2019

To Derogate or Not to Derogate, that Is the Question : a Comparison of Derogation Provisions, Alternative Mechanisms and Their Implications for Human Rights

Paige Tapp

To Derogate or Not to Derogate, that is the Question:

A Comparison of Derogation Provisions, Alternative Mechanisms and Their Implications for Human Rights

By: Paige Tapp

October 1, 2019

I. Introduction

Over a span of more than forty years, the United States has issued and sustained several declarations of national emergency. Most recently, pursuant to the National Emergencies Act, 50 U.S.C. § 1601 et. seq., President Trump was able to access previously denied funding and facilitate his Administration's policy regarding immigration at the southern border. While domestically the power to declare a national emergency is delegated to the Executive Branch, in both national and international contexts, the existence, location and utilization of this power can have major effects on the recognition and protection of human rights.

Specifically, in the international context, the declaration of national emergencies is one of the few actions that allows for the suspension of certain human rights through mechanisms known as "derogation" provisions.[1] Although not restricted to the international sphere, derogation provisions are not included in all constitutions and treaties, resulting in different methods for the protection of human rights and different monitoring capabilities, domestically and internationally.[2]

This paper discusses and compares the various derogation provisions contained in several international and regional documents and the processes to lawfully invoke the provisions under these regimes. It also posits the implementation and interpretation differences between regimes with formal derogation provisions and those without. Finally, it asserts that formally including derogation provisions and procedures, expressly defining the domestic protocols and standards required to lawfully invoke the provisions, and increasing supranational review are the most sensible paths forward to adequately protect human rights around the world.

[1] Derogation provisions are one of a few "Models of Accommodation" to facilitate State emergency powers, as discussed by Oren Gross and Fionnuala Ní Aoláin in their book, *Law in Times of Crisis: Emergency Powers in Theory and Practice*. e-Book, Cambridge University Press, 2006.

[2] *See id.*, at "Legal results of a declaration of a state of emergency" (The authors note, "[s]ome constitutions provide that a declaration of emergency may lead to the suspension of certain individual rights and freedoms.").

II. The Concept and History of Derogation

Derogation "refers to the legally mandated authority of states," who are otherwise bound by the obligations of treaties or constitutions, "to suspend certain civil and political liberties – in response to crises" and "can be justified solely by the concern to return to normality."[3] The belief that this mechanism – defining specific human rights, allowing states to derogate from certain rights, and outlining the situations in which these actions are considered lawful – would provide necessary flexibility with minimal or monitored right infringement, has resulted in its adoption into many international treaties and some sovereign constitutions.[4]

Overall, established authority, protocol, and intent to return the status quo are catalysts for these provisions' success. Therefore, certain features for compliance frequently appear across regimes, including required notification of derogation to specified individuals or groups and adherence to certain procedures, like supranational oversight and review. However, the most interesting facets of derogation, as it relates to human rights, are that documents utilizing the provision often define rights broadly, hold the scope of those rights constant while suspended, and limit the rights from which States can derogate. By holding the rights constant, through explicit articles that precisely outline the rights, the derogation provisions prevent states from re-interpreting rights during times of national emergency by effectively serving as a "pause" button until the threat has passed.[5] Alternatively, some documents do not contain these provisions and

[3] Gross, *supra* note 1, at 257; Emilie M. Hafner-Burton et al., *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 International Organization 673 (2011); N. Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, UN Commission on Human Rights, 35th Sess., Agenda Item 10 at 20, UN Doc. E/CN.4Sub.2/1982/15 (1982) at § 69.

[4] *See* Hafner-Burton, *supra* note 3, at 674 ("[Derogations] provide a safety valve for enormous pressures that governments face to repress individual liberties during times of crisis."); *See* Gross, *supra* note 1, at "Introduction" ("A driving feature of many of these treaties, regional and international, is that they explicitly acknowledge the need to make provision for the experience of crisis.").

[5] *Id.*, at 674 ("They reduce uncertainty by authorizing temporary deviations from treaty rules if exigent circumstances arise.").

instead allow established rights, like freedom of speech or association, to directly and fluidly shift with the evolving social landscape brought about through changing national and international crises.

Given the different regimes, it is easy to question why States developed derogation at all. However, its importance was recognized over the centuries precisely because "[h]uman rights are often the first casualties of a crisis" and early and modern drafters cannot possibly predict all future crises a nation may encounter.[6] Hence, the concept of derogation can be traced to historical regimes that recognized "flexibility in the face of unpredictability" and limitations to invoke and perpetuate states of emergency would preserve state sovereignty and the democratic order.[7]

Most notably, the Ancient Romans can be credited with the construction and implementation of emergency powers and derogation from individual rights.[8] Their regime appeared to develop under the rationale that emergency powers would result in the preservation of the Republic and a return to normalcy, so long as the procedures provided the right incentives and constraints on the leaders employing them. First, to ensure incentives for invoking the established emergency powers were properly aligned, those declaring the state of emergency (consuls) were prohibited from choosing themselves as dictator, the sole leader during the crisis, and were limited in their own term of office.[9] These restrictions ensured no consul could utilize an emergency declaration to seize heightened power, and that appointed dictators would oversee the return of power and restoration of normal rights once the crisis was resolved. Additionally, limits consisting of six months, or "the end of the term of the consuls who appointed him," were placed on the

[6] Hafner-Burton, *supra* note 3, at 674; Gross, *supra* note 1, at 66.
[7] Gross, *supra* note 1, at 50; *Id.*, at "Classical models of accommodation" (Gross mentions both the procedural limitations to declare states of emergency, and temporal limitations to their existence in Ancient Roman and French Revolutionary regimes, as indicators of the beginnings of these ideologies.).
[8] *See Id*., at "The Roman Dictatorship".
[9] *Id*.

dictator so they could lead the Republic through the crisis with the knowledge that the bestowed power would lapse at a certain time.[10] This assuaged any intent by appointed leaders to seize additional power, enabled flexible and decisive response, facilitated external oversight of the emergency, and ensured the survival of the representative Republic, in most all situations.[11]

