

# Ordinary and Extraordinary Limitations on Human Rights Introduced to Tackle CBRN Threats

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## 1 Introduction

The present contribution intends to illustrate the extent to which human rights can be restricted to respond to CBRN threats and events, looking at both the preventive and reactive measures that States can introduce. The chapter will start by briefly illustrating the legal framework concerning ordinary limitations on the enjoyment of human rights, and then will use concrete examples taken from the practice of human rights courts and monitoring bodies to elucidate how these standards have been applied to CBRN threats and events (Section 2). The same methodology will be followed with respect to cases in which States have made use of derogation clauses to react to major CBRN events, hence introducing exceptional limitations that would otherwise be incompatible with conventional standards (Section 3). In sketching the applicable legal framework, particular reference will be made to the Human Rights Committee's (HRC) General Comment No. 29 on 'States of Emergency'<sup>1</sup> and to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles)*, a soft-law tool that elaborates on the standards developed by treaty monitoring bodies.<sup>2</sup> The chapter will end with a few general comments on the practice reviewed (Section 4).

The analysis will adopt the open-ended definition of CBRN threats and events identified for the purpose of the present study.<sup>3</sup> However, CBRN events occurring in situations of armed conflict will not be considered, both because the applicable legal framework is compounded by the concurrent application of international humanitarian law, and because other contributions in this

1 HRC, General Comment No. 29. States of Emergency (Article 4), UN Doc. C/PR/C/21/Rev.1/Add.11 (2001).

2 The *Siracusa Principles* were adopted by a group of 31 eminent legal experts in 1984 and are reproduced in *Human Rights Quarterly*, Vol. 7, 1985, pp 5–17.

3 See ch 1 by Frulli.

volume have looked at the legal implications of the use of CBRN weapons in armed conflicts.<sup>4</sup> Finally, while CBRN events may also severely affect the enjoyment of economic, social and cultural rights,<sup>5</sup> for reasons of expediency, we will limit our discussion to civil and political rights.

## 2 Ordinary Limitations on Human Rights and CBRN Events

Ordinary limitations are usually made possible by including within a human rights treaty the possibility to interfere with individual rights if certain qualifying conditions are met. Thus, formal and substantial requirements must be respected or else a given limitation will amount to a treaty violation. These include the requirements that the limitation (a) is provided by law; (b) pursues a legitimate aim (*ie* that it serves one of the purposes for interference listed in the specific provision at hand); and (c) is necessary to achieve said aim, which requires a proportionality test, *ie* a balancing between the extent to which a right is restricted and the interest that the limitation seeks to protect.

A second way to impose ordinary limitations is to determine that certain conduct falls outside the protection of the treaty. For instance, Article 5(1) of the European Convention on Human Rights (ECHR, 1950) protects the right to personal liberty, but also features a list of circumstances which would not constitute violations of the right. These include the 'lawful detention of persons for the prevention of the spreading of infectious diseases' (Article 5(1)(e)). The example is pertinent for our purposes, as 'the spreading of infectious diseases' might well be considered a CBRN event.

As we shall see, in essence, the legal tests carried out by monitoring bodies to assess the legality of a given restriction under a specific human rights treaty do not distinguish between the first and the second category of limitations. In the following two subsections, we will first review the contents of the three-pronged test illustrated above and then analyse how it has been applied in cases concerning CBRN threats or events.

### 2.1 *Formal and Substantial Requirements for Legitimate Human Rights Limitations*

Any restriction of human rights requires a *formal legal basis*, *ie* the limitation must be 'provided by law'. The 'law' must be 'formulated with sufficient

<sup>4</sup> See ch 21 by Mauri and ch 22 by Saluzzo.

<sup>5</sup> See A Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', in *Human Rights Law Review*, Vol. 9, 2009, pp. 557–601.

precision to enable citizens to regulate their conduct'.<sup>6</sup> Moreover, it must be framed with sufficient clarity and specify the manner in which it will be applied.<sup>7</sup>

The second leg of the test requires States to clearly identify the purpose of the limitation it wishes to introduce. Each provision protecting limitable rights presents an exhaustive list of aims on which restrictions can be based. These include public order (*ordre public*), public health, public morals, national security, public safety and the rights and freedoms of others. Limitations are obviously only permitted on the basis of grounds that are expressly listed in the specific provision.<sup>8</sup>

It should be noted that the scope of most of the grounds for interference is rather wide, and States can usually make a plausible case that they have a legitimate reason for limiting a specific right. In cases of interference imposed to counter CBRN events, one of the most frequently invoked reasons is the preservation of public health.<sup>9</sup> For instance, the HRCComm recently stated that '[t]he protection of "public health" may exceptionally permit restrictions [on the right to peaceful assembly] to be imposed, for example where there is an outbreak of an infectious disease and gatherings are dangerous'.<sup>10</sup>

