

Michigan Journal of International Law

Volume 42 | Issue 1

2021

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Recommended Citation

Eric Richardson & Colleen 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*, 42 MICH. J. INT'L L. 105 (2020).

Available at: <https://repository.law.umich.edu/mjil/vol42/iss1/4>

<https://doi.org/10.36642/mjil.42.1.emergencies>

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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

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I. INTRODUCTION

On March 11, 2020, the World Health Organization declared the novel coronavirus (“COVID-19”) a pandemic, but even before the official declaration, UN member states began implementing emergency measures aimed at curbing its spread.¹ Restricting travelers from countries with high infection rates; preventing inter- and intra-state movement; quarantines; surveillance using mobile telephone data; contact tracing digital apps; stay-at-home-orders; limits on the number of people assembling in one place and other restrictions on public gatherings have all been heralded as important tools for bringing the global pandemic under control.² But at the same time, the

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1. See, e.g., *COVID-19 Civic Freedom Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/covid19tracker/> (last accessed Sept. 30, 2020) (documenting government responses to the pandemic that affect civic freedoms and human rights, focusing on emergency laws) [hereinafter *COVID-19 Tracker*]. The International Center for Not-for-Profit Law notes regarding the methodology of the tracker that “[w]hile the Tracker seeks to represent all countries’ responses to the pandemic, it reflects only the information that we have collected or received. The absence of an entry for a particular country does not mean that country has not taken measures that affect rights and freedoms.” *Methodology: COVID-19 Civic Freedom Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/methodology-covid-19-civic-freedom-tracker> (last visited Oct. 1, 2020). We use the Tracker in this article to highlight trends in governments’ response and recognize that the Tracker may not be completely comprehensive for all measures taken by states in response to COVID-19 that may impact civic freedoms.

2. See World Health Organization, *COVID-19 Strategy Update*, 11 (Apr. 14, 2020); see also *Coronavirus Restrictions in Each State*, NAT’L PUB. RADIO (May 20, 2020),

use of these measures raises important questions of international human rights, including those related to states' compliance with the International Covenant on Civil and Political Rights ("ICCPR" or "the Covenant"). The ICCPR recognizes the governmental need for emergency health measures which may infringe human rights but does so while establishing crucial safeguards, so emergency measures do not permanently erode human rights protections.³ In particular, Article 4 of the ICCPR provides that states should notify the UN Secretary-General if they intend to derogate from their international human rights obligations because of a crisis.⁴ This derogation power, however, is subject to the satisfaction of several conditions, including the notification requirement.⁵ Surprisingly, six months into the pandemic only 21 countries have issued notices of intent to derogate in relation to their COVID-19 measures.⁶

This article analyzes the ICCPR standards that apply to emergency regulation in times of public health crisis and the tangled morass of legal tests that have been used to balance human rights and emergency restrictions. Under the Covenant a state that intends to restrict a right due to COVID-19 should follow one of three pathways: notify of the intent to derogate; issue a reservation, understanding or declaration; or assert that the limitation is justified because the right at issue is limited and on balance, the limitation is permitted by the language of the ICCPR.⁷ We argue that in the COVID-19 emergency, derogation best protects human rights and the treaty structure, by providing opportunities for oversight and ensuring the end of emergency restrictions after the crisis subsides. Certainly, states should issue notices of derogation more often than the handful that have been received by the UN

<https://www.npr.org/series/847328455/coronavirus-restrictions-in-each-state> (last visited Oct. 1, 2020) (listing tools deployed or eased in U.S. states).

3. See *Emergency Measures and COVID-19: Guidance*, OFF. HIGH COMM'R FOR HUMAN RIGHTS ["OHCHR"], (2020), https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf [hereinafter *Emergency Measures*]; see also Diego S. Silva & Maxwell J. Smith, Commentary, *Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies*, 17 HEALTH & HUM. RTS. J. (Jun. 2, 2015), <https://www.hhrjournal.org/2015/06/commentary-limiting-rights-and-freedoms-in-the-context-of-ebola-and-other-public-health-emergencies-how-the-principle-of-reciprocity-can-enrich-the-application-of-the-siracusa-principles/>.

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

5. *Id.* art. 4(2).

6. See, e.g., *Chapter IV. Human Rights: 4. International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION: STATUS OF TREATY DATABASES [hereinafter *Derogation Notification*], https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en (last visited Oct. 1, 2020). This article focuses on the initial six months of the pandemic, beginning when it was declared by the World Health Organization on March 11, 2020 through September 11, 2020.

7. ICCPR, *supra* note 4, arts. 4(3), 51(2).

Secretary-General six months into the COVID-19 pandemic.⁸ Failure to notify of a derogation suggests that states are (a) ignoring the International Human Rights Law (“IHRL”) implications of their COVID-19-related emergency measures like travel restrictions, quarantines, restrictions on group activity and surveillance, (b) acting under substantive portion of Article 4 while ignoring the procedural requirements, or (c) assessing that given the limited nature of these rights under the ICCPR, no derogation is necessary.

The first half of this article addresses the harms flowing from these three possibilities. The second half of this article looks in particular at the third of these possibilities, a limitations analysis, and considers how it may have been applied by states in their restrictions of three ICCPR rights: freedom of movement, privacy rights, and freedom of assembly. States rarely explain their thinking under a limitations analysis, making it difficult to determine when a limitations analysis was used or by contrast when states ignored IHRL in their rush to impose COVID-19-related restrictions. The article then analyzes the harm from this uncertainty about how states are justifying COVID-19-related restrictions and the potential damage from indefinitely restricting key rights under the ICCPR’s limitations analysis. While ignoring IHRL is damaging, the alternative—assessing that emergency measures are justified on balance and not a rights infringement at all—may be worse. If states assess that emergency measures are justified because the underlying rights are themselves limited, the processes for restoring liberties and repealing excessive measures at the end of the emergency may not be followed. This possibility suggests that restrictions on travel against groups considered politically or socially undesirable, deployment of new surveillance systems that impede privacy, blocking of public assembly and democratic protest, and other human rights infringements caused by COVID-19-related measures may linger long after the virus itself.

Finally, this article questions whether traditional tests remain adequate for analyzing potential violations of three types of ICCPR rights in particular which contain a limitations clause: freedom of movement under Article 12,⁹ privacy rights under Article 17,¹⁰ and freedom of assembly under Article 21.¹¹ The ICCPR’s language in Articles 12, 17, and 21 has been boiled down by the UN Human Rights Committee’s General Comments and secondary sources like the Siracusa Principles into broad concepts of legality,

8. Compare Derogation Notification, *supra* note 6 (showing that few states have issued formal notices of derogation), with *COVID-19 Tracker*, *supra* note 1 (showing that most states have enacted emergency measures in response to COVID-19). The COVID-19 Tracker is a collaboration of the International Center for Not-for-Profit Law, the European Center for Not-for-Profit Law and the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.

9. ICCPR, *supra* note 4, art. 12.

10. *Id.* art. 17.

11. *Id.* art. 21.

necessity, proportionality, and non-discrimination.¹² We use our particular perch in Geneva to offer updated factors that states should consider in balancing COVID-19-related restrictions with limited human rights. These factors often build on the work of UN Special Rapporteurs and civil society and might be considered by the Human Rights Committee in updating its General Comments. Our proposals and proposed best practices for better balancing COVID-19-related emergency measures with human rights, as well as for how to remove restrictions once the COVID-19 crisis ends, include:

- improving the link between legal, technical and medical knowledge in crafting restrictions and considering less restrictive alternatives;
- ensuring an end date to restrictions either through derogation or the proportionality prong of a limitation analysis;
- considering the specific disease prevention phase and local conditions of the virus;
- prioritizing exercise of rights necessary in a democratic society;
- focusing on the availability of alternatives, especially online alternatives, for exercising rights temporarily limited during public health emergencies; and
- seeking technological solutions to minimize damages cause by limitations, such as using digital contact tracing, deploying privacy-protecting technologies, or offering the option of online assemblies.

In sum, well-meaning but poorly considered restrictions in the name of combatting COVID-19 threaten to undermine hard-won human rights protections and may, in fact, erode important elements of IHRL as a result of overreaching implementation or a lack of rigorous analysis in how the restrictions are put and kept in place.

II. BACKGROUND: THE ICCPR, ESCAPE MECHANISMS, INTERNATIONAL HEALTH REGULATIONS, AND THE HISTORY OF DEROGATIONS IN TIMES OF CRISIS

A. *The International Covenant on Civil and Political Rights*

The ICCPR was adopted by the United Nations General Assembly on December 16, 1966, and entered into force on March 23, 1976. To date, 173 parties have ratified the Covenant.¹³ Six additional countries, including Chi-

12. See discussion *infra* Part II.B.2.

13. *Status of Ratification Interactive Dashboard*, OFF. HIGH COMM’R FOR HUM RTS, [“OHCHR”] <https://indicators.ohchr.org/> (last visited May 18, 2020) (searching “International Covenant on Civil and Political Rights”).

na, have signed but not ratified it.¹⁴ As one of the core UN human rights treaties, the Covenant, translates the negative rights in the Universal Declaration of Human Rights into a binding treaty.¹⁵ Based on the inherent dignity of the person, the treaty seeks to promote conditions within states for the enjoyment of civil and political rights.¹⁶

Substantively, the Covenant enshrines rights to physical integrity, liberty and security of person, procedural fairness and rights of the accused, individual liberties, and political rights.¹⁷ Mechanically, Article 28 of the Covenant tasks the Human Rights Committee with monitoring states' compliance with the ICCPR.¹⁸ Comprised of independent human rights experts, the Committee assesses compliance based on reports submitted by the member usually every four years and issues findings based on the country's performance.¹⁹ In addition, the Human Rights Committee periodically issues General Comments providing interpretations of the treaty obligations.²⁰

Likewise, the Siracusa Principles have become an important secondary source analyzing and interpreting the ICCPR. Codified in 1985, following a conference hosted by the American Association of the International Committee of Jurists in 1984, the Siracusa Principles are a significant attempt at harmonizing principles on limitation and derogation in the ICCPR.²¹ While neither the General Comments of the Human Rights Committee nor the Siracusa Principles are legally binding, both provide soft law influence and guidance over the treaty text.²²

14. *Id.*

15. *See Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/sections/universal-declaration/human-rights-law/index.html> (last visited May 18, 2020).

16. ICCPR, *supra* note 4, pmb1.

17. *See generally id.*

18. *Id.* art. 28.

19. Human Rights Committee, OHCHR, last visited May 18, 2020), *available at* <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>.

20. *Id.*

21. UN Econ. & Soc. Council, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4 (Sept. 28, 1984) [hereinafter Siracusa Principles].

22. *See* Lottie Lane, *The Horizontal Effect of International Human Rights Law in Practice*, 5 EUR. J. COMP. L. & GOVERNANCE 5, 11 (2018) (commenting on the nature of the General Comments); *see also* Tracy Slagle, Mehdi Ben Youssef, Golda Calonge & Yanis Ben Amor, *Lessons from Africa: Developing a Global Human Rights Framework for Tuberculosis Control and Prevention*, 14 BMC INT'L. HEALTH & HUM. RTS. 1, 2 (2014) (commenting on the nature of the Siracusa Principles); Vienna Convention on the Law of Treaties arts. 31, 32, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) (stating that if the ordinary meaning of terms within a treaty cannot be interpreted based on the object and purpose of the treaty, supplementary means of interpretation may be used).

B. *Escape Mechanisms*

Many international human rights treaties contemplate the possibility that governments might need to take special measures in a time of crisis.²³ The ICCPR contains several escape mechanisms that allow states to restrict rights enshrined in the treaty's text while remaining in compliance with the treaty itself. Article 4 of the ICCPR provides that state parties to the Covenant may derogate from certain provisions of the treaty in times of emergency, but places restrictions on the circumstances and rights from which derogation is permitted.²⁴ Other substantive rights within the treaty contain a limitation clause acknowledging that the right is not absolute and provides member states the ability to undertake a balancing analysis.²⁵ Outside of the treaty text, member states may have issued a reservation, understanding, or declaration at the time of ratification that can redefine or qualify the scope of their obligations.²⁶

1. Article 4 Derogation

Article 4 of the Covenant provides the public emergency provision in which states may take measures to derogate temporarily²⁷ from some obligations²⁸ prescribed in the treaty.²⁹ It seeks to strike a balance between upholding the protection of human rights and maintaining the governmental order needed to guarantee those rights.³⁰

Substantively, for a state to implement Article 4, there must be a public emergency that both “threatens the life of the nation” and is “officially proclaimed,” necessitating a derogation.³¹ The Siracusa Principles provide additional guidance about what constitutes a public emergency which “threatens

23. See Emilie M. Hafner-Burton, Laurence R. Helfer & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT'L ORG. 673, 674 (2011); see also *Emergency Measures supra* note 3.

24. ICCPR, *supra* note 4, art. 4.

25. Dominic McGoldrick, *The Interface of Between Public Emergency Powers and International Law*, 2 INT'L J. CONST. L. 380, 383 (2014); see Silva & Smith *supra* note 3, at 53.

26. Eric Chung, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations*, 126 YALE L.J. 170, 173 (2016); Jack Goldsmith, *The Unexceptional U.S. Human Rights RUDs*, 3 U. ST. THOMAS L.J. 311, 312 (2005).

27. Scott P. Sheeran, *Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT'L L. 491, 507 (2013).

28. ICCPR, *supra* note 4, art. 4(2).

29. *Id.* art. 4(1).

30. Sheeran *supra* note 27 at 492 (2013); McGoldrick, *supra* note 25 at 411.

31. ICCPR, *supra* note 4, art. 4(1); Human Rights Committee [“HRC”], General Comment 29 art. 4, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter General Comment No. 29] (stating “[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant”).

the life of the nation” stating that an emergency must 1) be “actual or imminent”; 2) “affect[s] the whole of the population and either the whole or part of the territory of the State”; and 3) “threaten[s] 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 project the rights recognized in the Covenant.”³²

The Human Rights Committee in its General Comments also articulates a proportionality requirement, noting that measures derogating from the Covenant must be “strictly required by the exigencies of the situation,” and occur in the presence of an emergency.³³ Finally, the Covenant requires that any derogation measure cannot be discriminatory based on race, color, sex, language, religion or social origin and measures may not be inconsistent with other obligations under international law.³⁴ Therefore, derogations in a time of public emergency are subject to the principles of *necessity*, *proportionality*, *non-discrimination*, and the requirement of compliance with *obligations under international law*.³⁵

Procedurally, Article 4 also contains a notification requirement that obliges state parties to “immediately” inform other parties through the UN Secretary-General, stating the provisions from which they are derogating, making clear their reasoning, and providing an additional communication when the derogations are terminated.³⁶ This notification requirement acts as a safeguard by providing international oversight of compliance, discouraging member states from abusing emergency power.³⁷ It also helps ensure derogations do not continue after the emergency by requiring the state to communicate when the derogation is terminated and provide notification if a state of emergency is extended.³⁸ A state party that fails to make immediate notification to the Secretary-General of derogation is in breach of its Article 4 obligation. The Human Rights Committee has stressed the importance of notification on several occasions as more than a formality.³⁹ However, the

32. Siracusa Principles *supra* note 21, § II.A.

33. General Comment No. 29, *supra* note 31, ¶ 4; *see also* Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 MOD. L. REV. 656, 665 (2005) (arguing that the “strictly required” standard found in Article 4 is more demanding proportionality standard than the proportionality standard found in the limitation clauses).

34. ICCPR, *supra* note 4, art. 4(2).

35. *See Emergency Measures*, *supra* note 3; *see also* Adina Ponta, *Human Rights Law in the Time of Coronavirus*, 24 AM. SOC’Y INT’L L. (Apr. 20, 2020), <https://www.asil.org/insights/volume/24/issue/5/human-rights-law-time-coronavirus>.

36. ICCPR, *supra* note 4, art. 4(3).

37. General Comment No. 29, *supra* note 31, ¶ 17.

38. *Id.*

39. McGoldrick, *supra* note 25, at 422 (citing U.N. Doc. CCPR/C/SR.469, ¶ 19 (El Salvador) and U.N. Doc. CCPR/C/SR.355, ¶ 24 (Uruguay)).

Committee has not gone so far as to state that failure to notify would invalidate an otherwise legal derogation.⁴⁰

2. Limitation Clauses

The ICCPR explicitly limits certain rights and allows them to be infringed, often for reasons of public health. For these rights, some restrictions may be implemented based solely on the limited nature of the right. Clauses qualifying the nature of liberties under the ICCPR recognize that certain rights are not absolute and that the state may have a legitimate interest in balancing the individual rights at stake with other rights or interests of the society, including public health or public order.⁴¹ Unlike derogation under Article 4, justifying an emergency measure because of the limited nature of the right being infringed upon does not require a declared public emergency.⁴² When restrictions of rights are based on one of the ICCPR's limitation clauses, no notification procedures or additional oversight is required.⁴³ In this way, states restricting rights under a limitations clause can escape legal scrutiny, avoid clear time limits on the restrictions imposed, and the ensuing damage to human rights could continue indefinitely.⁴⁴

Five articles of the ICCPR expressly provide that public health needs can justify limitations on the rights articulated by those articles. As demonstrated below the language regarding public health exceptions varies for each of these rights based on the language of their respective ICCPR articles:

Article 12 sets forth the right to *freedom of movement* within a country, the right to leave any country, and the right to choose one's own residence.⁴⁵ Section 3 explicitly states the limitations on freedom of movement:

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,

40. *Id.* at 423 (citing U.N. Doc. CCPR/C/SR.355, ¶ 24 (Uruguay) & Silva case, U.N. Doc A/36/40, 130).

41. *Id.*

42. *See id.* at 383 (stating that limitations can be permanent); Ponta, *supra* note 35 (stating “[e]ven in “ordinary times,” limitations on non-absolute rights or freedoms are permissible”).

43. *Compare* ICCPR, *supra* note 4, art. 4(3) *with* ICCPR, *supra* note 4, art. 12(3).

44. McGoldrick, *supra* note 25, at 383 (stating that limitations can be permanent).

45. ICCPR, *supra* note 4, art. 12.

and are consistent with the other rights recognized in the present Covenant.⁴⁶

Section 4 of the Article then provides that “no one shall be arbitrarily deprived of the right to enter his own country.”⁴⁷ As such, Article 12 contains two separate standards for limiting freedom of movement.⁴⁸

Article 18 encompasses the right to *freedom of religion*.⁴⁹ The right may be limited “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.”⁵⁰

Article 19 provides the right to *freedom of expression*, including the freedom to seek, receive, and impart information and ideas of all kinds.⁵¹ The article explicitly states that these rights may 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.”⁵²

Article 21 provides the *right of peaceful assembly*.⁵³ With regard to limitations, it states:

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.⁵⁴

Article 22 provides the *right of freedom of association* and also sets forth specific limits:

“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

46. *Id.* art. 12(3).

47. *Id.* art. 12(4).

48. See Human Rights Committee [“HRC”], General Comment 27 art. 12 ¶¶ 11, 21, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999) [hereinafter General Comment No. 27].

49. ICCPR, *supra* note 4, art.18. In the second half of this article, scope and space limitations prevented us from analyzing restrictions on freedom of religion, expression and association but the same concerns and analysis with respect to limited rights that we posit could also apply to these rights.

50. *Id.*

51. *Id.* art. 19.

52. *Id.* art. 19(3).

53. *Id.* art. 21.

54. *Id.*

safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”⁵⁵

In addition, *Article 17* of the ICCPR on *privacy* provides the freedom from “unlawful or arbitrary interference with one’s privacy, family, home or correspondence.”⁵⁶ Article 17 does not explicitly mention limitations on these rights for reasons of public health, but privacy is a limited right because the Article expressly provides for freedom from “unlawful or arbitrary interference,” not from any interference.⁵⁷

a. *Standards for Judging Limitations*

While the text of the ICCPR provides inconsistent standards for when a limitation on substantive rights is justified, the General Comments of the Human Rights Committee and the Siracusa Principles, among other secondary sources, propose to harmonize standards around the principles of *legality, necessity, proportionality, and non-discrimination*.

Legality: The limitation clauses of Articles 12(3), 18, 19, 21, and 22 all contain language that reference legality⁵⁸ Articles 12(3) and 19 state that limitations must be “provided by law,” Article 21 states “in conformity with law,” and Articles 18 and 22 state “prescribed by law.”⁵⁹ General Comment 37 explicitly sets out that “in conformity with law” and “provided by law” have the same effect in creating a legality requirement.⁶⁰ The Siracusa Principles separately expand on the phrase “prescribed by law” defining it as “provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.”⁶¹ While the Siracusa Principles do not develop any of the other legality formulations,⁶² the definition does not appear to go beyond the general requirement of legality, nor has there been any debate around its use in the Travaux Préparatoires.⁶³ Additionally, in General Comment 22 on Freedom

55. *Id.* art. 22(2).

56. *Id.* art. 17(1).

57. *Id.*; see ELEC. FRONTIER FOUND., NECESSARY & PROPORTIONATE: INTERNATIONAL PRINCIPLES ON THE APPLICATION OF HUMAN RIGHTS LAW TO COMMUNICATIONS SURVEILLANCE, (May 2014) 18–19, <https://www.ohchr.org/Documents/Issues/Privacy/ElectronicFrontierFoundation.pdf>.

58. ICCPR, *supra* note 4, arts. 12, 18–19, 21–22.

59. *Id.*

60. Human Rights Committee [“HRC”], General Comment 37 art. 21, ¶ 39, U.N. Doc. CCPR/C/37 (July 23, 2020), <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx> [hereinafter General Comment No. 37]

61. 61. Siracusa Principles, *supra* note 21 at § B.i.

62. *Id.*

63. See Rep. of the Comm’n on Human Rights, 8th Sess., Apr. 14–June 14, 1952, U.N. Doc. E/2256 <https://hr-travaux.law.virginia.edu/document/iccpr/e2256/nid-119> [hereinafter *Travaux Préparatoires*]; see also Vienna Convention on the Law of Treaties, *supra* note 22,

of Religion, the Committee elaborates on the legality requirement stating, “[l]imitations imposed must be established by law. . .”, suggesting that “prescribed by law” should be interpreted similarly to legality requirements in the other Covenant Articles.⁶⁴ In its most recent reports on Italy and the United States, the Human Rights Committee confirmed that limitations to Article 17, privacy rights, must conform to the principle of legality.⁶⁵

Some dispute exists about whether an administrative regulation or executive order meets the requirements of being “prescribed by law” under the ICCPR principle of legality. Nowak argues in his Commentaries on the ICCPR that “mere administrative provisions are insufficient” to meet the legality standard, apparently relying on a hierarchy of laws analysis that a regulation does not rise to sufficient level to place substantive limits on a treaty provision.⁶⁶ Others have disagreed, contending that an Executive Order or administrative regulation, properly passed and appropriately based on delegated authority, remains lawful even if it potentially limits a treaty right.⁶⁷ The difference need not concern us here. As of September 2020, only about thirteen percent of over 323 COVID-19-restricting measures documented by a leading civil society/UN database (“COVID-19 Tracker”) were adopted by legislation; the remaining measures were authorized by executive or administrative order or practice.⁶⁸ Given the reality that most states have imposed limitations through executive or administrative actions, it would arbitrarily cut short this article’s analysis to overlook the dozens of restrictions passed by executive or administrative action because they fail Nowak’s test of legality.⁶⁹ Our primary concern remains that states should more rigorously analyze the impact of their COVID-related restrictions on key ICCPR rights.

