

# Exceptionality: A Typology of Covid-19 Emergency Powers

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## Abstract

The outbreak of the Covid-19 pandemic has stretched State capacity across the globe. It has simultaneously revealed both the robustness and fragility of public health, education, transportation, economics, welfare, and security systems. In one way, the pandemic is a classic emergency challenge for States. The pandemic is a sudden and unexpected event threatening many lives, and the multifaceted physical manifestations of and recovery from Covid-19 have crippled the capacity of health systems to function. In parallel, the pandemic also presents the spectre of a new normal, as exceptionality in the experience of a health crisis may not go away and pathogen-led crises may be with us for the long haul. There is no shortage of exceptional emergency responses to the pandemic, ranging from mandatory lockdowns, limits on freedom of expression, vaccine mandates, and mandatory labour production. Assessment of the scale, impact, and long-term significances of such emergency practice is nascent, and this Article offers a preliminary assessment of the legal forms and consequences of a resort to exceptional powers and widespread emergency practice across the globe. Specifically, this Article provides a typology of emergency powers practice emerging through pandemic responses. In addition, this Article explores the new forms and variations of emergency powers that appear to be thriving in the new normal of the

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pandemic. And finally, this Article addresses the human rights and rule of law consequences of new exceptionalities and offers a nuanced assessment in order to better understand global, regional, and national responses to the Covid-19 pandemic.

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## Introduction

“The structure of the international system is, however, irrelevant to the microbial world. Slogans like ‘germs know no frontiers’ and ‘germs carry no passports’ have been used since the founding of WHO. In international relations terms, pathogenic microbes constitute nonstate actors with transnational power.”<sup>1</sup>

The outbreak of the Covid-19<sup>2</sup> pandemic has stretched State capacity across the globe. It has simultaneously revealed both the robustness and fragility of public health, education, transport, economic, welfare, and security systems. In one sense, the pandemic is a classic emergency challenge for States.<sup>3</sup> The pandemic is a sudden and unexpected

1. David P. Fidler, *Return of the Fourth Horseman: Emerging Infectious Diseases and International Law*, 81 MINN. L. REV. 771, 811–12 (1997).

2. Coronavirus disease 2019, or Covid-19, is a highly contagious disease caused by severe acute respiratory syndrome coronavirus 2, or SARS-CoV-2. The first case of Covid-19 was identified in Wuhan, China, in December 2019. Nanshan Chen et al., *Epidemiological and Clinical Characteristics of 99 Cases of 2019 Novel Coronavirus Pneumonia in Wuhan, China: A Descriptive Study*, 395 LANCET 507 (2020) [<https://perma.cc/MT5N-3BKH>].

3. See generally OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* (2006) (conceptualizing the theories of emergency powers by examining the interface between law and crises through history and across jurisdictions); DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006) (examining how governments should respond to emergencies by exploring the notion of an unwritten constitution of law, exemplified in the common law

event threatening many lives, and the multifaceted physical manifestations of Covid-19 cripple the capability of health systems to function.<sup>4</sup> In parallel, the pandemic also presents the possibility of a new normal as the exceptionality of health crises may not go away and pathogen-led crises are with us for the long haul. Governmental reaction to the pandemic has produced or entrenched exceptional legal and political responses, meaning that in multiple contexts ordinary legal and political regulation was viewed as inadequate and exceptionality in law, policy and political reaction has dominated state practice. Thus, there is no shortage of exceptional emergency responses to the pandemic. These responses have included the physical lockdown of millions of people,<sup>5</sup> mandates to effectively move millions of people from cities to rural communities,<sup>6</sup> restrictions on expression that challenges government

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constitution of Commonwealth countries).

4. See Chen et al., *supra* note 2 at 509, tbl. 2 (listing the various symptoms observed by researchers in some of the first persons confirmed to be afflicted by Covid-19); Tim Arango, *Southern California's Hospitals Are Overwhelmed, and It May Get Worse*, N.Y. TIMES (Dec. 25, 2020), <https://www.nytimes.com/2020/12/25/us/southern-california-hospitals-covid.html> [<https://perma.cc/SM7L-766Y>] (“Nearly every hospital has surged past its capacity, putting new beds in any space it can find, and preparing for the possibility it will have to ration care—essentially making wrenchingly difficult decisions about who dies and who lives.”).

5. See Décret 2020-260 du 16 mars 2020 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19 [Decree 2020-260 of March 16, 2020 on the Restrictions on Movement in the Context of the Fight Against the Spread of the Covid-19 Virus] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2020, p. 2 (ordering people in France to stay at home for up to fifteen days because of the coronavirus outbreak, except to conduct official duties); Decree No. 297/2020, Mar. 19, 2020, [34.334] B.O. 3 (Arg.), <https://www.boletinoficial.gob.ar/detalleAviso/primera/227042/20200320> [<https://perma.cc/K8PB-7YZP>] (ordering people in Argentina to “stay in their habitual residences or in the place where they are and refrain from attending their workplaces.”); Minn. Exec. Order No. 20-20 (Mar. 25, 2020), [https://mn.gov/governor/assets/3a.%20EO%2020-20%20FINAL%20SIGNED%20Filed\\_tcm1055-425020.pdf](https://mn.gov/governor/assets/3a.%20EO%2020-20%20FINAL%20SIGNED%20Filed_tcm1055-425020.pdf) [<https://perma.cc/47YV-B2TC>] (providing an example of a “stay at home” order in one U.S. state, directing Minnesotans to stay at home and limit movements outside of their home beyond essential needs from March 27, 2020, at 11:50 p.m. local time to April 10, 2020, at 5:00 p.m. local time).

6. See, e.g., Government of Assam, Health & Family Welfare Department, The Assam COVID-19 Containment Regulations (Issued on Mar. 18, 2020), <https://covid19.assam.gov.in/wp-content/uploads/2020/03/The-Assam-COVID-19-Regulations2020.pdf> [<https://perma.cc/878K-HXCN>] (ordering a strict perimeter zone to contain the spread of Covid-19 in the Indian State of Assam; such lockdowns across India had the effect of instigating a migrant crisis as people attempted to return home); see also Joanna Slater & Niha Masih, *In India, The World's Biggest Lockdown Has Forced Migrants to Walk Hundreds of Miles Home*, WASH. POST (Mar. 27, 2020), [https://www.washingtonpost.com/world/asia\\_pacific/india-coronavirus-lockdown-migrant-workers/2020/03/27/a62df166-6f7d-11ea-a156-0048b62cdb51\\_story.html](https://www.washingtonpost.com/world/asia_pacific/india-coronavirus-lockdown-migrant-workers/2020/03/27/a62df166-6f7d-11ea-a156-0048b62cdb51_story.html) [<https://perma.cc/R5PP-K2HJ>] (describing the harrowing journey home for India's incalculable number of migrant workers after abrupt lockdowns and termination of transportation services); Devjyot Ghoshal & Rajendra

management of the crisis (“fake” news),<sup>7</sup> mandatory labor production,<sup>8</sup> data tracking on the movement of persons,<sup>9</sup> extensive border controls,<sup>10</sup> and a broad range of political and legal controls that are far-reaching and function at both wholesale and retail levels. Assessment of the scale, impact, and long-term significance of such emergency practice is just beginning, and this Article offers a preliminary assessment of the legal form and consequences of a resort to exceptional powers and widespread emergency practice across the globe.

In most countries, national legislatures and executive entities (including but not limited to Presidents, Prime Ministers, and cabinets) have led emergency powers practice. Traditional axes of regulation have broadly managed legal and political responses to Covid-19. However, responses have also conspicuously gone beyond them in substantive ways. Thus, the emergence of sub-national emergency regulations in the face of the pandemic adds new layers of complexity to the assessment of the scale, scope, and effect of emergency powers.<sup>11</sup> In tandem, Covid-

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Jadhav, *India's Urban COVID-19 Outbreak Is Morphing Into a Rural Health Crisis*, REUTERS (June 4, 2020), <https://www.reuters.com/article/health-coronavirus-india-migrants-idINKBN23B1M6> [<https://perma.cc/2QXM-5DM4>] (“Rural parts of India have begun to see a surge in novel coronavirus infections, as millions of migrant workers returning from big cities and industrial hubs bring the virus home with them . . .”).

7. See, e.g., Government of Maharashtra, Public Health Department, The Maharashtra COVID-19 Containment Regulations (Issued on Mar. 14, 2020), <https://www.maharashtra.gov.in/Site/Upload/Acts%20Rules/English/Korona%20Notification%2014%20March%202020.pdf> [<https://perma.cc/9XQU-WB4J>] (providing in relevant part that “[n]o person/ Institution/ organization will use any print or electronic or social media for dissemination of any information regarding Covid-19 without ascertaining the facts and prior clearance of the Commissioner, Health Services, Director of Health Services.”).

8. See Exec. Order No. 13911, 85 Fed. Reg. 18403 (Mar. 27, 2020) (invoking The Defense Production Act of 1950, 50 U.S.C. § 4501 et seq.); Memorandum on an Order Under the Defense Production Act of 1950 Regarding General Motors Company, 2020 DAILY COMP. PRES. DOC. 197 (Mar. 27, 2020) (directing the U.S. Secretary of Health and Human Services to “use any and all authority available under the [Defense Production Act] to require General Motors Company to accept, perform, and prioritize” contracts or orders for ventilators).

9. In April 2020, the Israeli Supreme Court issued a Decision holding that the General Security Services will only be authorized to track the technological data of citizens when primary legislation is passed. Specifically, the Decision outlines that powers granted to the General Security Services under Section 7(b)(6) of 8398 Emergency Regulations, *Authorization of the General Security Services to Assist the National Effort to Reduce the Spread of the New Corona Virus*, as amended on 31 March 2020 to collect and process location data for the prevention of the spread of Covid-19 violated the right to privacy.