In addition to being lawful and serving a legitimate purpose, any restriction must be 'necessary' to achieve said purpose. When restrictions are introduced, States 'must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims'.<sup>11</sup> To meet this test, a limitation must respond to a 'pressing social need' and the interference with the right protected must be no greater than is necessary to address such need.<sup>12</sup> The latter element is usually referred to as the test of *proportionality*, which

6 European Court of Human Rights (ECtHR), *Sunday Times v. UK*, Judgment of 26 April 1979, para 49. The same principles have been endorsed by the HRCComm as valid for limitations imposed under the International Covenant on Civil and Political Rights (ICCPR, 1966), see HRCComm, General Comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 25.

7 See, for instance, ECtHR, *Big Brother Watch and Others v. UK*, Judgment of 3 September 2018, para 306.

8 This is confirmed by art 18 ECHR, according to which 'restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'.

9 See ECtHR, *Solomakhin v. Ukraine*, Judgment of 15 March 2012.

10 HRCComm, General Comment No. 37 on the right of peaceful assembly, UN Doc. CCPR/C/GC/37 (2020) para 45.

11 HRCComm, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) para 6.

12 See ECtHR, *Sunday Times v. UK* (supra n 6) para 59.

treaty monitoring bodies apply to balance the severity of the interference against the importance of the public interest at stake.<sup>13</sup>

Under the ECtHR case law, States have been granted a ‘margin of appreciation’ in deciding on the nature and scope of the limitations required to protect certain general interests. The Strasbourg Court has stressed that State authorities:

[b]y reason of their direct and continuous contact with the vital forces of their countries [...] are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.<sup>14</sup>

The margin of appreciation doctrine is applied both with respect to limitations and derogations from the ECHR, but its exact meaning and scope is sometimes obscure.<sup>15</sup> The discretion left to States may, in fact, vary depending on the nature of the rights at issue and on the balancing of competing rights.<sup>16</sup> Indeed, the Court has clarified that the margin of appreciation is not unlimited, and that it will be narrower ‘where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights’.<sup>17</sup>

## 2.2 *The Practice of Human Rights Mechanisms Concerning Limitations Imposed to Tackle CBRN Events*

There is, so far, relatively little practice concerning ordinary limitations imposed to tackle CBRN events strictly speaking. Our analysis will be divided into two parts, looking first at measures directed at preventing a CBRN emergency and then at those employed to respond to a crisis once it has erupted.

13 On the proportionality test, as applied by the ECtHR, see JH Gerards, ‘How to Improve the Necessity Test of the European Court of Human Right’, in *International Journal of Constitutional Law*, Vol. 11, 2013, pp. 466–90.

14 ECtHR, *Handyside v. UK*, Judgment of 7 December 1976, para 48.

15 See A Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012). According to this author, even the IACtHR (at p. 32) and the HRCComm (at p. 81), while not explicitly endorsing this doctrine, have granted States a certain margin of appreciation when deciding cases before them. However, in one of its more recent General Comments, the HRCComm has explicitly dismissed the doctrine. See HRCComm, General Comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (2011) para 36.

16 See B Rainey, E Wicks and C Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (6th edn, Oxford University Press, 2014), pp. 325–333.

17 ECtHR, *Connors v. UK*, Judgment of 27 May 2004, para 82.

Starting with preventive measures, one interesting case concerns a compulsory vaccination campaign aimed at eradicating the risk of diphtheria, a highly infectious and virulent disease. In *Solomakhin v. Ukraine*, the applicant complained, *inter alia*, that there had been no reason for vaccinating him, as there had not been an outbreak of diphtheria in his hometown at the relevant time and the vaccine had been strongly contraindicated for him.<sup>18</sup> In the months following the vaccination, he suffered a bad state of health and maintained that it was linked to the vaccine he had received. The ECtHR decided to address the case under Article 8 of the Convention, which protects respect for private life.<sup>19</sup>

The Government agreed that the compulsory vaccination had constituted an interference with the applicant's private life but contended that this was made necessary by the complicated epidemiological situation in the region.<sup>20</sup> The Court agreed with the respondent State. Elaborating on the issue of proportionality, it recalled that the medical staff had checked the applicant's suitability for vaccination prior to carrying it out, which suggests that necessary precautions had been taken to ensure that the medical treatment would not be to his detriment to an extent that could upset the balance of interests between the applicant's personal integrity and the public interest of protecting the health of the population.<sup>21</sup> Another decisive element in the Court's reasoning was the fact that the applicant's allegations had been thoroughly examined by the domestic courts. Their findings were based on a large amount of medical data that had not been properly challenged by the applicant.<sup>22</sup>

A similar case was recently the object of a pivotal judgment rendered by the Grand Chamber of the Strasbourg Court. In the case of *Vavříčka and Others v. the Czech Republic*,<sup>23</sup> the Court held that there had been no violation of Article 8 with respect to the compulsory vaccination regime for children against nine common and potentially very serious diseases. The high-profile ruling confirmed the compatibility with conventional standards of national rules imposing vaccination and setting negative consequences in the case of non-compliance. The applicants were several children and one father. In none of the cases were the vaccines given, due to the applicants' objections which were based on concerns over possible serious damage arising from their side-effects. The applicant children were forbidden from attending nursery school, while the father was fined for non-compliance with the vaccination duty. The

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18 ECtHR, *Solomakhin v. Ukraine* (supra n 9), para 30.

