

**PROTECTING RIGHTS WHILE PROTECTING LIVES:  
PERMISSIBLE DEROGATIONS OF HUMAN RIGHTS  
IN THE COVID-19 PANDEMIC PHILIPPINE  
STATE OF EMERGENCY\***

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**ABSTRACT**

Human rights are universal and non-temporal, yet Philippine public officials have sweepingly claimed that these must yield in a state of emergency. This paper explores the legality of that claim. It examines the derogation clause enshrined in Article 4 of the International Covenant on Civil and Political Rights, which permits states parties such as the Philippines to derogate temporarily from its treaty obligations, albeit subject to certain safeguards. It contrasts the legal regimes of state of emergency and public emergency powers in Philippine Constitutional Law vis-à-vis derogations and limitations in international human rights law. This paper argues that the mere declaration of a state of emergency does not suspend all human rights.

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*“Your concern is human rights,  
mine is human lives.”*  
—President Rodrigo Duterte<sup>1</sup>

*“Shoot them dead.”*  
—Also President Duterte<sup>2</sup>

## I. INTRODUCTION

Are all human rights suspended as a consequence of the state’s mere declaration of a state of emergency? This must be answered in the negative. Some rights can be derogated from, limited or restricted. However, it is subject to certain safeguards in both international and domestic law.

The world is just several months in, in a crisis that could stretch to a year or more. It is but logical to posit that the longer the crisis lasts, the more human rights violations may be committed in the guise of “necessary measures.” Indeed, all citizens have the duty to comply with emergency health measures such as abiding by reasonable lockdown and quarantine restrictions. But while it is true that everyone should place health and safety first, it need not unnecessarily come at the expense of human rights. Unlike the practice of medicine or law, advocating for human rights needs no license. Thus, citizens are called to be vigilant in protecting their rights. After all, being cooperative citizens and being vigilant are not mutually exclusive.

The international community has consistently called out the incumbent Philippine leadership on the latter’s human rights violations. Now, the horn blows louder as United Nations (“UN”) Special Rapporteurs renew calls “to establish an on-the-ground independent, impartial investigation into human rights violations in the Philippines[;]”<sup>3</sup> citing the UN Office of the High Commissioner for Human Rights report confirming widespread and

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<sup>1</sup> Felipe Villamor, *Your Concern Is Human Rights, Mine is Human Lives, Duterte Says in Fiery Speech*, THE NEW YORK TIMES, July 23, 2018, available at <https://www.nytimes.com/2018/07/23/world/asia/philippines-duterte-speech-muslims.html>

<sup>2</sup> Sofia Tomacruz, *‘Shoot them dead’: Duterte orders troops to kill quarantine violators*, RAPPLER, Apr. 1, 2020, at <https://rappler.com/nation/duterte-orders-troops-shoot-kill-coronavirus-quarantine-violators>

<sup>3</sup> Agnès Callamard et al. [United Nations (“UN”) Special Rapporteurs], Philippines: UN human rights experts renew call for an on-the-ground independent, impartial investigation, UNITED NATIONS HUMAN RIGHTS, June 25, 2020, at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25999&LangID=E>

systematic human rights abuses in the form of killings, and the silencing of independent media, critics and the opposition.<sup>4</sup>

The renewed call highlights that “COVID-19 has further accelerated the downward spiral of the human rights situation in the Philippines. Police and the military have used violence and lethal force to enforce a quarantine imposed without due consideration for the situation of the poorest and most vulnerable communities.”<sup>5</sup> All happening amidst the Philippines’ failing battle against the COVID-19 pandemic are the ABS-CBN shut-down,<sup>6</sup> Maria Ressa’s conviction of cyber libel,<sup>7</sup> and the controversial Anti-Terrorism Law that may “further dilute human rights safeguards, by justifying the arrests of human rights defenders and government’s critics[.]”<sup>8</sup>

During the first month of the lockdown in the Philippines, human rights organizations and citizens took to both traditional and online media their concerns against some government measures, such as arrests made without a warrant for failure to abide by the community quarantine curfew and the corresponding punishment employed by authorities. Over 75,000 Filipinos were apprehended as of April 3, 2020,<sup>9</sup> followed by 400 to 1,000 arrests daily between April to May 10.<sup>10</sup> Some of those arrested were subjected to cruel, inhuman, and degrading punishment. Two children were placed in a coffin, five caged like animals, seven had their hair forcibly cut while the one

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<sup>4</sup> United Nations High Commissioner for Human Rights, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Philippines, U.N. Doc. A/HRC/44/22 (June 4, 2020), available at <https://www.ohchr.org/Documents/Countries/PH/Philippines-HRC44AEV.pdf>

<sup>5</sup> Callamard et al., *supra* note 3.

<sup>6</sup> *See id.* “On 5 May 2020, President Duterte’s government ordered the shut-down of ABS-CBN, the country’s largest TV and radio network, after years of explicit threats from the President in part because of its critical reporting on the ‘war on drugs.’”

<sup>7</sup> *Id.* “The Securities and Exchanges Commission in 2018 revoked the license of a prominent news website *Rappler* and its CEO, Maria Ressa, has been arrested multiple times on various charges and found guilty of cyber libel.”

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

<sup>9</sup> Danielle Nakpil, *More than 75,000 individuals arrested for curfew violations - officials*, CNN PHIL., Apr. 7, 2020, at <https://cnnphilippines.com/news/2020/4/7/More-than-75,000-individuals-arrested-for-curfew-violations-.html>

<sup>10</sup> Lian Buan, *Pandemic in Charts: Hundreds arrested daily, filing delays leave thousands in jail*, RAPPLER, June 22, 2020, at <https://www.rappler.com/newsbreak/iq/264432-coronavirus-pandemic-charts-daily-arrests-filing-delays-leave-filipinos-in-jails>

who resisted was stripped and ordered to walk home naked.<sup>11</sup> Others were even forced to sit under the afternoon heat for hours.<sup>12</sup>

What is also alarming is the fact that an undersecretary of the Department of Interior and Local Government—the department charged with the control and supervision of the Philippine National Police—believes that all human rights are suspended when under a state of emergency. On the heels of public clamor against human rights abuses in the first two weeks of the lockdown, Undersecretary Martin Diño made a sweeping claim in a radio interview that human rights are suspended during a state of emergency.<sup>13</sup> Diño stated “*Wala na hong karapatan. Tandaan niyo, state of emergency ngayon. Ang karapatang pantao ay nawawala pagdating ng state of emergency.*” (“There are no more rights. Remember, we are in a state of emergency. Human rights disappear in a state of emergency.”). He even added that “*Pagka ho meron tayong state of emergency, Jung writ of habeas corpus ay nawawala na po yan.*” (“When under a state of emergency, the privilege of the writ of habeas corpus disappears.”)

On top of this, the Malacañang seems to be setting the stage for a dangerous narrative that human rights can be disregarded for the sake of survival. Manila Bulletin reported, albeit only through their social media platform, that the Office of the Presidential Spokesperson cited a study that claims more than 80% of Filipinos are “willing to sacrifice some of their human rights if it helps prevent the spread of the virus.”<sup>14</sup> Unfortunately, this study, nor its details, is yet to be released for verification.

