

COVID-19 and International Freedom of Movement: A Stranded Human Right?

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Abstract:

Despite the lack of evidence that travel restrictions are effective, governments confronted with an infectious disease outbreak, especially one involving a poorly understood pathogen, often seek to restrict movement—both internally and across their borders. In response to COVID-19, most countries imposed a ban on foreign travelers, with some States even closing borders to their own nationals and residents or prohibiting them from leaving. While border control is a legitimate prerogative that States can use to assess the health condition of travelers, broader travel restrictions are more complex and raise intricate legal questions. This Article focuses on a specific category of travel restrictions: travel bans. Such measures are blanket prohibitions against crossing international borders applied to all or particular individuals, regardless of their health status. The lawfulness of travel bans depends on several elements. First, one needs to examine the applicable legal framework: the International Health Regulations and human rights treaties. Determining whether travel bans are lawful also depends on a second element: the status of travelers, namely, whether they qualify as nationals, residents, or something else. While all people have the right to leave any country and return to their country, there is no human right to enter a foreign state. After reviewing the legal framework and (available) information on travel bans implemented in response to COVID-19, this Article questions whether the pertinent requirements were respected and examines a few of the more clear-cut cases where travel bans breached the rules and principles that should govern international mobility.

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INTRODUCTION

The outbreak of the virus, now known as COVID-19, was reported by Chinese authorities to the World Health Organization (WHO) on the last day of 2019.¹ Based on the information available at the time, WHO advised “against the application of any travel or trade restrictions on China.”² On January 30, 2020, the organization declared the novel coronavirus a “Public Health Emergency of International Concern” (PHEIC).³ The Emergency Committee stated that it did “not recommend any travel or trade restriction based on the current information available.”⁴ Tedros Ghebreyesus, WHO’s Director-General, reiterated: “[T]here is no reason for measures that unnecessarily interfere with international travel and trade. WHO doesn’t recommend limiting trade and movement.”⁵ These recommendations were in line with the purpose and scope of the 2005 International Health Regulations (IHR)⁶ and the nature of temporary recommendations.⁷

Historically, governments confronted with a pandemic have engaged in a “knee-jerk” reaction of imposing travel restrictions.⁸ Such reactions were taken to

1 *COVID-19—China*, WORLD HEALTH ORG. (Jan. 5, 2020), <https://www.who.int/emergencies/disease-outbreak-news/item/2020-DON229>.

2 *Id.*

3 *Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (Jan. 30, 2020), [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) [hereinafter *Statement on the Second Meeting of the International Health Regulations (2005)*]. A PHEIC is “an extraordinary event which is determined . . . (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response.” International Health Regulations, WORLD HEALTH ORG. art. 1(1) (2005) [hereinafter IHR]; see also *id.* at art. 12 (determination of a PHEIC).

4 *Statement on the Second Meeting of the International Health Regulations (2005)*, *supra* note 3.

5 *WHO Director-General’s Statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (Jan. 30, 2020), [https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ih-er-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ih-er-emergency-committee-on-novel-coronavirus-(2019-ncov)).

6 IHR, *supra* note 3, at art. 2 (“[T]o prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”).

7 *Id.* at art. 1(1) (“[N]on-binding advice issued by WHO under Article 15 for application on a time-limited, risk-specific basis, in response to a public health emergency of international concern, to prevent or reduce the international spread of disease and minimize interference with international traffic.”).

8 Lawrence O. Gostin, *Pandemic Influenza: Public Health Preparedness for the Next Global Health Emergency*, 32 J. L. MED. & ETHICS 565, 569 (2004); D. Hagen, *Case Study 1: Port Health and International Health Regulations*, in INTRODUCTION TO PANDEMIC INFLUENZA 194 (Jonathan Van-Tam & Chloe Sellwood eds., 2009). Michael Kenwick & Beth Simmons, *Pandemic Response as Border Politics*, 74 Int’l Org. E36, E37 (2020) (“Hardening international borders in the face of perceived health threats is historically states’ first (and sometimes only) move.”).

unprecedented levels in response to COVID-19. According to WHO, 194 countries adopted some form of travel restriction, with 143 closing their borders.⁹ In April 2020, around 90% of the world population lived in countries with restrictions on non-citizens and non-residents, and roughly 39% lived in countries with borders closed to everyone.¹⁰ Many countries prohibited the entry of citizens or recent travelers from the most affected areas.¹¹ Others went farther and imposed an absolute ban on incoming travelers, including their own citizens,¹² or prohibited them from leaving.¹³ As conditions improved, some countries gradually lifted or

9 WHO, *Weekly Update on COVID-19, 8-15 April 2020*, WORLD HEALTH ORG. 5 (May 7, 2020), <https://www.who.int/publications/m/item/weekly-update-on-covid-19---15-april-2020>.

10 Phillip Connor, *More than Nine-in-Ten People Worldwide Live in Countries with Travel Restrictions amid COVID-19*, PEW RSCH. CTR. (Apr. 1, 2020), <https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19>.

11 For a useful roadmap of the maze of travel restrictions implemented worldwide, see COVID-19 TRAVEL RESTRICTIONS DATABASE, <https://restrictions.info>.

