous pressures that governments face to repress individual liberties during times of crisis.”<sup>79</sup> Without these measures, “states facing such emergencies would be more likely to repress derogable rights and may be held to be in violation of international law.”<sup>80</sup>

The inclusion of special measures in human rights instruments also serves the purpose of facilitating the negotiation and subsequent adoption of human rights agreements.<sup>81</sup> Moreover, it makes ratification more acceptable to would-be state parties by recognising the limitation on the responsibilities of states.<sup>82</sup> In the absence of such a “legal safety valve,” states may be hesitant to ratify these instruments or may “attach more significant reservations to their accession.”<sup>83</sup> Of course, there is a view that the special measures “reflect a certain tentativeness about the individual as a subject of international law and grave fears by governments about the consequences of a binding commitment to the international protection of human rights.”<sup>84</sup> However, it cannot also be denied that the inclusion of the provisions in human rights treaties serves to secure the widest participation of states by accommodating their interests in preserving their respective sovereignty.<sup>85</sup> In other words, special measures allow states “to calibrate [the] overall level of [their] international commitment.”<sup>86</sup>

While these measures provide a wide latitude for governments, they also require them to act within specified parameters such as the mode of invocation, method of application, duration of implementation, and operative effect.<sup>87</sup> Thus, this accommodation of interests is not envisioned to be a blank

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<sup>78</sup> Alston & Goodman *supra* note 23, at 401–02; Crawford *et al.*, *supra* note 77, at 496–97; Desierto, *supra* note 18, at 238–39, *citing* Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1 (2000); *See* James Gathii, *Neoliberalism, Colonialism and International Governance: Decentring the International Law of Governments Legitimacy*, 98 MICH. L. REV. 1996, 2024 (2000).

<sup>79</sup> Hafner-Burton *et al.*, *supra* note 46, at 674–75.

<sup>80</sup> *Id.*

<sup>81</sup> Ali, *supra* note 56, at 82, *citing* Hafner-Burton *et al.*, *supra* note 46, at 678. *See* Burchill, *supra* note 5, at 103.

<sup>82</sup> *Id.*

<sup>83</sup> Schreuer, *supra* note 2, at 115; Cowell, *supra* note 18, at 138.

<sup>84</sup> Gandhi, *supra* note 5, at 326 *citing* Joan Hartman, *Derogations from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT'L L.J. 1, 11 (1981).

<sup>85</sup> Cowell, *supra* note 18, at 136, 141.

<sup>86</sup> Hafner-Burton *et al.*, *supra* note 46, at 674.

<sup>87</sup> Desierto, *supra* note 18, at 259.

cheque for the government to take any action as it may deem fit. At no point do these clauses function as “absolute justifications for breaches of treaty obligations.”<sup>88</sup> The provisions on derogations and limitations “do not just enshrine the sovereign prerogative.”<sup>89</sup> These measures “work to limit this prerogative because by invoking a derogation provision, a state is following a particular legal path that is subject to international monitoring.”<sup>90</sup> After all, the ultimate purpose of these provisions is to protect human rights and thus, it may not be used for other ends.<sup>91</sup>

The purpose of this space for actions granted to governments is to allow them to pursue higher interests such as that of security, public order, and the protection of a democratic society. However, while it may be hoped that states would never need to resort to suspending or limiting the rights guaranteed under human rights instruments, a realistic view must be maintained in considering when the state is under threat, it is its duty and responsibility to take all necessary actions to protect the welfare of its people.<sup>92</sup> In other words, there are instances where “the sole means by which a state [...] can safeguard an essential interest threatened by a grave and imminent peril, is temporarily not to respect an international obligation protecting an interest of lesser value.”<sup>93</sup> Nevertheless, “the overriding objective of the state resorting to [special measures] must be the restoration of a state of normalcy to ensure full observance of [human] rights.”<sup>94</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> Burchill, *supra* note 5, at 100.

<sup>90</sup> *Id.*

<sup>91</sup> O’Donnell, *supra* note 54, at 24, *citing* Greek Case, (*Lawless v. Ir.*), Eur. Comm’n H.R., (1969).

<sup>92</sup> Burchill, *supra* note 5, at 102; Dolezal, *supra* note 35, at 1172, *citing* Joan Hartman, *Derogations from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT’L L.J. 1, 2 (1981); Ali, *supra* note 56, at 82, *citing* Amrei Muler, *Limitations to and Derogations from Economic, Social and Cultural Rights*, 9 HUM. RTS. L. REV. 557, 592 (2009).

<sup>93</sup> Crawford et al., *supra* note 77, at 491; Sheeran, *supra* note 6, at 496. *See* Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 AM. U. J. INT’L L. & POL’Y 35, 36 (1986); L.C. Green, *Derogation of Human Rights in Emergency Situations*, 16 CAN. Y.B. INT’L L. 92 (1978); Oren Gross, *Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT’L L. 437 (1998); Susan Marks, *Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights*, 15 OX. J. LEG. STUD. 69, 84–94 (1995).