This false dichotomy of “rights or lives” is nothing new. President Rodrigo Duterte himself employed similar semantics (“your concern is human rights, mine is human lives”<sup>15</sup>) to defend his deadly war on drugs and downplay human rights violations. This paper explores whether law

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<sup>11</sup> Human Rights Watch, *Philippine Children Face Abuse for Violating COVID-19 Curfew*, HUMAN RIGHTS WATCH WEBSITE, Apr. 3, 2020, at <https://www.hrw.org/news/2020/04/03/philippine-children-face-abuse-violating-covid-19-curfew>

<sup>12</sup> *Id.*

<sup>13</sup> Nicole-Anne Lagrimas, *CHR, NUPL contradict DILG's Diño, say human rights remain even during emergencies*, GMA NEWS ONLINE, Mar. 23, 2020, at <https://www.gmanetwork.com/news/news/nation/730889/nupl-contradict-dilg-s-dino-say-human-rights-remain-even-during-emergencies/story>

<sup>14</sup> Mads Mirafior, *80% of Filipinos are Willing to Sacrifice Some of Their Human Rights*, MANILA BULLETIN, Apr. 23, 2020, at <https://www.facebook.com/manilabulletin/photos/a.147434127984/10158994420887985>

<sup>15</sup> Felipe Villamor, *Your Concern is Human Rights, Mine is Human Lives, Duterte Says in Fiery Speech*, THE NEW YORK TIMES, July 23, 2018, available at <https://www.nytimes.com/2018/07/23/world/asia/philippines-duterte-speech-muslims.html>

supports—and whether there is a necessity of—choosing one to the exclusion of the other.

This paper was written in a desperate search for the legal basis (or lack thereof) for the sweeping statement that human rights disappear in a state of emergency. In Part II, the author will lay the predicate by briefly discussing the history of the legal regime of “state of emergency” and the difference between derogations and limitations in international human rights law. In Part III, he will discuss the requirements for permissible derogations in times of public emergencies in the International Covenant on Civil and Political Rights (“ICCPR”). He will then review some related public emergency powers in Philippine Constitutional Law in Part IV, and will end with a brief conclusion in Part V.

Most of the discussion will focus on the derogation clause found in Article 4 of the ICCPR<sup>16</sup>—an international instrument obligating states to respect, protect, and fulfill human rights. As a state party to the ICCPR, the Philippines is bound by it.

## II. LAYING THE PREDICATE

### A. Brief History of State of Emergency

The legal regime of a “state of emergency” involves “governmental action taken during an extraordinary national crisis that usually entails broad restrictions on human rights in order to resolve the crisis.”<sup>17</sup> The concept can be traced as far back as the Roman “practice of nominating a ‘dictator’ in exceptional circumstances of external attack or internal rebellion.”<sup>18</sup> However, the legal regime itself is “a relatively modern development with origins in the French Revolution,”<sup>19</sup> and after a couple of centuries, has since “gained a place in most national legal systems by the mid-twentieth century.”<sup>20</sup>

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<sup>16</sup> International Covenant on Civil and Political Rights [hereinafter “ICCPR”], Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>17</sup> 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).

<sup>18</sup> Scott Sheeran, *Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT’L L. 491, 496 (2013), citing JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 7 (1992); Nigel Rodley, *Book Review*, 42 INT’L & COMP. L.Q. 732, 732-733 (1993).

<sup>19</sup> Sheeran, *supra* note 18; See also Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben’s State of Exception*, 17 EUR. J. INT’L L. 677, 677-678 (2006).

<sup>20</sup> Sheeran, *supra* note 18; See GIORGIO AGAMBEN, THE STATE OF EXCEPTION 11-22 (Kevin Attell trans., Univ. of Chi. Press 2005) (2003); See also Humphreys, *supra* note 19.

European countries such as France and Germany “tentatively began to elaborate [on] the idea of a constitutional state of emergency” in the eighteenth and nineteenth centuries.<sup>21</sup> A 1789 decree of the French Constituent Assembly featured a distinguished legal regime of “state of peace” and a “state of siege.”<sup>22</sup> Under the state of siege, “all the functions entrusted to the civilian authority for maintaining order and internal policing pass to the military commander, who exercises them under his exclusive responsibility.”<sup>23</sup> This was further developed after the French Revolution of 1848 when “the Constitution of the Second French Republic included a new article that prescribed that the occasions, forms, and effects of the ‘state of siege’ were to be elaborated in law.”<sup>24</sup> In post-World War One Germany, the Weimar Constitution “provided the President extraordinary powers to cope with exceptional threats to the system,”<sup>25</sup> with “measures necessary to re-establish law and order, if necessary using armed force and including the suspension of a particular and limited set of rights.”<sup>26</sup>

Meanwhile, across the Atlantic, President Lincoln did the unprecedented at the start of the American Civil War in 1861.<sup>27</sup> He “suspended [the privilege of] the writ of habeas corpus” and “authorized the arrest and detention of those suspected of ‘disloyal and treasonable practices’” citing “popular demand and *public necessity*” to justify the measure.<sup>28</sup> This was unprecedented since the power to suspend the privilege of the writ lies with the American Congress.<sup>29</sup> This unprecedented act by Lincoln is now mirrored in the Philippine Constitution which, unlike its American counterpart, confers upon the President the power to suspend the privilege of the writ subject to strict conditions and mechanisms for review by the Congress and the Philippine Supreme Court.<sup>30</sup>

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<sup>21</sup> Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1006-1007 (2004).

<sup>22</sup> Sheeran, *supra* note 18, at 497, *citing* Agamben, *supra* note 20, at 5; *See also* THEODOR REINACH, *DE L'ÉTAT DE SIEGE: ÉTUDE HISTORIQUE ET JURIDIQUE* 109 (1885).

<sup>23</sup> *Id.*

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

<sup>25</sup> *Id.*

<sup>26</sup> Scheppele, *supra* note 21, at 1007.

<sup>27</sup> Sheeran, *supra* note 18, at 497, *citing* Agamben, *supra* note 20, at 20.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* *See Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) which ruled that Article I, section 9 of the United States Constitution reserves to Congress the power to suspend habeas corpus and thus that the President's suspension was invalid.

<sup>30</sup> JOAQUIN BERNAS, *THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY* 898 (2003 ed.); CONST. art. VII, § 18(1).

Although the legal regime of state of emergency has demonstrably developed over time, calling for different rules in different jurisdictions, its conceptual rationale remains “rooted in the nature of the *exceptional*.”<sup>31</sup> It has been dubbed as the international law counterpart of the concept of self-defense in criminal law<sup>32</sup> since both are born out of the need for survival—both lend legality to an otherwise unlawful act. The ultimate challenge, however, is balancing between “the collective’s interests (for example, the life of the nation) and the interests of the individual, in particular, in human rights and civil liberties.”<sup>33</sup>

## B. Derogation vs. Limitation

As the UN Human Rights Committee (“UN HRC”) states: “Derogation from some [ICCPR] obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the [ICCPR].”<sup>34</sup>

Derogations are temporary deviations which detract from the rights guaranteed by human rights instruments to respond to exceptional circumstances (in the ICCPR, a derogation clause is found in article 4, “in time[s] of public emergenc[ies]”).<sup>35</sup> In contrast, limitations are permitted restrictions on the exercise of certain rights even in ordinary circumstances.<sup>36</sup>

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<sup>31</sup> Sheeran, *supra* note 18, at 499.

<sup>32</sup> INT’L COMM’N OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS, at iii, 413 (1983); *See also* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 84 (2nd rev. ed. 2005).

<sup>33</sup> Sheeran, *supra* note 18, at 499.

<sup>34</sup> Human Rights Committee, General Comment No. 29: Derogations during State of Emergency Article 4 [hereinafter “General Comment 29”], ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 21, 2001).

<sup>35</sup> Gemmo Bautista Fernandez, *Within the Margin of Error: Derogations, Limitations, and the Advancement of Human Rights*, 92 PHIL. L.J. 1, 4 (2019), *citing* 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); ICCPR, art. 4. *See discussion infra*.

<sup>36</sup> *Id.* at 9, *citing* 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 PRÉPARATOIRES AND CASE-LAW OF THE INTERNATIONAL MONITORING ORGANS 721(1998).