12 See, e.g., *Ecuador Closes Borders to Foreign Travelers due to Coronavirus*, REUTERS (Mar. 15, 2020) <https://www.reuters.com/article/health-coronavirus-ecuador-idUSL8N2B70XK> (Ecuador, giving residents and nationals two days to return); U.S. Embassy in Trinidad & Tobago, *Closure of Trinidad and Tobago Borders Midnight March 22, 2020*, U.S. EMBASSY (Mar. 21, 2020), <https://tt.usembassy.gov/health-alert-u-s-embassy-port-of-spain-trinidad-and-tobago-march-21-2020> (Trinidad and Tobago); *Buhari Directs Closure of Air, Land Borders for 4 Weeks*, VANGUARD (Mar. 26, 2020), <https://www.vanguardngr.com/2020/03/breaking-buhari-directs-closure-of-air-land-borders-for-4-weeks> (Nigeria); *Belize is Now on War Footing; PM Barrow Announces Closure of Borders to Nationals*, BREAKING BELIZE NEWS (Apr. 3, 2020), <https://www.breakingbelize.com/2020/04/03/belize-is-now-on-war-footing-pm-barrow-announces-closure-of-borders-to-national> (Belize); Adriaan Alsema, *Colombia Closes Land and Sea Borders after Restricting Air Travel*, COLOM. REPS. (Mar. 16, 2020), <https://colombiareports.com/colombia-closes-land-and-sea-borders-after-restricting-air-travel> (Colombia, allowing only restricted air travel); *Suriname: Vice President Announces Nationwide Entry and Exit Ban March 13*, GARDAWORLD (Mar. 14, 2020), <https://www.garda.com/crisis24/news-alerts/322751/suriname-vice-president-announces-nationwide-entry-and-exit-ban-march-13-update-1> (Suriname); *Morocco to Start Reopening Borders After Strict Lockdown*, ASSOCIATED PRESS (July 9, 2020), <https://www.voanews.com/covid-19-pandemic/morocco-start-reopening-borders-after-strict-lockdown> (Morocco); Angela Burns, *British Virgin Islands Closes Borders to All Travelers Effective Midnight*, VIRGIN IS. CONSORTIUM (Mar. 22, 2020), <https://viconsortium.com/vi-coronavirus/virgin-islands-british-virgin-islands-closes-borders-to-all-travelers-effective-midnight> (British Virgin Islands); *COVID-19: Gambia, Senegal to Close Border for 21 Days*, ANADOLU AGENCY (Mar. 23, 2020), <https://www.aa.com.tr/en/africa/covid-19-gambia-senegal-to-close-border-for-21-days/1776298> (Gambia and Senegal).

13 In addition to Colombia, Suriname, Morocco, Gambia, and the British Virgin Islands, see *supra* note 12, additional countries or territories imposed an exit ban. See Hazlin Hassan, *Malaysia Bans Travel Abroad, Shuts Schools and Businesses over Coronavirus Spread; Lockdown till March 31*, STRAITS TIMES (Mar. 17, 2020), <https://www.straitstimes.com/asia/se-asia/malaysia-to-impose-lockdown-from-wednesday-to-march-31> (Malaysia); BBC News, *Covid: Australia to end ban on citizens leaving country*, BBC NEWS (Oct. 27, 2021), <https://www.bbc.com/news/world-australia-59058945> (Australia); *Kazakhstan, Uzbekistan Close Borders after First Coronavirus Cases*, REUTERS (Mar. 15, 2020), <https://www.reuters.com/article/us-health-coronavirus-kazakhstan-emergen-idUSKBN2120EX> (Uzbekistan and Kazakhstan); *Dominican Republic Closing Borders for*

alleviated restrictions.¹⁴

Travel contributes significantly to the propagation of infectious diseases,¹⁵ especially air travel.¹⁶ However, contrary to common perception, scientific studies have consistently demonstrated that travel restrictions have not been effective in significantly preventing the spread of infectious diseases, at most delaying the peak of past pandemics by a few days to weeks.¹⁷ By merely delaying the initial spread of the disease, such measures fail to considerably reduce transmissions if not combined with infection prevention and control measures.¹⁸ In addition, travel restrictions may create significant harm as they have disastrous economic effects, particularly for developing countries;¹⁹ hamper the flow of medical supplies and

¹⁵ *Days in Coronavirus Measure*, CARIBBEAN J. (Mar. 2, 2020), <https://www.caribjournal.com/2020/03/18/dominican-republic-closing-borders-15-days> (Dominican Republic); Rasidah Bakar, *No Plans to Reopen Brunei Borders in August*, SCOOP (July 18, 2020), <https://thescoop.co/2020/07/18/no-plans-to-reopen-brunei-borders-in-august> (Brunei); Giff Johnson, *FSM, Marshall Islands Step up Coronavirus Travel Bans*, RADIO N.Z. (Feb. 3, 2020), <https://www.rnz.co.nz/international/pacific-news/408617/fsm-marshall-islands-step-up-coronavirus-travel-bans> (Federated States of Micronesia).

¹⁴ See, e.g., Lauren Egan & Monica Alba, *Biden Administration to Lift Travel Restrictions on 8 African Nations*, CNBC (Dec. 24, 2021), <https://www.cnbc.com/2021/12/24/biden-administration-to-lift-travel-restrictions-on-8-african-nations.html>; *Singapore Lifts Travel Ban for 10 African Countries*, CHANNEL NEWS ASIA (Dec. 27, 2021), <https://www.channelnewsasia.com/singapore/covid-19-omicron-singapore-lift-travel-ban-10-africa-countries-2402061>; Ido Efrati & Shira Kadari-Ovadia, *Israel Lifts All COVID Travel Bans Made Irrelevant by Omicron, Eases School Restrictions*, HAARETZ (Jan. 6, 2022), <https://www.haaretz.com/israel-news/israel-to-lift-covid-travel-restrictions-on-all-countries-from-midnight-1.10519925>.

¹⁵ Mary Wilson, *Travel and the Emergence of Infectious Diseases*, 1 EMERGING INFECTIOUS DISEASES 39 (1995); Douglas MacPherson & Brian Gushulak, *Human Mobility and Population Health: New Approaches in a Globalizing World*, 44 PERSPS. BIOLOGY & MED. 390 (2001).

¹⁶ Rebecca Grais, Hugh Ellis & Gregory Glass, *Assessing the Impact of Airline Travel on the Geographic Spread of Pandemic Influenza*, 18 EUR. J. EPIDEMIOLOGY 1065 (2003); Aidan Findlater & Isaac Bogoch, *Human Mobility and the Global Spread of Infectious Diseases: A Focus on Air Travel*, 34 TRENDS PARASITOLOGY 772 (2018).

¹⁷ Joshua Epstein et al., *Controlling Pandemic Flu: The Value of International Air Travel Restrictions*, 5 PLOS ONE 1 (2007); Paolo Bajardi et al., *Human Mobility Networks, Travel Restrictions, and the Global Spread of 2009 H1N1 Pandemic* 6 PLOS ONE e16591 (2011); Ana Mateus et al., *Effectiveness of Travel Restrictions in the Rapid Containment of Human Influenza: A Systematic Review* 92 BULL. WORLD HEALTH ORG. 868 (2014); Nicole Errett, Lauren Sauer & Lainie Rutkow, *An Integrative Review of the Limited Evidence on International Travel Bans as an Emerging Infectious Disease Disaster Control Measure*, 18 J. EMERGENCY MGMT. 7 (2020); Asami Anzai et al., *Assessing the Impact of Reduced Travel on Exportation Dynamics of Novel Coronavirus Infection (COVID-19)* 9(2) J. CLINICAL MED. 601 (2020).

