

**STRANDED AT THE BORDER: AN ANALYSIS OF THE
LEGALITY OF INTERNATIONAL TRAVEL
RESTRICTIONS ADOPTED BY STATES IN THE COVID-
19 PANDEMIC IN LIGHT OF THE RIGHT TO RETURN
TO ONE'S COUNTRY**

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ABSTRACT

In the time since COVID-19 was declared a pandemic, several states have closed their borders and imposed travel restrictions to contain the proliferation of the disease, which, in turn, has left hundreds of thousands of people unable to return to their countries of nationality or residence. This Article analyzes the compatibility of these measures with the right to return to one's country and the right to family and private life, to the extent that these rights may obligate states to allow a person to re-enter a country. Part I analyzes who is entitled to claim said rights under the International Covenant on Civil and Political Rights, the European and American Conventions on Human Rights, and the African Charter on Human and Peoples' Rights. After this delimitation, this Part further assesses how international travel restrictions adopted in response to the pandemic interfere with these rights, as well as what obligations states have to secure them. Part II evaluates whether these interferences might qualify as lawful limitations and derogations under human rights law and concludes that they most likely do not. The satisfaction of the requirement of necessity, indispensable for lawful limitations and derogations, is disputable, since the scientific evidence available does not seem to support the efficiency of travel bans in containing the spread of disease. Moreover, there are several cases of persons stranded for long periods or in dire material conditions, putting into question the proportionality of these measures. There is thus a strong case for invoking state responsibility in these situations.

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INTRODUCTION

For many people, temporarily leaving one’s country and moving across international borders to study, work, or travel used to be routine. After COVID-19 was officially declared a pandemic, routine cross-border travel quickly ceased to exist. The virus’s high infection rate, coupled with the ease of mobility in modern society, caused the virus to spread across all continents at a significant speed.¹ As the magnitude of the situation came to light, many states started to restrict freedom of movement, not only within their territories but also across their borders. Some states restricted the entry of foreigners coming from places such as China, Italy, Spain, Brazil, and Iran, all of which were greatly affected by the virus; others closed all borders, allowing only nationals and permanent residents

¹ On February 26, 2020, less than two months after the first case of the virus was recorded in China, it had already spread across all continents but Antarctica. Bill Stock, *The coronavirus has now hit every continent except Antarctica after a man in Brazil tested positive*, BUS. INSIDER (Feb. 26, 2020), <https://www.businessinsider.com/antarctica-last-continent-no-coronavirus-brazil-confirms-case-south-america-2020-2> [<https://perma.cc/7B42-FP6Y>].

to return.² A third group of states chose to prohibit entry of *all* persons for an established period, including their own nationals.³

Each of these measures alone would have been enough to impact people abroad; the fact that over 130 countries adopted international travel restrictions beginning in March 2020 had gargantuan effects.⁴ The travel restrictions left hundreds of thousands of people unable to return to their homes.⁵ Those stranded abroad faced difficulties not only in obtaining permission to cross borders but also in obtaining transportation to do so, as transport companies significantly reduced their operations after border closures. In particular, airlines canceled scheduled flights and substantially

² *Coronavirus: Travel restrictions, border shutdowns by country*, AL JAZEERA (June 3, 2020), <https://www.aljazeera.com/news/2020/03/coronavirus-travel-restrictions-border-shutdowns-country-200318091505922.html> [<https://perma.cc/YN5S-UJNL>] [hereinafter *Coronavirus travel restrictions*].

³ See, e.g., *Ecuador suspende vuelos de pasajeros desde el exterior hasta el 5 de abril* [Ecuador suspends passenger flights from abroad until April 5], MINISTERIO DE RELACIONES EXTERIORES Y MOVILIDAD HUMANA [MREMH] [MINISTRY FOREIGN AFFS. & HUM. MOBILITY] (Mar. 15, 2020) (Ecuador), <https://www.cancilleria.gob.ec/2020/03/15/ecuador-suspende-vuelos-de-pasajeros-desde-el-exterior-hasta-el-5-de-abril/> [<https://perma.cc/U79L-64JJ>] [hereinafter MREHM Order]; Ricqcolia, *Trinidad and Tobago to close its borders indefinitely*, BUZZ (Mar. 21, 2020), <https://buzz-caribbean.com/news/trinidad-and-tobago-to-close-its-borders-indefinitely/> [<https://perma.cc/YS89-6N3W>]; Brian Major, *St. Kitts and Nevis Shuts Borders in Advance of COVID-19*, TRAVEL PULSE (Mar. 25, 2020), <https://www.travelpulse.com/news/destinations/st-kitts-and-nevis-shuts-borders-in-advance-of-covid-19.html> [<https://perma.cc/CDM2-G9B7>]; *Aeropuertos y fronteras se cerrarán totalmente el domingo, anunció el ministro de Defensa* [Airports and borders will be totally closed on Sunday, announced the minister of Defense], GESTIÓN (Peru) (Mar. 21, 2020), <https://gestion.pe/peru/coronavirus-en-peru-ministro-de-defensa-anuncia-que-aeropuertos-y-fronteras-se-cierran-completamente-el-domingo-cierre-de-fronteras-cuarentena-covid-19-ndc-noticia/> [<https://perma.cc/FTY4-GQND>] [hereinafter *Peruvian border closure*]; Henri Fotso, *Exilés du coronavirus: les Camerounais bloqués à l'étranger* [Exiles of coronavirus: Cameroonians stranded abroad] DEUTSCHE WELLE (Mar. 27, 2020), <https://www.dw.com/fr/exil%C3%A9s-du-coronavirus-les-camerounais-bloqu%C3%A9s-%C3%A0-l-%C3%A9tranger/a-52940285> [<https://perma.cc/SS7Q-6GCH>]. Arun Budhathoki, *Nepal May Escape the Coronavirus but Not the Crash*, FOREIGN POL'Y (Mar. 31, 2020), <https://foreignpolicy.com/2020/03/31/lockdown-virus-nepal-coronavirus-economic-crash/> [<https://perma.cc/FG3E-ZHZR>]; *Museveni closes borders, bans international flights*, DAILY MONITOR (Mar. 21, 2020), <https://www.monitor.co.ug/News/National/Museveni-closes-borders-bans-international-flights/688334-5499830-ndqbb9z/index.html> [<https://perma.cc/N6Y8-G7GX>].

⁴ *Coronavirus travel restrictions*, *supra* note 2.

⁵ In the European Union alone, over 300,000 nationals were estimated to be stranded abroad in late March 2020. Robin Emmott, *Coronavirus leaves 300,000 EU citizens stranded abroad*—Borell, REUTERS (Mar. 20, 2020), <https://www.reuters.com/article/us-health-coronavirus-eu-nationals/coronavirus-leaves-300000-eu-citizens-stranded-abroad-borrell-idUSKBN2172K5> [<https://perma.cc/WG3C-SM6K>].

raised fares for the remaining flights, making traveling unaffordable for many people trying to go home.⁶

In light of this situation, some states began to organize operations to repatriate nationals who were stranded abroad.⁷ However, some people complained that they did not receive adequate information or assistance from their consulates on such repatriation efforts,⁸ and as a result a significant number of individuals were not brought home promptly.⁹ Furthermore, in addition to the anxiety induced by being in a foreign country indefinitely, foreigners in some countries had to deal with particularly harsh conditions, and faced difficulty finding adequate accommodation, food, and medicine.¹⁰

This predicament raises several questions concerning the responsibility of states for guaranteeing the human rights of these stranded persons. One such question is the focus of this Article: whether the international travel restrictions and border closures adopted by states to

⁶ Isabel Choat & Antonia Wilson, *How can we get home? Brits stranded abroad despair at official advice*, THE GUARDIAN (Mar. 25, 2020), <https://www.theguardian.com/travel/2020/mar/25/how-can-we-get-home-brits-stranded-abroad-covid-19-coronavirus-outbreak> [https://perma.cc/527S-5FCG].

⁷ *Coronavirus: encore plus de 3000 Français coincés à l'étranger* [Coronavirus: more than 3000 French stuck abroad], LE PARISIEN (Apr. 3, 2020), <https://www.leparisien.fr/politique/coronavirus-encore-plus-de-3000-francais-coincees-a-l-etranger-03-04-2020-8293431.php> [https://perma.cc/8ZUN-K8FQ]; *Bahrain's Gulf Air to repatriate stranded citizens from Iran*, AL JAZEERA (Apr. 13, 2020), <https://www.aljazeera.com/news/2020/04/13/bahrain-gulf-air-to-repatriate-stranded-citizens-from-iran/> [https://perma.cc/QD76-LVUQ]; *883 brasileiros que estão em Portugal são repatriados em ação coordenada pelo MTur* [883 Brazilians in Portugal are repatriated in action coordinated by Ministry of Tourism], MINISTÉRIO DO TURISMO [MINISTRY OF TOURISM] (Braz.) (Mar. 19, 2020), <http://www.turismo.gov.br/%C3%BAltimas-not%C3%ADcias/13410-883-brasileiros-que-est%C3%A3o-em-portugal-s%C3%A3o-repatriados-em-a%C3%A7%C3%A3o-coordenada-pelo-mtur.html> [https://perma.cc/2JZD-M39F].

⁸ Sania Farooqui, *Thousands of Indian seafarers stranded due to coronavirus curbs*, AL JAZEERA (Apr. 13, 2020), <https://www.aljazeera.com/news/2020/04/13/thousands-of-indian-seafarers-stranded-due-to-coronavirus-curbs/> [https://perma.cc/LN4A-X65D].

⁹ Aina Khan, *UK nationals with critical health conditions stranded in Pakistan*, AL JAZEERA (Mar. 24, 2020), <https://www.aljazeera.com/news/2020/03/24/uk-nationals-with-critical-health-conditions-stranded-in-pakistan/> [https://perma.cc/3PVY-G6L5]; Flávia Mantovani, *Coronavirus: quase 11 mil brasileiros no exterior não conseguem voltar para casa* [Coronavirus: almost 11 million Brazilians abroad are unable to return home], O TEMPO (Mar. 23, 2020), <https://www.otempo.com.br/mundo/coronavirus-quase-11-mil-brasileiros-no-exterior-nao-conseguem-voltar-para-casa-1.2315328> [https://perma.cc/T9PF-WQVM].

¹⁰ See, e.g., Subina Shrestha, *Hundreds of Nepalese stuck at India border amid COVID-19 lockdown*, AL JAZEERA (Apr. 1, 2020), <https://www.aljazeera.com/news/2020/04/01/hundreds-of-nepalese-stuck-at-india-border-amid-covid-19-lockdown/> [https://perma.cc/F39H-43Q3].

address the COVID-19 pandemic complied with the human right to return to one's country.

Aside from being widely regarded as a customary norm of international law, at least as it pertains to a state's own nationals,¹¹ the right to return is also expressed in most human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR),¹² the European Convention on Human Rights (hereinafter "European Convention"),¹³ the American Convention on Human Rights (hereinafter "American Convention"),¹⁴ and the African Charter on Human and Peoples' Rights (hereinafter "African Charter").¹⁵ Moreover, the right to return to a country—not necessarily one's own—can be derived from the right to family and private life,¹⁶ which guarantees the maintenance of certain personal connections in the state and is also provided in the aforementioned treaties.¹⁷ This right is relevant to our analysis as well, to the extent that it may be invoked as grounds for the right to return to a country.

We will begin our analysis in Part I.A by defining the human right to return and, more precisely, determining who can benefit from it based on the provisions of human rights treaties such as the ICCPR, European Convention, American Convention, and African Charter. Part I.B will then evaluate whether the international travel restrictions adopted by states in the context of the COVID-19 pandemic are compatible with this right.

¹¹ Ilias Bantekas, *Repatriation as a Human Right Under International Law and the Case of Bosnia*, 7 J. INT'L L. & PRAC. 53, 59 (1998); Brigitte Stern, *Commentaires Sur: La Responsabilité de l'État d'Origine des Réfugiés* [Comments On: The Responsibility of the State of Origin of Refugees], in THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 81, 83 (Vera Gowlland-Debbas ed., 1996); Kathleen Lawland, *The Right to Return of Palestinians in International Law*, 8 INT'L J. REFUGEE L. 532, 544 (1996).

¹² International Covenant on Civil and Political Rights, art. 12, ¶ 4, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹³ Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Included in the Convention and the First Protocol Thereto, art. 3, ¶ 2, Sept. 16, 1963, E.T.S. No. 46 [hereinafter Protocol 4].