Some examples of ICCPR rights which contain limitation clauses are Articles 12(1) and (2),<sup>37</sup> 13,<sup>38</sup> part of 14(1),<sup>39</sup> 18(1),<sup>40</sup> 19(2),<sup>41</sup> 21,<sup>42</sup> and 22,<sup>43</sup> listing permissible limitations, such as public order, national security, and protection of the rights of others.<sup>44</sup> However, while certain rights can be restricted based on the grounds enumerated in their respective provisions, “these limitations must be prescribed by [domestic] law.”<sup>45</sup> Limitations of ICCPR guaranteed rights in domestic jurisdictions must be “clearly delineated

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<sup>37</sup> ICCPR, art. 12(1)-(2) [Freedom of Movement]. Limitation clause in art. 12(3): “3. The above-mentioned rights *shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others* [...]” (Emphasis supplied.)

<sup>38</sup> Art. 13 [Procedural Rights Against Expulsion]. “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, *except where compelling reasons of national security otherwise require*, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.” (Emphasis supplied.) Art. 14(1) [Right to a Fair Trial]. “[...] *The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary* [...]” (Emphasis supplied.)

<sup>39</sup> Art. 14(1) [Right to a Fair Trial]. “[...] *The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary* [...]” (Emphasis supplied.)

<sup>40</sup> Art. 18(1) [Freedom of Thought, Conscience, and Religion]. Limitation clause in art. 18(3): “[...] 3. Freedom to manifest one’s religion or beliefs may be *subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*.” (Emphasis supplied.)

<sup>41</sup> Art. 19(2) [Freedom of Expression]. Limitation clause in art. 19(3): “[...] 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain *restrictions*, but these shall only be such as are *provided by law and are necessary*: (a) *For respect of the rights or reputations of others*; (b) *For the protection of national security or of public order (ordre public), or of public health or morals*.” (Emphasis supplied.)

<sup>42</sup> Art. 21 [Freedom of Assembly]. “The right of peaceful assembly shall be recognized. *No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others*.” (Emphasis supplied.)

<sup>43</sup> Art. 22 [Freedom of Association]. “1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others*. [...]” (Emphasis supplied.)

<sup>44</sup> SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES MATERIALS AND COMMENTARY* 31 (2013 ed.).

<sup>45</sup> *Id.*



in an accessible law, whether that be statute law or common law,”<sup>46</sup> and not “vague as to permit too much discretion and unpredictability in its implementation.”<sup>47</sup> Limitations recognize that certain rights are not absolute and that individuals, in exercising their rights, are also bound to respect the rights of others<sup>48</sup> or yield to public interests.

For example, the ICCPR provides that the right of peaceful assembly may be restricted by domestic law for the protection of public health, among other grounds,<sup>49</sup> despite the absence of a public emergency. In the Philippines, the exercise of the right of peaceful assembly is regulated by Batas Pambansa Bilang 880 (“B.P. No. 880”) which was held as “a recognized exception to the exercise of the right even under the Universal Declaration of Human Rights and the [ICCPR].”<sup>50</sup> In *Bayan v. Ermita*, the Philippine Supreme Court had the occasion to rule certain provisions of B.P. No. 880 as a valid restriction to said right since it is “not an absolute ban of public assemblies but a restriction” that simply provides “a ‘content-neutral’ regulation of the time, place, and manner of holding public assemblies,”<sup>51</sup> provided, however, that “the permit can only be denied on the ground of clear and present danger to public order, public safety, public convenience, public morals or public health.”<sup>52</sup> As applied to the COVID-19 pandemic, this law can be the basis to deny the exercise of the right due to “clear and convincing evidence that the public assembly will create a clear and present danger to [...] public health”<sup>53</sup> considering that public assemblies or rallies may pose a serious risk of virus transmission. But even in a hypothetical situation where the Philippines has

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<sup>46</sup> *Id.* See Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 224. See also *Sunday Times v. UK* (1979-80) 2 EHRR 245, ¶ 49, confirming that judge-made laws may constitute sufficiently prescribed ‘laws’ for the purposes of limitation to rights under the European Convention.

<sup>47</sup> Joseph & Castan, *supra* note 44. See *Pinkney v. Canada* (27/78). See also UN Human Rights Committee, General Comment No. 27: Article 12 (Freedom of Movement), ¶ 13, U.N. Doc. CCPR/21/Rev.1/Add.9 (Nov. 2, 1999).

<sup>48</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 Oscar Garibaldi, *General Limitations on Human Rights: The Principle of Legality*, 17 HARV. INT’L. L.J. 503, 517 (1976).

<sup>49</sup> ICCPR, art. 21.

<sup>50</sup> *Bayan v. Ermita*, 522 Phil. 201 (2006).

<sup>51</sup> *Id.*, citing *Osmeña v. Comm’n on Elections*, 351 Phil. 692 (1998).

<sup>52</sup> *Id.*

<sup>53</sup> Batas Blg. 880 (1985), § 6(a). “Sec. 6. *Action to be taken on the application.* -(a) It shall be the duty of the mayor or any official acting in his behalf to issue or grant a permit *unless there is clear and convincing evidence that the public assembly will create a clear and present danger to public order, public safety, public convenience, public morals or public health.* [...]” (Emphasis supplied.)

no domestic law to restrict the exercise of the right, the Philippine Government can make a case for a permissible derogation due to a “public emergency” under Article 4 of the ICCPR.<sup>54</sup>

It is interesting to note that in General Comment 29, the UN HRC stated that in their opinion “the possibility of restricting certain [ICCPR] rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.”<sup>55</sup> In the mind of the UN HRC, since Articles 12 and 21 may be restricted, no derogation of such rights may be justified. However, recalling the requirement that limitations must be prescribed by domestic laws, the statement presupposes that all states have domestic laws providing for restrictions for any emergency scenario, be it foreseeable or not. In reality, some states may not yet have domestic laws in place that are comprehensive enough to restrict ICCPR rights for every public emergency that it may encounter; or in particular, for its measures in this fight against the pandemic. Notice that most of the states which were first to register derogations related to the COVID-19 pandemic, such as Guatemala, Armenia, Peru, Estonia, Ecuador, and Romania, imposed measures derogating from the right to freedom of movement (Article 12) and the right to peaceful assembly (Article 21).<sup>56</sup>

Interestingly, in its latest statement on derogations from the ICCPR in connection with the COVID-19 pandemic, the UN HRC changed its tone from *no permissible derogation* in General Comment 29 to *no permissible derogation if restrictions are possible*. According to the statement, “[s]tates parties should not derogate from [ICCPR] rights or rely on a derogation made when they are able to attain their public health or other public policy objectives by invoking the possibility to restrict certain rights, such as article 12 (freedom of movement), article 19 (freedom of expression) or article 21 (right to peaceful assembly) [...]”.<sup>57</sup>

Indeed, the limitation of human rights has many nuances that its discussion merits a separate paper. But for the purposes of this paper, the author briefly discussed the difference between a limitation and a derogation to pave the way for the discussion of the derogation clause in the ICCPR.

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<sup>54</sup> See discussion *infra*.

<sup>55</sup> General Comment 29, ¶ 5.

<sup>56</sup> See Intl. Justice Resource Center, at [https://ijrcenter.org/wp-content/uploads/2020/04/ICCPR-Derogations-28.apr\\_20.pdf](https://ijrcenter.org/wp-content/uploads/2020/04/ICCPR-Derogations-28.apr_20.pdf)

<sup>57</sup> Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, ¶ 2(c), U.N. Doc. CCPR/C/128/2 (Apr. 2, 2020).