¹⁸ Matteo Chinazzi et al., *The Effect of Travel Restrictions on the Spread of the 2019 Novel Coronavirus (COVID-19) Outbreak* 368 SCIENCE 395 (2020).

¹⁹ See ECONOMICS IN THE TIME OF COVID-19 (Richard Baldwin & Beatrice di Mauro eds., 2020).

health workers;²⁰ infringe upon the rights of migrants and refugees;²¹ and deprive countries of migrant workers.²²

A sharp reduction in international mobility is expected, given that individuals voluntarily refrain from traveling during an epidemic.²³ However, travel restrictions also send a powerful signal to businesses, namely airlines, who react by canceling flights, thus imposing de facto travel restrictions that compound the problem. The IHR, however, only apply to States Parties and do not impose any standards of behavior on private actors.²⁴

Travel restrictions were particularly cruel for migrants. Many were dismissed from their jobs and became unable to support themselves or return “home.”²⁵ Several countries chartered flights to bring them back.²⁶ Most flights were reserved for nationals, revealing a nationality-based approach to public health. As demonstrated earlier, these “rescue missions” ironically might have resulted in the importation of the virus if not coupled with proper control measures.²⁷ Those without a golden ticket had to scramble for a seat in the remaining regular flights, often to no avail. The “global village,” normally within the reach of a few flights, turned into an archipelago of inaccessible islands.

Like other epidemics or pandemics, COVID-19 is a threat to both human

20 Jennifer Nuzzo et al., *Travel Bans Will Increase the Damage Wrought by Ebola*, 12 *BIOSECURITY & BIOTERRORISM: BIODEFENSE STRATEGY, PRAC. & SCI.* 306 (2014); Chiara Poletto et al., *Assessing the Impact of Travel Restrictions on International Spread of the 2014 West African Ebola Epidemic*, 19 *EUROSURVEILLANCE* 1, 2 (2014).

21 Deisy Ventura, *The Impact of International Health Crises on the Rights of Migrants*, 23 *INT’L J. ON HUM. RTS.* 61 (2016); Elise Mercier & Sean Rehaag, *The Right to Seek Asylum in Canada (During a Global Pandemic)*, 57 *OSGOODE HALL L.J.* 705 (2020).

22 Julia Gelatt, *Immigrant Workers: Vital to the U.S. COVID-19 Response, Disproportionately Vulnerable*, *MIGRATION POL’Y INST.* (Mar. 2020), https://www.immigrationresearch.org/system/files/COVID-19-EssentialWorkers-FS_Final.pdf.

23 Hagen, *supra* note 8, at 194; Timothy Russell et al., *Effect of Internationally Imported Cases on Internal Spread of COVID-19: A Mathematical Modelling Study*, 6 *LANCET PUB. HEALTH* e12, e15 (2021) (“International travel has decreased greatly since the COVID-19 pandemic began because of travel restrictions, but also owing to individual self-exclusion due to fear of infection and reduced business and tourism opportunities.”).

24 Lawrence Gostin, Mary DeBartolo & Eric Friedman, *The International Health Regulations 10 Years on: The Governing Framework for Global Health Security*, 386 *LANCET* 2222, 2225 (2015).

25 See Lorenzo Guadagno, *Migrants and the COVID-19 Pandemic: An Initial Analysis*, *INT’L ORG. FOR MIGRATION* 1, 9-10 (2020), <https://publications.iom.int/books/mrs-no-60-migrants-and-covid-19-pandemic-initial-analysis>; *From the Field: COVID-19 Restrictions Leave Migrant Workers Stranded*, *UNITED NATIONS* (June 13, 2020), <https://news.un.org/en/story/2020/06/1066092>.

26 See, e.g., *Overview of Repatriation Flights*, *EUR. COMM’N* (Dec. 7, 2020), https://ec.europa.eu/info/files/overview-repatriation-flights_en; Michael Goldstein, *U.S. State Department Brings Home Over 85,000 Americans in Coronavirus Crisis*, *FORBES* (Apr. 10, 2020), <https://www.forbes.com/sites/michaelgoldstein/2020/04/10/us-state-department-brings-home-more-than-50000-americans-in-coronavirus-crisis/#40c87d865d93>.

27 Khan Sharun et al., *International Travel During the COVID-19 Pandemic: Implications and Risks Associated with ‘Travel Bubbles,’* 27 *J. TRAVEL MED.* 1 (2020).

health and human rights.²⁸ There are inextricable connections between these two spheres. Under human rights law, States must protect public health by fighting to contain the pandemic.²⁹ However, they also have a duty to protect other fundamental human rights. The pandemic endangers almost all human rights.³⁰ Governmental measures such as compulsory quarantine and travel restrictions may violate individual rights.³¹ The rights to bodily integrity, to privacy, to be free from inhumane or degrading treatment, to be free from discrimination, and to freedom of movement are particularly vulnerable.³²

Freedom of movement has significant economic, political, and legal dimensions. This right has received some scholarly attention in connection with certain topics such as the rights of migrants³³ and the right to obtain a passport,³⁴

28 Alessandra Spadaro, *COVID-19: Testing the Limits of Human Rights*, 11 EUR. J. RISK REGUL. 317, 317-18 (2020); Karima Bennoune, “*Lest We Should Sleep*”: *COVID-19 and Human Rights*, 114 AM. J. INT’L L. 666 (2020).

29 Article 12(1) of the International Covenant on Economic, Social and Cultural Rights provides that “States Parties . . . recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Off. of the High Comm’r for Hum. Rts., *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS (Jan. 3, 1976), <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>. Article 12(2)(c) adds that “[t]he steps to be taken by the States Parties to . . . achieve the full realization of this right shall include those necessary for . . . [t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases.” *Id.*

30 Bennoune, *supra* note 28, at 666, 669.

31 See Larry Gostin & Ben Berkman, *Isolation, Quarantine, Border Control and Social-Distancing Measures*, in ADDRESSING ETHICAL ISSUES IN PANDEMIC INFLUENZA PLANNING: DISCUSSION PAPERS 29, 34 (2008); Christian Enemark, *Is Pandemic Flu a Security Threat?*, 51 SURVIVAL 191, 200-01 (2009); Belinda Bennett, *Travel in a Small World: SARS, Globalization and Public Health Laws*, in GLOBALIZATION AND HEALTH: CHALLENGES FOR HEALTH LAW AND BIOETHICS 1, 5 (Belinda Bennett & George F. Tomosy eds., 2006).

