Only Sovereignty? Global Emergencies Between Domestic and International Law

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The COVID-19 pandemic demonstrates the need for global norms that assist nation-states in preserving democracy amid emergencies, mitigating the threat of a worldwide democratic decline. This Article examines the role of international law in providing nation-states with such norms on two levels. First, we discuss three classic models for coping with emergencies in constitutional democracies, arguing that all three are characterized by a "methodological nationalism" that limits them from considering international law norms in their responses to crises and disasters. Second, we examine the question on the level of positive law, demonstrating that while international law—particularly International Human Rights Law (IHRL)—may potentially provide nation-states with a legal model for adapting to emergencies, this potential is substantially limited. Three main problems restrict this potential: the weak formal support that democracy as a regime type receives under international law; the fragile democratic and constitutional features of international organizations; and the vagueness and unenforceability of certain IHRL norms designed to constrain state power during emergencies. By giving substantial weight to national sovereignty and leaving much to the discretion of individual nation-states, IHRL mirrors the methodological nationalism of the classic models and reproduces some hazardous tendencies that domestic legal regimes exhibit when cop-

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ing with emergencies. We conclude with policy recommendations for addressing these problems.

Introduction

The COVID-19 pandemic has served as a strong reminder of the threats that states of emergency pose to democracy. Since the outbreak of the pandemic, we have witnessed a widespread use of emergency measures, which constrain civil rights and limit parliamentary and judicial discretion.[1] While the abuse of emergencies is usually most serious in governments that are not truly democratic or responsive to the will of their people, democracies have also been known to take advantage of emergencies to expand the use of executive power.[2] States may apply various terms to the special legal order introduced in crisis situations, e.g., "state of exception," "state of emergency," "state of alarm," "state of siege," "martial law," etc. These exceptional situations often involve the introduction of special powers of arrest and detention; military tribunals; and criminal laws that are applied retroactively and limit the right to freedom of expression, association, and assembly.[3] Worse, in situations of upheaval, states have authority to torture and use other forms of ill-treatment to extract confessions and may even resort to abduction and extrajudicial killings.[4] The right to domestic remedies such as the writ of habeas corpus may also be suspended, leaving victims of arbitrary arrest and detention without legal protection.[5]

Such tendencies demonstrate the need for clear legal norms for governing emergencies while preserving the underlying principles of democracy. However, emergencies such as the current pandemic also demonstrate the need for *global* norms for governing states of emergency, in times when the threat to democracy is not limited to the regime of one country or another, but rather becomes a global hazard. While local emer-

1. *See Tracking tool– Impact of States of emergencies on civil and political rights*, CTR. FOR CIV. POL. RTS., https://ccprcentre.org/ccprpages/tracking-tool-impact-of-states-of-emergencies-on-civil-and-political-rights [https://perma.cc/M7W5-9A3N] (last visited Feb. 2, 2022).

2. Scott P. Sheeran, *Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT'L L. 491, 503–05 (2013).

3. *Id.*; OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 813 (2003) [hereinafter MANUAL ON HUMAN RIGHTS FOR JUDGES].

4. MANUAL ON HUMAN RIGHTS FOR JUDGES, *supra* note 3.

5. *Id.*

gency politics may seem exclusively domestic, it has transnational features. The responses of individual states affect others and domestic publics are likely to evaluate their government comparatively by looking at the actions and experiences of other countries. In the context of the pandemic, this is evident regarding the length and severity of lockdowns, the expertise claims invoked to support them, and vaccination programs.[6] However, such inclinations also exist in other global emergencies, such as terrorism, warfare, economic meltdown, or climate catastrophes.[7]

Despite the growing need for a global legal model to preserve democracy amid emergencies, the literature has so far given insufficient attention to the potential of international law to provide such a model. Much scholarship is devoted to the exploration and critique of the way international law—particularly International Human Rights Law (IHRL)—attempts to cope with emergencies.[8] This scholarship has yet to provide a methodical and systematic analysis of the role of international law in the protection of democratic principles during states of emergency. This Article attempts to take a step in this direction by examining this role on two levels. First, we discuss three classic models for coping with emergencies in constitutional democracies and examine whether international law plays any part in these models, or whether the models assume that state action should be governed via domestic law exclusively. Second, we examine the question on the level of positive law, by studying international law's general level of support for democracy, as well as the norms of IHRL that could potentially restrict national state power under emergency rule and their limitations.

The essence of this Article is the intersection of international law and domestic law while criticizing the bias towards national sovereignty and its implications regarding the protection of basic democratic principles amid emergencies. For this purpose, we adopt a relatively narrow definition of "democracy," which entails three main components: free elections and peaceful alteration in governing power; a small set of core rights related to political contestation such as rights to free speech, association, and voting; and the rule of law.[9]

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6. Christian Kreuder-Sonnen & Jonathan White, *Europe and the Transnational Politics of Emergency*, J. EUR. PUB. POL'Y 1, 7 (2021).

7. *See*, *e.g.*, *About Us,* MINERVA CTR. FOR RULE L. UNDER EXTREME CONDITIONS, https://minervaxtremelaw.haifa.ac.il/about-the-center/ [https://perma.cc/7RH4-Q6Y3] (last visited May 24, 2022).

8. For prominent examples *see generally, e.g.*, Sheeran, *supra* note 2; ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION: WITH SPECIAL REFERENCE TO THE TRAVAUX PREPARATOIRES AND CASE-LAW OF THE INTERNATIONAL MONITORING ORGANS (1998); Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241 (2003); Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 MOD. L. REV. 655 (2005); Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies: A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT'L. LJ 1 (1981).

9. For a similar definition, *see* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 9 (2018).

The layout of this Article is as follows: Section I discusses three main models for coping with emergencies in constitutional democracies—here termed "the suspension model," "the "expansion model," and the "legal adaptation model"—and their shortcomings. We argue that all three models, including the legal adaptation model, which we view as generally best suited for preserving democracy amid emergencies, are characterized by a "methodological nationalism" that limits them from confronting the threat of democratic decline on a global scale. Perhaps unsurprisingly, these models—based on theories conceived in a far less globalized world with a less developed corpus of international law—barely consider the potential role of IHRL in constraining state action. Hence, we pose the question whether these models were correct in largely dismissing international law, or whether IHRL may provide global norms assisting countries in adapting their laws to states of emergency, thus mitigating the risk of a worldwide democratic decline.

Section II sets out to answer this question on the level of positive law, based on an analysis of international treaties, as well as rulings and guidance by international tribunals and organizations pertaining to emergencies and specifically to the current pandemic. We demonstrate that while international law certainly has the potential to provide states with a model for adapting to emergencies, this potential is substantially limited, focusing on three main problems that limit this potential. First, we raise the question whether international law can be considered pro-democratic: namely if it explicitly endorses democracy as a form of government. The answer to this question is highly complex, given the many nondemocratic actors in the field of international law and the fact that even IHRL, which may be considered to have a pro-democratic agenda, does not positively express this view.

The second problem we consider is that even assuming international law has a pro-democratic agenda, this agenda does not necessarily translate into democratic or constitutional features of international law itself. While some scholarship, particularly the discipline of "global constitutionalism,"[10] underscores the democratic qualities of international law and the emergence of constitutional—and, to a lesser extent, administrative[11]—principles in this field of law, there are also serious reasons to doubt this view. Moreover, there is evidence to suggest that much like individual states, new forms of post-national emergency governance exercise substantial discretionary authority and stray from basic democratic principles.[12] This apparent lack of commitment to setting an example for governing emergencies in accordance with democratic and constitutional principles

10. *See generally* James Tully et al., *Introducing Global Integral Constitutionalism*, 5 GLOB. CONST. 1 (2016).

11. *See generally* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. CONTEMP. PROBS. 15 (2005).

12. William E. Scheuerman, *Executive and Exception*, *in* HANDBOOK ON GLOBAL CONSTITUTIONALISM 317 (Anthony F. Lang & Antje Wiener eds., 2017).

casts doubt on the ability of international law to serve as a model for such emergency governance.

Third, we grapple with the question of whether IHRL provides effective norms for preserving democracy amid emergencies, namely, norms that are enforceable and pose clear and concrete limitations on state power. Here too, the answer proves complex, due to various constraints imposed through national sovereignty, the flexibility of IHRL norms, and the relatively wide prerogative that states enjoy when it comes to derogating from human rights during emergencies.[13] Additionally, the effectiveness of IHRL norms depends on international tribunals' scope of power and ability to enforce their decisions, which are often limited.[14] We conclude that even assuming IHRL has a pro-democratic agenda, behaves in accordance with democratic principles, and accordingly attempts to provide states with norms for preserving democracy amid emergencies, such norms have limited effect.

This Article ends with a discussion and conclusions arguing that IHRL mirrors the methodological nationalism of the classic models for coping with emergencies, as it seems to assume that it is up to domestic law to restore balance and prevent democratic decline amid emergencies. Consequently, it reproduces some hazardous tendencies that domestic legal regimes exhibit during emergencies, such as leaving much room for executive discretion and allowing for the institutionalization of supposedly exceptional emergency measures. To overcome this limitation and provide states with an effective model for preserving democracy amid emergencies, international courts must bring emergency declarations under harsher scrutiny and provide clearer standards for terminating the derogation of human rights. Additionally, international organizations should lead by example and refrain from disproportionately expanding their own executive powers, acting without prior authorization, or suspending individual rights during emergencies.

I. Emergencies and the Threat to Democracy

The central role of emergencies in the deterioration of democratic regimes has received much attention, *inter alia* in the fields of political sociology,[15] political science,[16] law,[17] and philosophy.[18] It is widely agreed upon that severe and life-threatening emergencies, such as pandemics, eco-

13. *See, e.g.*, International Covenant on Civil and Political Rights art. 4, 5 (5), Dec. 16, 1966, 999 U.N.T.S. 171; European Convention on Human Rights art. 15, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123.

14. As discussed, we distinguish this question of enforceability from the question of state compliance, which depends on a variety of factors. *See infra* problem III in Section II.

15. *See generally*, Andrew W. Neal, *Normalization and Legislative Exceptionalism: Counterterrorist Lawmaking and the Changing Times of Security Emergencies*, 6 INT'L POL. SOC. 260 (2012); William E. Scheuerman, *Emergency powers*, 2 ANN. REV. L. SOC. SCI. 257 (2006); Jef Huysmans, *The Jargon of Exception—On Schmitt, Agamben and the Absence of Political Society*, 2 INT'L POL. SOC. 165 (2008).

nomic meltdowns, wars, and terrorist attacks, often act as license or justification for governments to deviate from the core principles of democracy.[19] Such deviations may entail an expansion of executive power at the expense of the discretion of the legislative and judicial branches of government;[20] restrictions on fundamental rights, such as privacy, freedom of movement, and freedom of demonstration;[21] and a suspension of due process and procedural protections central to the rule of law.[22] While these types of restrictions are often intended to be temporary, there is always an anxiety that they will gradually become permanent arrangements. This fear exists mainly in instances of protracted emergencies and even more so when the legal norms for governing emergencies and the conditions for declaring the end of a state of emergency are vague.

Broadly speaking, it is possible to identify three main models for coping with emergencies in constitutional democracies. These models may be termed the "suspension model," the "expansion model," and the "legal adaptation model." In this section, we discuss each of the models, arguing that while all three models pose challenges to the preservation of democracy in times of emergency, the legal adaptation model is probably best suited for this crucial task of preserving democracy. The legal adaptation model attempts to prevent the shift from a liberal democracy to a strict emergency rule by embedding emergency laws and regulations into the regular legal order of the state.[23] However, we also argue that like the suspension and expansion models, the legal adaptation model is characterized by a "methodological nationalism"—a national outlook on society, politics,

16. *See generally*, Scheuerman, *supra* note 15; BONNIE HONIG, EMERGENCY POLITICS (2009); Leonard C. Feldman, *Judging Necessity: Democracy and Extra-Legalism*, 36 POL. THEORY 550 (2008).

17. *See generally*, Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional*, 112 YALE L.J. 1011 (2002); Bruce Ackerman, *The emergency constitution*, 113 YALE L.J. 1029 (2003); OREN GROSS & NÍ AOLÁIN, FIONNUALA, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006).

18. *See generally*, GIORGIO AGAMBEN, STATE OF EXCEPTION (2005); Lukas Van den Berge, *Biopolitics and the Coronavirus: Foucault, Agamben, Zizek*, 49 NETH. J. LEGAL PHIL. 3 (2020); Andrej Zwitter, *The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy*, ARSP: ARCHIVES FOR PHIL. L. & SOC. PHIL. 95 (2012).

19. *See, e.g.,* Arend Lijphart, *Emergency Powers and Emergency Regimes: A Commentary*, 18 ASIAN SURV. 401, 401 (1978); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1433 (1989); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 93 (2018); Gross, *supra* note 17.

20. *See, e.g.*, Gross, *supra* note 17, at 1029; Jonathan White, *Authority After Emergency Rule*, 78 MOD. L. REV. 585, 586 (2015).

21. *See, e.g.,* MANUAL ON HUMAN RIGHTS FOR JUDGES, *supra* note 3, at 884; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 109 (1980).

22. Gad Barzilai, *Uncertainty and COVID-19: Legal Emergencies, Social Quandaries, and Reinventing 'Globalization' Zeitgeist*, Paper Presented in Minerva Center for the Rule of Law under Extreme Conditions, University of Haifa Law Faculty, under the title "Democracies Amid Legal Emergencies: Why Models are Limited but Some are Useful" (January 2021); Gross, *supra* note 17.

23. *See*, *e.g.*, Gabriel L. Negretto & José Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 CARDOZO L. REV. 1797, 1809 (2000).

law, and history that governs the political and sociological imagination.[24] This focus on national sovereignty and view of the nation state as the natural unit of analysis in times of emergency, might prove dated in the age of globalization.

The suspension model refers generally to a shift from a liberal democracy to an authoritarian model of government during states of emergency.[25] This transformation occurs via a suspension of the regular laws of the state, which normally guarantee civil rights and separation of powers.[26] The suspension model may entail a sharp and rapid move from a liberal democracy to an authoritarian (typically military) form of governance; alternatively, it may entail a more gradual shift, during which only certain civil rights are suspended to allow for the militarization or medicalization of government.[27] As such, it is possible to divide the suspension model into two sub-models (full suspension of the law vs. partial suspension), though such a division has little importance for the purposes of this Article.

The works of political theorist Carl Schmitt best identify the suspension model.[28] Schmitt's essays on political theology focus on states of emergency to unveil the structure and tensions of foundational juridical concepts.[29] According to his view, legal norms (both formal and informal) are unable to determine the rules of their own application; thus, the decision how to interpret said norms and to apply them in concrete cases is left to individuals.[30] This means that the legal order ultimately rests on a human decision and not on a norm and that the actor who is authorized to make this decision may be regarded as sovereign.[31] "While the sovereign's institutional form and conditions of emergence [were] treated as unknowable in advance," Schmitt foresaw states of exception as marked by the expansion of executive power and the marginalization of the legislative and judiciary.[32] "Schmitt insisted that such a perspective did not render the

24. Andreas Wimmer & Nina Glick Schiller, *Methodological Nationalism and Beyond: Nation-state Building, Migration and the Social Sciences*, 2 GLOB. NETWORKS 301, 302–308 (2002); Ulrich Beck, *Living in and Coping with World Risk Society*, *in* HUMANITY AT RISK: THE NEED FOR GLOBAL GOVERNANCE 11 (Daniel Innerarity & Javier Solana eds., 2013).

25. *See*, *e.g.*, Lindsey Wiley & Steven F. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 184 (2020).

26. *See*, *e.g.*, David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency inside or Outside the Legal Order*, 27 CARDOZO L. REV. 2005, 2006 (2005). In the Context of COVID-19, Wiley & Vladeck invoke the term "suspension model" to refer to the temporary suspension of judicial review. *See id.* at 182.