¹⁴ American Convention on Human Rights, art. 22, ¶ 5, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

¹⁵ African Charter on Human and Peoples' Rights, art. 12, ¶ 2, Oct. 21, 1986, 1520 U.N.T.S. 217 [hereinafter African Charter].

¹⁶ See, e.g., Human Rights Comm., *Aumeeruddy-Cziffra v. Mauritius*, U.N. Doc. CCPR/C/12/D/35/1978, ¶ 9.2 (Apr. 9, 1981).

¹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Sept. 3, 1953, 213 U.N.T.S. 221 [hereinafter European Convention]; American Convention, *supra* note 14, art. 11, 17; African Charter, *supra* note 15, art. 18; ICCPR, *supra* note 12, art. 17, 23.

Two particular scenarios will be analyzed: first, where the country of origin prohibited the entry of any persons into its territory, including its own nationals or permanent residents; and second, where the country of origin restricted international travel, entirely or partially, but allowed nationals and permanent residents to reenter. Part I.B will also discuss the responsibility of both an individual's home country and of the state in whose territory and jurisdiction an individual is stranded in relation to the right to return. This responsibility derives from two main factors: first, the impossibility of return was a direct and foreseeable consequence of measures adopted by states, namely, travel restrictions, and therefore the state is responsible for the resulting harm; and second, states have positive duties to protect and ensure human rights, even against acts of private persons such as flight cancellations.¹⁸

After establishing that these travel restrictions interfered with the right to return, our discussion in Part II turns to whether states can avoid a violation of the relevant treaty provisions in the two scenarios mentioned above by invoking limitations of or derogations from human rights. We conclude that, even when limitations may be invoked in principle, such invocation may be contested if either the condition of necessity or proportionality is not met, as human rights bodies require both conditions be satisfied.¹⁹ It is not clear that the scientific evidence available to states today supports travel bans as an efficient means to mitigate the proliferation of the virus. This casts doubt as to the necessity of such measures and thus to their validity as limitations of human rights. Further, in cases where individuals remained stranded for long periods of time or in harsh living conditions, there are meaningful arguments against the proportionality of the travel restrictions.

¹⁸ See generally Cathryn Costello & Michelle Foster, *Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, 46 NETH. Y.B. INT'L J. 273, 323 (2016).

¹⁹ See, e.g., Human Rights Comm., General Comment No. 36, U.N. Doc. CCPR/C/GC/36, ¶ 11-12 (Sept. 3, 2019) [hereinafter General Comment No. 36]; Sunday Times v. United Kingdom, App. No. 6538/74, Eur. Ct. H.R., ¶ 62 (1979), <https://hudoc.echr.coe.int/eng?i=001-57584> [<https://perma.cc/W32E-UHV3>]; Alvarez v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 93 (Nov. 21, 2007); Media Rights Agenda v. Nigeria, No. 105/93, 128/94, 130/94 and 152/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 69-70 (Oct. 22-31, 1998), http://www.worldcourts.com/achpr/eng/decisions/1998.10.31_Media_Rights_Agenda_v_Nigeria.htm [<https://perma.cc/2RQP-VCGY>].

The ICCPR²⁰ and the European²¹ and American²² Conventions on Human Rights all authorize derogations from the right to return. Since such derogations allow for the suspension of the right, this concept appears to allow states to avoid international responsibility for human rights violations. Despite this possibility, a state may not always be able to demonstrate that the measures it took were both necessary to respond to the emergency and proportionate to the harm the restriction caused. Again, scientific uncertainties regarding the effectiveness of travel restrictions call into question whether states that imposed travel restrictions were in compliance with the necessity requirement. The proportionality of the restrictions may also be difficult to justify in cases where there was a complete prohibition on returning, even for persons who arrived at the border, or where stranded persons were subjected to unsuitable conditions in their host countries. Furthermore, the vast majority of states failed to notify relevant bodies that they intended to deviate from the right to return, which may have weakened the legitimacy of those states' potential choice to resort to derogation.²³ Thus, individuals affected by COVID-19-related international travel restrictions likely have a solid argument that states unlawfully violated their right to return.

I. THE RIGHT TO RETURN TO ONE'S COUNTRY AND COVID-19 TRAVEL RESTRICTIONS

Even before the development of the current human rights framework, a person's ability to return to his or her country was considered one of the most central attributes of nationality.²⁴ Readmission guarantees both that individuals have at least one country to call home and that other states are not burdened by having to take in people rejected by their country of nationality. This notion was framed as a human right for the

²⁰ ICCPR, *supra* note 12, art. 4.

²¹ European Convention, *supra* note 17, art. 15.

²² American Convention, *supra* note 14, art. 27.

²³ Baena-Ricardo v. Panama, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 92 (Feb. 2, 2001). For further discussion on this topic, see Part II.

²⁴ INSTITUT DE DROIT INTERNATIONAL [INST. OF INT'L LAW] (Geneva Session), *Règles internationales sur l'admission et l'expulsion des étrangers* [International rules on the admission and expulsion of foreigners], art. 2 (Sept. 9, 1892) See also MICHELLE FOSTER & HÉLÈNE LAMBERT, INTERNATIONAL REFUGEE LAW AND THE PROTECTION OF STATELESS PERSONS 78–79 (2019); ALISON KESBY, THE RIGHTS TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW 16–17 (2012).

first time in the Universal Declaration of Human Rights²⁵ as a counterpart to the right to leave any country, including one's own.²⁶ It was later included as an autonomous provision in Article 12(4) of the ICCPR,²⁷ and further reiterated in Article 3(2) of Protocol 4 to the European Convention on Human Rights,²⁸ Article 22(5) of the American Convention on Human Rights,²⁹ and Article 12(2) of the African Charter on Human and Peoples' Rights.³⁰ In order to evaluate how the travel restrictions adopted in response to the COVID-19 pandemic interfere with this right, we must first analyze to whom these provisions apply—that is, the personal scope of the right to return.

A. WHOSE COUNTRY?

This Part will discuss the personal scope of the right to return on two bases: first, the right to return to an individual's "own" country, according to the express provisions on the subject in the human rights instruments analyzed herein; and second, the return to a country where an individual has family and other personal ties, derived from the right to respect for family and private life.

1. The Right to Return to One's "Own" Country

Article 12(4) of the ICCPR provides that "no one shall be arbitrarily deprived of the right to enter his own country."³¹ Considering

²⁵ The right to return may also be considered implicit in Article 8 of the American Declaration on the Rights and Duties of Man, which provides the right to establish residence in one's state of nationality and not to abandon it against one's will. Organization of American States [OAS], *American Declaration on the Rights and Duties of Man*, art. 8 (May 2, 1948). This provision was interpreted as such by the Inter-American Commission of Human Rights in *Texier v. Chile*, Case 5713, Inter-Am. Comm'n H.R., Report No. 56/81, OEA/Ser.L/V/II.57, doc. 6 rev. 1 (1982).

²⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), at 13.

²⁷ ICCPR, *supra* note 12, art. 12(4).

²⁸ Protocol 4, *supra* note 13, art. 3(2).

²⁹ American Convention, *supra* note 14, art. 22(5).

³⁰ African Charter, *supra* note 15, art. 12(2).

³¹ ICCPR, *supra* note 12, art. 12(4). The word "enter" was preferred over "return" so as to encompass, in addition to those seeking readmission, nationals born abroad seeking to come into the country for the first time. See U.N. Commission on Human Rights, *Draft International Covenant on Human Rights*, 6th Sess., U.N. Doc. E/CN.4/SR.151, ¶¶ 50, 53 (Apr. 19, 1950) [hereinafter U.N. Doc. E/CN.4/SR.151]. Nevertheless, in our analysis, we will deal only with the context of return to a country after having left it.

the ordinary meaning of the text,³² it seems intuitive that one's "own country" is broader than the term "country of nationality," and that the provision might, therefore, afford protection to persons who have strong ties to a particular country, but have not acquired its nationality. This prima facie impression is reinforced by the fact that, when the drafters of the ICCPR wished to reserve a particular right for nationals and citizens, those categories of people were expressly named. For example, Article 25 of the ICCPR establishes that "every citizen shall have the right and the opportunity" to take part in the conduct public affairs, to vote and to be elected, and to have access to public services.³³

However, the expression "his own country" has no clearly defined ordinary meaning that could be verified by reference to dictionaries or specific literature. The object and purpose of the ICCPR, which is to promote "universal respect for, and observance of, human rights and freedoms,"³⁴ does not shed light on this issue. Therefore, one could argue that the kind of attachment necessary for a country to be considered "one's own" can only be achieved by the formal link of nationality, entitling the individual to all forms of state protection. As a result of this ambiguity, further investigation is necessary to determine the meaning the drafters intended to convey. Specifically, an assessment of the *travaux préparatoires* of the ICCPR as a subsidiary means of interpretation is in order.³⁵

Indeed, in the first drafts of the ICCPR, the right to return was defined in relation to an individual's country of nationality.³⁶ The formulation "his own country" stemmed from an Australian proposal that sought to enlarge the scope of Article 12(4) and allow the return of aliens who had established their home³⁷ in the country, even if they had not acquired its nationality.³⁸ According to the Australian delegate:

³² Which is a primary rule of treaty interpretation under the Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

³³ ICCPR, *supra* note 12, art. 25.

³⁴ *Id.* pmb1.

³⁵ VCLT, *supra* note 32, art. 32(a).

³⁶ U.N. Commission on Human Rights, *Draft International Covenant on Human Rights*, 5th Sess., U.N. Doc. E/CN.4/SR.106, at 10 (June 8, 1949) [hereinafter U.N. Doc. E/CN.4/SR.106].

³⁷ The Australian delegate adopted the term "home" in the justification of his proposal, as opposed to merely residence, thus denoting a stronger bond between the alien and the host country. *See generally* U.N. Doc. E/CN.4/SR.151, *supra* note 31, ¶ 49.

³⁸ *Id.* ¶¶ 49, 52.

[T]he Australian amendment was designed precisely to cover the case of persons who had long resided in a country and might be said to have settled there, although they might still retain the nationality of some other country. [The Australian delegate's] primary concern was to enable them to return from a journey abroad to what had in effect become their country.³⁹

Chile supported this proposal,⁴⁰ but other delegates rejected it under the view that Article 12(4) ought to apply solely to nationals.⁴¹ Despite these criticisms, the Australian delegates were insistent,⁴² and the amendment was adopted by the Commission on Human Rights by a ten to two vote.⁴³ Six delegates abstained.⁴⁴ In later discussions by the Third Committee of the United Nations (UN) General Assembly, the question of how to interpret the term "his own country" arose again, and six delegates took the opportunity to reiterate their view that only nationals were covered by the provision.⁴⁵ Only the Saudi Arabian representative expressly supported a broader interpretation on that occasion.⁴⁶

The fact that the majority of delegates expressly commenting on Article 12(4) advocated for a restrictive interpretation has led some commentators to conclude that "his own country" should be read as "his country of nationality."⁴⁷ However, the delegates were not unanimous in holding that view, as evinced by the positions of the Australian, Chilean, and Saudi Arabian delegates. The approval of the amendment by both the

³⁹ *Id.* ¶ 52.

⁴⁰ *Id.* ¶ 53.

⁴¹ Delegates from the Philippines, Greece, the United States, and Egypt, for instance, found issue in allowing an individual to return to a nation where one may have residency, but not nationality or citizenship. *Id.* ¶¶ 54, 58, 59; U.N. Commission on Human Rights, *Draft International Covenants on Human Rights*, 8th Sess., U.N. Doc. E/CN.4/SR.315, at 13 (June 17, 1952) [hereinafter U.N. Doc. E/CN.4/SR.315].

⁴² U.N. Doc. E/CN.4/SR.315, *supra* note 41, at 12, 14.

⁴³ U.N. Commission on Human Rights, *Draft International Covenants on Human Rights*, 8th Sess., U.N. Doc. E/CN.4/SR.316, at 5 (June 17, 1952) [hereinafter U.N. Doc. E/CN.4/SR.316].

⁴⁴ *Id.*

⁴⁵ Namely, the delegates from Canada, Pakistan, Japan, India, the United Kingdom, and Czechoslovakia. U.N. GAOR, 14th Sess., 954th mtg. ¶ 25, U.N. Doc. A/C.3/SR.954 (Nov. 12, 1959); U.N. GAOR, 14th Sess., 956th mtg. ¶¶ 1, 30, U.N. Doc. A/C.3/SR.956 (Nov. 13, 1959) [hereinafter U.N. Doc. A/C.3/SR.956]; U.N. GAOR, 14th Sess., 957th mtg. ¶¶ 1, 13, 19, U.N. Doc. A/C.3/SR.957 (Nov. 16, 1959) [hereinafter U.N. Doc. A/C.3/SR.957]; U.N. GAOR, 14th Sess., 958th mtg. ¶ 5, U.N. Doc. A/C.3/SR.958 (Nov. 17, 1959) [hereinafter U.N. Doc. A/C.3/SR.958].