Necessity and Proportionality: All five of the limitation clauses from the ICCPR which single out public health include the phrase “necessary” in describing the grounds justifying a limitation on those rights.⁷⁰ The Siracusa

art. 32 (stating that if the ordinary meaning of terms within a treaty cannot be interpreted based on the object and purpose of the treaty in conformity with art. 31, supplementary means including the preparatory work of the treaty may be used to determine meaning).

64. See Human Rights Committee [“HRC”], General Comment 22 art. 18 ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Jul. 30, 1993) [hereinafter General Comment No. 22].

65. See Human Rights Committee [“HRC”], Concluding Observations on the Fourth Periodic Report of the United States of America ¶ 22, U.N. Doc. No. CCPR/C/USA/CO/4 (Apr. 23, 2014); Human Rights Committee [“HRC”], Concluding Observations on the Sixth Periodic Report of Italy ¶ 37, U.N. Doc. No. CCPR/C/ITA/CO/6 (May 1, 2020).

66. MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 270 (2d ed. 2005).

67. *Id.*

68. *COVID-19 Tracker*, *supra* note 1 (comparing by “Type” that only 43 of over 323 measures were authorized by law).

69. See, e.g., *id.*

70. ICCPR, *supra* note 4, arts. 12, 18–19, 21–22.

Principles expand further on “necessary” stating that it implies that a limitation:

- (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
- (b) responds to a pressing public or social need,
- (c) pursues a legitimate aim, and
- (d) is proportionate to that aim.⁷¹

The Siracusa Principles also state that “[a]ny assessment as to the necessity of a limitation shall be made on objective considerations” and that “a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.”⁷² The General Comments affirm that the principles of necessity and proportionality apply to Freedom of Movement,⁷³ Freedom of Expression,⁷⁴ Freedom of Religion⁷⁵ and Freedom of Assembly.⁷⁶

The application of these tests to Article 17’s Right to Privacy is more complicated. Because Article 17 protects from “unlawful” interference with privacy, the legality test is incorporated in the Article’s terms. But the analysis of necessity and proportionality is more roundabout. With respect to privacy, General Comment 16 of the Human Rights Committee defines non-arbitrary interference with privacy as (1) consistent with the provisions, aims, and objectives of the ICCPR and (2) “reasonable in the particular circumstances.”⁷⁷ This test from General Comment 16 is further refined in the UN Human Rights Committee opinion in *Van Hulst v. Netherlands* to encompass the tests of necessity and proportionality found in the other clauses, and to ask whether the restricting measure has a legitimate aim.⁷⁸ The UN Special Rapporteur on Combatting Terrorism has similarly concluded that a limitations analysis under Article 17 should meet the requirements of General Comment 27.⁷⁹ Of General Comment 27’s several requirements, the most pertinent state:

71. Siracusa Principles, *supra* note 21, § I.A.10.

72. *Id.*, § I.A.11.

73. General Comment No. 27, *supra* note 48, ¶ 16.

74. Human Rights Committee [“HRC”], General Comment 34 art.19 para. 22, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter General Comment No. 34].

75. General Comment No. 22, *supra* note 64, ¶ 8.

76. General Comment No. 37, *supra* note 60, ¶ 40.

77. Human Rights Committee [“HRC”], General Comment 16 art. 17 ¶ 4, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Apr. 8, 1988) [hereinafter General Comment No. 16].

78. Human Rights Committee [“HRC”], *Van Hulst v. the Netherlands*, Communication No. 903/2000 ¶ 7.10 [hereinafter *Van Hulst v. the Netherlands*] (views adopted on Nov.1, 2004, during the eighty-second session).

79. See Martin Scheinin (Special Rapporteur), *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering*

- (e) For a restriction to be permissible, it is not enough that it serves one of the enumerated legitimate aims; it must be necessary for reaching the legitimate aim; and
- (f) Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.⁸⁰

Given specific reference in other limitation clauses of the ICCPR to public health,⁸¹ we assume protection of public health can be “one of the enumerated legitimate aims” that could also limit privacy rights. In this way, the tests of necessity and proportionality are also among the standards secondary sources have used to determine whether “arbitrary and unlawful” interference with privacy has occurred under ICCPR Article 17.⁸²

In a democratic society: The phrase “in a democratic society” appears to be a separate and distinct requirement, unique to Articles 12(3),⁸³ 21,⁸⁴ and 22.⁸⁵ The Siracusa Principles recognize this phrase “as imposing a further restriction on the limitation clauses it qualifies” and is meant to ensure that the limitations “do not impair the democratic functioning of the society.”⁸⁶ The *Travaux Préparatoires* reveal that the addition of the phrase “in a democratic society” was also debated with regard to Article 19, but ultimately not included.⁸⁷ The amendments to include the phrase in the limitation clauses were put forth by France.⁸⁸ Other member states were concerned that the phrase was “not susceptible [to] precise interpretation and, since [the phrase was] frequently used as terms of abuse, [was] not suitable for inclusion in the covenant,”⁸⁹ yet the language was passed for Article 21⁹⁰ and Article 22.⁹¹

Terrorism ¶ 17 A/HRC/13/37 (Dec. 28, 2009), <https://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-37.pdf>.

80. See General Comment No. 27, *supra* note 48, ¶¶ 14–15.

81. See, e.g., ICCPR, *supra* note 4, arts. 12, 18, 19, 21–22.

82. See General Comment No. 16, *supra* note 77, paras. 4, 7, 8; *Van Hulst v. The Netherlands*, *supra* note 78, ¶ 7.10.

83. See General Comment No. 27, *supra* note 48, ¶ 11 (applying the “in a democratic society” standard to art. 12(3)).

84. ICCPR, *supra* note 4, art. 21.

85. *Id.* art. 22.

86. Siracusa Principles, *supra* note 21 § I.A.ii.

87. *Travaux Préparatoires*, *supra* note 63, at 239–41.

88. *Id.* at 207–08, 239–41.

89. *Id.* at 243.

90. *Id.* at 207.

91. *Id.* at 249.

Non-discrimination: The Siracusa Principles also make clear that all the limitations are subject to the non-discrimination principle found in Article 2(1) of the Covenant.⁹² It is interesting to note that the grounds on which discrimination is prohibited in Article 2 are drafted differently than the grounds in Article 4.⁹³ When compared to Article 4, Article 2 includes the additional grounds of “political or other opinion,” “national origin,” “property,” “birth,” and “other status.”⁹⁴ While “other status” may appear broad, the Human Rights Committee has been reluctant to define it, instead deciding its meaning on a case by case basis.⁹⁵ A limitation may differentiate based on a protected status “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”⁹⁶

While only treaty language is binding on member states, these soft law mechanisms are considered influential in the interpretation and establishment of customary international law.⁹⁷ As such, a legally rigorous analysis of COVID-19-related measures under the limitation clauses in Articles 12(3), 17, 18, 19, 21, and 22 should focus on the principles of legality, necessity, proportionality, and, where relevant, non-discrimination. Articles 12(3), 21, and 22 have the additional requirement of meeting the “in a democratic society” standard. We analyze states’ COVID-19-related restrictions on freedom of movement, privacy, and freedom of association later in this article by primarily focusing on these tests.

3. Reservations, Understandings, and Declarations

In addition, some member states qualified their consent to ICCPR provisions at the time of ratification using a reservation, an understanding, or a declaration (“RUD”), which may impact the lawfulness of their COVID-19-related restrictions.⁹⁸ By way of example, the United States and Australia, included a general RUD to the Covenant, limiting the treaty to the scope of their constitutional powers.⁹⁹ The United States specifically notes that Arti-

92. Siracusa Principles, *supra* note 21, § I.A.9.

93. Compare ICCPR, *supra* note 4, art. 2(1) with ICCPR, *supra* note 4, art. 4(2).

94. *Id.*

95. MARINA SHARPE, THE REGIONAL LAW OF REFUGEE PROTECTION IN AFRICA 108 (2018).

96. Human Rights Committee [“HRC”], General Comment 18 ¶ 13, U.N. Doc. HRI/GEN/1/Rev.1 (Nov. 10, 1989) [hereinafter General Comment No. 18].

97. See Lane, *supra* note 22; see also Slagle et al., *supra* note 22.

98. Chung, *supra* note 26, at 173; Goldsmith *supra* note 26, at 312.

99. Australia attached the declaration: “Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.” *International Covenant on Civil and Political Rights: Declarations and Reservations* (2020), U.N. TREATY

cles 1-27 of the Covenant are not self-executing.¹⁰⁰ As a result, the ICCPR cannot be directly enforced domestically in the United States.¹⁰¹

Other countries directed their RUDs at more specific provisions. As related to the ICCPR articles discussed here, France included a reservation specific to Article 4 stating that the emergency powers in the French Constitution are to be understood as meeting the purpose of Article 4.¹⁰² France also specified that the phrase “‘to the extent strictly required by the exigencies of the situation’ cannot place a limit on the power of the President to take ‘the measures required by the circumstances.’”¹⁰³ Likewise, Trinidad and Tobago also reserved the right not to apply Article 4(2) in full.¹⁰⁴ The United States includes an understanding related to the discrimination clause in Article 4(1) and states that it does not bar distinctions that may “‘have a disproportionate effect upon persons of a particular status” in line with the United States’ Constitution.¹⁰⁵ Moreover, many states have issued RUDs relevant to the specific articles that may be most impacted by COVID-19-related measures, including Article 12, Article 17, and Article 21.¹⁰⁶

C. *World Health Organization’s (“WHO”) International Health Regulations*

When limitations are invoked to protect public health, the Siracusa principles affirm that “‘due regard should be given to the international health regulations of the World Health Organization.”¹⁰⁷ The International Health Regulations (“IHRs”) are a form of administrative law updated in 2005. IHRs give the WHO Director-General power to declare a public health emergency of international concern and to issue temporary recommendations relevant to address the emergency, in consultation with the WHO’s Emergency Committee.¹⁰⁸ On January 30, 2020, the WHO’s Emergency Committee declared a public health emergency of international concern,

COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en (last visited Oct. 14, 2020) [hereinafter *Declarations and Reservations*]; see Goldsmith, *supra* note 26, at 313 (stating that the United States attached an understanding that the provisions it consented to were no more stringent than the analogous rule under the Constitution).

100. *Declarations and Reservations*, *supra* note 99.

101. Goldsmith, *supra* note 26, at 318.

102. *Declarations and Reservations*, *supra* note 99.

103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.*

107. *Siracusa Principles*, *supra* note 21 at § I.B.iv.26.

108. Constitution of the World Health Org. art. 2(k), July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185; see, e.g., World Health Org. [“WHO”], Revision of the International Health Regulations, WHA58.3 (May 23, 2005), available at http://www.who.int/gb/ebwha/pdf_files/WHA58/WHA58_3-en.pdf [hereinafter *Revised IHR*].

signaling to member states the need to take action against COVID-19.¹⁰⁹ In April, the WHO's Independent Oversight Advisory Committee proposed updating the IHRs to take account of lessons learned from addressing COVID-19.¹¹⁰ The WHO also has responsibilities for monitoring and collecting information from states about pandemics, but has been criticized for failing to use those powers adequately or early enough.¹¹¹

While the IHRs consist of regulations, some commentators have suggested that they operate like a treaty to the extent they are binding on governments in certain circumstances.¹¹² Article 3(1) of the regulations provides that they should be implemented, "with full respect for the dignity, human rights, and fundamental freedoms of persons."¹¹³ The IHRs were designed so that the declaration of a public health emergency of international concern is consistent with the kind of emergency contemplated under Article 4 of the ICCPR.¹¹⁴ At least one commentator has suggested that the types of temporary recommendations envisaged under the IHRs would necessitate governments to act under limitations included in the ICCPR.¹¹⁵ This would not require governments to use a derogation analysis because the measures envisaged under Article 18 of the regulations primarily focus on measures which would infringe upon the right to privacy, the right to liberty (related to forced health quarantine detention) and the freedom of movement.¹¹⁶

D. *History of Derogation in Times of Crisis*

Since the ICCPR's entry into force in 1976, an array of member states have provided notice of derogation. These include states that have experienced periods of civil unrest or threats of terrorism, as well as UN Security Council members.¹¹⁷ Some states have notified a derogation only once, whereas others have issued multiple notices a year.¹¹⁸ Several competing po-

109. Dr. Tedros Adhanom Ghebreyesus, Dir. Gen., World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020).

110. Independent Oversight and Advisory Committee for the WHO Health Emergencies Programme, Interim report on WHO's response to COVID-19 7 (May 14, 2020).

111. *Id.*; see also Jennifer Shkabatur, *A Global Panopticon - The Changing Role of International Organizations in the Information Age*, 33 MICH. J. INT'L L. 159, 171 (2011).

112. LAWRENCE GOSTIN, GLOBAL HEALTH LAW 35 (2014).

113. Revised IHR, *supra* note 108, art. 3(1).

114. Andraž Zidar, *WHO International Health Regulations and Human Rights: From Allusions to Inclusion* 19 INT'L J. HUM. RTS. L. 505, 508 (Jun. 23, 2015).

115. *Id.*

116. *Id.*

117. Emilie M. Hafner-Burton et al. *supra* note 23, at 678; see Derogation Notification *supra* note 6.

118. Emilie M. Hafner-Burton et al., *supra* note 23, at 678; see Derogation Notification *supra* note 6.

litical theories in international relations discuss why states derogate,¹¹⁹ but this article focuses on the legal consequences of the decision whether to derogate in response to COVID-19.

Although the drafting history reveals that war was seen as the paramount example of a public emergency requiring derogation under Article 4,¹²⁰ historically the vast majority of derogations have been in response to an internal threat.¹²¹ Examples include:

insurrection situations (Algeria, Ecuador), vandalism and the use of firearms (Argentina), serious political and social disturbances (Bolivia, Yugoslavia), terrorist activities (Azerbaijan, Chile, Colombia, Israel, Nepal, Peru, United Kingdom), subversive activities (Ecuador, Bolivia), serious internal unrest caused by an economic crisis (Ecuador, Bolivia), natural disasters (Guatemala, Ecuador), clashes between demonstrators and defense forces (Panama), acts of sabotage (Peru, Sri Lanka), violence caused by drug traffickers (Colombia, Peru), need to avert a civil war, economic anarchy and destabilization of state and social structures (Poland), violent nationalistic clashes (Russian Federation), civil war, a very chaotic socio-economic and political situation, lawlessness and armed robbery (Sudan), the threat from international terrorism (United Kingdom), or the attempt to assassinate the President of the Republic (Venezuela).¹²²

In several instances, the Human Rights Committee has been critical of member states' use of derogation. Broadly, these criticisms can be classified as a derogation from non-derogable rights,¹²³ derogation in situations not covered by Article 4,¹²⁴ and failure to provide notice of derogation.¹²⁵

119. For a discussion of the theory of why states derogate, see *generally* Emilie M. Hafner-Burton et al., *supra* note 23.

120. Marko Milanovic, *Extraterritorial Derogations from Human Rights Treaties in Armed Conflict in THE FRONTIERS OF HUMAN RIGHTS* 57, 63 (Nehal Bhuta ed., 2016).

121. Angelika Siehr, *Derogation Measures under Article 4 ICCPR, with Special Consideration of the 'War against International Terrorism'*, 47 GERMAN Y.B. INT'L L. 545, 550 (2004).

122. *Id.*; see Derogation Notification *supra* note 6.

123. General Comment No. 29, *supra* note 31, at ¶ 7 fn. 4 (citing the following comments/concluding observations: Dominican Republic (1993), CCPR/C/79/Add.18, ¶ 4; Jordan (1994) CCPR/C/79/Add.35, ¶ 6; Nepal (1994) CCPR/C/79/Add.42, ¶ 9; Russian Federation (1995), CCPR/C/79/Add.54, ¶ 27; Zambia (1996), CCPR/C/79/Add.62, ¶ 11; Gabon (1996), CCPR/C/79/Add.71, ¶ 10; Colombia (1997) CCPR/C/79/Add.76, ¶ 25; Israel (1998), CCPR/C/79/Add.93, ¶ 11; Iraq (1997), CCPR/C/79/Add.84, ¶ 9; Uruguay (1998) CCPR/C/79/Add.90, ¶ 8; Armenia (1998), CCPR/C/79/Add.100, ¶ 7; Mongolia (2000), CCPR/C/79/Add.120, ¶ 14; Kyrgyzstan (2000), CCPR/CO/69/KGZ, ¶12.)

124. *Id.* ¶ 3 fn. 1 (citing the following comments/concluding observations: United Republic of Tanzania (1992), CCPR/C/79/Add.12, ¶ 7; Dominican Republic (1993), CCPR/C/79/Add.18, ¶ 4; United Kingdom of Great Britain and Northern Ireland (1995),

Before COVID-19, only two states used Article 4 notification to address a public health crisis, despite numerous states enacting emergency health measures.¹²⁶ Guatemala notified a derogation in May 2009 after declaring a public health emergency due to the H1N1 epidemic.¹²⁷ In 2006, Georgia notified the Secretary-General following a presidential decree to prevent the spread of bird flu.¹²⁸ At the time of writing, only Argentina, Armenia, Chile, Columbia, the Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Georgia, Guatemala, Kyrgyzstan Latvia, Namibia, Paraguay, Peru, the Republic of Moldova, Romania, San Marino, Senegal, the State of Palestine, and Thailand have notified the UN of derogation due to the COVID-19 pandemic.¹²⁹

III. ARE STATES PROPERLY CONSIDERING WHETHER COVID-19-RELATED EMERGENCY HEALTH MEASURES REQUIRE A DEROGATION OR BALANCING OF PUBLIC HEALTH AND HUMAN RIGHTS?

Since very few states have issued a derogation notice related to their COVID-19 emergency responses, it appears states are either (a) ignoring international human rights principles; (b) failing to follow the procedural requirements of Article 4; or (c) acting under the substantive limitation clauses. In this section, we will consider the harms caused specifically by each of these explanations as well as the overall harm created by uncertainty over if and how states are justifying their restrictions under the ICCPR.

A. *Are States Analyzing Human Rights Damage Caused by COVID-19 Restrictions?*

Given the extraordinary death toll and economic impact of the COVID-19 emergency, it is not surprising that states quickly adopted emergency measures, nor is it surprising that states heavily value protection of public health as balanced against other human rights considerations. The small number of states issuing a notice of derogation compared with the rapid and

CCPR/C/79/Add.55, ¶ 23; Peru (1996), CCPR/C/79/Add.67, ¶ 11; Bolivia (1997), CCPR/C/79/Add.74, ¶ 14; Colombia (1997), CCPR/C/79/Add.76, ¶ 25; Lebanon (1997), CCPR/C/79/Add.78, ¶ 10; Uruguay (1998), CCPR/C/79/Add.90, ¶ 8; Israel (1998), CCPR/C/79/Add.93, ¶ 11).

125. *Id.* ¶ 17 fn. 10 (citing comments/concluding observations on Peru (1992) CCPR/C/79/Add.8, ¶ 10; Ireland (1993) CCPR/C/79/Add.21, ¶ 11; Egypt (1993), CCPR/C/79/Add.23, ¶ 7; Cameroon (1994) CCPR/C/79/Add.33, ¶ 7; Russian Federation (1995), CCPR/C/79/Add.54, ¶ 27; Zambia (1996), CCPR/C/79/Add.62, ¶11; Lebanon (1997), CCPR/C/79/Add.78, ¶ 10; India (1997), CCPR/C/79/Add.81, ¶ 19; Mexico (1999), CCPR/C/79/Add.109, ¶12).

126. *See* Derogation Notification, *supra* note 6.

127. *Id.* at Guatemala (May 6, 2020).

128. *Id.* at Georgia (Mar. 7, 2006).

129. *See id.* (listing as defined by the UN Treaty Collection Depository).

almost universal imposition of restrictions on human rights for COVID-19 related reasons raises significant questions about whether ICCPR requirements have been upheld under either a limitations analysis or a derogation analysis.¹³⁰ The ICCPR requires that any emergency measure which restricts rights should be legal, necessary, proportionate, and nondiscriminatory.¹³¹ Failure to conduct a clear analysis or file a notice of derogation also makes it challenging for individuals and international bodies, such as the Human Rights Committee, to look back after an emergency has ended to consider whether measures put in place because of the emergency have been rescinded or modified to restore liberties that may have been infringed.

1. Damage Caused by Ignoring International Human Rights Principles

If member states are failing to conduct any analysis of their obligations under the ICCPR in implementing their emergency measures in response to COVID-19, both individuals and the international legal system will suffer. For individuals, they may not receive the human rights protections that are the object and purpose of the ICCPR.¹³² Domestic law may protect some rights in the face of emergency measures, but the ICCPR sets universal standards for all.¹³³ Failing to conduct a legal analysis under the ICCPR has the potential to produce several harms. First, states might improperly derogate from rights that are deemed non-derogable under the treaty. Second, states may not provide the notice required by Article 4, reducing oversight by the international community.¹³⁴ Third, measures may not be time-limited and may continue even after their value in combating the pandemic has passed. Fourth, states may not analyze whether emergency measures are legal, necessary, proportionate, and adhere to the principles of non-discrimination.

130. By the sheer volume of COVID-inspired restrictions as opposed to the limited number of derogations, it appears that states are not conducting a rigorous limitations analysis or concluding that public health trumps other human rights without much rigor in their balancing analysis. *Compare* Derogation Notification, *supra* note 6 (showing only 22 states have issued formal notices of derogation), *with* COVID-19 Tracker, *supra* note 1 (showing that most states have enacted emergency measures in response to COVID-19). Unless a state mentions its balancing of human rights – as in the best practices we cite in the end of this article – it is impossible to know whether it has rigorously balanced public health and other rights or just ignored the terms of the ICCPR in passing COVID-related restrictions.

131. *Emergency Measures*, *supra* note 3; Matt Pollard, *COVID-19 Symposium: The Courts and Coronavirus (Part 1)*, OPINIO JURIS, (Apr. 3 2020), <http://opiniojuris.org/2020/04/03/covid-19-symposium-the-courts-and-coronavirus-part-i/>.

132. See Human Rights Committee [“HRC”], General Comment 24 para. 7, U.N. Doc CCPR/C/21/Rev.1/Add.6, (Nov. 2, 1994); Nahuel Maisley, *The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making*, 28 EUR. J. INT’L L. 89, (2017) (stating the ICCPR does not create these rights but rather defines and establishes standards to measure them).