<sup>94</sup> Desierto, *supra* note 18, at 258; CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 5 (1948); O’Donnell, *supra* note 54, at 26; El Zeidy, *supra* note 1, at 309, *citing* Brogan v. U.K., Eur. Ct. H.R., App. 11209/84, 11234/84, 11266/84, 11386/85, ¶ 48 (1988); Human Rights Committee, *supra* note 62, ¶ 1.

## B. Balancing of Interests

The utility of derogation measures lies in its capacity to balance individual rights and the interest of the state considering the changing circumstances.<sup>95</sup> In times where the security, public order, or the democratic society is threatened, the derogation of rights may be necessary in order to safeguard the rights of the entire community in the longer term.<sup>96</sup> This is precisely the purpose of the measure, which is “to provide adequate means of defending the imperilled existence of the nation, [while] at the same time guaranteeing the maximum protection of human rights.”<sup>97</sup> In other words, “the maximum strictly allowed by the conditions imposed by the severity of the exceptional crisis.”<sup>98</sup> The ultimate aim is not merely to provide a temporary guarantee but to restore a state of normalcy where there is full respect for human rights.<sup>99</sup> In this respect, these measures “help facilitate the realisation of rights to the entire community and preserve human rights.”<sup>100</sup>

The utilisation of “special measures” may be easily “seen as the end of the rule of law and evidence of unbridled government power.”<sup>101</sup> However, it could also be said that when a “state adheres to the procedures and substance of the provision, it is actually a demonstration of a belief in the importance of law.”<sup>102</sup> Derogation provisions strike a “balance between the protection of individual rights and the protection of national needs in times of emergency by placing reasonable limits on emergency powers.”<sup>103</sup> The existence of a derogation clause in a treaty should signify the “expressed intent to govern [a] state[']s mode and degree of compliance during situations of emergency.”<sup>104</sup> Concomitantly, the exercise of such right opens the government to the scrutiny of treaty monitoring bodies and other states if

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<sup>95</sup> Sheeran, *supra* note 6, at 499, *citing* *Haig v. Agee* 453 U.S. 280 (1981); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

<sup>96</sup> Cowell, *supra* note 18, at 139; El Zeidy, *supra* note 1, at 287 *citing* *Oraá*, *supra* note 1, at 233–32.

<sup>97</sup> Desierto, *supra* note 18, at 246, *citing* *Svensson-McCarthy*, *supra* note 54, at 200–01. *See A v. U.K.*, Eur. Ct. H.R., App. 3455/06 (Feb. 19, 2009); *See Lawless v. Ir.*, Eur. Ct. H.R., (No.3), *supra* note 68.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*, at 255.

<sup>100</sup> Cowell, *supra* note 18, at 139.

<sup>101</sup> Burchill, *supra* note 5, at 97.

<sup>102</sup> *Id.*

<sup>103</sup> Sheeran, *supra* note 6, at 507, *citing* Joan Hartman, *Derogations from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT'L. L.J. 1, 11 (1981).

<sup>104</sup> Desierto, *supra* note 18, at 240.

only to determine whether the actions of the government are justified and within the prescribed limits.<sup>105</sup> Seen from this perspective, derogation provisions “are not threats to the system of international human rights protection but, conversely, hallmarks of respect for treaty norms by states that take human rights seriously.”<sup>106</sup>

Similarly, limitation clauses seek to balance the various shared, inter-dependent, and often competing rights.<sup>107</sup> For instance, in the case of freedom of expression and hate speech, the right to expression is commonly “harmonised” with the right to equality and non-discrimination along with other communitarian values.<sup>108</sup> This flows from the realisation that while the “freedom of expression constitutes one of the essential foundations of a democratic society, and one of the basic conditions for its progress, and each individual’s self-fulfilment,” the abuse, or irresponsible use of the freedom is “incompatible with democracy and human rights and infringes the rights of others.”<sup>109</sup> This being the case, “there seems to be a [...] consensus among states [regarding the] need to restrict the right to freedom of expression to protect the rights or reputation of others, for national security, public order, health or morals.”<sup>110</sup> The right then “is not an absolute right and it may be restricted for the reasons mentioned above, but such restrictions should be

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<sup>105</sup> See Gross, *supra* note 18, at 299. See Mangan, *supra* note 14, at 382; ZAIM NEDJATI, HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION 44 (1978); FRANCIS JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 209 (1975).

<sup>106</sup> Hafner-Burton *et al.*, *supra* note 46, at 680. See Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEG. STUD. 397 (2007).

<sup>107</sup> Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses*, 20 S. AFR. J. HUM. RTS. 448, 454 (2004); Elizabeth Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT’L L. 57, 58 (1992); Ghanea, *supra* note 9, at 186.

<sup>108</sup> Fernandez, *supra* note 70, citing Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. CR.-CL. L. REV., 133 (1982); Stephanie Fariior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law concerning Hate Speech*, 14 BERKELEY J. INT’L L. 6 (1996).