27. *See*, *e.g.*, AGAMBEN, *supra* note 18, at 22–23; Rain Liivoja, *Introduction to Military Justice*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 326, 347 (Markus D. Dubber & Tatjana Hörnle eds., 2014); John Reynolds, *Emergency, Governmentality, and the 'Arab Spring,'* JADALIYYA (Aug. 10, 2011), https://www.jadaliyya.com/Details/24304 [https://perma.cc/N28Q-TEJQ].

28. *See generally* Jonathan White, *Emergency Europe*, 63 POL. STUD. 300, 301 (2015).

29. *See id.*

30. *See* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 10 (2005).

31. *See id.*

32. White, *supra* note 28.

law irrelevant," as the idea of exception presupposed a stable legal framework from which its status derived, making it internal, "rather than external to, the legal order."[33] Additionally, while suspension raises fundamental questions for the concept of the rule of law, it is unlikely that the sovereign would wish to be rid of this concept permanently and altogether.[34]

Unlike Schmitt, who unveiled the exception in relation to a state of emergency that requires the suspension of the normal legal order, political philosopher Giorgio Agamben views the exception as a kind of exclusion, which is not necessarily temporary by nature.[35] Agamben follows Schmitt in viewing the exception as the embodiment of sovereignty; however, he argues that the original political relation, the relation of exception, is one of ban—or abandonment.[36] In other words, the modern state is not primarily based on citizens as free and conscious subjects, but rather on the citizen as potential *homo sacer*—a figure abandoned by the law and reduced to "bare life."[37] The legal system may determine the extent of each individual's rights at any given time and citizens constantly remain on the threshold between inclusion and potential exclusion from the protection of the law.[38] Consequently, the suspension of laws amid a state of crisis can become a long-standing arrangement, which allows the sovereign to operate outside of the rule of law for a prolonged period.[39]

The possibility that emergency measures, originally intended as temporary suspensions of the rule of law, would become permanent arrangements is perhaps the gravest cause for concern regarding the suspension model. As White argues, emergency rule usually presents itself as a self-contained episode, with the idea of exceptional measures implying the awaited resumption of political normality.[40] Yet, "[o]nce executives have shown the extent of their willingness to use discretion" and apply emergency measures, they face the challenge of demonstrating they can also step back from it—a challenge to which they do not always rise.[41] Additionally, while the public typically aspires to return to legitimate authority after emergency rule, day-to-day compliance with emergency regulations may yet persist.[42] In fact, there is cause to assume that the politics of the extraordinary actually increases public compliance and that the level of compliance rises over time, as emergency regulations become normalized and normative standards become blurred.[43]

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33. *Id.*
34. *See* White, *supra* note 28, at 302.
35. *See* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 17 (1998).
36. *See* Richard Ek, *Giorgio Agamben and the Spatialities of the Camp: An Introduction*, 88 GEOGRAFISKA ANNALER 363, 366 (2006).
37. *See* AGAMBEN, *supra* note 35, at 71.
38. *See* Ek, *supra* note 36, at 367.
39. *See*, *e.g.*, AGAMBEN, *supra* note 18; Ek, *supra* note 36, at 365; Patricia Owens, *Reclaiming 'Bare Life'?: Against Agamben on Refugees*, 23 INT'L REL. 567, 568 (2009).
40. *See* White, *supra* note 20, at 609.
41. *Id.*
42. *See id.*
43. *Id.* at 609.

Emergencies thus pose an existential threat to democracy, not merely due to the opportunities with which they provide the executive for gaining new powers that may later prove difficult to reverse, but also due to the psychological legitimacy that they provide to authoritarianism. In other words, emergencies may potentially enhance the human tendency to "escape from freedom," as put by social psychologist Erich Fromm.[44] Fromm's understanding of the willingness to submit to authoritarianism—particularly in the form of fascism—as an attempt to overcome the anxiety of individuation by becoming one with an absolute authority, proves particularly relevant amid emergencies. Such times tend to increase feelings of powerlessness and isolation, allowing authoritarianism to provide individuals with relief from uncertainty—whether imagined or real—at the expense of personal freedoms.[45]

This challenge of maintaining constitutional democracy and guaranteeing the return to its principles after a period of suspension of the normal legal order was of great concern to historian and political scientist, Clinton Rossiter. Rossiter argued "the complex system of government of the democratic state is essentially designed to function under normal, peaceful conditions, and is often unequal to the exigencies of a great national crisis."[46] Therefore, in times of crisis, a free and democratic state must have some mechanism by which its leaders could take dictatorial action in its defense—an arrangement that Rossiter terms "constitutional dictatorship."[47] A constitutional dictatorship is:

> a system . . . of constitutional government that bestows on certain individuals or institutions the right to make binding rules, directives, and decisions and apply them to concrete circumstances, unhindered by timely legal checks to their authority . . . . These persons or institutions, however, are subject to various procedural and substantive limitations that are set forth in advance.[48]

While the very term might seem paradoxical,[49] such a system is indeed both a constitutional and a dictatorial one. It "is a dictatorship because the power conferred on the dictator combines elements of judicial, legislative, and executive power."[50] It is also constitutional in the sense that "it comes with various limits prescribed by law and enforced by institutional structures. The dictator exercises power according to constitutional procedures that bring the dictatorship into being, end it, and structure its

44. ERICH FROMM, ESCAPE FROM FREEDOM at xv (Henry Holt and Company 1994) (1941).

45. *Id.* at 36.

46. CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 5 (Transaction Publishers 2009) (1948).

47. *Id.*

48. Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1805 (2010).

49. *See id.* at 1795.

50. *Id.* at 1805.

scope and reach."[51]

Based on a study of the use of emergency powers in modern democracies, Rossiter determined that every democracy has a mechanism—one either expressed or implied—for suspending the constitution when normal rules might be considered to endanger the existence of the state.[52] In fact, on various occasions, "constitutional dictatorship has served as an indispensable factor in maintaining constitutional democracy."[53] However, "[t]he period of dictatorship is dangerous and must be controlled by the people," or "the democratic state will disappear."[54] The challenge is thus "to ensure that the democratic state survives the crisis without" succumbing to the crisis and "sacrificing its democracy."[55] According to Rossiter, the empowered crisis government must "have no other purposes than the preservation of the independence of the state, the maintenance of the existing constitutional order, and the defense of the political and social liberties of the people."[56]

Accordingly, "Rossiter advocated tightening, limiting, and simultaneously strengthening emergency powers," calling on "Congress to adopt a carefully elaborated scheme and procedure for the suspension of rights and invocation of executive power in time of emergency."[57] His book proposes eleven specific criteria for judging the worth and propriety of any resort to constitutional dictatorship,[58] which may be further boiled down to the following principles:[59]

> limit the assumption of dictatorial power to situations where such power is "necessary or even indispensable"; the would-be possessor of such power should not possess the authority to trigger the grant of such power; the grant of such power must be accompanied by a mechanism for terminating it; the

51. *Id.* at 1807. The "constitutional dictator" thus has much in common with Schmitt's "commissarial dictator." Schmitt drew on the distinction, traceable to Roman law, between "sovereign" and "commissarial" dictators: while the former uses a political crisis to overthrow the existing constitutional order and found a new one, the latter is "constituted by and given power by the existing political order." *Id.* at 1797. The commissarial "dictator exercises power temporarily in a crisis in order to save the regime and return to the status quo as soon as practicably possible . . . . The commissarial dictator is a constitutional dictator, whose powers are constituted by the basic law. The sovereign dictator, by contrast, has no obligation to return to the constitutional order . . ." as he himself "constitutes the legal order." *Id.* at 1798. However, "for Schmitt, constitutional (i.e., commissarial) dictatorships were but an unstable temporization that delayed the inevitable reality of sovereignty, the power to declare a state of exception." *Id.* at 1866. On Schmitt's view of dictatorship *see also, generally*, CARL SCHMITT, DIE DIKTATUR (1921).

52. *See* ROSSITER, *supra* note 46, at x.

53. *Id.* at ix-x.

54. David Rudenstine, *Roman Roots for an Imperial Presidency: Revisiting Clinton Rossiter's 1948 Constitutional Dictatorship: Crisis Government in the Modern Democracies*, 34 CARDOZO L. REV. 1063, 1069–70 (2013).

55. *Id.* at 1070.

56. ROSSITER, *supra* note 46, at xii.

57. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1407 (1989).

58. *See* ROSSITER, *supra* note 46, at xii–xiv.

59. *See* Rudenstine, *supra* note 54, at 1070.

> power granted should be commensurate with the crisis and exercised in particular situations only to the extent required; the grant of such power should not extend beyond the crisis and the termination of such power must be followed by as complete a return to pre-existing status as possible.

Yet even scholars who principally subscribe to Rossiter's viewpoint underline the limitations of these principles and warn us of the dangers inherent to such a constitutionalized suspension model, which might easily deteriorate into permanent dictatorship. Levinson & Balkin, for instance, point out that while "the rhetoric of emergency serves as the standard justification for dictatorship, dictatorial powers may not be connected to any real emergency."[60] For example, such powers may be granted because of the fear of an emergency, even if it has not yet materialized. Alternatively, even if dictatorship is initially justified by a real emergency, it may endure after the emergency is over, causing dictatorial powers to become normalized. This gives the executive incentive to magnify both the probability and severity of possible dangerous scenarios.[61] Finally, by declaring an emergency and bestowing dictatorial powers on itself, a government may create a self-fulfilling prophecy: the executive frames the situation as an emergency deserving of dictatorial powers, makes rules that narrate the situation accordingly and then acts on that framing, thereby confirming it.[62]

It is important to note that comprehensive suspensions of the rule of law are becoming less common worldwide. In a recent study, Huq & Ginsburg show that this type of "authoritarian reversion," namely, a rapid and near-complete collapse into authoritarianism,[63] has become a far less likely course of action for aspirational authoritarians than one of "constitutional retrogression."[64] "Constitutional retrogression" is an incremental erosion of three institutional predicates of democracy occurring simultaneously: competitive elections; rights of political speech and association; and the administrative and adjudicative rule of law.[65] Such constitutional retrogression might likewise occur under the suspension model, which may also come in the mitigated form of a more gradual shift from democracy to authoritarianism, during which only certain civil rights are suspended. White, for example, argues that the politics of emergency in contemporary Europe typically do not involve a wholesale suspension of the law in accor-

60. Levinson & Balkin, *supra* note 48, at 1809.

61. *Id.*

62. *Id.*

63. Huq & Ginsburg, *supra* note 19, at 92, 93.

64. For example, in both Hungary and Poland, elected governments have recently hastened to enact various legal and institutional changes that simultaneously diminish electoral competition, undermine liberal rights of democratic participation, and weaken legal stability and predictability. Huq & Ginsburg, *supra* note 19, at 93–94. *See also* David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 211 (2013).

65. *Id.* at 83. Other scholars offer different labels for this type of derogation, including "backsliding," "de-democratization" and the shift to "democratorship." *See*, respectively, Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 5 (2016); Charles Tilly, *Inequality, Democratization, and De-Democratization*, 21 SOC. THEORY 37, 40 (2003); Kim Lane Scheppele, *Worst Practices and the Transnational Legal Order (or How to Build a Constitutional "Democratorship" in Plain Sight)*, 8 U.C. IRVINE L. REV. (2018).

dance with the conventional understanding of the state of exception; rather, they entail a contravention of norms that may or may not be legally codified, combining acts of suspension with acts of legal improvisation.[66]

The expansion model refers generally to the tendency to increase the role and authority of experts or certain state officials in times of emergency.[67] This model may be divided into two main types. The first, which we refer to as the "experts' role expansion model," allows for the militarization or medicalization of society, with military or medical experts dominating government in times of a national security crisis or a health crisis. The second, which we refer to as the "expansion of state law model," entails an expansion of the state and state law into civil society, while limiting judicial review and other checks and balances.

Harold Lasswell's "garrison state" best identifies the first form of the expansion model.[68] Lasswell's 1941 article argued that we are moving towards a world of "garrison states"—a world in which the specialists on violence are the most powerful group in society.[69] In such states, authority will be dictatorial, governmentalized, and centralized, with the elite recruited based on military and technical ability in times of crisis.[70] However, Lasswell stresses that the garrison state differs from the type of military states that have traditionally emerged under emergency rule: while the military-industrial complex has often gained dominance during national security crises, such acquisitions of authority were typically temporary and lacked the permanence characterizing the garrison state.[71] Lasswell cites the development of modern technology as the most crucial cause for change, arguing that in our modern society, any military state must base its calculations of battle potential on the technical and psychological characteristics of modern production processes.[72] Advanced technical skills or management skills such as supervising technical operations, administrative organization, and personnel management, are needed to translate the complicated operations of modern life into the relevant frame of reference of fighting effectiveness (coupled with financial profit).[73] Consequently, the military men who in Lasswell's view will dominate a modern technical society, will be very different from the traditional military officers. These new specialists on violence will learn in their training many of the skills that we have traditionally accepted as part of modern civilian management, making them suited for the task of long-term governance that exceeds the

66. White, *supra* note 28. Moreover, while Schmitt had envisioned sovereignty as a centralized power, defined by its exclusive authority to declare the state of exception, the European emergency regime is in fact collaborative and decentralized.

67. Barzilai, *supra* note 22. *See also* Harold D. Lasswell, *The Garrison State*, 46 AM. J. SOCIO. 455, 457, 465 (1941).

68. Lasswell, *supra* note 67.

69. *Id.* at 455.

70. *Id.*

71. *Id.* at 457.

72. *Id.* at 457–58.

73. *Id.* at 458.

period of national emergency.[74]

The garrison state is an institutionalized military state, designed to cope with threats to national security, which may become permanent and longstanding. Lasswell's article—written during World War II when Americans acknowledged the need to confront and contain Nazi Germany and the Soviet Union—predicted that garrison states would arise under continual crisis and perpetual preparedness for total war.[75] However, in the years since *The Garrison State* was published, scholars have also pointed to more contemporary occurrences of militarization in line with Lasswell's prediction.[76] It has been argued, for instance, that while in the post-industrial age states appear less likely to engage in conventional warfare, the current threat of terrorism may cause the garrisoning of society and enhance the role of military and police organizations, as Lasswell warned.[77]

Such institutionalized militarization of society raises the concern that—somewhat similarly to the suspension model—the expansion model may hinder the return to democracy after the national crisis is resolved.[78] This concern exists not only when it comes to expanding the powers of military experts, but also when considering the "expansion of (nation) state law model." Under this model, the state and state law expand into civil society amid military or medical emergencies, or other instances of severe uncertainties and disasters, via emergency legislation and restrictions on civil rights. The nation state thus uses emergency regulations to intervene in civil society and the economic sphere, narrowing their scope.[79] This potentially increases two types of state power, which author Michael Foucault terms "discipline"[80] and "security,"[81] as emergency regulations expand the powers of the medical apparatus and the military apparatus, respectively. Such tendencies cause judicial review to become more important, in order to balance the expanded power of the executive and

74. *Id.* at 457-58.

75. AARON L. FRIEDBERG, IN THE SHADOW OF THE GARRISON STATE 57—58 (2012).

76. *See generally* MATTHEW J. MORGAN, THE AMERICAN MILITARY AFTER 9/11: SOCIETY, STATE AND EMPIRE (2008); Mukhtar Imam et al., *Re-Evaluating The Rise Of Garrison States: Turkey And Syria In Focus*, 4 INT'L J. INNOVATIVE RSCH. & ADVANCED STUD. 297 (2017); Niloy Ranjan Biswas, *Myanmar's military and the garrison state: State-military relations in Myanmar and their influence in the [re]production of violence against minorities*, 5 ASIAN J. COMPAR. POL. 158 (2020).

77. Matthew J. Morgan, *The garrison state revisited: civil-military implications of terrorism and security*, 10 CONTEMPORARY POL. 5, 5 (2004).

78. For other challenges posed by the garrison state and by the integration of the civil-military relationship in general *see generally* Harold D. Lasswell, *Does the Garrison State Threaten Civil Rights?*, *275* THE ANNALS AM. ACAD. POL. & SOCIAL SCI. 11 (1951); SAMUEL E. FINER. THE MAN ON THE HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS (1962).