The method employed by the Ancient Romans, which required that "[t]he ordinary laws and the constitutional order, in all or in part, [could] be suspended under the reign of the Supreme Ruler but [could not] be modified, amended or repealed during that time," was also utilized after the French Revolution.[12] Under this regime, the mechanism for operating in an elevated emergency state was expressly prescribed, and the intent was to prevent the creation of a new legal order. This sentiment has also been echoed in other legal systems, like Jewish law, whereby certain rules and procedures could be "suspended" to facilitate the Jewish community's ability to manage both crises and challenges to their cultural survival.[13]

Although often analyzing the emergency state framework through the lens of power and where it resided, these early structures paved the way for considering crisis situations from the perspective of human rights. Understanding that states will often act in the interest of protecting their sovereignty, but recognizing the need to ensure human rights remain protected, treaty drafters "envisioned that international restrictions on derogations, together with international notification and monitoring mechanisms, would limit rights suspensions during emergencies."[14] Ultimately, it is thought that greater protection can be afforded to human rights and democratic principles where defined mechanisms and processes are in place, even if these rights and principles may not exist

[10] Gross, *supra* note 1, at 21.
[11] *Id.*, at 35 (discussing Machiavelli's perspective on Julius Caesar's rise to power).
[12] *Id.* at 23-4 (citing Jean-Jacques Rousseau in *The Social Contract and Discourses*, trans G.D.H. Cole (New York: Everyman, 1993), p.296. The French regime reflected this structure after the 1946 amendment giving the National Assembly the sole ability to vote on laws).
[13] *Id*. at 116.
[14] Hafner-Burton, *supra* note 3, at 673.

in their entirety throughout.[15] With these foundational principles in mind, suspension of or derogation from rights in whole or in part, and the mechanisms by which it is reached, should be a starting point for analysis and comparison between regimes.

III. Documents Including Derogation Provisions and Their Implementation and Interpretation

Many international treaties and modern constitutions recognize the conflict that exists for states parties, between full compliance with international obligations and management of domestic threats.[16] Accordingly, the drafters of the International Convention on Civil and Political Rights ("ICCPR"), the European Convention on Human Rights ("European Convention"), and the American Convention on Human Rights ("American Convention"), "included an escape clause that sanctioned restrictions of certain rights during emergencies but subjected those restrictions to the strictures of international law."[17] Given that "states that are parties to any of these conventions are legally constrained by the demands of these international agreements and run the risk of violating their own international obligations if they choose to disregard the rules set forth by these agreements," drafters felt that having a formal mechanism would prevent ad-hoc or arbitrary derogation.[18] The following section discusses and compares several of these documents as well as their implications for the protection of individuals' rights under the systems.

---

[15] *See* Gross, *supra* note 1, at 38 (Gross also quotes Karl Loewenstein's discussion of some European regimes in "Militant Democracy and Fundamental Rights," 31 American Political Science Review 417, 432: "Where fundamental rights are institutionalized, their temporary suspension is justified.").

[16] Hafner-Burton, *supra* note 3, at 676 (Drafters of these treaties recognized the balance between "crises provid[ing] convenient excuses for governments to enhance their powers, dismantle democratic institutions, and repress political opponents... [and the] responsibility to protect their citizens and domestic institutions.").

[17] *Id.*

[18] Gross, *supra* note 1, at 59; Hafner-Burton, *supra* note 3, at 677.

A. International Covenant on Civil and Political Rights ("ICCPR")

Entered into force in 1976, the ICCPR was drafted in response to one of the most prolific abuses of emergency powers and derogation from human rights in modern history – the Nazi regime and World War II. Although the world had taken part in the conflict, uncertainty remained regarding how to best prevent future abuses from occurring. During the drafting of the ICCPR, potential States Parties were for and against the inclusion of a derogation provision, fearing both abuse of the provision's invocation, or alternatively, the suspension of the Covenant entirely.[19] Ultimately, those in favor prevailed.

Under ICCPR Article 4, "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the [Covenant] may take measures derogating from their obligations under the [Covenant] to the extent strictly required by the exigencies of the situation...."[20] Such measures must not be "inconsistent with their obligations under international law" and cannot involve "discrimination solely on the ground of race, colour, sex, language, religion or social origin."[21]

1. Process

According to Article 4, Section 3, States may invoke the right to derogate by following an established process. This includes "immediately inform[ing] the other States Parties to the ... Covenant," through the Secretary General of the United Nations, "of the provisions from which it

[19] *See* "Chapter 16: The Administration of Justice During States of Emergency," *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, pp. 816-19 available at https://www.ohchr.org/Documents/Publications/training9chapter16en.pdf. (discussing the travaux preparatoire of Article 4 of the International Covenant on Civil and Political Rights. Countries such as the U.S. were against the inclusion of Article 4, pushing for a general limitation instead. While countries such as the United Kingdom and France, were concerned with the consequence of full Covenant suspension, if a State had no ability to respond to crisis effectively).

[20] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 at Article 4, Section 1.

[21] *Id*.

has derogated and of the reasons by which it was actuated."[22] The State Party must also communicate, through the same channel, when the derogation has been terminated. Ultimately, States Parties may not derogate from Articles 6 (right to life), 7 (freedom from torture), 8 (freedom from slavery), 11 (right to be free from prison for contractual obligations), 15 (prohibition on ex post-facto criminal laws), 16 (right to recognition before the law), and 18 (right to freedom of thought, conscience and religion).[23]

2. Meaning and Assessing Legality

Intended to allow State response to an unanticipated crisis, and for use only in emergency situations when the "life of the nation" is threatened, one of the challenges plaguing monitoring and enforcement bodies comes in ensuring the provision is invoked only when these factors are present.[24] In comment, the Human Rights Committee expressed the importance of the notification requirements, articulation of the rights derogated from and the nature of such derogations.[25] Additionally, the Committee emphasized that any "measures taken must be exceptional and temporary, and may last only for as long as the life of the nation is threatened."[26] However, they have never clearly defined circumstances which constitute such threats and, as some scholars mention, a lack of clearly defined standards makes enforcement, oversight, and protection of human rights more difficult, while facilitating opportunities for Article 4 abuse.[27]