10. See, e.g., *COVID-19 Public Health Response (Air Border) Order (No 2) 2020*, PARLIAMENTARY COUNS. OFF., <https://legislation.govt.nz/regulation/public/2020/0239/latest/LMS403346.html> (N.Z.) (requiring, among other things, that any person arriving in New Zealand by air to “report for and undergo medical examination and testing for Covid-19, as soon as practicable after their arrival, at the airport at which they arrive.”).

11. See, e.g., The Assam COVID-19 Containment Regulations, 2020, *supra* note 6.

19 specific emergency regulation is layered atop the exercise of already expansive exceptional legal powers in many countries, creating a complex and opaque web of extraordinary law that is coterminous, connected, and mutually reinforcing. While national level analysis of the effects of Covid-19 emergency regulations are emerging,<sup>12</sup> the scale and effects of the pandemic itself limits our capacity to fully understand what the legal implications of exceptional law regulating movement, speech, assembly, political participation, and more will be across the globe.<sup>13</sup> Moreover, how exceptionality normalizes as the pandemic stays with us in the long term and perhaps indefinitely remains theoretically and practically under-explored. This Article seeks to break down and assess the nature and form of national regulatory responses to the Covid-19 pandemic and evaluate their compatibility with international human rights obligations of States. More broadly, the Article engages with the forms of exceptional legal practices we have seen emerge during this mammoth health crisis exploring the longer-term implications of the layers of exceptionality defining state practice since March 2020.

The practice of emergency is hardwired into international law as embodied by the derogation provisions of international human rights treaties.<sup>14</sup> Derogation permits states to limit the exercise of rights, for specific purposes and periods of time in order to regulate exceptional challenges.<sup>15</sup> Historically, the practice of emergency powers has been

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12. See Gwendoline Delbos-Corfield, *We Can't Fall for Viktor Orbán's Masquerade*, EURACTIV.COM (June 19, 2020), <https://www.euractiv.com/section/freedom-of-thought/opinion/we-cant-fall-for-viktor-orbans-masquerade> [<https://perma.cc/KVZ3-EJN2>]; Jocelyn Getgen Kestenbaum, *Coughing Into the Crowd: Bolsonaro's Botched COVID-19 Response*, JUST SEC. (May 1, 2020), <https://www.justsecurity.org/69960/coughing-into-the-crowd-bolsonaros-botched-covid-19-response> [<https://perma.cc/Y69J-P7BU>]; see also Gábor Halmai & Kim Lane Scheppelle, *Orban Is Still the Sole Judge of His Own Law*, VERFASSUNGSBLOG (Apr. 30, 2020), <https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law> [<https://perma.cc/SW9J-85V9>].

13. See Stephen Thomson & Eric C. Ip, *COVID-19 Emergency Measures and the Impending Authoritarian Pandemic*, 7(1) J.L. & BIOSCIENCE 1 (2020).

14. See International Covenant on Civil and Political Rights art. 4(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”); Convention for the Protection of Human Rights and Fundamental Freedoms, European Convention on Human Rights art. 15(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; American Convention on Human Rights art. 27(1), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

15. See generally Oren Gross, “Once More Unto the Breach”: *The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23

closely associated with security and public order, creating well-trodden normative and institutional pathways that privilege certain kinds of powers when responding to a crisis.<sup>16</sup> This hardwiring means that there are particular actors, institutions, and norms that become the “go-to” solutions for states experiencing an extended health emergency. Whether these norms, powers, and institutions are those best and most appropriate to manage the uniqueness of a health emergency with the burdens it imposes on affected individuals, communities, and society is an open question. It is also clear that the health emergency occasioned by the Covid-19 pandemic has in some cases, augmented existing emergency practices and formal derogation by states, creating a complex mosaic of emergency practices and making disentangling one kind of emergency from another difficult.

As emergencies have been part and parcel of the legal and political responses to Covid-19, obvious questions arise regarding the use and efficacy of such powers. First, are states in fact resorting to emergency powers to manage the pandemic? Second, are states formally derogating from their international human rights treaty obligations in parallel with the resort to domestic emergency powers? Third, what is the nature and form of emergency practice emerging during this pandemic? Finally, what are the long-term consequences of extensive, global responses across a range of regulatory areas for the integrity of legal and political systems? This preliminary assessment of global emergency practice in the context of the pandemic will broadly address these questions. To that end, Part I assesses the form and nature of emergency responses by States to the global pandemic. Part II establishes a broad typology on the use of emergency powers by States during the pandemic. In turn, Part III addresses the existing international human rights law framework for evaluating health emergencies. Here, I underscore the extent to which there are functional frameworks available to regulate and circumscribe the misuse of emergency powers, including those exercised under the mantle of a health pandemic. Finally, Part IV concludes by examining the limits of existing international oversight, ponders the fate of cumulative and expanded use of emergency powers during the pandemic and beyond, and addresses how best to sunset such powers once the pandemic and accompanying health emergency is under control.

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YALE J. INT'L L. 437 (1998); Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23(3) HUM. RTS. Q. 625 (2001).

16. GROSS & NÍ AOLÁIN, *supra* note 3.

## I. The Use of Emergency Powers by States During the Pandemic

Quantifying the use of emergency powers by States during the pandemic encounters several challenges, not the least of which is the lack of accurate and comprehensive global data on legal and political practices at national, federal, sub-regional, and city levels. One of the distinguishing features of pandemic regulation appears anecdotally to be how by both necessity and political convenience, there is a wide spectrum of regulation emerging. Thus, a narrow focus on national-level regulation (i.e., legislative and administrative activity of a country's central government) may be misleading, as sub-national, local, and regional responses may constitute the more impactful and legally significant set of emergency practices to document in the short, medium, and long-term.<sup>17</sup> This also leads to the obvious observation that it is the intersection of multiple layers of regulation—municipal, regional, and national—in any particular country that leads to the combined effects of multiple emergency powers and practices. Such integrated micro-level analysis is difficult not least because the data-collection and capacity required to produce it are not in place in most countries. Moreover, the burdens of infection rates and struggling health systems during the pandemic have limited the capacity to collect and analyze such data in most national settings. And the variable surges in infection have led to a fragmented application of emergency powers, making consistent tracking challenging. This leads to the additional observation that complex emergency practice is an inherent feature of response to this pandemic.<sup>18</sup>

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17. See, e.g., Caroline Pailliez, *Paris Bans Nighttime Food and Drink Delivery to Tackle Worsening COVID-19 Crisis*, REUTERS (Nov. 5, 2020), <https://www.reuters.com/article/idUSKBN27L0UK> [<https://perma.cc/LN5M-YYY6>]; see also C40 Cities Climate Leadership Group, “No Return to Business as Usual”: Mayors Pledge on COVID-19 Economic Recovery, C40 CITIES (May 7, 2020), [https://www.c40.org/press\\_releases/taskforce-principles](https://www.c40.org/press_releases/taskforce-principles) [<https://perma.cc/U7VF-LG6X>]. Compare President Trump’s Letter to America’s Governors, 2020 DAILY COMP. PRES. DOC. 735 (Sept. 28, 2020) (stating that the United States federal government would “be providing additional rapid point-of-care tests to continue to enhance [the] Nation’s [COVID-19] testing system” and “continue to collaborate with States in [the] battle to defeat the [novel corona]virus . . . .”), with U.S. DEP’T OF HEALTH & HUMAN SERVICES, REPORT TO CONGRESS: COVID-19 STRATEGIC TESTING PLAN 18 (May 24, 2020), <https://www.hsdl.org/?view&did=838624> [<https://perma.cc/W6JD-BKW2>] (“State plans must establish a robust testing program that ensures adequacy of COVID-19 testing, including tests for contact tracing, and surveillance of asymptomatic persons to determine community spread.”).

18. See generally JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992); GROSS & NÍ AOLÁIN, *supra* note 3, at 315–18.

Based on preliminary assessments from the Covid-19 Civic Freedom tracker,<sup>19</sup> which was established to track the impingements on certain human rights from the use of emergency powers during the pandemic, 112 countries have declared emergencies under domestic law. Here I distinguish between the practice of States in domestically declaring, as a legal or political matter, that they are experiencing an emergency and limiting the exercise of rights under domestic law, and a formal declaration of emergency under international law which would necessitate a derogation from the State's international treaty obligations, requiring a notification to either regional human rights treaty bodies or the Secretary-General of the United Nations if derogating from the International Covenant on Civil and Political Rights.<sup>20</sup> These formally declared (generally) internal emergencies offer only one lens on the practice of emergencies domestically, given that prior *de facto* and complex emergency practices co-exist with these 'new' sanitary or health-related emergency laws in multiple national settings.<sup>21</sup> As noted above, this underscores that there is no necessary relationship between the formal declaration and use of emergency powers under national law and the practice of State derogation from their international human rights treaty obligations.<sup>22</sup>

As outlined elsewhere, the robustness of derogation as a safeguard against the misuse of exceptional powers by states has been questionable, and that skepticism holds true with regards to this pandemic.<sup>23</sup>

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19. See *COVID-19 Civic Freedom Tracker*, ICNL, <https://www.icnl.org/covid19tracker> [<https://perma.cc/9AG4-B2DL>] (this civic freedom tracker was developed by the International Center for Not-for-Profit Law and the European Center for Not-for-Profit Law with support from the mandate of the Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism).

20. Human Rights Comm., Statement on Derogations From the Covenant in Connection With the Covid-19 Pandemic, U.N. Doc. CCPR/C/128/2 (April 30, 2020).

21. INT'L COMM'N OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS 413 (1983), <https://www.icj.org/wp-content/uploads/1983/01/states-of-emergency-thematic-report-1983-eng.pdf> [<https://perma.cc/SUX8-UD76>].

