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*Covid-19 And International Law: Derogation Of Human Rights Under The Inter-American System Of Human Rights*

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# Secção I

## Investigação Científica\*

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## Covid-19 And International Law: Derogation Of Human Rights Under The Inter-American System Of Human Rights

### Direito Internacional E Covid-19: A Derrogação De Direitos Humanos Sob A Luz Do Sistema Inter-Americano De Direitos Humanos

Victor Malta XAVIER<sup>1</sup>

**ABSTRACT:** This article aims to study the implications of certain measures taken by American States, in order to address the COVID-19 Pandemic, on International Human Rights Law. Throughout this article, we will dive deep into the phenomenon of Human Rights derogations that are employed during exceptional public safety crisis. For that purpose, firstly, we will examine the context behind the protection of Human Rights under the Inter-American System. Next, attention will be paid to the exception of the universal application of International Human Rights Law. Thirdly, we will examine the most common practices adopted during the COVID-19 pandemic, and how they interact with specific Human Rights. Lastly, we contemplate some matters about the future of International Law.

**KEYWORDS:** International Human Rights Law; Derogation; COVID-19; Public Emergency.

**RESUMO:** O presente artigo pretende estudar os impactos de certas medidas adotadas por Estados americanos, em face da pandemia do COVID-19, para o Direito Internacional dos Direitos Humanos. Ao longo do artigo, o fenômeno de derrogação de Direitos Humanos será extensivamente abordado. Por esta razão, primeiramente, iremos examinar o contexto por trás da proteção internacional dos Direitos Humanos sob a luz do Sistema Inter-Americano. Depois, daremos atenção à exceção da universalidade de aplicação do Direito Internacional dos Direitos Humanos. Em terceiro lugar, examinaremos algumas das práticas adotadas por Estados para combater o COVID-19, e como elas interagem com alguns Direitos Humanos em espécie. Por último, faremos algumas ponderações sobre o futuro do Direito Internacional pós-pandemia.

**KEYWORDS:** Direito Internacional dos Direitos Humanos; Derrogação; COVID-19; Emergência Pública.

## INTRODUCTION

The present article is structured as a critical analysis, since it aims to comprehend the extent of a State's capabilities to derogate International Human

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Rights Law, in order to face a public health crisis, in light of the existing model of protection of Human Rights. With the purpose of understanding the reasons that led many States to adopt measures restricting the rights of its citizens, and to understand the legal foundation, or lack of legality, behind them, some of the most relevant cases of derogation of Human Rights during the COVID-19 crisis will be analyzed.

This article has 2 natures, a didactic one, and, at the same time, a critical one. The current COVID-19 crisis allows the opportunity to study an often overlooked, and misused, instrument of International Law, the possibility of derogation of Human Rights. Secondly, the ability to interpret seemingly illegal actions taken by States, and the possibility to study how they affect different species of Human Rights, is an urgent tool for Law students and Human Rights practitioners, especially in the post-Coronavirus world.

Furthermore, the reader's critical sense is tested when, after being given the appropriate facts and legal foundation behind a case, he is invited to ponder the appropriateness of a State's derogation measure. As such, in order to understand the state of Human Rights during the COVID-19 pandemic, first, it's necessary to comprehend the foundation of International Human Rights Law.

## **1. INTERNATIONAL HUMAN RIGHTS LAW**

After the terror and tragedy that befell the world after WWII, especially that of the extermination of millions of people during the Holocaust carried out by the nazis in Germany, the international community saw itself in the need of constructing a normative system in order to protect the rights of individuals, in order to prevent other tragedies that might occur in the future. Thus, the legacy of the horrors of the Second World War is the creation of the normative field of international protection of the rights of individuals, namely, the International Human Rights Law field.

International Human Rights Law is an autonomous branch of International Public Law. Its *raison d'être* is the protection of the human being in any and all circumstances, meaning that humanity is the catalyst of all its provisions . Therefore, International Human Rights Law aims to protect the

individual, regardless of nationality, or the territory in which one may find oneself.

In this sense, International Human Rights Law deals with the study of the international norm, whether it comes from conventional or customary law, which stipulates the behavior and benefits that citizens may expect, or demand, from their government. The study of IHRL, befalls the normative environment of laws deriving from treaties, conventions, or declarations of Human Rights adopted by the International Community at the universal or regional level, whose object is the development of Human Rights, as well as the creation and regulation of systems in place for its protection<sup>2</sup>.