19 Ibid, para 28.

20 Ibid, para 32.

21 Ibid, para 36.

22 Ibid, para 38.

23 ECtHR [GC], *Vavříčka and Others v. the Czech Republic*, Judgment of 8 April 2021.

applicants argued that Czech rules on compulsory vaccination lacked a sufficient legal basis and sufficiently robust scientific justification.

The ECtHR found that the restriction pursued a legitimate aim, as the impugned legislation had the objective to protect against diseases posing a serious risk to health. In particular, the campaigns aimed at protecting both the health of those receiving the vaccination, as well as of those who cannot be vaccinated due to medical reasons and who need to rely on 'herd immunity' to be protected.<sup>24</sup> With respect to the requirement that the interference is 'necessary in a democratic society', the ECtHR noted that 'there is no doubt about the importance of the interest at stake' because 'there is a general consensus among the Contracting Parties, strongly supported by the specialised international bodies, that vaccination is one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination among its population'.<sup>25</sup>

Other important elements highlighted in the Court's assessment of whether the restriction imposed was reasonable concerned the fact that vaccinations could not be forcibly administered, as exemptions were foreseen, accompanied by procedural safeguards. Children with a permanent contraindication to vaccination were not asked to undergo the procedure<sup>26</sup> and parents who refused to vaccinate their children had at their disposal both administrative appeals, as well as judicial remedies before the administrative courts and ultimately the Constitutional Court.<sup>27</sup> Moreover, precautions were taken throughout the process, including the monitoring of the safety of the vaccines in use and the checking for possible contraindications in each individual case.<sup>28</sup> Finally, in cases of refusal to allow the required vaccination, the repercussions were not deemed to be excessive. The parents could only receive a fine which, in the case of Mr. *Vavříčka*, the Court did not consider 'unduly harsh or onerous',<sup>29</sup> and the effects on the child applicants were of limited duration, as admission to primary school was not affected by vaccine status.<sup>30</sup>

Also relevant in the Court's findings was the fact that no consensus exists among States on whether vaccination should be voluntary or compulsory, which implied that, on this sensitive topic, the national authorities should enjoy a wide margin of appreciation.<sup>31</sup> It is expected that the decision will have

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24 Ibid, para 272.

25 Ibid, para 277.

26 Ibid, para 291.

27 Ibid, para 295.

28 Ibid, para 301.

29 Ibid, para 293.

30 Ibid, para 302.

31 Ibid, para 280.

an impact on the approach of European States to compulsory vaccinations, at a time when the debate on the COVID vaccination campaign is particularly heated.<sup>32</sup>

Another pertinent example of a limitation that States might impose to pursue preventive aims can be found in the practice of the UN Special Rapporteur on human rights and hazardous substances. One of his most recent reports concerns the scope and content of the right to information throughout the life cycle of hazardous substances and wastes.<sup>33</sup> The document underlines that information about hazardous substances 'is essential to prevent risks, mitigate harms, conduct focused research on safer alternatives, provide treatment and remedy, and ensure transparency, participation and consent in decision- and policymaking'.<sup>34</sup> The corresponding right to seek information – protected under Article 19 ICCPR – should not be unduly restricted. An example of illegitimate limitation would be the refusal to disclose information because it would adversely affect the value of intellectual property or the confidentiality of commercial businesses or industrial information, in a situation where such refusal may hamper public health or the overall public interest. After recapitulating the relevant rules in matters of limitations to human rights,<sup>35</sup> the report concludes that '[i]t is not legitimate to protect a competitive advantage of businesses that create risks to public health and other public interests'.<sup>36</sup>

Turning to the second type of limitations, *ie* those introduced to tackle a threat that has already materialised, an illustrative example comes from a case concerning the deprivation of liberty of an HIV-positive homosexual man.<sup>37</sup> In *Enhorn v. Sweden*,<sup>38</sup> the applicant had unknowingly infected another man, which led medical authorities to issue him with a number of instructions in order to minimise the risk that he might transmit the virus to others. Among

32 Deutsche Welle, *ECHR rules obligatory vaccination may be necessary*, available at <<https://www.dw.com/en/echr-rules-obligatory-vaccination-may-be-necessary/a-57128443>>. See also S Katsoni, 'Do compulsory vaccinations against COVID-19 violate human rights?: An assessment of the measure's compatibility with the European Convention on Human Rights', *Völkerrechtsblog*, 2 December 2020, available at <<https://voelkerrechtsblog.org/do-compulsory-vaccinations-against-covid-19-violate-human-rights/>>.