22. Cf. Alan Greene, *States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic*, STRASBOURG OBSERVERS (Apr. 1, 2020), <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic> [<https://perma.cc/N865-ZAPQ>].

23. See Fionnuala Ní Aoláin, (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism on the Human Rights Challenge of States of Emergency in the Context of Countering Terrorism*, ¶¶ 6, 26–27, U.N. Doc. A/HRC/37/52 (Mar. 1, 2018); see also Fionnuala Ní Aoláin, *The Cloak and Dagger Game of Derogation*, in HUMAN RIGHTS IN EMERGENCIES 124 (Evan J. Criddle ed., 2016).

States still appear to derogate inconsistently. They remain reluctant to signal to other States that they are experiencing challenges sufficient to limit rights protection and invite treaty and international human rights oversight. Nonetheless, there is a substantive debate emerging about the use and value of derogation in the context of the pandemic.<sup>24</sup> I take the view that this debate is a deflection from more substantive questions, including how the pandemic is (re)shaping the practice of emergency powers around the globe and how well suited our existing international mechanisms may be to provide procedurally sufficient and substantively robust oversight of these fast-moving changes. It is to this critical matter of the shape and form of emergency practice that I now turn. I offer a four-pronged typology of the emergency powers practice that appears to be coalescing globally.

## II. A Typology of Emergency Powers in a Time of Pandemic

Setting out a typology comes with some caveats, not least that a typology suggests a rigidity to the categorization of state practice which does not fully comport with the fragmentation and blurriness of practice on the ground. It might also suggest that the categories operate as silos, whereas it is mostly the case that these forms of emergency practice overlap and have considerable interaction with one another. In this interactive view, different kinds of emergency practice are constitutive of the others and function to enable, extend, and entrench one another. Thus, in setting out a scheme of state emergency practice, I underscore the importance of viewing these categories as interrelated and, in some respects, interdependent, to avoid an overly formalistic and traditionalistic interpretation of them. We should, rather, view these emergency types as regimes that intersect and are ultimately dedicated “to serving the interests of power.”<sup>25</sup>

### A. The Formal Exercise of Emergency Powers

The first category is the formal, ‘traditional’ exercise of emergency powers by States. This involves the formal invocation of emergency powers by the governing authority, whether enabled by constitutional means or within the scope of executive and parliamentary powers.

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24. Kanstantsin Dzehtsiarou, *Article 15 Derogations: Are They Really Necessary During the COVID-19 Pandemic?*, EUR. HUM. RTS. L. REV. 359 (2020) (arguing that health emergencies are substantively different from military emergencies, that the human rights provisions of the ECHR have a “natural quarantining effect”, and that derogations are unable to significantly change the Court’s approach to human rights during the pandemic).

25. Martti Koskeniemi, *Miserable Comforters: International Relations as New Natural Law*, 15(3) EUR. J. INT’L REL. 395, 395 (2009).

Formal emergency declarations frequently include the passage of specifically entitled emergency legislation.<sup>26</sup> Traditionally, emergency powers have had a profound association with the exercise of security, policing, and war powers.<sup>27</sup> This means that State familiarity with the exercise of emergency powers has well-trodden pathways and entrenched institutional memory in the realm of securitization and the empowerment of particular agencies and actors within the state to regulate the ‘emergency’ at hand. The use of traditional emergency powers is generally possible and permissible for a health emergency meeting the established criteria of exceptionality and challenge for the State. That noted, there are obvious weaknesses from a rule of law perspective in emergency power use, and particular vulnerability for human rights and the rule of law when powers that have generally been exercised to confront war, internal armed conflict, insurgency, terrorism, or serious public disorder are exercised to confront the challenges of a health emergency.

Specific emergency health legislation is emerging in many countries with the titles of “Coronavirus,” “Sanitary,” or “Health” appearing in the title of legislation to clearly signal the relationship of the measures taken to the current pandemic.<sup>28</sup> In Ireland, one part of the Covid-19 regulatory package included criminal justice provisions which specifically mentioned “Covid-19” in their statutory title. The legislation directly addressed the number of persons who could gather in a private home, allowed for inspection of entertainment premises without warrant, and closure of premises by the police service.<sup>29</sup> Despite the breadth of the Irish Covid-19 related legislation and its impact on a range of human rights, no formal derogation was submitted to international treaty bodies, and the extent to which each rights-limiting measure taken was both proportionate and necessary has been the subject of vigorous debate.<sup>30</sup>

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26. See, e.g., Coronavirus Act 2020 c. 7 (Eng.).

27. GROSS & NÍ AOLÁIN, *supra* note 3.

28. See e.g., The Criminal Justice (Enforcement Powers) (Covid-19) 2020 (Act No. 14/2020) (Ir.), [https://www.justice.ie/en/JELR/Criminal%20Justice%20\(Enforcement%20Powers\)%20\(Covid-19\)%20Act%202020.pdf/Files/Criminal%20Justice%20\(Enforcement%20Powers\)%20\(Covid-19\)%20Act%202020.pdf](https://www.justice.ie/en/JELR/Criminal%20Justice%20(Enforcement%20Powers)%20(Covid-19)%20Act%202020.pdf/Files/Criminal%20Justice%20(Enforcement%20Powers)%20(Covid-19)%20Act%202020.pdf) [<https://perma.cc/2BZC-4PSY>] (setting out powers for the Gardai (police) to regulate restaurants and bars that fail to adhere to health regulations and the Health Act (1947) (Section 31A – Temporary Restrictions) (Covid-19)(No 4) Regulations 2020 regulating the size of gatherings in private dwellings, creating a civil offence of non-compliance if a breach of the regulations is identified).

29. THE IRISH COUNCIL FOR CIVIL LIBERTIES, ICCL ANALYSIS OF THE RENEWAL OF EMERGENCY COVID-19 POWERS (2021), <https://www.iccl.ie/wp-content/uploads/2021/05/ICCL-analysis-of-renewal-of-emergency-powers-.pdf> [<https://perma.cc/E5TV-GZAK>].

30. Eoin Carolan & Ailbhe O’Neill, *Ireland: Legal Response to Covid-19*, in THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octávio

In some countries, existing health law legislation has been modified to augment the regulatory powers of the state to quarantine, requisition, or place restrictions on persons to contain the spread of the virus.<sup>31</sup> Where these changes are clearly signaled as ‘emergency’ powers with exceptional effects, this typology would view them as consistent with the exercise of ‘classic’ emergency powers. Following domestic dispositions of emergency, a much smaller number of States (including Albania, Estonia, and Latvia) have declared and notified their emergency powers to human rights treaty bodies and taken measures derogating from regional or global treaties on a range of fundamental rights.<sup>32</sup>

The exercise of emergency powers is also taking place in federal systems at multiple levels. Even where health may be a delegated function under a federal division of powers, residual emergency powers at the federal center of government will intersect with the exercise of states’ powers during the pandemic. Australia has a triparted division of government among its Commonwealth Government, the State and Territory governments, and local councils, with obvious consequences for the exercise of emergency powers across these three levels.<sup>33</sup> Pursuant to the division of powers that operates under Australia’s federal system, public health powers are held primarily by the States and Territories. Thus, each State has public health legislation containing provisions related to public health, as well as public emergencies related to health.<sup>34</sup> State-level health emergency powers also intersect with emergency management legislation that is commonly broad ranging and applied in conjunction with, or alongside, public health emergency powers. Thus, at the State/Territory level, the *Public Health and*

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Ferraz eds., 2021).

31. See, e.g., Canada The Constitution Act (1867/1982) with the power to quarantine, with the Quarantine Act (2005).

32. See *Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005)*, COUNCIL OF EUR., <https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=005&codeNature=0> [<https://perma.cc/GD3Y-TNC9>] (showing that the following countries have derogated from the corresponding articles under the ECHR: Albania (arts. 8, 11, and 15); Estonia (arts. 5, 6, 8, 11, and 15); Georgia (arts. 5, 6, 8, 11, and 15); Latvia (arts. 11 and 15); North Macedonia (arts. 8, 11, and 15); Romania (art. 15); San Marino (art. 15); and Serbia (arts. 5, 6, and 57)).

33. *Australian Constitution* chs. I–III.

34. Legislation for Covid-19 is thus found by State and Territory: Victoria (Public Health and Wellbeing Act 2008); New South Wales (Public Health Act 2010); Queensland (Public Health Act 2005); South Australia (South Australian Public Health Act 2011); Western Australia (Public Health Act 2016); Tasmania (Public Health Act 1997); Northern Territory (Public and Environment Health Act 2011); and Australian Capital Territory (Public Health Act 1997).

*Wellbeing Act 2008* was used to declare a state of emergency in Victoria with respect to the Covid-19 pandemic.<sup>35</sup> But, while the emergency response is primarily State and Territory driven, at the Commonwealth level the Governor-General, exercising power in the Biosecurity Act 2015<sup>36</sup> and acting on the advice of the Commonwealth Health Minister, declared that a human biosecurity emergency existed in Australia in relation to Covid-19.<sup>37</sup> Here we see another layer of intersection and overlap between emergency powers being exercised at the sub-State (federal) level with those being exercised by the central government.