79. ROSSITER, *supra* note 46. For examples of such presidential intervention via emergency economic powers in times of military conflict, *see* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1263-65 (1988).

80. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 135 (Alan Sheridan trans., 1977).

81. *See* MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977-1978 (2009).

legislator and prevent it from becoming a long-standing arrangement. However, even courts tend to adjust to the "reality on the ground" during such periods and to limit their intervention in the executive's discretion.[82]

Consequently, some scholars have argued that the misuse of emergency powers does not necessarily reflect its undesirability under certain conditions, but instead that a careful institutional design is required to regulate their authoritarian risks.[83] Such arguments form the third model, **the legal adaptation model**, which aspires to prevent the shift from a liberal democracy to strict emergency rule, by embedding emergency legislation into the normal, civilian legal order of the state. To use the division offered by Kim Lane Scheppele between "legal" and "extralegal" emergencies, one might say that among the models surveyed in this section, the adaptation model falls most strictly into the legal category.[84] While "extralegalists" argue that severe crises of the nation-state must be met with responses outside the law, legalists insist that such crises must be met by entirely legal responses that typically constitutionalize emergency powers by ringing them round with various forms of constraint.[85] The adaptation model abides by this latter principle and attempts to anticipate the onset of an emergency by providing temporally limited legal powers, designed to address the urgent event and allow for reconstruction after it has been resolved. This model is becoming increasingly common worldwide, with some ninety percent of constitutions in force today including some provisions on emergency powers.[86] Four out of five of these also stipulate that declarations of emergency require the approval of at least two institutional actors identified in the constitution (for example a legislature and a chief executive or a court).[87] This is intended as a safeguard against unilateral abuse,[88] which may prevent the executive from creating a "self-fulfilling prophecy" by utilizing emergencies to spur and justify dictatorial powers.[89] Interestingly, such constitutional provisions exist in both democratic and non-democratic states, though democracies are generally less

82. White, *supra* note 20, at 35. *See also* Michelle Everson & Christian Joerges, *Who is the guardian for constitutionalism in Europe after the financial crisis?*, *in* POLITICAL REPRESENTATION IN THE EUROPEAN UNION. STILL DEMOCRATIC IN TIMES OF CRISIS? 197 (Sandra Kröger ed., 2014).

83. *See*, *e.g.*, Gabriel L. Negretto & José Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 CARDOZO L. REV. 1797, 1810 (2000). The authors make this argument in the context of military misuse of emergency powers in the Latin America.

84. Compare to Kim Lane Scheppele, *Legal and Extralegal Emergencies*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS (Keith E. Whittington et al eds., 2013). Scheppele argues that the usual answers to the question of how a duly constituted and legitimate government should act when political crises threaten the very viability of the state fall into two camps: the legal and the extralegal.

85. *Id.*

86. Christian Bjørnskov & Stefan Voigt, The Determinants of Emergency Constitutions 2 (Mar. 23, 2016) (unpublished manuscript) (on file with the Social Science Research Network).

87. Huq & Ginsburg, *supra* note 63, at 111.

88. *Id.* at 78.

89. *But see* Levinson & Balkin, *supra* note 48, at 1809.

inclined to allow discretionary power and the suspension of basic rights during emergencies.[90]

The legal adaptation model holds both promise and challenges for the preservation of democracy amid emergencies. This model provides a strong contrast to the suspension model, as it normalizes the state of emergency via mundane and routine practices, rather than viewing emergencies as grounds for a comprehensive yet temporary suspension of the rule of law. It also attempts to overcome the dangers of the expansion model, by limiting *ex-ante* the role of emergency legislation or military/medical experts. On one hand, this requires embedding the concept of emergency into the legal structure of the nation-state on a permanent basis, thus allowing for long-lasting restrictions on human and civil rights. Author Gunther Frankenberg, for example, demonstrates that the 20th century was characterized by a tendency to *juridify* the extreme exercise of state power, particularly in the field of counterterrorism law.[91] This has led liberal democracies to standardize emergency powers such as administrative detention, surveillance techniques, and even torture.[92] On the other hand, if we wish to prevent a rapid deterioration to authoritarianism, there seems to be no substitute for clear legal rules and standards constraining executive discretion *ex-ante*. This should be done both by strengthening the constitutional limits within which such discretion must operate, and by the political means of reinforcing the institutions and actors that may contest its exercise in real time.[93] Alternative suggestions such as submitting measures introduced under the sign of emergency to post-hoc public approval (e.g. by referendum) as a way of restoring legitimate authority, may prove highly problematic. Public approval may be too forthcoming, for it is consulted not in a time of normalcy, but at a moment where opinion itself is likely to have been shaped by the experience of exceptionalism.[94]

If emergency government is necessary, its institutions and the restraints upon them should be prepared in advance, to head off problems before they occur.[95] However, for the legal adaptation model to succeed in preserving the democratic, constitutional order of the state, it must entail a variety of safeguards, designed to balance the special powers that the constitution provides the executive branch in times of emergency. Such safeguards include effective judicial review, parliamentarian opposition (and in

90. However, this is mainly true for democracies with a mixed presidential political system, i.e. a democratic system with a weak president. *See* Christian Bjørnskov & Stefan Voigt, The Determinants of Emergency Constitutions (Mar. 23, 2016) (unpublished manuscript) (on file with the Social Science Research Network).

91. GUNTHER FRANKENBERG, POLITICAL TECHNOLOGY AND THE EROSION OF THE RULE OF LAW: NORMALIZING THE STATE OF EXCEPTION 25–28 (2014).

92. *Id.* at 115. Frankenberg argues that Schmitt and Agamben, who opposed the idea that the state of exception may be situated and regulated within the confines of the rule of law, overlooked this tendency.

93. White, *supra* note 20, at 35.

94. *Id.*

95. Levinson & Balkin, *supra* note 48.

federal systems, governor opposition), an autonomous regulatory system and clear separation between civilian and military authorities.[96]

Notwithstanding its challenges, it seems that the legal adaptation model is best suited for preserving the principles underlying liberal democracy in times of emergency.[97] Large-scale emergencies such as the outbreak of COVID-19 or acts of global terrorism demonstrate the importance of adopting this model, amid global crises that may lead not just any particular country, but many countries, to deviate from the principles of liberal democracy. Such global de-democratization[98] potentially holds serious implications for the stability of world peace and international cooperation, especially in cases where democratic decline comes in the form of militarization and the normalization of exceptionalism.[99] It also holds vast implications towards the global economy, as democracy is shown to have robust and positive, if indirect, effects on economic growth through higher human capital, lower inflation, lower political instability and higher levels of economic freedom.[100] Moreover, countries attempting to fortify their sovereignty in times of a national or international crisis may do so not only at the expense of their own citizens, but at the expense of other countries and their citizens as well. This may be done not just via military engagement, but also through the adoption of strict immigration policies, or by posing special restrictions and infringements upon the rights of noncitizens residing in the country.

This danger demonstrates a difficulty that is common to all three models discussed above: their strict adherence to the concept of the nation-state. The theories that have informed these models were conceived in a far less globalized world than the one we know today. Consequently, they view the nation-state as the natural unit of analysis for examining the challenges that emergencies pose to democracy and pay little attention to the possible implications of a process of de-democratization occurring on a

96. Additionally, constitutional liberal democracy depends not only on our institutions, but also and perhaps mainly on the qualities of political leadership, popular resistance and strong civil society, and partisan coalitional politics. Huq & Ginsburg, *supra* note 63, at 78.

97. For an opposing view, contending that there may be circumstances when tackling grave threats would require going outside the legal order and receiving ex-post approval for extralegal actions, *see* Gross, *supra* note 19.

98. Tilly, *supra* note 65. We use Tilly's term here to refer generally to a process of decline in democratic principles and values.

99. For the view of democracy as a core value of peace in the "positive" sense (rather than simply the negation of war) *see* Patricia M. Shields, *Limits of Negative Peace, Faces of Positive Peace*, 47 PARAMETERS 5, 8 (2017); JANE ADAMS, DEMOCRACY AND SOCIAL ETHICS 5–7, 276–77 (1920). For democracy as a stabilizing force in the international arena (and in fact, the widespread and empirically supported claim that "democracies do not fight each other") *see*, *e.g.*, Nils Petter Gleditsch, *Democracy and Peace*, 29 J. PEACE RSCH. 369, 369 (1992); Bruce Russett & William Antholis, *Do Democracies Fight Each Other? Evidence from the Peloponnesian War*, 29 J. PEACE RACH. 415, 416 (1992).

100. Hristos Doucouliagos & Mehmet Ali Ulubaşoğlu, *Democracy and Economic Growth: A Meta-Analysis*, 52 AM. J. POL. SCI. 61, 61 (2008); for current and even stronger findings, according to which democracy also has an overall direct positive effect on economic growth, *see* Marco Colagrossi et al., *Does Democracy Cause Growth? A Meta-Analysis (of 2000 Regressions)*, 61 EUR. J. POL. ECON. 1, 38 (2020).

global scale. This difficulty is certainly true for the suspension model and the expansion of state law model, which place much emphasis on the sovereignty of the nation-state and the powers of its executive. It is also true for the legal adaptation model, which relies on the national constitution to govern emergencies and strives to fortify national sovereignty in times of emergency by creating special executive powers in advance. This model mainly underscores the fuzzy boundaries between legal emergencies and legislation aimed mainly to deal with peaceful times. The experts' role expansion model, particularly in the form of the garrison state, involves a more global way of thinking, as militarization typically holds direct implications towards a country's foreign policy and international relations. However, even Lasswell, whose works were influenced by global crises and who did not limit his predictions to any specific country but rather offered a forecast for a future world order, focused on the implications of militarization towards the *internal* social order of the nation-state.[101] Moreover, the models seem to adhere to a traditional understanding of state sovereignty, viewing states as independent entities, each with exclusive control over its territory.[102] Yet, this understanding proves dated in a world economically, technologically, and socially interconnected. For example, while criminal law has long served as a primary example of the state's monopoly over the use of violence in its territory, this monopoly is challenged increasingly by a global enforcement regime, which supplements the enforcement powers of the nation-state.[103] Delegation of authority to international institutions, such as international agreements in which states grant international bodies the power to make decisions or take actions on their behalf, is likewise increasingly common.[104] Yet, it has been suggested that the "sovereignty costs" of such delegations are in fact marginal and that given the consensual nature of delegations, they are best understood as an exercise and even an expansion of national sovereignty, not its surrender.[105]

Thus, traditional theories concerning the threat to democracy in times of emergency suffer from a "methodological nationalism" that limits them from thinking about the deterioration of democracy on a global scale. "Methodological nationalism" is the assumption that the nation/state/society is the natural social and political form of the modern world.[106] It is a national outlook on society and politics, law, justice and history that governs the political, legal and sociological imagination.[107] Modernity, Wimmer & Schiller argue, was "cast in the iron cage of nationalized states that

101. *See generally* Lasswell, *supra* note 67.

102. For the traditional definition of state sovereignty as an independent governing authority that enjoys a supremacy in a given territory *see, e.g.*, Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 L. & CONTEMP. PROBS. 115, 120–21 (2008).

103. GREGORY SHAFFER & ELY AARONSON, THE TRANSNATIONAL LEGAL ORDERING OF CRIMINAL JUSTICE 3 (2020).

104. Hathaway, *supra* note 102, at 115.

105. *Id.* at 148–149.

106. Wimmer & Schiller, *supra* note 24, at 302.

107. Beck, *supra* note 24.

confined and limited our own analytical capacities"; yet, transnationalism has been a constant of modern life.[108] Following Wimmer & Schiller, Beck claims that methodological nationalism prevents the social sciences and humanities from getting at the heart of the key political dynamics of the "world risk society."[109] Beck argues that the accumulation of risk—nuclear, ecological, financial, military, terrorist, biochemical, and informational—has an overwhelming presence in our world today.[110] Such global risk, i.e., the anticipation of global catastrophe,[111] creates a global public and mobilizes people beyond borders.[112] What is needed for this age of globalization is thus a "cosmopolitan turn"—a new cosmopolitan perspective that overcomes the dualisms between universalism and particularism, between internationalism and nationalism, between globalization and localization.[113] Beck stresses that cosmopolitanism should not be understood as a negation of nationalism or as a thesis that the end of the nation-state has arrived; it simply means that the national organization as a structuring principle of societal and political action can no longer serve as the prevailing orienting reference point for the social scientific observer.[114]

Such a cosmopolitan perspective is sorely needed when considering the task of governing emergencies. The anticipation of global catastrophes requires international cooperation if we hope to overcome them with minimal damage to our health and security, but thinking globally about catastrophes today means also applying a cosmopolitan perspective to the risk that such catastrophes pose to democracy. What is required are global norms and principles that would guide countries in adapting their laws to states of emergency and maintaining the core principles of liberal democracy throughout the period of crisis. Such global norms are especially important for assisting countries that do not have a legal adaptation model embedded in their constitutional order.

The quandary we set out to unveil in the next chapter is whether such a system of global norms—whether explicit or implied—currently exists under international law. Can international law assist decision-makers in constructing a democratic legal policy amid emergencies?

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108. Wimmer & Schiller, *supra* note 24, at 302.

109. Beck, *supra* note 24, at 16.

110. *Id.* at 12–13; *see also* Ulrich Beck, Living in and Coping with World Risk Society: The Cosmopolitan Turn 5 (Lecture in Moscow, June 2012).

111. Beck stresses that risk differs from catastrophe. Risks are about anticipating catastrophe and staging the future in the present, whereas the future of future catastrophes is in principle, unknown. *Id.* at 12.

112. *Id.* at 14.

113. Beck, *supra* note 110, at 11. As such, cosmopolitanism is not the antithesis of various particulars (nationalism, localism, culturalism etc.) but is rather the synthesis of previous theories.

114. *Id.* at 3.

II. Democracy and Emergencies in International Law: The Three Problems

For international law to provide states with an effective legal model for protecting democracy amid emergencies, it must meet three basic requirements. First, international law must be pro-democratic, must endorse democracy as the preferred form of government, and promote basic democratic principles, at least in accordance with the thin definition of "democracy" offered above. Otherwise, entrenching democratic principles during states of emergency might not even be on the schema of international law.

Second, international law itself should ideally have democratic and constitutional features, causing international organizations to adhere to the same values they endorse. It would obviously be preferable if international organizations refrain from expanding their own executive discretion and restricting individual rights beyond necessity during emergencies.

Third, international law must provide nation-states with clear norms for preserving democracy amid emergencies. These norms must lay out concrete limitations on state power and must be enforceable. If the norms are ambiguous, leave much to the discretion of individual states, and cannot be enforced by international tribunals, they will most likely remain ineffective.

As we demonstrate below, the question of whether or not international law meets these requirements has a compound answer. The next sections will elaborate on these three requirements, focusing on the main problems that international law, particularly IHRL, encounters when attempting to provide nation-states with a framework for entrenching democracy.

Problem I: Is international Law Pro-Democratic?