<sup>109</sup> Fernandez, *supra* note 70, citing *Rekvényu v. Hungary*, Eur. Ct. H.R., App. 25390/94, ¶ 34 (May 20, 1999); *Witzsch v. Ger.*, Eur. Ct. H.R., App. No. 4785/03 (2005); *Féret v. Belg.*, Eur. Ct. H.R., App. No. 15615/07, ¶ 73 (2009). See Nathan Courtney, *British and United States Hate Speech Legislation: A Comparison*, 19 BROOK. J. INT’L L. 727, 728 (1993); Dominic McGoldrick & Therese O’Donnell, *Hate-Speech Laws: Consistency with National and International Human Rights Law* 18 LEG. STUD. 453, 455 (1998); G.N. Barries, *The Divergent Constitutional Approach to Hate Speech in South Africa and the United States* 2013 J.S. AFR. L. 697, 701 (2013), citing RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY, 151 (1992); SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY, 3 (1994).

<sup>110</sup> Human Rights Committee, *Good v. Republic of Botswana*, Communication 313/05, ¶ 187 (2010); Human Rights Committee, *Scanlen v. Zim.*, Communication 297/0, ¶ 107 (2009). See Helen Berrigan, *Speaking Out about Hate Speech*, 48 LOY. L. REV. 1, 2 (2002). See Gemmo Fernandez & Raphael Pangalangan, *Spaces and Responsibilities: A Review of Foreign Laws and an Analysis of Philippine Laws on Intermediary Liability*, 89 PHIL L.J. 761, 788 (2015).



necessary and have to be clearly provided by law.”<sup>111</sup> Following this, “when the level of speech already reaches a degree that amounts to [an] abuse of right or disregard of the rights of others, or in certain cases public order, [governments] have stepped in not necessarily to restrict the right of the speaker but to rule that such right has been overstepped to the detriment of others.”<sup>112</sup>

The advancement of rights in the case of limitation clauses lies in the recognition that “rights are not to be absolute but are interdependent and must be balanced against competing societal interests.”<sup>113</sup> Thus, the exercise of rights cannot be used to destroy or inhibit the exercise of other guaranteed rights.<sup>114</sup> Similarly, it cannot also be used to defeat the security, public order, and the democratic space of the state.<sup>115</sup> The clauses then allow for the exercise of a balancing act between the equally valid entitlements or expectations of a multitude of claimants.<sup>116</sup> As such, these restrictions could be considered not as a measure that impedes the exercise of rights, but as a tool for defining the circumstances in which the rights may most fairly and effectively be enjoyed.<sup>117</sup>

## V. SPECIAL MEASURES IN PRACTICE

Notwithstanding the conceptual foundations, the application of special measures in practice has been different. With regard to derogations, the number of times states resorted to such an option strikes as surprising. In a relatively recent study, it has been found that there are at least 568 instances

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<sup>111</sup> *Id.*

<sup>112</sup> Fernandez, *supra* note 70, citing *Erbakan v. Turk.*, Eur. Ct. H.R., App. 59405/00, ¶ 56 (July 6, 2006); *Perinçek v. Switz.*, Eur. Ct. H.R., App No. 27510/08, ¶ 189 (2015); Tanya Hernandez, *Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, 32 U. PA. J. INT’L L. 805, 809 (2011); Thomas Webb, *Verbal Poison - Criminalising Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J. 445, 449 (2011); Katharine Gelber, *Hate Speech - Definitions & Empirical Evidence*, 32 CONST. COMMENT. 619, 624 (2017); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1536 (2003).

<sup>113</sup> Fernandez, *supra* note 70, citing *Defeis*, *supra* note 107, at 71; *R. v. Keegstra*, 3 SCR 697, ¶ 1, (1990).

<sup>114</sup> *Id.*

<sup>115</sup> *Good v. Republic of Botswana*, *supra* note 110, at ¶ 187.

<sup>116</sup> *Iles*, *supra* note 107, at 454, citing *Soobramoney v. Minister of Health, KwaZulu-Natal*, (1) SA 765 (CC), ¶ 54, (1998).

<sup>117</sup> *Id.*

of derogations taken from the ICCPR, ACHR, and ECHR.<sup>118</sup> Notwithstanding that the measure has been frequently utilised, only a few countries have substantially complied with its prerequisites.<sup>119</sup> Deviations frequently include the lack of notifications, absence of formal proclamations of emergency, permanent emergencies arising out of continual formal extensions, complex emergencies involving overlapping and confusing legal regimes, and institutionalised emergencies under authoritarian governments.<sup>120</sup> Two reasons may be forwarded for the disjunct between theory and practice – the lack of clarity as to standards, and relative ineffectiveness of compliance and monitoring regimes.

### A. Clarity of Standards

The jurisprudence on special measures under international human rights has been observed to be inconsistent and divergent thereby producing problems of interpretation and giving rise to considerable abuse.<sup>121</sup> Thus, “although the notion of a public emergency might be defined in the abstract with relative ease, the application *in concreto* of such definition gives rise to numerous legal problems to which, so far, either only partial solutions have been found, or none at all.”<sup>122</sup>

Nevertheless, some semblance of guidance from convention organs is available. For instance, the European Court of Human Rights (ECHR) had the opportunity to discuss the concept of an emergency in the early case of *Lawless v. Ireland (No. 3)*. The case involved a claim of a suspected member of the Irish Republican Army for being held in a military detention camp without being brought before a judge in the relevant period. The ECHR held that the natural meaning of the words *other public emergency threatening the life of the nation* is sufficiently clear. The emergency must be “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to

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<sup>118</sup> Hafner-Burton *et al.*, *supra* note 46, at 679.