33 Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Başkut Tuncak, UN Doc. A/HRC/30/40, 8 July 2015.

34 *Ibid*, para 7.

35 *Ibid*, para 38–39.

36 *Ibid*, para 45.

37 Admittedly, the measures adopted in the case under scrutiny could also be considered as preventive ones, as they aimed at reducing the risk of a further spreading of the disease.

38 ECtHR, *Enhorn v. Sweden*, Judgment of 25 January 2005. For an accurate discussion, see R Martin, 'The Exercise of Public Health Powers in Cases of Infectious Disease: Human Rights Implications' 14 *Medical Law Review* (2006) 132–143.

them, was the requirement to attend periodical medical appointments. When the applicant failed to attend some of the meetings, the Swedish authorities issued an order imposing on him compulsory hospital isolation for three months. He was then arrested and interned, and the detention order was renewed several times. However, he frequently absconded thereafter, with the result that he was, in fact, deprived of his liberty for a total of about 18 months over a seven-year period.

Having accepted that Enhorn's detention potentially fell under the exception provided by Article 5(1)(e) ECHR, the ECtHR had to determine whether it was also 'prescribed by law'. The Court acknowledged that, if deprivation of liberty is involved, it is particularly important that the principle of legal certainty be satisfied. It was, therefore, essential that the conditions for detention be clearly defined and that the law be foreseeable in its application. At the same time, however, the Court accepted that it is for national courts to interpret and apply domestic law. In the case at hand, the Swedish courts had carefully examined the instructions given to the applicant and had concluded that the requirements of the relevant domestic legislation were fulfilled.

The Court then turned to the substantive requirements of Article 5 and determined that the essential elements when assessing the 'lawfulness' of the detention of a person for sanitary purposes are (a) whether the disease 'is dangerous to public health or safety' and (b) whether detention of the person infected is 'the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest'.<sup>39</sup> Regarding the first leg of the test, the Strasbourg judges had no problems in recognising that HIV constituted a serious threat to public health. Yet, with respect to the necessity of the measure, the judgment found that 'the compulsory isolation of the applicant was not a last resort in order to prevent him from spreading the HIV virus because less severe measures had not been considered and found to be insufficient to safeguard the public interest'.<sup>40</sup> As mentioned above, while the proportionality test is not expressly foreseen by Article 5 ECHR, the judgment attempted to strike a balance between the interference with the right to personal liberty and the need to preserve the general interest of society, thereby mirroring the process adopted for other limitation clauses.

Another right that could suffer undue limitations in the aftermath of a massive CBRN event is freedom of expression. Discussing the issue in the framework of the COVID-19 pandemic, the UN Special Rapporteur on the promotion and

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39 ECtHR, *Enhorn v. Sweden* (supra n 38), para 44.

40 *Ibid*, para 55.



protection of the right to freedom of opinion and expression stressed that access to information, independent media and other free expression rights are critical to meeting the challenges posed by the disease.<sup>41</sup> The report underscores that individuals 'cannot protect themselves against disease when information is denied to them, when they have diminished trust in sources of information, and when propaganda and disinformation dominate the statements of public authorities'.<sup>42</sup> After recapitulating the scope and form that legitimate limitations on the right to seek information must take, the document sets out State obligations with respect to government-held information. If it intends to restrict access to information on an ongoing crisis, a Government must justify such deprivation 'only on the narrowest grounds and with the greatest degree of necessity to protect a legitimate interest'.<sup>43</sup> However, even where authorities are legitimately concerned about releasing information that could cause individuals to panic, it is likely that failure to disclose is not the only option. To the contrary, sharing information that is properly contextualised may advance both public policy and freedom of expression guarantees.<sup>44</sup> It is suggested that a similar approach should inform the conduct of public authorities in many other CBRN-related emergencies.

This brief overview has strived to demonstrate the complex and delicate nature of the reasoning underpinning the assessment of the legality of restrictive measures adopted to tackle biological threats. While different hazards might present certain peculiarities (especially if CBRN material is used with criminal or malicious intent), it is submitted that certain features in the proportionality assessment will be present in most (if not all) of the relevant legal analyses. On one hand, States are required to properly assess the nature and danger of the threat, taking into account expert advice based on scientifically sound information. Human behaviour will obviously be an integral part of said calculation, as hostile, illegal or even simply negligent attitudes on the part of the end-user will inevitably increase the danger associated with CBRN material. Also relevant is the likelihood of an event actually materialising, and the perceived seriousness of the hazard will clearly be more intense for events that are already ongoing. On the other hand, appropriate weight should be given to a) the specific right subject to restriction (with more 'essential' rights – such as personal liberty – calling for increased levels of protection); b) the scope

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41 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/44/49, 23 April 2020.