⁴⁶ U.N. Doc. A/C.3/SR.957, *supra* note 45, ¶ 25.

⁴⁷ Ruth Lapidot, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees*, 16 ISR. Y.B. HUM. RTS. 103, 107–08 (1986); *see also* R. B. Lillich, *Civil Rights, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 114, 150-51 (Theodor Meron ed., 1984).

Commission⁴⁸ and the Third Committee⁴⁹ also indicates tacit support from other delegates for a broad interpretation of the Article. Indeed, the delegates should have been aware that the formulation “his own country” had been advanced precisely to cover a specific category of non-nationals (those who had established their “home” in the host country).⁵⁰ If the delegates still wished to ensure a more restrictive interpretation to Article 12(4), they could have advised their respective states to make reservations after the ICCPR was adopted, indicating their understanding that this provision applied only to nationals. However, to date, no reservation of this kind has been made to the ICCPR.

Moreover, as one author observed when she analyzed the *travaux préparatoires* of the ICCPR, “It appears from the debates in the Third Committee that the considerations which had induced the Commission on Human Rights to use the words ‘his own country’ were unknown to the delegates,” which led the latter to put forward their own interpretations of the term.⁵¹ Special Rapporteur Mubanga-Chipoya also noted this in his report on the right to leave and return to one’s country, which concluded that the drafters had not established the meaning of “his own country” and, instead, had left it to future development.⁵² In reviewing both the plain text and the *travaux préparatoires* of the ICCPR as a subsidiary means of interpretation,⁵³ it is thus possible to conclude that the right to return under Article 12(4) is not restricted to the nationals of a state.⁵⁴

⁴⁸ U.N. Doc. E/CN.4/SR.316, *supra* note 43, at 5.

⁴⁹ U.N. GAOR, 14th Sess., 959th mtg. ¶ 27, U.N. Doc. A/C.3/SR.959 (Nov. 17, 1959) [hereinafter U.N. Doc. A/C.3/SR.959].

⁵⁰ Further indication of this awareness is a report prepared in 1959 by the Committee of Experts of the Council of Europe tasked with drafting a protocol to the European Convention on Human Rights. The report, which was transmitted to the Consultative Assembly of the Council of Europe, expressed the view that “his own country” was broader than “country of nationality” and could be understood to encompass aliens who were permanent residents. COUNCIL OF EUROPE, COLLECTED EDITION OF THE “TRAVAUX PRÉPARATOIRES” OF PROTOCOL 4 TO THE CONVENTION, SECURING CERTAIN RIGHTS AND FREEDOMS OTHER THAN THOSE ALREADY INCLUDED IN THE CONVENTION AND IN THE FIRST PROTOCOL THERETO, 74 (1976) [hereinafter P4 TRAVAUX PRÉPARATOIRES].

⁵¹ Lawland, *supra* note 11, at 550.

⁵² C.L.C. Mubanga-Chipoya (Special Rapporteur on Analysis of Current Trends and Developments in respect of the Right of Everyone to Leave Any Country including His Own and to Return to His Country), *Analysis of the current trends and developments regarding the right to leave any country, including one’s own, and to return to one’s own country, and some other rights or considerations arising therefrom*, ¶ 93, U.N. Doc. E/CN.4/Sub.2/1988/35 (June 20, 1988).

⁵³ VCLT, *supra* note 32, art. 32(a).

⁵⁴ See Lawland, *supra* note 11, at 553; Rosalyn Higgins, *The Right in International Law of an Individual to Enter, Stay in and Leave a Country*, 49 INT’L AFF. 341, 349–50 (1973); Sitg Jagerskiold, *The Freedom of Movement, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT*

The Human Rights Committee (HRC), the treaty body tasked with interpreting the ICCPR, adopted the same conclusion in its General Comment No. 27, which established that the language of Article 12(4) also encompassed individuals who, because of their special ties to the country, could not be considered mere aliens.⁵⁵ Despite an initially restrictive approach in which non-nationals could not benefit from this provision,⁵⁶ from 2011 onward, the HRC has held that an individual who has strong and enduring connections with a given country may consider it “his own country” for the purposes of the right to return, even if he never acquired its nationality.⁵⁷ In evaluating whether a person has sufficient ties to a country, the HRC considers a variety of factors such as the length of residence, language spoken, whether a person has close personal and family ties in the country in question, and a person’s intent to remain there.⁵⁸ The absence of similar ties elsewhere is also considered.⁵⁹

Thus, states that are party to the ICCPR are bound to ensure the right to return not only to nationals but also to aliens with sufficient ties to the country. Not all permanent residents will necessarily have such ties, whereas in some instances a person may have such ties though they lack permanent resident status—for instance, stateless persons and children of undocumented migrants who were born or grew up in the country but have been denied formal resident status. Examining each concrete case individually is essential for ascertaining who Article 12(4) covers.

ON CIVIL AND POLITICAL RIGHTS 166, 180–81 (Louis Henkin ed., 1981); Lewis Saideman, *Do Palestinian Refugees Have a Right to Return to Israel? An Examination of the Scope of and Limitations on the Right of Return*, 44 VA. J. INT’L L. 829, 848–49 (2004); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 284 (2d ed. 2005).

⁵⁵ Hum. Rts. Comm., General Comment No. 27, U.N. Doc. CCPR/C/21/Rev.1/Add.9, ¶ 20 (Nov. 2, 1999) [hereinafter General Comment No. 27].

⁵⁶ In the much-criticized decision of *Stewart v. Canada*, the HRC considered the fact that the applicant had never applied for Canadian nationality despite the criteria for such not being arbitrary as a circumstance that prevented from claiming protection under Article 12(4). Hum. Rts. Comm., *Stewart v. Canada*, U.N. Doc. CCPR/C/58/D/538/1993, ¶¶ 12.5–12.9 (Dec. 16, 1996). *See also* Hum. Rts. Comm., *Canepa v. Canada*, U.N. Doc. CCPR/C/59/D/558/1993, ¶ 11.3 (June 20, 1997); Hum. Rts. Comm., *Madafferi v. Australia*, U.N. Doc. CCPR/C/81/D/1011/2001, ¶ 9.6 (Aug. 26, 2004).

⁵⁷ Hum. Rts. Comm., *Nystrom v. Australia*, U.N. Doc. CCPR/C/102/D/1557/2007, ¶ 7.4 (Sept. 1, 2011).

⁵⁸ *Id.*; Hum. Rts. Comm., *Warsame v. Canada*, U.N. Doc. CCPR/C/102/D/1959/2010, ¶ 8.4–8.5 (Sept. 1, 2011); Hum. Rts. Comm., *Budlakoti v. Canada*, U.N. Doc. CCPR/C/122/D/2264/2013, ¶¶ 9.2–9.3 (Aug. 29, 2018).

⁵⁹ *See Warsame v. Canada*, *supra* note 58; *Budlakoti v. Canada*, *supra* note 58.

In contrast, the European and American Conventions on Human Rights, in Article 3(2) of Protocol 4 and Article 22(5), respectively, both restrict the right to return to nationals.⁶⁰ Nevertheless, since all states who are parties to these Conventions are also parties to the ICCPR, countries must still guarantee the right to return to non-nationals with strong ties to the host country to fully comply with their human rights obligations.⁶¹ The African Charter, on the other hand, is closest to the ICCPR, as Article 12(2) provides that “[e]very individual shall have the right to leave any country including his own, and to return to his country.”⁶² However, no formal records of the Charter’s *travaux préparatoires* exist⁶³ and, to date, the precise meaning of “his country” has not been considered by the African Commission or Court on Human and Peoples’ Rights. Therefore, its application to non-nationals is dubious.

2. *The Right to Return Based on the Right to Family and Private Life*

Even if one contends that the right to return under these regional instruments does not cover non-nationals and that, as a general rule, states have no obligation to admit aliens into their territory,⁶⁴ a state may still be compelled to allow the return of non-nationals under treaty provisions protecting the right to family and private life.⁶⁵ Denying an alien entry to a country where he or she resides and has ties such as family, work relations, or other personal interests may be seen as unlawful interference

⁶⁰ Proposals to adopt broader formulations, mirroring the language of the ICCPR, were rejected during the drafting processes. ORGANIZACIÓN DE LOS ESTADOS AMERICANOS [ORGANIZATION OF AMERICAN STATES] [OAS], CONFERENCIA ESPECIALIZADA INTERAMERICANA SOBRE DERECHOS HUMANOS: ACTAS Y DOCUMENTOS [INTER-AMERICAN SPECIALIZED CONFERENCE ON HUMAN RIGHTS: ACTS AND DOCUMENTS] 65, 246, 317 (1969); P4 TRAVAUX PRÉPARATOIRES, *supra* note 50, at 40; American Convention, *supra* note 14, art. 22(5).

⁶¹ This is further reaffirmed by Article 53 of the European Convention and Article 29(d) of the American Convention, which expressly establish that these treaties’ provisions shall not be interpreted as excluding or limiting the effect of other international human rights treaties to which the state is a party, acting as most-favorable-protection clauses. European Convention, *supra* note 17, art. 53; American Convention, *supra* note 14, art. 29(d).

⁶² African Charter, *supra* note 15, art. 12(2).

⁶³ Although, as noted by Corinne Packer, informal records of the discussions concerning the establishment of the ACHPR were published. CORINNE A.A. PACKER, USING HUMAN RIGHTS TO CHANGE TRADITION: TRADITIONAL PRACTICES HARMFUL TO WOMEN’S REPRODUCTIVE HEALTH IN SUB-SAHARAN AFRICA 110 (2002).

⁶⁴ Hum. Rts. Comm., General Comment No. 15, U.N. Doc. HRI/GEN/1/Rev.1, ¶ 5 (July 29, 1994) [hereinafter General Comment No. 15].

⁶⁵ ICCPR, *supra* note 12, art. 17, 23; European Convention, *supra* note 17, art. 8; American Convention, *supra* note 14, art. 11, 17; African Charter, *supra* note 15, art. 18.

with this right. This possibility is well developed in the case law of the European Court on Human Rights (ECtHR) concerning Article 8 of the European Convention. The ECtHR has often relied on this provision to establish limits on the removal of aliens whose enjoyment of family or private life would be strongly impaired if expelled,⁶⁶ and the same reasoning could be applied to aliens seeking to re-enter the country. Similarly, the HRC has held that, even when Article 12(4) of the ICCPR is not relied upon⁶⁷ or the state cannot be considered the applicant's "own country,"⁶⁸ the right to remain in the state's territory may be safeguarded by Articles 17 (right to privacy, family, and home) and 23(1) (protection of the family) of the ICCPR. Similar claims can be made under Articles 11(2) and 17 of the American Convention⁶⁹ and Article 18 of the African Charter.⁷⁰

The difference between the right of non-nationals to return to and remain in a country on the basis of the right to family and private life and Article 12(4) lies on the intensity of the ties. Article 12(4) requires strong ties with the host country itself, taking into account factors such as the language spoken by the individual, duration of stay in the country, personal connections, and absence of similar ties elsewhere.⁷¹ The right to family and private life, on the other hand, relates only to the personal connections an individual might have in the host country, which is just one of the factors relevant to the assessment of an individual's "own country."⁷² This explains why a person who does not qualify for protection under Article 12(4) may have relevant and successful claims regarding the

⁶⁶ *Maslov v. Austria*, App. No. 1638/03, Eur. Ct. H.R. ¶ 61–101 (2008). For analysis of similar decisions and comparisons between the approaches of the HRC and the ECtHR, see JULIA WOJNOWSKA-RADZIŃSKA, *THE RIGHT OF AN ALIEN TO BE PROTECTED AGAINST ARBITRARY EXPULSION IN INTERNATIONAL LAW* 47-80 (2015).

⁶⁷ *Hum. Rts. Comm., M.G.C. v. Australia*, U.N. Doc. CCPR/C/113/D/1875/2009, ¶¶ 11.8–11.9 (May 7, 2015); *Hum. Rts. Comm., Leghaei v. Australia*, U.N. Doc. CCPR/C/113/D/1937/2010, ¶¶ 10.3–10.5 (May 15, 2015).

⁶⁸ *Madafferi v. Australia*, U.N. Doc. CCPR/C/81/D/1011/2001 at ¶ 9.8.

⁶⁹ A claim under Article 17 of the American Convention was accepted in *Pacheco Tineo Family v. Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, ¶¶ 226–29 (Nov. 25, 2013).