---

[22] *ICCPR*, *supra* note 20, at Article 4, Section 3.
[23] *Id*.
[24] *See* Dolezal, Scott, *The Systematic Failure to Interpret Article IV of the International Covenant on Civil and Political Rights: Is There a Public Emergency in Nigeria?*, 15 Am. U. Int'l L. Rev. 1163 (2000); Hartman, Joan F., *Derogations from Human Rights Treaties in Public Emergencies – A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 Harv. Int'l L. J. 1 (1981).
[25] *See* UN Human Rights Committee (HRC), *CCPR General Comment No 29: Article 4: Derogations during a State of Emergency*, 31 August 200, CCPR/C/21/Rev.1/Add.11, available at: https://www.refworld.org/docid/453883fd1f.html [accessed 12 September 2019].
[26] Dolezal, *supra* note 24, at 1176; *Report of the Human Rights Committee*, UN GAOR Human Rights Comm., 36th Sess., Annex VII, General Comment 5/13, at UN Doc. A/36/40 (1981).
[27] Dolezal, *supra* note 24, at 1168, 1177; Hartman, *supra* note 24.

Driven by these concerns, the international community has attempted to address the lack of explicit standards articulated through the treaty. First, the Committee has attempted to provide direction regarding internal protocols for declaring states of emergency in certain State reports.[28] Second, The Siracusa Principles seek to outline the standards for lawful derogation under a public emergency threatening the life of a nation, including that the emergency be "1) actual or imminent; 2) affect an entire population and some part of its territory; and 3) affect a populations' physical integrity, political independence or territorial integrity, or the existence or function of indispensable institutions designed to protect human rights."[29] The Principles also state "that internal conflict and unrest do not satisfy these conditions and that economic difficulties are not a per se justification for invoking Article IV of the ICCPR."[30] However, the Principles are only a suggestion from the international community and have not provided a meaningful solution to the challenges of invocation and enforcement. Therefore, while the concept of the derogation mechanism is thoughtfully crafted, in practice its protection is less effective than intended.[31]

B. European Convention on Human Rights

Entering into force in 1953, the European Convention on Human Rights ("European Convention") contains its derogation provision in Article 15. Based on the draft Article 4 of the ICCPR, Article 15 specifically details that "[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided

[28] *See* Ch. 16 of "Human Rights in the Administration of Justice," *supra* note 19, at 823 (discussing various Committee reports including the United Republic of Tanzania, Uruguay, Dominican Republic and Colombia).
[29] Dolezal, *supra* note 24, at 1187 (discussing the enumeration of The Siracusa Principles); *see* The American Association for the International Commission of Jurists, Inc., *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* April 1985, for entire list of principles.
[30] *Id*.
[31] *See id*., at 1179 (offering a comparison with the European Convention on Human Rights and the European Court of Human Rights' jurisprudence as a useful lens to the determination of implementable standards).

that such measures are not inconsistent with its other obligations under international law."[32] Ultimately, the European Court of Human Rights (the "Court") is tasked with interpreting and expounding upon the European Convention, and the Convention applies to all States who are parties to it, even though some States may not be members of or governed by the European Union.[33] This applicability has placed the Court at the forefront of recognizing, respecting and protecting human rights among the 47 states that are parties to it.

1. Process

The Court notes that "the making of a derogation" does not mean that the State "will" derogate from the rights, only that the measures put in place by the State "may involve a derogation from the Convention."[34] Specifically, under Article 15 procedure, the derogating party must keep the Secretary General of the Council of Europe updated with the measures taken, the reasons for the measures, and when the measures taken have stopped.[35] It also prohibits derogation from Article 2 (right to life), Article 3 (prohibition on torture and other forms of ill-treatment), Article 4, Section 1 (the prohibition of slavery or servitude) and Article 7 (no punishment without law).[36] Additional optional Protocols contain express prohibitions on derogating from more recently recognized principles including Protocol No. 6 (death penalty in times of peace and war), Protocol No. 7 (the ne bis in idem principle) and Protocol No. 13 (complete abolition of the death penalty).[37] States charged with violating the Convention often defend their measures by asserting that their

[32] *See* Council of Europe, *Guide on Article 15 of the European Convention on Human Rights: Derogation in time of Emergency*, April 30, 2019, available at: https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf; *see also* Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, 4 November 1950, at Article 15.
[33] *See* Council of Europe, *Guide*, *supra* note 32 ("Indeed the Court has emphasized the Convention's role as a 'constitutional instrument of European public order' in the field of human rights." (citing Eur. Court of HR, *Bosphorus Hava Yollari Turzm ve Ticaret Anonim Sirketi v. Ireland* [GC], no. 405036/98, §156, ECHR 2005-VI)).
[34] *Id*. at § 4.
[35] *See European Convention*, *supra* note 32, at Article 15.
[36] *Id.* (Derogation from Article 2 is allowed "in respect of deaths resulting from lawful acts of war...").
[37] Council of Europe, "Facts and Figures," *Factsheet – Derogation in time of emergency*, July 2019.

actions were covered under Article 15, and are therefore, not a violation of other substantive provisions of the Convention. While the clause has been invoked, it's use has been infrequent and challenges to it remain sparse. As of August 2018, "[9] States Parties to the European Convention on Human Rights – Albania, Armenia, France, Georgia, Greece, Ireland, Turkey, [Ukraine], and the United Kingdom – have relied on their right of derogation."[38]

2. Meaning and Assessing Legality

Similar to its international counterparts, the Court has review jurisdiction if requested by certain parties. However, different from other regimes, individuals can directly petition the Court for review. If an individual charges that their rights were violated under the Convention, the Court must assess "whether the measures taken can be justified under the substantive articles of the Convention," and, only if the measures are not justified under the Convention standing alone, then must assess the validity of the derogation.[39] The Court will ultimately determine whether the measures taken are only to the "'extent strictly required by the exigencies' of the crisis" and this requires considering many factors and relying on information known at the time.[40]