There are two main systems in place for the protection of International Human Rights Law, the Universal System, and the Regional ones. The Universal System of International Law, also known as the United Nations system, has been instrumental in the process of standard setting, that is, creating treaties and other documents that set out universally recognised human rights. In this sense, the International Bill of Human Rights<sup>3</sup> was only achieved through the cooperation of the international community as a whole<sup>4</sup>. Therefore, the United Nations system has successfully generated a wide-ranging series of international instruments dealing with the establishment of standards and norms in the human rights field<sup>5</sup>.

In essence, the universal quality of Human Rights resides in the fact that they are inherently human in its nature, and should accordingly be protected and exercised in view of the individual as an active part of humanity, and not as the concession of any singular state. As such, Human Rights are insubordinate to any form of sociopolitical organization, including the state itself.

The other instances of protection of Human Rights in International Law are the regional systems. The regionalization of Human Rights Law, through the

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<sup>2</sup> MAZZUOLI, Valerio de Oliveira. Curso de Direito Internacional Público 12. ed. Rio de Janeiro: Forense, 2019.

<sup>3</sup> This document consists of the Universal Declaration of Human Rights (adopted in 1948), the International Covenant on Civil and Political Rights (ICCPR, 1966) with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).

<sup>4</sup> CONTE, ALEX. Counter-terrorism and Human Rights. *In*: JOSEPH, Sarah. L., McBETH, Adam. Research Handbook on International Human Rights Law, 1st edition, Cheltenham, Edward Elgar Publishing, 2010. pp.512-540.

<sup>5</sup> SHAW, Malcom. International Law. 6. ed. Cambridge: Cambridge University Press, 2008.

adoption of regional treaties and conventions in the Americas, Europe, Africa and the Middle East/Asia, aims to maximize the protection of Human Rights, while adopting the particularities of each region. These 4 regional systems do not proclaim the rights of europeans, africans, or americans, each of them contribute, in their own way, to the universalization of Human Rights on their respective region of application<sup>6</sup>. Therefore, the regional system of Human Rights does not undermine the project of Universal Human Rights, but magnifies it and further its applications through regionalized and culturally appropriate means.

An important part of IHRL is the possibility of action and participation by individuals in the normative environment. As such, in the realm of IHRL, the human being is the recipient of the norm, but it can also play an active role in International Law as a “legal person”. As an example of this, article 34, of Protocol nº11 of the European Convention on Human Rights (1988), the European Court of Human Rights<sup>7</sup> recognizes the competence of individuals, NGOs, and other private groups to petition in the Court as victims of violations of any State-party to the convention and its additional protocols<sup>8</sup>.

At the present moment in time, International Human Rights Law evolved to foster the protection of minorities and other vulnerable groups, which are historically and socially less protected by domestic law. For this reason, International Human Rights Law has been trying to establish minimal standards of protection for these group of people, in the International and Regional contexts<sup>9</sup>.

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<sup>6</sup> BRANT, Leonardo. Teoria de Direito Internacional Público, Vol.1. Belo Horizonte: CEDIN, 2020.

<sup>7</sup> Article 34, Individual Application, of Protocol nº11 of the European Convention on Human Rights (1988): “*The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.*”

<sup>8</sup> BRANT, Leonardo. Teoria de Direito Internacional Público, Vol.1. Belo Horizonte: CEDIN, 2020.

<sup>9</sup> MAZZUOLI, Valerio de Oliveira. Curso de Direito Internacional Público 12. ed. Rio de Janeiro: Forense, 2019.

## 1.1. THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

In order to analyze the Inter-American System of Human Rights, it's necessary to understand the region's historical context and particularities. First of all, the Americas are plagued with an extremely high level of social inequality and exclusion of minorities. Its fledgling democracies have been left to bare the fruits of decades of dictatorial and authoritarian regimes, which fostered a culture of violence and impunity, along with the lack of institutional respect for Human Rights<sup>10</sup>.

In this sense, while most countries in the continent have surpassed the transition of an authoritarian regime to a democratic one, they are still to take the necessary steps in order to consolidate these Democratic Constitutional States founded upon the Rule of Law<sup>11</sup>. This means that the Latin-American portion of the Americas is yet to break their definitive ties with authoritarian traditions and develop their Democratic States based on the respect for Human Rights as a whole, which include: civil and political rights, social and cultural rights, and environmental rights<sup>12</sup>.

As such, in order to densify american democracies, and to face the many violations of Human Rights which weighs heavily on the social inequality and exclusion that afflicts the region, the Inter-American Human Rights System was made necessary.

### 1.1.1. THE AMERICAN CONVENTION ON HUMAN RIGHTS

The most fundamental instrument for the protection of Human Rights in the Americas region is the Inter-American Convention of Human Rights which came into force in 1978. Only members of the Organization of American States (OAS) can be parties to the convention<sup>13</sup>. As of 2020, 24 parties to the OAS are signatories of this Convention<sup>14</sup>.