⁷⁰ *Modise v. Botswana*, Communication 79/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 93 (Nov. 6, 2000); *Amnesty Int'l v. Zambia*, Communication 212/98, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 59 (May 5, 1999).

⁷¹ *Hum. Rights Comm., Budlakoti v. Canada*, U.N. Doc. CCPR/C/122/D/2264/2013, ¶¶ 9.2–9.3 (Aug. 29, 2018).

⁷² *Madafferi v. Australia*, U.N. Doc. CCPR/C/81/D/1011/2001 at ¶ 9.7.

right to family and private life.⁷³ It should be noted that human rights bodies tend to consider family broadly to include all persons whom society considers to constitute a family, regardless of marriage or blood.⁷⁴ The HRC has also observed that the idea of what family is may vary in different regions within the state.⁷⁵

Private life, on the other hand, encompasses other kinds of interpersonal relations including those of a professional or business nature.⁷⁶ Even when a person has no family ties in a given country, measures such as expelling that person or prohibiting that person from returning may be contested on the grounds that they constitute unlawful interferences with the right to private life.⁷⁷ For instance, in the case of a man who had resided in Australia for sixteen years and whose children were all living there, either as permanent residents or citizens, the HRC decided that removing him without a clear reason why his right of residency was being terminated was contrary to Articles 17 and 23 of the ICCPR.⁷⁸ Similarly, the ECtHR held that the deportation of a Moroccan citizen who had lived in Belgium with his family since he was one year old would violate his right to family life.⁷⁹ In any event, the legality of interferences with the right to private and family life must be evaluated according to its aim, necessity, and proportionality, as discussed in Part II below.

B. INTERFERENCES CAUSED BY TRAVEL RESTRICTIONS

Having established the broad personal scope of the right to return, especially when considering its indirect protection through the right to family and private life, it becomes clear how international travel

⁷³ *Id.* ¶ 9.8.

⁷⁴ Hum. Rts. Comm., *Ngambi v. France*, U.N. Doc. CCPR/C/81/D/1179/2003, ¶ 6.4 (July 9, 2004); *Al-Nashif v. Bulgaria*, App. No. 50963/99 Eur. Ct. H.R. ¶ 112 (2002); *Riffo v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 142 (2012); On the other hand, in *Schembri v. Malta*, the ECtHR considered that the applicant's marriage was not genuine so as to attract protection of the right to family life. See *Schembri v. Malta*, App. No. 66297/13, Eur. Ct. H.R. ¶ 53 (2017).

⁷⁵ Hum. Rts. Comm., General Comment No. 19, U.N. Doc. HRI/GEN/1/Rev.1, ¶ 2 (July 29, 1994).

⁷⁶ *Niemietz v. Germany*, App. No. 13710/88, Eur. Ct. H.R. ¶ 29 (1992).

⁷⁷ So far, only the ECtHR has considered the right to private life independently from the right to family life in immigration cases. See *Üner v. Netherlands*, App. No. 46410/99, Eur. Ct. H.R. ¶ 59 (2006).

⁷⁸ *Leghaei v. Australia*, U.N. Doc. CCPR/C/113/D/1937/2010, at ¶¶ 10.5, 11.

⁷⁹ *Moustaquim v. Belgium*, App. No. 12313/86, Eur. Ct. H.R. ¶ 46 (1991).

restrictions may conflict with this right. As previously mentioned, some states, such as Peru and Ecuador, completely shut down their borders in an attempt to slow the proliferation of COVID-19, expressly prohibiting any persons, including their nationals abroad, from entering the country for an established period.⁸⁰ Even individuals who managed to arrive at the border were denied entry.⁸¹ In these situations, the right to return is clearly restricted in relation to nationals and, for those states who are also parties to the ICCPR (and potentially the African Charter), to non-nationals who have sufficiently strong bonds with the country. Other aliens with lesser ties may also claim a right to readmission if their family or private life was impacted by the shutdown.

Further questions as to whether the right to return was violated arise when we consider states that, despite not having formally prohibited the entry of persons abroad, partially closed their borders or imposed travel restrictions that effectively prevented individuals from returning. This occurred with the cancellation of commercial flights and the unavailability of new flights or other means of transportation. Furthermore, there are instances in which, even though transportation back to the country was materially available, its cost was prohibitive. Britons stranded in New Zealand reported in late March 2020 that even the cheapest airfares back to the United Kingdom cost around fifteen thousand pounds, preventing the return of many.⁸² By April 2020, a Brazilian woman in Italy had four flights cancelled as she was attempting to return to Brazil.⁸³ The question in these scenarios is whether the state can be held responsible for the resulting prejudice to human rights caused by travel difficulties that have arisen between private parties—the individuals and the transport companies.

The view adopted herein is that the answer is yes, on two grounds. First, these impediments in obtaining transportation are a direct and

⁸⁰ MREHM Order, *supra* note 3; *Peruvian border closure*, *supra* note 3.

⁸¹ Shrestha, *supra* note 10; *Bolivianos enfrentam militares para tentar regressar ao seu país [Bolivians face military to try to return to their country]*, ESTADO DE MINAS (Apr. 7, 2020), https://www.em.com.br/app/noticia/internacional/2020/04/07/interna_internacional,1136666/bolivianos-enfrentam-militares-para-tentar-regressar-ao-seu-pais.shtml [https://perma.cc/VEJ7-UTH2].

⁸² Mark Townsend, *Stranded Britons quoted £40,000 each to fly home from New Zealand*, THE GUARDIAN (Mar. 28, 2020), <https://www.theguardian.com/global/2020/mar/28/stranded-britons-quoted-40000-each-to-fly-home-from-new-zealand> [https://perma.cc/C884-UNSM].

⁸³ João Prata, *6.000 brasileiros ainda estão no exterior e aguardam repatriação [6000 Brazilians are still abroad and await repatriation]*, UOL (Apr. 10, 2020), <https://noticias.uol.com.br/ultimas-noticias/agencia-estado/2020/04/10/seis-mil-brasileiros-ainda-estao-no-exterior.htm> [https://perma.cc/J2FP-P5VF].

foreseeable consequence of the state's actions, which exposed individuals to a real risk of not being able to return, and the states failed to prevent this risk. Even if a state did not expressly dictate the cancellation of flights and the like, it was foreseeable that these measures would be taken by transport companies to comply with the travel restrictions and would not have been adopted had these restrictions not been imposed. Accordingly, even though the transport companies' conduct is not attributable to the state, the harmful consequences—the interference with human rights—might be if the state failed to take reasonable measures to prevent the risk of harm from materializing. In cases where these preventive measures were not taken or were deemed inadequate, human rights bodies have found states responsible for the violation of their positive human rights obligations, even if the harm itself was perpetrated by private parties.⁸⁴

It is important to clarify that it is not the authors' contention that air companies are responsible for violations of the human right to return. These companies may have solid grounds for avoiding responsibility under domestic law since, as mentioned above, the decrease in their operations resulted from their complying with states' travel restrictions. The question is only whether states themselves can be held responsible for failing to prevent the ensuing harm to human rights.

It could nevertheless be argued that transport companies decided themselves to limit their operations to reduce the risk of contamination of their employees or due to the decrease in demand. In this case, the state may assert that these measures were unrelated to governmental action and would have been taken despite it. Indeed, there may be cases in which this may have occurred.⁸⁵ However, it is difficult to believe that the current

⁸⁴ See, e.g., *Florea v. Romania*, App. No 37186/03, Eur. Ct. H.R. ¶ 61 (2010); *Opuz v. Turkey*, App. No 33401/02, Eur. Ct. H.R. ¶¶ 133–36 (2009); *Edwards v. United Kingdom*, App. No 46477/99, Eur. Ct. H.R. ¶ 55 (2002); *Keenan v. United Kingdom*, App. No 27229/95, Eur. Ct. H.R. ¶ 89–90, 100 (2001); *Jaramillo v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser C) No. 192, ¶ 76 (Nov. 27 2008); *Pueblo Bello Massacre v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 126 (Jan. 31, 2006). For specific analysis on the causal link between states' acts and human rights violations, see Vladislava Stoyanova, *Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights*, 18 Hum. Rts. L. Rev. 309 (2018); Benedetto Conforti, *Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 129, 130–35 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004).

⁸⁵ For instance, *Norwegian Air* cited as the main cause for cancelling its flights the decrease in demand resulting from the COVID-19 pandemic. Terje Solsvik, *Norwegian Air to cancel 85% of flights and lay off 90% of staff*, REUTERS (Mar. 16, 2020), <https://www.reuters.com/article/us->

crisis of hundreds of thousands of persons stranded abroad would have reached this level were it not for states' travel restrictions. Most travel difficulties started right after states announced their restrictions. There are, therefore, several cases in which the cancellation of flights and resulting impossibility to return stemmed directly—and foreseeably—from states' acts, entailing their responsibility for the ensuing violations of human rights.

The second ground for asserting state responsibility is that, regardless of what portion of responsibility may be attributed to the companies, human rights bodies have recognized that states have positive duties to *ensure* human rights.⁸⁶ As observed by the Inter-American Court on Human Rights (IACtHR), “[t]his duty to ‘guarantee’ the rights entails a positive obligation for the State to adopt a series of conducts, depending on the specific substantive right involved.”⁸⁷ Indeed, in cases concerning Article 12(4) of the ICCPR, the HRC has interpreted this provision as implying a duty of the state to create safe conditions for individuals to return to their country,⁸⁸ a position similarly endorsed by the IACtHR⁸⁹ and the African Commission on Human Rights.⁹⁰ Hence, if individuals are prevented from exercising their right to return, it is up to the state to seek the appropriate measures to attempt to remedy this situation.

This rationale applies both to the state to which the affected individuals have a right to return and to the state where they are stranded. Aside from the general duty to guarantee human rights for persons under their jurisdiction, host states must make efforts to allow the individuals to return to their countries in order to comply with the positive obligations to ensure the right to return. States can do this by engaging in meaningful

health-coronavirus-norwegianair/norwegian-air-to-cancel-85-of-flights-and-lay-off-90-of-staff-idUSKBN2132F7 [<https://perma.cc/P3Q3-KW2A>].

⁸⁶ Human Rights Comm., General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶¶ 6–8 (May 26, 2004); *Kawas-Fernández v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 196, ¶¶ 74–75 (Apr. 3, 2009); *A v. United Kingdom*, App. No. 100/1997/884/1096, Eur. Ct. H.R. ¶ 22 (1999); Commission nationale des droits de l’Homme et des libertés v. Chad, Communication No. 74/92, Afr. Comm’n H.P.R., ¶ 20 (Oct. 1995).

⁸⁷ *Kawas-Fernández v. Honduras*, *supra* note 86, ¶ 75.

⁸⁸ See Human Rights Comm., Communication No. 859/1999, *Jiménez Vaca v. Colombia*, U.N. Doc. CCPR/C/74/D/859/1999, ¶ 7.4 (Mar. 25, 2002).

⁸⁹ *Moiwana Cmty v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 120 (Jun. 15, 2005).

⁹⁰ See *Elgak v. Sudan*, Communication 379/09, African Court on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 126 (Mar. 7–14, 2014), https://www.fidh.org/IMG/pdf/achpr14eos_decis_379_09_sudan_eng.pdf [<https://perma.cc/U4WQ-BGN5>].

negotiations with the country of origin concerning repatriation, or at least by not interfering with persons trying to leave the country. In the end, these efforts will necessarily depend on the willingness of the state of origin to admit these persons, since forcing individuals across borders, without allowing the state to assess whether they indeed have a right to return, could be understood as a violation of the state of origin's sovereignty and an intervention in its internal affairs.

As for the question of which positive measures the state of origin is required to take, that depends on what is necessary to give practical effect to the right in question and what is feasibly within the state's power to do,⁹¹ bearing in mind that states have a certain margin of discretion as to which ones to adopt, especially so as not to compromise other rights.⁹² States may, for instance, choose to negotiate with airline companies to provide more return commercial flights, request the host state to provide transportation for stranded foreigners, or send its own means of transportation to repatriate them.

In this sense, one may inquire whether states have an actual obligation to promote repatriation of individuals seeking to return to their country. One commentator maintains that the right to return falls short of guaranteeing a right to repatriation.⁹³ In his view, repatriation would require a state to act outside of its jurisdiction, which would possibly infringe another state's sovereignty.⁹⁴ He contends that the decision of whether or not to promote repatriation remains at the state's discretion, as a form of diplomatic protection.⁹⁵

However, repatriation is one of the many actions that may be demanded from the state of origin for the state to comply with its positive duty to ensure the right to return, especially if other measures are not effective. As for the concerns about repatriation violating the rights of other states, it is conceded that human rights obligations are not to be

⁹¹ ALASTAIR R. MOWBRAY, *THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS* 221–24 (2004).