133. See Maisley, *supra* note 132.

134. ICCPR, *supra* note 4, art. 4(3).

UN human rights officials have raised concerns about human rights abuses and violations during the COVID-19 emergency.¹³⁵ In order to advance the promotion and protection of international human rights, the UN Human Rights Council appoints Special Procedures Mandate Holders to articulate and focus on certain areas of human rights.¹³⁶ A group of 17 such mandate holders issued a joint statement on March 16, 2020, warning governments not to abuse the COVID-19 emergency to limit human rights.¹³⁷ Their statement urged states to avoid security measures that respond to COVID-19 with excessive or overreaching emergency powers reminding states that “any emergency responses to the coronavirus must be proportionate, necessary and non-discriminatory” and that the “use of emergency powers must be publicly declared and should be notified to the relevant treaty bodies.”¹³⁸ The statement also highlighted that the protection of public health should “not function as a cover for repressive action nor should it be used to silence the work of human rights defenders.”¹³⁹

Similarly, the chairs of the ten international human rights treaty bodies called on states to adhere to international human rights law in their handling of the COVID-19 crisis, such that no one is deprived of life-saving treatment as a result of stigma, discrimination or other violation of IHRL.¹⁴⁰

Among the reasons to monitor human rights changes and violations in times of emergency is the potential harm to dissenters, minorities and vulnerable populations that could plausibly be reduced through increased oversight. Governments have used public emergencies as an excuse to justify discrimination, repression of political opponents, or to enhance marginalization of minorities or other vulnerable populations.¹⁴¹ These actions underscore the importance of Article 4 limits on derogation and the requirement that derogations which violate non-discrimination principles are unlawful.

135. See *COVID-19: States Should Not Abuse Emergency Measures to Suppress Human Rights*, OFF. HIGH COMM’R FOR HUMAN RIGHTS [“OHCHR”], (Mar. 16, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E> [hereinafter *Statement from UN Experts, COVID-19*].

136. See *Special Procedures of the Human Rights Council*, OFF. HIGH COMM’R FOR HUMAN RIGHTS [“OHCHR”], <https://www.ohchr.org/en/HRBodies/SP/Pages/WelcomePage.aspx>. (last visited May 18, 2020).

137. *Statement from UN Experts, COVID-19*, *supra* note 135.

138. *Id.*

139. *Id.*

140. *UN Human Rights Treaty Bodies call for human rights approach in fighting COVID-19*, OFF. HIGH COMM’R FOR HUMAN RIGHTS [“OHCHR”] (Mar. 24, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25742&LangID=E>.

141. See Doug Rutzen & Nikhil Dutta, *Pandemic and Human Rights*, JUST SEC. (Mar. 12, 2020) <https://www.justsecurity.org/69141/pandemics-and-human-rights/>; see also *Coronavirus and Civic Space*, INT’L CTR. FOR NOT-FOR-PROFIT L. (Mar. 10, 2020) <https://www.icnl.org/post/analysis/coronavirus-and-civic-space>.

In addition to the direct damage suffered by individuals, treaty non-compliance undermines the systems created by the ICCPR and the Human Rights Committee. Non-compliance can lessen the utility of the treaty as a mechanism that civil society actors can use to pressure governments to respect human rights. More broadly, noncompliance with one core human rights treaty may weaken general habits of compliance and erode the overall international human rights regime.¹⁴² Thus, if member states fail to recognize the ICCPR in implementing their emergency measures, not only is the legitimacy of the ICCPR harmed, but it creates a slippery slope threatening adherence to the international rule of law in general.¹⁴³

B. *Damage Caused by Failing to Follow the Procedural Requirements of Article 4*

Alternatively, member states might conduct a legal analysis under Article 4 of the ICCPR to implement emergency measures, but fail to follow the notification procedures. While this may cause less damage than ignoring the ICCPR, as states may consider the substantive principles of necessity, proportionality, non-discrimination, and compatibility with other obligations under international law, divorcing substantive requirements of derogation from the procedural requirements still creates problems.

When a state fails to provide notice of a derogation to the UN Secretary-General, other member states also do not get notice. The failure to provide notice of a derogation limits opportunities for oversight, analysis, and disagreement with a state's derogation practice. It disrupts the balance envisioned by the ICCPR, that emergency divergence from human rights requires oversight. The notification mechanism is meant to provide other member states an opportunity to challenge a derogation,¹⁴⁴ and it provides the Human Rights Committee the chance to examine and to comment on the emergency measures during the member state's review or when issuing General Comments interpreting the ICCPR.¹⁴⁵ For states that are party to the First Optional Protocol, establishing the individual complaint mechanism, the notification procedure also informs potential victims who can then bring a complaint before the Committee.¹⁴⁶ Without the transparency provided by the notification mechanism that allows the Human Rights Committee to comment on the state's emergency measures, jurisprudence related to ICCPR derogations is stunted.¹⁴⁷

142. See Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 203–04 (2006).

143. *Id.*

144. Emilie M. Hafner-Burton et al., *supra* note 23, at 677.

145. *Id.*

146. *Id.*

147. The Human Rights Committee has commented on instances when states are acting under Article 4 without providing notice of derogation, but this requires the Committee to in-

In addition to providing the transparency necessary for dissent, the notification mechanism serves to reinforce the substantive requirements of Article 4. Article 4(3) requires that member states include in a notice of derogation the specific rights and freedoms derogated, the reason for derogation, and notification of when the measures will be terminated.¹⁴⁸ Providing the specific rights and freedoms derogated as well as the reason for derogation helps to ensure that member states are acting in a necessary and proportionate manner to the emergency. Moreover, requiring states to notify the Secretary-General when the derogation will be terminated reinforces the time-limited nature of derogations. During the first six months of the pandemic, many of the states that initially issued notices of derogation have since notified the Secretary General of either extensions and/or terminations to their states of emergency.¹⁴⁹ This continued engagement of states with Article 4's notification mechanism strengthens the safeguards of oversight and demonstrates some states are reassessing the proportionality of the emergency measures. Without providing notice of derogation or termination, these safeguards are diminished.

IV. DAMAGE CAUSED BY ACTING UNDER THE SUBSTANTIVE LIMITATION CLAUSES

Member states may also be acting under the substantive limitation clauses found in the individual articles of the ICCPR when they establish their emergency measures to respond to COVID-19. As previously discussed, member states utilizing this escape mechanism must still adhere to the principles of legality, necessity, proportionality, and non-discrimination to be in compliance with the treaty.¹⁵⁰ However, when using a limitation clause to enact an emergency measure, there is not an explicit temporal limitation as there is with derogation, nor the need to declare a state of emergency officially.¹⁵¹ As a result, states may keep emergency measures limiting the rights of the ICCPR in place even after the crisis has passed. Although the necessity or proportionality principles may capture the notion that emergency measures cannot linger past the emergency, because no official state of emergency is required, in practice, a limitations analysis provides no demarcation as to when limitations must be repealed. Without a

fer intent to act under Article 4 and may not capture all instances where countries are using Article 4 without providing notice. *See supra* fn. 124 for examples.

148. ICCPR, *supra* note 4, art. 4(3).

149. *See* Derogation Notification, *supra* note 6 (noting notices of extension from Armenia, Chile, Columbia, Ecuador, El Salvador, Georgia, Guatemala, Paraguay, Peru, Romania, San Marino and Thailand; noting notices of termination from Columbia, Estonia, Latvia, the Republic of Moldova, Romania, and San Marino).

150. *See infra* Part II.B.2.

151. McGoldrick, *supra* note 25, at 383.

transparent deadline for restoring rights and liberties at the end of an emergency, restrictions might easily remain in place.¹⁵²

Additionally, unlike a derogation, states face no notification requirement when they act under a limitation clause in a time of emergency.¹⁵³ Beyond losing the oversight that comes with a notification, states are not required to justify their limitations in writing, as they would be with a derogation. Without a clearly articulated statement of necessity to argue against, advocates have a harder time pointing to the moment when the necessity for the state's imposition of a restriction expires. Notification may also serve to constrain the state's emergency powers and reflect a positive commitment to the principles of legality and normalcy; features lost when acting under a limitation.¹⁵⁴

Guidance by the Office of the High Commissioner for Human Rights' ("OHCHR") issued in April 2020 relating to emergency measures and COVID-19 states that "[e]mergency measures, including derogation or suspension of certain rights, should be subject to periodic and independent review by the legislature."¹⁵⁵ While the rules governing derogation requires such review, nothing in the ICCPR requires a later review by a legislature, or any other branch of government, for restrictions enacted under a limitation clause. General Comment 29 further underscores this point stating, "[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant."¹⁵⁶ Because states may enact measures under the limitation clauses regardless of whether there is a state of emergency,¹⁵⁷ jurisprudence does not exist regarding restoration of normalcy under a limitation clause, unless it is captured by the principles of necessity and proportionality.¹⁵⁸ While OHCHR may call for review and oversight for emergency restrictions, if states enact the measures pursuant to limitation rather than as a derogation, they face no binding treaty requirement or institutional mechanism to require a review when the emergency ends.¹⁵⁹

152. The joint statement of Mandate Holders on March 16, 2020 contemplates this issue stating, "authorities must seek to return life to normal and must avoid excessive use of emergency powers to indefinitely regulate day-to-day life." Statement from UN Experts, COVID-19, *supra* note 135.

153. Compare ICCPR, *supra* note 4, art. 4(3) with ICCPR, *supra* note 4, art. 12(3).

154. See Scheinin, *supra* note 79.

155. *Emergency Measures*, *supra* note 3.

156. General Comment No. 29, *supra* note 31, ¶ 5.

157. Ponta, *supra* note 35 (stating "[e]ven in 'ordinary times,' limitations on non-absolute rights or freedoms are permissible").

158. See *infra* II.B.2.

159. *Id.*

B. *About Which Escape Mechanism Member States are Using to Justify COVID-19-Inspired Restrictions Undermines the ICCPR*

Uncertainty about whether member states are undertaking a legal analysis when implementing restrictions on human rights to combat COVID-19 or not produces its own set of harms and undermines the Covenant, especially in the face of a global crisis.

For rights that are subject to both a limitation clause and derogation under Article 4, there is little guidance on when the scope of a limitation exceeds the clause, requiring the member state to justify its action through a derogation. A member state may not invoke a derogation for what it could achieve through a limitation, and the treaty encourages the use of limitations rather than derogations.¹⁶⁰ While the Human Rights Committee and the Siracusa Principles focus on when a limitation or derogation is permissible, there is no clear standard for when a derogation becomes necessary. The Siracusa Principles state that the scope of a limitation shall not be interpreted so as to “jeopardize the essence of the right concerned.”¹⁶¹ But it is clear from member states’ disparate use of the derogation clause regarding COVID-19 measures that confusion is widespread about the permissible scope of the limitations and at what point a derogation rather than a limitation is required under the ICCPR. The division between limitations and derogations is further confused because principles such as proportionality and non-discrimination are applicable to both.¹⁶² 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.¹⁶³ At the same time, other member states may conceivably stretch the limitation clause to avoid international oversight. In the case of COVID-19, this could account for the disparate results where when undertaking the same action some states use limitation clauses while others issue notices of derogation.

The confusion between limitation clauses and derogations undermines the Covenant in several ways. First, it disrupts the progressive structure of the Covenant which envisions greater oversight and more restricted use of

160. See General Comment No. 29, *supra* note 31, ¶ 4 (stating “[d]erogation from obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant.”); see also Siracusa Principles, *supra* note 21, para. 53 (stating “[a] measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitations clauses of the Covenant would be adequate to deal with the threat to the life of the nation.”); McGoldrick, *supra* note 25, at 384.

161. Siracusa Principles, *supra* note 21, ¶ 2.

162. McGoldrick, *supra* note 25, at 383–84.

163. Emanuele Sommario, *Limitation and Derogation Provisions in International Human Rights Law Treaties and Their Use in Disaster Settings*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND DISASTERS, 98, 113 (Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari, & Giulio Bartolini eds., 2018).

derogations as opposed to limitations which are less procedurally constrained but more limited in application. Second, it creates uncertainty for observers as to whether member states are acting under a limitation clause or if they are disregarding the notification provision of Article 4. Third, member states are defining the scope of the limitation clauses on a regional basis rather than universally. The global nature of the COVID-19 pandemic highlights these issues as multiple member states are simultaneously grappling with their response to the same threat. As the global community proceeds to address other large-scale crises such as the War on Terror or climate disasters, the need to strengthen multilateral human rights instruments with clear standards and consistent application will become more acute and this analysis will prove useful.

The ICCPR's escape mechanisms are implemented progressively. Rather than a general limitation clause as in the Universal Declaration of Human Rights, the ICCPR's drafters included the limitation provisions within the specific substantive right. This change "reflected a desire to tailor limitations to assure maximum protection for the individual,"¹⁶⁴ meaning limitations are only allowed on the grounds stated within the relevant Article. The inclusion of limitations in the ICCPR recognizes that most human rights are not absolute and require balancing individual and community interests.¹⁶⁵ As such, these rights can be limited permanently and still conform to the ICCPR.¹⁶⁶ In contrast, a derogation completely or partially eliminates an international obligation.¹⁶⁷ Because derogations cast a wider scope in restricting rights than limitations do, the Covenant confines their use to narrow circumstances and subjects them to the notification provision, allowing others to monitor implementation. Unlike a limitation, when a derogation is used, it must be time-limited.¹⁶⁸ At the same time, the Covenant flatly prohibits the derogation of certain rights, deeming the obligation to protect those rights too important to be eliminated even in emergencies.¹⁶⁹ In this way, the ICCPR creates a progressive model in which increased restrictions on rights are subject to narrower circumstances and greater oversight.

Based on this model, when an emergency situation arises, the Covenant is designed so states first act within the scope of permissible limitations before seeking to eliminate an obligation through a derogation.¹⁷⁰ However, the Covenant does not provide clear standards for member states to ascer-

164. Alexandre Charles Kiss, *Permissible Limitations on Rights, in THE INTERNATIONAL BILL OF RIGHTS - THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 290, 291 (Louis Henkin ed. 1981).

165. McGoldrick, *supra* note 25, at 383.

166. *Id.*

167. *Id.*

168. Siracusa Principles, *supra* note 21, ¶¶ 45(c), 48; *Emergency Measures, supra* note 3.

169. ICCPR, *supra* note 4, art. 4(2).

170. *See infra* fn. 157.

tain the permissible scope of limitations. This means states often deploy derogations in a precautionary fashion, contrary to the ICCPR's ideal prioritization.¹⁷¹ It also creates an incentive for states who want to avoid international oversight to stretch what can be properly accomplished through a limitation. The Covenant envisions increasing oversight as restrictions rise in scope or severity—putting in stricter requirements for derogation than limitations. This balance is disrupted by states' differing interpretations about the scope of permissible limitations.

For example, Latvia was one of the first countries to notify a COVID-19-related derogation to the UN on March 16, 2020.¹⁷² It justified using a derogation because it would be impossible to assess limitations during the crisis individually.¹⁷³ Latvia is not the only state to approach derogation during the COVID-19 crisis in a precautionary way. Estonia's notice of derogation said, "some of these measures may involve a derogation. . ."¹⁷⁴ The use of "may" suggests Estonia may not have intended to suspend rights.¹⁷⁵ While this prophylactic use of derogation respects the Covenant, it raises questions about whether a derogation was truly necessary and appropriate.

The Human Rights Committee has also expressed concern with the "underuse" of derogations. For example, the Human Rights Committee has rebuked several states for failing to provide notice of a derogation.¹⁷⁶ Other states facing a public emergency have claimed to be acting under the limitation clauses of the substantive rights.¹⁷⁷ In 1976, the UK submitted a notice of derogation to the Secretary-General concerning Northern Ireland but withdrew the notice in 1984.¹⁷⁸ In explaining the withdrawal, the UK stated that the emergency continued, but there had been a change in the measures for addressing it,¹⁷⁹ suggesting it was now justifying its restrictions under a limitations analysis. Because of ambiguity in ICCPR limitation clauses, states over- and under- use of derogation to fit their agendas.

Further, when states enact emergency measures without providing notice of derogation, it is difficult to tell whether a state is acting under the

171. Sommaro, *supra* note 163.

172. Derogation Notification, *supra* note 6.

173. E-mail from Janis Karklins, Lat. Ambassador to the U.N. in Geneva to authors (April 2, 2020, 12:51 PM CET) (on file with authors).

174. Derogation Notification, *supra* note 6.

175. Sommaro, *supra* note 163, at 113.

176. *See infra* n. 126.

177. McGoldrick, *supra* note 25, at 384 (citing UN Doc. A/34/40, ¶ 383 (1979) (Cyprus), UN Doc. A/35/40, ¶297 (1980) (Suriname), UN Doc. A/54/40, Vol. I. ¶ 324 (Mexico), and UN Doc. A/46/40, ¶¶ 618–56 (Iraq)).

178. *See* McGoldrick, *supra* note 25, at 385 (citing UN Doc. CCPR/C/2/Add.8, App.II, 2) (stating the United Kingdom has "come to the conclusion that it is no longer necessary, in order to comply with its obligations under the Covenant, for the United Kingdom to continue, at present time, to avail itself of the right of derogation under Article 4.")

179. McGoldrick, *supra* note 25, at 385 (citing UN Doc. CCPR/C/SR.594, ¶ 3).

limitation clause, acting under Article 4 without providing notice, or ignoring its treaty obligations altogether. This uncertainty, whether real or perceived, undermines the treaty as a whole by creating distrust about the degree of compliance. The lack of a derogation notice also complicates the Human Rights Committee's task of evaluating emergency restrictions.

The lack of jurisprudence and clear standards about when an emergency situation warrants derogation is also creating unhelpful regional variation in practice which is incompatible with the treaty. With COVID-19, for example, Latvia was a first mover in March 2020, quickly followed by Armenia, Romania, the Republic of Moldova, Georgia, and Estonia.¹⁸⁰ This practice within the UN's Eastern Europe Group could appear to demonstrate a regional understanding of the importance of derogation as opposed to the limitation in the COVID-19 situation. Likewise, during the six month period this article focuses on eight countries from the Latin American and Caribbean Group have also issued notices of derogation although they did not move as early as those in the Eastern Europe Group.¹⁸¹ In contrast, only one country from the Western European and Other Group (San Mario), two countries from the Asia Pacific Group (Kyrgyzstan and Thailand) and three countries from the Africa Group (Ethiopia, Namibia, and Senegal), have issued notices of derogation.¹⁸² Because the ICCPR does not utilize the margin of appreciation doctrine,¹⁸³ such regional understandings of the derogation mechanism are not only confusing but incompatible with the treaty.

As the ICCPR is increasingly utilized to protect human rights in the face of global threats such as terrorism and climate change, clear definitions about the scope of limitation provisions are needed. Such clarity will help states receive the proper oversight for their actions, limiting over- and under- use of derogations. It will also allow member states and the Human Rights Committee to more readily and accurately assess compliance and to prevent the emergence of conflicting regional understandings of the ICCPR, strengthening the treaty regime overall.

IV. A RIGOROUS LIMITATIONS ANALYSIS FOR MEASURES INFRINGING FREEDOM OF MOVEMENT

We now turn to a consideration of what a rigorous limitations analysis might look like for travel bans, stay-at-home orders, quarantines, digital surveillance, and bans on public gatherings, along with how international human rights might be harmed by such measures. Most states adopted some,

180. Derogation Notification, *supra* note 6.

181. *Id.*

182. *Id.*

183. Dominick McGoldrick, *A Defense of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee*, 65 INT'L & COMP. L. QUARTERLY 21, 21 (2015).

if not all, of these measures in response to COVID-19, but only twenty-two have notified that they implemented a derogation.¹⁸⁴ With respect to each of three types of rights—freedom of movement, freedom of assembly, and privacy rights—we consider whether the restrictions states have imposed meet the tests of legality, necessity, and proportionality, as well as non-discrimination. In addition, we discuss whether other tests or additional factors might provide a better way of assessing compliance with the ICCPR in our modern digital age and in the context of COVID-19 limitations. These include assessing whether restrictions are necessary for a democratic society, looking at the COVID-19-related context in which specific restrictions are imposed, encouraging consultation between health, information technology, and legal experts in crafting limitations, and considering how modern technology and online alternatives impact the limitations analysis.

Many member states have curtailed the right to freedom of movement in response to COVID-19. According to the COVID-19 Tracker and as of September 2020, at least 107 countries have adopted measures limiting freedom of movement.¹⁸⁵ Both quarantines and travel restrictions have been widely implemented as public health measures designed to stop the spread of the virus.¹⁸⁶ While limitations on freedom of movement vary widely in scope, they can include restricting the right to leave a country, restricting inter-country travel, and restricting the right to enter one's country.¹⁸⁷ At the beginning of the COVID-19 pandemic, such restrictions often targeted people in virus hot spots, but as the virus has spread, restrictions have become more wide-reaching.¹⁸⁸ In this section, we analyze (A) requirements for limitations on freedom of movement under Article 12(3) looking at quarantines and travel restrictions; and (B) whether citizens legally can be stopped from returning to their own country under Article 12(4).

A. *Freedom of Movement Restrictions Under Article 12(3)*

Article 12(3) provides that states may limit the right to “liberty of movement and freedom to choose his residence” as well as the freedom to “leave any country” found in Article 12(1) and Article 12(2), respectively.¹⁸⁹ Below we consider the two most salient emergency measures implemented under 12(3): quarantines and travel restrictions.

In the public health sphere, a quarantine is defined as “the separation of persons (or communities who have been exposed to an infectious disease,” while isolation applies to “the separation of persons who are known to be

184. See Derogation Notification, *supra* note 6.

185. COVID-19 Tracker, *supra* note 1.

186. *Id.*

187. *Id.*

188. See *Coronavirus Restrictions in Each State*, *supra* note 2.

189. ICCPR, *supra*, note 4, art. 12.

infected.”¹⁹⁰ However, laws often conflate the two terms, referring to both under the umbrella of quarantine.¹⁹¹ This article uses quarantine to mean measures restricting individuals to their residence or other quarantine sites and includes “stay-at-home orders” and “lockdowns.” Likewise, this section considers travel restrictions limiting the ability to enter, leave, and travel within a country. As in the real world, the precise contours between broad quarantine and limits on inter-country travel are not well defined.