In terms of measures taken by UN Member States, the Covid-19 Freedom Tracker has identified 62 countries that have measures affecting freedom of expression, 156 that have measures affecting freedom of assembly, and 61 that have measures touching on privacy.<sup>38</sup> I will return to assess the adequacy, significance, implications, and oversight of formal derogation to international treaty bodies below. Given the global scale of the pandemic, it is obvious that the absolute number of state formal derogation to treaty bodies is low relative to the scale of measures taken.<sup>39</sup>

## B. De Facto Emergency Powers in Response to Covid-19

Next, multiple States have regulated extensively but have not declared a formal emergency or utilized the rhetoric of classic emergency powers to stake out their regulatory responses. This category of *de facto* emergency powers is broad and harder to enumerate than the identification and consequence of classic, publicly proclaimed emergency powers.<sup>40</sup> Joan Fitzpatrick has defined the *de facto* emergency as a time “during which rights are suspended without proclamation or notification, or suspension of rights is continued after termination of a formal emergency”.<sup>41</sup> It can include the use of regular legislative power to address the pandemic and is marked in some States by the passage

35. Minister for Health (Vic.), Declaration of a State of Emergency Under Section 198 of the Public Health and Wellbeing Act 2008 (Mar. 16, 2020), at 1, <http://www.gazette.vic.gov.au/gazette/Gazettes2020/GG2020S129.pdf> [<https://perma.cc/BQZ6-8DCM>] (the effect of declaring the state of emergency is that it allows emergency powers articulated in the Public Health and Wellbeing Act 2008 to be exercised by authorized officials).

36. *Biosecurity Act 2015* (Cth) s 475 (Austl.) (providing that the Governor-General may declare that a human biosecurity emergency exists).

37. Governor-General, Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 (Mar. 18, 2020), at 1, <https://www.legislation.gov.au/Details/F2020L00266> [<https://perma.cc/4XP2-KKYZ>].

38. *COVID-19 Civic Freedom Tracker*, *supra* note 19.

39. *See id.*

40. GROSS & NÍ AOLÁIN, *supra* note 3 (discussing de facto emergencies).

41. JOAN M. FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY 21–22 (1994).

of additional (exceptional) health legislation to respond to a health crisis.<sup>42</sup> The exceptionality is defined by the significant regulatory effect of legislative or administrative practice on the exercise of fundamental rights. The key point here is that such legislation is not deemed to be ‘emergency’ in nature, presented instead as ‘ordinary’ in nature and effect, even if on close examination the powers enabled are exceptional by virtue of their rights-limiting effects.

Such normalized exceptionality can involve the use of police and military powers through legislation that focuses on public safety and public order. It may involve the expansion, repurposing, or public order provision enabling stop and search powers in addition to border control and immigration law restrictions.<sup>43</sup> It is only on close inspection of legislative enactments that the full scope of powers across a range of regulatory arenas are fully revealed, as well as the exceptional nature of what appears to be ‘ordinary’ law. Thus, classic signaling of ‘crisis’ power accumulation is occluded by the placement of policing, intelligence, and administration power in regulatory forms that appear neutral and constrained.

But the very fact that policing, intelligence, and administrative measures appear in health regulation should be a clear signal of the exceptional nature of the regulation in play. Here, *de facto* emergency practice is found in the extensive resort to the use of administrative regulation at a multilevel application that adapts existing and sometimes underutilized powers of the State in the health and safety arena.<sup>44</sup> One of the challenges of assessing the scope and scale of *de facto* emergency power use lies in the nebulous array of powers and capacities available to States, as well as the intersection of formally declared emergencies with the parallel use of administrative and regular legislative enactments in a range of areas.

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42. See, e.g., *COVID-19 Public Health Response (Air Border) Order (No 2) 2020*, *supra* note 10 (requiring, among other things, that any person arriving in New Zealand by air to “report for and undergo medical examination and testing for COVID-19, as soon as practicable after their arrival, at the airport at which they arrive.”).

43. South Sudan’s Covid-19 response has been led by a High-Level Taskforce chaired by the President and deputized by First Vice President Dr Riek Machar. The taskforce includes national security services, the Ministry of Interior and the defence forces, the role of which is to enforce measures adopted by the taskforce including controlling borders and enforcing compliance with testing and contact tracing. SEAN MOLLOY, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *EMERGENCY LAW RESPONSES TO COVID-19 AND THE IMPACT ON PEACE AND TRANSITION PROCESSES* 21 (2021).

44. Connor Raso, *Emergency Rulemaking in Response to COVID-19*, BROOKINGS INST. (Aug. 20, 2020), <https://brook.gs/2QdXP1c> [<https://perma.cc/TMU9-R5C2>].

### C. Exceptional Executive Powers in a Time of Pandemic

A third layer of emergency practice is evidenced in the expanded use of executive powers enabled by the pandemic in multiple States. In several high-profile country contexts, the pandemic has provided an opportunity for authoritarian figures to consolidate their own political power, limit the exercise of parliamentary and other oversight, and get ‘other business’ done under the pretext of Covid-19.<sup>45</sup>

The consolidation of executive power through the pandemic has strong historical analogies,<sup>46</sup> and underscores the centralizing impulse of crisis management. That centralizing compulsion has positive and negative dimensions. The scale, unexpectedness, and restraint imposed by an airborne and aggressive virus have meant that in some countries that the capacity to convene legislators, engage in protracted debate, or allow for consultation and participation in law-making, has been attenuated. In contrast, the pandemic has illustrated the ingenuity of democratic processes to function even in extremis.<sup>47</sup> For other States, the pandemic has perpetuated existing trends of executive power consolidation.<sup>48</sup> In Hungary, for example, the opportunity provided by the pandemic enabled an autocratic-leaning President to trigger further powers, ostensibly to respond to the crisis, but whose import was to strip

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45. Delbos-Corfield, *supra* note 12; Kestenbaum, *supra* note 12; Tom Ginsburg & Mila Versteeg, *Can Emergency Powers Go Too Far?*, TABLET (Apr. 7, 2020), <https://www.tabletmag.com/sections/news/articles/coronavirus-emergency-powers-constitutional-rights> [<https://perma.cc/HE7J-AS9F>].

46. GROSS & NÍ AOLÁIN, *supra* note 3, at 59–60 (discussing the consolidation of executive governance in the U.K. during the Second World War).

47. See H.R. 965, 116th Cong. (2020) (authorizing members of the U.S. House of Representatives to vote by proxy during the COVID-19 pandemic and setting processes for the designation of such proxies and their recognition); 116 Cong. Rec. H3965 (daily ed. July 29, 2020) (statement of Rep. Pelosi) (Speaker Pelosi announcing that all members of the U.S. House of Representatives and their staff must wear a mask while inside the House chamber unless recognized to speak); Andisiwe Makinana, *Zooming with MPs: Parliament to Hold its First Virtual Plenary Session*, SUNDAY TIMES (May 21, 2020), <https://www.timeslive.co.za/politics/2020-05-21-zooming-with-mps-parliament-to-hold-its-first-virtual-plenary-session> [<https://perma.cc/ZRN3-2YML>] (reporting that the South African National Assembly was scheduled to hold a meeting under “a hybrid model” with most MPs connecting virtually via Zoom); *UK Lawmakers Agree to ‘Hybrid Parliament’ Format*, REUTERS (Apr. 21, 2020), <https://www.reuters.com/article/idUSKCN2232E7> [<https://perma.cc/6AJ6-GJ5Y>] (reporting that the U.K. House of Commons would temporarily conduct meetings “with only a handful of lawmakers attending in person and more than 100 others joining virtually” in light of the COVID-19 pandemic).

48. Márta Pardavi & András Kádár, *Hungary Should Not Become Patient Zero*, JUST SEC. (Apr. 22, 2020), <https://www.justsecurity.org/69780/hungary-should-not-become-patient-zero/> [<https://perma.cc/R5JU-BU6Q>] (explaining the issues with Hungarian Prime Minister Viktor Orbán’s use of unilateral, emergency decrees since the beginning of the COVID-19 pandemic).

out any vestige of parliamentary oversight. This allowed the President, Victor Orban, the sole power to decide on the end of the emergency, and left a broad swathe of regulation at the dictate of the President alone.<sup>49</sup> The challenge, historically and now, is to unwind the accumulations of power that ferment and thrive in crisis, and operate to limit transparency, accountability, and participation in the political process.

#### D. Repurposing Counter-terrorism and Security Powers to the Regulation of the Pandemic

The fourth layer of emergency practice is the adaption of security and counter-terrorism powers and practices which were in place prior to the Covid-19 pandemic and are conveniently available to be repurposed to the health emergency at hand. There is no generic authorization for global emergencies, and such a process would significantly impinge on state sovereignty, whether in the context of security or widespread health emergency. State practice, however, is increasingly normalizing the use of exceptional counter-terrorism powers, often justified by the obligations to enforce Security Council Resolutions passed under Chapter VII of the United Nations Charter. The increased use and legitimacy of emergency powers driven by Covid-19 may exacerbate these trends further.

As I have set out elsewhere, many States have a vast arsenal of emergency powers already available to them based on claims of counter-terrorism necessity or security threat.<sup>50</sup> Domestic counter-terrorism legislation in many States is sufficiently broad that it enables the capacity for expansion with little or no intervening legal act required. Hence, a number of States functioning under an existing state of emergency (formal or de facto) have not needed to seek new or additional powers to address the Covid-19 pandemic.<sup>51</sup> Rather, the shrewd adaption of existing

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49. Secretary General, *Secretary General Writes to Viktor Orbán Regarding COVID-19 State of Emergency in Hungary*, COUNCIL OF EUR. (Mar. 24, 2020), <https://www.coe.int/en/web/portal/-/secretary-general-writes-to-victor-orban-regarding-covid-19-state-of-emergency-in-hungary> [<https://perma.cc/Y3FT-M8DE>].

50. Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders*, ¶¶ 45–7, U.N. Doc. A/HRC/40/52 (Mar. 1, 2019); see also *Comments on Legislation and Policy*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/EN/Issues/Terrorism/Pages/LegislationPolicy.aspx> [<https://perma.cc/96NT-QXU9>] (providing all comments provided by the mandate to States on national laws, regulations, and policies, including Egypt, France, Turkey, and the United Kingdom).