⁹² Matthias Klatt, *Positive Obligations under the European Convention on Human Rights*, 71 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV]* 691, 694–95, 711 (2011).

⁹³ Baptiste Jouzier, *Le “droit d’entrer dans son propre pays” à l’épreuve de circonstances sanitaires exceptionnelles: un cadre juridique devant évoluer? [The “Right to Enter One’s Own Country” Put to the Test of Exceptional Health Circumstances: A Legal Framework That Needs to Evolve?]*, 14 *REVUE DE DROITS ET LIBERTÉS FONDAMENTAUX [RDLF]* 1, 5–6 (2020).

⁹⁴ *Id.*

⁹⁵ *Id.*

applied “in a vacuum” and must be interpreted in light of the other international obligations of the state,⁹⁶ including respect for territorial sovereignty and non-intervention in domestic affairs. The state of origin must engage in negotiations with the host state to define how repatriation may be conducted and to organize the logistics of such operations within its jurisdiction. It is worth noting that the host state cannot arbitrarily deny requests for repatriation since it is also under the obligation not to prevent persons under its jurisdiction from returning to their own country.⁹⁷

As for the argument that the state of origin has no jurisdiction over persons stranded abroad, it must be emphasized that the application of the right to return is necessarily extraterritorial.⁹⁸ This right was conceived so the state would not take measures within its jurisdiction depriving persons abroad from re-entering its territory.⁹⁹ By taking measures that directly and foreseeably interfere with the right to return, it can be argued that the state exercises authority over individuals abroad who have relevant ties with or in the state, bringing them under its jurisdiction.

In this sense, the ECtHR’s recent decision in *M.N. and Others v. Belgium* is relevant to the discussion.¹⁰⁰ The case concerned a Syrian family living in Aleppo who had applied for a visa with the Belgian Embassy in Beirut. The applicants contended that, by ruling on these requests, including through decisions of administrative courts, Belgium had exercised public powers over them and brought them under its jurisdiction.¹⁰¹ After Belgium denied them their visas, the applicants argued that Belgium was responsible for exposing them to inhumane treatment resulting from the armed conflict in Syria, contrary to Article 3 of the European Convention.

The ECtHR dismissed this submission, ruling that “[t]he mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of

⁹⁶ *Al-Adsani v. United Kingdom*, App. No. 35763/97, Eur. Ct. H.R. ¶ 55 (2001).

⁹⁷ General Comment No. 15, *supra* note 64, ¶ 8.

⁹⁸ During the drafting of the ICCPR, states expressed concern over contradictions between the right to return and a potential provision in the sense that the rights were to be guaranteed within the states’ territory. See U.N. Secretary-General, *Annotations on the text of the draft International Covenants on Human Rights*, ¶¶ 50–60, U.N. Doc. A/2929 (July 1, 1955).

⁹⁹ This is exemplified by statements of delegates that alluded to the right of nationals and foreign nationals to return to a country after having left it. See U.N. Doc. E/CN.4/SR.151, *supra* note 31, ¶¶ 50, 52, 53.

¹⁰⁰ *M.N. v. Belgium*, App. No. 3599/18, Eur. Ct. H.R. (2020).

¹⁰¹ *Id.* ¶ 111.

the State concerned over those persons outside its territory.”¹⁰² Further links between the state and the individuals were necessary for jurisdiction to be established.¹⁰³ In particular, the ECtHR mentioned that, in cases in which individuals were outside the state’s territory but had pre-existing ties of family or private life there, there existed a jurisdictional link obliging the state to protect such ties.¹⁰⁴ The ECtHR also noted that the applicants were not Belgian nationals,¹⁰⁵ had never been to that country and did not claim to have any ties of family or private life there¹⁰⁶ as factors that corroborated its conclusion affirming the lack of jurisdiction. Following this reasoning, the ECtHR seemed to imply that, where individuals are not only affected by extraterritorial acts of public authority but also have relevant connections in the country, this is enough to establish jurisdiction.

This rationale is compatible with decisions of human rights bodies where jurisdiction was established in cases where the individual had some connections in the state and had been directly affected by extraterritorial legislative and administrative measures taken by it.¹⁰⁷ For instance, in communications concerning the refusal by Uruguayan authorities to renew passports of Uruguayan nationals living abroad, the HRC held that this matter was clearly within the jurisdiction of the state-party, even if the applicants were outside of the state’s territory.¹⁰⁸ Likewise, in the case of *Ibrahima Gueye and Others v. France*, the HRC found that French pension laws unlawfully discriminated against retired Senegalese soldiers of the French Army residing in Senegal, noting specifically that “the authors are not generally subject to French jurisdiction, *except that they rely on French legislation in relation to the amount of their pension rights.*”¹⁰⁹ The ECtHR, in *Kovačić and Others v. Slovenia*, has also found that

¹⁰² *Id.* ¶ 112.

¹⁰³ *Id.* ¶ 113.

¹⁰⁴ *Id.* ¶ 109; *see also* Khan v. United Kingdom, App. No 11987/11, Eur. Ct. H.R. ¶ 27 (2014).

¹⁰⁵ M.N. v. Belgium, *supra* note 100, ¶ 118.

¹⁰⁶ *Id.* ¶ 115.

¹⁰⁷ For a more in-depth assessment of case law in this regard, *see* Maarten den Heijer & Rick Lawson, *Extraterritorial Human Rights and the Concept of ‘Jurisdiction’*, in GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 153 (Malcolm Langford et al. eds., 2013).

¹⁰⁸ Human Rights Comm., Communication No. 57/1979, Vidal Martins v. Uruguay, U.N. Doc. CCPR/C/15/D/57/1979, ¶ 7.4 (Mar. 25, 2002); Human Rights Comm., Communication No. 77/1980, Lichtenstein v. Uruguay, U.N. Doc. CCPR/C/OP/2, ¶ 6.1 (Mar. 31, 1983).

¹⁰⁹ Human Rights Comm., Communication No. 196/1985, Gueye v. France, U.N. Doc. CCPR/C/35/D/196/198 (Apr. 3, 1989).

Slovenia's responsibility was triggered by its adoption of legislative measures that prevented Croatian citizens from withdrawing currency from a Slovenian bank in Zagreb.¹¹⁰

Given that (1) the right to return may only be invoked by persons who have relevant connections in the state (whether by considering it their own country or in light of the right to family and private life) and (2) the obstacles to return resulted directly from state action, there appears to be a sufficient link to establish state jurisdiction over persons stranded abroad as a result of COVID-19 travel restrictions. In cases where states fail to adopt measures to prevent the interference with the right to return from materializing, states are under the obligation to remedy the situation and ensure the right to return, including—where necessary and in agreement with host states—through repatriation.¹¹¹ This is not to exclude, however, other measures that may be adequate to ensure the right to return according to the situation at hand.

The repatriation operations that some states¹¹² have conducted to bring home those stranded amidst the pandemic thus cannot be considered *ex gratia*. These operations are a form of complying with the legal obligation to ensure human rights protection. States that have not adopted specific measures to facilitate the return of stranded persons bear the burden of demonstrating that they could not reasonably have done so,

¹¹⁰ *Kovačić v. Slovenia*, Apps. No. 44574/98, 45133/98, 48316/99, Eur. Ct. H.R., at 55 (2004), <http://hudoc.echr.coe.int/fre?i=001-23835> [<https://perma.cc/J5UN-GJTQ>].

¹¹¹ A recent example of this understanding was expressed in a November 2019 decision of the Higher Administrative Court of Berlin-Brandenburg. It held that Germany, after having denied travelling papers to a German citizen who, in 2014, had left the country to join the Daesh in Syria, had the obligation to repatriate her, on the grounds of, *inter alia*, Article 12(4) of the ICCPR and Article 3(2) of Protocol 4 to the European Convention. Jenny Gesley, *Germany: Court Obligates Government to Repatriate ISIS Member and Children to Germany*, LIBR. OF CONG. (Dec. 17, 2019), <https://www.loc.gov/law/foreign-news/article/germany-court-obligates-government-to-repatriate-isis-member-and-children-to-germany/> [<https://perma.cc/HJ29-L5ZS>].

¹¹² See, e.g., *COVID-19: European Union supports repatriation of EU citizens from Morocco*, EUR. UNION (MAR. 17, 2020), https://ec.europa.eu/neighbourhood-enlargement/news_corner/news/covid-19-european-union-supports-repatriation-eu-citizens-morocco_en.

either by proving an effective lack of resources¹¹³ or other operational difficulties, such as the absence of adequate aircraft.¹¹⁴

Therefore, the international travel restrictions and border closures adopted as a response to the spread of COVID-19 directly interfere with the right to return guaranteed in international human rights instruments, thereby triggering a positive duty in states to take measures with the view of allowing stranded persons to return. Repatriation is one of the means through which this duty may be fulfilled, but, inasmuch as it may not be feasible in given circumstances and the carrying out of such operations depends on the consent of host states, states are not under an absolute obligation to guarantee repatriation.

II. AVOIDING VIOLATIONS WITHIN THE HUMAN RIGHTS FRAMEWORK

Although the travel restrictions analyzed herein are prima facie incompatible with the right to return, they do not necessarily constitute a violation by the state. International human rights instruments allow for the restriction of the enjoyment of human rights in two scenarios: limitations and derogations.¹¹⁵ Limitations are restrictions imposed on the exercise of human rights. These restrictions may be adopted to the extent provided by the human rights instrument in question, allowing the state to curtail, in certain aspects, the enjoyment of the right.¹¹⁶ Derogations, on the other

¹¹³ A large-scale repatriation may be quite costly. For instance, in March 2020 the United Kingdom announced it would be dedicating £75m to a repatriation mission for 300,000 British nationals. Lisa O'Carroll, *How will the UK's £75m coronavirus repatriation work?*, THE GUARDIAN (Mar. 31, 2020), <https://www.theguardian.com/world/2020/mar/31/how-will-uk-75m-coronavirus-repatriation-rescue-mission-work> [<https://perma.cc/KU44-49EH>].

¹¹⁴ One specific case in this sense was that of an Air France Airbus 330 that was damaged by shots in the Republic of Congo, where it was to be used to repatriate stranded French nationals. Serge Koffi & Bertrand Boukaka, *Congo: un avion de la compagnie Air France pris pour cible [Congo: an Air France airplane targeted]*, AFR. NEWS (Apr. 12, 2020), <https://fr.africanews.com/2020/04/12/un-airbus-a330-de-la-compagnie-compagnie-air-france-a-ete-pris-pour-cible-par/> [<https://perma.cc/8T7B-U4VJ>].

¹¹⁵ See generally OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY 288–364, 513–60 (2010).

¹¹⁶ Viktor Mavi, *Limitations of and Derogations from Human Rights in International Human Rights Instruments*, 38 ACTA JUR. HUNG. 107, 109 (1997). Rosalyn Higgins refers to these provisions as “clawback clauses,” meaning one that permits, in normal circumstances, breach of an obligation for a specified number of public reasons. Rosalyn Higgins, *Derogations under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281, 281 (1976). It is the case, for instance, of the prohibition of

hand, are temporary suspensions the obligations assumed by states under human rights treaties in circumstances characterized as public emergencies.¹¹⁷ The instrument must expressly authorize this sort of suspension.¹¹⁸

It should be clarified that derogation is a prerogative of the state and cannot be applied unless a state expressly seeks to invoke it.¹¹⁹ Accordingly, when a state that is before a human rights body chooses not to qualify restrictions on rights as derogations, these bodies turn to the more general framework of limitations, which may be invoked regardless of public emergencies, in order to assess whether the requirements for a lawful limitation were met. In the same vein, if a claim of derogation is deemed to fail because the state has not complied with formal requirements, such as a public declaration of a state of emergency or giving notice to the relevant bodies, nothing prevents the governmental measures from being analyzed as limitations of human rights and, eventually, being found lawful.¹²⁰ It is worth mentioning that the HRC, in a statement issued on April 24, 2020 concerning the COVID-19 pandemic, stressed that states should give preference to limitations of human rights instead of derogations when dealing with the pandemic.¹²¹ Accordingly, the lawfulness of states' travel restrictions will be evaluated in light of both of these institutes—limitations and derogations.

hate speech, which is usually framed as a limitation on the freedom of speech for reasons of public security and order.

¹¹⁷ Mavi, *supra* note 116, at 110.