Because quarantines and travel restrictions can be employed to limit the movement of potentially large groups of asymptomatic people, they are one of the most aggressive and controversial public health tools for controlling the spread of infectious disease.¹⁹² Historically, quarantines have been used since the 14th century, when ships were required to sit in port for forty days to protect coastal cities from the plague.¹⁹³ Most recently, quarantines have been deployed to combat both Severe Acute Respiratory Syndrome (“SARS”) and Ebola.¹⁹⁴ Similarly, states have used their borders as a control point for stopping the spread of diseases such as Yellow Fever.¹⁹⁵ In response to COVID-19, quarantine and travel restriction measures implemented by member states vary widely in scope and scale, ranging from border closure to mandatory geographic quarantines to stay-at-home recommendations.¹⁹⁶

1. Legality

For a limitation on freedom of movement to meet the legality standard, it must be contained in a “national law of general application, which is in force at the time when the limitation is applied.”¹⁹⁷ The COVID-19 Tracker shows that most measures related to freedom of movement restrictions have been implemented by an order, regulation, or law.¹⁹⁸ Applied to the COVID-19 situation, for a quarantine or travel restriction stemming from an order or regulation to meet this legality standard, the power that places the limit on freedom of movement must be contained in national law. Because quaran-

190. Wendy E. Parmet & Michael S. Sinha, *COVID-19 - The Law and Limits of Quarantine*, NEW ENG. J. MED., e28(1), e28(1) (Apr. 9, 2020).

191. *Id.*

192. Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. 227, 227–28 (2015).

193. *History of Quarantine*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Jan. 10, 2012), <https://www.cdc.gov/quarantine/historyquarantine.html>.

194. Rothstein, *supra* note 192.

195. *See New Yellow Fever Vaccination Requirements for Travelers*, WORLD HEALTH ORG., (Jul. 27, 2016), <https://www.who.int/ith/updates/20160727/en/> (discussing how the certificate of vaccination against yellow fever is required for some travelers).

196. *See COVID-19 Tracker*, *supra* note 1 (searching “movement”).

197. *Emergency Measures*, *supra* note 3.

198. *See COVID-19 Tracker*, *supra* note 1 (searching “movement”).

tines are well-established public health tools, most states have laws allowing the government to mandate quarantines or other legal mechanisms to implement such measures.¹⁹⁹ For example, Australia used an order, pursuant to section 7 of the Public Health Act of 2010, in New South Wales to require individuals to stay in their residence absent a reasonable excuse.²⁰⁰ Botswana declared a nationwide lockdown and curfew from 8 PM to 8 AM, using regulations issued under the Emergency Power Act, which specifically allows for limitations of freedom of movement.²⁰¹ The United Kingdom implemented its freedom of movement restriction by law, passing the Coronavirus Act 2020, giving UK authorities emergency powers to address the COVID-19 pandemic.²⁰²

Article 12(3) also states that any limitation must be “consistent with the other rights recognized in the present Covenant.”²⁰³ A limitation that is properly passed according to domestic law should not, according to this standard, conflict with the objects and purposes of the treaty.²⁰⁴ In a situation where a person must leave a state in the context of asylum-seeking, an exit ban²⁰⁵ could be incompatible with other ICCPR rights such as the right to life or freedom from torture or cruel, inhuman, or degrading treatment.²⁰⁶ States imposing restrictions need to examine the limitation in the context of the ICCPR as a whole.

In addition, the OHCHR issued guidance on the legality standard, stating that “[t]he law must not be arbitrary or unreasonable, and it must be clear and accessible to the public.”²⁰⁷ Even where restrictions have been is-

199. See Rothstein, *supra* note 192, at 228.

200. *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 Under the Public Health Act 2010, 2020* (N.S.W.) Part I (Austl.), *Government Gazette No. 65* of March 30, 2020 149–1163. (defining orders as executive measures including executive orders and presidential decrees).

201. *Emergency Powers (COVID-19) Regulations, 2020 Under the Emergency Powers Act, Supplement C 2020* Part II (Bots.), *Botswana Extraordinary Government Gazette*, April 2, 2020; see also *Emergency Powers, 1966*, Chapter 22:04 (Bots.), <http://extwprlegs1.fao.org/docs/pdf/bot91330.pdf> (defining regulation as measures that guide the implementation of law and including “(a) make provision for the detention of persons or the restriction of their movements.”).

202. *Coronavirus Act 2020*, c. 7 (UK). The tracker defines laws as measures that have been enacted through the legislative process.

203. ICCPR *supra* note 4, art. 12(3).

204. Siracusa Principles *supra* note 21, ¶ 5.

205. See Tan Sri Muhyiddin Yassin, *(Full Text) PM’s Movement Control Order Speech in English*, NEW STRAIT TIMES (Mar. 17, 2020), <https://www.nst.com.my/news/nation/2020/03/575372/full-text-pms-movement-control-order-speech-english> (illustrating Malaysia as an example of a state imposing restrictions on exiting the country as part of its COVID-19 response measures).

206. Kate Ogg, *COVID-19 Travel Bans: The Right to Seek Asylum When You Cannot Leave Your Homeland*, UNSW L., (Apr. 16, 2020) <https://www.kaldorcentre.unsw.edu.au/publication/covid-19-travel-bans-right-seek-asylum-when-you-cannot-leave-your-homeland>.

207. *Emergency Measures*, *supra* note 3.

sued in accordance with the legislative process, many states are struggling with communicating the laws to the public. The *New York Times* reported on confusion over quarantine guidelines in New York, noting “when the authorities do issue guidance or directives, they can seem contradictory or illogical.”²⁰⁸ The public faced similar confusion in the United Kingdom, with contradictory messaging from government officials about the contours of the lockdown order in London.²⁰⁹

It appears that many, if not most governments have or have made some effort to demonstrate legal authority to implement quarantines, and those doing so in response to COVID-19 have followed their legal process, whether that involves action by the legislative or executive branch of government.²¹⁰ However, a rigorous legal analysis must ensure that the restriction comports with the rest of the ICCPR and that the public is informed of the contours of any limitations in order to meet the legality standard.

2. Necessity

Restrictions on freedom of movement must be “necessary to protect” the legitimate aims contained in the treaty, according to ICCPR standards.²¹¹ In the instance of COVID-19, quarantines and travel restrictions must be necessary to protect public health.²¹²

States have recognized the potential necessity of quarantines in their legal regimes. In the United States, for example, federal quarantine and isolation powers may be implemented in response to a closed list of diseases, which include “severe acute respiratory syndromes” encompassing COVID-

208. Andy Newman, *Confusion Over Coronavirus Quarantines Feeds Anxiety*, N.Y. TIMES, (Mar. 9, 2020), <https://www.nytimes.com/2020/03/09/nyregion/coronavirus-ny-quarantines.html>.

209. See Jill Lawless, *UK Clamps Down to Fight Virus, but Confusion Still Reigns*, ASSOCIATED PRESS, (Mar. 24, 2020), <https://apnews.com/5131953f9d8fe0b47c08accf9241f499> (noting contradictory government statements regarding children moving between households).

210. See *COVID-19 Tracker*, *supra* note 1 (searching “movement”) (showing that most measures related to freedom of movement restriction have been implemented by an order, regulation or a law, with the exception of the travel lockdowns in Wuhan and cities in Hubei province which were issued by central government policy). *But see Decision on the Extension of the Temporary Measure*, CONST. CT. REPUBLIC KOS., (Mar. 31, 2020), <https://gjk-ks.org/vendimet-nga-seancat-shqyrtuese-te-mbajtura-me-30-dhe-31-mars-2020/>. Although the analysis was not conducted under the ICCPR, the Constitutional Court in Kosovo ruled that the Law on the Prevention of Spreading Infectious Disease does not specifically provide for the restriction of freedom of movement as required to limit the Constitutional right to freedom of movement. Jack Robinson & Eve-anne Travers, *Government Decision Restricting Freedom of Movement Ruled Unconstitutional*, PRISHTINA INSIGHTS, (Mar. 31, 2020) <https://prishtinainsight.com/government-decision-restricting-movement-ruled-unconstitutional/>.

211. ICCPR, *supra* note 4, art. 12(3).

212. *Id.*

19.²¹³ The U.S. Supreme Court discussed this sentiment in *Jacobson v. Massachusetts*, stating that it is necessary that a “well-ordered society” can enforce “reasonable regulations” to effectively respond to “an epidemic disease which threatens the safety of its members.”²¹⁴ Given the broad use of quarantines globally to combat COVID-19 and the potential of asymptomatic transmission, states are likely to find quarantines necessary to protect public health. For example, the WHO recommends that “contacts of patients with laboratory-confirmed COVID-19 be quarantined for fourteen days from the last time they were exposed to the patient.”²¹⁵ The WHO has previously justified even involuntary quarantines based on its assessment of balancing between public health needs and freedom of movement concerns.²¹⁶ As such, most states will be able to satisfy the necessity principle in relation to quarantines, although it should be reassessed as transmission progresses and scientific understanding evolves.

However, the WHO has criticized the use of travel restrictions to combat COVID-19. In its updated recommendations, the WHO “advises against the application of travel or trade restriction on countries with COVID-19 outbreaks.”²¹⁷ The recommendation continues, “[t]ravel bans to affected areas or denial of entry to passengers coming from affected areas are usually not effective in preventing the importation of cases but may have a significant economic and social impact.”²¹⁸ Further, sixteen global health law scholars recently concluded in a *Lancet* commentary that imposing travel restrictions against China during the COVID-19 outbreak violates the

213. 42 C.F.R. §§70.1–9 (2015) (regulating interstate quarantine through E.O. 13295) as amended by Exec. Order No. 13674, 79 Fed. Reg. 45671 (July 31, 2014). Under these orders, federal quarantine and isolation powers currently apply to the following diseases: cholera; diphtheria; infectious tuberculosis; plague; smallpox; yellow fever; viral hemorrhagic fevers; influenza caused by new or reemerging flu viruses that are causing, or have the potential to cause, a pandemic; and severe acute respiratory syndromes (which may include COVID-19).

214. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905); see also Polly J. Price, *Quarantine and Liability in the Context of Ebola*, 131 PUB. HEALTH REP. 500, 502 (2016).

215. World Health Org. [“WHO”], *Considerations for Quarantine of Individuals in the Context of Containment for Coronavirus Disease (COVID-19)*, at 1–2, WHO/2019-nCoV/IHR_Quarantine/2020.2 (Mar. 19, 2020).

216. *WHO Guidance on Human Rights and Involuntary Detention for XDR-TB Control*, WORLD HEALTH ORG. (Jan. 24, 2007), https://www.who.int/tb/features_archive/involuntary_treatment/en/ (“Therefore, interference with freedom of movement when instituting quarantine or isolation for a communicable disease such as MDR-TB and XDR-TB may be necessary for the public good, and could be considered legitimate under international human rights law. *This must be viewed as a last resort and justified only after all voluntary measures to isolate such a patient have failed.*”) (italics in original).

217. *Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak*, WORLD HEALTH ORG., (Feb. 29, 2020), <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>.

218. *Id.*

IHRs.²¹⁹ Given the support for the IHRs in the WHO and the Siracusa Principles,²²⁰ member states could find that travel bans fail to meet the principle of necessity.

This analysis highlights the need for states to consult public health experts when pursuing the “public health” goals in the limitation clauses. We suggest that rigorous legal analysis cannot be complete without collaboration between technical experts and domestic policymakers.

3. Proportionality

As with necessity, an assessment of proportionality is best guided by public health and technical collaboration with policymakers. The Human Rights Committee expands on the notion of proportionality in relation to Article 12(3) stating:

Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least restrictive instrument among those that might achieve the desired result; and they must be proportionate to the interest to be protected.²²¹

In the event that states could show that international travel restrictions are necessary, it will be difficult to show that they are the least restrictive instrument. The WHO has offered guidance on less-restrictive alternatives, including risk communication, surveillance, patient management, and screening at ports of entry and exit.²²²

In contrast, the WHO recommends using quarantines,²²³ which states have implemented on various scales. China quarantined close to 60 million people in a two-day effort to limit transmission from the city of Wuhan in Hubei province.²²⁴ Italy took a different approach by progressively expanding quarantine from ten towns in Lombardy and one in Veneto to the entire country.²²⁵ Meanwhile, in the United States, a letter from 800 public health and legal experts called for voluntary self-isolation measures in combination with education, widespread testing, and universal access to treatment, stat-

219. Roojin Habibi, Gian Luca Burci, Thana C. de Campos, Danwood Chirwa, Margherita Cina, Stephanie Dagrón, Mark Eccleston-Turner, Lisa Forman, Lawrence O. Gostin, Benjamin Mason Meier, Stefania Negri, Gorik Ooms, Sharifah Sekalala, Allyn Taylor, Alicia Ely Yamin & Steven J. Hoffman, Commentary, *Do Not Violate the International Health Regulations During the COVID-19 Outbreak*, 395 LANCET, 664, 664 (2020).

220. Siracusa Principles, *supra* note 21, at § I.B.iv.

221. See ICCPR, *supra* note 4, art. 12(3).

222. Habibi et al., *supra* note 219.

223. See generally World Health Org. *supra* note 215.

224. Amy Qin, *China May Be Beating the Coronavirus, at a Painful Cost*, N.Y. TIMES, (Mar. 7, 2020), <https://www.nytimes.com/2020/03/07/world/asia/china-coronavirus-cost.html>.

225. *Human Rights Dimensions of COVID-19 Response*, HUM. RTS. WATCH, (Mar. 19, 2020) <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>.

ing they “are more likely to induce cooperation and protect public trust than coercive measures and are more likely to prevent attempts to avoid contact with the healthcare system.”²²⁶ The WHO recommends that contacts of patients with laboratory-confirmed results be quarantined for 14 days.²²⁷ This containment strategy assumes rapid identification through laboratory testing, a capacity which not all states have met.²²⁸ As such, an assessment of whether quarantine constitutes “least restrictive means” must be tailored to the region’s circumstances. For example, taking into account factors like geographic scope, healthcare infrastructure, testing capacity, the phase of the pandemic, and public compliance with other prevention measures are relevant to the assessment of what constitutes “least restrictive means.” In addition, the assessment should involve consultation with technical and health professionals based on up-to-date scientific information.

Beyond the scope of the quarantine and travel restrictions, we suggest that a proportionality assessment also should consider a limitation’s time frame. When states act under a limitation clause to restrict rights, the ICCPR has no explicit requirement that the restriction be time-limited and removed or reviewed after a certain time period, unlike for derogations.²²⁹ This is a major shortcoming of using a limitation analysis during an emergency. The proportionality prong of a limitation analysis is the best place to capture this time factor. Because the COVID-19 emergency is not static, the assessment of proportionality and appropriateness of emergency measures will change as the situation progresses. For example, Croatia’s decision prohibiting individuals from leaving home without a special permit is only in effect for thirty days.²³⁰ In contrast, Jordan’s movement restrictions are in place “until further notice.”²³¹ We do not categorically suggest states must include time limits in their emergency measures to be proportionate, but recommend time limits because they are an additional safeguard that states will review the proportionality of their COVID-19 response measures as the situation changes. If states proceed under a limitations analysis, including a time-limit or a mechanism to trigger a later review of the emergency measures is

226. Open Letter to Vice President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States, Achieving a Fair and Effective COVID-19 Response, (Mar. 6, 2020) (on file with Yale Law School), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/march6_2020_final_covid-19_letter_from_public_health_and_legal_experts_2.pdf.

227. World Health Org., *supra* note 215, at 2.

228. *Id.*

229. See McGoldrick *supra*, note 25, at 383 (stating limitations may be permanent).

230. See *COVID-19 Tracker*, *supra* note 1 (searching “movement” and “Croatia”) (stating “[t]he decision prohibits individuals from leaving their place of residence without a special permit, to be issued for very limited cases. The decision is in effect for 30 days.”).

231. See *COVID-19 Tracker*, *supra* note 1 (searching “movement” and “Jordan”) (stating “[i]t is forbidden to move and roam people in All regions of the Kingdom, starting from seven in the morning on Saturday, 3/21/2020 until further notice.”).

vital to guarantee that restrictions do not remain in place beyond the emergency and that human rights are ultimately restored upon the emergency's end.

4. Non-discrimination

No limitation of the rights contained in the ICCPR may be imposed for a discriminatory purpose or applied in a discriminatory manner.²³² Article 2(1) stipulates that any limitation must ensure that the rights of the Covenant are applied “without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²³³ However, differential treatment is allowed under the Covenant if the goal is to achieve a legitimate purpose, and the criteria for such differentiation are reasonableness and objectiveness of the measure are met.²³⁴

Several member states have limited freedom of movement based on age. Turkey restricts those over sixty-five from leaving their residence,²³⁵ while Bosnia and Herzegovina's order bans movement by citizens younger than eighteen and older than sixty-five.²³⁶ Bulgaria takes a slightly different approach, restricting persons under sixty from visiting shops or pharmacies between 8:30 AM and 10:30 AM,²³⁷ while Uzbekistan limits persons older than sixty-five from leaving their homes except to visit pharmacies or grocery stores.²³⁸ Despite creating restrictions that distinguish based on age, these types of limitations likely do not run afoul of the non-discrimination principle.

While age is not one of the listed protected statuses in Article 2(1), the Human Rights Committee has found that age is encompassed by the “any other status” provision.²³⁹ However, states may be able to justify age differentiation based on the legitimate aim of public health. Available data suggests that older individuals are more likely to experience serious and life-

232. General Comment No. 22, *supra* note 64, ¶ 8.

233. ICCPR, *supra* note 4, art. 2(1).

234. General Comment No. 18, *supra* note 96, para. 13.

235. See *COVID-19 Tracker*, *supra* note 1 (searching “movement” and “Turkey”).

236. See *COVID-19 Tracker*, *supra* note 1 (searching “movement” and “Bosnia Herzegovina”). On April 3, the government revised the rule to allow older people to go out between 7 AM and noon, Monday through Friday.

237. See *COVID-19 Tracker*, *supra* note 1 (searching “movement” and “Bulgaria”).

238. See *COVID-19 Tracker*, *supra* note 1 (searching “movement” and “Uzbekistan”).

239. See SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY (2nd ed, 2004), ¶¶ 23.25–23.29 (citing *Schmitz-de-Jong v. Netherlands*, Communication No 855/1999 (July 16, 2001) and Human Rights Committee [“HRC”], *Love v. Australia*, Communication No. 983/2001 (Mar. 25, 2003).

threatening responses to COVID-19.²⁴⁰ Governments have an interest in avoiding infection of this highly susceptible population, to save lives, and to conserve treatment resources. In *Love v. Australia*, the Human Rights Committee found that imposing mandatory retirement for pilots at age sixty did not violate the non-discrimination principle because the widespread national and international practice at the time, of mandatory retirement at age sixty, suggested the differentiation was objective and reasonable.²⁴¹ Likewise, in the case of COVID-19, many states deploy age-related restrictions backed by data showing a correlation between the age of the person infected and the rate of morbidity and mortality.²⁴² However, states still need to analyze whether these limitations comply with other requirements of the ICCPR, especially whether they constitute the least restrictive means.

In other instances, member states have passed facially neutral restrictions but implemented them in a discriminatory manner. In Australia, reports claim that Indigenous and migrant communities have been disproportionately targeted by police enforcing COVID-related movement restrictions.²⁴³ In Bulgaria, checkpoint controls went into effect against two Sofia neighborhoods largely composed of the Roma community.²⁴⁴ Both Australia and Bulgaria's implementation of the limitations discriminates against groups protected by Article 2(1). So, while protecting public health meets the legitimate purpose test, states must also justify that their "criteria for such differentiation is reasonable and objective."²⁴⁵ Given the historical use of public health policy to discriminate against marginalized communities,²⁴⁶ states should support any differential treatment with scientific evidence and show that they meet the other requirements of the ICCPR.

240. See *Groups at Higher Risk for Severe Illness*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (the CDC defines this group as people over 65).

241. See Human Rights Committee ["HRC"], *Love v. Australia*, Communication No. 983/2001, ¶ 8.3 (Mar. 25, 2003).

242. See e.g., *COVID-19 Tracker*, *supra* note 1 (searching "movement" and "Uzbekistan"). The Uzbekistani order restricts persons over sixty-five from leaving their homes noting that the elderly have made up the majority of COVID-19 deaths worldwide.

243. See Osman Faruqi, *Compliance Fines Under the Microscope*, SATURDAY PAPER, (Apr. 18, 2020), <https://www.thesaturdaypaper.com.au/news/health/2020/04/18/compliance-fines-under-the-microscope/15871320009710>.

244. *Rights Group Criticises Quarantine of Roma Settlements in Bulgaria and Slovakia*, REUTERS, (Apr. 21, 2020), <https://www.reuters.com/article/health-coronavirus-bulgaria-slovakia/rights-group-criticises-quarantine-of-roma-settlements-in-bulgaria-and-slovakia-idUSL5N2C90TW>.

245. General Comment No. 18, *supra* note 96, ¶ 13.

246. See e.g., Weijun Yu and Jessica Keralis, *Controlling COVID-19: The Folly of International Travel Restrictions*, HEALTH & HUM. RTS. J. 1 (Apr. 6, 2020), https://www.hhrjournal.org/2020/04/controlling-covid-19-the-folly-of-international-travel-restrictions/#_edn5 (citing Joseph J. Amon & Katherine Wiltenburg Todrys, *Fear of Foreigners: HIV-Related Restrictions on Entry, Stay, and Residence*, 11 J. INT'L AIDS SOC. 8 (2008)).

5. In a Democratic Society

While the ICCPR text does not require that restrictions on freedom of movement qualify as necessary in a democratic society, General Comment 27 explicitly extends this requirement to freedom of movement limitations.²⁴⁷ We explore this requirement in more detail in Section IV below, particularly as it relates to elections and other forms of democratic protest.

B. *Freedom of Movement Restriction Under Article 12(4)*

Article 12(4), regarding the right to enter one's own country, is not subject to the same limitation clause found in Article 12(3). Instead, this article is written with the blanket prohibition stating, "[n]o one shall be arbitrarily deprived."²⁴⁸ The Human Rights Committee has stated in General Comment 27 that "there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."²⁴⁹ Nonetheless, the phrase "one's own country" leaves room for interpretation. The burden is on the alleged victim to show that a State is their "own country" conferring rights under Article 12(4).²⁵⁰ Additionally, citizenship alone may not be determinative of one's own country in the context of Article 12(4) without a real connection to the country.²⁵¹ As such, while the right appears absolute, it is subject to defining the right holder's "own country." Notwithstanding this question, any COVID-19 restriction, such as closing borders, that does not allow individuals to return to their "own country" would be overbroad and incompatible with the ICCPR.

V. A LIMITATIONS ANALYSIS OF DIGITAL COVID-19 SURVEILLANCE AND ITS IMPACT ON PRIVACY

Another critical tool states are deploying to address COVID-19 involves digital surveillance. We consider in this section how digital tools for combatting COVID-19 fare under a rigorous limitations analysis of the limited right to avoid "arbitrary and unlawful interference" with privacy under Article 17 of the ICCPR. This section also catalogs many digital surveillance tools and related applications being deployed against COVID-19 and analyzes their characteristics using a limitations analysis.