32 Gostin & Berkman, *supra* note 31, at 35; Wendy Parmet, *Public Health & Social Control: Implications for Human Rights*, INT’L COUNCIL ON HUM. RTS. POL’Y 2 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1546654; Brigit Toebes, *Human Rights and Public Health: Towards a Balanced Relationship*, 19 INT’L J. HUM. RTS. 488, 496 (2015); *Update and Summary Guide to the Report: Advancing the Right to Health—The Vital Role of Law*, WORLD HEALTH ORG. 29 (2018), https://www.who.int/healthsystems/topics/health-law/ARH-Summanry-Guide_Final_online_version.pdf.

33 See, e.g., Colin Harvey & Robert Barnidge, *Human Rights, Free Movement, and the Right to Leave in International Law*, 19 INT’L J. REFUGEE L. 1 (2007); Eric Retter, *You Can Check out Any Time You Like, But We Might Not Let You Leave: Cuba’s Travel Policy in the Wake of Signing the International Covenant on Civil and Political Rights*, 23 EMORY INT’L L. REV. 651 (2010); Dmitry Kochenov, *The Right to Leave Any Country Including Your Own in International Law*, 28 CONN. J. INT’L L. 43 (2012).

34 See, e.g., Daniel Turack, *Freedom of Movement and the Travel Document*, 4 CAL. W. INT’L L. J. 8 (1973); Paul Lansing, *Freedom to Travel: Is the Issuance of a Passport an Individual Right or a Governmental Prerogative*, 11 DENVER. J. INT’L L. & POL’Y 15 (1981); Paul Scott, *Passports, the Right to Travel, and National Security in the Commonwealth*, 69 INT’L & COMPAR. L.Q. 365 (2020).

but mainly from a domestic law perspective.³⁵ In the context of epidemics and pandemics, this right has mostly been examined vis-à-vis another well-known limitation to individual freedom: quarantine.³⁶ However, what is missing is a thorough analysis of how travel restrictions limit some of the facets of (international) freedom of movement that are safeguarded by human rights treaties. This right has been suppressed in the global response to COVID-19. In particular, the pandemic accentuated the need to devote greater consideration to the individual's right to return to his or her own country, a matter mostly neglected in the literature thus far.³⁷

This Article contributes to that discussion by questioning the lawfulness of certain travel restrictions implemented during the COVID-19 pandemic. The legal limitations to international freedom of movement during this period are absolutely unparalleled in human history.³⁸ Several authors have argued that travel restrictions breach international law.³⁹ The IHR enable WHO to recommend States Parties to refuse entry of suspect and affected persons and refuse entry of unaffected persons to affected areas,⁴⁰ but they do not mention the closure of borders.⁴¹ Travel restrictions are generally not supported by scientific evidence,

35 See, e.g., Allan Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6 (1995); Jeanne Woods, *Travel That Talks: Toward First Amendment Protection for Freedom of Movement*, 65 GEO. WASH. L. REV. 106, 109 (1996); J. Nicholas Murosko, *Communicable Diseases and the Right to Re-Enter the United States*, 24 WM. & MARY BILL RTS. J. 913, 920 (2016).

36 See, e.g., Kathleen Choi, *A Journey of a Thousand Leagues: From Quarantine to International Health Regulations and Beyond*, 29 U. PA. J. INT'L L. 989, 1006 (2008); Gregory Campbell, *Global H1N1 Pandemic, Quarantine Law, and the Due Process Conflict*, 12 SAN DIEGO INT'L L. J. 497, 504 (2011); Courtney Maccarone, *Crossing Borders: A TRIPS-Like Treaty on Quarantines and Human Rights*, 36 BROOK. J. INT'L L. 781, 788 (2011); Erin Pauley, *Human Rights in the Midst of Quarantine*, 13 LOY. U. CHI. INT'L L. REV. 71, 77 (2016).

37 Frédéric Mégret, *Homeward Bound? Global Mobility and the Role of the State of Nationality During the Pandemic*, 114 AJIL UNBOUND 322, 323 (2020).

38 Lawrence Gostin, Roojin Habibi & Benjamin Meier, *Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats*, 48 J. L., MED & ETHICS 376, 379 (2020); Kelley Lee et al., *Global Coordination on Cross-Border Travel and Trade Measures Crucial to COVID-19 Response*, 395 LANCET 1593, 1594 (2020).

39 Roojin Habibi et al., *Do Not Violate the International Health Regulations During the COVID-19 Outbreak*, 396 LANCET 664, 665 (2020); Benjamin Meier, Roojin Habibi & Y. Tony Yang, *Travel Restrictions Violate International Law*, 367 SCIENCE 1436 (2020); Weijun Yu & Jessica Keralis, *Controlling COVID-19: The Folly of International Travel Restrictions*, HEALTH & HUM. RTS. J. (Apr. 6, 2020), <https://www.hhrjournal.org/2020/04/controlling-covid-19-the-folly-of-international-travel-restrictions>.

40 IHR, *supra* note 3, at art. 18(1).

41 Robert Steffen, *Influenza in Travelers: Epidemiology, Risk, Prevention, and Control Issues*, 12 CURRENT INFECTIOUS DISEASE REP. 181, 182 (2010); Sarah Goldfarb, *The Phase-Out and Sunset of Travel Restrictions in the International Health Regulations*, 41 BROOK. J. INT'L L. 781, 803 (2016). According to Adam Ferhani and Simon Rushton, "[t]he IHR's overall orientation is firmly against the imposition of border restrictions." Adam Ferhani & Simon Rushton, *The International Health Regulations, COVID-19, and Bordering Practices: Who Gets in, What Gets out, and Who Gets*

and even if they were, more effective alternatives could have been adopted with less restrictive effects, including procedures recommended by WHO.⁴² Other authors adopt a more nuanced approach, stressing the unprecedented nature of the pandemic and the need to contemplate multiple factors when evaluating the scientific justification and proportionality of measures.⁴³

This split in scholarship echoes previous disagreements over the legality under international law of measures adopted during epidemic outbreaks. While some have asserted that travel restrictions constitute a violation of human rights, namely freedom of movement,⁴⁴ others contend that such measures do not violate the right to freedom of movement because countries have the right to decide who may enter their borders.⁴⁵

It would be a Herculean task to scrutinize every single measure implemented around the world that, in one way or another, constrained international mobility. While border control is a legitimate prerogative that States can use to prevent the entry of infected individuals or those suspected of carrying the virus, broader travel restrictions are more complex and raise intricate legal questions.⁴⁶ This work focuses on a specific category of travel restrictions: travel bans, specifically, “entry bans” and “exit bans” (referred to collectively in this Article as “travel bans”).⁴⁷ These measures are a blanket prohibition applied to all or certain individuals who

Rescued?, 41 CONTEMP. SEC. POL’Y 458, 459-60 (2020).