<sup>119</sup> Gross, *supra* note 18, at 304, 306; Questiaux, Special Rapporteur, *Study of the Implications for Human Rights of Recent Developments Concerning Situations known as States of Siege or Emergency*, E/CN.4/Sub.2/490, ¶¶ 34–5 (1981); INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS, 442 (1983). *See* Mangan, *supra* note 14, at 373; TIBOR MACHAN, HUMAN RIGHTS AND HUMAN LIBERTIES: A RADICAL RECONSTRUCTION OF THE AMERICAN POLITICAL TRADITION 222 (1975); Daes, *Restrictions and Limitations on Human Rights*, in III AMICORUM DISCIPLINARUMQUE LIBER, 87–93 (Cassin ed. 1971).

<sup>120</sup> Gross, *supra* note 18, at 306.

<sup>121</sup> Sheeran, *supra* note 6, at 493.

<sup>122</sup> Svensson-McCarthy, *supra* note 54, at 195.

the organised life of the community of which the state is composed.”<sup>123</sup> Thus, given the nature of the threat of the operation of a secret army within the state and the steady increase in terrorist activities, the Irish Government was justified in declaring that there was a public emergency threatening the life of the nation.

Subsequently, the report of the European Commission of Human Rights (ECmHR) in the *Greek case* further shed light in characterising what constitutes an emergency for the purpose of derogations. The case stemmed from the change of regime in Greece in 1967. Following the formation of a new government, it informed the Secretary-General of the Council of Europe that it was suspending certain rights under its constitution. In response, four governments under the European Union alleged that the Greek government has not shown that the conditions under which a derogation may be taken have not been shown. The Commission identified four characteristics of a public emergency: it must be actual or imminent; its effects must involve the whole nation; the continuance of the organized life of the community must be threatened; and the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.<sup>124</sup> Following this, the Commission ruled that the public emergency invoked by the Greek government, the taking over a military junta, was not existent in reality. Thus, the measures taken by the government breached the provisions of the ECHR.

Aside from defining the circumstances where resort to derogations is allowed, there is also the problem of assessing the validity of the measures taken in response to emergencies. The implementation of this proportionality requirement has varied in state practice and across treaty bodies.<sup>125</sup> Nevertheless, it is understood that the extent of a derogation must be strictly related to the situation. In other words, “there must be a link between the facts of the emergency and the specific measures chosen.”<sup>126</sup> Even “where derogations are legitimate, the individual measures taken must be applied only to the extent absolutely necessary to cope with the emergency.”<sup>127</sup>

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<sup>123</sup> *Lawless v. Ir.* (No. 3), *supra* note 68, at ¶ 28. See Aly Mokhtar, *Human Rights Obligations v Derogations: Article 15 of the European Convention on Human Rights*, 8 INT’L J. HUM. RTS. 65, 68 (2004); Sheeran, *supra* note 6, at 510; Svensson-McCarthy, *supra* note 54, at 215.

<sup>124</sup> *Greek case*, *supra* note 91, at ¶ 153.

<sup>125</sup> Gross, *supra* note 18, at 257; Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625, 630–34 (2001).

<sup>126</sup> Schreuer, *supra* note 2, at 127.

<sup>127</sup> *Id.*

As in the case of defining the circumstances, creating a clear-cut standard for proportionality also might not be possible. As a basic criterion for evaluating the legitimacy and legality of the derogation, “the principle of proportionality entails specific examination and justification of each measure taken in response to an emergency.”<sup>128</sup> This principle embodies three constraints: severity, duration, and scope.<sup>129</sup> Nevertheless, what could be done is to ensure that these constraints are applied strictly with consideration as to the nature of the rights affected. For instance, “the existence of a high level of violence should not automatically be accepted as requiring measures like administrative detention.”<sup>130</sup> Measures should still be considered in the light of all the possible alternatives that would not require a derogation or a lesser form of limitation.<sup>131</sup>

Turning to limitations, these clauses impose three cumulative standards for a restriction to be valid.<sup>132</sup> The measure must be provided by law;<sup>133</sup> it must “have the purpose of protecting one or more of the collective needs listed in the limitation clause,”<sup>134</sup> and it must “be necessary in order to protect the named collective need.”<sup>135</sup>

The first criterion requires the measure to be accessible and formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.<sup>136</sup> A law is adequately accessible when “the citizen [is able] to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.”<sup>137</sup> On the other hand, it is foreseeable in its effects when the citizen, in regulating his conduct, is able to “foresee, to a degree reasonable in the

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<sup>128</sup> Mokhtar, *supra* note 123, at 70.

<sup>129</sup> *Id.*

<sup>130</sup> Schreuer, *supra* note 2, at 127.