The Court also believes that "a wide margin of appreciation should be left to the national authorities" and tends to defer to the expertise of the States in determining the presence of a national emergency and the measures needed to rectify the situation.[41] This deference makes sense from a conceptual level, as a cornerstone of international treaty cohesion is recognition of state sovereignty, however this is not intended to result in unfettered discretion as "[t]he domestic margin of appreciation is accompanied by European supervision."[42] Ultimately, this

[38] Council of Europe, *Factsheet*, *supra* note 37.
[39] Council of Europe, *Guide*, *supra* note 34.
[40] *See id* at § 21.
[41] *Id*. at § 11.
[42] Council of Europe, *Guide*, *supra* note 41.

implementation has been criticized as affording too much leeway and potential for abuse, when compared with other treaty derogation mechanisms.[43]

However, the European Court of Human Rights has tried to implement interpretive guidance to aid States in complying with Article 15 of the Convention. In *Lawless v. Ireland*, they "defined a 'public emergency' for the purposes of Article 15 ... as 'a situation of exceptional and imminent danger or crisis affecting the general public as distinct from particular groups, and constituting a threat to the organized life of the community which composes the State in question."[44] Gross notes that dissenters advocated for a more stringent interpretation.[45] Additionally, the Court further defined the characteristics of a public emergency in the *Greek Case*, stating, "the emergency must be actual or imminent, its effects must involve the whole nation, the continuance of the organized life of the community must be threatened, and the crisis or danger must be exceptional, in that normal measures or restrictions, permitted by the convention for the maintenance of public safety, health, and order, are plainly inadequate."[46] Historically, situations where derogation has been justified included terrorism or the heightened threat of such activity within a country or region of a country.[47]

Lastly, the Court has considered whether measures taken are consistent with a State's obligations under international law or other instruments, although this has rarely led to invalidation

[43] *See, for example*, Hartman, *supra* note 24.
[44] Gross, *supra* note 1, at 249 (quoting Eur. Court HR, *Case of Lawless v. Ireland*, 1. Eur. Ct. HR (ser. B) at 56 (1960-1961) (Commission report)).
[45] *See id*.
[46] *Id*. (discussing 1 European Court of Human Rights, *The Greek Case*: Report of the Commission (1969)).
[47] *See* Council of Europe Guide, *supra* note 32, at § 12 (discussing Eur. Court HR, *Case of Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A, No. 25; Eur. Court HR, *Case of Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, Series A, No. 258-B; Eur. Court HR, *Case of Marshall v. the United Kingdom*, decision of 10 July 2011 on admissibility; Eur. Court HR, *Case of Aksoy v. Turkey*, judgment of 18 December 1996, Reports 1996-VI; Eur. Court of HR, *Case of A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009; Eur. Court HR, *Case of Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018; and Eur. Court HR, *Case of Sahin Alpay v. Turkey*, 26 November 1997, Reports of Judgments and Decisions 1997-VII).

of a State's actions. For example, the Court has invalidated a State's application of Article 15 where no "formal and public act of derogation ... has been proclaimed," while upholding there is no requirement that this "notification... be made before the measure in question [is] introduced" nor a specified "time within which the notification must be made or ... the extent of the information to be furnished."[48] Interestingly, these interpretations would appear to be in conflict with ICCPR Article 4 protocol, given its formality and timing requirements, especially as the court has not found an Article 15 violation even where Article 4 was not met.[49] Unfortunately, these interpretations, coupled with the margin of appreciation accorded to States Parties, continue to perpetuate concerns regarding abuse of the derogation provision and challenges with enforcement in future emergency conflicts.

C. The American Convention on Human Rights

Interpreted by the Inter-American Court of Human Rights, the American Convention on Human Rights ("American Convention"), which entered into force in 1978, borrowed some traits from the ICCPR and the European Convention, but also adopted some noticeable differences.

Similar to its predecessors, the American Convention allows for derogation from certain rights under Article 27. The article states, "[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its

[48] *See* Council of Europe Guide, *supra* note 32, at § 36 (discussing Eur. Court of HR, *Greece v. the United Kingdom*, no. 176/56, Commission report of 26 September 1958. The court's jurisprudence has found a 12-day delay to be sufficient (*Lawless v. Ireland* (no.3) while a 3-month gap to be non-justifiable (*The Greek Case*)).

[49] The Court has broadly interpreted the "official proclamation" provision. *See* Council of Europe Guide, *supra* note 32, at § 24-5 (summarizing Eur. Court of HR, *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A no. 258-B and Eur. Court of HR, *Marshall v. the United Kingdom* (dec.), no. 41571/98, 10 July 2001. The Court has found a statement to be a form of proclamation, and the withdrawal of derogation made under the Article, yet with measures still continuing, not to be excessive.); *but see* Eur. Court of HR, *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, Commission report of 10 July 1976 ("Article 15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency, and that, where no such act has been proclaimed by the High Contracting Party concerned, although it was not in the circumstances prevented from doing so, Article 15 cannot apply.').

obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin."[50] Following prior examples, "both the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights have accepted the requirement that the emergency be exceptional and temporary" in order to lawfully invoke the provision.[51]

Also consistent with other international treaties, the Convention does not provide for derogation from all rights. The article specifies that "[t]he foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights."[52] However, while this enumeration of rights is consistent with prior treaties, some noticeable interpretive differences and the inclusion of certain clauses provides the American Convention with the possibility of being a more impactful document.