42 Ibid, para 5.

43 Ibid, para 20.

44 Ibid.

and length of the limitations imposed; c) the way in which the limitation is applied (*eg* by offering differential treatment based on reasonable and objective grounds) and enforced (*eg* in terms of the consequences attached to a lack of compliance);<sup>45</sup> d) the attempt to identify the least intrusive measure to cope with the threat; e) the availability of procedural safeguards that allow individuals to challenge any restrictive measure. In addition, national authorities might rely on a margin of appreciation in deciding which measures to adopt and how to implement them, especially if there is no consensus between States Parties to a treaty regarding the relative importance of the interest at stake or as to the best means of protecting it.

### 3 Extraordinary Limitations on Human Rights and CBRN Events

Some CBRN events may have exceptionally severe consequences that call for the adoption of extraordinary measures. These may entail restrictions of individual rights and freedoms to an extent which goes beyond what is allowed by limitation clauses and which is not compatible with the affected State's international obligations under human rights law treaties. The drafters of human rights conventions acknowledged that the texts needed to provide States facing this sort of predicament with a mechanism that would enable them 'to loosen the stranglehold of their obligations without running the risk of their membership of the community of States parties being called into question'.<sup>46</sup> This is why the principal human rights instruments include a derogation clause.<sup>47</sup>

The derogation clause sets out the requirements States need to respect if they intend to avail themselves of it, as well as a list of those rights that cannot be derogated from under any circumstances. The use of the clause exonerates the State invoking it from international responsibility for failing to fully respect its treaty obligations, provided that certain substantial and procedural

45 For instance, UN Human Rights Special Rapporteurs have recently criticised Cambodia's anti-COVID legislation, which allows 20-year prison terms and fines of up to USD 5,000 for those convicted of violations of said law. In their joint press release, they stressed that '[a]ll measures taken to fight the pandemic, including possible punishments, should be necessary and proportionate and not be used excessively', see OHCHR Press release, UN experts urge Cambodia to review approach to COVID-19, 12 April 2021, available at <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26985&LangID=E>>.

46 N Questiaux, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, UN Doc. E/CN.4/Sub.2/1982/15 (1982) 11, para 37.

47 See, for instance, art 15 of the ECHR, art 4 of the ICCPR, or art 27 of the American Convention on Human Rights (ACHR, 1969).

rules are complied with.<sup>48</sup> Before looking at the actual practice concerning the application of the clause, it must be underlined that natural or human-made CBRN events might be qualified as ‘public emergencies’ in the sense of IHRL. While the clause was predominantly used in the context of armed conflicts or other situations of violence,<sup>49</sup> it is clear that major CBRN events having the potential to seriously undermine the functioning of the State could also create an appropriate context for the application of the derogation clause. This view is supported by the preparatory works of the ACHR<sup>50</sup> and is also reflected in legal literature.<sup>51</sup> However – most importantly – it has gained traction in view of the widespread resort to the derogation clause in response to the COVID-19 pandemic.<sup>52</sup>

### 3.1 *The Normative Framework: Substantial and Procedural Requirements*

When can a CBRN event prompt resort to the derogation clause? As the HRCComm points out, ‘not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation’.<sup>53</sup> When it was called on to work out this notion in relation to Article 15 ECHR, the European Commission on Human Rights (ECommHR) established that a ‘public emergency’ must possess the following features:

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- 48 For a general introduction to the derogation clauses and their operation, see AL Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (Martinus Nijhoff Publishers, 1998); G Cataldi, ‘Art. 15 – Deroga in caso di urgenza’ in S Bartole, P De Sena and V Zagrebelsky (eds), *Commentario breve alla Convenzione europea dei diritti dell’uomo* (CEDAM, 2012), pp. 555–564; E Sommario, *Stati d'emergenza e trattati a tutela dei diritti umani* (Giappichelli, 2018).
- 49 For a list of situations in which States have resorted to derogation clauses, see A Siehr, ‘Derogation Measures under Article 4 ICCPR, with Special Consideration of the “War against International Terrorism”’, in *German YB of International Law*, Vol. 47, 2004, p. 550.
- 50 See Conferencia Especializada Interamericana Sobre Derechos Humanos, San José, Costa Rica, 7–22 de noviembre de 1969, Actas y Documentos, Doc OEA/Ser.K/XVI/1.2, 264–265 (1969).
- 51 Commenting on Article 15 ECHR, Boisson de Chazournes expresses the view that ‘[e]nvironmental disasters can give rise to the right of derogation if the conditions of Article 15 are met’, L Boisson De Chazournes, ‘Non-Derogable Rights and the Need to Protect the Environment’, in D Premont (ed), *Droits Intangibles et Etats d'Exception: Non-Derogable Rights and States of Emergency* (Editions Bruylant, 1996), p. 465. The same view is held by, among others, SR Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (St. Martin's Press, 1989), pp. 16–17.
- 52 See *infra*, Section 3.2.
- 53 HRCComm, General Comment No. 29, (supra n 1) para 3.