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<sup>10</sup> PIOVESAN, Flávia. *Direitos humanos e Justiça Internacional*, 5ª ed. São Paulo: Saraiva, 2014.

<sup>11</sup> *ibid*

<sup>12</sup> *ibid*

<sup>13</sup> MAZZUOLI, Valerio de Oliveira. *Curso de Direito Internacional Público* 12. ed. Rio de Janeiro: Forense, 2019.

<sup>14</sup> ORGANIZATION OF AMERICAN STATES. *American Convention On Human Rights "Pact of San Jose, Costa Rica"* 11 Nov. 1969. Available at: [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm)

The American Convention of Human Rights provides a wide range of rights, similar to the International Covenant for Civil and Political Rights (ICCPR), that must be protected by States Parties. Among these rights are Right to Juridical Personality (art.3), Right to Life (art. 4), Right to Humane Treatment (art.5), Right to Personal Liberty (art. 7), Right of Assembly (art. 15), and Freedom of Association (art. 16) Freedom of Movement and Residence (22). While Social and Economic Rights are not explicitly laid out in its text, the Convention underlines that States must adopt measures to progressively achieve these rights as set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires<sup>15</sup>.

The Convention operates as a complementary instrument of protection, which means that States retain the primary responsibility in regards to the protection and development of Human Rights. In order to protect and monitor the rights established by it, the American Convention is integrated by two autonomous and independent institutions: the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights.

### **1.1.2. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

The primary objective of the Inter-American Commission on Human Rights is to promote the observance and the protection of Human Rights in the Americas<sup>16</sup>. Under its mandate, the Commission has wide powers to promote the awareness and study of human rights in the Americas and to make recommendations to member states. The Commission has jurisdiction over all State parties to the Inter-American Convention of Human Rights, in relation to the rights in its text. The Commission 's competence also reaches every State party to the OAS, in relation to the rights enshrined in the American Declaration of the Rights and Duties of Man (1948)<sup>17</sup>.

The Commission may publicise human rights matters by way of reports, studies, lectures and so forth. It may also make recommendations to states on

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<sup>15</sup> ORGANIZATION OF AMERICAN STATES. American Convention On Human Rights "Pact Of San Jose, Costa Rica" 11 Nov. 1969. art. 26. Available at:

[http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm)

<sup>16</sup> MAZZUOLI, Valerio de Oliveira. Curso de Direito Internacional Público 12. ed. Rio de Janeiro: Forense, 2019.

<sup>17</sup> PIOVESAN, Flávia. Direitos humanos e Justiça Internacional, 5ª ed. São Paulo: Saraiva, 2014.



the adoption of progressive measures in favour of human rights and conduct on-site investigations with the consent of the state in question. In its reports, the Commission has put to brought to light certain themes which are of primary concern in the Americas, such as disappearances, torture, refugees and economic and social rights<sup>18</sup>. However, the Commission's primary practical function<sup>19</sup> is to receive complaints and petitions from individuals, States agencies, or NGOs relating to Human Rights violations committed by States Parties to it<sup>20</sup>.

In this sense, it falls to the Inter-American Commission on Human Rights the responsibility to proceed with the admissibility analysis of petitions and human rights violations complaints. Whenever the Commission finds a petition admissible, it will forward it to the Inter-American Court of Human Rights for the necessary proceedings.

Lastly, in cases of great need and urgency, and whenever it's deemed necessary, according to the available information, the Commission may, on its own initiative or via a petition of an interested party, solicit a State to adopt precautionary measures in order to prevent irreparable damage<sup>21</sup>.

### **1.1.3. THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

The Inter-American Court of Human Rights is the jurisdictional institution of the Inter-American System, which functions in San José, Costa Rica. The Court is responsible for cases involving violation of Human Rights committed by a State Party to the OAS and that have ratified the Inter-American Convention. It is an autonomous International Tribunal able to condemn states for the violation of Human Rights as long as they have accepted its judicial competence<sup>22</sup>.

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<sup>18</sup> SHAW, Malcom. *International Law*. 6. ed. Cambridge: Cambridge University Press, 2008.

<sup>19</sup> MAZZUOLI, Valerio de Oliveira. *Curso de Direito Internacional Público* 12. ed. Rio de Janeiro: Forense, 2019.

<sup>20</sup> ORGANIZATION OF AMERICAN STATES. American Convention On Human Rights "Pact Of San Jose, Costa Rica" 11 Nov. 1969. art. 44 Available at: [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm).

<sup>21</sup> COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS. Regulamento da Comissão Interamericana de Direitos Humanos. 2009. art. 25. Available at: <http://www.cidh.org/Basicos/Portugues/u.Regulamento.CIDH.htm>.