51. Cf. Sri Lanka Prevention of Terrorism Act No. 48 of 1979, amended by Acts No. 10 of 1982 and No. 22 of 1988; Egypt, Amendments to the Terrorist Entities Law (Law 8 of 2015) and the Anti-Terrorism Law, (Law 94 of 2015), approved by the Parliament’s Legislative Committee on 10 February 2020; effect and application of The Right to Public

(counter-terrorism/security) emergency powers to the pandemic has been sufficient to marshal the immediate needs of the State. This adaptive use raises a number of legal challenges, not least the appropriateness of using a range of powers created for use against terrorist groups and individuals to combat a pandemic where the most vulnerable and marginalized in society appear to be at greatest risk of harm and negative health consequences.<sup>52</sup> Notably, a number of States have seized the opportunity provided by the global pandemic to legislate exceptionally in the field of counter-terrorism and security.<sup>53</sup> The limits on parliamentary scrutiny as a result of Covid-19 restrictions has negatively influenced the kind of restraint one would expect to see if counter-terrorism and security powers were being directed to other uses in society. Moreover, the ways in which battling the pandemic takes the regulatory, journalistic, and critical gaze away from the augmentation of security capacity affirm that the crisis can serve to enable a range of nefarious agendas, including the consolidation of security spaces in exceptional times.

In another worrying move, global counter-terrorism institutions have offered themselves as key stakeholders in “fighting” the pandemic. In June 2020, the United Nations Counter-Terrorism Executive Directorate (CTED) launched a paper on the convergences between Covid-19 and counter-terrorism, setting out a long-term Covid-19 agenda for the UN Security Council’s Counter-Terrorism Committee,<sup>54</sup> with a follow-up brief in January 2021.<sup>55</sup> In July 2020, a virtual global

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Meetings, Processions and Peaceful Demonstrations Law No. 107/2013; the Law no.70/2017 on Associations and Other Foundations Working in the Field of Civil; and Law No. 149/2019; and Turkey Anti-Terror Law No. 3713 (“Anti-Terror Law”) and the amendments made to this law and the Penal Code through Law No. 7145, adopted on 31 July 2018.

52. See U.N. Network on Racial Discrimination and the Protection of Minorities, *Leave No One Behind: Racial Discrimination and the Protection of Minorities in the COVID-19 Crisis* (Apr. 29, 2020), [https://www.ohchr.org/Documents/Issues/Minorities/UN\\_Network\\_Racial\\_Discrimination\\_Minorities\\_COVID.pdf](https://www.ohchr.org/Documents/Issues/Minorities/UN_Network_Racial_Discrimination_Minorities_COVID.pdf) [<https://perma.cc/GBK6-PVYF>].

53. E.g., France law on security measures that may be ordered against perpetrators of terrorist offences amending Title xv of Book iv of the Code of Criminal Procedure (proposition de loi sur les « Mesures de sûreté pouvant être ordonnées à l’encontre des auteurs d’infractions terroristes » portant modification du titre xv du livre iv du code de procédure pénale.

54. U.N. SEC. COUNCIL COUNTER-TERRORISM COMM. EXEC. DIRECTORATE [CTED], UPDATE ON THE IMPACT OF THE COVID-19 PANDEMIC ON TERRORISM, COUNTER-TERRORISM AND COUNTERING VIOLENT EXTREMISM (June 2021), [https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Jun/cted\\_covid\\_paper\\_15june2021\\_1.pdf](https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Jun/cted_covid_paper_15june2021_1.pdf) [<https://perma.cc/E8AX-DG92>].

55. CTED, THE IMPACT OF THE COVID-19 PANDEMIC ON TERRORISM, COUNTER-TERRORISM AND COUNTERING VIOLENT EXTREMISM: UPDATE (Dec. 2021), [https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Dec/cted\\_covid19\\_paper\\_dec\\_2021.pdf](https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Dec/cted_covid19_paper_dec_2021.pdf) [<https://perma.cc/5VX5-H5GT>].

counter-terrorism conference was repurposed to address the interlinkages between counter-terrorism and Covid19,<sup>56</sup> offering a menu of options to States to use their counter-terrorism structures and capacities in response to the pandemic. Despite warning about the re-purposing of counter-terrorism tools to ‘manage’ the pandemic,<sup>57</sup> the attraction of repurposing security frameworks was palpable and remains undiminished. This includes the widespread use of data-tracking including, in some contexts, the most sensitive data (e.g., biometric health data) without any or sufficient protections on collection, storage, use, or transfer of such data. There was little apparent concern for the documented policing deficits of Covid-19 that have exacerbated discriminatory patterns of abuse in the use of force in communities of color and ethnic minority communities.<sup>58</sup> Epidemiological evidence across a number of countries already reveals that Covid-19 is causing disproportionate deaths among racialized minorities or other historically vulnerable groups.<sup>59</sup> Imagine then that the tools of the surveillance state and the use of force capacity of the state would be further mobilized against those communities who experience ongoing trust and harm deficits with the security sector. Much can be said about this strategy to adapt anti-terrorism regulations to pandemic conditions, but it is significant in so far as it further entrenches and normalizes exceptional and security powers which, in a number of countries have been the basis for widespread human rights and rule of law abuses.

As the United Nations counter-terrorism architecture rushed to embrace and support a security-based response to Covid-19, underlying

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56. 2020 *Virtual Counter-Terrorism Week*, U.N. OFF. OF COUNTER-TERRORISM, <https://www.un.org/counterterrorism/2020-counter-terrorism-week> [<https://perma.cc/54F8-G35F>].

57. Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Statement at Virtual Counter-Terrorism Week 2020: Webinar IV: Protecting and Promoting Human Rights as a Cornerstone of Building Resilience Against Terrorism* (July 9, 2020), [https://www.ohchr.org/Documents/Issues/Terrorism/SR/Remarks\\_SRCT\\_HR\\_Virtual\\_High\\_Level\\_Week\\_2020.pdf](https://www.ohchr.org/Documents/Issues/Terrorism/SR/Remarks_SRCT_HR_Virtual_High_Level_Week_2020.pdf) [<https://perma.cc/Y3LG-LALR>].

58. See, e.g., Maria Grazia Giammarinaro (Special Rapporteur on Trafficking in Persons, Especially Women and Children,) *COVID-19 Position Paper: The Impact and Consequences of the COVID-19 Pandemic on Trafficked and Exploited Persons* (June 8, 2020), <https://www.ohchr.org/Documents/Issues/Trafficking/COVID-19-Impact-trafficking.pdf> [<https://perma.cc/WQ89-2H4Z>]; United Nations Working Group of Experts on People of African Descent, *Statement on COVID-19: Racial Equity and Racial Equality Must Guide State Action* (Apr. 6, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=25768> [<https://perma.cc/Z4HA-JWXZ>].

59. Michelle Bachelet, UN High Commissioner for Human Rights, *Addressing the Disproportionate Impact of COVID-19 on Minority Ethnic Communities* (Nov.24,2020)<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26541&LangID=E> [<https://perma.cc/BHW8-U28C>].

issues of a lack of transparency, a human rights enforcement desert, and a lack of meaningful engagement with civil society or those affected by security measures, were being exported to the management of the health pandemic. The persistent marginalization of human rights concerns in the institutional counter-terrorism architecture, their side-lining in Security Council Resolutions regulating terrorism, and a lack of stand-alone oversight, underscores the challenges of ensuring State compliance with their international human rights obligations in the counter-terrorism governance arena.<sup>60</sup> In parallel, this context affirms the permissive framework within which domestic counter-terrorism responses are being activated, and the barriers to firmly obstructing domestic overreach.

This permissive global security framework may be further enabled by the scale, complexity and scope of emergency regulations being used by States to respond to the Covid-19 pandemic. Those responses have been characterized by a significant resort to exceptional legal powers and restrictions on a range of fundamental rights. This has underpinned a broader ascendancy of authoritarian and rights-suppressing practices by States *de facto* enabled by Covid-19. While the initial absence of a Security Council debate on the pandemic demonstrated increasing fragmentation, the July 2020 debate held under the German Presidency underscored the effects that the pandemic was having on “peace and security,”<sup>61</sup> and urged States to engage cooperatively to address these threats. It seems that many States will interpret that signal to use all of their available security tools, including but not limited to emergency powers to respond, thereby creating a new legitimacy and embedding of the exceptional in the ordinary law. These affirmations of exceptional tools and practices are even more problematic for the rule of law as the pandemic settles in for the long-haul and a new normal of a peculiar health crisis sustains across the globe.

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60. Ben Emmerson (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 17–20, U.N. Doc. A/HRC/34/61 (Feb. 21, 2017) (describing how the Office of the Ombudsperson, as limited to the Da’esh and Al-Qaida list, was established by the Security Council in part to address specific human rights and rule of law shortcomings; however, the Special Rapporteur observed that the process for listing remains “unnecessarily opaque and access to information problematic”).

61. *COVID-19 Fast Becoming Protection Crisis, Guterres Warns Security Council*, UN NEWS (July 2, 2020), <https://news.un.org/en/story/2020/07/1067632> [<https://perma.cc/CPH4-BFT4>].

### III. Health Emergencies and International Law

As Part I notes, international human rights law makes specific provisions for the regulation of emergencies using derogation provisions. Derogation provisions are found in the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the American Convention on Human Rights (ACHR), although the formulation of derogation varies between these treaties.<sup>62</sup> All three treaties allow for derogation in the context of a health emergency.<sup>63</sup> The right to health is a key right protected in a range of human rights instruments and is related to other rights including the right to life and the right to be free from torture such as inhuman and degrading treatment.<sup>64</sup>

In the past two decades, there has been a distinct decline in the resort to derogation notification and proclamation by States. As I have

62. ICCPR, *supra* note 14, art. 4; ECHR, *supra* note 14, art. 15; ACHR, *supra* note 14, art. 27.

63. ICCPR, *supra* note 14, art. 4(1) (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”); ECHR, *supra* note 14, art. 15(1) (“In 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 this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”); ACHR, *supra* note 14, art. 27(1) (“In 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 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.”).