42 Habibi et al., *supra* note 39, at 664; Meier, Habibi & Yang, *supra* note 39, at 1436.

43 Barbara von Tigerstrom & Kumanan Wilson, *COVID-19 Travel Restrictions and the International Health Regulations (2005)*, 5 BMJ GLOB. HEALTH 1, 2-3 (2020); Barbara von Tigerstrom, Sam Halabi & Kumanan Wilson, *The International Health Regulations (2005) and the Re-Establishment of International Travel Amidst the COVID-19 Pandemic*, 27 J. TRAVEL MED. 1, at 2 (2020).

44 Gostin & Berkman, *supra* note 31, at 53; LARRY GOSTIN & ZITA LAZARRINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC 87-88 (1997); Lawrence Gostin, Ronald Bayer & Amy Fairchild, *Ethical and Legal Challenges Posed by Severe Acute Respiratory Syndrome: Implications for the Control of Severe Infectious Disease Threats*, 290 J. AM. MED. ASS’N 3229, 3235 (2003).

45 DAVID FIDLER, INTERNATIONAL LAW AND INFECTIOUS DISEASES 205 (1999); *see also* András Miklós, *Public Health and the Rights of States*, 2 PUB. HEALTH ETHICS 158, 161-62 (2009). These statements, naturally, were of a general nature and not made in response to COVID-19.

46 Vincent Chetail, *Crisis Without Borders: What Does International Law Say About Border Closure in the Context of Covid-19?*, 2 FRONTIERS IN POL. SCI. 1, 2 (2020); Daniel Thym, *Travel Bans in Europe: A Legal Appraisal (Part I)*, EU IMMIGRATION & ASYLUM L. & POL’Y (Mar. 18, 2020), <http://eumigrationlawblog.eu/travel-bans-in-europe-a-legal-appraisal-part-i>.

47 *Travel Ban*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/travel-ban> (“[T]ravel ban: a law preventing people from travelling somewhere, especially preventing a particular person or group from entering a particular country . . .”). Other measures that can be qualified as travel restrictions include entry bans for citizens of or recent travelers to affected areas; bans on the entry of tourists, business travelers, new immigrants, and refugees; medical checks, presentation of a health certificate, registration for the purpose of contract tracing, mandatory quarantine upon arrival, and travel conditioned on the existence of a “valid reason.” Many of these measures raise distinct legal questions and therefore are not be addressed in this piece.

cross international borders, regardless of their health status.

Over the last year, “social distancing” and “physical distancing” became household expressions and quotidian obligations, raising a host of legal and ethical queries:

Physical distancing raises profound questions of culture, faith, and family. Coming together affords comfort during times of crisis. At the same time, physical distancing affects rights, including liberty, privacy, and freedoms of speech, religion, and assembly. How are the fundamental values of health and human rights balanced in times of crisis? Although there is no clear answer, there are guideposts: adopt rigorous scientific standards based on the best available evidence, make decisions transparently and fairly, and adopt the least restrictive measures needed to protect the public’s health.⁴⁸

This Article submits that travel bans constitute the utmost form of physical distancing and inquires into whether they fall within those (elusive) guideposts. The validity of such measures depends on several elements. First, one needs to examine the applicable legal framework—the IHR and human rights treaties—and the standards they contain. As discussed in Part I, both sets of rules protect international mobility, but with different goals and scopes of application. The IHR acknowledge the link between controlling the global spread of disease and human rights protection, prescribing that its provisions be implemented “with full respect for the dignity, human rights and fundamental freedoms of persons.”⁴⁹ On the other hand, like the IHR, human rights treaties recognize that in some cases, it may be necessary to constrain the freedom of movement of individuals to protect other interests such as public health.

Determining whether travel bans are lawful also depends on a second element: the traveler’s status. Thus, Part I also examines the rights bestowed upon individuals depending on whether they qualify as nationals, residents, or something else. After reviewing the relevant legal framework and (available) information on how travel bans were applied, Parts II and III question whether the pertinent requirements and principles were respected. While these measures seem like an intuitive way to “curb the spread,” reality is much more complicated.

A judgment on whether travel bans comply with international law may sound premature. These measures are often decided in a context of significant scientific

48 Lawrence Gostin & Lindsay Wiley, *Governmental Public Health Powers During the COVID-19 Pandemic: Stay-at-Home Orders, Business Closures, and Travel Restrictions*, 323 J. AM. MED. ASS’N 2137, 2138 (2020).

49 IHR, *supra* note 3, at art. 3(1).

uncertainty.⁵⁰ Gathering, processing, and validating reliable scientific information takes time, a scarce resource.⁵¹ Governments are under pressure to act rapidly without having complete information about the appropriate public health measures to adopt, especially in the case of an unknown disease.⁵² When they turn to scientists, they may be confronted with “dueling experts” who advocate contradicting courses of action.⁵³ In the context of urgency and scientific uncertainty about the dangerousness and magnitude of the pandemic, governments may implement travel bans to avoid accusations, including from political quarters,⁵⁴ of “doing nothing” to prevent the spread of the virus.⁵⁵ The public pressure to “do something” may be compounded as rumors and misinformation float on the press and social media,⁵⁶ leading to what has been termed an “infodemic.”⁵⁷ Governments also face a form of peer pressure: as other countries implement travel bans, they feel compelled to do the same.⁵⁸ Closing borders allows States to demonstrate authority⁵⁹ and convey to their citizens a message that the situation is “under control.”⁶⁰

50 Jonathan Suk, *Sound Science and the New International Health Regulations*, 1 GLOB. HEALTH GOVERNANCE 1, 2 (2007); Terry Carney & Belinda Bennett, *Governance, Rights and Pandemics: Science, Public Health or Individual Rights?*, in ETHICS AND SECURITY ASPECTS OF INFECTIOUS DISEASE CONTROL: INTERDISCIPLINARY PERSPECTIVES 201 (Michael Selgelid ed., 2012).

51 Frederick Burkle, *Global Health Security Demands a Strong International Health Regulations Treaty and Leadership from a Highly Resourced World Health Organization*, 9 DISASTER MED. & PUB. HEALTH PREPAREDNESS 568, 570 (2015).