In essence, a derogation clause allows a state to suspend certain individual rights under exceptional circumstances.<sup>58</sup> What constitutes these required “exceptional circumstances” vary from instrument to instrument.<sup>59</sup> Under the ICCPR derogation clause found in article 4, these are referred to as “time[s] of public emergency which [threaten] the life of the nation.”<sup>60</sup> Similarly, the European Convention on Human Rights clause uses the phrase in “time[s] of war or other public emergency threatening the life of the nation.”<sup>61</sup> Meanwhile, the American Convention on Human Rights spells out 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>62</sup>

### III. PERMISSIBLE DEROGATION OF RIGHTS GUARANTEED BY THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

#### A. Overview: Article 4 of the ICCPR

Under the ICCPR, states may derogate from its obligation to respect, protect, and fulfill certain rights as a proportionate response to a serious public emergency.<sup>63</sup> While there is a general recognition that civil liberties may be curtailed during public emergencies to prioritize general public safety, it can be observed that “some of the most egregious human rights abuses occur during purported public emergencies.”<sup>64</sup> This highlights the importance of strictly monitoring whether derogating measures imposed by states are permissible—so it cannot “operate as a shield for the ‘cynical and calculated destruction of the rights’ of [political] opponents” and dissidents.<sup>65</sup>

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<sup>58</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>59</sup> Fernandez, *supra* note 35, at 4.

<sup>60</sup> *Id.* ICCPR, art. 4.

<sup>61</sup> Gross, *supra* note 58, at 257, *citing* European Convention for the Protection of Human Rights and Fundamental Freedoms, *as amended*, art. 15, Nov. 4, 1950, 213 U.N.T.S. 221. *See* Fernandez, *supra* note 35, at 4.

<sup>62</sup> Gross, *supra* note 58, at 257, *citing* American Convention on Human Rights, art. 27, Nov. 22, 1950, 1144 U.N.T.S. 123. *See* Fernandez, *supra* note 35, at 5.

<sup>63</sup> Joseph & Castan, *supra* note 44, at 910.

<sup>64</sup> *Id.* *See* DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 301 (Clarendon Press, 1994).

<sup>65</sup> Joseph & Castan, *supra* note 44, at 910, *citing* PR Ghandhi, *The Human Rights Committee and Derogation in Public Emergencies*, 32 GER. Y.B. INT'L L. 323, 323 (1989).

### 1. *Substantive Limits of Article 4*

While the first paragraph of Article 4 allows states, in times of public emergencies, to take measures *derogating* from their obligations to protect and respect some rights, this should only be to the extent required to address the emergency:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, [color], sex, language, religion or social origin.<sup>66</sup>

Moreover, the second paragraph enumerates several rights that can never be derogated from in any situation; these are the so-called “non-derogable rights”.<sup>67</sup> These rights are the:

- a) Right to life;
- b) Right against torture or to cruel, inhuman, or degrading treatment or punishment;
- c) Right against slavery and servitude;
- d) Right against imprisonment for failure to fulfill contractual obligations;
- e) Right against ex post facto punishment;
- f) Right to recognition; and
- g) Right to freedom of thought, conscience, and religion.<sup>68</sup>

One misconception is that the presence of a public emergency justifies the derogation of any right not enumerated as non-derogable in the second paragraph of Article 4. However, the fact that certain rights are listed as non-derogable does not mean that other ICCPR rights that are not enumerated may be subjected to derogations at will, despite the presence of a public emergency.<sup>69</sup> This is because the measures imposed should still be only “to the extent strictly required by the exigencies of the situation”—this

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<sup>66</sup> ICCPR, art. 4(1). *See* discussion *infra*.

<sup>67</sup> General Comment 29, ¶¶ 7, 10 & 11; Joseph & Castan, *supra* note 44, at 916; Human Rights Committee, *Giri v. Nepal*, Comm. 1671/2008, ¶ 7.9 (2011).

<sup>68</sup> ICCPR, art. 4(2); “2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”

<sup>69</sup> General Comment 29, ¶ 6; *See* discussion *infra*.

requirement reflects the principle of “proportionality” in international human rights law.<sup>70</sup>

This is where the notification procedure in Article 4(3) becomes instrumental. The notification furnishes the UN HRC with essential information so it can discharge its duty to assess whether the measures taken by the state satisfies the test of proportionality.<sup>71</sup>

## 2. *Procedural Requirements in Article 4*

Internally, the state must officially declare a state of emergency.<sup>72</sup> Externally, a state “availing itself of the right of derogation must immediately inform the other States Parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures.”<sup>73</sup>

While the first paragraph of Article 4 requiring the official proclamation of a state of emergency “imposes procedural ‘notice’ requirements in [domestic] law,” the third paragraph “imposes notice requirements at the international level.”<sup>74</sup> Paragraph three provides for a “regime of international notification.”<sup>75</sup> The third paragraph outlines the procedure, thus:

Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through its intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

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<sup>70</sup> ICCPR, art. 4(1); *See* discussion *infra*.

<sup>71</sup> General Comment 29, ¶ 17

<sup>72</sup> ICCPR, art. 4(1). “In time of public emergency which threatens the life of the nation *and the existence of which is officially proclaimed*, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” (Emphasis supplied.); *See also* General Comment 29, ¶ 2.

<sup>73</sup> General Comment 29, ¶ 17.

<sup>74</sup> Joseph & Castan, *supra* note 44, at 919.

<sup>75</sup> General Comment 29, ¶ 17.

The notification “should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding [the implementing state’s domestic] law.”<sup>76</sup> Furthermore, the UN HRC adds that “[a]dditional notifications are required if the State party subsequently takes further measures under article 4” such as “extending the duration of a state of emergency.”<sup>77</sup> This is what Guatemala did when it first communicated its derogations through the UN Secretary-General on January 24, 2020, explaining that it has declared a state of emergency in several municipalities and will be imposing measures derogating from Articles 12, 19 and 21 to fight the threat of the pandemic.<sup>78</sup> Guatemala has subsequently sent six more notifications thereafter when it modified, imposed more, or extended the imposition of measures.<sup>79</sup>

Unfortunately, despite the noble objective of the notice requirement, compliance has been problematic. If not totally disregarded, the notice lacks sufficient information to help the UN HRC assess the validity of the derogation.<sup>80</sup> As of May 5, 2020, more or less three months since countries started imposing strict measures, only 14 of 173 states (8%) have notified derogations from the ICCPR.<sup>81</sup> This may mean two things: (1) that other states opted to *limit* or restrict rights pursuant to their domestic laws, or (2) other states disregarded the notice requirement despite its *derogation*. The Philippines did not send any notice of derogation.

One reason pointed out by scholars for poor compliance is the lack of ability of human rights bodies (such as the UN HRC) to enforce decisions<sup>82</sup> which means that non-compliance has less adverse consequences on non-compliant states.<sup>83</sup> Furthermore, a state’s substantive right to take derogating measures does not depend on the procedural notification requirement in

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<sup>76</sup> ¶ 17.

<sup>77</sup> ¶ 17.

<sup>78</sup> International Justice Resource Center, *supra* note 56.

<sup>79</sup> *Id.* As of April 28, 2020, Guatemala sent seven notifications: one dated January 24 and January 31; two on February 19; one on March 10 and another on March 31 and April 6.

<sup>80</sup> See Fernandez, *supra* note 35, at 23, citing Gandhi, *supra* note 65, at 357: “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>81</sup> See United Nations Treaty Collection, *Depositary Notifications (CNs) by the Secretary-General*, UNITED NATIONS TREATY COLLECTION, at [https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=\\_en](https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=_en). See also Niall Coghlan, *Dissecting Covid-19 Derogations*, VERFBLOG, May 5, 2020, at <https://verfassungsblog.de/dissecting-covid-19-derogations>

<sup>82</sup> See Fernandez, *supra* note 35, at 25, citing Gandhi, *supra* note 65, at 361. “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.’”