64. U.N. Charter art. 55(b) (1945) (addressing international cooperation, including with respect to health); G.A. Res. 217(III)A, Universal Declaration of Human Rights art. 25(1) (1948) (“Everyone has the right to a standard of living adequate for the health of himself and his family, including food, clothing, housing and medical care, and necessary social services . . . .”); International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (“The States Parties . . . recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”; which requires the “prevention, treatment and control of epidemic, endemic, occupational and other diseases.”); Comm. on Econ., Soc. & Cultural Rts. (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), ¶ 16, U.N. Doc. No. E/C.12/2000/4 (Aug. 11, 2000) (stating “[t]he right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations.”). See generally Caroline Sell, *Ebola and Emerging Infectious Diseases in Armed Conflict: Contemporary Challenges in Global Health Security Laws and Policies*, 29 MINN. J. INT’L L. 187 (2020).

explored in other writing, the reasons for this shift are multifaceted.<sup>65</sup> They include the increased normalization of emergency powers into ordinary law as well as governments' wariness about the adverse signals garnered by proclaiming to the international community that they are experiencing an internal crisis. In parallel, more countries engage in a cost-benefit analysis of the value of being flagged for additional scrutiny from the United Nations and regional treaty-based emergency oversight systems. It is also clear that a lack of collective will to hold governments accountable and impose costs when they fail to notify treaty bodies that they are experiencing a state of emergency, makes the requirement to notify derogation much less stringent in practice. Despite this recent history, there has been some uptick in notice of state derogation to international human rights treaties in response to the Covid-19 pandemic. The Office of the High Commission for Human Rights affirms that multiple States are currently in derogation of their human rights treaty obligations, formally based on the Covid-19 pandemic.<sup>66</sup>

Further, the resort to derogation based on a health emergency is not intrinsically new. In the past, where health emergencies occasioned derogation, the use of exceptional powers were generally textbook cases of the optimal operation of the derogation regime. To wit, exceptional powers were narrow (e.g., restrictions on movement). Their use was generally proportionate and non-discriminatory, and when the health emergency receded the use of such powers ended. For example, in 2008, Georgia availed itself of the right of derogation from Article 1 Protocol 1 of the European Convention on Human Rights (right of property), and Article 2 (freedom of movement) of Protocol 4 on the basis of a public health emergency occasioned H5N1 (bird flu) in the Khelvachauri district.<sup>67</sup> The derogation ended speedily and in parallel with the demise of the health challenges.

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65. Ní Aoláin, *supra* note 23, ¶ 27 (“[M]any States no longer formally derogate from their human rights treaty obligations — even in contexts where their actions reflect de facto suspensions of derogable and non-derogable rights. Such non-derogation occurs notwithstanding the extensive use of exceptional national security or emergency powers. . . .”); see also Laurence R. Helfer, *Rethinking Derogations From Human Rights Treaties*, 115 AM. J. INT’L L. 20, 20 (2021).

66. *COVID-19 and Human Rights Treaty Bodies*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (2021), <https://www.ohchr.org/EN/HRBodies/Pages/COVID-19-and-TreatyBodies.aspx> [<https://perma.cc/LXB7-HPFS>]; see also Niall Coghlan, *Dissecting Covid-19 Derogations*, VERFASSUNGSBLOG (May 5, 2020), <https://verfassungsblog.de/dissecting-covid-19-derogations> [<https://perma.cc/GM7J-2S77>]; *Database Phase 2 (1995–2015)*, STATE OF EMERGENCY MAPPING PROJECT (STEMP), <http://emergencymapping.org/database2.html> [<https://perma.cc/4SCZ-BNJG>]; ICCPR, *supra* note 14; ECHR, *supra* note 14, at reservations and declarations page.

67. Withdrawn on March 23, 2006.

Other health crises—including the bovine spongiform encephalopathy (“mad cow disease”) outbreak during 2001 to 2002 in Western Europe which prompted limitations on the transfer of goods across borders and were primarily focused on commercial rather than individual freedoms, —did not engage long-term and widespread regulatory actions.<sup>68</sup> Prior emergency practice in health contexts (e.g., in respect of H5N1, Ebola, Zika, SARS) have been regional or country-specific and even when national restrictions were considerable,<sup>69</sup> emergency health powers appear to be constrained in ways that did not raise fears about widespread misuse or rule of law deficits that appear synonymous with this pandemic. There are some obvious caveats here, for example, when during the Ebola crisis West African governments made considerable use of quarantine powers, both public health and legal practitioners identified abuses that were not always addressed by affected governments.<sup>70</sup>

Despite these prior specifics, the resort to exceptional regulation in health emergencies has been under-practiced. A broad understanding of the global, regional, and national dangers of infectious diseases has been lacking,<sup>71</sup> and the security dimensions of public health have lacked consistent attention from policymakers and governments.<sup>72</sup> In parallel, a striking regulatory gap is that global health policies—such as the International Health Regulations—do not address “legal standards

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68. Cf. National measures in response to Mad Cow, specifically French, British, and Irish measures.

69. WORLD HEALTH ORG. [WHO], MANAGING EPIDEMICS: KEY FACTS ABOUT MAJOR DEADLY DISEASES 15 (2018); *Statement on the October 2018 Meeting of the IHR Emergency Committee on the Ebola Virus Disease Outbreak in the Democratic Republic of the Congo*, WHO (Oct. 17, 2018), <https://www.who.int/news-room/detail/17-10-2018-statement-on-the-meeting-of-the-ih-er-emergency-committee-on-the-ebola-outbreak-in-drc> [<https://perma.cc/NYP6-5EB5>]; see also Alison Agnew, *A Combative Disease: The Ebola Epidemic in International Law*, 39 B.C. INT’L & COMPAR. L. REV. 97, 128 (2016) (noting that the Security Council declared Ebola a threat to peace and security).

70. Andra Le Roux-Kemp, *International and Operational Responses to Disease Control: Beyond Ebola and Epistemological Confines*, 15 IND. HEALTH L. REV. 247, 282, 284 (2018).

71. See WORLD HEALTH ORG. [WHO], THE WORLD HEALTH REPORT 2007: A SAFER FUTURE: GLOBAL PUBLIC HEALTH SECURITY IN THE 21ST CENTURY 12 (2007) (demonstrating that the WHO has consistently raised these issues).

72. See DAVID P. FIDLER, INTERNATIONAL LAW AND PUBLIC HEALTH: MATERIALS ON AND ANALYSIS OF GLOBAL HEALTH JURISPRUDENCE 127 (2000) (explaining that the global crisis in infectious disease is not new, and in 1996 the WHO DG argued that the world stands “on the brink of a global crisis in infectious diseases. No country is safe from them. No country can any longer afford to ignore their threat . . . Infectious diseases are attacking us on multiple fronts. Together they represent the world’s leading cause of premature death. At least 17 million people were killed by them last year, including 9 million young children who die from such preventable causes as diarrhea and pneumonia. Millions more were disabled even though effective measures to prevent them were available.”).

and fair processes necessary for isolation, quarantine, and other compulsory measures<sup>73</sup>,<sup>73</sup> leaving the gaps most likely to be addressed by the international human rights oversight bodies and systems. Moreover, international law engagement and human rights treaty oversight of State management of infectious diseases has been attenuated, meaning that the catch-up in the context of a global pandemic is now considerable.<sup>74</sup> For example, while global health practitioners have been developing a language and practice of global public health security, including updating International Health Regulations to the challenges of epidemics and pandemics,<sup>75</sup> this language is almost entirely absent from the human rights regimes.<sup>76</sup> The need for gaps to be filled is now evident in policy conversations to jump-start negotiations on a pandemic treaty addressing the need for better pandemic preparedness and seeking to deepen a global political consensus on collective responses to infectious disease outbreaks.<sup>77</sup>

These observations about the interface of derogation, emergency powers, and health crisis underscore the following. First, there is sizeable jurisprudential and fact-finding work ahead for human rights treaty bodies faced with derogations based on the health pandemic, and a sizeable oversight gap in the meantime. Second, prior derogation practice premised on health emergencies offers limited guidance to States on how best to regulate their use of health emergency powers with their international human rights obligations. Third, derogation oversight alone is a necessary but insufficient means to address the challenges of emergency oversight in the time of a pandemic. The long-term consequences for the rule of law, democracy, and human rights from the complex exercise of the typology of powers identified in this area have yet to be fully understood and regulated.

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73. Lawrence O. Gostin, *International Infectious Disease Law: Revision of the World Health Organization's International Health Regulations*, 291 JAMA 2623, 2626 (2004).

74. See generally DAVID P. FIDLER, *INTERNATIONAL LAW AND INFECTIOUS DISEASES* (1999).

75. David P. Fidler & Lawrence O. Gostin, *The New International Health Regulations: An Historic Development for International Law and Public Health*, 34 J.L., MED. & ETHICS 85, 86 (2006).

76. THÉRÈSE MURPHY, *HEALTH AND HUMAN RIGHTS* 58–59 (2013); WHO, *supra* note 71, at 1 (defining public health security as “the activities required, both proactive and reactive, to minimize vulnerability to acute public health events that endanger the collective health of national populations.”).

77. *An International Treaty on Pandemic Prevention and Preparedness*, COUNCIL OF THE E.U. (Dec. 6, 2021), [https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/# \[https://perma.cc/JU65-7RJP\]](https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/# [https://perma.cc/JU65-7RJP]).