Considering whether the broad use of digital surveillance and enforcement tools against COVID-19 is justified under the standards of legality,

247. General Comment No. 27, *supra* note 48, ¶ 11 (applying the "in a democratic society" standard to art. 12(3)).

248. ICCPR, *supra* note 4, art. 12(4).

249. General Comment No. 27, *supra* note 48, ¶ 21.

250. THE LAW AND PRACTICE OF EXPULSION AND EXCLUSION FROM THE UNITED KINGDOM 47–48 (Eric Fripp, Rowena Moffatt & Ellis Wilford eds., 2015).

251. *Id.* at 48.

necessity, and proportionality and non-discrimination outlined above²⁵² is an important starting point for a rigorous limitations analysis. The legality test is largely met when digital tools are authorized by properly passed law and regulation, but with edicts requiring the use of digital surveillance apps emanating from a range of authorities—including workplaces, security and health ministries, and state governments—it is unclear whether all have been authorized or required by law. In considering necessity and proportionality, we must first consider specifically whether digital surveillance tools produce an “arbitrary” invasion of privacy, as this is a threshold question for determining whether any violation of Article 17 has occurred.²⁵³ In many ways, arbitrariness is linked to necessity and proportionality. Thus we examine those factors in combination. Finally, we address whether failure to protect private data, after it has been digitally collected to combat COVID-19, might produce an additional privacy violation. We review developing standards related to a right of data protection and note that privacy violations could result from problems with data storage, transfer, and lack of consent, if, for example, COVID-19 surveillance data was inappropriately shared with the public or law enforcement agencies. We conclude with recommendations to better protect privacy during the pandemic, including a call for better coordination of the legal, health, and technical communities in deploying privacy-protecting technologies in COVID-19 surveillance and response.

A. *Violations of Privacy Rights Through Digital Surveillance and Collection*

1. Comparison of Practice: South Korea and Switzerland

Several countries have determined that cellphone location records provide powerful tools for enforcement of COVID-19-related restrictions.²⁵⁴ South Korea and Switzerland were among the first countries to deploy digital apps and use mobile phone location information for purposes of COVID-19-related contact tracing and monitoring.²⁵⁵ South Korea uses cellphone data to determine where individuals have been, to trace contacts of those exposed or suspected of exposure to the virus, and to enforce adherence to

252. See *infra* Part V.A.3 for an explanation of the legality, necessity, and proportionality standard regarding Article 17.

253. Matisse Barbaro, *Government Interference with the Right to Privacy*, 6 CAN. J. HUM. RTS. 127, 128–29 (2017) (arguing that “non-arbitrary” surveillance is reasonable and proportional under the circumstances).

254. See Isobel Asher Hamilton, *Compulsory Selfies and Contact-Tracing: Authorities Everywhere are Using Smartphones to Track the Coronavirus, and It’s Part of a Massive Increase in Global Surveillance*, BUS. INSIDER (Apr. 14, 2020), <https://www.businessinsider.com/countries-tracking-citizens-phones-coronavirus-2020-3?r=US&IR=T>.

255. *Id.* (describing policies in South Korea); *infra* note 268 (describing policies in Switzerland).

quarantines and stay-at-home orders.²⁵⁶ South Korea permits relatively broad surveillance under its national laws.²⁵⁷ South Korea changed its legal framework after the MERS health scare in 2015 to allow the government to gather and centrally control data from users' cellphone locations that were previously privacy protected.²⁵⁸ Now South Koreans are questioning whether too much information is being revealed in the course of contact tracing.²⁵⁹ Among recent examples, revealing people's late-night whereabouts in gay bars and publicly identifying visitors to so-called "love motels" has raised questions about privacy and adultery.²⁶⁰ In explaining contact tracing measures, an official at the Korea Centers for Disease Control said the government starts with patient interviews but adds to the picture by using "GPS data, surveillance camera footage, and credit card transactions to recreate their route a day before their symptoms showed."²⁶¹ Some have suggested South Korea's public disclosure of infected people's locations violates non-discrimination protections, given a May case in which a patron visiting gay nightclubs was outed as a source of new infections.²⁶² In contrast to these broad laws permitting electronic medical surveillance, telemedicine remains illegal in South Korea.²⁶³

In Switzerland, authorities are using group data from mobile telephone carrier Swisscom to determine compliance with a national order limiting the size of public gatherings.²⁶⁴ According to the Federal Office of Public Health, Swisscom has provided analysis to the Swiss government about situations in which twenty or more cellphone users are gathered.²⁶⁵ The data indicates that far fewer Swisscom users are moving or gathering in large

256. See Hyung Eun Kim, *Coronavirus and Privacy: Are South Korea's Alerts Too Revealing?* BBC (Mar. 5, 2020), <https://www.bbc.com/news/world-asia-51733145>; c.f. David Argente, *The Costs of Privacy* (Nat'l Bureau Econ. Rsch., Working Paper No. 27220, 2020), <https://www.nber.org/papers/w27220.pdf> (illustrating the amount of detail shown by South Korean text alerts related to COVID contact tracing apps).

257. See Suk T. Lee, *South Korea: Implementation and Application of Human Rights Covenants*, 14 MICH. J. INT'L L. 705, 712–16 (1993).

258. See Kim, *supra* note 256; Steven Borowiec, *How South Korea's Nightclub Outbreak is Shining an Unwelcome Spotlight on the LGBT Community*, TIME (May 14, 2020), <https://time.com/5836699/south-korea-coronavirus-lgbtq-itaewon/>.

259. Kim, *supra* note 256.

260. *Id.*

261. *Id.*

262. *Don't Rely on Contact-Tracing Apps*, ECONOMIST (May 16, 2020), <https://www.economist.com/leaders/2020/05/16/dont-rely-on-contact-tracing-apps>.

263. *Telemedicine Remains Illegal in South Korea*, KOREA ECON. INST. AMERICA: THE PENINSULA, (May 15, 2020), <http://blog.keia.org/2020/05/telemedicine-still-illegal-south-korea/>.

264. *New Coronavirus: Evaluation of Anonymised Data on Gatherings*, SWITZ. FED. OFF. PUB. HEALTH, (Mar. 27, 2020), <https://www.bag.admin.ch/bag/en/home/das-bag/aktuell/news/news-26-03-2020.html>.

265. *Id.*

groups after the Swiss government limited the size of gatherings.²⁶⁶ At the same time, the Swiss government took pains to emphasize that it was protecting data privacy and time-limiting its use of the information:

At no point do we receive location data from Swisscom, merely analyses and visualisations that Swisscom can generate from that data. The provisions of the Data Protection Act and the ethical principles that Swisscom follow in processing data are fully respected. As soon as COVID-19 Ordinance 2 is abrogated, we will not be provided with any further analyses.

Swisscom's Mobility Insights platform (based on Art. 45b of Telecommunications Act) shows the approximate movements of all SIM cards in a given area (e.g. a cantons) over a certain time period. The analyses are based on approximate location details from the previous 24-hour period.²⁶⁷

In response to privacy-related concerns, the Swiss health authorities updated the information provided to the public, noting that the app "does not record data," it works on a decentralized basis, "is designed to ensure anonymity, and "meets the highest privacy protection requirements."²⁶⁸

2. Legality Suffers When States Rush to Adopt Digital Surveillance Apps

In both Switzerland and South Korea, the use of digital applications stemmed from legislative action where laws or regulations were adopted.²⁶⁹ But for most states, the rush to adopt digital surveillance apps in response to COVID-19 feels like a free-for-all. Six months into the pandemic, at least thirty-seven states mandated digital applications or other surveillance for some locations or parts of their populations, such as those under quarantine; other states have encouraged the use of digital applications for COVID-19 surveillance on a voluntary basis.²⁷⁰ The distinction between voluntary and

266. *Id.*

267. *Id.*

268. *New Coronavirus: SwissCovid App and Contact Tracing*, SWITZ. FED. OFF. PUB. HEALTH (Sept. 11, 2020), <https://www.bag.admin.ch/bag/en/home/krankheiten/ausbrueche-epidemien-pandemien/aktuelle-ausbrueche-epidemien/novel-cov/swisscovid-app-und-contact-tracing.html>.

269. *See* Kim, *supra* note 256 (discussing South Korea); *Evaluation of Anonymised Data on Gatherings*, *supra* note 264 (discussing Switzerland); *see also infra* Part IV.A.1 for a discussion evaluating emergency measures under the ICCPR's legality standard.

270. *See COVID-19 Tracker*, *supra* note 1 (effective September 2020, "states" as defined by the Tracker deploying surveillance include Armenia, Australia, Azerbaijan, Bahrain, Bulgaria, Brazil (city of Recife only), Cambodia, China, Ecuador, Grenada, Hong Kong, India, Iran, Israel, Italy, Jamaica, Kazakhstan, Kuwait, Kyrgyzstan, Lichtenstein, Mexico, Montenegro, Nigeria, Oman, Peru, Poland, Qatar, Romania, Republic of Korea, Russia, Singapore, South Africa, State of Palestine, Taiwan, Tunisia, Turkey and the United Kingdom).

mandatory use of digital applications has been blurred by mandates from employers, local governments, and other authorities, raising questions about the legality of required use of digital apps.²⁷¹

Numerous European states started to employ telecom provider data to enforce their social distancing regulations early in their responses to COVID-19.²⁷² In addition, within twenty-four hours of it being offered, more than one million users in Australia downloaded a government-run surveillance app using Bluetooth to monitor locations of those who had tested positive and trace their contacts.²⁷³ The government has promised to stop using the app and wipe users' personal data when the COVID-19 crisis ends.²⁷⁴ While intrusive, these applications are examples of measures to combat COVID-19 that users voluntarily accept and that meet the legality standard.

Other states have failed to follow their own legal and regulatory procedures in mandating citizens use digital applications or in authorizing telephone companies to provide to the state information to monitor and enforce COVID-19-related quarantines, stay-at-home orders, and contact restrictions. Kazakhstan, Turkey, and the United Arab Emirates, for example, have adopted mandatory use of digital applications for quarantine enforcement without a clear legal basis.²⁷⁵ In some countries, including India, voluntary apps have been made mandatory for public employees or imposed as conditions for returning to work, sometimes without a legal basis for such conditions.²⁷⁶ While the use of a mobile surveillance application in Israel was lawful according to emergency regulations, Israel's Supreme Court ruled in April 2020 that the program of surveillance developed by the nation's internal security organization could not extend beyond May 1st with-

271. See, e.g., New Guidelines on the measure to be taken by Ministries/Department of the Government of India, State/UT Government and State/UT authorities for the containment of COVID-19 in the country for an extended period of the National Lockdown for a further period of two weeks with effect from May 4, 2020. Order, No. 40-3/2020-DM-i(A) (May 1, 2020) (India) [hereinafter India Order].

272. See Catherine Stupp, *Europe Tracks Residents' Phones for Coronavirus Research*, WALL ST. J. (Mar. 27, 2020), <https://www.wsj.com/articles/europe-tracks-residents-phones-for-coronavirus-research-11585301401>.

273. See A. Odysseus Patrick, *Australians Toss Aside Privacy Concerns in Rush to Sign up for Virus Tracking Phone App*, WASH. POST, (Apr. 29, 2020), https://www.washingtonpost.com/world/asia_pacific/australians-toss-aside-privacy-concerns-in-rush-to-sign-up-for-virus-tracking-phone-app/2020/04/29/9a67ae88-89dd-11ea-80df-d24b35a568ae_story.html.

274. *Id.*

275. See *COVID-19 Tracker*, *supra* note 1; L. Libr. Cong, LL File No. 2020-019000, *Regulating Electronic Means to Fight the Spread of COVID-19* 163–64, 204 (2020); *New 'Stay Home' App Launched by DoH to Reinforce Self-Quarantine Procedures*, Emirates News Agency (March 4, 2020), <https://wam.ae/en/details/1395302834693>. See also *Mobile Location Data and COVID-19: Q&A*, HUM. RTS. WATCH, (May 13, 2020), <https://www.hrw.org/news/2020/05/13/mobile-location-data-and-covid-19-qa>.

276. See, e.g., *Mobile Location Data and COVID-19: Q&A* *supra* note 275; see also India Order *supra* note 271.

out parliamentary approval.²⁷⁷ The Court held that the executive branch could not legally extend the extensive surveillance program.²⁷⁸ Ultimately following standards for legality, Israel's parliament approved the program in May, allowed it to lapse, and then restarted digital surveillance in July after a new outbreak.²⁷⁹ The surveillance today remains in place, with a parliamentary imposed time limit at year's end.²⁸⁰

3. Necessity and Proportionality in the Context of Avoiding Arbitrary Interference with Privacy

Even in states that have taken precautions and used legislation or properly adopted regulations to impose digital health surveillance tools, the risks of overreach and long-standing damage to privacy rights remain of concern. To determine whether, on balance, a state's measures that infringe on privacy are permissible, we have to first determine if Article 17's limited right to freedom from "unlawful and arbitrary" interference with privacy has been triggered. This query, however, throws us almost immediately back to considering the secondary tests of necessity and proportionality.

Arbitrariness can be considered an element of a proportionality analysis as it centers on the link between the state's reasoning for a restriction, the scope of the restriction, and the reasonableness of the measure for fighting COVID-19.²⁸¹ Digital surveillance is, by its nature, broad and can encompass actors or circumstances beyond the originally intended scope.²⁸² In the context of terrorist surveillance, commentators have argued that blanket surveillance is inherently arbitrary.²⁸³ Even worse, information gathered from surveillance is often transferred to police and other third parties, with

277. See Fahim et al., *supra* note 267.

278. Elena Chachko, *The Israeli Supreme Court Checks COVID-19 Electronic Surveillance*, LAWFARE, (May 5, 2020), <https://www.lawfareblog.com/israeli-supreme-court-checks-covid-19-electronic-surveillance>.

279. Craig Timberg, *No Service: Cellphone Apps Designed to Track Covid-19 Spread Struggle Worldwide Amid Privacy Concerns*, WASH. POST (Aug. 18, 2020), <https://www.washingtonpost.com/technology/2020/08/17/covid-tracking-apps-cellphones/>.

280. *Id.*

281. See *Van Hulst v. the Netherlands*, *supra* note 78; see also Barbaro, *supra* note 253, at 129.

282. See *Coronavirus: States Use of Digital Surveillance Technologies to Fight Pandemic Must Respect Human Rights*, ARTICLE19.ORG (Apr. 2, 2020), <https://www.article19.org/resources/covid-19-states-use-of-digital-surveillance-technologies-to-fight-pandemic-must-respect-human-rights/>.

283. See, e.g., Barbaro, *supra* note 253, at 149 (stating "[f]ifth, surveillance and other measures that result in 'blanket and indiscriminate' collection and storage of personal data should be prohibited insofar as they must be conceived as disproportionate."); Scheimin, *supra* note 79, at para. 23 (stating "[t]he proportionality requirement in the limitations test to the right to privacy raises questions whether blanket stop and search powers in designated security zones, such as in the Russian Federation or the United Kingdom, are really necessary in a democratic society.") [internal citations omitted].

little regard for the user's privacy or consent to the transfer.²⁸⁴ In the language of proportionality, digital surveillance is arbitrary when it is not narrowly tailored to the specific COVID-19-related objective being pursued.²⁸⁵

In evaluating whether COVID-19-related restrictions on privacy are necessary, health authorities find different digital tools relatively more useful at different phases of COVID-19 response.²⁸⁶ For example, when states seek to flatten the curve and delay the spread of COVID-19, location data, which can assist in determining adherence to social distancing policies, is particularly useful.²⁸⁷ At other stages of response, knowledge of an infected cellphone user's proximity to others and details of whom she interacted with becomes important to contact tracing.²⁸⁸ Sometimes analysis of anonymized data can aid policymaking, while in other cases—such as contact tracing—knowledge about a named individual's location, movements, and identities of those with whom the infected person came into contact are essential.²⁸⁹ Thus, digital surveillance, in general, can be deemed necessary, but a more precise analysis would show that only some types of digital surveillance are necessary at corresponding phases of the pandemic.

With respect to proportionality, most essential data for combatting COVID-19 can be gathered in an anonymous form or, even if a link to an infected person is required, with applications that do not remove data from a user's cellphone.²⁹⁰ Moreover, once a national surveillance program begins to collect mobile telephone data and location information, is it necessary to supplement this data with additional privacy invasions from facial recognition artificial intelligence or credit card records, as in South Korea and elsewhere?²⁹¹ Bahrain, Jamaica, Kuwait, and Hong Kong require self-isolating individuals to wear electronic bracelets to ensure they stay close to their mobile phone so as to enhance the effectiveness of mobile phone-based surveillance.²⁹² Oman and Tunisia have gone even farther, deploying

284. See *infra* Part VI. B.

285. See *supra* Part II.B.2.a.

286. *Digital Contact Tracing Tools for COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 20, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/downloads/digital-contact-tracing.pdf>.

287. *COVID-19 Response: Overview of Data and Technology*, PRIVACY INT'L, (Apr. 1, 2020), <https://privacyinternational.org/key-resources/3547/covid-19-response-overview-data-and-technology>.

288. *Id.*

289. *Id.*

290. See *id.* (explaining contact tracing).

291. See *COVID-19: The Surveillance Pandemic*, INT'L CTR. NOT-FOR-PROFIT L., <https://www.icnl.org/post/analysis/covid-19-the-surveillance-pandemic> (last visited Sept. 28, 2020) (citing Park Eui-rae, Corona 19, Second Concern About Excessive Disclosure of Privacy, YONHAP NEWS (Mar. 9, 2020) <https://www.yna.co.kr/view/AKR20200309089000004>).

292. *IGA Begins Distribution of Electronic Bracelets Compatible with 'BeAware' App*, INFO. & E-GOV'T AUTH. NEWS (Apr. 4, 2020) <http://www.iga.gov.bh/en/article/the-iga-begins-distribution-of-electronic-bracelets-compatible-with-beaware-app> (discussing electron-

drones and robots, respectively, to assist in COVID-19 monitoring and enforcement.²⁹³ Less restrictive alternatives to broad digital surveillance programs that would cause less damage to privacy are available.²⁹⁴ However states are not using these less-restrictive solutions that protect private information. Rather, states are rushing to deploy new digital tools, often giving themselves and their telecommunications companies blanket authorization to collect and use cellphone users' location data, proximity data and interaction data, with little oversight.²⁹⁵ Thus, many digital surveillance tools used for COVID-19 fail the proportionality test.

As examples, consider the following measures for contact tracing and digital surveillance that are designed or are being deployed in arbitrary, unnecessary, or disproportionate ways. Cambodia's April 10, 2020 State of National Emergency authorizes measures including "mobilizing military forces; surveilling telecommunications "by any means," and banning or restricting news media that may harm "national security," or create confusion about the state of emergency."²⁹⁶ China²⁹⁷ has deployed the Alipay Health Code application in more than 200 cities.²⁹⁸ Alipay Health Code contains an algorithm that analyzes a user's data, including uploaded information and information derived from locations and cellphone proximity to assign the user with a color code (red, yellow, or green like a stoplight) indicating their risk of COVID-19 transmission to others, and user data is shared with the police.²⁹⁹ COVID-19 testing is not among the data the application can access.³⁰⁰ Media reports say the app will soon be required nationwide in Chi-

ic monitoring bracelets in Bahrain); *see also* *COVID-19 Tracker*, *supra* note 1 (searching "surveillance" and "Hong Kong" or "Kuwait" or "Jamaica").

293. *See* *COVID-19 Tracker*, *supra* note 1 (searching "Oman" and "Tunisia").

294. *See* *fn*s. 338–49.

295. *See* *COVID-19: The Surveillance Pandemic*, *supra* note 291.

296. *See* *COVID-19 Tracker*, *supra* note 1 (searching "Cambodia"); *see also* Rebecca Ratcliffe, *Fears as Cambodia Grants PM Vast Powers Under COVID-19 Pretext*, *GUARDIAN*, (Apr. 10, 2020), <https://www.theguardian.com/world/2020/apr/10/fears-as-cambodia-grants-hun-sen-vast-power-under-covid-19-pretext>.

297. China has not ratified the ICCPR but has signed the Universal Declaration of Human Rights whose Article 12 protects privacy in terms similar to ICCPR Article 17. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, UN Doc. A/RES/217(III) art. 12 (Dec. 10, 1948). For an argument why the ICCPR applies to surveillance by China, *see* James D. Fry, *Privacy, Predictability and Internet Surveillance in the U.S. and China: Better the Devil You Know?* 37 *U. PA. J. INT'L L.* 419, at 433–37 (2015).

298. *See* Paul Mozur, Raymond Zhong & Aaron Krolik, *In Coronavirus Fight, China Gives Citizens a Color Code, With Red Flags*, *N.Y. TIMES* (Mar. 1, 2020) <https://www.nytimes.com/2020/03/01/business/china-coronavirus-surveillance.html>.

299. *See id.*

300. *See* Yuan Yang & Nian Liu, *China, Coronavirus and Surveillance: The Messy Reality of Personal Data*, *FIN. TIMES* (Apr. 2, 2020), <https://www.ft.com/content/760142e6-740e-11ea-95fe-fcd274e920ca>.

na.³⁰¹ Again, such a broad program that does not link to COVID-19-testing data appears disproportionate to the privacy damage caused.

Democracies also are guilty of violating the proportionality test in their zeal to adopt digital tools to combat COVID-19. The province of Western Australia amended its Emergency Management Act, “allowing the government to install surveillance devices in homes and direct people to wear monitoring devices, in order to ensure that those required to quarantine do not interact with the community.”³⁰² South Korea’s aforementioned COVID-19 surveillance program has been questioned domestically because its use of credit card records and closed-circuit television monitoring goes beyond the mobile telephone surveillance authorized by law.³⁰³ Lichtenstein uses electronic bracelets to enhance its mobile surveillance app with data sent directly to the mobile provider Swisscom.³⁰⁴

B. *Privacy Violations from Failure to Protect Private Health Data*

Any balancing test must compare the intrusiveness of digital COVID-19 surveillance with the extent of harm. So, in essence, how serious is the damage to privacy from digital medical surveillance in response to the COVID-19 emergency? In addition to the initial privacy intrusion occurring when surveillance takes place, the data collected to combat COVID-19 is often passed on to other government agencies, law enforcement, private insurance companies and the general public, usually without again seeking the user’s explicit consent.³⁰⁵ UN Special Rapporteur for Human Rights and Counterterrorism Martin Scheinin underscored that absent strict adherence to ICCPR requirements of legality and time-limitation, COVID-19-related surveillance measures could irreversibly damage privacy related to health data:

Although privacy in principle is subject to a proportionality test also in normal times, it is in my view different from the first set of rights just mentioned because of the risk of letting loose Orwellian surveillance in respect of highly sensitive personal health data. The risk of breaching the essential core of privacy rights is real.³⁰⁶

301. See Mozur et. al., *supra* note 298.

302. See *COVID-19 Tracker*, *supra* note 1 (citing Emergency Management Amendment (COVID-19 Response) Bill 2020 (WA) s 6 (Austl.)).

303. *COVID-19: The Surveillance Pandemic*, *supra* note 291.

304. *COVID-19 Tracker*, *supra* note 1 (searching “Lichtenstein”).