<sup>22</sup> ORGANIZATION OF AMERICAN STATES. American Convention On Human Rights "Pact Of San Jose, Costa Rica" 11 Nov. 1969. art. 62. Available at: [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm).

The Court has a consultative competence and a contentious competence. In the consultative field, any member of the OAS, party or not to the Convention, may solicit a Court ruling in relation to the interpretation of the Inter-American Convention or any other Human Rights treaty applicable to American States<sup>23</sup>. Every State that has ratified the Inter-American Convention has preemptively accepted the consultative competence of the Court.

The Court's contentious competence, is a judicial power, as it should be for rulings on concrete cases when a state party to the Convention has allegedly violated any of its precepts. However, the scope of its judicial competence is limited to states parties to the convention that have expressly recognized its jurisdiction<sup>24</sup>. This means that a State-party to the convention may not be demanded before the Court if it does not accept its contentious jurisdiction<sup>25</sup>.

The Court's judgements are binding to States that have recognized its jurisdiction. Through its jurisprudence, the Court has recognized that its judgements are also binding to all States-parties, although indirectly. It understands that States must apply the Convention in accordance to the Court's interpretation, in this sense the Court's decisions possesses *res interpretata* effects<sup>26</sup>.

Finally, when the court declares that a Human Rights violation has occurred in the territory of a State-party, it must demand the immediate reparation of the damage caused by the State's action or inaction, and, if the need arises, it must also stipulate the payment of just compensation to victims. States also have the obligation to not impede the execution of the Court's decision internally, and it must adopt all necessary measures for this execution to be expedited. The Court has a supervision mechanism to ensure the application of its decisions<sup>27</sup>.

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<sup>23</sup> PIOVESAN, Flávia. *Direitos humanos e Justiça Internacional*, 5ª ed. São Paulo: Saraiva, 2014.

<sup>24</sup> MAZZUOLI, Valerio de Oliveira. *Curso de Direito Internacional Público* 12. ed. Rio de Janeiro: Forense, 2019.

<sup>25</sup> ORGANIZATION OF AMERICAN STATES. *American Convention On Human Rights "Pact Of San Jose, Costa Rica"* 11 Nov. 1969. art. 61 Available at: [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm).

<sup>26</sup> MAZZUOLI, Valerio de Oliveira. *Curso de Direito Internacional Público* 12. ed. Rio de Janeiro: Forense, 2019.

<sup>27</sup> MAZZUOLI, Valerio de Oliveira. *Curso de Direito Internacional Público* 12. ed. Rio de Janeiro: Forense, 2019.

## 2. THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS LAW IN THE CONTEXT OF A PUBLIC EMERGENCY

In light of the COVID-19 pandemic, and its ensuing health crisis on the planet as a whole, some countries have been adopting mandatory policies such as social distancing, or lockdowns, for the purpose of lowering cases of infections. These measures apparently violate the Human Rights Law of the citizens of a state. However, there are some provisions of International Human Rights Law which derogates human rights in times of crisis, such as the COVID-19 pandemic.

Firstly, it is necessary to study the differences between “limitations” and “derogations” of Human Rights. In the first case, the limitation of human rights means the restriction of the exercise of rights under certain conditions, without suspending its application as a whole, while being previously prescribed in Law. As an example, all human beings have the right to marry and to constitute a family, however, the law stipulates the minimum age to be married, in order to protect children’s rights. On the other hand, the derogation of Human Rights is a much more exceptional restriction of Human Rights. To derogate Human Rights means to suspend its application as a whole in certain parts of a territory, for a set period of time. Because of the broad effects of the restrictions of IHRL, the derogation of Human Rights can only be done under very specific conditions.

According to art. 27 (1) of the American Convention,

“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”.

This provision is very much in accordance with other International Human Rights texts, such as the ICCPR (art. 4), and the European Convention of Human Rights (art. 15).

Therefore, in situations of public emergencies, ones of exceptional character, some human rights can be derogated if such measures are considered necessary for the well being of the population and the continuation

of public order within a state. For these provisions to take place, there are first some requirements to be met, which are: the existence of a public emergency; the proclamation, or notification of a public state of emergency; the persistence of the state of emergency; and, the permissible extent of derogating measures<sup>28</sup>.

As to the existence of a public emergency, the European Court of Human Rights on the judgement of *Lawless vs Ireland* (§28<sup>o</sup>) defines it as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”<sup>29</sup>.

The Inter-American Commission on Human Rights has embraced the European Commission’s formulation of the applicable legal standards, reasoning that an armed conflict would not support a state of emergency unless emergency measures were of limited duration and the armed conflict compromised “the continued viability of the organized community as a whole<sup>30</sup>. In this sense, in order for a situation to constitute a public emergency, it must comprise an exceptional threat to the State as a whole.