#### **IV. What would meaningful emergency oversight look like in a time of health crisis?**

The focus on emergency powers and the sustained use of exceptional powers has long-term consequences for the integrity of legal and political systems. A key question is the extent to which this health emergency can be overseen by the traditional legal and political tools available nationally and internationally. I start with the incontestable affirmation that the pandemic constitutes a challenge that is an emergency on its face. It affects the life of each nation,<sup>78</sup> almost without exception, and its scope and impact threaten the right to life of a significant number of persons and more specifically affects the capacity of health systems to respond to the multitude of health demands placed by on them by the complexity, and scale of the virus' effects on the human body.

But, a health or sanitary emergency is precisely that, an emergency that threatens health and health systems, so the general rules that apply to emergencies as developed in the jurisprudence of international courts and interpretative bodies namely, necessity, proportionality, and non-discrimination are the starting points from which we measure the adequacy and legality of the State's response.<sup>79</sup> The pandemic has moved through differing phases and extremities, and these legal tests have to show their inherent flexibility and relevance by being directly calibrated to the challenge of the pandemic at any given moment in time. Such adjustments include new coronavirus variants, seasonal adjustments, vaccine availability, booster shots, and new clinical management procedures that offset the impact of the virus on individuals who contract the virus. These regulatory and judicial tests that were developed both in the application of limitation and derogation provisions have also never been static, but always required constant adjustment and reevaluation to the exigencies of the crisis or normalcy at hand and constitute our best means to calibrate emergency responses to the pandemic.

Simply put, the emergency measures taken to respond to the health emergency must always have a direct and specific relationship with the protection of health. Measures that reach beyond health and

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78. See ICCPR, *supra* note 14, at art. 4(1) ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed . . .").

79. Hum Rts. Comm., *Statement on Derogations From the Covenant in Connection with the COVID-19 Pandemic*, ¶¶ 1–2(a), U.N. Doc. CCPR/C/128/2 (Apr. 30, 2020) ("In particular, States parties must observe the following requirements and conditions when exercising emergency powers in connection with the COVID-19 pandemic: [] Where measures derogating from the obligations of States parties under the Covenant are taken, the provisions derogated from and the reasons for the derogation must be communicated immediately to the other States parties through the Secretary-General.").

seek to accumulate the power of the State to engage in other regulatory matters are not necessary to the protection of health and illustrate overreach by the State in scope of powers accumulated. Thus, where Covid-19 has been used by governments to regulate matters that failed to have a direct and distinct relationship with the protection of health, it fails the necessity test well-established in emergency jurisprudence.<sup>80</sup>

Equally, measures taken in response to any emergency must be proportionate.<sup>81</sup> Proportionality in the exercise of emergency powers is not always a straightforward measurement given that the assessment is not an idealized and backward-looking exercise, but rather an evaluation in the context of challenging and suboptimal policy-making by governments often under the stress of time, political uncertainty, and incomplete information. Here, a proportional response requires that there is a meaningful relationship between the measure taken and the harm being addressed and that there is a quality of balance in response. The measures taken would not have a greater adverse effect than the harm being averted.

Discriminatory effect is often the most obvious area to discern a lack of compliance to international human rights standards in the regulatory responses of States to an identified emergency. Here, when emergency measures are pinpointed or directed at particular groups and individuals, that may be marginalized or vulnerable in identifiable ways (gender, sexual orientation, age, disability, and/ or socio-economic status) there is both a disparate effect and a negative consequence of emergency regulation, which does not serve the ends enabling the emergency power, namely protecting the life and health of those at risk.<sup>82</sup>

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80. *Id.* ¶ 2(b) (“Derogating measures may deviate from the obligations set out by the Covenant only to the extent strictly required by the exigencies of the public health situation. Derogations must, as far as possible, be limited in duration, geographical coverage and material scope, and any measures taken, including sanctions imposed in connection with them, must be proportional in nature.”). For example, the declaration of Emergency on January 12<sup>th</sup>, 2021, in Malaysia to suspend Parliament and State legislatures while invoking Covid-19 appears to have little to do with the health emergency and more to do with the maintenance of power by the PM.

81. GROSS & NÍ AOLÁIN, *supra* note 3, at 261–63; U.N. Comm’n on Hum. Rts., *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, ¶ 10(d), U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984).

82. Some litigation is already emerging at national level to address the disproportionate, discriminatory and/or unnecessary use of emergency restrictions to manage the pandemic. On March 26, 2020, and September 11, 2020, the Constitutional Chamber of the Supreme Court of El Salvador ruled in favor of habeas corpus cases 148 and 149 of 2020, respectively, presented by legal representatives of inhabitants of the Republic of El Salvador captured and held in custody in police precincts as of March 22, 2020, for alleged violations of the national quarantine enforced by the Executive Branch vis a vis the National Civilian Police and the Salvadoran Armed Forces. 148-2020. Las

In numerous countries, it has become clear that the burden in death and extremity of harm from the virus is being experienced by highly vulnerable populations, whose vulnerability is produced from pre-existing conditions of poverty, structural discrimination, food insecurity, limited access to health systems, and a lack of access to clean water.<sup>83</sup> Here the management of the pandemic by certain countries has further exacerbated the marginality and exposure of certain groups, including, for example, decisions to return large groups of migrant workers from cities with the potential to manage the pandemic to rural areas without such an infrastructure.<sup>84</sup>

Derogation, as a practice among States, has been waning. This failure to derogate is a serious and emerging practice that must be addressed in order to ensure some meaningful legal oversight of emergency powers and to limit adverse and unwarranted human rights violations under cover of “emergency.” This trend also appears to be holding in respect of derogation based on the Covid-19 health/sanitary emergency. Data suggest that approximately 30 countries (at time of writing) have formally entered derogations in respect of measures taken to respond to the health crisis, notwithstanding extensive restrictions on freedom of movement, assembly, and association connected to the pandemic in every country in the world.<sup>85</sup> But data on Covid-19 related derogations are not easily accessible, nor is the specificity of the health emergency easily discernable from the ways in which derogation

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señoras *EA, LA* y “*de una tercera persona que se encuentra en la subdelegación policial de Jiquilisco, capturada y detenida bajo similares circunstancias que las ya citadas*” vrs. Jefe de la Subdelegación de la Policía Nacional Civil de Jiquilisco y Presidente de la República; 149-2020. La señora *SNVG* vrs. Presidente de *ANDA*.

83. U.N. Hun. Rts. Off. of the High Comm’r, *COVID-19 and Its Human Rights Dimensions*, <https://www.ohchr.org/EN/NewsEvents/Pages/COVID-19.aspx> [<https://perma.cc/NX7A-PB7N>].

84. See The Assam COVID-19 Containment Regulations, 2020, *supra* note 6 (ordering a strict perimeter zone to contain the spread of Covid-19 in the Indian State of Assam; such lockdowns across India had the effect of instigating a migrant crisis as people attempted to return home); Slater & Masih, *supra* note 6 (describing the harrowing journey home for India’s incalculable number of migrant workers after abrupt lockdowns and termination of transportation services); Ghoshal & Jadhav, *supra* note 6 (“Rural parts of India have begun to see a surge in novel coronavirus infections, as millions of migrant workers returning from big cities and industrial hubs bring the virus home with them . . .”).

85. Derogations for the ICCPR can be accessed at, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en) [<https://perma.cc/2ZSZ-JVCY>], and the reservations and declarations page of the ECHR also have a dedicated site, see source cited *supra* note 32. These notices appear to be kept up-to-date with various derogations by States but notably one needs to go review a mass of information individually to assess which notices those remain active and compile a comprehensive overall number.

notices are made publicly available on UN and regional human rights databases. For each human rights treaty body, determining if the derogation is Covid-19 related requires going through a mass of information manually and individually to work out which derogations are active and on what basis. In theory, the pandemic appears to provide the perfect derogation opportunity, and States might reasonably feel that the regional and international human rights bodies (should there be litigation on sanitary measures) will give a significant degree of deference to their assessment of the crisis, and the scale and scope of the measures needed to confront it. Nonetheless, State derogation appears to be limited even in these exceptional circumstances, confirming the trend toward normalizing the exceptional and avoiding the constraints of exceptionality and oversight that follow from treaty derogation.<sup>86</sup>

In addition to standard tests to assess the justification and validity of emergency powers, it is necessary to reflect on the other effects of the use of this compendium of formal, informal, executive, and counterterrorism and security powers during this crisis. Decades of emergency practice by States show that such powers tend to persist and are difficult to dislodge once they have been comfortably exercised.<sup>87</sup> So, we should be rightly concerned that Covid-19 powers, particularly those related to information gathering, surveillance, restrictions on expression and movement would be particularly attractive to retain for some States. The amalgam of powers exercised in this crisis given inter alia to police, military, security, intelligence, and border forces, and the newness of coercive tools being exercised by administrators and officials around the world illustrate the complexity of shifting the regulatory framework at the end of the pandemic.

For example, a significant and common aspect of Covid-19 regulation in a number of States has been the collection of data on the movement, locale, and health of individuals.<sup>88</sup> The use of tracking, biometric data, and databases repurposed primarily from the security field has transformed the scale and scope of information available to and held by a number of States at this pivotal moment. Surveillance technologies have been enlisted to enable tracking of persons—often with the will and consent of the general public, contact tracking, and

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86. See Helfer, *supra* note 65, at 25.

87. See generally David Dyzenhaus, *The Permanence of the Temporary: Can Emergency Powers Be Normalized?*, in *THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL 21* (Ronald J. Daniels, Patrick Macklem & Kent Roach eds., 2016).