Even referring to the relatively minimalist definition of "democracy" offered above, it is unclear that international law explicitly endorses this form of government.[115] Under the proposed definition, norms and actions may be considered pro-democratic if they seek to enhance freedoms of speech and association and to promote electoral integrity, peaceful government changes, legitimate opposition, and the rule of law based on equality of rights.[116] While some democracies certainly utilize international law to protect and extend such principles, this does not mean that most international law is inherently democratic.[117] In fact, there are strong reasons for thinking that as a whole, international law is neutral or agnostic when it comes to regime types.[118]

First, many of the players in the field of international law are not democratic. It is true that since World War II, much of what we have come to think of as international law has mainly been the product of liberal democracies. However, the number of democracies in the world has been in

115. *See* GINSBURG & HUQ, *supra* note 9 and accompanying text in the Introduction.
116. While activity directed at suppressing such principles may be considered pro-authoritarian. *See* Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221 (2019).
117. *See id.* and discussion in the rest of this subsection.
118. *Id.*

decline since 2006, with less than half the world's population currently living in nations that are full or even "flawed" democracies.[119] Some young democracies have been lost, some long-established democracies have seen erosion in the quality of democratic institutions, and the global liberal order is under assault by populists, economic nationalists, and autocrats.[120] It has been predicted that in the next few years, the total share of global output produced by dictatorships will surpass that of the Western democracies, which will fall to less than a third.[121] Thus, author Thomas Ginsburg argues, there is a strong possibility that the 21st century will be known more as an authoritarian century than a democratic one.[122]

Such developments potentially hold vast implications for the field of international law. Today's dictatorships are largely integrated into the global capitalist economy and thus rely heavily on international trade, labor and investment flows, guaranteeing a continued demand for some regional and global public goods from dictatorships and democracies alike.[123] Moreover, while for much of the twentieth century, countries' approaches to international law reflected different ideological positions, in which liberalism found itself in a contest with specific antagonists, today we are witnessing a relative decline in ideology.[124] This leaves states generally free from the need to articulate specific ideologies as alternatives to liberalism, allowing them instead to rely on national interest as the guiding force. Together, these processes suggest that authoritarian regimes might increasingly look for ways to use international law to achieve their nationalist core goals.[125]

In fact, Ginsburg suggests that we are currently witnessing the rise of "authoritarian international law," defined as international legal behavior designed to undermine the spread of liberal democracy and extend the reach of authoritarian rule across space and/or time.[126] This means not only that a rising authoritarianism will find ways to put international law to service, but also that international law will itself be transformed by authoritarianism. Authoritarian international law, Ginsburg predicts, will have different substance, with greater emphasis on internal security, and a different political style, being more flexible and less amenable to third-party dispute resolution.[127] It will emphasize non-interference by international organizations, sovereign equality, and the importance of state consent to international norms, leading to a decline in human rights

119. *Id.* at 225.

120. *Id.* at 221; Michael J. Abramwotiz, *Freedom in the World 2018: Democracy in Crisis*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world/2018/democracy-crisis [https://perma.cc/FYY8-PVL2] (last visited Mar. 12, 2023).

121. Ginsburg, *supra* note 116, at 222.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 225.

127. *Id.* at 231.

enforcement.[128] However, because 21st century authoritarianism is embedded in a system of global capitalism, authoritarian international law will also lead to innovation in international economic law, with much more emphasis on contracts than treaties. Finally, the growth of authoritarian international law is likely to accelerate long-term trends towards increasing executive power within national constitutional orders, resulting in less room for international human rights and democracy promotion.[129]

Such a scenario seems conceivable considering that even now, international law gives much weight to states' right to self-determination and generally does not intervene in their form of government. The right to self-determination is recognized under the United Nations Charter, which speaks of fundamental human rights that are to be protected, but also limits the United Nations from intervening in matters "essentially within the domestic jurisdiction of any state."[130] While these two competing imperatives create internal tensions in the Charter, the basic idea is that, so long as certain minimal and loosely defined standards are met, international law remains rather indifferent about regime type.[131]

Furthermore, the formal support for democracy provided by positive law is significantly limited, even in IHRL, which explicitly stipulates the rights that nation-states are obligated to grant their citizens.[132] On one hand, the central international human rights treaties do mention democracy.[133] While they seem to do so almost in passing, this is perhaps the strongest indication that democracy was simply assumed to be the preferred and most legitimate form of government in the aftermath of World War II. For example, the Universal Declaration of Human Rights states in article 29 that when exercising rights and freedoms, persons shall be subject only to limitations determined by law.[134] Such limitations must be determined for securing due recognition and respect for the rights and freedoms of others and for meeting the just requirements of morality, public order and the general welfare *in a democratic society*.[135] Similarly, the International Covenant on Civil and Political Rights;[136] the International Covenant on Economic, Social and Cultural Rights;[137] the American Convention on Human Rights;[138] and the European Convention on Human

128. *Id.*
129. *Id.*
130. The Charter stipulates that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter". *See* U.N. Charter art. 2(7).
131. Ginsburg, *supra* note 116, at 226.
132. *Id.* at 223–227.
133. *See infra* footnotes 134–139.
134. G.A. Res 217 (III) A, U.N. Doc. AIRES/217(III), art. 29 (Dec. 10, 1948).
135. *Id.* This is the only mention of democracy in the Declaration.
136. International Covenant on Civil and Political Rights, *supra* note 13, at art. 14, 21, 22.
137. International Covenant on Economic, Social and Cultural Rights art. 4, 8, Dec. 16, 1966, 993 U.N.T.S. 3.
138. American Convention on Human Rights, *supra* note 13, at art. 15, 16, 22.

Rights[139] all allow states to restrict rights when necessary in a democratic society. The European Convention takes the most explicit pro-democratic stance, stating in its introduction that fundamental freedoms, which are the foundation of justice and peace in the world, are best maintained by an effective political democracy.[140] Protocol No. 13 to the Convention also defines the right to life as "a basic value in a democratic society" to justify the abolition of the death penalty.[141] Democracy is thus the only political model that the Convention aims for and finds compatible with itself. The concept of a "democratic society" encompasses the entire framework of the Convention and serves as a criterion for the assessment of legality of state action.[142]

On the other hand, except for the European Convention, the issue of democratic/nondemocratic regimes is not part of the law as positively expressed in the IHRL treaties.[143] Consequently, the classical view of the international legal system is one of ideological pluralism. According to this view, international law in its essence is not democratic or authoritarian, nor is it moral or immoral, good nor bad.[144] Its central purpose is not to facilitate the spread of any form of government but instead to facilitate the interactions of governments of very different types.[145]

Many have challenged this classical view, seeking to deploy international law in the service of democracy and arguing that the international system is moving toward a clearly designated right to sue.[146] Yet, such challenges have been criticized on various grounds, both normative and descriptive.[147] First, some have argued in defense of ideological pluralism that societies must be free to subordinate the democratic entitlement to

139. European Convention on Human Rights, *supra* note 13, at art. 6, 8–11. *See also* Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto art. 2, Sept. 16, 1963, E.T.S. 46.

140. Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Aug. 1, 2021, C.E.T.S. No. 213.

141. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2002, E.T.S. No. 187.

142. *See, e.g.*, Rory O'Connell, *Towards a Stronger Concept of Democracy in the Strasbourg Convention*, EUR. HUM. RTS. L. REV. 281, 271 (2006); Joseph Zand, *The Concept of Democracy and the European Convention on Human Rights*, 5 ILS J. INT'L L. 195, 226 (2017).

143. Sheeran, *supra* note 2, at 503.

144. Ginsburg, *supra* note 116, at 226.

145. *Id.* For the claim that international law exists primarily to facilitate relations between states based on self-interest and has no special normative authority *see also, generally*, JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

146. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 54 (1992); *see generally* Fernando R. Tesón, *Two Mistakes about Democracy*, 92 PROC. ANN. MKTG AM. SOC. INT'L L. 126 (1998); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 Colum. L. Rev. 53 (1992); James Crawford, *Democracy and International Law*, 64 B. YB INT'L L. 113 (1993); DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad Roth, eds., 2000); Susan Marks, *What Has Become of the Emerging Right to Democratic Governance?*, 22 EUR. J. INT'L L. 507 (2011).

147. *See*, *e.g.*, DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 146.

other collective goals.[148] By turning democracy itself into a legal right, the two are conflated, putting much pressure on international institutions and leaving less space for democratic choice.[149] Second, it is argued that a right to democracy could be destabilizing and disruptive to the international order.[150] If democracy were accepted as a universal legal right, non-democratic states would become illegitimate members of the international community, with pro-democratic military intervention becoming routine.[151] Third, descriptively speaking, the prediction that we are moving towards such a universal right seems to have failed. This prediction emerged just after the end of the Cold War, when optimism about the prospects of democracy was at its highest.[152] It is now clear that this enthusiasm was at least partially unfounded; democracy is in decline rather than continuing to spread and many democracies are perfectly content to collaborate with authoritarian regimes for economic or political motives.[153]

Consequently, Ginsburg suggests it is impossible to think about international law as inherently democratic.[154] Rather, we may define three categories of international law that currently exist side by side: pro-democratic, general or regime-neutral, and authoritarian. Indeed, democracies may spur human rights agreements that enshrine democratic participation and civil rights, advance charters of regional organizations and election monitoring,[155] all of which are designed to protect and extend democratic governance. Nonetheless, much international legal activity does not have this specific character and even aims explicitly to suppress democratic principles such as freedoms of speech and association, electoral integrity, and the rule of law.[156]

Problem II: Does International Law Behave Democratically?

Assuming that international law does support democracy as a form of government, and aspires to mitigate democratic decline amid emergencies by assisting states in their process of legal adaptation—does international law lead as an archetypal force? Do international organizations adopt democratic and constitutional principles? If so, do these principles guide the

148. Thomas M. Franck, *The Democratic Entitlement*, 29 U. Rich. L. Rev. 1 (1994).

149. *See, e.g.*, Brad Roth, Sovereign equality and moral disagreement (2011). *See also* Ginsburg, *supra* note 116 at 226–226.

150. *See, e.g.*, *id.*; John S. Dryzek, *Can There Be a Human Right to an Essentially Contested Concept?* 78 J. Pol. 357, 358 (2016).

151. *See, e.g.*, Dryzek, *supra* note 150.

152. Eric Alterman, *When Democracy and Liberty Collide; Finding Reasons for optimism About Authoritarian Regimes*, N.Y. Times (Oct. 3, 1998), https://www.nytimes.com/1998/10/03/arts/when-democracy-liberty-collide-finding-reasons-for-optimism-about-authoritarian.html [https://perma.cc/99NS-5C6N].

153. Ginsburg, *supra* note 116, at 228; *see also* Toke Aidt & Facundo Albornoz, *Political Regimes and Foreign Intervention*, 94 J. Dev. Econ. 192, 192–193 (2011).

154. Ginsburg, *supra* note 116, at 227.

155. *See generally* African Charter on Democracy, Elections and Governance art. 2; Inter-American Democratic Charter art. 3; Ben Kiolo, *The African Charter on Democracy, Elections and Governance as a Justiciable Instrument*, 63 J. African L. 39 (2019).

156. Ginsburg, *supra* note 116, at 228.

organizations in their own emergency politics? May such democratic features serve to compensate for processes of national de-democratization?

Two main disciplines underscore the democratic and constitutional qualities of international law: "global constitutionalism" and "global administrative law." Global constitutionalism refers to the global field of formal and informal assemblages of laws, governance, norms, and actors that exhibit constitutional qualities, e.g. separation of powers, secondary rules that constitute and limit primary rules, courts and governments, and the existence of compliance mechanisms.[157] This discipline comprises different strands of thought, most of which reconstruct some features of the status quo of global law and governance as "constitutional" in accordance with the aforementioned qualities. Its main premise is that the principles of the rule of law, separation of powers, fundamental rights protection, and democracy, together with institutions and mechanisms securing and implementing these principles, are best suited to safeguard and promote the well-being of individuals.[158] These principles, institutions, and mechanisms can and should be used as parameters to inspire strategies for the improvement of the legitimacy of an international legal order.[159]

Global administrative law, a scholarly agenda developed by Kingsbury and fellow scholars, refers to the structures, procedures, and normative standards for regulatory decision making that are applicable to various formal and informal intergovernmental regulatory bodies.[160] This discipline contends that there is, and ought to be, a global administrative law which governs the conduct of such international entities to promote accountability, fairness, protection of individual rights, and some sense of democratic decision-making.[161]

While the claim that there is a global order with constitutional and administrative law features is not necessarily new, recent years have seen a more concerted effort to describe, explain, and evaluate the global order through concepts drawn from these fields of law.[162] The theory of global constitutionalism in particular has drawn much interest, with scholars studying both empirical facts and normative ideals, some arguing that the international system is becoming increasingly constitutional and some arguing that it should become so.[163]

On the descriptive level, scholars have reread the founding treaties of some international organizations as the constitutions of those organiza-

157. Tully, s*upra* note 10.

158. Anne Peters, *Global Constitutionalism*, *in* THE ENCYCLOPEDIA OF POLITICAL THOUGHT 1484, 1484 (Michael T. Gibbons ed., 2015).

159. *Id.*

160. Kingsbury et al., *supra* note 11, at 1–2.

161. *Id.*

162. For example, while efforts to formalize international law in the nineteenth and twentieth centuries included discourses of the constitutional nature of international life, the academic discipline of global constitutionalism is relatively new. Anthony F. Lang & Antje Wiener, *Introduction*, *in* HANDBOOK ON GLOBAL CONSTITUTIONALISM 1 (Anthony F. Lang & Antje Wiener eds., 2017).

163. *Id.*

tions, including the European Union[164] and the World Trade Organization.[165] Similarly, the United Nations (U.N.) Charter has been reread as a constitution,[166] or a proto-constitution,[167] of the international community at large, with both the U.N. and the World Trade Organization increasingly subject to a constitutional discourse in attempt to regulate and assess their policies.[168] While these treaties lack both a democratic foundation (were not established by citizens to govern their affairs) and a global political power to enforce the law,[169] scholars have argued that more parts of international law are becoming increasingly constitutionalized.[170] Consequently, we are witnessing a transformation from an international order based on organizing principles such as national sovereignty to one that acknowledges and creatively appropriates principles and values of constitutionalism.[171]

Such a global constitutional order need not mirror in detail that of Western, liberal democratic states. For example, while a global constitutional order exhibits a separation of powers, it lacks a strong global legislative body.[172] There is also no single, clearly defined constituent power, though various groups, agencies, and modes of activism can be understood as providing a representative institution for the international community as a whole.[173]

On the normative level, global constitutionalism grapples with globalization processes that transgress and perforate national or state borders, undermining familiar roots of legitimacy and calling for new forms of checks and balance as a result.[174] A main idea advocated by the normative school of thought is the notion of "compensatory constitutionalism," which calls for the development of global constitutional law as a strategy to

164. *See*, Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349, 372 (2009).

165. *See, e.g.*, Ernst-Ulrich Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, *in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND INTERNATIONAL ECONOMIC LAW 5 (2nd ed.; C. Joerges and E. U. Petersmann eds., 2005). For an opposing view, according to which the WTO does not comply with classical understandings of constitutionalization, *see* DEBORAH Z. CASS, CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION 4 (2005).

166. BARDO FASSBENDER, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY 9–11 (2009).

167. Jürgen Habermas, *Does the Constitutionalization of International Law Still Have a Chance?*, *in* THE DIVIDED WEST 115 (C. Cronin ed. and Trans., (2006)).

168. Antje Wiener et al., *su Rights, Democracy and the Rule of Law*, 1 GLOB. CONST. 1, 2–4 (2012).

169. Habermas, *supra* note 167, at 134. Habermas argues that because the international plane is lacking on both fronts, international law as it stands is only a "proto-constitution."

170. THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 3–4 (Jan Klabbers et al. eds., 2011); Lang & Wiener, *supra* note 162.

171. Peters, *supra* note 158, at 2.

172. Although there are a number of intersecting sites of law making and an increasing number of judicial bodies. Lang & Wiener, *supra* note 162.