52 Johan Giesecke, *Prevention, not Panic—Epidemics and Trade Sanctions*, 356 LANCET 588 (2000).

53 DAVID FAIRMAN ET AL., *NEGOTIATING PUBLIC HEALTH IN A GLOBALIZED WORLD: GLOBAL HEALTH DIPLOMACY IN ACTION* 30 (2012).

54 Catherine Worsnop, *Domestic Politics and the WHO's International Health Regulations: Explaining the Use of Trade and Travel Barriers During Disease Outbreaks*, 12 REV. INT'L ORGS. 365, 371 n.7 (2017); SARA E. DAVIES, ADAM KAMRADT-SCOTT & SIMON RUSHTON, *DISEASE DIPLOMACY: INTERNATIONAL NORMS AND GLOBAL HEALTH SECURITY* 120 (2015).

55 Worsnop, *supra* note 54, at 373; Adam Kamradt-Scott et al., *WHO Tracking Mechanism for IHR Additional Health Measures*, 392 LANCET 2251 (2018); Lee et al., *supra* note 38, at 1594.

56 Adaobi Duru, *Narratives of Death: Systemic Determinants of the Coverage of a Public Health Emergency of International Concern*, 15 GLOB. MEDIA & COMM'NS 215 (2019); Giuseppe Ippolito et al., *Toning Down the 2019-nCoV Media Hype—and Restoring Hope*, 8 LANCET RESPIRATORY MED. 230 (2010).

57 Gabriel Leung & Kathy Leung, *Crowdsourcing Data to Mitigate Epidemics*, 2 LANCET DIGIT. HEALTH e156 (2020).

58 Ria Vaidya et al., *Travel Restrictions and Infectious Disease Outbreaks*, 27 J. TRAVEL MED. 1 (2020). According to Mara Pillinger, “[t]he fact that China [implemented] travel restrictions on its own citizens—and WHO [did] not [challenge] those restrictions—[made] it difficult to convince policymakers in other countries not [to] follow suit.” Mara Pillinger, *Virus Travel Bans Are Inevitable But Ineffective*, FOREIGN POL'Y (Feb. 23, 2020), <https://foreignpolicy.com/2020/02/23/virus-travel-bans-are-inevitable-but-ineffective>.

59 Kenwick & Simmons, *supra* note 8, at 3, 7, 9; Tine Hanrieder, *Priorities, Partners, Politics: The WHO's Mandate Beyond the Crisis*, 26 GLOB. GOVERNANCE 534, at 535-36 (2020).

60 Derek Lutterbeck, *The COVID-19 Pandemic and Territoriality: Some Initial Reflections*, in

There is still much we do not know about COVID-19, so it might seem advisable to reserve judgment. Still, there are important lessons to draw from this pandemic, as it will almost certainly not be the last. A committee is already reviewing the functioning of the IHR during the COVID-19 response, and one of the key topics under discussion is the implementation of travel restrictions.⁶¹ International travelers may be carriers of infection, raising important questions that need to be addressed by international law. As underlined by one author, “[d]isease has been the unwelcome traveling companion of international commerce.”⁶² While international travelers are an important piece in the puzzle of the fight against infectious diseases, they should not be turned into scapegoats and shoulder an unreasonable burden. The tension between international mobility and human health protection is not new, and COVID-19 is just one reminder of the need for governments to adopt justified, calibrated measures. Some measures adopted in the name of public health seem difficult, if not impossible, to justify. This Article examines a few more clear-cut cases where travel bans breached the rules and principles governing international mobility.

I. THE LEGAL FRAMEWORK ON INTERNATIONAL MOBILITY

Cross-border mobility is regulated by two international legal frameworks: the IHR and human rights treaties. Part I examines each in turn and explains how they should shape the behavior of States during a pandemic.

A. *The IHR*

The history of international cooperation to tackle infectious diseases spans 170 years.⁶³ The IHR, last revised in 2005, are the only international legal instrument in the field⁶⁴ and have almost universal membership (196 States Parties).⁶⁵ The goal remains the same: to protect people from infectious diseases

MEDITERRANEAN ACAD. OF DIPLOMATIC STUDY, TOWARDS A POST PANDEMIC EURO-MEDITERRANEAN STRATEGY 36, 41 (Stephen Calleya ed., 2020), https://www.um.edu.mt/__data/assets/pdf_file/0005/448655/Towardsapostpandemiceuro-med.pdf.

61 See *Strengthening Preparedness for Health Emergencies: Implementation of the International Health Regulations (2005): Interim Progress Report of the Review Committee on the Functioning of the International Health Regulations (2005) During the COVID-19 Response*, WORLD HEALTH ORG. (Jan. 12, 2021), <https://reliefweb.int/report/world/strengthening-preparedness-health-emergencies-implementation-international-health>.

62 Allyn Taylor, *Global Health Law: International Law and Public Health Policy*, in 3 INTERNATIONAL ENCYCLOPEDIA OF PUBLIC HEALTH 268 (2d ed. 2017).

63 See David Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, 4 CHINESE J. INT’L L. 325 (2005).

64 Jennifer Ruger, *Normative Foundations of Global Health Law*, 96 GEO. L.J. 423, 434-35 (2008).

65 See *States Parties to the International Health Regulations (2005)*, WORLD HEALTH ORG.,

while minimizing interference with international trade and travel. To achieve this purpose, the IHR mandate that WHO issue temporary recommendations to States Parties on when and how to respond to transnational health threats.⁶⁶ Recommendations should take into account, inter alia, scientific principles, and available scientific evidence and information. Importantly, WHO's Director-General shall consider "health measures that, on the basis of a risk assessment appropriate to the circumstances, are not more restrictive of international traffic and trade and are not more intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection."⁶⁷ Through these statements, WHO seeks to exercise authority in the epidemiological field.⁶⁸ Admittedly described within the IHR as "non-binding advice,"⁶⁹ recommendations lay down a benchmark allowing for a comparison of measures adopted by States with the actions recommended by WHO.⁷⁰

1. WHO's Recommendations

After declaring COVID-19 a PHEIC, WHO made several statements to guide States Parties' responses to the unfolding public health crisis. In early February 2020, WHO issued a "Strategic Preparedness and Response Plan" where the organization adopted a nuanced approach towards the suitability of travel restrictions:

Evidence has shown that restricting the movement of people and goods during public health emergencies may be ineffective, and may interrupt vital aid and technical support, disrupt businesses,

<http://www.emro.who.int/health-topics/international-health-regulations/index.html>. The IHR entered into force on 15 June 2007. *Id.*

⁶⁶ IHR, *supra* note 3, at art. 15.