The second requirement for derogation, the notification of a public state of emergency, is required for a number of reasons. Firstly, as previously stated, Human Rights Law concerns the entire international body, therefore, any derogation attempt must be properly publicized, in order for supervision to be made by other States. Secondly, depending on the type of the public emergency (e.g, a pandemic) other states may be interested in discussing safety measures for their own population. In the case of the American

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<sup>28</sup> CONTE, ALEX. Counter-terrorism and Human Rights. *In*: JOSEPH, Sarah. L., McBETH, Adam. Research Handbook on International Human Rights Law, 1st edition, Cheltenham, Edward Elgar Publishing, 2010. pp. 512-540.

<sup>29</sup> EUROPEAN COURT OF HUMAN RIGHTS. Case of *Lawless vs Ireland*, 1st July 2017, Application no 332/57. Judgement. Available at: [https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22Lawless%20v%20Ireland%22\],%22docum%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-57518%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Lawless%20v%20Ireland%22],%22docum%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57518%22]}).

<sup>30</sup> CRIDDLE, Evan J., FOX-DECENT, Evan. Human Rights, Emergencies, and the Rule of Law. *Human Rights Quarterly*, Vol.39. p.39-87. 2012. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1591970](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1591970).

Convention, the obligation of notification of other States Parties is presented in article 27, §3<sup>31</sup>.

The third requirement for the derogation of human rights during a public emergency is the persistence of the situation itself. It is mandatory for the derogating State to continually review the situation faced by it to ensure that the derogation lasts only as long as the state of emergency exists, since the restoration of a state of normality is always urgent<sup>32</sup>.

Lastly, the extent to which any right is derogated from must be limited 'to the extent strictly required by the exigencies of the situation.' Any derogating measure must therefore be both necessary and proportionate<sup>33</sup>. The Inter-American Court's reluctance to apply a broad standard of appreciation in this factor refers to the fact that the Inter-American Court began its work at a time when much of Latin America was ruled by oppressive military dictators, and this period still influences the court's decisions and cases<sup>34</sup>. In its advisory opinion on Habeas Corpus in Emergency Situations, the Court expresses this understanding:

"The Inter-American Court has frankly acknowledged that it views human rights derogation with a jaundiced eye: It cannot be denied that under certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a democratic society. The Court cannot, however, ignore the fact that abuses may result from the application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27 [of the American Convention] and the principles contained in other relevant international instruments. This has, in fact, been the experience of our hemisphere. (...)

From Article 27(1), moreover, comes the general requirement that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it"<sup>35</sup>.

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<sup>31</sup> Article 27, 3. of the American Convention: "Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension."

<sup>32</sup> CONTE, ALEX. Counter-terrorism and Human Rights. In: JOSEPH, Sarah. L., McBETH, Adam. Research Handbook on International Human Rights Law, 1st edition, Cheltenham, Edward Elgar Publishing, 2010. pp.512-540.

<sup>33</sup> *Ibid.*

<sup>34</sup> CRIDDLE, Evan J., FOX-DECENT, Evan. Fiduciaries of Humanity: How International Law Constitutes Authority, 1ed. New York: Oxford University Press, 2016. ISBN: 9780199397921.

<sup>35</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS. Advisory Opinion OC-8/87. 30 jan. 1987. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on

Given this legacy of human rights abuse to suppress political dissent, it should come as no surprise that the Inter-American Court has a very strict interpretation of the proportionality principle in emergency situations<sup>36</sup>. . As such, it can be inferred that States must abide to proportionate and adequate standards of practice, in order not to arbitrarily violate the Human Rights of vulnerable individuals.

It must also be noted that not all Human Rights are subject to derogation. By definition, *jus cogens law*, which are substantive rules recognised to be of a higher status, based upon an acceptance of fundamental and superior values within the international system<sup>37</sup>, cannot be derogated. Some treaties may also express that some of their provisions cannot be derogated. In its article 27, §2, the American Declaration states that

“The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.”

Furthermore, the IACHR in its Advisory Opinion Habeas Corpus in Emergency Situations, expands on this matter, stating that:

“Article 27(2), as has been stated, limits the powers of the State Party to suspend rights and freedoms. It establishes a certain category of specific rights and freedoms from which no derogation is permitted under any circumstances and it includes in that category “the judicial guarantees essential for the protection of such rights.” Some of these rights refer to the physical integrity of the person, such as the right to juridical personality (Art. 3); the right to life (Art. 4); the right to humane treatment (Art. 5); freedom from slavery (Art. 6) and freedom from ex post facto laws (Art. 9). The list of non-derogable rights and freedoms also includes freedom of conscience and religion (Art. 12); the rights of the family (Art. 17); the right to a name (Art. 18); the rights of the child (Art. 19); the right to nationality (Art. 20) and the right to participate in government (Art. 23).”