88. Examples include the apps used in Poland, Ireland, and a number of countries.

identifying clusters of disease outbreak.<sup>89</sup> Counterterrorism and security bodies, including United Nations entities have been offering their services to States to help them translate security powers to health-regulation. The shift of surveillance and intelligence capacity into the health sphere portends serious challenges ahead to the gateway right of privacy and its likely diminished status in a post-Covid world. The collection, retention, sharing or other use of data related to any person whether in a counterterrorism context or health emergency, particularly if done without the person's valid consent, must meet a set of conditions for such measures to be human rights-compliant. It includes ensuring that any such interference is implemented pursuant to a domestic legal basis that is sufficiently foreseeable,<sup>90</sup> accessible,<sup>91</sup> provides for adequate safeguards against abuse.<sup>92</sup> Moreover, such data collection must have practical regard to principles and practice of necessity, proportionality, and non-discrimination. These parameters are distinctly absent from contemporary conversations about how data should be collected in a pandemic-ravaged world.

Covid-19 vulnerabilities are laid on top of existing axes, including structural discrimination, systemic police violence directed at certain groups or communities, structural racism, and economic and social exclusions making certain populations more vulnerable to the spread and harm of the disease than others.<sup>93</sup> A complicating feature is that many individuals are willingly sharing information concerning their movement, intimate health details, and family histories with the State or private entities during the pandemic.<sup>94</sup> The great fear of infection,

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89. See Isla Binnie, *Spain's COVID Tracing App Tries to Balance Public Health With Privacy*, REUTERS (Sept. 16, 2020), <https://www.reuters.com/article/us-health-coronavirus-apps-spain/spains-covid-tracing-app-tries-to-balance-public-health-with-privacy-idINKBN2680SF> [<https://perma.cc/CP7B-Z4ME>].

90. See *Sunday Times v. The United Kingdom* (No. 1), App. No. 6538/74, ¶ 49 (Apr. 26, 1979), <https://hudoc.echr.coe.int/eng?i=001-57584> (stating that the law must be foreseeable as to its effects, that is, “formulated with sufficient precision to enable the citizen to regulate his conduct” and that the individual affected by it “must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”).

91. See *Gropper Radio AG v. Switzerland*, App. No. 10890/84, ¶¶ 65–68 (Mar. 28, 1990), <https://hudoc.echr.coe.int/eng?i=001-57623> (suggesting that accessibility implies that individuals that are to be affected by the respective legislation must have the possibility to become aware of its content).

92. See *Kruslin v. France*, App. No. 11801/85, ¶¶ 33, 35 (Apr. 24, 1990), <https://hudoc.echr.coe.int/eng?i=001-57626>; *Huvig v. France*, App. No. 11105/84, ¶¶ 32, 34 (Apr. 24, 1990), <https://hudoc.echr.coe.int/eng?i=001-57627>.

93. ACTIONS DROITS DES MUSULMANS (“ADM”), *L'IMPACT DU COVID-19 SUR LA COMMUNAUTÉ MUSULMANE EN FRANCE* (2020).

94. See Farkhondeh Hassandoust, *Not Just Complacency: Why People Are Reluctant*

the exposure of the individual to unknown harms from a perilous pathogen, and the desire for ensuring good health outcomes has shaped a public willingness to take a range of actions that may ultimately constitute a profound compromise on the integrity, dignity, and privacy of the person. Not all data collection related to the pandemic is constructed under an “emergency” rubric, but the scope and import of data collection during the global pandemic veers us directly into the realm of exceptional regulation—sometimes without regard to the rule of law, particularly when conducted by private entities subcontracted by States. The collection, storage, use, and sharing of biometric and other data lacks a firm legal basis in many legal systems and has a number of lacunae from a human rights and rule of law perspective.<sup>95</sup> Lack of legal certainty, the protection of fundamental rights in data collection, and the challenges of misuse are all exacerbated by the Covid-19 crisis. Here, the opportunity to collect large amounts of metadata, as well as personal health and location information is unprecedented, and the multiple (commercial and other) uses of such data are highly attractive to States and corporations. As a preliminary matter, the importance of adequately regulating the collection of personal data has never been more pressing and regulating the potential use of Covid-19 data remains an obvious if under-appreciated necessity. Here again, the emergency pathway that prompted the move to extensive data collection may become routinized in a way that undermines not only privacy but the gateway it provides to the protection of a range of other rights.

Finally, I reflect on the adaption strategies that are visible in the use of counterterrorism and security powers repurposed for Covid-19. Both international and national counter-terrorism regulation is extensive and ascendant. The move to a quasi-legislative function for the Security Council including in the criminal law sphere continues unchecked.<sup>96</sup> Nationally, in the absence of a universally agreed definition of “terrorism,” States are free to define terrorism, terrorist groups, and terrorist acts

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to Use COVID-19 Contact-Tracing Apps, CONVERSATION (Dec. 17, 2020, 2:07 PM), <https://theconversation.com/not-just-complacency-why-people-are-reluctant-to-use-covid-19-contact-tracing-apps-152085> [<https://perma.cc/QCY5-5Y5D>].

95. KRISZTINA HUSZTI-ORBÁN & FIONNUALA NÍ AOLÁIN, HUM. RTS. CTR., U. OF MINN, USE OF BIOMETRIC DATA TO IDENTIFY TERRORISTS: BEST PRACTICES OR RISKY BUSINESS? 19–20 (2020) (warning of the risk of proliferating wide-ranging and problematic surveillance practices following the utilization of biometric data during the COVID-19 pandemic).

96. See Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Second Rep. on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 9, 33, U.N. Doc. A/73/361 (Sept. 3, 2018).

in wide, imprecise, and highly political ways.<sup>97</sup> The misuse of counter-terrorism measures against civil society, dissenters, human rights defenders, and humanitarians is widespread and unrestrained.<sup>98</sup> It is in this global and national context that the repurposing of counter-terrorism and security measures should be understood and assessed. In a way, the Covid-19 pandemic offers the security sector and authoritarian leaning States<sup>99</sup> the perfect opportunity to normalize the use of counter-terrorism law and practice. This repurposing then continues the trend that has been accelerating since the events of 9/11, to regularize the use of counter-terrorism and security measures in the ordinary law, to widen their definitional scope and field of application, and to make the exceptional normal. The dangers of further acceleration in this field should be evident.<sup>100</sup> Security measures and security actors, already broadly unaccountable in multiple legal systems, are further entrenched in practices that are deeply problematic, not only to individual rights, but to open and transparent governance. Powers that undermine the most fundamental of rights (such as the rights to a fair trial, freedom of expression, freedom of association, and freedom of movement) are allowed to be hardwired into legal systems, making the task of dislodging them arduous. Moreover, the lines between ‘exceptionalism for terrorism’ and ‘exceptionalism for health’ become blurred in ways that serve to obscure the specific kinds of limited and targeted exceptional powers that might be necessitated by a pandemic, precisely to enable a wider degree of control, surveillance, and capture by the state. All of this to say, that, while vaccines have been developed to address the ills of the pandemic, the post-Covid world may not have an adequate vaccine against the rule of law deficits, authoritarianism, and dignity costs that will be inflicted by the legal regulation of the pandemic itself, through the complexity of the emergency framework that has consolidated and embedded as the pandemic raged.

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97. Cf. recent legislation in China (HK), Kirgizstan, the Philippines.

98. Ní Aoláin, *supra* note 50, at ¶ 1 (“Since 2001, civil society space has been shrinking around the globe. Civil society as a whole frequently stigmatized and sometimes discriminated against, and its actors are subjected to smear campaigns, defamation and physical harassment, spuriously charged and sentenced under various laws. . . .”); Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Human Rights Impact of Policies and Practices Aimed at Preventing and Countering Violent Extremism*, ¶¶ 43, 45–47, U.N. Doc. A/HRC/43/46 (Feb. 21, 2020) (“[C]ivil space is shrinking and under sustained pressure in many parts of the world. The prevention and countering of violent extremism increasingly functions as a device to silence, limit the scope of and target civil society actors . . .”).

99. See generally Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT’L L. 221 (2020).

100. Ní Aoláin, *supra* note 57.

## V. Conclusion

Globalization, which has gone hand in hand with the global movement of people has created vulnerabilities as the pervasive spread of infectious agents and gaps in inter-state health communication laid the ground for complicating outbreak management.<sup>101</sup> In parallel, lax oversight of exceptional power use by States over many decades has also established the basis for disproportionate, security-led, human rights 'lite' responses to the pandemic. The pandemic is creating new patterns and intersections of emergency law practice, some of which build on prior exceptionality and some practices and regulation which are evolving. Understanding the complexity of national emergency responses has been one goal of this Article, not least to better address the gaps in oversight and accountability, and to bridge the emerging rule of law deficits. The long-term costs of the pandemic will certainly be counted in lives lost, economic harm, mental and physical health costs, as well as the emotional costs of loneliness, absence, and fear. But the costs to the rule of law and the health of our democracies are challenged by the resort to exceptionality and are also in play during the pandemic.

States are rightly seeking to balance the need to protect the most fundamental of rights, the right to life through restrictions on day-to-day life for millions of people across the globe. The long-term prognosis for the pandemic's decline underscores the lack of a quick fix on both the health and rule of law challenges simultaneously in play. There is no doubt that second-guessing in a universe of imperfect epidemiological information makes the task of balancing and tending to the rule of law challenging. The pandemic has created the need for the use of exceptional powers, but it has inherited and further enabled the fertile ground in which such powers can be abused and mismanaged, particularly against those who may be the most vulnerable economically and socially as a result of the pandemic. This Article is a first start on identifying some early discernible patterns in the use of exceptional powers in the Covid-19 context and pointing out the fault-lines that are emerging on the rule of law. Evidencing exceptionality challenges us to be aware that protecting the rule of law, preventing overreach, and avoiding the hardwiring of the exception is also an obligation of States in a time of pandemic.

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101. See generally Matingai Sirleaf, *Ebola Does Not Fall From the Sky: Structural Violence & International Responsibility*, 51 VAND. J. TRANSNAT'L L. 477 (2018) (noting that globalization, in parallel with pre-existing and deepening structural inequality, has exacerbated both previous and current vulnerabilities to epidemics and pandemics).