[50] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, at Article 27.
[51] Gross, *supra* note 1, at 250.
[52] Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, 9 Inter-Am Ct. H.R. (Ser.A) (1987) Advisory Opinion OC-9/87, October 6, 1987

1. Process

Under Article 27(3), "[a]ny State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions of the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension."[53] This process of formal declaration, notice, and continued oversight by external actors is consistent with the protocols typically employed under similar international regimes, whether through explicit provisions or interpretive jurisprudence. However, the American Convention differs slightly from its European counterpart, in that only the Commission or States Parties can petition the Court for review of State actions and it is textually broader in terms of the rights and characteristics from which the country may not derogate.[54]

2. Meaning and Assessing Legality

Recognizing the broad nature of the provisions, the Commission asked the Inter-American Court of Human Rights to issue a few advisory opinions focused upon the interpretation of "judicial guarantees essential for the protection of such rights" to aid future compliance and enforcement. First, in Advisory Opinion OC-8/87, the Commission requested the Court provide clarity on certain articles of the Convention when "read in conjunction with the final clause of Article 27(2)" so they could understand whether habeas corpus and certain judicial protections could be suspended in times of crisis.[55] The Commission sought guidance on how the final provision in 27(2) impacted the derogability of Articles 25 (Right to Judicial Protection) and 7

[53] *The American Convention*, *supra* note 50, at Article 27(3).
[54] *See* Gross, *supra* note 1, at 258.
[55] Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations (Arts. 26(2), 25(1) and 7(6) American Convention on Human Rights)*, OC-8/87, Inter-American Court of Human Rights (IACrtHR), 30 January 1987 at §§ 9 and 11.

(Right to Personal Liberty), both of which are suspendable pursuant to Article 27(2) of the Convention. [56] The Court ultimately advised that "the legal remedies guaranteed in Articles 7(6) and 25(1) of the Convention may not be suspended" as they considered them to espouse "amparo" and therefore essential to protecting those rights that cannot be suspended under Article 27(2).[57]

Second, in Advisory Opinion OC-9/87, the Government of Uruguay requested an advisory opinion to define the term "essential" and Article 27(2)'s relationship to Articles 25 and 8 regarding judicial protection and due process of law, which are not included in the list of non-derogable rights.[58] Relying on Advisory Opinion OC-8/87 and the spirit of the Convention, the Court reiterated their interpretation that strong judicial oversight of certain measures during crises are essential to the protection of non-derogable human rights, even where the Articles expressly outlining judicial involvement (Articles. 25 and 8) could be suspended under the letter of the Convention.[59] The application of these opinions together essentially led to a finding that "certain derogable rights under the American Convention were effectively rendered non-derogable by expansive interpretation of the term 'judicial guarantees.'"[60]

This expansive interpretation has great implications for the protection of fundamental human rights for States Parties to the American Convention. Given the region's history with certain human right abuses, including derogating from judicial guarantees of non-derogable rights, the assurance of independent judicial intervention is viewed as essential to the integrity of the Convention and protection of persons.[61] However, similar to other treaties, these advisory opinions

[56] *See American Convention on Human Rights*, *supra* note 50, at Articles 25, 7, and 27. Under Articles 25(1) and 7(6) persons are entitled to certain judicial protections.
[57] *See* Advisory Opinion OC-8/87, *supra* note 55, at § 44.
[58] *See* Advisory Opinion OC-9/87, *supra* note 52.
[59] *See id* at § 22.
[60] Gross, *supra* note 1, at 259.
[61] *See* Advisory Opinion OC-9/87, *supra* note 52; Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention of Human Rights*, 1 Am. U. J. Int'l L. & Pol'y. 35, at 36 (1986) (Scholars

still fall short of bolstering enforcement or outlining standards needed to invoke derogation at the outset.

IV. Documents Without Derogation Provisions and the Impact of Their Omission

In contrast to a formal derogation regime, other international treaties and the United States follow a different mechanism. Choosing instead to have the rights develop in response to both normal and emergency legal changes, the effects of these systems is seen through more restricted definitions of certain human rights and reduced accountability and oversight.

A. The African Charter of Human and People's Rights

Although written after the aforementioned treaties, and entered into force in 1986, the African Charter of Human and People's Rights ("African Charter") does not contain a derogation provision. As some authors note the increasing broadness in human right protections with each subsequent treaty ratification, when comparing the ICCPR, European Convention and American Convention, the time between this treaty and its predecessors presents the question as to the provision's omission.[62]

While some have identified the drafters' intentions to increase State adherence by specifically excluding the ability to suspend certain rights, Gross mentions that the appearance of a heightened standard of State adherence is illusory, as "commentaries on the theory and observance of rights protection in Africa have demonstrated that littered throughout the charter's rights provisions are numerous and multiple internal limitation clauses."[63] Therefore, although

and the Commission note the practices of disappearances, extra-judicial execution, and lack of due process protection warrant increased diligence and oversight).

[62] Tolera et al., *Absence of Derogation Clause under the African Charter and the Position of the African Commission*, 4 Bahir Dar Univ. Journal of Law 2, 237 (2014).

[63] Gross, *supra* note 1, at 252.

intending to prevent "limitations on the rights and freedoms enshrined in the Charter" from being "justified by emergencies or special circumstances," the inclusion of individual limitation clauses may provide a parallel avenue with different consequences.[64]

1. Claw-Back Clauses

Tolera notes, "[e]ven though the African charter contains no derogation clause, the formulation of the Charter's rights is characterized by the predominance of claw-back clauses" – added explanations at the end of individual rights, such as "except for reasons and conditions previously laid down by law" or "subject to law and order."[65] While some scholars point out that the inclusion of these clauses has been cited as a reason for the lack of an explicit derogation clause; claw-backs are also present in treaties which have stand-alone derogation provisions.[66] For example, the ICCPR contains similar claw-back clauses, labeled as such by former International Court of Justice President Rosalyn Higgins, "because they permit states parties to restrict protected rights and freedoms for a specified list of public reasons" not just in times of emergency.[67] As claw-back provisions apply regardless of the current state of the world, the States have much wider discretion in terms of actually restricting and defining individual rights. Accordingly, these claw-back provisions were not seen as a comprehensive protection device within other treaties and have been criticized as offering governments extensive ability to infringe on certain individual rights.[68]

---

[64] Gross, *supra* note 1, at 252 (citing "Media Rights Agenda and Constitutional Rights Project Case", Comm. Bo 105/93, 128/94, 130/94, 152/96, 12th Annual Activity Report 1998-1999, paras. 67-70).
[65] Tolera, *supra* note 62, at 238; *see* Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) *at* Article 6 and Article 8, respectively.
[66] Tolera, *supra* note 62, at 237; *see also* Louis Henkin et al., "The International Law of Human Rights," Human Rights, 2d. ed., Foundation Press (2009).
[67] Henkin, *supra* note 66, at 218 (The authors note "[u]nlike derogations, limitations are not restricted to emergencies but are permitted at all times under a state party's police power, or for such reasons as national security, public order, public health or morals or the rights and freedoms of others.")
[68] Tolera, *supra* note 62, at 237.