173. *Id.*

174. Wiener et al., *supra* note 168, at 6.

compensate for processes undermining domestic constitutions.[175] Accordingly, globalization processes have put nation-states and their constitutions under strain, compelling states to cooperate within international organizations and through bilateral and multilateral treaties.[176] Consequently, previously governmental functions, such as guaranteeing security, freedom, and equality, are transferred to international organizations and non-state actors.[177] This has led to governance that is exercised beyond the states' constitutional confines, causing traditional domestic constitutional principles and protections to become hollowed out. Thus, compensatory mechanisms on the international plane are required to preserve the achievements of national constitutionalism.[178] A main proponent of this view, author Anne Peters, argues that a constitutionalist reconstruction of international law is likely to serve as such a compensatory measure for constitutionalist deficits on the national level.[179]

Global constitutionalism thus provides a potential model for entrenching democratic principles via international law. However, this model has attracted several criticisms. One objection is that the identification of a process of "constitutionalization" in international law is descriptively false.[180] According to this objection, the international legal order in fact remains minimalist, soft, and fragmented, due to the undemocratic nature of the international legal process as well as deficient enforcement.[181] In particular, the typical normative supremacy of constitutional law over other types of law is lacking with regard to international law, as international law does not trump contrary domestic norms.[182] The European Union (EU) is the most successful example of constitutionalization, with constitutional law now providing the hermeneutics for the interpretation and application of EU law.[183] However, while the global realm harbors more constitutionalized international organizations and an increasingly diverse range of actors,[184] compliance with international law, even with European law, remains contested.[185] Some scholars go so far as to claim that constitutionalization in international law is in fact intrinsically impossible, because the preconditions, such as political power of global governance institutions, are lacking in the international sphere.[186]

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175. Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures,* 19 LEIDEN J. INT'L L. 579, 580 (2006).

176. *Id.*

177. *Id.*

178. Peters, *supra* note 158, at 2.

179. Peters, *supra* note 175; Anne Peters, *The merits of global constitutionalism*, 16 IND. J. GLOB. LEGAL STUD. 397, 403–05 (2009).

180. Peters, *supra* note 158, at 2.

181. *Id.*

182. *Id.* at 5.

183. Wiener et al., *supra* note 168.

184. *See, e.g.*, Martin Binder, *The Politicization of International Security Institutions: The UN Security Council and NGOs* 1, 17 (EconStor, Working Paper 2008).

185. Antje Wiener, *Contested Compliance: Interventions on the Normative Structure of World Politics*, 10 EUR. J. INT'L REL. 189, 190 (2004); Wiener et al., *supra* note 168.

186. Peters, *supra* note 158, at 3.

Another fundamental, pluralist critique is that the political, economic, intellectual, and moral diversity of the world population makes constitutionalism both unattainable and illegitimate.[187] Any constitutional arrangement would be imposed by a particular group and would thus be perceived as an imperial tool rather than as an expression of common self-government.[188] This critique is reinforced by the difficulty of defining an international "public" that could potentially agree on the constitutional norms by which it wishes to be governed.[189]

While there are signs that constitutionalization processes (as well as the development of new mechanisms of administrative law[190]) are occurring in international law, such constitutionalization is a matter of degree—an ongoing, but not linear, process, accompanied by antagonist trends.[191] Moreover, the potential of global constitutionalism to compensate for the decline in constitutional and democratic principles on the national level seems limited, especially in times of emergency. First, to realize this potential, global constitutionalism requires dual democratic mechanisms.[192] Not only must states themselves adopt democratic regimes, but the production of primary international law, the international institutions and their secondary law making must also be democratized, on two tracks. On the statist track, citizens should continue to be mediated by their nation-states that act for them in international relations. On the individualist track, citizens must be able to bypass their intermediaries, the nation-states, and take direct democratic action on the supra-state level to combat attacks on the state's constitutional order. Such an individualist track has so far been quite limited.[193]

Second, any attempt to establish global constitutionalism must grapple with the familiar task of taming executives and especially emergency executive action. However, applying the concepts of the executive and the exception, which first emerged in the context of the modern territorial nation-state, to the global setting, poses special problems.[194] This leads to a final challenge to the theories of both global constitutionalism and global administrative law: the apparent willingness of international organizations themselves to deviate from constitutional and administrative principles when conducting emergency politics.

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187. *Id.*

188. *Id.*; NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 27–68 (2010).

189. Hauke Brunkhorst, *Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism*, 31 MILLENNIUM 675, 675 (2002). However, Brunkhorst contends that the existing global weak and deliberative public can be optimistically interpreted as a "strong public in the making."

190. Kingsbury et al., *supra* note 11, at 16. *See also* Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15, 18 (2006).

191. Peters, *supra* note 158, at 3.

192. Anne Peters, *Dual Democracy*, *in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 264 (Jan Klabbers et al. eds., 2011).

193. *Id.*

194. Scheuerman, *supra* note 12.

There is evidence suggesting that much like individual states, new forms of post-national emergency governance exercise substantial discretionary authority and stray from basic democratic principles.[195] As author Christian Kreuder-Sonnen demonstrates, during the last two decades, international organizations have played politically powerful and legally questionable roles in a diverse set of crises in world politics.[196] Organizations such as the U.N. Security Council, the World Health Organization (WHO) and the EU have reacted to large-scale crises by resorting to assertive governance modes, best described as emergency powers.[197] Much like government practices in domestic states of exception, these organizations deploy emergency measures expanding their executive discretion, justified by exceptional circumstances.[198] For example, in its reaction to the 9/11 terrorist attacks, the U.N. Security Council vastly extended its jurisdiction by empowering itself to act as a global legislator and suspending due process rights of individuals.[199] In resolution 1373, adopted without prior public debate, the Security Council stipulated that international terrorism per se—an abstract and general phenomenon—constitutes a threat to international peace and security.[200] Moreover, acting under Chapter VII of the U.N. Charter, the Council imposed on all states a number of legal obligations to combat terrorism, which must be translated into domestic legislation.[201] Thus, the Council widened the reach of its emergency powers by leaving the terrain of executive regulation and beginning to legislate for the international community as a whole. This imposition of international legal obligations by the Council undermined the principle of state consent upon which international law is traditionally structured.[202] Another example is the 2002/3 SARS crisis, during which the WHO issued travel warnings for affected regions and encroached upon the sovereignty rights of some of its nation-state members, without prior authorization to do so.[203] Additionally, since the outbreak of the euro crisis in 2010, the European Central Bank received extra-legal empowerment to act as a lender of last resort to sovereigns in the Eurozone and to impose austerity measures on recipient states.[204]

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195. *Id.*

196. Christian Kreuder-Sonnen, *International authority and the emergency problematique: IO empowerment through crises*, 11 INT'L THEORY 182, 182 (2019).

197. *Id.*

198. *Id.* at 183–184; *see also* White, *supra* note 28, at 308; Benton J. Heath, *Global Emergency Power in the Age of Ebola*, 57 HARV. INT'L L.J. 1, 26–27 (2016); Scheuerman, *supra* note 12. Kreuder-Sonnen terms this tendency "international organization exceptionalism."

199. Scheuerman, *supra* note 12, at 322.

200. S.C. Res. 1373 ¶ 4 (Sept. 12, 2001).

201. This included the duty to criminalize any form of logistic or financial support for terrorists, to freeze funds and financial assets of persons or entities potentially involved in terrorist activities and to tighten border controls and cross-border intelligence sharing. Kreuder-Sonnen, *supra* note 196, at 194.

202. *Id.* at 194–96.

203. *Id.* at 196–97.

204. *Id.* at 198–99.

This expansion of executive authority was achieved in an informal and—from a legal perspective—irregular way. The institutional changes effectuated by these organizations were abrupt, comparatively drastic, with both bureaucratic and member state organs exercising political authority.[205] Such practices constituted "authority leaps" –an expansion of the organizations' mandate facilitated by the rationale of emergency and based on the assumption that the strict observance of ordinary legality could be obstructive to the goal of providing essential public goods in extraordinary situations.[206] Hence, the organizations moved to suspend constraints on the exercise of authority, leading to the expansion of executive discretion in two dimensions: the horizontal (lowering of checks and balances) and the vertical (reduction of legal protection of subjects and individual rights).[207]

When emergency politics—a mode of politics in which unconventional actions are rationalized as necessary responses to exceptional and urgent threats—moves beyond the nation-state, it takes on forms different from those familiar at the domestic level.[208] First, while domestic states of exception operate in the shadow of the monopoly of force and are typically underpinned by coercive institutions such as the police and the army, supranational authorities tend to lack independent enforcement capacities.[209] Consequently, there is more scope for clashes between actors seeking to shape the outcome. Second, transnational legal structures tend to be less codified and constitutionalized, leaving more room for the utilization of informal emergency measures and for executives to bend the law or work creatively within it.[210] Third, emergency rule in the transnational setting generally involves a wider array of actors and audiences, with emergency measures co-produced by national and supranational institutions, often with the involvement of transnational private actors.[211]

While a relatively novel phenomenon with a manageable number of instances so far, transnational emergency politics yet threatens to become a normalized, permanent feature. As we know from domestic states of emergency, emergency measures tend to have a lasting impact on a polity's

205. *Id.* at 183; *see also* Michael Zürn et al., *International Authority and Its Politicization*, 4 INT'L THEORY 69, 87 (2012).

206. Kreuder-Sonnen, *supra* note 196, at 182.

207. *Id.*

208. Kreuder-Sonnen & White, *supra* note 6; *see also* William E. Scheuerman, *States of Emergency Beyond the Nation State?*, *in* VIENNA LECTURES ON LEGAL PHILOSOPHY: VOLUME I: LEGAL POSITIVISM, INSTITUTIONALISM AND GLOBALISATION 65 (Christoph Bezemek eds., 2018).

209. *See* Kreuder-Sonnen & White, *supra* note 6, at 955; *see also, e.g.*, G.A. Res. 60/251 at pmbl. (Mar. 15, 2006). Although the preamble to the resolution establishing the UN Human Rights Council affirms "that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis," article 5 of the resolution establishes that the Council shall perform an educational, consultative, cooperative, and recommendatory relationship with Member States and provides no mechanism for independent enforcement of Council recommendations.

210. Kreuder-Sonnen & White, *supra* note 6, at 956.

211. Furthermore, they tend to address not just the domestic public of a single state but various populations and decision-makers. *Id.*

authority structures.[212] Similarly, emergency measures adopted by international organizations tend to lead to a sustainable empowerment of the institution in question. In fact, the specific post-national conditions in which such measures operate increases the likelihood of intensifying "authority leaps." Emergency politics thereby becomes an important mechanism through which international authority is sustainably expanded through crises.[213]

This inclination casts serious doubt on the ability of international law to assist states in preserving democracy amid emergencies. If international organizations offer any model for governing in times of emergency, this model seems to reproduce many of the failings of domestic emergency law and politics. It similarly justifies deviations from proper procedure and violations of rights as necessary responses to exceptional and urgent threats, resulting in the expansion of executive power and the erosion of constitutional principles. This type of emergency politics challenges the claim of global constitutionalists that international law is currently undergoing processes of constitutionalization.

It is noteworthy, however, that a recent study examining the response of security international organizations (mainly the North Atlantic Treaty Organization (NATO)) to COVID-19, found that this response has so far not been governed by the logic of exceptionalism. According to the study, while NATO had taken some special steps to expedite delivery of medical equipment, it has sought neither to lower checks and balances, nor to reduce the legal protection of individuals for this purpose.[214] While further research on international organizations' response to the pandemic is needed, such a conclusion might be considered an encouraging sign.

Yet, it seems that NATO's avoidance of "authority leaps" stands in stark contrast to the domestic emergency politics adopted by individual states during the pandemic. In Europe, for instance, many governments have imposed the greatest restrictions on civil rights and liberties in their countries since World War II.[215] This stems *inter alia* from the fact that domestic emergency politics has transnational features; the responses of individual states typically affect each other, and domestic publics are likely to evaluate their government comparatively by examining the actions and experiences of other countries. The pandemic has made this fact evident regarding the length and severity of lockdowns, the expertise claims invoked to support them, and the vaccination programs meant to end them.[216]

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212. Kreuder-Sonnen, *supra* note 196, at 184; *see also* SIDNEY G. TARROW, WAR, STATES, AND CONTENTION 24 (2015) (describing one of several "ratchet effects" in relation to the expansion of emergency measures as "temporal" whereby "an executive takes on more and more power over time").

213. Kreuder-Sonnen, *supra* note 196, at 184.

214. *See* Cornelia Baciu, *Beyond the Emergency Problematique: How Do Security IOs Respond to Crises–A Case Study of NATO Response to COVID-19*, 19 J. TRANSNAT'L STUD. 261, 276 (2021).

215. Kreuder-Sonnen & White, *supra* note 6, at 959.

216. *Id.* at 7.

Can norms of international law mitigate domestic emergency politics and prevent nation-states from excessively expanding executive discretion at the expense of effective checks and balances and individual rights? This brings us to the third problem: the effectiveness of IHRL.

Problem III: Does International Law Provide Effective Norms for Preserving Democracy Amid Emergencies?

As discussed above, the classic models for coping with emergencies in constitutional democracies largely ignore international law norms and assume that the tension between democratic principles and the special circumstances of the emergency may be resolved exclusively via domestic law. This is true even for the legal adaptation model, which suffers from a methodological nationalism like that of the suspension model and the expansion model. In this section, we ponder what IHRL must contribute to the preservation of democracy amid emergencies.

On the one hand, international law does seem to endorse a legal adaptation model, with Schmitt's sovereignty thesis and its modern equivalents principally rejected. There appears to be no concession in international treaties to the theories of Schmitt and others concerning the extralegal nature of emergencies. On the contrary, "legal" or "rule of law" approach dominates IHRL.[217] The international treaties stipulate conditions for adapting to times of public emergency by temporarily derogating from human rights, with the expectation that those derogations will be terminated once they are no longer necessary.[218] They permit derogation only to the extent strictly required by the exigencies of the situation and only upon officially proclaiming the emergency[219] and informing the treaty depositary.[220] The treaties also require the protection of certain human rights even amid public emergencies.[221] They thus provide a framework for adapting to the state of emergency and for posing certain restrictions on executive power during this time. Svensson-McCarthy consequently claims that respect for the rule of law and the concept of a democratic society are controlling parameters in any valid limitation on human rights

217. Sheeran, *supra* note 2, at 510.

218. *See*, *e.g.*, International Covenant on Civil and Political Rights, *supra* note 13, art. 4, 5; European Convention on Human Rights, *supra* note 13, at art. 15; American Convention on Human Rights, *supra* note 13, art. 27.

219. International Covenant on Civil and Political Rights, *supra* note 13, art. 4. Additionally, derogations are only permitted provided that the measures taken are consistent with the state's obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion or social origin.

220. European Convention on Human Rights, *supra* note 13, art. 15(3), requires keeping the Secretary General of the Council of Europe fully informed of the measures taken and the reasons therefor. The derogating state shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed. Additionally, under Article 15(1), derogations are only permitted provided the measures taken are consistent with the state's other obligations under international law.

221. *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 13, art. 4, 5; European Convention on Human Rights, *supra* note 13, art. 15; American Convention on Human Rights, *supra* note 13, art. 27(2).

under international law.[222] According to this view, democratic government and society can be a constraint on exceptional powers in times of emergency.[223]

Such a conclusion may perhaps be deduced, for example, from the groundbreaking advisory opinion of the Inter-American Court of Human Rights on Habeas Corpus in Emergency Situations. In this ruling, the Court described derogation as a provision for exceptional situations only, emphasizing that its intention is to enable the effective exercise of representative democracy.[224] Thus, suspensions of guarantees lack all legitimacy whenever they resort to undermining the democratic system[225] and derogations can be invoked in no circumstances to install an authoritarian regime.[226] The Court concluded that writs of habeas corpus are among those judicial remedies that are essential for the protection of inalienable rights and it should serve to preserve legality in a democratic society.[227]

On the other hand, there are various problems with fully endorsing this "democracy as constraint" perspective regarding IHRL and states of emergency. The principle human rights conventions do not differentiate legally between democracies and non-democracies. Moreover, what is or is not a democracy and whether this distinction may justify differential treatment are difficult questions. The definition of a modern "democracy" is no longer an easy undertaking and today's international landscape is characterized by a significant variation of political regimes that possess an array of human rights challenges.[228] Sheeran argues that consequently, treaty law is in fact reflective of the non-role of democracy in the regulation of emergency powers.[229]

IHRL also gives significant weight to the principle of state sovereignty, as is evident by the substantial leeway that the central international human rights treaties allow nation-states when coping with states of emergency. These treaties have incorporated the dichotomy of norm and exception by permitting the contracting parties to take measures derogating from their regular obligations under the treaty in exceptional cases of public emergencies threatening the life of the nation.[230] The International Covenant on

222. SVENSSON-MCCARTHY, *supra* note 8, at 190.

223. *Id.*

224. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 19–20 (Jan. 30, 1987).