¹¹⁸ See ICCPR, *supra* note 12, art. 4; European Convention, *supra* note 17, art. 15; American Convention, *supra* note 14, art. 27.

¹¹⁹ Which is why the international instruments providing for the possibility of derogation indicate that the state “may take measures” derogating from its obligations instead of framing derogation as an automatic consequence of the public emergency. See ICCPR, *supra* note 12, art. 4; European Convention, *supra* note 17, art. 15; American Convention, *supra* note 14, art. 27.

¹²⁰ In contrast, if it is found that the substantial requirements for derogation were not satisfied, it is highly unlikely that the measures would be considered lawful limitations, since derogations commonly entail the complete suspension of the applicability of the right, thus raising problems as to the requirement of proportionality in the framework of limitations.

¹²¹ According to the Committee: “States parties should not derogate from Covenant rights or rely on a derogation made when they can attain their public health or other public policy objectives through invoking the possibility to restrict certain rights [. . .] in conformity with the provisions for such restrictions set out in the Covenant, or through invoking the possibility of introducing reasonable limitations on certain rights.” Human Rights Comm., Statement on derogations from the Covenant in connection with the COVID-19 pandemic, ¶ 2(c), U.N. Doc. CCPR/C/128/2, (Apr. 24, 2020) [hereinafter HRC Statement].

A. LIMITATIONS ON THE RIGHT TO RETURN

Article 12(3) of the ICCPR establishes the general limitations concerning the liberty of movement: any restrictions on the liberty of movement must be provided by law and “necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others” as well as be consistent with the other rights provided in the ICCPR.¹²² It is commonly agreed that this provision does not apply to the right to return, due to the importance of the latter, which is why Article 12(4) was placed after this clause.¹²³ Instead, Article 12(4) establishes only that no one may be *arbitrarily* deprived of the right to enter their own country. The logical implication is that non-arbitrary deprivations are allowed.

The problem then is defining which limitations are arbitrary and which ones are not. Some authors suggest that the drafters of the ICCPR meant to establish an exception to the right to return only in cases of exile imposed in accordance with domestic law and that, since this kind of punishment is no longer accepted in democratic states, Article 12(4) cannot be subjected to any limitations.¹²⁴ This view seems to have gained favor among a number of human rights scholars, which advanced the interpretation that the right to return under Article 12(4) was absolute in the Uppsala¹²⁵ and Strasbourg Declarations on the Right to Leave and Return.¹²⁶

Indeed, the *travaux préparatoires* indicate that some delegates understood that exile was the only circumstance that could limit the enjoyment of the right to return.¹²⁷ However, an express mention of exile in the final text of the ICCPR was rejected, as some states (mainly in Latin America) did not permit exile in their domestic orders and did not want

¹²² ICCPR, *supra* note 12, art. 12(3).

¹²³ U.N. Doc. A/C.3/SR.957, *supra* note 45, ¶¶ 3, 19, 35.

¹²⁴ Maria Stavropoulou, *Bosnia and Herzegovina and the Right to Return in International Law, in POST-WAR PROTECTION OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA* 123, 126 (Michael O’Flaherty & Gregory Gisvold eds., 1998); Nowak, *supra* note 54, at 262, 283; John Quigley, *Displaced Palestinians and a Right to Return*, 39 HARV. INT’L L.J. 171, 202 (1998).

¹²⁵ *The Right to Leave and the Right to Return: A Declaration Adopted by the Uppsala Colloquium, Sweden, June 21, 1972*, 7 INT’L MIGRATION REV. 62, 64, art. 9 (1973).

¹²⁶ Hurst Hannum, *Strasbourg Declaration on the Right to Leave and Return*, 81 AM. J. INT’L L. 432, 433, 436, art. 6(a) (1987).

¹²⁷ Specifically, the delegates from Ireland, the United Kingdom, Chile, and France. See U.N. Doc. A/C.3/SR.956, *supra* note 45, ¶ 23; U.N. Doc. A/C.3/SR.958, *supra* note 45, ¶ 31; U.N. Doc. E/CN.4/SR.151 *supra* note 31, ¶ 62; U.N. Doc. E/CN.4/SR.315, *supra* note 41, at 8.

this kind of punishment sanctioned in an international instrument.¹²⁸ A number of delegates, on the other hand, rejected any limitations on the right to return.¹²⁹ Two others (Greece and Italy) maintained that some limitations could apply, such as in the interests of national security,¹³⁰ and the Philippine delegation agreed there could be restrictions to the right to return, though not broad ones.¹³¹

As can be seen, the drafters' interpretations on what limitations were permissible on the right to return and whether they were allowed at all is far from uniform. It is thus questionable whether real guidance can be derived from the *travaux préparatoires*. Furthermore, according to the customary rules of treaty interpretation,¹³² the *travaux* are a subsidiary means of interpretation and recourse to them is only relevant when the general rules established in Article 31 of the Vienna Convention on the Law of Treaties are not enough to discern the meaning of the treaty's terms. However, these general rules seem to be sufficient to establish the meaning of "arbitrary" in Article 12(4).

The term "arbitrary" is used in other provisions of the ICCPR in the same context, namely Articles 6 (right to life), 9 (right to liberty and security), and 17 (right to private life), so that the HRC has had several opportunities to develop its ordinary meaning.¹³³ The HRC takes the view that prohibiting an arbitrary deprivation of a right establishes the need for any limitations to the right to be prescribed by law and reasonable as well

¹²⁸ As expressed by the delegates from Guatemala, El Salvador, Panama, Argentina, and Cuba. See U.N. Doc. A/C.3/SR.958, *supra* note 45, ¶¶ 17, 18, 26, 29; U.N. Doc. A/C.3/SR.959, *supra* note 49, ¶ 29.

¹²⁹ Namely, the delegates from Uruguay, Egypt, Lebanon, Saudi Arabia, Morocco, Iraq, Ethiopia, and Ecuador. See U.N. Doc. E/CN.4/SR.106, *supra* note 36, at 6; U.N. Doc. E/CN.4/SR.315, *supra* note 41, at 10; U.N. Doc. A/C.3/SR.957, *supra* note 45, ¶¶ 14, 24, 32; U.N. Doc. A/C.3/SR.958, *supra* note 45, ¶ 16; U.N. Doc. A/C.3/SR.959, *supra* note 49, ¶¶ 28, 34.

¹³⁰ U.N. Doc. E/CN.4/SR.315, *supra* note 41, at 4; U.N. Doc. A/C.3/SR.957, *supra* note 45, ¶ 26.

¹³¹ U.N. Doc. A/C.3/SR.958, *supra* note 45, ¶ 10.

¹³² VCLT, *supra* note 32, art. 32. For an analysis of how international courts and tribunals have accepted the customary nature of articles 31 and 33 of the VCLT, see Oliver Dörr, *Article 31: General rule of interpretation*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 559, 561–64 (Oliver Dörr & Kirsten Schmalenbach eds., 2018). For criticism of this view, see MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 448 (2009).

¹³³ See General Comment No. 36, *supra* note 19, ¶¶ 11–12; Human Rights Comm., General Comment No. 35, U.N. Doc. CCPR/C/GC/35, ¶ 12 (Dec. 16, 2014) [hereinafter General Comment No. 35]; General Comment No. 27, *supra* note 55, ¶ 21; General Comment No. 16, *supra* note 74, ¶ 4.

as compatible with the purposes, aims, and objectives of the ICCPR.¹³⁴ In analyzing these elements, the HRC refers to the necessity of the limitation and its proportionality to the harm caused.¹³⁵

There is nothing in the text of the ICCPR, read in light of its objective and purpose, that indicates that arbitrariness ought to have a meaning different from the one described above under Article 12(4).¹³⁶ The fact that this provision does not enumerate specific parameters to be observed in limitations, like Articles 6 and 9 do, does not render the term “arbitrary” meaningless; Article 17 sets out no parameters for limitations either and the HRC has repeatedly confirmed the possibility of limiting this right.

It is true that, given the content of the right to return and its significance in ensuring that individuals can have a ‘home’ state, there are few circumstances in which limiting this provision would be reasonable.¹³⁷ However, one can imagine scenarios in which a temporary restriction would be legitimate to prevent risk of serious harm to individuals.¹³⁸ Hence, the right to enter one’s country under Article 12(4) may be limited, including on the basis of considerations similar to the ones enumerated in Article 12(3),¹³⁹ so long as the limitations are not arbitrary, according to the HRC’s definition.¹⁴⁰

The considerations above also apply to the right to return under Article 12(2) of the African Charter, which allows for limitations “provided for by law for the protection of national security, law and order,

¹³⁴ See General Comment No. 36, *supra* note 19, ¶¶ 11–12; General Comment No. 35, *supra* note 132, ¶ 12; General Comment No. 27, *supra* note 55, ¶ 21; General Comment No. 4, *supra* note 52, ¶ 4.

¹³⁵ General Comment No. 36, *supra* note 19, ¶ 12. General Comment No. 35, *supra* note 132, ¶ 12.

¹³⁶ Saideman, *supra* note 54, at 855–56.

¹³⁷ General Comment No. 27, *supra* note 55, ¶ 21.

¹³⁸ Jagerskiold, *supra* note 54, at 181. For instance, when most of Europe’s airspace was shut down in 2010 after a volcanic eruption in Iceland and dispersion of its ashes across the continent, to prevent risks of aerial accidents. *Iceland closes airports for the first time due to volcanic ash cloud*, CNN (Apr. 23, 2010), <http://edition.cnn.com/2010/WORLD/europe/04/22/iceland.airport.closures/index.html> [<https://perma.cc/S34X-WDDF>]. Although this situation could have been framed as a derogation, since enjoyment of the right was temporarily suspended on the basis of a public emergency, it is worth noting that no European states notified derogations concerning this event and did not claim to be exercising this prerogative.

¹³⁹ Saideman, *supra* note 54, at 856.

¹⁴⁰ Vincent Chetail, *Freedom of Movement and Transnational Migrations: A Human Rights Perspective*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 47, 58 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003); Lawand, *supra* note 11, at 457.

public health or morality.”¹⁴¹ According to the caselaw of the African Commission,¹⁴² proportionality is an inherent requirement to any limitations of rights and must be strictly observed.

In the framework of the American Convention and Protocol 4 to the European Convention, the analysis is more straightforward, since both instruments enunciate the right without allowing for limitations or non-arbitrary deprivations. Indeed, in a case concerning the expulsion of a Cypriot national from Cyprus, the ECtHR had the opportunity to clarify that Article 3 of the Protocol “secures an absolute and unconditional freedom from expulsion of a national,”¹⁴³ which entails a similar absoluteness in relation to the right to return, provided under the same Article and, likewise, without any qualifications. Therefore, states party to these treaties may not limit their nationals’ right to return under any circumstances.¹⁴⁴ Only aliens may have their right to return limited under the European and Inter-American systems, as long as this limitation does not amount to an arbitrary interference with their right to family and private life.

The criteria for these limitations are essentially uniform among the human rights systems discussed, namely: the limitation must be prescribed by law; it must be necessary to achieve a legitimate objective; and it must be proportionate. As such, we will now turn to assess whether the COVID-19 international travel restrictions comply with these criteria.

The first requirement for a lawful limitation, prescription by law, aims to guarantee a degree of foreseeability to those persons affected by the limitation measure. The law must establish the limitation in clear and accessible terms and articulate its duration and exceptions.¹⁴⁵ Although each state has its own procedures for determining border closures and limitations on international travel, most states have done so by adopting

¹⁴¹ African Charter, *supra* note 15, art. 12(2).

¹⁴² “The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.” *Media Rights Agenda v. Nigeria*, No. 105/93, 128/94, 130/94 and 152/96, at ¶ 69–70.

¹⁴³ *Shchukin v. Cyprus*, App. No. 14030/03, Eur. Ct. H.R. ¶ 144 (2010).

¹⁴⁴ *Lapidoth*, *supra* note 47, at 111; *Chetail*, *supra* note 139, at 58.

¹⁴⁵ Permanent Rep. of the Netherlands to the U.N., Note verbale dated Aug. 24, 1984 from the Permanent Rep. of the Netherlands to the United Nations at Geneva addressed to the Security-General, Annex ¶ 17, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984) [hereinafter *Siracusa Principles*].

legislative or executive decrees with the force of law, which set out the conditions of the limitations. This requirement is therefore generally met.