2. Article 27(2)

Perhaps attempting to mitigate concerns, "the African Commission on Human and People's Rights has stated that the only legitimate basis for limiting rights under the charter is found in Article 27(2)," which states "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."[69] Still, this statement leaves the definition of those topics open to interpretation. Attempting to clarify, the Commission advises that limitations under the article "should be founded on legitimate state interest, and must be both proportionate and absolutely necessary," indicating further intent for state accommodation in exigent circumstances.[70] However, it is this sizeable state accommodation and the lack of a formal derogation clause that have fueled concerns that arbitrary deviation from recognizing and protecting human rights may ensue, without specific application in times of emergency and without any additional oversight.[71] In fact, this has resulted, as Gross mentions, in certain regimes and actions infringing upon human rights under the guise of ordinary law, by simply legislating or interpreting existing laws in such a way as to justify limitations.[72]

Witnessing the impact on individual rights, it would appear advantageous to have included a derogation provision within the document. However, several potential explanations emerge as to why the drafters expressly sought to "offer[] a unitary vision of response to crisis" instead of the ability for States to derogate.[73] Perhaps, as Hafner-Burton mentions, the countries most likely to formally derogate are those that enjoy "stable democracies" and judicial systems with strong

---

[69] Gross, *supra* note 64 (referencing "Media Rights Agenda," paras 67-70); *see African Charter on Human Rights*, *supra* note 65, at Article 27(2).
[70] *Id*.
[71] *See* Tolera, *supra* note 62, at 241.
[72] See Gross, *supra* note 1, at 254 ("Zimbabwe provides us with multiple examples of state overreach in the area of emergency powers undertaken through the guise of ordinary law, operating as if normal legislative mechanisms were in place and not affected by the context of national security or other stated political threats.")
[73] Gross, *supra* note 64.

executive oversight – those with mechanisms that can hold the country accountable to its treaty obligations.[74] Additionally, countries "where the judiciary is weak or voters cannot easily remove leaders from office" are more likely to actually breach international treaties than to use any formal mechanism.[75] With the relatively recent implementation of a union wide treaty, and as the power of the Commission and the judiciary ebbs and flows, it is possible drafters of the document wanted to bolster institutional and treaty competence, while enforcement and compliance may still prove difficult.

B. The United States Constitution

Under the United States Constitution, there is no formal clause that allows for or prescribes the mechanics to derogate from certain civil and political liberties.[76] Ultimately, this lack of explicit Constitutional guidance leads to a different practice in the United States, where the role of inherent powers and necessity tend to fill the gap to allow for "flexibility in the face of unpredictability".[77]

As Richard Posner has acknowledged, in our regime, "[t]he point is not that law is suspended in times of emergency ... The point rather is that law is usually flexible enough to allow judges to give controlling weight to the immediate consequences of decision ..." [78] Under this ideology, the United States implements what could be considered a "rights-shifting" approach,

---

[74] Hafner-Burton, *supra* note 3.
[75] *Id.* at 675.
[76] *See* Gross, *supra* note 1, at 92 (discussing *Ex Parte Milligan*, 71 US (4 Wall.) 2 (1866): "Constitutional guarantees and safeguards cannot be ignored, suspended, or removed in times of war and calamity any more than they can be so ignored, suspended, or removed in times of peace..."); *see id.* at 93 (The Suspension Clause for the Writ of Habeas Corpus, contained in Article I, Section 9, clause 2 may be the closest the U.S. Constitution comes to a derogation clause); *Id.* (quoting *Ex Parte Milligan*, 71 US (4 Wall.) 2, 125 (1866): "Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus.*").
[77] *Id.* at 49-50 (discussing the actions of President Lincoln during the Civil War and Post-War Reconstruction. The author asserts that support for Lincoln's actions "revolved around the claim that the president enjoys a wide range of constitutionally inherent powers, including emergency powers, and therefore acts legally and constitutionally, rather than outside the constitutional framework.").
[78] *Id.*, at 73 (quoting Richard A. Posner, *Law, Pragmatism, and Democracy*, (Cambridge, MA: Harvard University Press, 2003) p. 295).

similar to that utilized under the African Charter, whereby the scope of the rights of individuals are constantly being "balanced" and "ebb and flow" as the emergency situations or changing social norms dictate.[79] This type of balancing results in "constitutional fluidity and adjustment to changing circumstances" in the rights afforded through the Constitution. [80]

For example, as Gross notes, "as crime rates fluctuate, so does the need to change the point of balance between the various risks. Such changes are often introduced into the legal system by way of judicial interpretation of existing constitutional provisions and legal rules."[81] Accordingly, "what seems unreasonable in reasonable times may look reasonable in unreasonable times."[82] This approach, where rights expand and contract based on the nature of the external environment, is consistent during shifting crises and lends the United States regime to a different process than international counterparts. When determining whether measures taken by the government are allowable, the Supreme Court considers the legality of the regulation, or changing social norms, to determine whether the scope of certain rights need to give way, instead of starting with the scope of the right to determine if the measure can be justified within its definition. While flexible in nature and intending to return rights to normal once the emergency or crisis situation has passed, changing the scope of individual rights could pose more harm, have longer-lasting effects, and does not overcome the enforcement and oversight problems accompanying alternative derogation mechanisms.