1. It must be actual or imminent.
2. Its effect must involve the whole nation.
3. The continuance of the organised life of the community must be threatened.
4. 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>54</sup>

A quick review of these four elements is called for in order to clarify their actual import. The 'actual' or 'imminent' nature of the emergency implies that derogation is not allowed when the threat is merely 'latent' or 'perceived'.<sup>55</sup> The requirement that the emergency must involve 'the whole nation' has been somewhat loosened, as it is accepted that the crisis situation may have a geographically limited scope while still affecting the entire population of the interested area.<sup>56</sup> According to the *Siracusa Principles*, the third criterion demands that the situation is so serious as to imperil 'the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant'.<sup>57</sup> The last condition requires that a crisis be truly 'exceptional', a feature that is assessed on the basis of the quality and scope of the measures required to avert the emergency. Measures that are incompatible with conventional standards must be the last resort and can only be enacted when all ordinary measures are exhausted and have not been adequate to deal with the threat. As we shall see, this element might be decisive with respect to the assessment of the restrictive regimes introduced to tackle the COVID pandemic. Indeed, while considering the prospect of derogation from the ICCPR during a natural catastrophe or a major industrial accident, the HRCComm expressed the opinion that:

the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement [...] or freedom of assembly [...] is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.<sup>58</sup>

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54 ECommHR, *Denmark, Norway, Sweden and the Netherlands v. Greece*, Report of 5 November 1969, para 113.

55 See J Hartman, 'Derogation from Human Rights Treaties in Public Emergencies', in *Harvard International Law Journal*, Vol. 22, 1981, p. 16; and *Siracusa Principles* (supra n 2) N 39.

56 ECtHR, *Ireland v. UK*, Judgment of 18 January 1978, para 205.

57 *Siracusa Principles* (supra n 2) N 39.

58 HRCComm, General Comment No. 29 (supra n 1) para 5.

Therefore, when (even major) CBRN events can be dealt with by resorting to ordinary restrictions, the crisis cannot be deemed to be 'exceptional', and derogation from HR treaties should not be allowed.

Once it is established that a given event constitutes a 'public emergency', it must be asked whether the measures adopted to confront it are 'strictly required by the exigencies of the situation'. As with ordinary limitations, the severity of the measures resorted to must strictly depend on – and correspond to – the gravity of the threat. The HRCComm has deemed the principle of strict necessity to be 'a fundamental requirement for any measures derogating from the Covenant' and one which 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>59</sup> Looking first at the temporal dimension, the requirement stipulates that derogation measures can only be kept in place as long as the emergency persists.<sup>60</sup> As to the 'geographic' element, the principle of strict necessity demands that the applicability of any derogation measure be limited to the areas where the emergency actually unfolds. Moving to the scope of the derogation measures enacted, States are again required to strike a balance between individual rights and the public interest endangered by the emergency. In reviewing State compliance with the principle, treaty bodies have developed a number of criteria.

First, each measure of derogation must bear some relation to the threat and be apt to contribute to the solution of a specific problem that forms part of the emergency. In the words of the ECommHR, '[t]here must be a link between the facts of the emergency on the one hand and the measures chosen to deal with it on the other'.<sup>61</sup> Second, when more than one measure appears acceptable, the least interfering measure must be chosen.<sup>62</sup> While assessing the requirement of strict necessity, much emphasis has been put on the availability of sufficient safeguards against the abuse of derogation measures. The need for a proper assessment of emergency legislation and for a periodic review of emergency powers by the legislature or by the judiciary have been identified as essential factors in this respect.<sup>63</sup> Closely linked to this requirement is that effective remedies remain available to persons affected by emergency legislation.<sup>64</sup>

59 Ibid, para 4.

60 ECommHR, *De Becker v. Belgium*, Report of 8 January 1960.

61 ECommHR, *Ireland v. UK*, Report of 25 January 1976, p. 97.

62 ECommHR, *Lawless v. Ireland*, Report of 19 December 1959, p. 123 (Opinion of Mr Waldock).

63 ECtHR, *Ireland v. UK* (supra n 56) para 220.

64 *Siracusa Principles* (supra n 2) NN 55–56.