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Human Rights. §§20-21. Available at: [https://www.corteidh.or.cr/docs/opiniones/seriea\\_08\\_ing.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_08_ing.pdf).

<sup>36</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS. Advisory Opinion OC-9/87. 6 oct. 1987. Judicial Guarantees In States Of Emergency (Arts. 27(2), 25 And 8 American Convention on Human Rights). §21°. Available at: [https://www.corteidh.or.cr/docs/opiniones/seriea\\_09\\_ing.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_09_ing.pdf).

<sup>37</sup> SHAW, M. N. International law. Cambridge, UK: Cambridge University Press. 6th edition, 2008, p. 124-125.

Therefore, States must abide by a particular set of limitations, in order to refrain from imposing measures of discrimination of Human Rights while managing a public safety crisis, as per the guidelines laid out above.

### **3. INTERNATIONAL HUMAN RIGHTS LAW IN THE CONTEXT OF THE COVID-19 PANDEMIC**

The extent of the COVID-19's impact on Human Rights as a whole is immeasurable, and State's responses to it may further aggravate current social and political crisis. Some measures taken by States in order to address the pandemic have been excessive in many instances, drawing international attention to violation of Human Rights occurring all over the globe. As such, it's necessary to delimit the extent of State's capability to derogate Human Rights, and, to examine the ongoing IHRL violations derived from actions taken by governments as a response to the COVID-19 pandemic.

In april of 2020, the Inter-American Commission adopted resolution 1/2020, entitled "Pandemic and Human Rights in the Americas" in order to address the measures related to Human Rights taken by States during the COVID-19 pandemic. In its resolution, the Inter-American Commission warned its member-states on the risks of excessive measures<sup>38</sup>, stating that:

"Even in the most extreme and exceptional cases in which suspension of certain rights may become necessary, international law lays down a series of requirements such as legality, necessity, proportionality and timeliness, which are designed to prevent measures such a state of emergency from being used illegally or in an abusive or disproportionate way, causing human rights violations or harm to the democratic system of government."<sup>39</sup>

The Commission also warns that States may not derogate provisions in a manner that is discriminatory, or which violates other obligations they have undertaken under international law, including under other international human rights treaties from which no derogation is allowed<sup>40</sup>. As such, IACHR finds that the COVID-19 pandemic is an extreme matter of public safety, and requires

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<sup>38</sup> LEBRET, Audrey. COVID-19 pandemic and derogation to human rights. *Journal of Law and the Biosciences*, may. 2020. vol.7, n. 1, pp 1-15. Available at: <https://doi.org/10.1093/jlb/ljaa015>.

<sup>39</sup> IACHR, Pandemic and Human Rights in the Americas, Resolution 1/2020, 10 Apr., 2020, § 3, <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>.

<sup>40</sup> *ibid.* §20.

urgent measures in order to protect the right to life and health of all individuals within the territory of a State, nonetheless, Governments may not abuse this situation to impose discriminatory systems that may especially harm some individuals.

Despite the Commission's statement, there have been many reports on Human Rights violations as a consequence of State's responses, or lack thereof. It is now necessary to define the extent of these measures' impact on specific Human Rights.

### **3.1 FREEDOM OF MOVEMENT. IMPACTS ON MIGRATION AND REFUGE IN VENEZUELA**

Amongst the most common measures taken by the International community, there are travel restrictions and Lockdowns, which impacts heavily the rights of Freedom of Movement and Freedom of association. The derogation of these rights are especially important in the context of the COVID-19 pandemic, since the virus is highly contagious, and stopping its spread is a priority in order to contain it. However, as previously stated, the derogation of rights can only be employed in proportionate and adequate manners, in order to encourage social distancing without causing major violations of Human Rights. Therefore, in order to properly assess the impact of the COVID-19 pandemic on them, it is necessary to define the nature of the rights to freedom of movement and association

Firstly, freedom of movement can be defined as the right to enter or leave one's own country. It also encompasses both the right to travel freely within the territory of the State and the right to relocate oneself and to choose one's place of residence<sup>41</sup>. The right to freedom of movement is inscribed in article 12 of the ICCPR, which states that: "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own".

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<sup>41</sup> GILBERT, Jérémie. *Nomadic Peoples and Human Rights*, 1<sup>a</sup> ed. London: Routledge Research in Human Rights Law, 2014.