---

[79] Gross, *supra* note 1, at 74 (discussing the "ebb-and-flow" model of criminal procedure as interpreted through the Fourth and Fifth Amendments based on heightened or lowered crime rates. This model parallels the interpretation of the Constitution, and human rights provided therein, compared to formal derogation provisions and procedures which would likely be invoked if in existence.); *see also* at 75 Chief Justice Chase's opinion in *Ex Parte Milligan*: "[p]owers expand and rights contract (but are not necessarily suspended) in times of crisis.").

[80] *Id*.

[81] *Id.* (citing William J. Stuntz, "Local Policing after the Terror," 111 Yale Law Journal 2137, 2138-39).

[82] *Id*. (quoting Harold D. Lasswell, *National Security and Individual Freedom* (New York: McGraw-Hill, 1950), p. 141).

V. How Does the Decision Procedure Differ and What are the Implications for Oversight and Accountability?

A crucial factor to any derogation or right-shifting system is also the procedure to declare a state of emergency, which differs between countries. Coupling the type of mechanism with the ease of invoking such a mechanism can have major and lasting implications on the recognition and protection of human rights. As Gross notes, "[i]n many of the modern constitutions that provide explicitly for emergency powers, the primary authority for declaring a state of emergency is vested in parliament."[83] However, different regimes also vest the responsibility in the executive or with parliament after involvement by the government, while others have increasing levels of participation or scrutiny as the expansiveness of the powers sought to be utilized increases.[84]

For example, in the United States, the lack of explicit Constitutional guidance regarding national emergencies has allowed Congress to pass several statutes outlining the authorization of such actions. Consequently, under the National Emergency Act, the President has the power to declare a national emergency by following certain protocols.[85] Once declared and announced properly to Congress, which includes publication in the Federal Register and outlining intended actions, the President can access additional authority in order to fulfill his or her duties in mitigating the emergency.[86] Announced emergencies are reviewed by Congress, can be terminated by joint resolution or by the President, and can be extended.[87] The expansive abilities of the President to issue emergencies, and as the U.S. has recently seen, to veto joint resolutions to end such emergencies, creates major constitutional concerns.

---

[83] Gross, *supra* note 1, at 55.
[84] *See id.* at 55-6 (discussing the increasing level of parliamentary involvement in declaring certain states of national emergency under the Spanish Constitution).
[85] *See* 50 U.S.C. 1601 et. seq.
[86] *Id.*
[87] *Id.*

Given the authority unlocked through these actions and the potential human rights implications, similar concerns abound in other systems. More recently, scholars have argued that the European Court of Human Rights needs to increase its scrutiny of the invocation of the derogation provision, particularly with the rise of the declaration of states of emergency.[88] The same could be said in the United States, where any challenge to the issuance of a national emergency would likely be classified as a "political question" and therefore outside the scope of the Court's review. Indeed, as Gross notes, "the Truman administration famously argued in court that the executive had unlimited power in time of emergency and that the executive determined the emergencies without the courts having the authority to review whether such emergencies in fact existed."[89] However, this is precisely the challenge to the protection of human rights that regimes should try to combat.

As national emergencies or "crises are generally characterized by a strengthening of the executive to the detriment of judicial authority and parliamentary oversight," the need for heightened review processes in these instances increases. While some bodies like the European Court of Human Rights could increase their scrutiny under the current Convention, the United States may need to consider adopting additional mechanisms that currently do not exist, in order to offer sufficient accountability and oversight and ensure the protection of human rights caught in the cross-fire of exigent circumstances.

[88] Mariniello, Tiestino, *Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system*, 20 German Law Journal 46-71, (2019).
[89] Gross, *supra* note 1, at 51 (referencing *Youngstown Sheet and Tube Co. v. Sawyer*, 343 US 579 (1952)).

VI. Suggestions for Future Treaties or Constitutions

Given the different regimes, the pros and cons to the practices, and the inability for future drafters to foresee all the potential crises that could befall States, what should future treaty or constitution authors take from the discussion? While some scholars recognize the need for flexibility and the "oversight and accountability" defined mechanisms provide, still others pinpoint the opportunity for abuse of, or "disingenuous" use of, established provisions.[90] However, there are some common practices that could be implemented to help limit arbitrary invocation of derogation and allow sovereign flexibility while protecting citizens. The options with the most implications upon human rights could be broken down into three parts: (i) mechanism – derogation provision v. right-shifting approach; (ii) location of power to invoke the mechanism through emergency declaration; and (iii) review and oversight of declarations and continuing derogations. Ultimately, drafters should prioritize derogation over a right-shifting approach, define location of power protocols and standards in order to lawfully derogate, and increase supranational review and oversight.

A. Express Derogation Provisions over Right-Shifting Approach

Focusing on the mechanism, Gross notes, "experience informs us that neither the judicial nor the legislative branches function as meaningful guardians of individual rights and liberties in times of great peril. Thus, it seems extremely dangerous to allow any modifications to the constitutional and legal terrain to take place at such times, regardless of whether such changes are introduced by way of judicial interpretation or existing legal and constitutional provision, or by way of legislative initiatives."[91] Particularly, he alludes to the practice of group think among the

[90] *See* Gross, *supra* note 1, at 260 (recognizing both sides of the debate).
[91] *Id*., at 81.

branches in times of emergency, or turning a blind eye to actions which would be deemed outside constitutional norms, if not for certain exigent circumstances.[92] In fact, it is precisely the guise of upholding the law during an emergency that highlights the need for formal derogation with accompanied oversight.

Without a defined pause button, it becomes more difficult to monitor the beginning and end point of a state of emergency that may violate certain rights and prevents external evaluation of the methods employed. Operating under the façade of normal law but acting in such a way as to erode human rights in states of emergency, poses a greater threat to the establishment and perpetuity of those rights than offering a moment of suspension. Future authors of treaties or constitutions can counterbalance the ease of emergency legislation or interpretation by expressly including derogation provisions. Indeed, the importance of this provision will likely grow as the global economic and political climate continues to challenge previous understandings of national threats.