As for the requirement of the measure's necessity in order to achieve a legitimate objective, it is worth noting that the Commission on Human Rights—a former UN body tasked with reviewing the human rights situations in member-states—in its Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR (hereinafter “Siracusa Principles”), considered that public health could be invoked as a ground for limiting certain rights so as to prevent the proliferation of a disease that threatens the population.¹⁴⁶ Measures with the view of mitigating the COVID-19 pandemic thus have a legitimate objective. The Principles also recommend that due regard be given to the International Health Regulations of the World Health Organization (WHO). The WHO, in turn, interpreted the Siracusa Principles as requiring that limitations be based on scientific evidence in order to avoid arbitrariness.¹⁴⁷

Although scientific evidence is not always uniform, there seems to be a general consensus that the new coronavirus spreads quickly among humans and that social distancing is one of the key measures to reduce its proliferation rate. This may lead to the impression that more significant restrictions for leaving and entering countries are called for. However, studies conducted on the efficiency of travel bans adopted to contain previous disease outbreaks, such as Ebola, MERS, and SARS found that these measures only had a limited effect.¹⁴⁸ One study published in relation to the COVID-19 pandemic concluded that travel restrictions had little effect in mitigating the pandemic.¹⁴⁹ Thus, it is doubtful whether there is enough scientific evidence available to support the necessity of these restrictions.

In any event, the necessity of a limitation cannot be assessed in abstract terms, but instead must be viewed in context. There are cases in which a complete closure of borders or the imposition of certain travel

¹⁴⁶ *Id.* ¶ 25.

¹⁴⁷ *Guidance on human rights and involuntary detention for xdr-tb control*, WHO (Jan. 24, 2007), https://www.who.int/tb/features_archive/involuntary_treatment/en/ [https://perma.cc/74X4-UVFE].

¹⁴⁸ Chelsea Ferrell & Pulkit Agarwal, *Flight Bans and the Ebola Crisis: Policy Recommendations for Future Global Health Epidemics*, 14 HARV. PUB. HEALTH. REV. 1, 6–8 (2018); Trish M. Perl & Connie Savor Price, *Managing Emerging Infectious Diseases: Should Travel Be the Fifth Vital Sign?*, 172 ANNALS OF INTERNAL MED. 560 (2020).

¹⁴⁹ Matteo Chinazzi et al., *The Effect of Travel Restrictions on the Spread of the 2019 Novel Coronavirus (COVID-19) Outbreak*, SCI., Apr. 24, 2020, at 395, 400.

restrictions clearly did not contribute to achieving the goal of reducing the proliferation of the virus; sometimes these restrictions even had the opposite effect. One example of the former scenario was the Brazilian government's closure of its border with Venezuela in mid-March 2020.¹⁵⁰ Although the declared objective was to contain the pandemic, there had not been reports of a significant number of cases in the region at the time, whereas travel routes from and to more affected countries, such as Italy and the United States, remained open for a longer period. Another example is the closure of the border between Chile and Bolivia, which led to substantial agglomerations of Bolivians who could not return to their country,¹⁵¹ creating a more propitious environment for the virus to spread. In situations like these, there is an even stronger argument against the necessity of the travel restrictions.

Another important issue with the COVID-19 restrictions concerns the requirement of proportionality. Regardless of any potential contributions to "flattening the curve," the travel bans left thousands of persons stranded outside of their countries. In addition to the difficulties in obtaining financial resources to provide for themselves, especially in foreign currency, many faced severe hardships due to lack of shelter, food, and medication, and resorted to sleeping in airports and hoping for a flight back to their home countries.¹⁵² This situation was further aggravated by restrictions on the operation of businesses in the host states. For instance, a pregnant Brazilian woman and her spouse were stranded in India in March and reported they had started to ration food because no supermarkets were open.¹⁵³ On the Bolivia-Chile border, hundreds of

¹⁵⁰ Fabrício Araújo & Valéria Oliveira, *Fronteira do Brasil com a Venezuela é fechada* [Brazil's border with Venezuela is closed], G1 (Mar. 18, 2020), <https://g1.globo.com/rr/toraima/noticia/2020/03/18/fronteira-do-brasil-com-a-venezuela-e-fechada.ghtml> [<https://perma.cc/QWY9-ZJJM>].

¹⁵¹ André Borges, *Coronavírus: Brasileiros retidos na Índia racionam comida e são hostilizados por serem 'gringos'* [Coronavirus: Brazilians stranded in India ration food and are harassed for being 'gringos'], ESTADÃO (Mar. 26, 2020), <https://saude.estadao.com.br/noticias/geral,coronavirus-brasileiros-retidos-na-india-racionam-comida-e-sao-hostilizados-por-serem-gringos,70003249237> [<https://perma.cc/UA8Z-NB97>].

¹⁵² Evan Gershkovich, *Coronavirus Border Closures Leave Migrant Workers Stranded in Moscow's Airports*, MOSCOW TIMES (Mar. 24, 2020), <https://www.themoscowtimes.com/2020/03/24/coronavirus-border-closures-leave-migrant-workers-stranded-in-moscows-airports-a69733> [<https://perma.cc/UHY4-FK98>].

¹⁵³ André Borges, *Coronavírus: Brasileiros retidos na Índia racionam comida e são hostilizados por serem 'gringos'* [Coronavirus: Brazilians stranded in India ration food and are harassed for being 'gringos'], ESTADÃO (Mar. 26, 2020), <https://saude.estadao.com.br/noticias/geral,coronavirus-gringos>].

Bolivian nationals were barred from entering their country and stayed in improvised camps outdoors.¹⁵⁴ Added to these dire material conditions was the tremendous psychological stress of not knowing when they would be able to return home, how they would be treated in a foreign country if they caught the virus, and many other concerns, to which consular staff was not always able to respond.¹⁵⁵

In some of these situations, the suffering—physical and psychological—may well reach the level of intensity to constitute inhuman and degrading treatment,¹⁵⁶ a non-derogable prohibition in all the human rights treaties under analysis.¹⁵⁷ Where the harm is so great, it is difficult to conceive limitations on return as proportionate.

Of course, each case needs to be assessed on its own merits. If the impossibility of returning lasted a short period and the individuals were able to maintain decent living conditions in the meantime, the limitation may be seen as proportionate. This will often depend on the assistance provided by governments, both in the country of origin and in the host country, in arranging for repatriation and providing for the most vulnerable among those stranded. If the country of origin took all measures to secure that persons abroad would be able to return in a short time, but these plans were frustrated due to the host country's refusal to cooperate, the failure of securing proportionality to the limitations falls on the host country. On

brasileiros-retidos-na-india-rationam-comida-e-sao-hostilizados-por-serem-gringos,70003249237 [https://perma.cc/UA8Z-NB97].

¹⁵⁴ *Unos 800 bolivianos cumplen cuarentena en Chile antes de volver a su país* [About 800 Bolivians are quarantined in Chile before returning to their country], FRANCE24 (Apr. 14, 2020), <https://www.france24.com/es/20200413-unos-800-bolivianos-cumplen-cuarentena-en-chile-antes-de-volver-a-su-pa%C3%ADs> [https://perma.cc/DVA7-MDSC]; Pizarro & Pérez, *supra* note 149.

¹⁵⁵ Linda Givetash, Suzanne Ciechalski & Abigail Williams, *Coronavirus: Americans stranded abroad struggle as border closures intensify*, NBC NEWS (Mar. 20, 2020), <https://www.nbcnews.com/news/world/coronavirus-americans-stranded-abroad-struggle-border-closures-intensify-n1164596> [https://perma.cc/BYM2-M5EN].

¹⁵⁶ Harsh conditions of socioeconomic deprivation have been recognized as constituting inhuman and degrading treatment. *E.g.*, *M.S.S. v. Belgium*, App. No. 30696/09, Eur. Ct. H.R. ¶ 263 (2011); *N.H. v. France*, App. No. 28820/13, 75547/13 and 13114/15, Eur. Ct. H.R. ¶¶ 182, 184–86 (2020); *Vera Vera v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 226, ¶¶ 43–44 (May 19, 2011); General Comment No. 36, *supra* note 19, ¶ 26. Hum. Rts. Comm., Communication No. 2575/2015, *Araya v. Denmark*, U.N. Doc. CCPR/C/123/D/2575/2015 (May 3, 2019).

¹⁵⁷ ICCPR, *supra* note 12, art. 7; European Convention, *supra* note 17, art. 3; American Convention, *supra* note 14, art. 5; African Charter, *supra* note 15, art. 5. However, responsibility for a violation in this regard would depend on a deeper examination, taking into account the extent of the state's jurisdiction and its duty of care over persons abroad and in its territory, which exceeds the scope of this article.

the other hand, if the country of origin does not provide sufficient information and assistance for persons to return, it is not complying with its positive obligations to ensure this right and is subjecting individuals to disproportionate limitations.

Some states' absolute refusal to allow the return of persons who managed to get to the borders is particularly difficult to justify as proportional to the harms caused by COVID-19 since other less restrictive measures could have been adopted in order to control the pandemic,¹⁵⁸ such as a period of mandatory quarantine for returnees. Moreover, this complete prohibition of entry seems not only to be limiting the enjoyment of the right to return but completely suspending its application—like a derogation would—which also fails to meet the requirement of proportionality.

Similar considerations apply to persons who sought to return to a country based on the right to family and private life, although travel restrictions may be easier to justify in these cases. That is because if one's connections in the host country are less intense than with one's own country, the degree of interference will be lower and, consequently, the threshold for achieving proportionality will be lower. This does not mean, however, that the proportionality threshold will necessarily be low. In order to assess if an interference with the right to family and private life is disproportionate to the state's objectives, a number of factors should be considered, such as: the length of residence in the host state, the age of any children who are trying to return or who are left in the host state while a parent or other caregiver is stranded, and the degree of the family's financial and emotional interdependence.¹⁵⁹ These considerations must then be balanced with the state's interests in ensuring public health. Again, only through a case-by-case analysis will one be able to identify whether the degree of interference with the right was proportionate. In any event, states will have the burden of proving that the individual harm caused to those unable to return for long periods was proportionate to the benefits reaped from closing its borders.

¹⁵⁸ See Jouzier, *supra* note 93, at 3–4.

¹⁵⁹ Wojnowska-Radzińska, *supra* note 66, at 49.

B. DEROGATION FROM THE RIGHT TO RETURN

In addition to the difficulties of characterizing the COVID-19 travel restrictions as limitations, they likely cannot be justified as lawful derogations from the right to return either. With the exception of the African Charter,¹⁶⁰ the human rights instruments analyzed herein each contain a clause allowing for derogation of rights in times of a public emergency that threatens the life of the nation, or, using the terms of the American Convention, its independence or security.¹⁶¹ These clauses allow states to take measures that suspend the application of the right, as long as they demonstrate that the derogation was strictly necessary to safeguard against the dangers created by the public emergency.¹⁶² The requirement of “strict necessity” also entails a requirement of proportionality between the derogation and the ensuing harm to human rights.¹⁶³

Another common feature of the derogation procedure is the duty to notify. Any state party invoking derogation must inform the other parties—through the Secretary-General of the UN, of the Council of Europe, and of the Organization of American States (OAS), as applicable—of which provisions have been derogated and the reasons why, as well as of the date when derogation is terminated.¹⁶⁴ The ICCPR further requires that the public emergency be officially proclaimed.¹⁶⁵

Both the provisions concerning the right to return and the rights to family and private life admit derogation in accordance with these

¹⁶⁰ Media Rights Agenda v. Nigeria, No. 105/93, 128/94, 130/94 and 152/96, at ¶ 67.

¹⁶¹ ICCPR, *supra* note 12, art. 4; American Convention, *supra* note 14, art. 27; European Convention, *supra* note 17, art. 15. Both the ICCPR and the European Convention refer to a “public emergency which threatens the life of the nation.” The American Convention, on the other hand, refers to times of “war, public danger, or other emergency that threatens the independence or security of a State Party.”

¹⁶² HÉCTOR FAÚNDEZ LEDESMA, EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS [THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS] 123–24 (3d ed. 2004), https://www.iidh.ed.cr/IIDH/media/1575/si_proteccion_ddhh_3e.pdf [<https://perma.cc/JS3T-X45C>]; Siracusa Principles, *supra* note 143, ¶ 51–54.

¹⁶³ Hum. Rts. Comm., General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 4 (Aug. 31, 2001) [hereinafter General Comment No. 29]; CECILIA MEDINA QUIROGA, LA CONVENCION AMERICANA: TEORIA Y JURISPRUDENCIA 52 (2005).

¹⁶⁴ ICCPR, *supra* note 12, art. 4(3); European Convention, *supra* note 17, art. 15(3); American Convention, *supra* note 14, art. 27(3).