225. *Id.* ¶ 20.

226. *Id.*

227. Advisory Opinion OC-8/87, *supra* note 224, ¶ 42. For a similar advisory opinion, on judicial guarantees in states of emergency; *see* Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 21 (Oct. 6, 1987). The Court ruled that the declaration of a state of emergency cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of such rights.

228. Sheeran, *supra* note 2, at 504.

229. *Id.* at 510.

230. *Id.* Derogations have also been called "extraordinary limitations" on the exercise of human rights. Ordinary limitations on the exercise of human rights and extraordi-

Civil and Political Rights,[231] the European Convention[232] and the American Convention[233] all permit derogation amid such emergencies. While a few of the rights guaranteed under these treaties, such as protection from torture and cruel, inhumane, and degrading treatment, are inalienable even in times of emergency,[234] these rights rely on ambiguous terms that potentially limit their scope. For example, despite the formally unqualified prohibition of torture under IHRL, this body of law provides no clear definition of the term "torture,"[235] nor does it provide a clear distinction between torture and "inhumane and degrading treatment."[236]

Additionally, nation-states often overlook the requirements pertaining to the declaration and the termination of derogation of human rights.[237] Derogation is a product of the key distinction between normality and emergency, which is central to the philosophy of the state of emergency.[238] It assumes both the necessity of proclaiming officially that a situation constitutes a public emergency, notifying the treaty depositary, and the need to restore normalcy in which the full range of human rights can be respected,

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nary limitations in the form of derogations are, in fact, closely linked, forming a legal continuum rather than two distinct categories of limitations. This is evident by the fact that, while some rights may be subjected to further strict limitations in emergencies, such limitations must not annihilate the substance of the rights inherent in the human person. MANUAL ON HUMAN RIGHTS FOR JUDGES, *supra* note 3, at 814.

231. International Covenant on Civil and Political Rights, *supra* note 13, art. 4. *See also* Human Rights Committee, General Comment No. 29: States of Emergency, (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶¶ 1 2, 4 (Aug. 31, 2001).

232. European Convention on Human Rights, *supra* note 13, art. 15.

233. American Convention on Human Rights, *supra* note 13, art. 27. In contrast to the American and European Conventions on Human Rights, the African Charter on Human and Peoples' Rights contains no derogation provision. In the view of the African Commission on Human and Peoples' Rights, this means that the Charter "does not allow for states parties to derogate from their treaty obligations during emergency situations." African Commission on Human and Peoples' Rights, 74/92 (*Commission nationale des droits de l'Homme et des libertés* v. Chad), ¶ 21 (Oct. 1995). *See* African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 (1982).

234. International Covenant on Civil and Political Rights, *supra* note 13, art. 4(2), states that some of the rights stipulated in the Covenant are inalienable in time of emergency, including the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The European Court has held that while the majority of the articles of the European Convention for the Protection of Human Rights of 1950 are not absolute, Article 3 of the Convention, which prohibits torture, inhumane and degrading treatment left no room for exceptions. With regard to the inhumane treatment referred to in the article, the Court stipulated that a certain minimum level of conduct must not be passed. This minimum level is not objective but rather determined by the length of time, circumstances of the case, physical and mental repercussions, and, on occasion, even by the gender of the suspect, their age, state of health, etc. *See* Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 129 (2001); *See* Republic of Ireland v. United Kingdom, App. No. 5310/71 Eur. H. R. Rep. 25 (1978).

235. Gross, *supra* note 17, at 94.

236. *See, e.g.,* European Convention on Human Rights, *supra* note 13, art. 3 (establishing that "[n]o one shall be subjected torture *or to inhuman or degrading treatment* or punishment") (emphasis added).

237. *See, e.g.*, Sheeran, *supra* note 2, at 525.

238. *Id.* at 500.

once the emergency concludes.[239] However, the COVID-19 pandemic has seen the essential collapse of the notification regime.[240] While almost every country in the world has taken some exceptional measures limiting civil and political rights, only a handful of countries have notified the Human Rights Committee of the derogation. Additionally, in practice, many emergencies—particularly those related to terrorism[241]—are protracted, generating a form of entrenched public emergency and causing the boundaries between the normal and the exceptional to become blurred. While the idea of limited duration for states of emergency is reflected in many national legal systems, countries including Israel, Egypt, the UK, and Sri Lanka have shown such constraints to be largely ineffective, as emergency measures are simply renewed periodically.[242]

Moreover, the ability and willingness of international tribunals to enforce IHRL norms in times of emergency are both limited.[243] First, some tribunals lack the basic authority to compel states to act in accordance with their obligations under the treaties to which they are party. When nation-states refuse to comply with the norms stipulated in the treaties despite attempts to enforce those norms via the national courts,[244] individuals and NGOs may attempt to compel compliance via an international court or tribunal.[245] However, to do so, the judgements of these tribunals must be binding, and these tribunals must be authorized to enforce their judge-

239. *Id.* at 544 (citing Human Rights Committee, which observes that the "restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant").

240. *Tracking tool– Impact of States of emergencies on civil and political rights*, CTR. FOR CIV. & POL. RTS. (Apr. 1, 2020, 3:31 PM), https://ccprcentre.org/ccprpages/tracking-tool-impact-of-states-of-emergencies-on-civil-and-political-rights [https://perma.cc/9MBX-M82J].

241. Due to their perpetual nature and the difficulty of threat assessment, terrorist threats may generate an ongoing public emergency. Often, in such emergencies, no peace talks are conceivable, progress is measured by the absence of attacks, and the duration of hostilities is measured by the persistence of subjective fear that the enemy retains the capacity to strike. *See, e.g.*, Sheeran, *supra* note 2, at 251. Consequently, the U.N. Sub-Commission on the Promotion and Protection of Human Rights has advocated setting strict time limits to ensure that exceptional measures taken to combat terrorism do not become permanent features of national law or action. *See* Kalliopi K. Koufa (Special Rapporteur on Human Rights and Terrorism), Updated Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism, ¶ 37, U.N. Doc. A/HRC/Sub.1/58/30 (Aug. 3, 2006).

242. Sheeran, *supra* note 2, at 546.

243. *See, e.g.*, *id.* at 518–26.

244. In accordance with the rule of prior exhaustion of domestic remedies, individuals whose rights are violated must first attempt to settle their grievances by petitioning state tribunals and seeking judicial remedies as far as permitted by local law and procedures. Only then may they bring claims of violations of an individual's rights before an international adjudicative body or procedure. *See, e.g.*, Cesare Romano, *The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures*, *in* INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOR OF TULLIO TREVES, 561 (Nerina Boschiero et al. eds., 2013).

245. The European system of human rights, for example, has a compulsory international judicial mechanism to which individuals, groups of individuals and NGOs may file applications directly. *See* European Convention on Human Rights, *supra* note 13, at art. 34.

ments. This challenge of enforceability is different from the question of the level of state compliance with the norms of IHRL prior to any intervention by an international tribunal—the answer to which depends on numerous variables that remain outside the scope of this Article.[246]

Not all treaties are enforceable via a judicial supervisory body. For example, the United Nations human rights system adopts a broad and flexible approach, which allows for the particularities of the legal and administrative systems of each state, as well as other relevant considerations, to be taken into account.[247] Perhaps consequently, with the exception of Peru and Columbia, states have not enacted special enabling legislation under which the decisions of U.N. Human rights treaty bodies and regional human rights instances are given legal status.[248] The system set up by the International Covenant on Civil and Political Rights does not have a supervisory body that may issue judgments, leaving states to abide by the principle of good faith.[249] This principle generates, first, a duty to take into account the international obligations existing in the treaty, and second, a duty to cooperate with the Human Rights Committee (HRC) set up under the Covenant.[250] State parties that have ratified the First Optional Protocol recognize the competence of the HRC to consider communications from individuals, who claim to be victims of a violation by that state party of any of the rights set forth in the Covenant.[251] Yet, the HRC is no court and the first protocol defines the committee's decisions as "views."[252] While the authority to monitor the effect of its views may be considered an

246. For example, whether the state is "monist" or "dualist"; whether international law has direct or rather indirect effect on domestic constitutions and legislation; the existence of laws that facilitate or enable the implementation of international human rights treaties in domestic legislation. On monism v. dualism *see, e.g.*, Madelaine Chiam, *Monism and Dualism in International Law*, in OXFORD BIBLIOGRAPHIES IN INTERNATIONAL LAW 1 (Anthony Carty ed. 2018). For a critical view of this dichotomy *see, e.g.*, PAUL GRAGL, LEGAL MONISM: LAW, PHILOSOPHY, AND POLITICS 42–44 (2018); Armin von Bogdandy, *Pluralism, Direct effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law*, 6 INT'L J. CONST. L. 397, 400 (2008); *see also* Shelly Aviv Yeini; & Ariel L. Bendor, *Charming Betsy and the Constitution*, 53 CORNELL IN'L L.J. 420, 432 (2020). On direct v. indirect effect *see, e.g.*, Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the relationship between international and domestic constitutional law*, 6 INT'L J. CONST. L. 397, 401–04 (2008). On the importance of legislation enabling the implementation of international human rights treaties in the domestic legal order *see, e.g.*, EUR. COMM'N FOR DEMOCRACY THROUGH L. (VENICE COMM'N), REPORT ON THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS TREATIES IN DOMESTIC LAW AND THE ROLE OF COURTS 10 (2014).

247. EUR. COMM'N FOR DEMOCRACY THROUGH L., *supra* note 246, at 21.

248. *Id.* at 33.

249. *Id.* at 21.

250. International Covenant on Civil and Political Rights, *supra* note 13, art. 28 establishes a Human Rights Committee consisting of eighteen members, serving in their personal capacities.

251. EUR. COMM'N FOR DEMOCRACY THROUGH L., *supra* note 246, at 30.

252. Optional Protocol to the International Covenant on Civil and Political Rights art. 5(4), Dec. 16, 1966, 999 U.N.T.S. 171.

implied power of the HRC,[253] and the committee considers its views to be quasi-binding, it does not possess an explicit competence to enforce its views.[254] Accordingly, domestic courts have rejected frequently and consistently any formally binding quality of such views.[255]

Additionally, those judicial supervisory bodies that do exist are likewise limited in their authority. The only compulsory international human rights judicial mechanism, where individuals may file applications directly to the court, is the European Court of Human Rights.[256] The Court holds exclusive and final jurisdiction when it comes to interpreting the European Convention on Human Rights, and states are obligated to abide by its final judgment.[257] Its judgments may require the state party to cease the violation of rights and, when measures are available and have been requested by the individual, to repair violated rights.[258] The Court may order individual measures, such as the release of a detained person;[259] the return of prop-

253. *See, e.g.*, Markus G. Schmidt, *Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond*, *in* THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21 CENTURY 233, 234 (Brill Nijhoff ed., 2000).

254. EUR. COMM'N FOR DEMOCRACY THROUGH L., *supra* note 246, at 31–32.

255. *See, e.g.*, Perterer v. Land Salzburg and Austria, May 6, 2008, ¶ 7–9 (Austria); Singarasa v. Attorney General, Sept. 15 2006, ¶ 21 (Sri Lanka); Spanish Constitutional Court, José Luis PM v. Criminal Chamber of the Supreme Court, Apr. 3, 2002, ¶ 17 (Spain); Kavanagh v. Governor of Mountjoy Prison, Mar. 1, 2002, ¶ 36 (Ir.); Conseil d'Etat, Hauchemaille v. France, Oct. 11 2001, ¶ 22 (Fr.).

256. EUR. COMM'N FOR DEMOCRACY THROUGH L., *supra* note 246, at 18.

257. European Convention on Human Rights, *supra* note 13, at art. 32, 46. In practice, different states give different weight to the judgements of the Court. For example, under German constitutional law, unjustified departure from or non-application of a judgment is sanctioned. An applicant may argue that his or her "parallel" fundamental right as guaranteed by the German Constitution has been violated through the non-application of a judgment of the European Court. *See* German Constitutional Court, Case of Görgülü, 111 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 307–332Oct. 14, 2004 (Ger.). In Italy, the judgments of the European Court deploy a precise legal obligation for the national Italian judge. *See* Court of Cassation (First Criminal Section), Somogyi v. Italy, Oct. 3, 2006, ¶ 10 (It.). The Bulgarian Supreme Administrative Court stated more specifically that the European Court's judgments are addressed to all public authorities of the Bulgarian State at all levels. Bulgarian Supreme Administrative Court, Al-Nashif v. National Police Directorate at the Ministry of the Interior, May 8, 2003, ¶ 9 (Bulg.).

By contrast, the Spanish Constitutional Court has emphasized that the judgments of the European Court possess only declaratory power and are not enforceable in the Spanish legal order. However, the Court also stated that the Spanish authorities and courts are obliged to interpret Spanish law in conformity with these judgments, especially when interpreting parallel fundamental rights also guaranteed in the Spanish Constitution. *See* Spanish Constitutional Court, Fuentes Bobo v. Public Prosecutor and Televisión Española SA, July 3, 2006, ¶ 31–33 (Spain).

258. A judgment of the Court normally contains two elements: the statement of a violation or non-violation of the Convention, and, in case of violation, a section on "just satisfaction," which may cover pecuniary and non-pecuniary damages. The final judgements of the Court are transmitted to the Committee of Ministers—a plenary organ of the Council of Europe in which each state has one representative—so that the committee may supervise their execution. *See* European Convention on Human Rights, *supra* note 13, at art. 41, 46(2).