Secondly, the right to freedom of assembly is defined by the Inter-American Court of Human Rights, in the *Escher case*<sup>42</sup>, as

“the right to associate freely with other persons, without an intervention of the public authorities that restricts or obstructs the exercise of the said right, in order to seek the common achievement of a lawful purpose, without pressure or interference that could alter or distort this purpose (§170)”.

In addition, the Court also found that the right of freedom of association “gives rise to positive obligations to prevent attacks against it, to protect those who exercise it, and to investigate violations of this freedom (§175)”.

As previously discussed, both of these rights are subject to lawful derogation, when it is necessary to protect national security, public order, public health or the rights and freedoms of others. As such, in the case of the COVID-19 pandemic and the need to practice social distancing, and other safety measures, in order to halt the spread of the virus, the derogation of the rights of freedom of movement and association have been adopted by many States.

Travel restrictions, both internationally and domestically, have been employed in order to stop the circulation of people, reducing the risk of the virus spread across many different areas. Although the WHO recommended against travel restrictions, stating that: “In general, evidence shows that restricting the movement of people and goods during public health emergencies is ineffective in most situations and may divert resources from other interventions”<sup>43</sup>. Therefore, travel restrictions may aid in halting the damage of the disease, especially in States with limited response capacities. As a consequence, several people that have been living abroad have been unable to return to their country of origin, being essentially stranded on foreign states.

However, the Americas is currently facing a refugee crisis in Venezuela, and its risks are heightened during the COVID-19 pandemic. The exodus from Venezuela, which began in 2016 when cascading economic, political and health crises in the country forced millions of Venezuelans to flee, was already one of the most underfunded refugee situations in the history of Latin America. As the

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<sup>42</sup> INTERAMERICAN COURT OF HUMAN RIGHTS. *Escher et al. v. Brazil*. Judgment. San Jose, July 6, 2009. Available at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_200\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_200_ing.pdf).

<sup>43</sup> WORLD HEALTH ORGANIZATION. Updated WHO recommendations for international traffic in relation to COVID-19 outbreak, World Health Organization, 29 April 2020. Available at: <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>.

COVID Pandemic becomes a priority to regional governments, the region's long-term solutions to the refugee crisis has been replaced with greater barriers for migrants and refugees and heightened xenophobia<sup>44</sup>.

These freedom of travel restrictions have had a broad impact in the Venezuelan refugee situation. According to a Relief Web Report<sup>45</sup>, "increasing border closures and measures to restrict the movement of people often results in many refugees and migrants stranded in border areas". The likelihood of contracting or spreading the virus is also heightened for people on the move or stranded in densely populated areas and/ or in shelters. In these situations, social distancing measures become impossible to implement.

Movement restrictions can also increase reliance on smugglers and illicit groups. With several countries increasingly closing their borders with Venezuela, desperate refugees are compelled to resort to more risky migration and informal border crossings. Experience from previous epidemics suggest that restrictions on movement and other contingency measure can create opportunities for sexual exploitation and abuse<sup>46</sup>. In a press statement, the Commission warned that " the blockades related to COVID-19 in countries from the region have resulted in an increase in the use of informal routes and insecure and more violent border crossings, which place previously displaced people in an even more vulnerable situation"<sup>47</sup>.

This exposure to danger is contrary to the Inter-American Commission's resolutions 4/2020, aptly named Human Rights of Persons with COVID-19<sup>48</sup>, and resolution 1/2020, Pandemic and Human Rights in the Americas, which promptly states that States must avoid "measures that may increase the risk of

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<sup>44</sup> JANETSY, Megan. COVID-19 is Making the Latest Migrant Exodus from Venezuela Even Worse. *World Politics Review*. 11 nov. 2020. Available at: <https://www.worldpoliticsreview.com/articles/29208/covid-19-is-making-the-latest-migrant-exodus-from-the-venezuela-crisis-even-worse>.

<sup>45</sup> RELIEF WEB. The Impact of Covid - 19 on Refugees and Migrants from Venezuela Vulnerable to Human Trafficking and Smuggling: Key messages to government authorities and law enforcement agencies. *Relief Web*. 5 jun. 2020. Available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/76848.pdf>.

<sup>46</sup> *ibid*.

<sup>47</sup> IACHR. On the occasion of World Refugee Day, the IACHR observes serious challenges in the comprehensive protection of the rights of refugees and urges States to adopt effective and urgent measures in the context of the COVID-19 pandemic. Press Release. 20 Jun. 2020. Available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2020/142.asp](http://www.oas.org/en/iachr/media_center/PReleases/2020/142.asp).

<sup>48</sup> IACHR, Human Rights of Persons with COVID-19, Resolution 4/2020, 27 Jul., 2020 §21. Available at: <http://www.oas.org/en/iachr/decisions/pdf/Resolution-4-20-en.pdf>.

contagion and propagation of the disease caused by COVID-19 and the vulnerability of migrant people<sup>49</sup>”.