<sup>131</sup> *Id.*

<sup>132</sup> Doswald-Beck, *supra* note 57, at 71; Stapleton, *supra* note 54, at 535; Hovius, *supra* note 9, at 224; *See* Human Rights Committee, General Comment No. 27: Freedom of Movement art. 16, 67<sup>th</sup> Sess., C/21/Rev1/Add9 (Nov. 2, 1999), ¶ 2; Human Rights Committee, General Comment No. 22: Freedom of Thought, Conscience, or Religion art. 18, 48<sup>th</sup> Sess., C/21/Rev1/Add4 (July 30, 1993), ¶ 8.

<sup>133</sup> Human Rights Committee, General Comment No. 34: Freedoms of Opinion and Expression art. 19, 102<sup>nd</sup> Sess., C/GC/34 (Sept. 12, 2011), ¶ 25.

<sup>134</sup> Doswald-Beck, *supra* note 57, at 71.

<sup>135</sup> *Id.*

<sup>136</sup> Human Rights Committee, Toktakunov v. Kyrg., Communication 1470/2006, ¶ 7.6 (2011); *See* Glasenapp v. Ger., Eur. Ct. H.R., App. 9228/80, ¶ 81 (1984); Chauvy v. Fr., Eur. Comm'n H.R., VI, ¶¶ 43–5 (2004); Delfi AS v. Est., Eur. Ct. H.R., App. 64569/09, ¶ 72, (2013).

<sup>137</sup> Sunday Times v. U.K., Ser. A No. 30, ¶ 49 (1979).

circumstances, the consequences which a given action may entail,”<sup>138</sup> even with appropriate advice. The consequences, however, need not be “foreseeable with absolute certainty.”<sup>139</sup>

The second criterion mandates that they must have a legitimate aim that may be pursued by the state.<sup>140</sup> Limitation clauses differ as to the circumstances under which a particular right may be restricted. For instance, the ICCPR provides that the right to freedom of expression may be restricted “[f]or respect of the rights or reputations of others; [f]or the protection of national security or of public order (*ordre public*), or of public health or morals.”<sup>141</sup> On the other hand, the ECHR and the case-law of the ECtHR allows the right to freedom of expression to be limited in the interests of national security,<sup>142</sup> territorial integrity or public safety;<sup>143</sup> for the prevention of disorder or crime;<sup>144</sup> for the protection of health or morals;<sup>145</sup> for the protection of the reputation or rights of others;<sup>146</sup> for preventing the disclosure of information received in confidence;<sup>147</sup> and for maintaining the authority and impartiality of the judiciary.<sup>148</sup>

This third requirement implies an element of proportionality such that the “restrictions must be applied only for the purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”<sup>149</sup>

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<sup>138</sup> Feldek v. Slov., ¶ 56, Eur. Comm'n H.R. (2001); Gawęda v. Pol., ¶ 39, Eur. Comm'n H.R. (2002).

<sup>139</sup> Sunday Times v. U.K., *supra* note 137, ¶ 49.

<sup>140</sup> Zana v. Turk., VII 2533, 2548, Eur. Comm'n H.R. (1997). *See* Weber v. Switz., Ser. A No. 177, (1990); Prager v. Austria, Ser. A No. 313, (1995); De Haes v. Belg., I, Eur. Comm'n H.R., (1997); Worm v. Austria, V, Eur. Comm'n H.R. (1997).

<sup>141</sup> ICCPR, art. 19(3).

<sup>142</sup> *See* Observer v. U.K., Ser. A No. 216 (1991); Vereniging Weekblad Bluf v. Neth., Ser. A No. 306-A. (1995).

<sup>143</sup> *See* Zana v. Turk., *supra* note 140; Grigoriades v. Greece, Eur. Comm'n H.R. (1997-VII).

<sup>144</sup> *See* Engel, Ser. A No. 22 (1976); Chorherr v. Austria, Ser. A No. 266-B (1993); Steel v. U.K., VII, Eur. Comm'n H.R., (1998).

<sup>145</sup> *See* Open Door v. Ir., Ser. A No. 246. (1992).

<sup>146</sup> *See* Barfod v. Den., Ser. A No. 149 (1989); Prager v. Austria, *supra* note 140.

<sup>147</sup> *See* Stoll v. Switz., Eur. Ct. H.R. (2007).

<sup>148</sup> *See* Weber v. Switz., *supra* note 140; Kyprianou v. Cyprus, Eur. Ct. H.R. (2005).

<sup>149</sup> Human Rights Committee, *supra* note 62, at ¶ 22; Human Rights Committee, General Comment 3: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004), ¶ 6. *See* Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 125 (Macdonald ed., 1993); Janneke Gerards, *How to Improve the Necessity Test of the European Court of Human Rights* 11 INT'L J. CONST. L. 466 (2013); CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY, AND PRIMACY IN THE

Hence, the measure must satisfy three criteria: necessity, effectiveness, and proportionality.<sup>150</sup> Generally, the first two criteria are concerned with the relationship between the aims of a measure and the means or instruments that have been chosen to achieve these aims.<sup>151</sup> By contrast, the last criterion concerns the relationship between the interests at stake as it mandates that a reasonable balance should be achieved among the interests served by the measure and the interests that are harmed by introducing it.<sup>152</sup>