Another requirement foreseen for derogation measures is that they must be in line with the derogating State's other obligations under international law. These will obviously vary from State to State, depending on their level of participation in multilateral and bilateral treaties. The requirement of consistency has generated very little case law by treaty bodies. Yet, treaties pertaining to the field of international disaster law would appear to be particularly relevant in the context of CBRN events.<sup>65</sup>

One of the cornerstones of the derogation regime is the principle of non-derogability of certain key rights. The different derogation clauses each contain a list of these rights, which display certain differences.<sup>66</sup> Those which are common to all human rights treaties are: the right to life; the prohibition of torture and cruel, inhuman and degrading treatment and punishment; the prohibition of slavery; and the prohibition of retroactive application of criminal law, most of which are considered to reflect norms of *jus cogens*.<sup>67</sup>

Looking at the procedural steps that are required from States intending to derogate from certain rights, Article 15 ECHR requires such a State to keep the Secretary-General of the Council of Europe 'fully informed' of the measures it has taken and of the reasons for doing so. This is usually done by filing a so-called 'derogation notice', which the Secretary-General then circulates to other Member States.

### 3.2 *State Practice Regarding Derogations Prompted by CBRN Events*

As mentioned above, State practice under human rights treaties suggests the permissibility of derogations in cases of major CBRN events. Article 4 ICCPR was invoked as early as 2006 to deal with a dangerous epidemic. On that occasion, Georgia derogated from the Covenant when authorities felt they had to suspend – in one of the country's districts – constitutional guarantees related to freedom of movement and to the right to property, in order to prevent further spread of the Avian Flu virus.<sup>68</sup> Three years later, it was Guatemala's turn

65 See E Sommario, 'Limitation and Derogation Provisions in International Human Rights Law Treaties and their Use in Disaster Settings', in F Zorzi Giustiniani et al. (eds), *Routledge Handbook of Human Rights and Disasters* (Routledge, 2018), p. 110.

66 The longer lists in the ICCPR, the ACHR and the Arab Charter are also explained by the different rationale behind the inclusion of certain rights, which were added not because they were perceived as being absolutely central to the protection of individuals in emergency situations, but rather because their suspension could never be justified in such contexts; see HRCComm, General Comment No. 29 (supra n 1) para 11.

67 See Questiaux (supra n 46) p. 19.

68 See ICCPR, Notification under Article 4(3) of the Covenant: Georgia (7 March 2006) 2363 UNTS 465. Note that, in relation to the same events, Georgia also invoked art 15 ECHR; see Georgia: ECHR, Derogation to the Convention on the Protection of Human Rights and Fundamental Freedoms, Notification – JJ6239C Tr./005–166 (13 March 2006). The

to declare a 'public health emergency' for a period of 30 days, with a view to 'preventing and mitigating the effects of the influenza A (H1N1) epidemic'. The Guatemalan government suspended Article 12 (right to liberty of movement), Article 19 (right to freedom of expression) and Article 21 (right of peaceful assembly).<sup>69</sup> Yet, the most significant use of derogations linked to a CBRN event occurred in 2020, when more than 25 States<sup>70</sup> made resort to the various derogation clauses to justify the introduction of anti-COVID measures.

The rights derogated from include freedom of assembly, the right to education, freedom of movement, the right to property, the right to private and family life, the right to personal liberty and the right to fair trial. Interestingly, while all States have introduced measures of confinement, just a few have chosen to expressly suspend the right to personal liberty, perhaps reflecting the idea that quarantines and similar measures rather correspond to restrictions on freedom of movement. The frequent amendments to the derogation regimes seem to reflect the requirement for a constant reconsideration of the measures needed to confront the emergency, in line with the principle of proportionality. Also, the withdrawal of derogation notices by many States testifies to a strict adherence to the principle of necessity.

#### 4 Conclusions

The substantive compliance of the various suspension regimes introduced to confront the COVID virus with the rules regulating derogations has not yet been tested by any human rights body. Moreover, the decision by the majority

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derogation was withdrawn about three weeks later; see ECHR, Georgia: Withdrawal of Derogation to the Convention on the Protection of Human Rights and Fundamental Freedoms, Notification – JJ6268C Tr./005–168 (7 April 2006). Both notifications are available at <<https://wcd.coe.int>>. Neither the affected individuals nor other States Parties to the Convention have voiced opposition to Georgia's conduct.

69 ICCPR, 'Notification under Article 4(3) of the Covenant: Guatemala, UN Doc. C.N.347.2009.TREATIES-8 (Depositary Notification)' (20 May 2009), available at <<https://treaties.un.org/doc/Publication/CN/2009/CN.347.2009-Eng.pdf>>.