⁶⁷ *Id.* at art. 17.

⁶⁸ Armin von Bogdandy & Pedro Villarreal, *Critical Features of International Authority in Pandemic Response: The WHO in the COVID-19 Crisis, Human Rights and the Changing World Order*, MAX PLANCK INST. 14 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3600058; Lawrence Gostin, *A Proposal for a Framework Convention on Global Health*, 10 J. INT'L ECON. L. 989, 998 (2007). On the "epistemic authority" of WHO, see Jan Klabbers, *The Normative Gap in International Organizations Law: The Case of the World Health Organization* 16 INT'L ORGS. L. REV. 272 (2019).

⁶⁹ IHR, *supra* note 3, at art. 1.

⁷⁰ Benjamin Meier, Dabney Evans & Alexandra Phelan, *Rights-Based Approaches to Preventing, Detecting, and Responding to Infectious Disease*, in *INFECTIOUS DISEASES IN THE NEW MILLENNIUM: LEGAL AND ETHICAL CHALLENGES* 217, 243 (Mark Eccleston-Turner & Iain Brassington eds., 2020). According to Gian Burci, "IHR-based temporary recommendations constitute a reliable reference and a kind of default normative guidance in the absence of diverging national considerations." Gian Burci, *The Legal Response to Pandemics: The Strengths and Weaknesses of the International Health Regulations*, 11 J. INT'L HUMANITARIAN LEGAL STUD. 204, 216 (2020).

and have a negative impact on the economies of affected countries and their trading partners. However, in certain specific circumstances, such as uncertainty about the severity of a disease and its transmissibility, measures that restrict the movement of people may prove temporarily useful at the beginning of an outbreak to allow time to implement preparedness activities, and to limit the international spread of potentially highly infectious cases. In such situations, countries should perform risk and cost-benefit analyses before implementing such restrictions, to assess whether the benefits outweigh the drawbacks.⁷¹

A few days later, WHO made additional remarks on the subject, again sounding relatively favorable to the adoption of travel restrictions:

Evidence on travel measures that significantly interfere with international traffic for more than 24 hours shows that such measures may have a public health rationale at the beginning of the containment phase of an outbreak, as they may allow affected countries to implement sustained response measures, and non-affected countries to gain time to initiate and implement effective preparedness measures. Such restrictions, however, need to be short in duration, proportionate to the public health risks, and be reconsidered regularly as the situation evolves.⁷²

Later that month, WHO updated its recommendations and reiterated its position:

WHO continues to advise against the application of travel or trade restrictions to countries experiencing COVID-19 outbreaks.

In general, evidence shows that restricting the movement of people and goods during public health emergencies is ineffective in most situations and may divert resources from other interventions. Furthermore, restrictions may interrupt needed aid and technical support, may disrupt businesses, and may have negative social and economic effects on the affected countries.

⁷¹ *2019 Novel Coronavirus (2019-nCoV): Strategic Preparedness and Response Plan*, WORLD HEALTH ORG. 10 (Feb. 4, 2020), <https://www.who.int/publications/i/item/strategic-preparedness-and-response-plan-for-the-new-coronavirus>.

⁷² *Key Considerations for Repatriation and Quarantine of Travellers in Relation to the Outbreak of Novel Coronavirus 2019-nCoV*, WORLD HEALTH ORG. (Feb. 11, 2020), <https://www.who.int/news-room/articles-detail/key-considerations-for-repatriation-and-quarantine-of-travellers-in-relation-to-the-outbreak-of-novel-coronavirus-2019-ncov>.

However, in certain circumstances, measures that restrict the movement of people may prove temporarily useful, such as in settings with few international connections and limited response capacities.

Travel measures that significantly interfere with international traffic may only be justified at the beginning of an outbreak, as they may allow countries to gain time, even if only a few days, to rapidly implement effective preparedness measures. Such restrictions must be based on a careful risk assessment, be proportionate to the public health risk, be short in duration, and be reconsidered regularly as the situation evolves.

Travel bans to affected areas or denial of entry to passengers coming from affected areas are usually not effective in preventing the importation of cases but may have a significant economic and social impact. Since WHO declaration of a public health emergency of international concern in relation to COVID-19, and as of 27 February, 38 countries have reported to WHO additional health measures that significantly interfere with international traffic in relation to travel to and from China or other countries, ranging from denial of entry of passengers, visa restrictions or quarantine for returning travellers. Several countries that denied entry of travellers or who have suspended the flights to and from China or other affected countries, are now reporting cases of COVID-19.⁷³

In April 2020, WHO updated its COVID-19 strategy, shifting its stance for the first time. It stated that one of the global strategic objectives was for countries to “[s]uppress community transmission through context-appropriate infection prevention and control measures, population-level physical distancing measures, and *appropriate and proportionate restrictions on non-essential domestic and international travel.*”⁷⁴ It also added:

In countries and/or subnational regions in which community transmission has become established, or that are at risk of entering this phase of an epidemic, authorities must immediately adopt and

⁷³ *Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak*, WORLD HEALTH ORG. (Feb. 29, 2020), <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>.

⁷⁴ *COVID-19 Strategy Update*, WORLD HEALTH ORG. (Apr. 14, 2020), <https://www.who.int/publications/i/item/covid-19-strategy-update---14-april-2020> (emphasis added).

adapt population-level distancing measures and movement restrictions in addition to other public health and health system measures to reduce exposure and suppress transmission, including . . . [m]easures to reduce the risk of importation or reintroduction of the virus from high-transmission areas, such as *limits on national and international travel . . .*⁷⁵

In early May 2020, WHO recommended that States Parties “[i]mplement appropriate travel measures with consideration of their public health benefits, including entry and exit screening, education of travelers on responsible travel behaviour, case finding, contact tracing, isolation, and quarantine, by incorporating evidence on the potential role of pre-symptomatic and asymptomatic transmission.”⁷⁶ Again, WHO recommended that States “not implement trade restrictions beyond those considered to be of public health importance in accordance with relevant international agreements” and “[c]ontinue to provide appropriate public health rationale to WHO for additional health measures in accordance with [the] IHR.”⁷⁷

In October 2020, WHO recommended that States Parties only introduce travel restrictions with clear, justified limits. Specifically, WHO recommended that State Parties “[r]egularly re-consider measures applied to international travel in compliance with Article 43 of the IHR (2005) and continue to provide information and rationales to WHO on measures that significantly interfere with international traffic” and “[e]nsure that measures affecting international traffic (including targeted use of diagnostics and quarantine) are risk-based, evidence-based, coherent, proportionate and time-limited.”⁷⁸

Finally, in its latest public statement specifically addressing international travel, in mid-January 2021, WHO again recommended that States:

[i]mplement coordinated, time-limited, risk-based, and evidence-based approaches for health measures in relation to international traffic in line with WHO guidance and IHR provisions. Careful

⁷⁵ *Id.* (emphasis added).