### 3.2 FREEDOM OF ASSOCIATION. RISE ON DOMESTIC VIOLENCE

Lockdowns restrictions influence the right to freedom of assembly by imposing limits or banning of gatherings of people. These restrictions are related to quarantine and other social distancing measures, taken in order to stop further contamination.

Since the World Health Organisation stated that human-to-human transmission is possible, and that the COVID-19 is extremely contagious, keeping people apart is essential in order to stop them from getting ill. According to the US Center for Disease Control and Prevention: “COVID-19 spreads mainly among people who are in close contact (within about 6 feet) for a prolonged period. Spread happens when an infected person coughs, sneezes, or talks, and droplets from their mouth or nose are launched into the air and land in the mouths or noses of people nearby<sup>50</sup>.”

As such, Lockdowns and Quarantines are measures put in place in order to stop the population from coming into contact with each other and spreading the disease. However, States must abide to proportionate and adequate standards of practice, in order not to arbitrarily violate the Human Rights of vulnerable individuals.

According to the Inter-American Commission, there has been a rise in domestic violence during the COVID-19 Pandemic. This spike in domestic abuse can be attributed to the fact that many women and children are being forced to quarantine alongside their abusers. Domestic and sexual violence has been a longstanding problem in Latin America, with thousands of victims every year. However, while analysis is still ongoing, there is sufficient evidence to believe that women and children in vulnerable situations are being

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<sup>49</sup> IACHR. Pandemic and Human Rights in the Americas, Resolution 1/2020, 10 Apr., 2020, §58. Available at: <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>.

<sup>50</sup> CENTER FOR DISEASE CONTROL. Social Distancing Keep Your Distance to Slow the Spread. Center for Disease Control and Prevention. Available in: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>. Accessed on: 3 June 2020.

disproportionately affected by this health emergency, deepening the danger to their lives and wellbeing<sup>51</sup>.

In essence, the Commission urges States to grant them special protection to safeguard their rights, and it reminds them that “all measures taken to contain the pandemic must take into consideration intergenerational and gender perspectives and note the structural inequality and subordination faced by women, girls, and adolescents based on their gender”<sup>52</sup>. In this instance, in order to try and circumvent this isolation problem, the Commission suggests that States reinforce their communications mechanisms, as well as their sexual exploitation education programs.

In conclusion, although they are necessary for the prevention of the disease, travel restrictions and social distancing policies have had consequences on Human Rights. However, as previously discussed, the rights to freedom of movement and freedom of association are subjected to derogation when the need to safeguard public safety arises. Nevertheless, any derogation measure must be both necessary and proportionate, and cannot last longer than what is absolutely necessary, and states must refrain from abusing their emergency powers to impose discriminatory and authoritarian systems that may especially harm some individuals.

## **CONCLUSION**

As of the writing of this article, the COVID-19 Pandemic still achieves ever continuing peaks in new confirmed cases and, unfortunately, deaths. As such, the final toll of the virus on human lives is still unknown. At the present time, there is now telling how long the public health emergency will last, and therefore, there is no reasonable projection on how long the derogation measures will be necessary for the protection of the general public.

However, while this uncertainty scares governments and the public alike, and rightfully so, States must refrain from abusing their emergency powers. There is also a risk that the rights derogated, and the systems created in order

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<sup>51</sup> IAHCR. On the International Day of the Girl Child, the IACHR Urges States to Provide Increased Protection to Girls and Adolescents During the COVID-19 Pandemic. Press Statement. 11 Oct. 2020. Available at:

[http://www.oas.org/en/iachr/media\\_center/PReleases/2020/250.asp](http://www.oas.org/en/iachr/media_center/PReleases/2020/250.asp).

<sup>52</sup> *ibid.*

to deal with the pandemic, will remain in place after it finally passes. In this regard, the violations of International Human Rights Law that derived from the exceptionality of the COVID-19 situation must not consolidate themselves after the end of the public emergency.

The Inter-American System of Human Rights Institutions must play an active role during this pandemic. It's certain that, in the aftermath of the COVID-19 crisis, the Court will receive many applications concerning this period<sup>53</sup>. However, both the Court and the Commission must remain vigilant, in order to curb Human Rights abuse by State's measures regarding the Pandemic, and to uphold their mandate under the American Convention.

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<sup>53</sup> LEBRET, Audrey. COVID-19 pandemic and derogation to human rights. Journal of Law and the Biosciences, may. 2020. vol.7, n. 1, pp 1-15. Available at: <https://doi.org/10.1093/jlb/lisaa015>.

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