70 For instance, Latvia, Romania, Armenia, Estonia, Moldova, Georgia, Albania, North Macedonia, Serbia, and San Marino notified derogations from the ECHR. The texts of the notifications are all available at the following link: <<https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/6211354>>. Ecuador, Bolivia, Guatemala, Peru, Columbia, Panama, Chile, the Dominican Republic, Honduras, Argentina and El Salvador invoked Article 27 of the ACHR. The derogation notices are available at the following link: <[http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_suspension\\_guarantees.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_suspension_guarantees.asp)>. At least 25 States have derogated from the ICCPR. The notifications are available here: <[https://treaties.un.org/Pages/CNs.aspx?cnTab=tab1&clang=\\_en](https://treaties.un.org/Pages/CNs.aspx?cnTab=tab1&clang=_en)>.

of States not to use the derogation clause has prompted a lively debate among human rights scholars. Can the pandemic be addressed by using 'only' ordinary limitations to human rights? Some scholars seem to support this view, arguing that '[o]ne can insist on the principle of normalcy and on full respect for human rights. What can be done under the framework of permissible restrictions, should be preferred'.<sup>71</sup> On the other hand, other commentators disagree, rejecting the argument that 'everything can and should be accommodated through the proportionality test' as it would render derogations 'a dead-letter' and, in so doing, 'increase the possibility of exceptional powers becoming normalised'.<sup>72</sup>

It is submitted that the answer to this question should be based on a careful analysis of the measures adopted and of their compatibility with ordinary conventional standards. As mentioned above, it is only when the normal measures or restrictions on rights, which are permitted by human right treaties, are 'plainly inadequate' to tackle the emergency that derogation measures are justified. The decision to derogate must, therefore, depend on the specific set of measures introduced.<sup>73</sup> Yet, it should be borne in mind that, where measures which restrict rights are adopted to respond to exceptional situations of crisis, the ECtHR has generally allowed States to interpret the scope of the permitted restrictions under the relevant articles broadly.<sup>74</sup> A derogation may, therefore, be unnecessary given that extensive interferences with rights may be justifiable in pursuit of the legitimate aim of protecting public health. On the other hand, the distinction between limitations and derogations is difficult to draw because principles such as proportionality and non-discrimination are

71 See M Scheinin, COVID-19 Symposium: To Derogate or Not to Derogate?, *Opinio Juris*, <<https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>>; see also K Dzehtsiarou COVID-19 and the European Convention on Human Rights, *Strasbourg Observers*, 27 March 2020, <<https://strasbourghobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>>.

72 A Greene, 'States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic', *Strasbourg Observers*, 1 April 2020, <<https://strasbourghobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>>.

73 See for example GM Farnelli, 'Proporzionalità ed emergenza sanitaria da COVID-19 nei parametri CEDU', in *La Comunità Internazionale*, Vol. 75, 2020, p. 110, arguing that quarantine measures as applied by many States are not in line with the ECHR and must thus be legitimised through a derogation.

74 For instance, the Court was ready to accept an extensive interference with the right to property where a State adopted measures in response to 'the existence of an exceptional crisis without precedent', ECtHR, *Koufaki and Adedy v. Greece*, Judgment of 7 May 2013, para 37.



applicable to both. The lack of a clear standard may lead to Member States issuing a notice of derogation in a situation where it might not be required, in essence using the derogation as a safety net.<sup>75</sup>

Whatever the answer to this question, States must always give priority to human rights protection as they attempt to prevent and to react to CBRN events. Respect for the international legal system as a whole and of individual rights in particular should inform any plan or policy directed at curbing CBRN risks. The main human rights treaties provide that, in times of public emergency, States may restrict rights protected by the treaty in order to respond more effectively to a possible crisis. However, resort to derogation clauses should be a measure of last resort and is unlikely to be required when reacting to minor CBRN events or when introducing preventive measures against CBRN threats. These types of situations are probably better addressed by making use of the ordinary limitations foreseen by the provisions of all major treaties protecting civil and political rights.

Irrespective of the kind of restriction used, public authorities should strive to be transparent in justifying their line of conduct. In this context, human rights monitoring mechanisms play an important role and should guide States in deciding which sort of restrictive regime is better attuned to achieve the desired aim of effectively tackling CBRN threats. Hopefully, the COVID-19 crisis will provide opportunities to shed further light on what appears to be a largely uncharted legal territory.

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75 See Sommario (supra n 65) p. 110, noting that certain derogation notices are not entirely clear as to the intention of the State authorities to expressly suspend the enjoyment of certain rights. The same stance is taken by E Richardson and C Devine, 'Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights', in *Michigan Journal of International Law*, Vol. 42, 2020, pp. 128–130; and by A Spadaro, COVID-19: testing the limits of human rights, in *European Journal of Risk Regulation*, Vol. 11, 2020, p. 322.

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