<sup>83</sup> Gross, *supra* note 58, at 297.

Article 4(3).<sup>84</sup> However, scholars posit that a state's failure to provide relevant information, such as "details of the nature and exigencies of the relevant public emergency, means that the State will fail to discharge its burden of proof in justifying those derogations, and will thus be denied any substantive [A]rticle 4 defen[s]e of its actions."<sup>85</sup>

### **B. The "When" and "to What Extent" of ICCPR Human Rights Derogations**

The requirements for permissible derogation in paragraph one may be divided into four requirements: (1) that there exists a public emergency threatening the life of the nation, (2) that the measures imposed are only to the extent strictly required by the exigencies of the situation (3) in conformity with international law, and (4) does not discriminate solely on the basis of race, color, sex, language, religion, or social origin.<sup>86</sup> Further, the provisions of paragraph two may be added as a fifth element; that (5) the measures do not violate the right to life, right against torture or to cruel, inhuman, or degrading treatment or punishment, right against slavery and servitude, right against imprisonment for failure to fulfill contractual obligations, right against ex post facto punishment, right to recognition, and the right to freedom of thought, conscience, and religion.<sup>87</sup>

The usual points of contention in Article 4 are the first and second requirements. Since the other requirements are straight-forward and self-explanatory, the author shall focus on the first two requirements.

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<sup>84</sup> See *Landinelli Silva v. Uruguay*, HRC Comm. 34/1978, ¶ 8.3 (1981). "Although the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to article 4(3) of the Covenant, the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4(1) of the Covenant in proceedings under the Optional Protocol." See also Joseph & Castan, *supra* note 44, at 921.

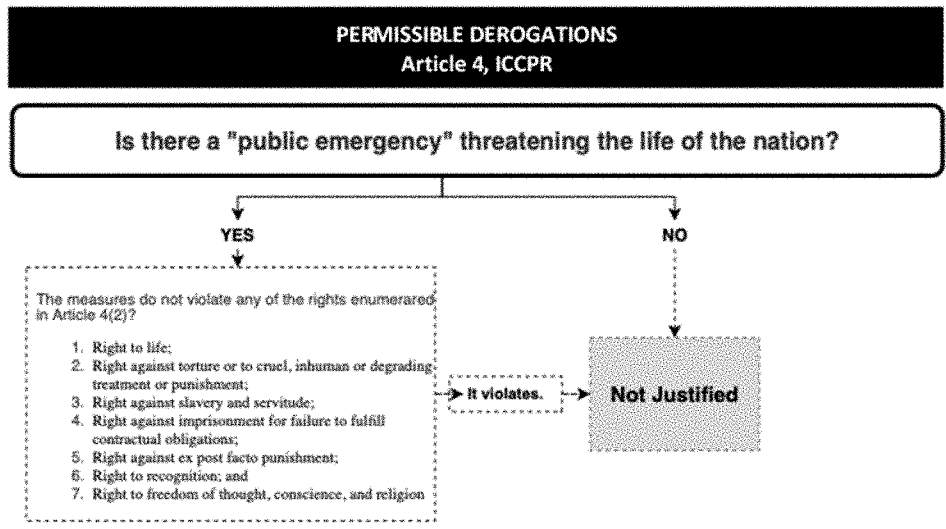
<sup>85</sup> Joseph & Castan, *supra* note 44, at 921.

<sup>86</sup> ICCPR, art. 4(1).

<sup>87</sup> Art. 4(2); "2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."

### 1. Public Emergency Threatening the Life of the Nation

The first requirement for a permissible derogation in the ICCPR is the existence of a “public emergency which threatens the life of the nation.”<sup>88</sup> Without the existence of a public emergency, any measure derogating from the state’s obligation to grant ICCPR rights would never be justified.



A “public emergency” refers to “an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organi[z]ed life of the community.”<sup>89</sup> Note, however, that any form of crisis would not suffice as it should be shown that it is of exceptional character—such that it affects a state’s “physical integrity, political independence or territorial integrity, or the existence or function of

<sup>88</sup> Art. 4(1). “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” (Emphasis supplied.)

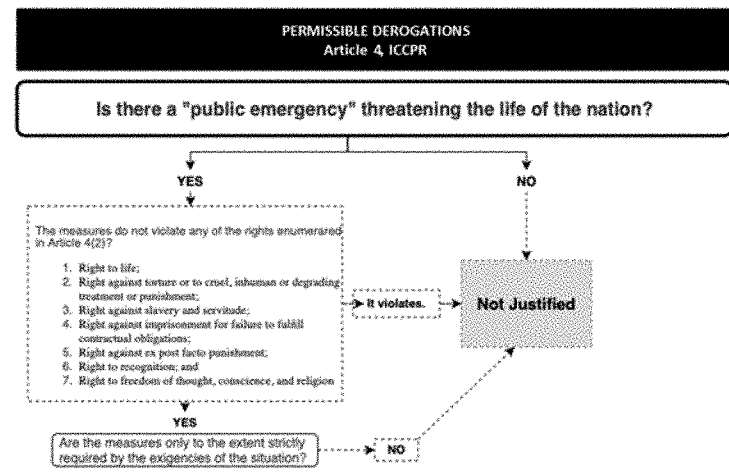
<sup>89</sup> Gross, *supra* note 58, at 249 (2006); Scott Dolezal, *The Systematic Failure to Interpret Article IV of the International Covenant on Civil and Political Rights: Is there a Public Emergency in Nigeria?*, 15 AM. U. INT’L. L. REV. 1163, 1187-1188 (2000), *citing* *Siracusa Principles on 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).



indispensable institutions designed to protect human rights.”<sup>90</sup> Some examples that fit this characterization are war, terrorist emergencies, or severe natural disasters, such as major floods or earthquakes.<sup>91</sup>

The UN HRC has already acknowledged that the COVID-19 pandemic is a public emergency that can be a basis to invoke Article 4.<sup>92</sup> In this regard, states “confronting the threat of widespread contagion may, on a temporary basis, resort to exceptional emergency powers and invoke their right of derogation from the Covenant under article 4 provided that it is required to protect the life of the nation.”<sup>93</sup>

*2. Only to the Extent Strictly Required by the Exigencies of the Situation (a.k.a. “proportionality”)*



<sup>90</sup> DIANE DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES 247 (2012), *citing* MARC BOSSUYT, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 81-102 (1987); Joseph & Castan, *supra* note 44, at 911, *citing* MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 91 (2005 ed.).

<sup>91</sup> Joseph & Castan, *supra* note 44, at 911.

<sup>92</sup> UN Human Rights Committee, Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic (Apr. 24, 2020), ¶ 2, U.N. Doc. CCPR/C/128/2 (Apr. 2, 2020).

<sup>93</sup> ¶ 2.

States are not given free rein just because there is a public emergency. After confirming the presence of a public emergency, states still need to satisfy the proportionality requirement.<sup>94</sup>

The derogating measures that states may employ are limited only “to the extent strictly required by the exigencies of the situation.”<sup>95</sup> This reflects the principle of proportionality in international human rights law which is a common standard for both derogations and limitations.<sup>96</sup> Simply stated, these measures should only be in proportion to the threat posed by the public emergency and should only be enough to quell the threat. Proportionality “relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.”<sup>97</sup>

#### i. Material Scope of the State of Emergency

The permissibility of a derogating measure would of course depend on the kind of emergency the state is confronting.