305. See *id.*; see also Wendy K. Mariner, *Reconsidering Constitutional Protection for Health Information Privacy*, 18 J. CONST. L. 976, at 986–93 (2016).

306. Martin Scheinin, *COVID-19 Symposium: To Derogate or Not to Derogate?*, OPINIO JURIS (Apr. 6, 2020), <http://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate>.

Another commentator has said that mass collection and analysis of data “challenges international privacy laws in several ways: it casts doubt on the distinction between personal and non-personal data, clashes with data minimization, and undermines informed choice.”³⁰⁷

1. Overview of Health Data Protection Standards

In fleshing out the legal basis for a right to protection of private data, the UN Special Rapporteur for the Protection of Human Rights While Countering Terrorism reported to the United Nations that data protection principles are “encapsulated in the right to privacy” under the Human Rights Committee’s General Comment 16.³⁰⁸ Among the international core data protection provisions, he identifies as encapsulated by the right to privacy are obligations for states to:

- Obtain personal information fairly and lawfully;
- Limit the scope of its use to the originally specified purpose;
- Ensure that the processing is adequate, relevant and not excessive;
- Ensure its accuracy;
- Keep it secure;
- Delete it when it is no longer required; and
- Grant individuals the right to access their information and request corrections.³⁰⁹

Similar standards were set forth by the Special Rapporteur on the Right to Privacy in his 2019 consultations to establish a Draft Recommendation on the Protection of Health-Related Data.³¹⁰ That recommendation, produced by a Task Force created by the Special Rapporteur, was designed to establish “a common international baseline for minimum data protection standards for health-related data for implementation at the domestic level, and, to be a reference point for the ongoing debate on how the right to privacy can be protected in the context of health data.”³¹¹ Among the rights, the Draft Recommendation sets forth with respect to health data are:

307. Ira S. Rubinstein, *Big Data: The End of Privacy or a New Beginning?* 3 INT’L DATA PRIV. L. 74, 74 (2013).

308. Scheinin, *supra* note 79, ¶ 12 (citing Human Rights Committee General Comment No. 16).

309. *Id.* (citing Data Protection regulations of the Council of Europe, the OECD and the UN General Assembly).

310. *See* Mandate of the United Nations Special Rapporteur on the Right to Privacy, Task Force on Privacy and the Protection of Health-Related Data, Draft Recommendation on the Use of Health-Related Protection and Data, Third Draft for Consultation, (Nov. 2018), available at https://www.ohchr.org/Documents/Issues/Privacy/SR_Privacy/DraftRecommendationProtectionUseHealthRelatedData.pdf.

311. *Id.* ¶ 1.2.

- A right to transparency in how, when and by whom one's health data is processed;³¹²
- Rights of access to, portability, rectification, erasure, and objection to the processing of health-related data;³¹³
- A right to informed consent prior to the processing or use of their health-related data.³¹⁴

Failure to adhere to these obligations can damage privacy through an inadequate focus on safe data storage, consent of users to use of their data, and protecting transfer of data collected for health purposes to law enforcement or third parties who may use it for other unintended purposes.³¹⁵

In the COVID-19 crisis, states have rushed to deploy digital surveillance so quickly that few of the data protection principles related to privacy have been followed.³¹⁶ Informed consent, for example, is not necessarily a focus of COVID-19-related surveillance.³¹⁷ Armenia passed a new law on March 31, 2020, providing the government with broad powers to track citizens' locations and movements using their cellphone data without the explicit permission of the person being monitored.³¹⁸ Even where consent is initially given, such as an individual voluntarily downloading a tracing app at the height of COVID-19 spread, later transfer of the data can violate informed consent because the data passes on to a different user or for a different purpose.

According to WHO guidelines on ethical issues in public health surveillance, using unique anonymous identifiers and geo-masking are among the safeguards that should be deployed to avoid harm from public health surveillance.³¹⁹ Data collected in the name of public health should never be shared for purposes unrelated to public health or for taking non-health action against any person.³²⁰ In addition, the WHO advises that oversight is key in the use of surveillance data, in collecting data that reveals stigmatized behavior and to maintain and preserve public trust.³²¹ States should exert special caution regarding the transfer of data to law enforcement agen-

312. *Id.* ¶ 11.

313. *Id.* ¶ 12.

314. *Id.* ¶ 5.1.a.

315. Scheinin, *supra* note 79, ¶ 12 (citing General Comment No. 16).

316. *See infra* Part V.A.2.

317. *See* Kerstin Vokinger, *Digital Health and the COVID-19 Epidemic: An Assessment Framework for Apps from an Epidemiological and Legal Perspective*, SWISS MEDICAL WKLY. (May 17, 2020) <https://smw.ch/article/doi/smw.2020.20282>.

318. *See* *COVID-19 Tracker*, *supra* note 1 (searching "Armenia").

319. *WHO Guidelines on Ethical Issues in Public Health Surveillance*, WORLD HEALTH ORG. (2017); *Q&A: Ethics in Public Health Surveillance*, WORLD HEALTH ORG. (June 2017), <http://www10.who.int/features/qa/surveillance-ethics/en/>.

320. *Id.*

321. *See id.* at 27, 34, 37.

cies.³²² These WHO provisions also guide where and how a patient's public health data should be restored after an emergency has passed. For example, the WHO calls for states to have a "compelling justification" for sharing identifiable data for non-public health uses in the WHO guidelines raises the specter that health, location, contacts or other surveillance data—once taken—will be used again by governments or remain in the public domain where it can be exploited for other purposes.³²³

It is no coincidence that counterterrorism surveillance provides one of the best parallels for a rigorous analysis of how health surveillance violates privacy. Governments often permit human rights infringements in response to both health and security emergencies.³²⁴ Moreover, the combination of disease and terrorism-related concerns has led law enforcement and other security officials to gain broad access to massive health databases, which often include data collected for medical surveillance:

Nonetheless, before September 11, 2001, public health agencies had not persuaded the public to compel reporting of personally identifiable health information for all these purposes. The five deaths from anthrax letters sent in October 2001 fueled fears that terrorists might use chemical or biological agents to attack the United States. The SARS epidemic in 2003 revived fears of natural epidemics. Both the possibility of bioterrorism and new natural epidemics like avian influenza inspired new legislation to collect vast amounts of medical information in an attempt to detect cases in time to prevent the further spread of disease. . . . Public sentiment about providing personal information to the government or private companies has appeared to whipsaw between support in the name of preventing terrorism and opposition due to fears of government invasions of privacy. . . . New information technology encourages both more surveillance and new uses for the data collected, from changing the environment to changing individual behavior. Surveillance programs have traditionally been disease specific, but the present federal attention to terrorism has been encouraging coordinated systems that link all types of health information in an electronic database.³²⁵

322. See *id.* at 46.

323. See *id.*

324. Wendy K. Mariner, *Mission Creep: Public Health Surveillance and Medical Privacy*, 87 B.U. L. REV. 347, 347 (2007) (quoting *City of Newark v. J.S.*, 652 A.2d 265, 271 (N.J. Super. Ct. Law Div. 1993)) [hereinafter Mariner, *Mission Creep*] ("The claim of 'disease' in a domestic setting has the same kind of power as the claim of 'national security' in matters relating to foreign policy. Both claims are very powerful arguments for executive action. Both claims are among those least likely to be questioned by any other branch of government and, therefore, subject to abuse").

325. *Id.* at 356–58 (internal citations omitted).

2. Data Collected From COVID-19 Surveillance Harms Privacy After the Emergency Ends

As introduced above, a significant concern with COVID-19-inspired health surveillance data is that even if an initial intrusion on privacy is justified on balance, the privacy violation does not end when the COVID-19-related emergency ends. Absent rigorous data protection, the information collected for stopping the spread of disease is likely to make its way into other government, law enforcement, or third-party uses, without consent of those being monitored.³²⁶ This risk of unauthorized transfer existed before COVID-19's outbreak but has expanded because of the rapid pace and scope at which COVID-19 surveillance data is collected, processed, and stored.³²⁷ In considering other aspects of health surveillance, information initially collected to fight an epidemic is often later contained in databases whose primary purpose is health and financial management or research.³²⁸ Moreover, the initial reason for allowing interference with privacy (consent of the patient or an overriding public health interest) has often changed or eroded by the time the data is included in other, different, down-stream databases.³²⁹ A balancing analysis premised on avoiding arbitrary interference with privacy will be hard-pressed to conclude that broad use of data without sufficient safeguards is the least-restrictive alternative to achieve public health goals.

How might this type of privacy infringement due to data collection and storage have a practical impact with respect to COVID-19-inspired restrictions? A recent Human Rights Watch study indicated that the accumulation of large amounts of data by governments through COVID-19-surveillance apps risks use of that data for repression:

Other concerns include: restricting people's movements based on arbitrary and opaque apps, as is the case in China; the lack of consent to data being used, as is the case in Armenia, Israel, and South

326. See *id.*, at 358–60, 369.

327. See Wafa Ben-Hassine & Philip Dawson, *4 Rules to Stop Governments Misusing COVID-19 Tech After the Crisis*, WORLD ECON. F., (May 15, 2020), <https://www.weforum.org/agenda/2020/05/covid-19-tech-data-usage-privacy/>.

328. See Mariner, *Mission Creep*, *supra* note 324, at 358–60; see also Mariner, *Reconsidering Constitutional Protection*, *supra* note 305, at 986–93.

329. Mariner, *Mission Creep*, *supra* note 324, at 384 (“[c]ourts in cases like *Whalen* and *Danforth* have limited their analyses to the justification for the initial collection of information – the first level of surveillance. The laws at issue in these first-generation cases did not contemplate secondary or tertiary reporting; courts had no need to consider re-disclosures other than accidental or negligent breaches of confidentiality at the first level. Yet it is the subsequent release of information to other public agencies and private entities that dominates the structure of many current surveillance programs. Moreover, a program’s function can and often does change from level to level. If the different surveillance levels are not viewed independently, the public health purpose of the first level of reporting may be conflated with the ultimate use of the data”).

Korea; and the combination of mobile location data with other types of data, such as facial recognition, as is the case in Moscow. Almost all of the initiatives using location data to respond to COVID-19 involve placing large collections of data in the hands of governments, many of which have histories of repression and discrimination against already marginalized communities, including religious minorities and political dissidents. Excessive interference with location privacy is a gateway to undue restrictions on other rights.³³⁰

Other possibilities for unauthorized transfer of data or other violations of data privacy arise from the role of tech giants in the creation of digital apps to help track the spread of COVID-19.³³¹ In Nigeria, for example, the governors association has already initiated cooperation with the mobile telephone company to fight the pandemic that shares subscriber data unrelated to COVID-19.³³² Surveillance data could be coupled with other health information, for example information from fitness trackers in health apps, for malign purposes.³³³ From such a starting point, it is not difficult to imagine security agencies using smartphone heart and pulse trackers to determine if suspected individuals show signs of nervousness and use that as a basis of criminal suspicion, interrogation, or evasion of quarantine.³³⁴ Similarly, collection of location data, credit card information, and CCTV footage could be combined with facial recognition and other artificial intelligence analysis to reveal details of personal movements and habits unrelated to any health interest.³³⁵

Examples like Switzerland, where digital solutions to address COVID-19 protect data privacy, constitute best practices and less restrictive means as alternatives to digital surveillance infringements.³³⁶ Similarly, South Africa appears to have considered protecting privacy as part of a balancing analysis in revising its COVID-related regulations. In April, it repealed and

330. *Mobile Location Data and COVID-19: Q&A*, HUM. RTS. WATCH, (May 13, 2020, 12:01 AM), <https://www.hrw.org/news/2020/05/13/mobile-location-data-and-covid-19-qa>.

331. See Abrar Al-Heeti, *Snowden Warns Government Surveillance Amid COVID-19 Could be Long Lasting*, CNET (Mar. 26, 2020 2:31 PM), <https://www.cnet.com/news/snowden-warns-government-surveillance-amid-covid-19-could-be-long-lasting/>.

332. COVID-19 Tracker, *supra* note 1 (searching “Nigeria”).

333. *Id.*

334. See, e.g., *COVID-19 Tracker*, *supra* note 1 (noting Iran’s mobile app claims to be able to diagnose COVID-19 using technology similar to that in health applications); Hanna Kozłowska, *Our Obsession with Health-Tracking Technology is Great Evidence for Cops*, QUARTZ (Oct. 7, 2018), <https://qz.com/1415879/our-obsession-with-health-tracking-technology-is-great-evidence-for-cops/>; Hamilton *supra* note 254.

335. See, e.g., Eun A Jo, *South Korea’s Experiment in Pandemic Surveillance*, DIPLOMAT (Apr. 13, 2020), <https://thediplomat.com/2020/04/south-koreas-experiment-in-pandemic-surveillance/>.

336. *New Coronavirus: Evaluation of Anonymised Data on Gatherings*, *supra* note 264.

revised regulations under its Disaster Management Act to create a national COVID-19 Tracing Database which provides that data of contacts for all who have a positive COVID-19 test must be anonymized within six weeks of the end of the declared COVID Disaster.³³⁷ Under ICCPR standards for proportionality, COVID-19-inspired restrictions that are not the least restrictive method for privacy infringement in use and handling of data fail a limitations or a derogation analysis. One significant reason is that data privacy violations by their nature are likely to continue after the initial emergency, and the initial reason for the data collection ends.

C. Technology Offers Less Intrusive COVID-19 Surveillance Measures

Today, technology offers states a range of less-intrusive health surveillance alternatives to address concerns about COVID-19-related data use, storage and transfer policies, and issues of informed consent. These include:

- Using privacy-protecting technologies, such as randomization of identifiers, secure hardware enclaves, secure multiparty computations, differentiated privacy, and homomorphic encryption,³³⁸
- Tailoring the surveillance information collected to the appropriate phase of disease protection and prevention being employed at the time by public health authorities,³³⁹
- Data security, retention, and auditing policies, including storing data temporarily on the user's phone or in anonymized or third-party applications instead of on government or telecommunications provider servers,³⁴⁰ and
- Ensuring consent of the user to any transfer of the data beyond the initial purpose for which it was collected.³⁴¹

Moreover, a sophisticated merged understanding of technology, public health, and the law is necessary to come up with new solutions that protect

337. *COVID-19 Tracker*, *supra* note 1 (searching "South Africa").

338. *COVID-19: Using Mobile Phones & AI for Contact Tracing While Respecting Privacy*, OTTER (Apr. 3, 2020, 10:06 AM), https://otter.ai/s/T_XbMSQ7SfGuG0dwXgX-TQ.

339. As the pandemic becomes less localized with more community spread, different information collection tools become more appropriate and individual information is less necessary, except for contact tracing of specific individuals. *See e.g.*, Sera Whitelaw, *Applications of Digital Technology in COVID-19 Pandemic Planning and Response*, LANCET, (June 29, 2020), [https://www.thelancet.com/journals/landig/article/PIIS2589-7500\(20\)30142-4/fulltext](https://www.thelancet.com/journals/landig/article/PIIS2589-7500(20)30142-4/fulltext). (exploring the various information collection tools being used at various phases of pandemic preparedness and response). Yet others argue that location data of individual users is important for effective contact tracing, even if it results in a privacy violation. *See* Timberg, *supra*, note 279.

340. *See, e.g.*, *New Coronavirus: Evaluation of Anonymised Data on Gatherings*, *supra* note 264.

341. *See, e.g.*, Ashkan Soltani et al., *Contact Tracing Apps Are Not a Solution to the COVID-19 Crisis*, BROOKINGS (Apr. 27, 2020), <https://www.brookings.edu/techstream/inaccurate-and-insecure-why-contact-tracing-apps-could-be-a-disaster/>.

privacy while providing health authorities with valuable data for stopping epidemics like COVID-19. Governments, companies, and the tech community are working together to come up with ways to protect privacy while allowing data relevant to COVID-19 surveillance to be processed and used by governments.³⁴² But few measures deploy these safeguards. On the other hand, states are rolling out new apps on an almost daily basis around the world and giving themselves and their telecommunications companies authorization to collect and use cellphone users' location data, proximity data and interaction data, often without restriction.³⁴³

The tech communities in Europe and the United States are pushing governments to include data protection technologies in their COVID-19 responses, including the Pan European Privacy Preserving Proximity Tracing system.³⁴⁴ Among the technologies that are being deployed are randomization of identifiers, secure hardware enclaves, secure multiparty computations, differentiated privacy, and homomorphic encryption.³⁴⁵ Stakeholders ranging from the UN's International Telecommunications Union to the World Economic Forum have proposed that privacy-enhancing technologies should be used to prevent abuse of private data, which has been placed in the hands of governments during the emergency response to COVID-19.³⁴⁶

One widely discussed solution stems from a Google-Apple cooperation project which uses Bluetooth in both Apple and Android cellphones to support contact-tracing.³⁴⁷ Unlike others, the Google-Apple collaboration saves tracking information on a user's phone, rather than on government-accessed servers.³⁴⁸ This decentralized data storage better protects privacy and seems to be a reasonable balance in line with the principles of necessity and proportionality. Six months into the pandemic, studies question whether any contact tracing apps have helped to control the spread of the virus, but at least those using the Google-Apple based technologies better protect privacy.³⁴⁹

342. *Id.*

343. *See, e.g., id.*

344. *COVID-19: Using Mobile Phones & AI for Contact Tracing While Respecting Privacy*, *supra* note 338; *see, e.g.,* Timberg, *supra*, note 279.

345. *See generally* BIGDATA UN GLOB. WORKING GRP. UN HANDBOOK ON PRIVACY-PRESERVING COMPUTATION TECHNIQUES, (2019), <http://publications.officialstatistics.org/handbooks/privacy-preserving-techniques-handbook/UN%20Handbook%20for%20Privacy-Preserving%20Techniques.pdf>.

346. Samantha Stein, *How to Restore Data Privacy After the Coronavirus Pandemic*, WORLD ECON. F., (Mar. 31, 2020), <https://www.weforum.org/agenda/2020/03/restore-data-privacy-after-coronavirus-pandemic/>; Ben-Hassein, *supra* note 327.

347. *Some Countries Want Central Databases for Contact-Tracing Apps*, ECONOMIST, (Apr. 30, 2020) <https://www.economist.com/europe/2020/04/30/some-countries-want-central-databases-for-contact-tracing-apps>.

348. *Id.*

349. *See* Timberg, *supra* note 279.

UN human rights monitors and interested civil society groups have offered interesting proposals to better protect privacy rights in the face of modern surveillance and the spread of health data across uncontrolled databases. For example, a group of more than 100 civil society organizations signed a joint statement April 2nd, calling on governments to ensure their surveillance practices were strictly necessary and tailored to health needs identified by public health professionals.³⁵⁰ Their joint statement proposed seven preventive and protective measures for COVID-19-related surveillance. These include:

- Ensuring surveillance measures are lawful, necessary, and proportionate and provided for by law.
- Expanded surveillance powers should be time-limited and end after the pandemic pressure decreases.
- Data collection should be used only for COVID-19 response and no other government purpose.
- Digital safety and personal data must be protected in the process of pandemic response.
- Any use of digital surveillance or AI must address the risk that marginalized populations are discriminated against or inaccurately characterized or targeted.
- Data sharing agreements that governments enter into must be based on law and disclosed in a manner to allow public oversight, sunseting, and other safeguards.
- Government should ensure that health authorities, not domestic or international intelligence agencies, handle and control the information collected by COVID-19-related surveillance and effective remedies must exist for misuse and error.
- Public health experts and marginalized populations are among the stakeholders that should be consulted in COVID-19 related data collection and surveillance programs.³⁵¹

The difficulty of coordinating fast-moving technology changes for the protection of privacy with the evolving responses of legal and health professionals in dealing with the virus is another significant reason why states should consider COVID-19-related restrictions on privacy based on derogation from the ICCPR, rather than a limitations analysis. Our legal and health framework would benefit from constant reassessment given the rapid change in the scientific knowledge about the virus, its various stages, and the best ways to combat the virus at each of these stages. Moreover, states must have a sufficient understanding of the privacy-protecting technologies available and must incentivize surveillance and digital app designers to pro-

350. Joint Statement *States Use of Digital Surveillance Technologies to Fight Pandemic Must Respect Human Rights*, ALGORITHM WATCH (Apr. 2, 2020), <https://algorithmwatch.org/en/joint-statement-pandemic-surveillance-tech-and-human-rights/>.

351. *Id.*

tect privacy. A one-time limitations analysis that determines a privacy infringement caused by digital surveillance is permitted, because it was not arbitrary under Article 17, threatens to be quickly out of date and does a disservice to the rapid advances in privacy-enhancing technology which can permit strong digital responses to COVID-19 without infringing privacy rights.

VI. IMPROVING LIMITATIONS ANALYSES OF COVID-19 RESTRICTIONS ON FREEDOM OF ASSEMBLY

COVID-19-inspired restrictions on public gatherings, which in many nations limit the number of individuals outside the same household who can meet at one time or place, create interesting challenges under the ICCPR, particularly under Article 21 on Freedom of Assembly. These limitations impact public protests, church and other religious gatherings, opportunities for political candidates to campaign, and for voters to cast ballots, cultural, sports and recreational activities, and many other elements of social and political life. Many citizens seem to have accepted the balancing decision that governments have made for them—agreeing to temporary limitations on their exercise of rights in the interest of “preserving life.”³⁵² In other cases, citizens protest and vocally object to COVID-19-inspired restrictions and demand a return to economic and social life without these public health measures.³⁵³

This section argues that analyses governments have undertaken with respect to freedom of assembly, if any, have been incomplete or insufficient, and suggests additional factors states may use to conduct more thorough limitations analyses. This section makes four primary points. First, a balancing between public health and other rights is clearly contemplated under Article 21, but states should not weigh all competing rights equally. The standard of the ICCPR prioritizes avoiding restrictions that impact a democratic society. So, COVID-19-related restrictions that infringe political protests and elections deserve more strict scrutiny than restrictions interfering with sporting or cultural events. Second, governments should draw lessons from European and U.S. legal doctrines, which emphasize that restrictions on assemblies should be viewpoint neutral and should maintain the ability of an assembly to reach its intended audience. Third, modern society offers a range of online alternatives, which could make restrictions more or less necessary and proportionate. States should explicitly consider the availability of

352. See, e.g., Raphaella Stavrinou, *Public Opinion in Italy, Spain, France in Favour of Lockdown Measures*, NEW EUR., (March 26, 2020, 6:56 PM), <https://www.neweurope.eu/article/public-opinion-in-italy-spain-france-in-favour-of-lockdown-measures>; Ted Van Green & Alec Tyson, *Five Facts About Partisan Reaction To COVID-19 in the US*, PEW RSCH. CTR. (April 2, 2020), <https://www.pewresearch.org/fact-tank/2020/04/02/5-facts-about-partisan-reactions-to-covid-19-in-the-u-s>.

