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International Bio Law
Interest Group

Welcome and Opening Keynote

“In/Ex-clusiveness in International Bio Law: Human Rights Concerns in a Post-Covid Era”

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ESIL IG on International Biolaw Workshop

“IN/EX-CLUSIVENESS OF INTERNATIONAL BIO LAW: ACTORS, PROCESSES AND OUTCOMES”

Utrecht University

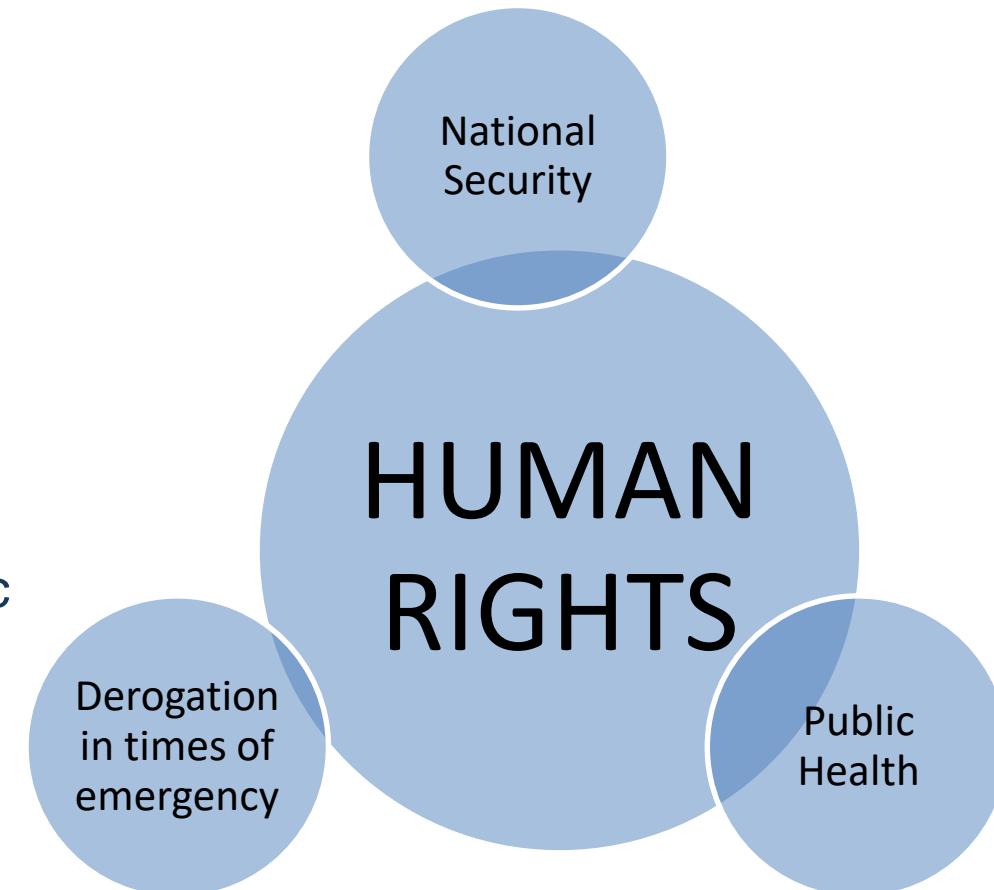
1 September 2022

POINT OF DEPARTURE: Public health is of international concern:

- Resolution 2177 (2014), adopted on 18 September, determined that “the unprecedented extent of the Ebola outbreak in Africa constitute[d] a threat to international peace and security”
- Resolution 2532 (2020), on 1 July: “Considering that the unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security”

... AND MANY UNSOLVED QUESTIONS:

- ❖ **On actors and processes:** institutional governance (WHO, EU, States...)
 - ❖ Bye-bye inter-State governance on health crisis?
 - ❖ Role of non-state actors...
- ❖ **On substance:**
 - ❖ Relationship between Security-freedom, public health & Human Rights
 - ❖ Human rights derogation in case of sanitary crisis and mechanism of control



HUMAN RIGHTS DEROGATIONS IN CASE OF SANITARY CRISIS: THE CASE OF THE ECHR

Rights affected:

- practically all the rights included in the ECHR such as the right to life (art. 2), to liberty (art. 5), to a process (art. 6), to the principle of criminal legality (art. 7), to integrity (art. 8), to religious freedom (art. 9) or expression (art. 10), or freedom of assembly (art. 11)

Traditional workaround:

- Clash of 2 rights: proportionality test...
- Derogation clause

Consequences of a fail to fulfil derogation requisites (case-law)



DEROGATION CLAUSE (ART. 15 ECHR)

Derogation in time of emergency

- 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
- 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*
- 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.*

DEROGATION CLAUSE (ART. 15 ECHR)

AIM of art. 15: derogation (temporary suspension of treaty obligations regarding a State party without bringing international responsibility)

APPLICABILITY of derogation clause to Covid-19 pandemic

- 15.1: public emergency and threat to life of nation
- 15.2: Limits (non-derogable rights)
- 15.3: Duty to inform

Consequences of Non-Compliance?





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Derogations Covid-19

Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)

Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic

Only 10 States!! Albania, Armenia, **Estonia**, Georgia, **Latvia**, North Macedonia, Moldova, **Romania**, San Marino, Serbia.



DEROGATION CLAUSE (ART. 15 ECHR)

Formal requirements: inform to the COE Secretary-General

Soft requirements → laxity in states' declaration

- Notion of “measures taken” and “reasons”
- No identification of rights derogated
- Silence on time-limit (Lawless case, Greek case...)

What sanction for non-compliance? Important role for treaty organs
(Secretary-General, ECtHR)



Not any declaration may be considered valid...

- Declaration made by Spain at the time of deposit the instrument of ratification, on 4 October 1979:

The provisions of Articles 15 and 17 to the effect that they permit the adoption of the measures contemplated in Articles 55 [SUSPENSION OF RIGHTS] and 116 [states of alarm, emergency and siege] of the Spanish Constitution.



FINAL REFLEXIONS

This is a question that matters. We cannot be complacent with such disturbing application of a core norm protecting human rights

The Covid and post-covid reality must encourage to wisely analyse what happened and to improve the rules governing this issues.



Thank you