For example, a lockdown which derogates from the rights to freedom of movement<sup>98</sup> (Article 12) and peaceful assembly<sup>99</sup> (Article 21) may be seen as permissible when fighting against a pandemic, but not when the emergency is a severe natural disaster. The most common measures being employed by states during this fight against the COVID-19 pandemic are quarantines, lockdowns, and travel bans—measures that derogate from Articles 12 and 21, among other rights. In fact, most of the states that were first to register

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<sup>94</sup> ICCPR, art. 4(1). “*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*” (Emphasis supplied.)

<sup>95</sup> Art. 4(1); *See* General Comment 29, ¶ 4; Human Rights Committee, Gen Comm 29 at ¶¶ 4-5; *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR*, 7 HUM. RTS. Q. 1, principle 54; Joseph & Castan, *supra* note 44, 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, Comm. 488/92, U.N. Doc. CCPR/C/50/D, ¶ 8.3 (1994).

<sup>96</sup> General Comment 29, ¶ 4.

<sup>97</sup> ¶ 4.

<sup>98</sup> ICCPR, art. 12. This includes the freedom to travel and the right to return to one’s country.

<sup>99</sup> Art. 21.

derogations related to the COVID-19 pandemic imposed measures that affect freedom of movement and the right to peaceful assembly.<sup>100</sup>

## ii. Geographical Coverage and Duration

What are seen as permissible measures also depends on the geographical coverage and duration of the emergency.<sup>101</sup> Since derogations are “exceptional and temporary [in] nature” which “may only last as long as the life of the nation is threatened,”<sup>102</sup> it only follows that it should be imposed on areas which are affected and while the emergency lasts. At the end of the day, the objective behind the imposition of the measure must be “[t]he restoration of a state of normalcy where full respect for the [ICCPR] can again be secured.”<sup>103</sup>

Before imposing lockdowns, most states resorted first to quarantines<sup>104</sup> and travel bans.<sup>105</sup> In the Philippines, the Civil Aeronautics Board indefinitely suspended all flights from Wuhan as early as January 23, followed by a travel ban on those coming from the Hubei province of China on January 28.<sup>106</sup> On February 2, President Duterte approved a temporary ban of entry of persons coming from or who were in China within 14 days before arrival,<sup>107</sup> this was followed by a ban on disembarkation of vessel crews from China by the Philippine Ports Authority on February 3. On February 6, the Inter-Agency Task Force for the Management of Emerging Infectious Diseases (IATF-EID) identified Clark City as a temporary quarantine site for

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<sup>100</sup> See International Justice Resource Center, *supra* note 55.

<sup>101</sup> General Comment 29, ¶ 4.

<sup>102</sup> UN Human Rights Committee, General Comment No. 5: Article 4 (Derogations), ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (July 31, 1981).

<sup>103</sup> ¶ 1.

<sup>104</sup> See Amnesty International (USA), *Responses to COVID-19 and States' Human Rights Obligations: Preliminary Observations*, AMNESTY INTERNATIONAL WEBSITE, Mar. 16, 2020, at <https://www.amnestyusa.org/press-releases/responses-to-covid-19-and-states-human-rights-obligations-preliminary-observations>. Quarantine is the process of separating individuals who may have been exposed to or are showing symptoms of an infectious disease.

<sup>105</sup> See *id.* Travel restrictions and bans affect “the right to the freedom of movement, which includes the freedom to leave any country and the right to not be arbitrarily deprived of the right to enter one’s own country. Several countries have closed certain borders, or imposed bans on travel to and from areas with high numbers of COVID-19 cases, often impacting people trying to reach their homes and families, conducting their regular business, or accessing education at schools and universities.”

<sup>106</sup> Department of Health (DOH), *COVID-19 Timeline (January)*, COVID-19 DASHBOARD WEBSITE, at <http://www.covid19.gov.ph/jan-covid-19-timeline>

<sup>107</sup> DOH, *COVID-19 Timeline (February)*, COVID-19 DASHBOARD WEBSITE, at <http://www.covid19.gov.ph/feb-covid-19-timeline>

repatriated Filipinos from Wuhan.<sup>108</sup> After three days, the Department of Foreign Affairs reported over 30 overseas Filipino workers repatriated from Wuhan who were to undergo the mandatory 14-day quarantine.<sup>109</sup> All subsequent repatriates were also subjected to quarantine. It was not until March 12 when President Duterte ordered a strict community quarantine (a lockdown) in the National Capital Region (“NCR”) from March 15 up to April 15, suspending all classes and government work in NCR; and on March 16, placed the whole of Luzon under a stricter “Enhanced Community Quarantine” (“ECQ”).<sup>110</sup> It was also around this time when the Bureau of Immigration implemented additional travel restrictions for those arriving from Iran and Italy which were becoming the epicenter of the pandemic at that time. The whole country was eventually placed under ECQ which was extended several times: from April 16 to April 30,<sup>111</sup> May 1 to 15, and again from May 16 to 31.<sup>112</sup> As of June 1, the Philippine scaled down to a “General Community Quarantine” (“GCQ”), easing some restrictions on movement; but still, technically, on lockdown as of the end of June.

In assessing the proportionality of the lockdown, notice that with regard to the geographical coverage, the Philippine Government first imposed a lockdown in NCR since this is where most COVID-19 cases were initially recorded. The whole of Luzon was placed on lockdown several days after when the threat was not contained within NCR. The whole country was eventually placed on lockdown after the rising number of confirmed cases outside NCR and Luzon. With regard to duration, the Philippines shifted from ECQ to the less restrictive GCQ on June 1, but is still, technically, on lockdown for more than three months as of the end of June. Stretching this community quarantine measure for this extended period of time may be reasonable since the curve of confirmed cases has not yet flattened. However, the author submits that even a perfectly reasonable measure may become unjustified, despite the ongoing presence of a public emergency, if imposed longer than is necessary. There may come a time that the situation calls for the phasing out of draconian lockdown measures and phasing in of less restrictive measures. In fact, other countries that also imposed lockdowns,

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> DOH, *COVID-19 Timeline (March)*, COVID-19 DASHBOARD WEBSITE, at <http://www.covid19.gov.ph/mar-covid-19-timeline>

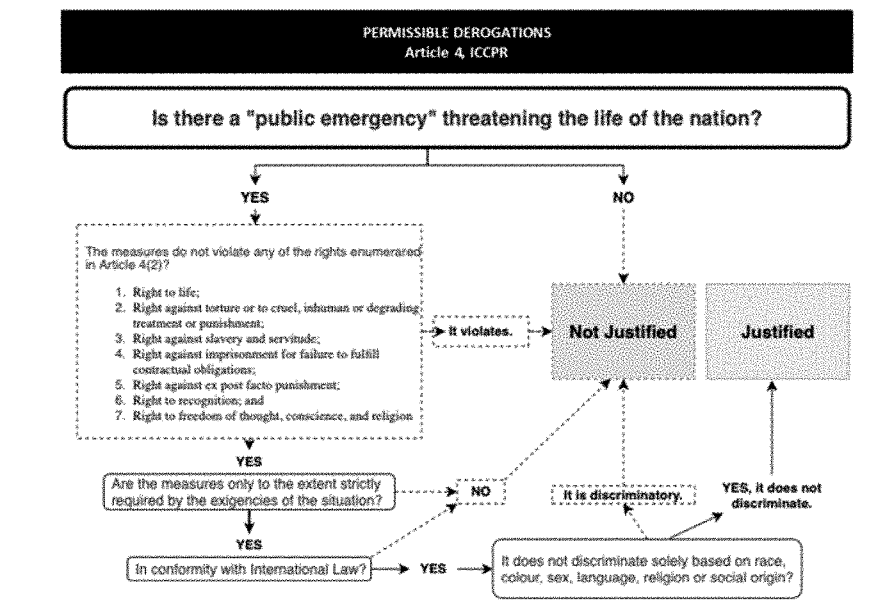
<sup>111</sup> DOH, *COVID-19 Timeline (April)*, COVID-19 DASHBOARD WEBSITE, at <http://www.covid19.gov.ph/apr-covid-19-timeline>