259. Assanidze v Georgia, Eur. Ct. H.R. 2 (2004).

erty;[260] the performance of additional investigations on the circumstances of the death of a victim;[261] or the reopening of legal proceedings when a domestic court has not met the requirements of independence or given a fair trial.[262] The Court also issues "pilot judgements" to address systemic problems in the legal order of member states (e.g., large-scale expropriations, inhuman detention conditions, or lack of legal remedies) by inducing the state to remove the problem and to resolve the issue domestically.[263] In these judgments, the Court not only finds a violation in the concrete case, but may also impose an obligation to take general measures to remove the systemic defect, often within a deadline.[264] In such cases, the state must adapt its law and practice to prevent similar future violations.[265] The Court issued such judgements in two cases pertaining to a state of emergency in Italy, ruling that the Italian government must remedy the overcrowding of its prisons caused by the emergency[266] and must amend one of its emergency legislative decrees.[267]

As opposed to the European system of human rights, the Inter-American system does not include a compulsory mechanism that individuals can approach directly.[268] Instead, it has a two-step individual complaints system, with individuals only receiving standing to lodge a petition to the Inter-American Commission of Human Rights.[269] If the Commission sees fit it may, upon drawing up a preliminary report,[270] refer the case to the Inter-American Court of Human Rights.[271] This option only exists if the state concerned has accepted the Court's jurisdiction,[272] with the Court's judgements only binding towards states that were parties to the litiga-

260. Brumărescu v Romania, Eur. Ct. H.R. 6 (2001).
261. Abuyeva and others v Russia, Eur. Ct. H.R. ¶ 243 (2010).
262. EUR. COMM'N FOR DEMOCRACY THROUGH L., *supra* note 246, at 23.
263. *Id.*
264. *Id.*
265. *Id.* This practice began in the case of Broniowski v. Poland [GC], Eur. Ct. H.R. (2004). When it comes to the impact on third States, a judgment does not have a formal *erga omnes* effect but deploys a *de facto* orientating effect for third member states. *See, e.g.*, German Federal Constitutional Court, Preventive Detention 2 BvR 2365/09, May 4, 2011, ¶ 89 (Ger.).
266. European Court of Human Rights Press Release 007 of 2013 on Torreggiani and Others v. Italy, nr. 43517/09 ECHR (8 January 2013).
267. MC. and others v. Italy, Eur. Ct. H.R. n. 166 (2013).
268. *Petition and Case System*, ORG. AM. STATES 1, 5 (2010), https://www.oas.org/en/iachr/docs/pdf/howto.pdf [https://perma.cc/6Z6V-RJ2L].
269. American Convention on Human Rights, *supra* note 13, art. 44.
270. *Id.* at art. 50; R. P. INTER-AM. COMM'N ON H.R. ART. 44.
271. *See* ORG. AM. STATES, *supra* note 268.
272. *Id.* at art. 45–46. For example, the Venezuelan Supreme Tribunal of Justice held that a judgment of the Court can deploy effects only if they are in conformity with the Constitution of Venezuela; consequently, it considered that rulings of the Court cannot, as such, be enforced in Venezuela. *See* Solicitor General of the Republic v. Venezuela, Final award on jurisdiction, No 1939 (File No 08-1572) (Venez.). It is noteworthy that while individuals cannot directly petition the Court, the Court tends to approach the rule of the exhaustion of domestic remedies in a more flexible way than its European counterpart does, interpreting it in the most favorable way to the victims. *See* LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY 138 (2011).

tion.[273] While the American Convention does not contain a specific provision on the implementation of the judgments or on monitoring their execution, it asserts that the Court shall specify cases in which a state has not complied with its judgments, and make pertinent recommendations.[274] Since 2008, the Court has conducted compliance hearings to assess whether the state's measures indeed fulfil the orders made in the judgment.[275]

If the Court finds that there has been a violation of the Convention, it may rule that the situation be remedied and that fair compensation be paid to the injured party.[276] In a few cases, the Court has also annulled domestic legislation incompatible with the American Convention. However, to do so, such legislation must be of "immediate application" to the case.[277]

Second, no less important than the enforceability question, is whether the international courts are inclined to use their jurisdiction to rule against nation-states in times of emergency. This problem arises regarding the derogation regime, which invokes two main legal questions: whether a situation constitutes a "public emergency which threatens the life of the nation" and if so, whether the measures taken by the contracting state are proportional, i.e., are "strictly required by the exigencies of the situation."[278]

The jurisprudence on the first question under IHRL has so far been inconsistent and lacking, with courts endorsing flexible definitions of the

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273. American Convention on Human Rights, *supra* note 13, art. 2, 67–8. This binding nature can be based on Articles 67 and 68 of the Convention, as well as Article 2, which stipulates the general obligation of the State parties to "give effect" to the rights and freedoms enshrined in the Convention. This general provision requires the states to adopt "legislative or other measures." As for states which were not parties to the litigation, the Convention stipulates only that they be notified of the judgement.

Inter-American Commission of Human Rights' confidential reports and published opinions are not legally binding, because they are not judgments. It may be argued, however, that the principle of good faith obligates all member States of the Organization of American States to make every effort to comply with the Commission's recommendations in individual cases. *See also* Loayza-Tamayo v. Peru, (Merits), Inter-Am. Ct. H.R., Series C No. 33, ¶ 79- 81 (Sept. 17, 1997).

274. This provision is repeated in Article 30 of the Statute of the Court and has been interpreted by the Court as implying that the supervision of compliance falls, in the first instance, with the Court itself. The Court considers this implied power part of its explicit jurisdictional powers. *See*, Baena Ricardo et al v. Panama (competence), Inter-Am. Ct. H.R., Series C No 104, ¶ 66 (Nov. 28, 2003).

275. *See* EUR. COMM'N FOR DEMOCRACY THROUGH L., *supra* note 246. In 2009, these hearings were codified in Article 63 of the Rules of Procedure of the Inter-American Commission of Human Rights (in force since Jan. 1, 2010).

276. American Convention on Human Rights, *supra* note 13, at art. 63. Compensation is varied and has included such measures as pecuniary compensation; the return of property or of territory; release of a prisoner; return to place of residence, and reinstatement in employment. *See also* EUR. COMM'N FOR DEMOCRACY THROUGH L., *supra* note 246.

277. International responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, Advisory Opinion, OC 14-94, Inter-Am. Ct. H.R. ¶ 41-43.

278. *See* Sheeran, *supra* note 2, at 492; *See also* Peters, *supra* note 192, at General Comment 29 (stating "[a] third question concerns the procedural requirement that the state derogating must notify the treaty depositary and therefore in practice the other state parties of its public emergency and measures of derogation.").

term "emergency."[279] The somewhat artificial dichotomy of norm and exception present in the derogation regime endorses a bifurcated approach to balancing the interests of the collective and the individual. It may thus provide instant legitimacy to the greater limitation of human rights by governments once an "emergency" is declared. Yet, the concept of "emergency" is not conducive to clear definition under international law, nor are concepts such as "public order" and "national security," which are to be balanced with individual rights under the derogation regime.[280]

Similarly, the definition of the term "terrorism" is ambiguous and controversial,[281] and thus poses a significant conceptual challenge to avoiding the abuse of states of emergency.[282] Most terrorism is targeted at creating ongoing fear in the civilian population, and, as such, may not directly threaten the institutions of the state and governance, nor be temporary in nature.[283] Thus, the circumstances under which the threat of terrorism reaches the threshold necessary to satisfy a public emergency that requires derogation of human rights obligations remain unclear,[284] with some human rights treaty bodies setting a low bar for derogation.[285] The European Court of Human Rights, for instance, has ruled that the threat of terrorism prior to any actual attack could constitute a public emergency threatening the life of the nation.[286] Such leeway in declaring national security emergencies is consistent with the "margin of appreciation" doctrine, which entitles each European society to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge due to diverse moral convictions.[287] This deference to the national level to resolve difficult political and moral decisions is partly justified by liberal ethos, which stimulates courts to have faith in the legitimacy and lawfulness of their decisions. Yet, this doctrine also challenges the ability of the judicial branch and the law to protect minorities from a "tyranny of the majority," which likewise is a key component of liberal

279. *See* Sheeran, *supra* note 2, at 493–94.

280. *Id.* at 505.

281. *See, e.g.*, Gilbert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L. Q. 537, 537–38 (2004). The distinction between "terrorists" and "freedom fighters," for instance, remains contentious in situations such as the Occupied Palestinian Territories or the Kurds in Turkey. *See also* Sheeran, *supra* note 2, at 542.

282. *See also* Sheeran, *supra* note 2, at 541.

283. *See id.* at 543; *see, e.g.,* Guillaume, *supra* note 281, at 541 (stating that "[t]errorism is a method of combat in which the victims are not chosen on an individual basis but are struck either at random or for symbolic effect. The goal pursued in attacking them is not to eliminate the victims themselves but to spread terror among the group to which they belong.").

284. *Id.* at 542.

285. *See, e.g.*, Evan Criddle & Evan Fox-Decent, *Human Rights, Emergencies, and the Rule of Law*, 34 HUM. RTS. Q. 39, 49 (2012) (stating that "[e]ach convention furnishes discrete substantive and procedural criteria for evaluating whether exigent circumstances justify entry into a state of emergency.").

286. *A & Others v. United Kingdom*, Eur. Ct. H.R. 72, ¶ 175–181 (2009).

287. *See* Sheeran, *supra* note 2, at 493, 538–41; For a critical assessment *c.f.* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INT'L L. & POL. 843, 834 (1999).

democracy. The margin of appreciation doctrine thus proves highly problematic in emergency cases where the conflict concerns treatment of the minority by the majority,[288] as is often the case when coping with terrorist threats.[289]

IHRL is vague on the precise conditions that constitute a public emergency and justify derogation.[290] The human rights treaty bodies have often abdicated responsibility for making this determination and declined to overturn the assertion of a state of emergency by a government.[291] They usually choose to focus instead on the second question of the proportionality of the emergency measures taken by the derogating state[292] or, alternatively, on the state's compliance with procedural requirements.[293] Consequently, they continue to affirm, either directly or indirectly, unfounded government assertions of a state of emergency, thereby diluting the law's normativity and its positive influence.[294] Sheeran argues that the most effective solution is simply to examine the public emergency precondition and threshold under the proportionality-of-measures assessment.[295] He notes that the proportionality query is already inherently tied to the public emergency question, given the U.N. Human Rights Committee's key statement on the proportionality test.[296] The statement stipulates that the proportionality test concerns the "duration, geographical coverage and material scope of the state of emergency"[297]—meaning that it also includes an assessment of the nature of the public emergency situation.[298]

In assessing proportionality, the human rights treaty bodies likewise tend to defer to the judgement of governments.[299] For example, the European Court of Human Rights has generally endorsed a wide margin of appreciation, both on the existence of the emergency and the proportionality of measures.[300] In the context of counterterrorism, the Court has accepted far-reaching extraordinary powers of arrest and detention void of judicial review, ruling that they were within the margin of appreciation.[301]

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288. *See* Sheeran, *supra* note 2, at 540; Benvenisti, *supra* note 287, at 853–54.
289. Sheeran, *supra* note 2.
290. *Id.* at 493.
291. *Id.*
292. *Id.*
293. *Id.* at 528. *See, e.g.*, Consuelo Salgar de Montejo v. Colombia, Commc'n No. R. 15/64, H.R. Comm., ¶ 1.2 (Dec. 18, 1979).
294. *See* Sheeran, *supra* note 2, at 557.
295. *Id.*
296. *Id.* at 530.
297. *See* General Comment No. 29, *supra* note 231, at 2, ¶ 4.
298. *See* Sheeran, *supra* note 2, at 530.
299. *See, e.g.*, Lawless v. Ireland (No. 3), Eur. Ct. H.R. (1961); Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser. B) at 117 (1976). For a notable exception, *c.f.* James Becket, *The Greek Case Before the European Human Rights Commission*, 1 HUM. RTS. 97, 108 (1970). The Greek case, Eur. Comm'nH.R. 1 (1969)).
300. *A & Others v. United Kingdom*, Eur. Ct. H.R. 72, ¶ 175–181 (2009). Although for a verdict limiting the margin of appreciation, *see* Zielinski and Pradal & Gonzalez and Others v. France, Eur. Ct. H.R. (1999).
301. *See, e.g.*, Lawless Case (Merits), Eur. Ct. H.R. 53 (1961); Marshall v. the United Kingdom, Eur. Ct. H.R. (2001) Case of Brannigan and McBride v. the United Kingdom,

With regard to counterterrorism measures adopted by the UK after 9/11, the Court went so far as to limit its intervention in the British court's discretion to cases in which the British court had misinterpreted or misapplied the derogation clause or reached a ruling that was manifestly unreasonable.[302] Similarly, while it is widely agreed upon that proportionality relies partly on the imminence of the threat posed by the public emergency, it is rare for the international treaty bodies to rule against a nation-state on this issue.[303] For instance, when it comes to terrorism-related emergencies, no treaty body has ever dealt seriously with the imminence condition or ruled that the state did not meet the requirement.[304]

As a result, the criteria for legally determining the proportionality of measures taken by derogating states to cope with emergencies remain quite flexible. In the context of the COVID-19 pandemic, it is still unclear whether this inclination likewise exists, as not enough cases pertaining to emergency measures taken by states have been decided upon. In a couple of cases, the European Court of Human Rights has emphasized the seriousness of the pandemic as justification for limitations on freedom of movement[305] and the particularly wide margin of appreciation that states enjoy with regard to their health care policies.[306] Conversely, when it comes to state action that endangers the health of individuals during the pandemic, both the European Court and the Inter-American system seem more inclined to rule against the state.[307] In the Inter-American system, "[t]he most direct protective response to date has been the issuance of two measures of protection requiring concrete action to safeguard the rights of particular people at urgent risk of irreparable harm."[308] In one decision, the Inter-American Commission of Human Rights issued precautionary measures in favor of the Yanomami and Ye'kwana peoples in Brazil, requiring the state to provide access to medical treatment.[309] In the second ruling, the Inter-American Court of Human Rights granted provisional measures

Eur. Ct. H.R. 49 (1996). *But see* Aksoy v. Turkey, Eur. Ct. H.R. 2281 (1996); Yalgin and Others v. Turkey, Eur. Ct. H.R. (2001).

302. A & Others v. United Kingdom (2009). For the relevant derogation clause *see* European Convention on Human Rights, *supra* note 13, at art. 15.

303. Sheeran, *supra* note 2, at 543. The Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR, for example, provide that each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger. *See* Economic and Social Council, U.N., and Social Council, Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR, UN Doc. No. E/CN (1984).

304. Sheeran, *supra* note 2, at 544.

305. Terheş v. Romania, Eur. Ct. of H.R. 12–14 (2020).

306. Vavricka & Others v. The Czech Republic, Eur. Ct. H.R. (2021). While this case was not related directly to the pandemic, it referenced the importance of vaccinations in this context as well.

307. *Id.* at 6.

308. *COVID-19, Health, and Human Rights: the Inter-American System's Response*, GLOB. CAMPUS HUM. RTS. (Dec. 12, 2022), https://gchumanrights.org/gc-preparedness/preparedness-economic-social-and-cultural-rights/article-detail/covid-19-health-and-human-rights-the-inter-american-systems-response.html [https://perma.cc/98BK-3T7A].

309. The Inter-American Commission on Human Rights, Members of the Yanomami and Ye'kwana Indigenous Peoples regarding Brazil, Resolution 35/2020, July 17, 2020.

in favor of migrants who were detained in unsanitary conditions, leading to a surge in positive coronavirus cases.[310] The European Court likewise ruled in favor of an applicant who was detained in hazardous conditions in the context of the pandemic.[311]

One encouraging sign regarding the derogation regime may be found in the attempt of numerous international tribunals and organizations to guide states when it comes to respecting human rights in their response to COVID-19. The U.N. Human Rights Committee,[312] the U.N. Office of the High Commissioner,[313] the Council of Europe,[314] the Inter-American Court of Human Rights,[315] and many others[316] have all issued general statements or guidance on this issue. Many of these organizations have outlined States' responsibilities to ensure that declared states of emergency comply with human rights obligations, properly notify any derogations from their human rights treaty obligations, and to avoid using emergency measures to infringe upon human rights.[317] While some of these statements are more general or vague than others,[318] and some emphasize the inevitability, in certain circumstances, of adopting measures that may result in restrictions on individual rights,[319] all statements insist on a strictly "legal" response to COVID-19.[320] They stipulate that restrictions must be provided by law and must not be arbitrary, unreasonable or inac-

310. Caso Veléz Loor v. Panama, Inter-Am. Ct. H.R. (July 22, 2020).

311. Feilazoo v. Malta, Eur. Ct. H.R. (2021).

312. *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, U.N. HUM. RTS. COMM. (Apr. 30, 2020), https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/COVIDstatementEN.pdf [https://perma.cc/VH5G-Z4XN].

313. *Covid-19: Guidance*, U.N. OFF. HIGH COMM'R (Apr. 27, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx [https://perma.cc/GK7Z-68E9].

314. *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis A toolkit for member states*, COUNCIL EUR., https://www.coe.int/en/web/congress/covid-19-toolkits [https://perma.cc/4NC6-D9SS] (last visited Aug. 21, 2023).

315. *Covid-19 and Human Rights: The Problems And Challenges Must be Addressed From A Human Rights Perspective and With Respect for International Obligations*, INTER-AM. CT. H.R. (Apr. 9, 2020), https://www.corteidh.or.cr/tablas/alerta/comunicado/Statement_1_20_ENG.pdf [https://perma.cc/8F9M-RCKR].

316. *E.g.*, Press Release on Coronavirus Disease 2019 (COVID-19), Asean Intergovernmental Commission on Human Rights, (May 1, 2020), https://aichr.org/news/press-release-on-coronavirus-disease-2019-covid-19-by-the-asean-intergovernmental-commission-on-human-rights-aichr/[https://perma.cc/F7X3-WDSE]; INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, RESOLUTION 1/2020, PANDEMIC AND HUMAN RIGHTS IN THE AMERICAS (Apr. 10, 2020), http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf [https://perma.cc/FP2F-NBWZ].