The problem in providing guidance and clarifying the standards is that it is difficult to “foresee or to define the extent and variety of national exigencies and the correspondent extent and variety of the means which may be necessary to satisfy them.”<sup>153</sup> The circumstances that endanger the safety of nations vary and no clear limitations may be imposed on the state exercising the privilege to take such measure.<sup>154</sup> This being the case it might not be “desirable nor possible to stipulate [sic] what particular type or types of events will automatically constitute a public emergency within the meaning of the terms.”<sup>155</sup> Thus, each “case has to be judged on its own merits taking into account the overriding concern for the continuance of a democratic society.”<sup>156</sup> An approach that may be considered in assessing what constitutes an emergency “for the purpose of allowing [measures] would be to look at the well-being of the community in terms of the physical well-being of the population, especially in situations of extensive violence.”<sup>157</sup>

## B. Effective Compliance, Monitoring, and Oversight

If there exist difficulties in clarifying the standards and requirements, perhaps the possible key lies in the existence of checks and balances in the resort to special measures. One of the underlying presumptions of the inclusion of special measures in human rights instruments is the existence of a supranational body that has the ability to assess the implementation of derogation measures and monitor the limitations on rights made under the

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EUROPEAN CONVENTION OF HUMAN RIGHTS, 49 (2009); *Klass v. Ger.*, Ser. A No. 28, ¶ 59; *Dudgeon v. U.K.*, Ser. A No. 45, 24, (1981); *Gaskin v. U.K.*, Ser. A No. 160, ¶ 40, (1989); *Barfod v. Den.*, Ser. A No. 149, ¶ 63, (1989); *B v. Fr.*, Ser. A No. 232–C, ¶ 63, (1992); *Murray v. U.K.*, Ser. A No. 300-A, ¶ 91, (1994); *Piermont v. Fr.*, Ser. A No. 314, ¶ 77, (1995); *Animal Defenders Int’l v. U.K.*, App. 48876/08, ¶ 100, Eur. Ct. H.R., Apr. 22, 2013).

<sup>150</sup> Gerards, *supra* note 149, at 466.

<sup>151</sup> Christoffersen, *supra* note 149, at 49.

<sup>152</sup> Gerards, *supra* note 149.

<sup>153</sup> Gross, *supra* note 93, at 437, 439.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Schreuer, *supra* note 2, at 122.

instruments.<sup>158</sup> The premise is that states cannot be left to their own devices when it comes to resort to special measures, and institutional reinforcement remains important when “international law cannot guarantee its own efficacy.”<sup>159</sup> Thus, the legal supervision of states resorting to special measures is of “primary importance as grave human rights violations often occur in this context and states may use the power” as a “pretext for [restricting rights] or to a larger extent than is justified.”<sup>160</sup> As such, treaty bodies have been endowed with their own respective procedures in monitoring and reporting; addressing complaints of individual human rights violations, accepting inter-state complaints procedure, and initiating *motu proprio* inquiries.<sup>161</sup> In this regard, these bodies have been observed to have, in some cases, “curtailed gross and systematic violations of essential human rights.”<sup>162</sup>

Nevertheless, problems continue to persist with regard to the compliance by states as to obligations in the taking of special measures. There had been delays, clumsiness, and general inadequacy in the reporting procedure that result in problems in “securing reliable, complete and contemporaneous information about state compliance with the carefully delineated limits of [special measures].”<sup>163</sup> For instance, the shortcomings of the French notice of derogation from the ECHR in 2015 has been noted by the Parliamentary Assembly of the Council of Europe in 2018. The French government delivered the notice in light of the “large-scale terrorist attacks [that] took place in the Paris region.” The French government indicated that it shall apply its 1955 law on the state of emergency that “grants a range of restrictive powers to the administrative authorities throughout metropolitan France and its overseas territories.” However, the notification does not specify the Convention rights from which France derogated.<sup>164</sup> Similarly, the deficiencies in the Turkish notice of 2016 have also been observed. The notice was delivered subsequent to the failed *coup* attempt in the country. Aside from the vagueness of the derogations taken, it has also been noted that the “derogation relates to the successive emergency decree-laws that have been passed under the state of emergency that was declared on July 20, 2016 and

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<sup>158</sup> Cowell, *supra* note 18, at 138.

<sup>159</sup> *Id.*

<sup>160</sup> Sheeran, *supra* note 6, at 518.

<sup>161</sup> Desierto, *supra* note 18, at 254; Dolezal, *supra* note 35, at 1174; Ghandhi, *supra* note 5, at 328.

<sup>162</sup> Cowell, *supra* note 18, at 138, *citing* Grossman, *supra* note 93.

<sup>163</sup> Ghandhi, *supra* note 5, at 357, *citing* Hartman, *supra* note 72, at 122.

<sup>164</sup> Council of Europe, Parliamentary Assembly, State of Emergency: Proportionality Issues Concerning Derogations Under Article 15 of the European Convention on Human Rights, Res. No. 2209 (2018), ¶ 10; O’Boyle, *Emergency Government and Derogation under the ECHR*, 4 EUR. HUM. RTS. L. REV. 331, 335 (2016).

prolonged on several occasions since.<sup>165</sup> While there were several notices of prolongations, no sufficient explanation was provided for such extensions.