¹⁶⁵ “In time of public emergency which threatens the life of the nation and *the existence of which is officially proclaimed*, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant.” (emphasis added) ICCPR, *supra* note 12, art. 4(1).

procedures. At first sight, it seems that the requirement of existence of a public emergency is met in the context of the COVID-19 pandemic. After all, it is a highly contagious disease that has caused over a million fatalities worldwide and has cost states billions of dollars. Nevertheless, it is less clear if the specific international travel restrictions adopted by states conform to the material conditions for a lawful derogation.

1. The Derogation from the Right to Return Likely Cannot Survive a Necessity and Proportionality Analysis

Although an absolute prohibition of re-entering one's country could easily be qualified as a suspension of rights that could, theoretically, be achieved by derogation, it is difficult to conceive of this measure as strictly necessary to prevent further proliferation of COVID-19. As mentioned before, experts disagree as to whether travel bans are an effective means to respond to pandemics. Furthermore, a period of mandatory quarantine can effectively be imposed on those who get to the border, mitigating the risk of contamination and allowing them to return home.

Even if the closure of borders and imposition of certain travel restrictions could arguably meet the "strict necessity" test for controlling the infection rate, the situation of those materially prevented to return may reach the level of inhuman and degrading treatment, whose prohibition is a non-derogable provision.¹⁶⁶ Thus, the derogation in this case seems to lack proportionality.

2. Procedural Concerns Regarding the Derogation from the Right to Return

Further concerns on the legality of derogations invoked during the pandemic relate to the duty to notify the applicable regulatory bodies. Even though several states have now declared some sort of state of emergency under domestic law to take urgent measures to contain the virus, few have notified these bodies about derogations.

According to the United Nations Treaty Collection database, as of May 7, 2020, only fourteen states party to the ICCPR had informed the

¹⁶⁶ ICCPR, *supra* note 12, art. 4(2); European Convention, *supra* note 17, art. 15(2); American Convention, *supra* note 14, art. 27(2).

UN Secretary-General of derogations to the Covenant related to the COVID-19 pandemic.¹⁶⁷ Almost all of these states suspended the application of the liberty of movement under Article 12, thus derogating from the right to return. The only—and curious—exception is Ecuador, which formally derogated only from paragraphs 1 to 3 of Article 12, although it imposed a complete shutdown of borders and prohibited its nationals from re-entering its territory for a certain period. Moreover, only five states (Estonia, Georgia, Latvia, Peru, and Romania) have derogated from Article 17, the right to family and private life.

As for the European Convention, ten states have notified the Council of Europe of their derogations.¹⁶⁸ Although some of them (Albania, Armenia, Estonia, Latvia, and North Macedonia) mentioned the adoption of restrictions imposed on movement across borders in their notification, none have expressly indicated that they derogated from Article 3(2) of Protocol 4. This brings into question whether the formalities for derogation are satisfied in these cases. As for the right to family and private life, only four states (Albania, Georgia, Latvia, and Moldova) expressly derogated from this Article.

Among the states who have so far notified the OAS Secretary-General of their derogations from the American Convention,¹⁶⁹ few have expressly indicated which specific provisions of the treaty were suspended. Nevertheless, from the content of the notifications and attached documents, it is possible to discern that only six states derogated from Article 22 in such a broad manner so as to encompass the right to return (Chile, Colombia, Dominican Republic, Guatemala, Peru, and Ecuador). Moreover, none of these states derogated from the right to

¹⁶⁷ Armenia, Chile, Colombia, Ecuador, El Salvador, Estonia, Georgia, Guatemala, Kyrgyzstan, Latvia, Peru, Romania, San Marino, and Palestine. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en [<https://perma.cc/7TDD-5EAB>] (last visited May 7, 2020).

¹⁶⁸ Albania, Armenia, Estonia, Georgia, Latvia, Moldova North Macedonia, Romania, San Marino, and Serbia. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Mar. 9, 1953 C.E.T.S. No. 005, <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354> [<https://perma.cc/L4WS-F5QT>] (last visited October 15, 2020) for notifications under Article 15 of the Convention in the context of the COVID-19 pandemic.

¹⁶⁹ Argentina, Bolivia, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Panama, Peru, and Suriname. *Recent Suspensions of Guarantees regarding Multilateral Treaties*, ORGANIZATION OF AMERICAN STATES [OAS] http://www.oas.org/en/sla/dil/inter_american_treaties_suspension_guarantees.asp [<https://perma.cc/7TC4-5E5S>] (last visited May 7, 2020).

family and private life, thus implying that claims to return to a country may still be brought under these rights during the public emergency.

A lack of notification to the relevant bodies may indicate that the state in question does not seek to rely on derogation and, therefore, that compliance with rights must be analyzed in light of permissible restrictions, discussed in the previous section. States that have derogated only from the right to return may then be held responsible for violations of the right to family and private life and vice-versa. The problem, however, arises when the state does seek to derogate from these rights but has not given formal notice.

To date, the effects of failure to comply with the procedural requirements for derogations are not clear. In one of its early decisions under Optional Protocol 1, the HRC stated that “[a]lthough the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to Article 4 (3) of the Covenant, the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts” when it invokes the right to derogate.¹⁷⁰ The HRC thus seemed to imply that the absence of notice itself did not compromise the lawfulness of a derogation made in a situation of public emergency. Nonetheless, the HRC also stressed that vague claims that a public emergency existed, without furnishing enough information to assess whether the conditions established in Article 4 were met, compromise the derogation’s validity.¹⁷¹ Years later, when General Comment No. 29 was issued, the HRC gave more emphasis to the obligation to notify, qualifying it as essential to monitor compliance with the ICCPR, but fell short of affirming that lack of notification prevented the state from claiming derogation.¹⁷² Similarly, in the HRC’s recent statement on the COVID-19 pandemic, it stressed the need for notification for the exercise of its supervisory functions, but did not clarify what the consequences of lack of notification were.¹⁷³

In the European human rights system, it is accepted that notification does not need to be concomitant to derogation,¹⁷⁴ but as of yet there is no decision on the consequences where no notice at all is given.

¹⁷⁰ Hum. Rts. Comm., *Landinelli Silva v. Uruguay*, U.N. Doc. CCPR/C/12/D/34/1978, ¶ 8.3 (Apr. 8, 1981).

¹⁷¹ *Id.*

¹⁷² General Comment No. 29, *supra* note 161, ¶ 17.

¹⁷³ HRC Statement, *supra* note 121, ¶¶ 1, 2(a).

¹⁷⁴ *Lawless v. Ireland* (No. 3), App. No. 332/57, Eur. Ct. H.R. ¶ 47 (1961).

The European Commission on Human Rights had the opportunity to clarify this matter in *The Greek Case*, when it considered that Greece had not complied with the requirement of notification under Article 15(3) of the European Convention.¹⁷⁵ However, since the European Commission also concluded that there had not been an emergency threatening the life of the nation on which a derogation could have been based, it did not explain the consequences for breaching Article 15(3).¹⁷⁶

So far, only the IACtHR has issued clear guidance on the duty to inform and its consequences for the responsibility of a state. In the case of *Baena Ricardo and Others v. Panama*, the IACtHR stressed that notification is an indispensable requirement¹⁷⁷ and that lack of compliance prevented the use of derogation as a defense against claims of human rights violations.¹⁷⁸ Accordingly, states party to the American Convention that have not notified the OAS Secretary-General of a derogation of Article 22(5) are in violation of this provision, which, as seen before, admits no limitations.

As for states that have not given the UN Secretary-General and the Council of Europe formal notice of derogation from the ICCPR and the European Convention, respectively, it is not clear if the relevant bodies would see this as a violation of the substantive rights affected. Nevertheless, lack of notification impairs the predictability of states' actions concerning human rights restrictions. At a minimum, the state should have proclaimed a situation of domestic emergency and explained the grounds for the restrictions in a manner accessible to the population. Otherwise, it will be highly difficult to prove that the emergency existed and that the restrictions were adopted with the purpose of containing it.

It is also worth noting that states bear the burden of constantly reviewing the measures taken in relation to the derogation in order to assess whether these measures are still necessary and proportionate and whether a situation of emergency still exists. The Siracusa Principles

¹⁷⁵ The Greek Case, App. No. 3321/67, 3322/67, 3323/67, 3344/67, Eur. Comm'n. H.R. ¶¶ 45–46 (1970).

¹⁷⁶ *Id.* ¶¶ 125, 150. For further discussion about the position of the European human rights bodies on the effects of non-compliance with Article 15(3), see Natasha Holcroft-Emmess, *Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification*, EJIL:TALK! (Apr. 10, 2020), https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2 [<https://perma.cc/8J7U-7REG>].

¹⁷⁷ *Baena Ricardo v. Panama*, *Inter-Am. Ct. H.R. (ser. C) No. 72*, ¶ 92.

¹⁷⁸ *Id.* ¶ 94.

present some guidelines on this matter, indicating that the domestic laws governing states of emergency should “provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.”¹⁷⁹ Moreover, states should provide means for individuals to challenge the lawfulness of the derogation.¹⁸⁰

In sum, although derogations allow states to suspend the application of certain rights instead of merely limiting certain aspects of them, states’ leeway in performing these derogations is curtailed by rigorous procedures. If the derogation procedure is closely followed, it presents a more solid means for states to adopt international travel restrictions while complying with human rights law. Nevertheless, doubts remain as to the scientific support behind these kinds of measures as a means to mitigate the virus’s proliferation. Their considerable harmful effects to individuals who remain unable to return home call into question whether the requirements of necessity and proportionality are satisfied. The fact that few states have notified the relevant bodies of derogations from the right to return is also an indication that the travel restrictions were not adopted with this specific legal framework in mind, which could minimize a potential defense of states on this basis.

III. CONCLUSION

The international travel restrictions adopted by states interfere directly with the right to return, be it by expressly prohibiting any persons from entering or by creating obstacles in obtaining transportation that render it materially impossible for individuals to return. In this context, states have positive duties towards persons stranded abroad, requiring the former to adopt appropriate measures that ensure the enjoyment of this right. For states party to the ICCPR and, arguably, the African Charter, this obligation exists in relation to both nationals and non-nationals with special ties in the country. However, under the European and American Conventions, states are bound to ensure the right to return in itself only to their nationals. Moreover, states must also provide the return of aliens who have meaningful connections in the country in relation to the right to family and private life.

¹⁷⁹ Siracusa Principles, *supra* note 143, ¶ 55.

¹⁸⁰ *Id.* ¶ 56.

Nevertheless, states may seek to avoid breaching their obligations by resorting to mechanisms under human rights law that allow certain restrictions upon human rights, namely limitations and derogations.

States party to the ICCPR and to the African Charter may place limitations on the right to return and on the right to family and private life, provided these are not arbitrary. In turn, parties to the European and American Conventions may not limit the right to return of their nationals under any circumstances but may do so in relation to non-nationals by limiting the right to family and private life. Nonetheless, all limitations must observe strict requirements, among which is the necessity of the measure, which must be assessed in light of available scientific evidence, and its proportionality in relation to the harm caused. It is doubtful whether there is sufficient scientific evidence to support travel bans as a means to contain the pandemic, making compliance with the requirement of necessity controversial. Moreover, travel restrictions that left persons stranded outside their countries for a significant time or in harsh living conditions will hardly be considered proportionate, since less restrictive measures—such as testing and quarantine—could have been adopted.

Regarding derogations, this mechanism, only available under the ICCPR and the European and American Conventions, allows states to suspend the application of given rights in times of public emergencies threatening the life of the nation. Both the rights to return and to family and private life are derogable provisions and it can hardly be denied that the spread of COVID-19 qualifies as a public emergency. However, states availing themselves of the prerogative of derogation must ensure that the restrictions are strictly necessary and proportionate to contain the emergency. In addition to the uncertainties concerning the efficiency of these measures, situations in which persons were stranded without proper assistance for a long time may present relevant grounds for questioning the necessity of these measures, especially if their circumstances reach the level of inhuman and degrading treatment. Furthermore, states seeking to derogate from these rights should inform the international bodies indicated in each of the treaties—which few states have done so far—to avoid questions about whether the lack of notice compromises the validity of the derogation. This is particularly relevant within the Inter-American system, given that the IACtHR has already ruled that lack of notification precludes a state from claiming derogation as a defense.

Therefore, although states have relevant means to avoid responsibility for restrictions of the right to return, strict conditions must be fulfilled, especially concerning the necessity and proportionality of

these measures. From what has been reported in the media so far about the situation of persons stranded abroad, there are many who did not receive adequate assistance from their states and faced dire living conditions. In these cases, it is difficult to justify the compatibility of the restrictions with human rights law and individuals may have a strong case for claiming reparations from states.