<sup>112</sup> DOH, *COVID-19 Timeline (May)*, COVID-19 DASHBOARD WEBSITE, at <http://www.covid19.gov.ph/may-covid-19-timeline>

such as Italy and Spain, have lifted their respective lockdown measures and significantly eased their restrictions after somehow flattening the curve.<sup>113</sup>

Due to the novelty of the crisis that all countries are simultaneously fighting against, how long states will derogate from their obligations under human rights treaties is yet to be clear.<sup>114</sup> But states have generally indicated a period of one to two months, with the possibility of extension.<sup>115</sup>

### C. Validity or Invalidity of Measures Employed by the Philippines in its Fight Against the COVID-19 Pandemic



The test on the permissibility of derogating measures may be further simplified by associating it with two simple questions:<sup>116</sup> *when* can ICCPR

<sup>113</sup> Guy Davies, *Italy and Spain begin to reopen after coronavirus lockdown, rest of Europe to follow suit*, ABC NEWS, May 19, 2020, at <https://abcnews.go.com/International/italy-spain-begin-reopen-coronavirus-lockdown-rest-europe/story?id=70742735>

<sup>114</sup> Kushtrim Istrefi & Isabel Humburg, *To Notify or Not to Notify: Derogations from Human Rights Treaties*, OPINIOJURIS, Apr. 8, 2020, at <http://opiniojuris.org/2020/04/18/to-notify-or-not-to-notify-derogations-from-human-rights-treaties>

<sup>115</sup> *Id.*

<sup>116</sup> See General Comment 29, ¶ 5. “The issues of when rights can be derogated from, and to what extent, cannot be separated from the provision in article 4, paragraph 1, of the Covenant according to which any measures derogating from a State party’s obligations under

rights be derogated from, and *to what extent?* To which, the answer would be: (when?) “in time[s] of public emergencies” threatening the life of the nation, (to what extent?) but employed measures should only be “to the extent strictly required by the exigencies of the situation,” in conformity with international law, do not discriminate on the basis of race, color, sex, language, religion, or social origin,<sup>117</sup> and do not violate the non-derogable rights.<sup>118</sup>

Contrary to Diño’s claim, a state of emergency does not suspend all human rights. Since the COVID-19 pandemic is a public emergency which threatens the life of the nation, the Philippines may invoke Article 4 in imposing a lockdown, quarantine and travel restrictions that derogate from the ICCPR guaranteed rights of freedom of movement and freedom of assembly, among other rights, if affected rights cannot be restricted pursuant to limitations in domestic law.<sup>119</sup> But even if these necessary measures pass the test of proportionality, conformity with international law, and non-discrimination, it can never lend legality to the imposition of cruel, inhuman, or degrading punishment proscribed by Article 4(2) for those who violate these restrictions.<sup>120</sup> Therefore, punishment in the form of placing children in coffins or caging violators like animals<sup>121</sup> is never justified even in a state of emergency. Neither can a “shoot to kill” order<sup>122</sup> that was probably the hand that pulled the trigger in the killing of unarmed Winston Ragos<sup>123</sup> be justified since it violates the non-derogable right to life.<sup>124</sup>

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the Covenant must be limited ‘to the extent strictly required by the exigencies of the situation’ [...]”.

<sup>117</sup> ICCPR, art. 4(1).

<sup>118</sup> Art. 4(2).

<sup>119</sup> See discussion *supra*.

<sup>120</sup> ICCPR, art. 4(2).

<sup>121</sup> Human Rights Watch, *Philippine Children Face Abuse for Violating COVID-19 Curfew*, HUMAN RIGHTS WATCH WEBSITE, Apr. 3, 2020, at <https://www.hrw.org/news/2020/04/03/philippine-children-face-abuse-violating-covid-19-curfew>

<sup>122</sup> See Amnesty International, *Philippines: President Duterte gives “shoot to kill” order amid pandemic response*, AMNESTY INTERNATIONAL WEBSITE, Apr. 2, 2020, at <https://www.amnesty.org/en/latest/news/2020/04/philippines-president-duterte-shoot-to-kill-order-pandemic>

<sup>123</sup> Vince Ferreras & Greg Cahiles, *Retired soldier shot dead by police at checkpoint in Quezon City*, CNN PHIL., Apr. 22, 2020, at <https://www.cnnphilippines.com/news/2020/4/22/Retired-soldier-shot-dead-by-police-.html>

<sup>124</sup> ICCPR, art. 4(2).

#### IV. STATE OF EMERGENCY AND RELATED POWERS IN PHILIPPINE CONSTITUTIONAL LAW

All states are expected to “act within their [Constitution] and other provisions of law that govern such proclamation and the exercise of emergency powers” in “proclaiming a state of emergency with consequences that could entail derogation from any provision of the [ICCPR].”<sup>125</sup>

In Philippine law, the 1987 Philippine Constitution outlines several powers and the requirements for their valid exercise. These are the emergency powers,<sup>126</sup> calling out powers,<sup>127</sup> the declaration of martial law and the suspension of the privilege of the writ of habeas corpus.<sup>128</sup> Since these are powers with similar requirements and all originating from the rationale of granting states leeway to address public emergencies, they are often conflated. However, each of these powers has different requisites, with the declaration of martial law and the suspension of the privilege of the writ of habeas corpus having the strictest safeguards (only in invasion or rebellion, and when the public safety requires it)<sup>129</sup> since both curtail basic civil rights and individual freedoms.<sup>130</sup>

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<sup>125</sup> General Comment 29, ¶ 2.

<sup>126</sup> CONST. art. VI, § 23(2). “*In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.*” (Emphasis supplied.)

<sup>127</sup> Art. VII, § 18(1). “The President shall be the Commander-in-Chief of all armed forces of the Philippines and *whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. [...]*” (Emphasis supplied.)

<sup>128</sup> Art. VII, § 18(1). “[...] In case of *invasion or rebellion, [and] when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law. [...]*” (Emphasis supplied.)

<sup>129</sup> Art. VII, § 18(1).

<sup>130</sup> Raul Pangalangan, *Political Emergencies in the Philippines: changing labels and the unchanging need for legitimacy*, in EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 423 (Victor Ramraj & Arun Thiruvengadam eds., 2010), *citing* Integrated Bar of the Phil. v. Zamora [hereinafter “IBP”], G.R. No. 141284, 338 SCRA 81, 110, Aug. 15, 2000. *See* discussion *infra*.