In the region of the Association of Southeast Asian Nations (ASEAN), the Philippines' declaration of martial law appears to run into the same concerns. To recall, a state of martial law and suspension of the privilege of the writ of habeas corpus was declared in 2017 covering the entire Mindanao following the rebellion that occurred in the city of Marawi.<sup>166</sup> After the constitutionally-provided period for the declaration and suspension lapsed, the president requested an extension until the end of 2017. This extension was granted by the Congress.<sup>167</sup> Still, another extension was sought to extend the proclamation until the end of 2018. Before the end of the year, the Congress approved the second extension.<sup>168</sup> A subsequent constitutional challenge before the Philippine Supreme Court failed when the Court ruled in favour of the government.<sup>169</sup> In this scenario, in relation to derogations, the problem lies in the fact that proclamation also included the suspension of the privilege of the writ of habeas corpus albeit only to persons judicially charged for offences connected with the rebellion.<sup>170</sup> Notably, such a right is guaranteed under the ICCPR under article 9(4).<sup>171</sup> Thus, if the state is to derogate from its human rights obligations, it must comply with both the procedural and substantive requirements under the treaty. Yet, the government has not lodged any notification, as required by the Covenant, concerning its proclamation of a state of emergency. As of writing, the martial law remains in place in Mindanao and has been extended by the Congress until the end of 2019.<sup>172</sup>

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<sup>165</sup> *Id.* at ¶ 14.

<sup>166</sup> Proc. No. 216 (2017). Declaring a State of Martial Law and Suspending the Privilege of the Writ of Habeas Corpus in the Whole of Mindanao.

<sup>167</sup> Elmor Santos, *Congress grants Duterte's request to extend martial law in Mindanao until end of year*, CNN Philippines, July 22, 2017, available at <http://cnnphilippines.com/news/2017/07/022/Congress-votes-martial-law-extension-Duterte.html>.

<sup>168</sup> Patricia Ann Roxas, *Senate, House allow 1-year martial law extension in Mindanao*, PHIL. DAILY INQ., Dec. 13, 2017, available at <https://newsinfo.inquirer.net/951965/breaking-martial-law-mindanao-president-rodrigo-duterte-congress-joint-session>.

<sup>169</sup> See *Lagman v. Sen. Pres.*, G.R. No. 235935, 854 SCRA 184 (2018).

<sup>170</sup> See JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 554 (2009 ed.).

<sup>171</sup> Joseph & Castan, *supra* note 25, at 374; See *Habeas Corpus in Emergency*, *supra* note 36; *Neira Alegria v. Peru*, Ser. C No. 20 (Jan. 19, 1995).

<sup>172</sup> *Congress extends Mindanao martial law until end of 2019*, ABS-CBN News, Dec. 12, 2018, available at <https://news.abs-cbn.com/news/12/12/18/congress-extends-mindanao-martial-law-until-end-of-2019>.



On the other side, problems also exist in the assessment by treaty bodies of the measures taken by states. For one, the general lack of ability of human rights bodies to enforce decisions which adversely affect the individual has long been noted.<sup>173</sup> The status of the decisions of the Human Rights Committee (“HRC”) demonstrate this. Article 5(4) of the Optional Protocol only provides that the committee “shall forward its views to the State Party concerned and to the individual.” Note that the ‘legal status of the decision is not mentioned nor is any follow-up to the communication envisaged’.<sup>174</sup> Thus, ‘because of the relatively limited status of the HRC, there may be less adverse consequences for states for non-compliance with its communications’.<sup>175</sup> Moreover, it has also been observed that the fact-finding procedures under some instruments have been unrealistically and unjustifiably limited.<sup>176</sup> For instance, it has been noted that the HRC is not provided with “a summary procedure for binding determinations on the conformity of particular derogations to the requirements of article 4” of the ICCPR.<sup>177</sup> The Committee further lacks adjudicatory powers like that of the ECmHR and the ECtHR.<sup>178</sup> It also does not have the flexibility of the Inter-American Commission on Human Rights that allows it on its own accord to assess the human rights situation in any state party nor the flexible fact-finding methodology of certain *ad hoc* United Nations (UN) groups.<sup>179</sup> These problems thus create concerns as to the monitoring and enforcement of human rights treaty obligations “thereby making it difficult to give the life to a country’s expression of commitment to the goals of a treaty.”<sup>180</sup>

The view is that such questions relate intimately to the “very heart of a state’s autonomy” where the issues raise “extremely sensitive and complex political questions.”<sup>181</sup> There is also the fear that states would withdraw from the convention should treaty bodies act in a “strict manner towards their

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<sup>173</sup> Ghandhi, *supra* note 5, at 361.

<sup>174</sup> Gross, *supra* note 18, at 297.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*, at 357, citing Hartman, *supra* note 72, at 122.

<sup>177</sup> Hartman, *supra* note at 72, 127.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; See Statute of the Inter-American Commission on Human Rights, OAS DOC. OEA/Ser. L/V/II.50, doc. 6, art. 18 (July 1, 1980).

<sup>180</sup> Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2007 (2002).