317. *See, e.g.*, U.N. HUM. RTS. COMM, *supra* note 312; INTER-AM. CT. H.R., *supra* note 315; U.N. OFF. HIGH COMM'R, *supra* note 313. The Council of Europe also reiterated the standards for declaring states of emergency.

318. *See, e.g.*, U.N. HUM. RTS. COMM, *supra* note 312. The statement does not mention democracy and mostly reiterates the general principles of the derogation regime.

319. *See id.*

320. *See, e.g.*, INTER-AM. CT. H.R., *supra* note 315; U.N. OFF. HIGH COMM'R, *supra* note 313; COUNCIL EUR., *supra* note 314. Compare to Scheppele, *supra* note 84.

cessible to the public.[321] Restrictions must also be applied indiscriminately and should not be used as a basis to target particular individuals or groups, including minorities.[322] They must be temporary and include safeguards to ensure the return to ordinary laws as soon as the emergency is over.[323] The statements also emphasize that supervision of the exercise of emergency powers is essential to allow substance to democracy and the rule of law.[324] Emergency measures, including derogation and suspension of certain rights, should be subject to independent review by the legislature and the judiciary.[325] Furthermore, they should be accessible to scrutiny by the media, civil society activists, and the public at large.[326] Some of the statements and guidance also attempt to instruct states on the permitted level of restriction of specific rights[327] or on the adoption of particular state powers to cope with emergencies.[328]

The Council of Europe has taken a particularly firm pro-legal stance, one that is compatible with the legal adaptation model, as it seeks to find the authority, as well as the limitations and safeguards, for emergency measures in domestic constitutions and legislation. The Council stresses that states must seek to protect the democratic order from the threats to it and that every effort should be made to safeguard the values of a democratic society, such as pluralism and tolerance.[329] Even in emergencies, the rule of law must prevail, with "law" including not only acts of the legislature but also, for example, emergency decrees of the executive, if they have a constitutional basis.[330] The legislature may also adopt emergency laws specifically crafted for dealing with a prevailing crisis, so long as they comply with the constitution and international standards and are subjected to judicial review by the Constitutional Court.[331] If parliament wishes to authorize the government to deviate from special majority legislation, the majority required for the adoption of the legislation must be reached.[332] Any legislation enacted during the state of emergency should also include clear time limits on the duration of these exceptional measures.[333] Additionally, constitutional prolongation of the emergency regime should be

321. *See, e.g.*, U.N. OFF. HIGH COMM'R, *supra* note 313; COUNCIL EUR., *supra* note 314.
322. *See, e.g.*, U.N. OFF. HIGH COMM'R, *supra* note 313; U.N. HUM. RTS. COMM, *supra* note 312; INTER-AM. CT. H.R., *supra* note 315.
323. *See, e.g.*, U.N. OFF. HIGH COMM'R, *supra* note 313; U.N. HUM. RTS. COMM, *supra* note 312; COUNCIL EUR., *supra* note 314.
324. COUNCIL EUR., *supra* note 314, at 3.
325. *See, e.g.*, U.N. OFF. HIGH COMM'R, *supra* note 313; COUNCIL EUR., *supra* note 314.
326. *See, e.g.*, COUNCIL EUR., *supra* note 314; INTER-AM. CT. H.R., *supra* note 315.
327. *See, e.g.*, COUNCIL EUR., *supra* note 314, which addresses various rights stipulated in European Convention, e.g., the right to life, the Right to liberty and security, the right to privacy, freedom of conscience, freedom of expression and freedom of association.
328. *See, e.g.*, U.N. OFF. HIGH COMM'R, *supra* note 313, which stipulates some general principles for imposing penalties for violations of extraordinary measures and for the use of force by law enforcement.
329. COUNCIL EUR., *supra* note 314.
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*

subject to the control of its necessity by parliament.[334]

Some international organizations also issued statements[335] and guidance on holding free elections during public health emergencies.[336] Additionally, there are instances of international courts communicating between themselves, such as a joint virtual conversation on COVID-19 and human rights held in 2020 by the European Court, the Inter-American Court, and the African Court of Human and Peoples' Rights.[337]

These steps may indicate that the need for global norms for governing emergencies has become greater, and more widely recognized than ever. Yet, they have so far been largely declarative, and it is still hard to tell whether they will translate into de-facto protection of democratic principles, given the weight that national sovereignty holds in IHRL. The next and final section below considers the implications of this significant deference to national sovereignty toward the prevention of global democratic decline and concludes with some policy recommendations.

Discussion and Conclusions

As we have explicated above, the classic models for coping with emergencies in constitutional democracies—particularly the suspension and expansion models, which are based on theories developed largely prior to the age of globalization[338]—suffer from a methodological nationalism. However, IHRL, which generally adopts the legal adaptation model, likewise seems to mirror the assumption that it is up to domestic law to restore balance and prevent democratic decline amid emergencies.

While IHRL attempts to stipulate norms that would assist in protecting basic democratic principles during public emergencies, it grants indi-

334. *Id.*

335. *See, e.g.*, *Declaration on elections in the digital age*, OFF. U.N. HIGH COMM'R FOR HUM. RTS. (Apr. 30, 2020), https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/JointDeclarationDigitalAge_30April2020_EN.pdf [https://perma.cc/6B4M-BVXP]; *Statement of the African Commission on Human and Peoples' Rights on Elections in Africa during the COVID-19 Pandemic*, AFR. COMM'N ON HUM. AND PEOPLES' RTS. (July 22, 2020), https://achpr.au.int/en/news/press-releases/2020-07-22/statement-african-commission-human-and-peoples-rights [https://perma.cc/45EF-E9MJ].

336. For example, the Inter-American Institute of Human Rights has published a guide (in Spanish) on organizing an election and on establishing during a pandemic. *See* José J. Thompson, DIMENSIONES QUE INCIDEN EN LA ORGANIZACIÓN DE PROCESOS ELECTORALES EN TIEMPOS DE PANDEMIA 9 (2020). The African Court on Human and Peoples' Rights issued an advisory opinion on holding elections during public health emergencies. *See* The Right to Participate in the Government of One's Country in the Context of an Election Held During a Public Health Emergency or a Pandemic, such as the COVID-19 Crisis, Advisory Opinion No. 001/2020, Afr. Ct. H.P.R. (July 16, 2021).

337. Erizabeth Abi-Mershed, *COVID-19, Health and Human Rights: the Inter-American System's Response*, GLOB. CAMPUS HUM. RTS. (Dec. 11, 2020), https://gchumanrights.org/gc-preparedness/preparedness-economic-social-and-cultural-rights/article-detail/covid-19-health-and-human-rights-the-inter-american-systems-response.html [https://perma.cc/8JHY-L82U].

338. While early processes of globalization date back to the 16th century, the era of globalization is generally identified with the 20th century. *See generally* Adam McKeown, *Periodizing globalization*, 63 HIST. WORKSHOP J. 218 (2007).

vidual nation-states wide discretion in interpreting norms and applying them in concrete cases. Moreover, each nation-state remains free to choose its preferred regime type, with democracy not part of the compulsory law as expressed in IHRL treaties. While this wide discretion has various justifications,[339] it reflects a somewhat dated understanding of national sovereignty, under which states are viewed as atomistic entities whose legal regimes and conduct amid emergencies only affect their own citizens.[340] In fact, domestic emergency politics has transnational features, with individual governments influenced by each other's responses and public opinion in each state formed vis-a-vis the actions and experiences of other countries.[341] As evident in the context of COVID-19, different nation-states tend to resort to similar measures during emergencies—particularly the expansion of executive powers, often at the expense of human rights.[342] Consequently, the threat of democratic decline is not limited to the regime of one country or another, but rather becomes a global hazard.

In states of emergency, authoritarianism might provide individuals with a supposed relief from uncertainty, leading to an increased willingness to surrender personal freedoms. Alternative, legal measures for coping with uncertainty—namely, rules that facilitate *ex-ante* the temporary adaptation of the regular legal order to the special circumstances of the emergency—are necessary to mitigate this danger. IHRL attempts to provide states with such measures by insisting on a legal response to emergencies[343] and offering general principles for limiting executive power and derogation of human rights. However, as we have analyzed above, these principles tend to be vague, usually do not trump contrary domestic norms and are not always enforceable. Consequently, it seems that IHRL struggles to offer certainty and stability amid emergencies, as both the precise obligations that its norms impose on states and its ability to compel states to comply with said norms remain doubtful.

This is true also regarding the duration of emergency measures, which often remains uncertain and flexible. As explained, some public emergencies become institutionalized, with supposedly exceptional measures renewed periodically.[344] This occurs notwithstanding international treaties, which stipulate only that derogating states must notify the treaty depositary when the derogation is terminated and do not specify standards for deciding on such termination.[345] Such a problem exists not only in IHRL but also in other fields of international law, which likewise facili-

339. For such justifications and the importance of respect for national sovereignty, including from the perspective of representative democracy, *see, e.g.*, GOLDSMITH & POSNER, *supra* note 145; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV., 815, 815–76 (1997); John Yoo, *UN Wars, US War Powers*, 1 CHI. J. INT'L L. 355, 372 (2000).

340. Compare with discussion in Section I.

341. *See* Kreuder-Sonnen & White, *supra* note 6 and accompanying text.

342. *Id.*

343. Sheeran, *supra* note 2, at 510.

344. *Id.* at 546.

345. *See id.* at 507.

tate longstanding emergency measures, originally intended as temporary. A robust example is the "temporary protection" regime, which international refugee law defines as a measure intended for exceptional humanitarian crises leading to a mass influx of displaced persons.[346] When the state is unable to process the large number of individual asylum claims, it may instead provide the entire group of asylum-seekers with immediate and temporary protection that entails a minimum set of rights but not full refugee status.[347] As with derogation, the UNHCR guidelines prohibit the use of temporary protection as a permanent arrangement and encourage states to set timeframes for terminating it.[348] Nevertheless, many countries have adopted forms of temporary protection[349] that have deviated from its definition under international law, using it as a long-term substitute for the examination of individual asylum claims.[350] In these countries, temporary protection has in fact become a type of "second rate" refugee status, applied regardless of whether the country is still dealing with an exceptional influx of asylum-seekers.[351]

Thus, much like nation-states, international law struggles to cope with uncertainty and unpredictable situations. Consequently, international law

346. *See, e.g.*, *Guidelines on Temporary Protection or Stay Arrangements*, U.N. HIGH COMM'R FOR REFUGEES, http://www.unhcr.org/protection/expert/5304b71c9/guidelines-temporary-protection-stay-arrangements.html [https://perma.cc/7SLC-LBGU] (last visited Mar. 15, 2023); The European Council has adopted a similar definition. *See* Council Directive 2001/55, 2001 O.J. (L.212) 12 (EC) [hereinafter Directive 2001/55]; for a general discussion of temporary protection regimes *see generally* Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT'L L. 279 (2000).

347. For example, freedom of movement, access to housing, health and education services, special care for separated and unaccompanied children, etc. *See*, U.N. HIGH COMM'R FOR REFUGEES, *supra* note 346, at sections 5–6; Directive 2001/55, *supra* note 346.

348. However, the guidelines also recognize that the determination of an exact duration for temporary protection may not always be possible because of the complex or fluid nature of the movements and their root causes. U.N. HIGH COMM'R FOR REFUGEES, *supra* note 346, at section 7; *see also* Directive 2001/55, *supra* note 346.

349. Temporary protection gained much prominence during the 1990s as a response to forced migration, especially in Europe. *See* Fitzpatrick, *supra* note 346; Tally Kritzman-Amir, *'Otherness' as the Underlying Principle in Israel's Asylum Regime*, 42 ISR. L. REV. 603, 618 (2009).

350. In Denmark, for example, temporary protection may be applied for a period of up to seven years. Aliens (consolidation) Act (2006: 608) § 7–11 (Den.). In Germany asylum-seekers may hold this status for a period of three years. Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory], July 30, 2004, [last amended August 1, 2017], Federal Law Gazette I at 1106, Sec. 24, 26 (Ger.). The same is true for Australia, where temporary protection was abolished in 2008 and reinstated in 2014. *See* Migration Act 1958 (Austl.) and Migration Regulations 1994 (Austl.) [hereinafter Australia Migration Act].

351. Some of these countries also deviate from international law in the sense that they have adopted temporary protection not as a form of group protection due to mass-movement, but rather as an alternative to refugee status that is granted on an individual basis. A prime example is Australia, where asylum-seekers considered to have arrived in the country "illegally" may only be granted a temporary visa (defined either as a Temporary Protection visa (TPV) or Safe Haven Enterprise visa (SHEV)). *See* Australia Migration Act, *supra* note 350.

seems to reproduce hazardous tendencies that domestic legal regimes exhibit during emergencies. It similarly leaves much leeway for executive discretion, both in the sense of deferring to the judgment of states and their governments and in the sense that international organizations themselves have centered their emergency politics on expanded executive powers.[352] International law also struggles to define clearly the precise conditions for declaring an emergency, as well as the exact circumstances that require the termination of exceptional measures, thus enabling the institutionalization of such measures.

Can IHRL overcome these challenges and provide a more effective model for protecting democracy? One prerequisite seems to be that international courts develop a clearer definition of the term "public emergency," bringing emergency declarations under harsher scrutiny, as well as clearer standards for terminating the derogation of human rights. Such actions are important not merely for minimizing human rights violations amid emergencies, but also for providing citizens with more certainty concerning both the conditions under which their state may declare an emergency and the expected restoration of normalcy. While in the context of COVID-19 the existence of a public emergency may be evident (perhaps explaining the low number of states that have notified the Human Rights Committee of a derogation[353]) this is not true for all types of crises. In some cases, an emergency declaration might prove to be a self-fulfilling prophecy, the framing of a situation as deserving of exceptional executive powers to justify action in accordance with these powers, thereby confirming their necessity. Therefore, whether the public emergency precondition is considered independently or whether it is debated under the proportionality-of-measures assessment,[354] it is important that international courts do not abdicate responsibility for making this determination.

Furthermore, long-term emergencies such as COVID-19 cause the issue of terminating the derogation of human rights to become all the more acute. It is difficult to ascertain at which point the pandemic ceases to constitute a public emergency that threatens the life of the nation, given its duration and the fact that it is comprised of different variants of viruses and reproduces in "waves." It is also extremely challenging to determine when emergency measures become obsolete or disproportional to the severity of the crisis. Nation-states may argue justifiably that any decline in the pandemic is only temporary, and that restoring normalcy prematurely will cause an eventual deterioration in public health. However, the danger that emergency powers will become permanent arrangements and that infringements upon human rights will become longstanding is pre-

352. Kreuder-Sonnen, *supra* note 196, at 183–84; *see also* White, *supra* note 28; Heath, *supra* note 198; Scheuerman, *supra* note 12.

353. These countries include Guatemala, Armenia, Latvia, Estonia and Ecuador. *See Tracking tool– Impact of States of emergencies on civil and political rights*, CTR. FOR CIV. & POL. RTS., https://ccprcentre.org/ccprpages/tracking-tool-impact-of-states-of-emergencies-on-civil-and-political-rights [https://perma.cc/84UJ-VTPM] (last visited Feb. 6, 2022).

354. Sheeran, *supra* note 2, at 557.

cisely why guidance by international courts is so important. Courts should also pay particular attention to the tendency to empower the executive in times of uncertainty and should scrutinize with extra caution the necessity and proportionality of emergency measures taken by the executive devoid of parliamentary supervision.

Finally, international organizations should lead by example and refrain from disproportionately expanding their own executive powers, acting without prior authorization, and suspending individual rights during emergencies. This is important not only for encouraging individual nation-states to act similarly but also for entrenching the faith of the international public in democratic and constitutional principles, by demonstrating their capability to guide the actions of international organizations amid crisis and uncertainty. An adherence to democratic principles may also serve to increase public faith in international law itself and in its ability to serve as a model for nation-states struggling to preserve their democratic tradition in times of emergency.