353. See, e.g., *infra* fns. 409–416 (discussing Michigan protests).

online alternatives, where relevant, and the impact of Internet shutdowns on other freedoms during a pandemic. Finally, we conclude that a derogations-based approach for justifying COVID-19-related restrictions on freedom of assembly is preferable to a limitations-based one. All emergency restrictions should eventually come to an end, an outcome more easily assured under a derogations analysis than under a limitations analysis.

A. Limitations Analyses, If Any, Appear to Have Been Conducted Superficially

According to the COVID-19 Tracker, at least 110 nations have imposed freedom of assembly restrictions due to COVID-19 as of September 2020³⁵⁴ Of those, ten percent involved legislation, with most other restrictions imposed by executive order or regulation.³⁵⁵ There is little evidence that officials analyzed the ICCPR standards of legality, necessity, and proportionality in detail in designing these restrictions.³⁵⁶ Despite the lack of evidence of any rigorous analysis, we assume³⁵⁷ that the regulations of assemblies meet the legality test and assume the responsible officials believed that some limit on public gatherings was necessary to protect the lives and capacity of their health systems from the virus.³⁵⁸

Assessing proportionality, however, is more complicated. The only UN Special Rapporteur to formally report on health-based limitations on human rights in pandemics since the COVID-19 outbreak essentially merged the necessity and proportionality tests.³⁵⁹ He noted:

[U]nder the necessity principle, when a State invokes a legitimate ground for restriction of freedom of expression, it must establish a

354. *COVID-19 Tracker*, *supra* note 1.

355. *Id.* Cambodia, Denmark, Egypt, El Salvador, France, Greenland, Hungary, Ireland, Kyrgyzstan, Moldova, N. Macedonia, South Korea, Singapore, and the United Kingdom adopted national legislation, while Ethiopia and Nigeria imposed restrictions on assemblies via legislation at state-level. Others in the database imposed restrictions based on executive order, regulation, or practice. While not in the Tracker, Papua New Guinea also passed a law giving the government Controller broad authority to restrict movement, assemblies and most aspects of public life. *See National Pandemic Act of 2020*, Papua New Guinea National Parliament (June 12, 2020), <https://covid19.info.gov.pg/files/June2020/18062020/National%20Pandemic%20Act%202020-%28Certified%29.pdf>;

356. *See, e.g.*, Neil Jarman & Simona Ogenovska, *Protest in Time of Pandemic*, EUR. CENT. NOT-FOR-PROFIT L., (last accessed May 28, 2020), <https://ecnl.org/protest-in-time-of-pandemic/> (arguing European assembly restrictions are haphazard with no standard for the number of people permitted to gather or time-length of restrictions).

357. *See supra* text accompanying fns. 66–70.

358. *COVID-19 Tracker*, *supra* note 1 (searching “Assemblies”).

359. *See, e.g.*, *COVID-19 and Special Procedures*, OFF. HIGH COMM’R FOR HUMAN RIGHTS [“OHCHR”] (last visited May 29, 2020), <https://www.ohchr.org/EN/HRBodies/SP/Pages/COVID-19-and-Special-Procedures.aspx> (Special Rapporteur David Kaye was the first UN Special Rapporteur to file a formal report related to the pandemic. Numerous rapporteurs have produced unofficial reports).

direct and immediate connection between the expression and the threat said to exist. It is the State's obligation to demonstrate necessity, not a complainant's obligation to demonstrate its failure. The judgment of the European Court of Human Rights – that, to meet the test of necessity, any restriction must be something more than “useful,” “reasonable,” or “desirable”—is the correct one. Necessity implies proportionality, according to which restrictions must target a specific objective and not unduly intrude upon other rights of targeted persons, and the ensuing interference with third parties' rights must be limited and justified in the light of the interest supported by the intrusion (A/HRC/29/32, ¶ 35). The restriction must be the least intrusive instrument among those which might achieve the desired result.³⁶⁰

We consider COVID-19-inspired assembly restrictions under these tests below and suggest improvements for states to use in their balancing analyses.

B. A Rigorous Limitations Analysis Should Draw Lessons from Article 21, Jurisprudence on Protest Limitations, and Online Alternatives in Modern Society

In considering restrictions on freedom of assembly, we suggest states should, in the future, consider the following factors in assessing a restriction's proportionality. First, ICCPR Article 21's standard—that a restriction must be necessary in a democratic society—prioritizes certain types of assemblies in balancing public health interests against human rights. The ICCPR language suggests an intent to minimize limitation on rights key to democratic expressions—such as those related to policy issues, protest messages, and elections—over gatherings for sporting or cultural purposes.³⁶¹ Standards adopted by the General Comments and other secondary sources under-emphasize this link to democratic expression.³⁶² In the case of COVID-19-related restrictions, limitations that impact the rights necessary for democratic expression should be strictly scrutinized. In effect, this suggests that restrictions for public health may fail a limitations balancing analysis and would be better imposed as emergency derogations with limited life-span.

Second, in a proper analysis of COVID-19-related restrictions, states might consider the type of balancing European and U.S. law has applied to freedom of assembly and public protest in a non-health context. In these ju-

360. David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Disease Pandemics and the Freedom of Opinion and Expression* ¶ 15, U.N. Doc. A/HRC/44/49 (Apr. 23, 2020) (internal citations omitted).

361. ICCPR, *supra* note 4, art. 21.

362. See General Comment No. 37, *supra* note 60, ¶ 40.

risdictions, time, place, and manner restrictions are permitted in certain circumstances but must be applied to maximize the opportunity for the underlying message of an assembly to reach the intended audience—often lawmakers or other politicians. The Organization for Security and Co-operation in Europe (“OSCE”), for example, considers whether a protest is taking place within sight and sound of the policymakers who are its intended audience.³⁶³ Finally, states should consider the availability of online alternatives to assemblies that are important in a democracy.³⁶⁴ While this range of online alternatives was unavailable when the ICCPR was drafted, any proportionality test applied today should consider the specific type and nature of online alternatives, especially as they impact freedom of assembly.

1. “Necessary in A Democratic Society” From the ICCPR’s History

Analysis of bans on public gatherings and other COVID-19-inspired restrictions affecting freedom of assembly under IHRL is complicated by the intention of drafters in the negotiating history of ICCPR Articles 21 and 22 requiring that any restriction be “necessary in a democratic society in the interests of . . . public health.”³⁶⁵ It appears from the negotiating history of the ICCPR that the point inserted into the Covenant by the states advocating for restrictions to be “necessary in a democratic society” was more a political point about the link between assembly related rights and democratic activity than a legal one. The *Travaux Préparatoires* state:

Article 17 (Right of peaceful assembly) Formulation of the right. The debate on article 15 that took place at the Commission’s 325th meeting was concerned with the purposes of, and limitations on, the right of peaceful assembly. Many representatives regarded the second sentence of the article as a satisfactory specification of the limitations that were desirable. Some representatives thought there was room for improvement and suggested the revision of the catalogue of limitations by adding public safety, public health instead of health simply the prevention of disorder or crime, and the maintenance of order, as some of the criteria by which the necessity of allowable legislative limitations should be judged. A number of representatives said it was of fundamental importance that limita-

363. See Nina Belyaeva, Thomas Bull, David Goldberger, Michael Hamilton, Neil Jarman, Muatar S. Khaidarova, Sergei Ostaf, Vardan Poghosyan, Alexander Vashkevich & Yevgeniy Zhovtis (Organization for Security and Co-Operation in Europe Panel of Experts on Freedom of Assembly), *Guidelines on Freedom of Peaceful Assembly* (2nd ed., 2010) [hereinafter *Freedom of Peaceful Assembly*], at 17 § 3.4-3.5. *infra* text accompanying fns. 402–405 (discussing U.S. standards for time, place, and manner restrictions).

364. See generally Amy E. Cattle, *Digital Tahrir Square: An Analysis of Human Rights and the Internet Examined Through the Lens of the Egyptian Arab Spring*, 26 *DUKE J. COMP. & INT’L L.* 417, 449 (2016).

365. ICCPR, *supra* note 4 at art. 21–22.

tions on the right to peaceful assembly should be allowed only where they were necessary in a democratic society. Other representatives contended that the right itself should serve the interests of democracy and that any exercise of the right running counter to democratic principles should be prohibited and penalized. The proponents of that view argued that the aim should meet with universal approval among the members of the Commission and also that it was consonant with the very principles and purposes of the United Nations. Some representatives, however, opposed the linking either of the right of peaceful assembly or of the limitations thereon to democratic principles, since it was difficult to find any practical definition of the term “democracy” that would meet with universal acceptance and, furthermore, since none of the limitations in the covenant should be used for the extirpation of any philosophies or political beliefs, however detestable or obnoxious they might be, unless the exercise of the right of peaceful assembly by groups avowing such.³⁶⁶

This discussion in the *Travaux Préparatoires* suggests that state representatives highly valued the connection between the right to peaceful assembly and democratic expressions of political views. They specified that the ICCPR should not permit limitations that impede assemblies important to a democracy. The political nature of this argument is enhanced by the fact that language about limitations on freedom of assembly being necessary in a democratic society was added to the ICCPR Article by the narrowest of margins in a nine to eight vote, which split on ideological lines.³⁶⁷

In attempting to interpret the “necessary in a democratic society” clause of the ICCPR, some secondary sources oversimplified the political point being emphasized by the drafters. Clearly, an ideological battle between democracy and other forms of government was underway in 1966 when the ICCPR was adopted. Proponents of democracy had prevailed in World War II and held the majority in the UN at the time of the ICCPR vote, but the Cold War-era blocs had formed.³⁶⁸ Democratic states largely supported the ICCPR, while those in the Soviet-bloc supported the ICESCR, and non-aligned states like India and Yugoslavia supported elements of both treat-

366. *Travaux Préparatoires*, *supra* note 63, paras. 21–22.

367. *Id.* The insertion of the words “in a democratic society,” proposed by France (E/CN.4/L.201), was adopted 9 to 8, with 1 abstention.

368. See Nico Schrijver, *Fifty Years International Human Rights Covenants. Improving the Global Protection of Human Rights by Bridging the Gap Between the Two Covenants*, 41 *TJDSCHRIFT VOOR RECHTSGESCHIEDENIS [TVR]* 457, 458 (2016); Daniel Tarantola, *A Perspective on the History of Health and Human Rights: From the Cold War to the Gold War*, 29 *J. PUB. HEALTH POL'Y*, 42, 42-53. (discussing right to health in ideological context of Cold War).

ties.³⁶⁹ In the context of the ICCPR discussion of the term “necessary in a democratic society,” these non-aligned states assiduously abstained and argued that democracy was not sufficiently well defined.³⁷⁰ But that position was defeated in the final vote on the article, and again in the amendment, as the position of democratic states in the Western bloc prevailed.³⁷¹

Finally, in considering the standard for deciding whether a restriction is “necessary in a democratic society,” the UN Human Rights Committee’s General Comment 37 suggests that a limitation on freedom of assembly under Article 21 must, *inter alia*:³⁷²

- Be considered imperative, in the context of a society based on democracy, political pluralism, and human rights, as opposed to being merely reasonable or expedient;
- Be the least intrusive among the measures that might serve the relevant protective function. Establishing whether a restriction is necessary requires a factual assessment;
- Be proportionate, which requires . . . balancing the nature and the extent of the interference against the reason for interfering.

This approach substitutes for the “necessary in a democratic society” standard legal tests of proportionality and least restrictive means, which were not necessarily intended in negotiating the ICCPR. Viewed in this light, it appears the first test proposed by the General Comment—whether a limitation is “considered imperative, in the context of a society based on democracy, political pluralism, and human rights”—is the most consistent with the underlying view of states negotiating the treaty. It is also the most closely linked to the language of Article 21.

369. Schrijver *supra* note 368; *see also* THE HUMAN RIGHTS COVENANTS AT 50 23-26 (Daniel Moeckli & Helen Keller eds., 2018).

370. *See* Travaux Préparatoires, *supra* note 63, at paras. 249–50. (Some representatives, however, opposed the linking either of the right of peaceful assembly or of the limitations thereon to democratic principles, since it was difficult to find any practical definition of the term “democracy” that would meet with universal acceptance and, furthermore, since none of the limitations in the covenant should be used for the extirpation of any philosophies or political beliefs, however detestable or obnoxious they might be, unless the exercise of the right of peaceful assembly by groups avowing such philosophies fell unmistakably within one of the types of activity that the State would be permitted, under the statement of limitations already contained in the article, to prohibit or restrain. In favor: Egypt, Pakistan, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Uruguay. Against: Australia, Belgium, Chile, China, France, Greece, Lebanon, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America. **Abstaining: India, Yugoslavia.**) (emphasis added).

371. *Id.*

372. General Comment No. 37, *supra* note 60, ¶ 40.

2. Impact of COVID-19-Related Restrictions on Rights Necessary to Democracy

Analyzing whether a given restriction is necessary and justified in a democratic society inherently poses its own balancing test based on the facts of the restriction and the application of that restriction to assemblies, which are expressing various viewpoints and opinions of relevance to democratic debate.³⁷³ The “proportionality” analysis advanced by secondary sources such as the Siracusa principles suggests analyzing a restriction by focusing on the objective being sought to protect through the restriction—here, the benefit to public health. In the case of COVID-19 related restrictions on freedom of assembly, large gatherings could rationally impact public health.³⁷⁴ But the original terms of the ICCPR and its history suggest that the Covenant and Article 21, in particular, focused on how a given legal restriction would impact rights central to a democracy.³⁷⁵ In this way, the ICCPR prioritizes certain rights as having greater weight than others in a proper balancing analysis.

How would this apply in practice? The lawfulness of COVID-19 response measures depends on many factual questions about how the restriction was adopted, how it is being deployed, and what activity is being limited. Is the restriction being deployed on a neutral basis across the board, or is freedom of assembly or other political activity specifically targeted by the limitation?³⁷⁶ For example, is the restriction being deployed, as it potentially was in Poland, to limit participation in an election?³⁷⁷ Is it being deployed to limit the ability of protesters to complain about a political issue? Is it, as in recent protests in the United States, part of a debate about the impact of COVID-19-inspired restrictions themselves?³⁷⁸ Can bans on public gatherings deny the right to work, or similarly, can they keep workers from striking over, for example, inadequate protective gear or failure to grant premium pay to healthcare workers treating those with the virus? What if the ban is being deployed to limit another protected ICCPR right, such as religious freedom? Or is it deployed as a pretext to push demonstrators off the streets? In balancing the extent of a state’s interest in the protection of

373. See *S. Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts concurring) (emphasized the judiciary lacks the background, competence and expertise to second-guess public health decisions and stating “when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter.”).

374. *Id.*

375. See ICCPR *supra* note 4, art. 21; see also *Travaux Préparatoires*, *supra* note 63, paras. 248–50.

376. *COVID-19 Tracker*, *supra* note 1 (searching “Albania”)(an executive order provided a ban and fines for all gatherings, specifically mentioning political gatherings).

377. See *COVID-19 and Special Procedures*, *supra* note 359 (stating that the ‘principles of non-discrimination, participation, empowerment and accountability in particular needs to be applied. Particular attention should be paid to people in vulnerable situations”).

378. See *id.*

public health, is it relevant to how serious the risk of infection is in the location where the assembly is to take place? For example, should an election be permitted to go forward in a relatively isolated area of a country where the virus has not yet spread, whereas it might be lawful to postpone or cancel a similar gathering for an election in New York City or another metropolis where hospitals threaten to be overwhelmed by the disease? Many of these questions are at the heart of an analysis of whether a restriction is necessary in a democratic society in the interest of public health.

These fact patterns are not hypothetical but have already emerged in the months since COVID-19 erupted into our social and political lives. Elections have been conducted, for example, in South Korea and some U.S. states, but more often they have been delayed, as in Poland, New Zealand and many U.S. state presidential primaries.³⁷⁹ In Burundi and Guinea, dictators are reportedly proceeding with elections because they know COVID-19 will keep election observers away.³⁸⁰ Protests against COVID-19-related stay-at-home orders have occurred in many U.S. states: Most have been permitted, but some have been at least partially dispersed by police.³⁸¹ U.S. authorities may also have misused COVID-19 measures in policing protests sparked by the death of George Floyd in police custody.³⁸² Health care

379. See Choe Sang-Hun, *In South Korea Vote, Virus Delivers Landslide Win to Governing Party*, N.Y. TIMES (Apr. 15, 2020), <https://www.nytimes.com/2020/04/15/world/asia/south-korea-election.html>. (stating despite being one of the first states to face serious infection and restrictions as a result of COVID-19 South Korea held national elections for Parliament on April 15, 2020); Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here's a List.*, N.Y. TIMES, (May 27, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html> (Similarly, 16 U.S. states delayed presidential primaries because of the risk of COVID-19 transmission and regulations limiting public gatherings); Joanna Berendt & Marc Santora, *Pandemic Forces Poland to Delay Presidential Election*, N.Y. TIMES, (May 7, 2020), <https://www.nytimes.com/2020/05/07/world/europe/poland-presidential-election-coronavirus.html> (Poland's May 10 Presidential election was delayed because of COVID-19-related restrictions and political debate about whether the election delay gave the incumbent a greater opportunity to campaign on state-dominated television while the opposition has been unable to campaign during the virus lockdown); Damien Cave, *New Zealand Election Delayed Amid New Coronavirus Outbreak*, N.Y. TIMES (Aug. 17, 2020), <https://www.nytimes.com/2020/08/17/world/asia/new-zealand-election-coronavirus.html>

380. *Covid-19 Helps Ballot-Dodgers in Africa*, ECONOMIST, (May 16, 2020), <https://www.economist.com/middle-east-and-africa/2020/05/16/covid-19-helps-ballot-dodgers-in-africa>.

381. See Manny Fernandez, *Conservatives Fuel Protests Against Coronavirus Lockdowns*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/texas-protests-stay-at-home.html> (Protesting in Michigan and Texas were partially restricted by police enforcing stay-at-home orders, while other parts of those protests went forward uneventfully. Other demonstrations against COVID-19-inspired stay-at-home orders have taken place in Ohio, Indiana, Nevada and Maryland, often under the "You Can't Close America" banner used in Austin, Texas).

382. See Robinson Meyer, *The Protests Will spread the Coronavirus*, ATLANTIC (June 1, 2020), <https://www.theatlantic.com/health/archive/2020/06/protests-pandemic/612460/> (citing

workers from New York to Malawi have staged public protests over a lack of protective gear, and Amazon closed its operations in France after French authorities responded to worker protests by threatening to level heavy fines against the company.³⁸³ In Iraqi Kurdistan, public workers protesting withholding of salaries were arrested, along with a journalist, under a COVID-19 law banning public gatherings.³⁸⁴ India's police used a COVID-19 ban on public gatherings as an excuse to break up a months-long sit-in protesting a citizenship law as discriminating against Muslims.³⁸⁵

COVID-19-related restrictions on freedom of assembly that interfere with democratic activity and expression should be viewed with suspicion in a proper balancing analysis under Article 21's limitation clause. The ICCPR drafters emphasized that limitations on assemblies that impede democratic debate merit greater scrutiny than restrictions on mass gatherings in general.³⁸⁶ In the context of COVID-19, restrictions on the assembly which impede elections and interfere with protests over the very restrictions at issue during the pandemic are among those meriting such scrutiny. Protests about the extent and length of stay-at-home orders, pay and treatment of workers during COVID-19, and their impacts on the economy are similarly important topics for democracies to debate in order to reach sound policy decisions. Denmark's law implementing COVID-19 restrictions, discussed in the following section of this article, calls these "opinion-shaping protests" and exempts them from restrictions on freedom of assembly.³⁸⁷ Is the protection of these rights more important than the protection of religious assemblies or cultural performances? The language of Article 21 and the context of the ICCPR's drafting seems to prioritize public assemblies relevant to democratic activity. As such, a proper limitations analysis should not balance all ICCPR rights equally in permitting COVID-19-related health restrictions but rather should scrutinize more strictly restrictions limiting as-

Georgetown professor of health law Alexandra Phelan claiming that pretextual use of public health to justify arrests of civil rights activists was a motivating factor for the Siracusa principles, and alleging that crowd control and imprisonment practices used in response to the George Floyd protests violate international law).

383. See Charles Pensulo, *Malawi Health Workers Protest Against Lack of Protective Gear*, ALJAZEERA (Apr. 14, 2020) <https://www.aljazeera.com/news/2020/04/malawi-health-workers-protest-lack-protective-gear-200414165616071.html>; Adam Jeffery, *Healthcare Workers Protest for Vital Protection Equipment*, CNBC (Apr. 18, 2020), <https://www.cnbc.com/2020/04/18/healthcare-workers-protest-for-vital-protection-equipment.html> (photos from nurses protests across the United States); Mathieu Rosemain & Gwénaëlle Barzic, *Amazon to Close French Warehouse Until Next Week After Court Order*, REUTERS (Apr. 15, 2020) <https://www.reuters.com/article/us-health-coronavirus-amazon-france/amazon-to-close-french-warehouses-until-next-week-after-court-order-idUSKCN21X192>.

384. See *COVID-19 Tracker*, *supra* note 1 (searching "Iraq").

385. See *id.* (searching "India").

386. ICCPR *supra* note 4, art. 21 ("necessary in a democratic society").

387. See *COVID-19 Tracker*, *supra* note 1 (searching "Denmark").

semblies crucial to elections or public debate, including debates on the democratic nature and permissibility of COVID-19-related restrictions themselves.

3. Lessons from National Jurisprudence on Limiting Public Assemblies

From the previous examples, the type of assembly and message it promotes clearly are relevant to a limitations-based balancing, even when public health protections are at issue. One could argue that temporary health restrictions should yield for elections, important public dissent, debate or manifestation about the emergency measures themselves, and other group activity necessary in a democratic society. If public health restrictions on assemblies should be evaluated based on their impact on certain types of democratic expression, it would also make sense for legislatures and officials to consider domestic jurisprudence specific to restrictions on freedom of assembly.

European examples offer some instructive factors. For example, the OSCE developed guidelines in 2006 on freedom of peaceful assembly, articulating important principles for limitations.³⁸⁸ These include a presumption in favor of permitting peaceful assemblies, a state's positive obligation to facilitate and protect peaceful assemblies, good administration and accountability in government conduct regulating assemblies, and principles of legality, proportionality, and non-discrimination.³⁸⁹ The last of these OSCE elements parallels the Siracusa Principles' and General Comments' efforts at harmonizing ICCPR language into legal tests.³⁹⁰ Interestingly, the OSCE guidelines offer five additional criteria for consideration:

3.1 Legitimate grounds for restriction. The legitimate grounds for restriction are prescribed in international and regional human rights instruments. These should not be supplemented by additional grounds in domestic legislation.

3.2 Public space. Assemblies are as legitimate uses of public space as commercial activity or the movement of vehicular and pedestrian traffic. This must be acknowledged when considering the necessity of any restrictions.