Emergency powers	Calling Out Powers	Martial Law / Suspension of the Privilege. of the Writ of <i>Habeas Corpus</i>
<p><b>Article VI, Section 23(2):</b></p> <p>“In times of <i>war</i> or <i>other national emergency</i>, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to <i>exercise powers</i> necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.” (Emphasis supplied.)</p>	<p><b>Article VII, Section 18(1):</b></p> <p>“The President shall be the Commander-in-Chief of all armed forces of the Philippines and <i>whenever it becomes necessary, he may call out such armed forces</i> to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law. [...]” (Emphasis supplied.)</p>	<p><b>Article VII, Section 18(1):</b></p> <p>“The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of <i>invasion or rebellion</i>, [and] <i>when the public safety requires it</i>, he may, for a period not exceeding sixty days, <i>suspend the privilege of the writ of habeas corpus</i> or place the Philippines or any part thereof under <i>martial law</i>. [...]” (Emphasis supplied.)</p>

When Diño claimed that all human rights, including the privilege of the writ, are suspended, he conflated these powers. It is clear that contrary to Diño’s claim, the privilege of the writ is not suspended by mere declaration of a state of emergency. In fact, even the declaration of martial law—a legal regime seen in the Philippines to be more draconian than a state of emergency—“does not suspend the operation of the Constitution, [...] nor automatically suspend the privilege of the writ.”<sup>131</sup>

The 1987 Constitution guarantees human rights under Article III (Bill of Rights) which includes the privilege of the writ of habeas corpus, and

<sup>131</sup> CONST. art. VII, § 18(4).



provides that the President may suspend the privilege of the writ of habeas corpus only “in case of invasion or rebellion” and “when the public safety requires it.”<sup>132</sup> Without need of exhaustive explanation, the COVID-19 pandemic is far from qualifying as an invasion or a rebellion. Equally laughable is Chief Presidential Legal Counsel Salvador Panelo’s argument “that President Rodrigo Duterte can declare martial law on the basis of ‘invasion’ of the novel coronavirus.”<sup>133</sup>

### **A. The Granting of Emergency Powers to the President**

The presence of war or other national emergencies, such as the COVID-19 pandemic, is a ground for the Congress to grant the President emergency powers under Section 23(2), Article VI of the 1987 Philippine Constitution.<sup>134</sup>

In *David v. Macapagal-Arroyo*, the Philippine Supreme Court explained that “emergencies” include rebellion, economic crisis, pestilence, epidemic, typhoon, flood, or other similar catastrophe of nationwide proportions.<sup>135</sup> While the ultimate power to declare the existence of a national emergency is reposed in Congress,<sup>136</sup> the Congress may give additional powers to the President under the following conditions: (i) in “times of war or other national emergency”; (ii) authorized by law; (iii) “for a limited period and subject to such restrictions as [Congress] may prescribe”; and (iv) limited to the “powers necessary and proper to carry out a declared national policy.”<sup>137</sup>

This is the constitutional basis of Congress in granting President Duterte emergency powers through Republic Act No. 11469 to combat the COVID-19 pandemic in the Philippines.<sup>138</sup> The last time it was invoked

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<sup>132</sup> Art. III, § 15: “The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion or rebellion, when the public safety requires it.” See also art. VII, § 18(1).

<sup>133</sup> CNN Philippines, *Panelo Floats COVID-19 ‘invasion’ as Basis to Declare Martial Law*, CNN PHIL., May 4, 2020, at <https://cnnphilippines.com/news/2020/5/4/Salvador-Panelo-COVID-19-invasion-martial-law.html>

<sup>134</sup> CONST. art. VI, § 23(2).

<sup>135</sup> *David v. Macapagal-Arroyo* [hereinafter “David”], G.R. No. 171396, 489 SCRA 160, 242, May 3, 2006.

<sup>136</sup> CONST. art. VI, § 23(2).

<sup>137</sup> Art. VI, § 23(2).

<sup>138</sup> Rep. Act No. 11469, (2020), otherwise known as “Bayanihan to Heal as One Act.” Bayanihan to Heal as One Act is a law enacted on March 2020 granting the President additional authority to combat the COVID-19 pandemic in the Philippines.

before this pandemic was when emergency powers were granted to President Corazon Aquino after the 1989 coup d'état attempt.<sup>139</sup>

### **B. The Graduated Powers: Calling-Out Power, Martial Law, and the Suspension of the Privilege of the Writ**

Section 18(1), Article VII of the 1987 Constitution contains the sequence of “graduated powers” on national security.<sup>140</sup> These powers are described as “graduated” since the provision features powers “[f]rom the most to the least benign, these are: the calling-out power, the power to suspend the privilege of the writ of *habeas corpus*, and the power to declare Martial Law.”<sup>141</sup>

The calling-out power enables the President as the Commander-in-Chief of all armed forces to call the armed forces, whenever it becomes necessary, to prevent or suppress lawless violence, invasion, or rebellion.<sup>142</sup> Moreover, the President may suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law, in case there is an invasion or rebellion, *and* when the public safety requires it.<sup>143</sup>

Notice that while the Constitution “mandate[s] two conditions—actual rebellion or invasion and the requirement of public safety—before the suspension of the privilege of the writ of *habeas corpus* or the declaration of martial law could be declared,” these conditions are not required in the President’s exercise of the calling-out power.<sup>144</sup> The only condition is that “whenever it becomes necessary,” the President may call the armed forces “to suppress lawless violence, invasion or rebellion.”<sup>145</sup>

In *Integrated Bar of the Philippines v. Executive Secretary Zamora*, then President Joseph Estrada deployed the marines in Metro Manila at a time when terrorist attacks were rampant.<sup>146</sup> The Court upheld Estrada’s actions, “citing his ‘widest leeway and broadest discretion’ while avoiding the constitutional constraints inherent in the suspension of the writ or the

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<sup>139</sup> Rep. Act No. 6826 (1989); *See Pangalangan, supra* note 130, at 422.

<sup>140</sup> *IBP*, 338 SCRA 81, 109; *Pangalangan, supra* note 130, at 423.

<sup>141</sup> *David*, 489 SCRA 160, 242.

<sup>142</sup> CONST. art. VII, § 18(1).

<sup>143</sup> Art. VII, § 18(1).

<sup>144</sup> *David*, 489 SCRA 160 (Tinga, J., *dissenting*), *citing IBP*, 338 SCRA 81, 110.

<sup>145</sup> CONST. art. VII, § 18(1); *Id.*

<sup>146</sup> *IBP*, 338 SCRA 81.

declaration of martial law.”<sup>147</sup> The President was given “full discretion [...] to determine the factual basis”<sup>148</sup> on when it is necessary to call out the armed forces.<sup>149</sup>

The validity of the exercise of the calling out power was held to a lower threshold because out of the three graduated powers, it is “considered as the lesser and more benign power” compared to the declaration of martial law and suspension of the writ—“both of which involve the curtailment and suppression of certain basic civil rights and individual freedoms, and thus necessitate affirmation by Congress and, in appropriate cases, review by [the Supreme Court].”<sup>150</sup>

## V. CONCLUSION

Exceptions, in the form of derogations in human rights law, allow states to harmonize the granting of human rights with other prevailing interests such as self-preservation. It allows justifiable deviations from granting rights in exigent circumstances but identifies non-derogable rights which it finds indispensable.

The presence of this balancing mechanism in human rights law emphasizes that a public emergency does not justify an unqualified suspension of rights. By using this balancing mechanism, states can protect rights while protecting lives in their respective jurisdictions.

In closing, Filipinos need not fall victim to the narrative that any and all human rights must give way in order to survive this pandemic. In fact, contrary to the false dichotomy of “rights or lives” and the sweeping claim that human rights are suspended in public emergencies, when states impose health measures to save human lives in this pandemic, they do so pursuant to their human rights obligation to achieve the full realization of people’s right to health.<sup>151</sup> Therefore, when the Philippines implements health programs to

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<sup>147</sup> Pangalangan, *supra* note 130, at 423, *citing* IBP, 338 SCRA 81, 109.

<sup>148</sup> IBP, 338 SCRA 81, 109.

<sup>149</sup> Pangalangan, *supra* note 130, at 423.

<sup>150</sup> IBP, 338 SCRA 81, 110; Pangalangan, *supra* note 130, at 423.

<sup>151</sup> International Covenant on Economic, Social and Cultural Rights, art. 12, Dec. 16, 1966, 993 U.N.T.S. 3. “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: [...] (c) The *prevention, treatment and control of epidemic, endemic, occupational and other diseases* [...]” (Emphasis supplied.)

combat the threat of the COVID-19 pandemic, they are implementing human rights. This is one concrete example that by protecting rights, states can protect lives; by protecting lives, states uphold human rights.

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