<sup>181</sup> *Id.* at 257, citing Merrills, *The Development of International Law by the European Court of Human Rights* (2<sup>nd</sup>, 1993), 9; Morrisson Jr, *Margin of Appreciation in European Human Rights Law*, 6 HUM. RTS. J. 263, 269 (1973); Joan Hartman, *Derogations from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT’L. L.J. 1, 2 (1981).

conduct in safeguarding the public interest.”<sup>182</sup> This being the case, some treaty bodies have frequently adopted a deferential approach to the assertions of governments of the existence of a public emergency.<sup>183</sup> While they exercise oversight in assessing the necessity of the derogation measures taken, the bodies “have been less assertive in questioning whether or not an emergency exists allowing for a state to invoke a derogation provision in the first place.”<sup>184</sup> In other cases, there has been some level of unwillingness on the part of treaty bodies and human rights tribunals to “examine whether the state was actually experiencing such a level of violence and threat that necessitated a resort to emergency powers.”<sup>185</sup>

For instance, the ECtHR has frequently chosen to “defer to the ‘better position’ of the national authorities both to determine the existence of an emergency and to select measures appropriate.”<sup>186</sup> In the case of *A & Others v. United Kingdom*, the ECtHR concluded that a “wide margin of appreciation applies to both the determination of an emergency and proportionality of measures.”<sup>187</sup> The Court ruled that “by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it.”<sup>188</sup> Notably, it has been forwarded that increasing levels of deference “signal, if high standards of application are missing, that signing human rights conventions is a window-dressing exercise.”<sup>189</sup> This is problematic considering that monitoring state prerogatives are integral to the protection of individuals in situations of exigency.<sup>190</sup>

In response to these difficulties, what should be remembered is that “exacting standards of human rights enforcement sends a direct signal to governments” that violation is “intolerable and that exceptions that allow coercive state action are limited and closely monitored.”<sup>191</sup> Such proposed

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<sup>182</sup> El Zeidy, *supra* note 1, at 317.

<sup>183</sup> Sheeran, *supra* note 6, at 537; Gross, *supra* note 18, at 297; See Human Rights Committee, Kavanagh v. Ir. No.1, Communication 818/1998 (Apr. 4, 2001); See also Landinelli Silva v. Uru., *supra* note 27; Salgar de Montejo v. Colom., *supra* note 27.

<sup>184</sup> Burchill, *supra* note 5, at 103.

<sup>185</sup> Gross, *supra* note 18, at 281.

<sup>186</sup> Sheeran, *supra* note 6, at 537; Fitzpatrick, *supra* note 12, at 197.

<sup>187</sup> Sheeran, *supra* note 6, at 538.

<sup>188</sup> A v. U.K., App. No. 3455/05, ¶ 173, Eur. Ct. H.R. (2009).

<sup>189</sup> El Zeidy, *supra* note 1, at 317.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*; See Hafner-Burton *et al.*, *supra* note 46, at 677 citing JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 40–41 (1992).

level of oversight is not unheard of. While many of the issues that have been highlighted “in respect of the European Court of Human Rights are duplicated by its Inter-American counterpart, there are some notable differences.”<sup>192</sup> Its case-law has been described to have adopted a more stringent review especially with problematic democracies.<sup>193</sup> In particular, the “Court has been extremely activist in its emergency-related jurisprudence, a product of the hemisphere’s long and tragic experiences with dictatorships, authoritarian regimes, and the profound abuse of emergency powers.”<sup>194</sup> Further, the “strength of review and accountability of governmental response to crisis in the region is not solely dependent on the strength of the Court’s jurisprudence.”<sup>195</sup> It has been observed that *one of the unique features of the Inter-American enforcement system is the operation and functioning of its Commission*. Specifically, it has “extremely well-developed procedures for on-site fact-finding that provides an extraordinarily useful tool in emergency contexts facilitating responsive international oversight.”<sup>196</sup>

## VI. CONCLUSION

The allowance for the taking of special measures may advance human rights but are nonetheless fraught with complexities. On the one hand, these concessions recognise the limitation of the responsibilities of states for matters not within their control. These measures also provide them with a wide latitude in balancing individual rights with the interests of the state in maintaining security, public order, and the requirements of a democratic society. Further, they also serve as a tool that enables governments to balance the various shared, interdependent and often competing rights.

However, left to their own devices, there exists a potential for abuse and possibility for authoritarian policies. Of course, formalising special measures in human rights instruments opens up governments to the scrutiny of treaty bodies and other states. However, the question remains whether such opportunities have been maximised. In this regard, the standards for assessing the validity of measures taken by governments and the procedure for monitoring compliance have to be re-evaluated. Experience derived from the countless measures adopted by governments reveal the need for greater

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<sup>192</sup> Gross, *supra* note 18, at 289.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*, *citing* Judicial Guarantees in States of Emergency, Advisory Opinion, OC-9/87, Inter-Am. Ct. H.R., (Oct. 6, 1987), 24.

<sup>195</sup> *Id.* at 296.

<sup>196</sup> *Id.*

institutional oversight. In this regard, experiences and practices from some of the more effective treaty bodies may be considered.

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