B. Defined Protocols for Emergency State Declaration and Clearly Defined Standards for Derogation

However, as witnessed in present documents, a formal derogation clause is not enough to ensure state compliance and rights protection. States and monitoring bodies also need defined protocols and standards to gauge appropriate use of emergency mechanisms and enforce protections. Thus, specifically outlining the procedures, such as separation of powers, and the standards that must be met to justify a lawful derogation, would go a long way to bolstering a derogation mechanism.

[92] Gross, *supra* note 1, at 94-6 (Gross alludes to these actions in his discussion of President Roosevelt's Executive Order 9066 regarding Japanese evacuation and the deference to Executive action by the Court during the Civil War period).

As it relates to the location of power, the ease with which individual decisions can be made and their far-reaching impact should inform future drafters that legislative involvement presents the lowest likelihood of abuse of power to establish a state of emergency.[93] As Gross notes, "if it is the president, for example, who decides when the need arises for the use of such powers and the extent to which such powers ought to be used in any given case, then [he] enjoys truly unlimited powers."[94] This concern was echoed by Justice O'Connor in *Hamdi v. Rumsfeld*: "[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens ... in times of conflict [the Constitution] most assuredly envisions a role for all three branches when civil liberties are at stake."[95] For similar reasons, the UN Human Rights Committee has previously issued reports concerning certain States domestic processes for declaring national emergencies to ensure compliance with Article 4.[96]

Drafters could extend this rationale one step further, by expressly outlining a consistent emergency declaration process required for domestic regimes to comply with international obligations. However, well-defined protocols also need to be paired with well-defined standards to give the international community more ex-ante understanding of the legality of their actions. This sentiment was expressed by the Netherlands during the drafting of Article 4 of the ICCPR, which would have preferred a more precise definition of "the circumstances under which a Party may evade its obligations" to prevent mis-use of the derogation provision.[97] Thus, full adoption of The Siracusa Principles or establishing similar protocols and standards at the outset could allow

[93] One major argument against this approach is the inability to mobilize in times of need, however this paper assumes that for true states of emergency involving threats to the life of the nation, even large legislatures will be inclined to act under threat of public choice. This assumption, while large, has lesser implications on human right fluctuations than constant re-interpretation of the word "threat" in individual decision-making regimes.
[94] Gross, *supra* note 1, at 50.
[95] *Id.* at 53 (quoting *Hamdi v. Rumsfeld*, 542 US 507, 536 (2004).
[96] *See* Chapter 16, "The Administration of Justice During States of Emergency," *supra* note 20, at 823 (discussing certain Committee reports).
[97] *Id.*, at 817.

for more effective self-monitoring and result in heightened protection of human rights, instead of requiring case-by-case evaluations of each State's domestic process.

C. Supranational Review and Oversight

Finally, and once consistent protocols are established, sua sponte review of States' decisions, even as it pertains to domestic responses, would help in preventing abuse of derogations or declarations of emergency.[98] As Gross notes: "the criticism leveled against domestic courts has led some scholars to argue that international or regional courts, which enjoy detachment and independence from the immediate effects of national emergencies, are better situated to monitor and supervise the exercise of emergency powers by national governments."[99] Since regional and international courts are currently in existence, authorizing automatic or sua sponte review to these bodies – focused more on the primary question, whether a derogation was justified, than on the secondary question, whether the measures taken are proportional – would provide an additional layer of protection and could facilitate faster development of workable standards of review for derogation. [100]

Although likely viewed as counterintuitive to the function of international law, where oversight is reserved only for parties to treaties or protocols, the UN Human Rights Committee has already stated their ability to consider a State's other international obligations, outside of the ICCPR, when determining that party's ability to derogate from certain provisions of the Covenant.[101] This ability to consider other international treaty compliance is also included in both

[98] See Hartman, *supra* note 24, at 1-3 and 41 (discussing the "disturbingly vague and inconsistent" standards of review under the European Convention, the lack of sua sponte review under current treaty regimes, and the inadequate review capabilities provided to the Human Rights Committee through Article 40 reporting or Article 41 inter-state complaints, under the ICCPR); Additionally, Gross, *supra* note 1, at 266 notes that the current system of requiring application for review enhances the delay in effectively reviewing and fashioning judicial remedies for violations.
[99] Gross, *supra* note 1, at 79.
[100] *See id.*, at 265.
[101] UNHRC General Comment, *supra* note 25.

the European Convention and the American Convention.[102] These statements and actions, in conjunction with attempts to articulate overarching standards, indicate the international community's recognition of commonality and interest in enforcing and monitoring across documents and regimes. Therefore, this recognized mechanism could be applied from regional and international bodies regarding domestic decisions.

However, this solution is not without its challenges. First, monitoring would be costly, especially when one considers the differing internal regimes and the potential delay and inability to fashion effective case-by-case legal remedies in each regime.[103] These challenges alone would threaten any established institution's credibility.[104] There is also the challenge of interpreting standards across different treaties and diffuse monitoring bodies like the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Court, and any additional bodies that could fulfill the role of providing oversight. Without one, final arbiter, the competing interpretations could instill more confusion within the international community. Still, while not perfect, a step in the direction of standardization could go a long way toward establishing consistent legal standards and rights protection for people around the world.

VII. Conclusion

Human rights protection is the responsibility of each sovereign nation and the treaties which collectively bind them together. Since evolving challenges to national security are sure to develop in the future, scholars and legislators should think critically about the mechanisms for protecting rights around the globe. By adopting a more uniform system of derogation, defining the protocols and standards for States to validly derogate from certain human rights, and providing

[102] *See* Chapter 16, "The Administration of Justice During States of Emergency," *supra* note 19, at 877-79.
[103] *See* Gross, *supra* note 1, at 266.
[104] *See id.*

proper oversight and review, drafters will be able to shape sovereign behavior, international norms, and ensure more secure protection of human rights in the international sphere.