3.3 Content-based restrictions. Assemblies are held for a common expressive purpose and, thus, aim to convey a message. Restrictions on the visual or audible content of any message should face a high threshold and should only be imposed if there is an imminent threat of violence.

3.4 "Time, place and manner" restrictions. A wide spectrum of possible restrictions that do not interfere with the message communi-

388. See generally Freedom of Peaceful Assembly, *supra* note 363.

389. *Id.* at 15–17.

390. See *id.*; *c.f. supra* Section II.B.2.

cated is available to the regulatory authority. Reasonable alternatives should be offered if any restrictions are imposed on the time, place or manner of an assembly.

3.5 “Sight and sound.” Public assemblies are held to convey a message to a particular target person, group or organization. Therefore, as a general rule, assemblies should be facilitated within “sight and sound” of their target audience.³⁹¹

We will consider each of these in turn, as applied to COVID-19-related health restrictions that impact freedom of assembly.

The question of Section 3.1 of the OSCE’s guidelines on whether a legitimate ground for restriction exists is answered affirmatively by ICCPR Article 21. Public health is a specific legitimate grounds for restriction acknowledged in articles of the ICCPR.³⁹² Section 3.2’s concern that public space be protected for both commercial and political assemblies suggests that as public space reopens for commerce and traffic, it should similarly reopen for assemblies seeking to deliver a political message.³⁹³ Likewise, Section 3.4’s guidance related to reasonable time, place, and manner restrictions reinforces our advice that legislatures consider alternatives, both online and offline.³⁹⁴

Section 3.3’s focus not to “interfere with the message” conveyed by an assembly³⁹⁵ strikes at the heart of factors governments should consider in a proper limitations balancing analysis of COVID-19-related restrictions on assemblies. Under the ICCPR, the balance must rest in favor of permitting expression, especially expression related to issues in a democratic society.³⁹⁶ Respecting Section 3.3’s concern about not restricting the content of assembly messages is extremely challenging in the context of COVID-19. Certain aspects of content are key in deciding whether to permit a restriction on an assembly impacting public health. Thus, assemblies whose content contains a political theme related to democratic rights should, in fact, receive greater consideration. Content-neutrality is important in a different way: restrictions should be non-discriminatory for a political viewpoint, but content-neutral does not mean thematic content is irrelevant. In fact, restrictions that interfere with political messages should have a higher level of scrutiny than restrictions that interfere with, for example, sporting events.

Some European countries have put the principles behind the OSCE Guidelines into practice as they regulate freedom of assembly during the

391. See Freedom of Peaceful Assembly, *supra* note 363, § 3 at 17.

392. See ICCPR, *supra* note 4, art. 21.

393. See Fernandez, *supra* note 381 (advocating greater commercial reopening); *c.f.* Chicago v. Mosley 408 U.S. 92, 95 (1972) (overturning ordinance permitting labor protests, but not school segregation complaints, near a school).

394. See *infra* Part VI.B.4.

395. See Chicago v. Mosley 408 U.S. 92, 95 (1972).

396. See *supra* Part VI.B.1–2.

COVID-19 crisis. For instance, Denmark's COVID-19 response law is a best practice, as it includes exceptions for what it calls "opinion-shaping assemblies," or those assemblies that might contribute to democratic debate.³⁹⁷ Greenland's law includes a similar exception.³⁹⁸ Germany's federal stay-at-home order did not exempt political gatherings, but its Constitutional Court ruled that COVID-19-inspired limits on freedom of assembly were overbroad and remanded a decision, allowing an anti-COVID-19 protest to go forward.³⁹⁹

U.S. jurisprudence analyzing freedom of assembly reaches similar conclusions. In *Cox v. New Hampshire*, the U.S. Supreme Court ruled that reasonable time, place, and manner restrictions on a public assembly were lawful.⁴⁰⁰ The Court ruled that interests in public safety, such as the orderly conduct of parades or other large gatherings, justified reasonable time, place, and manner restrictions on demonstrations by a group of Jehovah's witnesses.⁴⁰¹ More recently, the U.S. Supreme Court in *National Socialist Party of America v. Village of Skokie* ruled that a government could not ban a public assembly simply because it contained images (in this case swastikas) that a majority of citizens considered abhorrent.⁴⁰² This content neutrality rule was made clearest in *Police Department of Chicago v. Mosley*, where the Supreme Court held the government, could not selectively exclude speakers from the public sphere based on the content of their message.⁴⁰³ In that case, Earl Mosley was told by Chicago police he would be arrested if he continued picketing against segregation in Chicago public schools because of a Chicago ordinance banning all picketing, except for labor protests, within 150 meters of a school. The Court ultimately ruled that content and viewpoint neutrality was an essential requirement for otherwise permitted time, place and manner restrictions on freedom of assembly:

[G]overnment may not grant the use of a forum to people whose views it finds acceptable but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and the government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, the government may not prohibit others from assembling or

397. See COVID Tracker, *supra* note 1 (searching "Denmark").

398. See *id.* (searching "Greenland").

399. See Kate Martyr, *Top German Court: Coronavirus Restrictions Not Grounds to Ban All Protests*, DEUTSCHE WELLE (April 4, 2020), <https://p.dw.com/p/3b1kI>.

400. *Cox v. New Hampshire*, 312 U.S. 569, 574–76 (1941).

401. *Id.*

402. *Nat'l Socialist Party of America v. Vill. of Skokie*, 432 U.S. 43, 43 (1977).

403. *Chicago v. Mosley* 408 U.S. 92, 95 (1972).

speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone and may not be justified by reference to content alone.⁴⁰⁴

In May 2020, the Supreme Court upheld a California order closing churches and later limiting them to twenty-five percent capacity during the COVID-19 crisis.⁴⁰⁵ In his concurrence, Chief Justice Roberts emphasized the need for technical expertise in making “fact-intensive” decisions about stay-at-home-orders and underscored the non-discriminatory nature of limits placed on churches.⁴⁰⁶

Finally, states adopting freedom of assembly restrictions because of COVID-19 should consider carefully the idea behind Section 3.5 of the OSCE guidelines focused on whether the message of an assembly is within “sight and sound” of the desired audience. This concept creates an appropriate parallel to the “necessary in a democratic society” test because this section of the OSCE guidelines considers the democratic nature of the messages conveyed by a protest. So, for example, evaluating whether assemblies can continue to get across a message of democratic dissent or reach the audience intended seems a more appropriate way to structure an assembly restriction than numerical limitations on gatherings largely applied to COVID-19. Like the ICCPR drafting body and the UN, the OSCE is as much a political as a legal body; perhaps this explains why its analysis captures the kind of ideological questions about democracy faced by the ICCPR’s drafters.⁴⁰⁷

4. Offering and Protecting Alternatives to Assemblies, Including Online Options

Modern society’s online alternatives for peaceful assembly seem especially important to the evolution of legal tests applied to COVID-19-related restrictions under the ICCPR. Modern telecommunications tools offer a similar new lens in considering whether a state’s restrictions are proportional or no more restrictive than required for their purpose. A world of Zoom, Webex, FaceTime, and other video-conferencing software has now made it

404. *Id.* at 96.

405. *See* *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, J. concurring).

406. *Id.*

407. The author has observed the political and legal nature of these bodies through participation in sessions of the OSCE, the UN Human Rights Council and the UNGA’s Third Committee on matters related to freedom of assembly, including defending the U.S. position on policing of demonstrations by the “Occupy Movement” in the United States in 2011-12. *See, e.g.*, Eric Richardson, Organization for Security and Cooperation in Europe, Intervention Regarding the ODIHR Report Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States, Supplementary Human Dimension Meeting on Freedom of Assembly and Association, (Nov. 8–9, 2012), <https://www.osce.org/odihr/93722>.

possible for a range of public assemblies to take place in cyber-space. The existence of these online alternatives might make a restriction on public assemblies important to a democratic society more tolerable when balancing against public health interests.

If, however, limiting in-person gatherings defeats the public message or pressure that protestors intended to deliver through an assembly, then online alternatives do not necessarily make an otherwise overly restrictive ban on assembly into a lawful limitation. An online protest can simply be turned off or ignored, whereas a public demonstration in front of a capitol building is difficult to avoid. Thus, the OSCE Guidelines' consideration of remaining within "sight and sound" of the intended audience bear attention in deciding whether online alternatives to a public assembly are sufficient.⁴⁰⁸

Interestingly for an analysis produced at the University of Michigan Law School, the United States' first highly public objection to stay-at-home orders arose April 15, 2020, in Lansing, Michigan. There, hundreds stormed the state capitol to protest the continuation of a month-old stay-at-home order in Michigan,⁴⁰⁹ at the time facing the United States' third-highest COVID-19 caseload.⁴¹⁰ The rationales deployed by protestors in Lansing varied. Some wanted to return to work.⁴¹¹ Others expressed political animus toward the governor issuing the order, with some ultimately charged in a kidnapping plot which aimed to try her for treason.⁴¹² Some protested that the definition of necessary businesses kept churches, gun shops, and garden centers from opening.⁴¹³ The Republican Speaker of Michigan's House of Representatives tweeted:

"Non-essential in Michigan: Lawn care, construction, fishing if boating with a motor, realtors, buying seeds, home improvement equipment, and gardening supplies. Essential in Michigan: Mariju-

408. Freedom of Peaceful Assembly, *supra* note 363, § 3.5.

409. See, e.g., Paul Egan & Kara Berg, *Thousands Converge on Lansing to Protest Whitmer's Stay Home Order*, DET. FREE PRESS (Apr. 15, 2020, 7:25 PM) <https://www.freep.com/story/news/local/michigan/2020/04/15/lansing-capitol-protest-michigan-stay-home-order/5136842002/>.

410. E.g., Trip Gabriel & Jonathan Martin, *Gretchen Whitmer Isn't Backing Down*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/politics/gretchen-whitmer-michigan-protests.html>.

411. E.g., Sara Burnett, *Michigan Militia Puts Armed Protest in the Spotlight*, ASSOCIATED PRESS (May 2, 2020), <https://apnews.com/c04cc1df0c958053489bd24bb7fce93f>.

412. E.g., Nicholas Bogel-Burroughs, Shaila Dewan & Kathleen Gray, *FBI Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, N.Y. TIMES (Oct. 8, 2020), Trip Gabriel & Jonathan Martin, *Gretchen Whitmer Isn't Backing Down*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/politics/gretchen-whitmer-michigan-protests.html>.

413. See, e.g., Jeremy W. Peters, *How Abortions, Guns and Church Closings Made Coronavirus a Culture War*, N.Y. TIMES (Apr. 20, 2020) <https://www.nytimes.com/2020/04/20/us/politics/coronavirus-protests-democrats-republicans.html>.

ana, lottery, and alcohol. Let's be safe and reasonable. Right now, we're not!"⁴¹⁴

A follow-up rally featured protesters toting automatic weapons seeking their right to return to work, shopping, and daily life.⁴¹⁵ The caricature of protesters wielding guns and blocking ambulances undermines the serious political debate about when and how to reopen U.S. states for business and the economic toll that long-term COVID-19-related closures could take. Moreover, in this case, the location of the public protest appears to have been essential to the democratic purpose of the protest and online alternatives would seem inadequate. At the same time, online platforms clearly served as important vehicles for organizing the protest and for amplifying its message before, during, and after the event.⁴¹⁶ A Tennessee anti-lockdown organizer who launched his movement on Zoom and Twitter said he started his protests because "if constitutional rights can be taken away whenever there is a crisis, they are not rights at all—they are permissions."⁴¹⁷

California's COVID-19-related public notice is one best practice, as it specifically proposes alternatives to public gatherings as a means of political expression.⁴¹⁸ The website offers guidance about alternatives to organizing a protest and how to engage in political activity, including online and in-car protests, and exemptions for voting.⁴¹⁹

Among California's practices that others might consider are: alternatives to physical protests, online assemblies, wearing or displaying symbols, in-car protests, balloting by mail, and declaring an exception for activities (such as elections) deemed necessary to a democracy:

State agencies are not issuing permits for any gatherings—of any size, or any kind—at this time. Gatherings will be permitted again once public health officials determine they can be conducted in a manner consistent with public health and safety. In the meantime, please postpone or cancel your gathering and consider whether you can find alternative ways to host your event that do not require an

414. Lee Chatfield (@LeeChatfield), TWITTER (Apr. 11, 2020, 10:08 AM), <https://twitter.com/LeeChatfield/status/1248976304155869190>.

415. Burnett, *supra* note 411.

416. See Grace Panetta, *Trump Calls Protesters Who Carried Guns Into the Michigan Capitol 'Very Good People' and Says the Governor Should 'Make a Deal' With Them*, BUS. INSIDER (May 1, 2020), <https://www.businessinsider.com/trump-protestors-with-guns-in-michigan-capitol-are-very-good-people-2020-5?r=US&IR=T>.

417. Millicent Smith, *How the Anti-Lockdown #FreeTN Movement was Launched*, CHATTANOOGA TIMES FREE PRESS, (Apr. 25, 2020), <https://www.timesfreepress.com/news/local/story/2020/apr/25/anti-lockdown-movement-tennessee/521545/>.

418. *Stay Home Q&A*, CAL. ALL <https://covid19.ca.gov/stay-home-except-for-essential-needs/> (last updated Oct. 29, 2020, 4:29 PM).

419. *Id.*

in-person, physical gathering There are many ways for you to express your political views without holding a physical, in-person gathering. For example, you may continue to call or write elected officials, write letters to the editor of news publications, display lawn or window signs, or use online and other electronic media (including Zoom rooms, Twitter feeds, Facebook pages, and other digital forums) to express your views. Additionally, as noted above, you may leave your home as long as you do not gather with people who are not members of your household. When you are otherwise out in public, public health directives do not prevent you from engaging in political expressions—such as by wearing or carrying a sign—as long as you do not hold a gathering of any size, and otherwise maintain physical distancing. If collective action in physical space is important to you, consider whether you and other participants can safely protest from within your cars.⁴²⁰

Unfortunately, some countries not only fail to propose online alternatives when they restrict freedom of assembly but also use COVID-19 as a pretext to shut down the Internet altogether. If a state were to shut down Internet access—as has been done by Indian authorities in Kashmir, by Bangladeshi authorities in Rohingya migrant camps,⁴²¹ and by others—the lawfulness of such a move merits strict scrutiny for its negative impact on online alternatives to freedom of assembly and other rights.⁴²² In the first formal UN Special Rapporteur report about COVID-19,⁴²³ the Special Rapporteur on Freedom of Expression emphasized the importance of online alternatives

420. *Id.*

421. See Athar Parvaiz, *Kashmir Internet Blackouts Hinder Health Services, Contact Tracing*, REUTERS (May 19, 2020, 9:37 PM), <https://www.reuters.com/article/us-health-coronavirus-india-tech-trfn/kashmir-internet-blackouts-hinder-health-services-contact-tracing-idUSKBN22W052>; *Bangladesh: End Internet Blackout to Protect Public Health of Rohingya Refugees and Host Communities*, GLOB. JUST. CTR. (Apr. 2, 2020), <http://www.globaljusticecenter.net/blog/19-publications/1239-bangladesh-end-internet-blackout-to-protect-public-health-of-rohingya-refugees-and-host-communities>; Phelim Kine, *Internet Curbs on Rohingya Risk Wider Virus Outbreak*, PHYSICIANS FOR HUM. RTS., (Mar. 30, 2020), <https://phr.org/our-work/resources/internet-curbs-on-rohingya-risk-wider-virus-outbreak/>; *UN Experts Concerned at Surge in Civilian Casualties in Northwest Myanmar After Internet Shutdown*, OFF. HIGH COMM’R FOR HUMAN RIGHTS [“OHCHR”] (Feb. 18, 2020) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25572&LangID=>.

422. Joseph J. Amon & Margaret Wurth, *A Virtual Roundtable on COVID-19 and Human Rights with Human Rights Watch Researchers*, HEALTH & HUM. RTS. J. (Apr. 16, 2020) <https://www.hhrjournal.org/2020/04/a-virtual-roundtable-on-covid-19-and-human-rights-with-human-rights-watch-staff/> (describing where the internet has been shut down as a tool of repression during COVID-19). *But see* Adi Radhakrishnan, *COVID-19: Restricted Internet Impacts on Health in Kashmir*, HEALTH & HUM. RTS. J. (Apr. 15, 2020) <https://www.hhrjournal.org/2020/04/covid-19-restricted-internet-impacts-on-health-in-kashmir/> (describing what internet restrictions were in place prior to COVID-19)..

423. See Kaye, *supra* note 360, at 9.

for all human rights. He also noted the devastating impact of Internet shutdowns on the enjoyment of human rights during a pandemic:

Given the migration of all manner of essential services to online platforms, shutdowns not only restrict expression but also interfere with other fundamental rights (A/HRC/35/22, ¶ 15). In the context of the pandemic, it has been especially troubling to observe the continuation of several instances of Internet shutdowns. The most prominent has been the long-term disruption that the Government of India has imposed on Kashmir. . . . India has not been alone. The Government of Ethiopia imposed a shutdown of Internet services in the Oromia region at the beginning of 2020, reportedly promising only at the end of March to end the shutdown. Bangladesh imposed an Internet blackout affecting Rohingya refugees from Myanmar, prompting 50 organizations to call for a lifting of the blackout in the face of the COVID-19 pandemic. The persistence of Internet shutdowns in parts of Myanmar continues to be of serious concern, particularly in light of COVID-19. In other contexts, mandate holders have raised concerns related to Iraqi service disruptions. A growing number of shutdowns have been imposed during election periods, including in Cameroon, Chad, the Gambia, and Togo. Almost 200 Internet shutdowns of various varieties in 2018 have been documented, with almost two thirds occurring in India, and the remainder occurring principally in Asia, the Middle East, and Africa.⁴²⁴

The Special Rapporteur for Freedom of Association and Assembly made similar points among “Ten Key Principles,” he announced in April 2020.⁴²⁵

Clearly, Internet shutdowns are at odds with the ICCPR requirement that restrictions are “necessary in a democratic society.” Of course, many societies who have imposed these restrictions are not democracies, although India is the world’s largest democracy and the country imposing the most Internet shutdowns.⁴²⁶ The damage of Internet shutdowns underscores the importance of modernizing our limitations analysis to consider online alternatives not just for freedom of expression, but also for freedom of assembly

424. *Id.* at 9 (internal citations omitted).

425. See Clément Voule, *States Responses to Covid 19 Threat Should not Halt Freedoms of Assembly and Association*, OFF. HIGH COMM’R FOR HUMAN RIGHTS [“OHCHR”] (Apr. 14, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E> (emphasizing the importance of online assembly in principles 2, 5 and 7).

426. See Sage Chen & Berhan Taye, *Targeted, Cut Off, and Left in the Dark: How Internet Shutdowns Became an Even Greater Threat to Human Rights in 2019*, ACCESSNOW, (Feb. 24, 2020, 6:59 PM) <https://www.accessnow.org/keepiton-2019-review/>; Special Rapporteur on the Promotion and Protection of the Right of Freedom of Opinion and Expression, *Freedom of Expression and Elections in the Digital Age* Research Paper 1/2019 (June 2019).

and other rights. If a state considers online alternatives in analyzing proposed limitations, then the state should—as the Special Rapporteur suggests—judge Internet shutdowns particularly harshly. It is almost impossible to imagine how an Internet shutdown would be “necessary in a democratic society” or justified under tests of necessity or proportionality.⁴²⁷

5. Need to Rebalance once the Emergency Ends

Perhaps most important, states need a legally rigorous and transparent analysis of restrictions on IHRL principles like freedom of assembly, because any balancing analysis needs to be updated as the circumstances of the virus-related emergency change. In the case of freedom of assembly, if states simply decide that, because of the limited nature of Article 21, it is acceptable to limit assemblies for public health purposes, those societies could lose the built-in opportunity for reconsideration of emergency measures a derogation provides. The ICCPR framework for derogation includes the idea that measures should be time-limited and that restrictions should go away when the emergency resolves. But, if states justify restrictions based on a limitations analysis, the law provides no such opportunity for reconsideration. It remains essential that restrictions continue only for the duration of the emergency and that opportunities for public assembly—particularly those related to political rights—are rapidly and comprehensively restored.⁴²⁸ One core reason why states are encouraged to derogate under Article 4 rather than merely undertake a balancing test or limitations analysis is that restrictions, once put in place, often have inertia and momentum that makes them difficult to remove.

Even if a rigorous balancing analysis prioritizes rights necessary in a democracy, the end of an emergency means that all rights should be restored—including those that might not be considered necessary in a democracy. For example, religious congregants certainly enjoy elements of their rights to religious freedom and free expression from in-person meetings, which may be impossible or less intense when done via online platforms. As a result, the existence of video conferencing and other distance technologies should not be a justification for eroding their freedom of assembly once an emergency ends. Delaying exercise of rights might be justifiable in a health emergency, but rights should not be forever limited just because a state conducted a limitations analysis rather than following the clearly time-limited pathway of derogation. This is just one example of why full freedoms of

427. We view Internet shutdowns as almost always unjustified in a “limitations”-based balancing analysis but acknowledge that extreme cases of online incitement or hate speech could allow a state to plausibly argue in favor of restricting the Internet when using a limitations analysis and focusing on the non-discrimination requirement. This possibility highlights the article’s underlying theme—the advisability of derogation over limitation, with its temporary nature and its prohibition on derogations that undermine non-discrimination principles.

428. See, e.g., Sheeran *supra* note 30, at 544–46 (2013).

peaceful assembly must be restored once the COVID-19 emergency has passed and why limitations analyses if deployed, must be reconsidered throughout the various phases of the epidemic.

VII. CONCLUSION

States must keep human rights at the forefront as they continue to respond to the global health crisis caused by COVID-19. It is paramount that states maintain respect for the international legal system as a whole and the individuals protected by it. The ICCPR contemplates that in a time of a public health emergency, states may restrict rights enshrined in the treaty in order to respond to the crisis effectively. States should utilize these mechanisms but need to be transparent about how they justify their actions. The Human Rights Committee should provide additional guidance about when states should move from using limitations to derogations as the preferred mechanism to implement restrictions. More rigorous limitations analysis by states should consider the phase of disease prevention at issue; prioritizing rights necessary in a democracy; and modern alternatives for promoting and protecting human rights, especially online alternatives; and privacy-protecting technologies. Under either a derogation or a limitations analysis, states must recognize that restrictions need to be informed by experts outside of the law, especially in the fields of medicine, public health, and technology, in order to assess the substantive requirements of emergency measures adequately. Finally, states must ensure that emergency measures do not extend beyond the current crisis by assessing their temporality through the procedural requirements of derogation or the proportionality assessment of a limitation analysis.

As the pandemic unfolds, we hope that states will thoroughly consider their international human rights obligations in implementing emergency measures and that this article has provided some best practices and other guidance on how states can improve their analysis and response to COVID-19 in compliance with the ICCPR. Times of crisis provide the global community an opportunity to renew its commitment to human rights, and we hope that states will rise to the occasion.