⁷⁶ *Statement on the Third Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Coronavirus Disease (COVID-19)*, WORLD HEALTH ORG. (May 1, 2020), [https://www.who.int/news/item/01-05-2020-statement-on-the-third-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-\(covid-19\)](https://www.who.int/news/item/01-05-2020-statement-on-the-third-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-(covid-19)).

⁷⁷ *Id.*

⁷⁸ *Statement on the Fifth Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORG. (Oct. 30, 2020), [https://www.who.int/news/item/30-10-2020-statement-on-the-fifth-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic](https://www.who.int/news/item/30-10-2020-statement-on-the-fifth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic).

consideration should be given to when and if travel bans should or should not be used as tools to reduce spread. Such decisions should be based on the best available evidence.⁷⁹

In addition, States were asked to “[s]hare information with WHO on the effects of health measures in minimizing transmission of SARS-CoV-2 during international travel to inform WHO’s development of evidence-based guidance.”⁸⁰ Temporary recommendations offer guidance to States based on WHO’s “assessment of risk to human health, risk of international spread of disease and of risk of interference with international travel.”⁸¹ Still, that assessment is not peremptory, as Article 43 of the IHR allows States Parties to go beyond WHO’s recommendations:

1. These Regulations shall not preclude States Parties from implementing health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern, which:
 - a. achieve the same or greater level of health protection than WHO recommendations; or
 - b. are otherwise prohibited under Article 25, Article 26, paragraphs 1 and 2 of Article 28, Article 30, paragraph 1(c) of Article 31 and Article 33,

provided such measures are otherwise consistent with these Regulations.⁸²

There is, however, an important caveat: additional health measures “shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.”⁸³

⁷⁹ *Statement on the Sixth Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORG. (Jan. 15, 2021), [https://www.who.int/news/item/15-01-2021-statement-on-the-sixth-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic](https://www.who.int/news/item/15-01-2021-statement-on-the-sixth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic).

⁸⁰ *Id.*

⁸¹ *What Are the International Health Regulations?*, WORLD HEALTH ORG. (Dec. 19, 2019), <https://www.who.int/news-room/q-a-detail/emergencies-international-health-regulations-and-emergency-committees>.

⁸² IHR, *supra* note 3, at art. 43(1).

⁸³ *Id.*

Under the same provision, a decision to implement additional health measures shall be based upon the following elements: “(a) scientific principles; (b) available scientific evidence of a risk to human health, or where such evidence is insufficient, the available information including from WHO and other relevant intergovernmental organizations and international bodies; and (c) any available specific guidance or advice from WHO.”⁸⁴ If such measures “significantly interfere with international traffic,” the State Party “shall provide to WHO the public health rationale and relevant scientific information for it.”⁸⁵ Importantly, the following measures are generally considered as “significant interference”: “refusal of entry or departure of international travellers, baggage, cargo, containers, conveyances, goods, and the like, or their delay, for more than 24 hours.”⁸⁶ WHO assesses these additional health measures and may request the State to reconsider their application.⁸⁷ States must also report measures to WHO within 48 hours of implementation, together with their health rationale, unless a temporary or standing recommendation already covers the measures.⁸⁸ States should review measures within three months, taking into account WHO's advice and the criteria set forth in Article 43(2).⁸⁹

2. States' Non-Compliance

States Parties to the IHR decided almost universally to disregard WHO's recommendations not to implement travel restrictions.⁹⁰ At the early stage of the pandemic, WHO was chastised by some for giving such counsel.⁹¹ The imposition of travel restrictions in response to an epidemic outbreak is not a novelty—rather, it has become the rule.⁹² In addition, countries frequently breach their obligations

⁸⁴ *Id.* at art. 43(2).

⁸⁵ *Id.* at art. 43(3).

⁸⁶ *Id.*

⁸⁷ *Id.* at art. 43(4).

⁸⁸ *Id.* at art. 43(5).

⁸⁹ *Id.* at art. 43(6).

⁹⁰ According to Burci, a “weakness of the IHR 2005, in dramatic display since the declaration of the COVID-19 PHEIC, is the failure or refusal of many states to follow WHO's temporary recommendations, in particular with regard to disruptive international measures such as border closures, travel restrictions and trade limitations.” Burci, *supra* note 70, at 213.

⁹¹ See Amanda Watts & Veronica Stracqualursi, *WHO Defends Coronavirus Response after Trump Criticism*, CNN (Apr. 8, 2020), <https://edition.cnn.com/2020/04/08/politics/who-responds-trump-claims-coronavirus/index.html>.

⁹² Lawrence Gostin, *Influenza A(H1N1) and Pandemic Preparedness Under the Rule of International Law* 301 J. Am. Med. Ass'n 2376, 2377-78 (2009); Lawrence Gostin, *Our Shared Vulnerability to Dangerous Pathogens*, 25 MED. L. REV. 185, 191 (2017); Morenike Folayan & Brandon Brown, *Ebola and the Limited Effectiveness of Travel Restrictions*, 9 DISASTER MED. & PUB. HEALTH PREPAREDNESS 92 (2015); Wendy Rhymer & Rick Speare, *Countries' Response to WHO's Travel Recommendations During the 2013-2016 Ebola Outbreak*, 95 BULL. WORLD HEALTH

to report additional measures to WHO⁹³ and to explain their scientific and public health rationale.⁹⁴ This lack of compliance with reporting obligations was also pervasive during the COVID-19 pandemic. While practically all countries adopted some form of travel restriction, by the end of February 2020, only thirty-eight countries had reported such measures to WHO.⁹⁵ It seems evident that many such measures went unreported.⁹⁶

COVID-19 seems to be the latest episode in a saga of “pathological”⁹⁷ or even “epidemic”⁹⁸ non-compliance with the IHR. The root of the problem is the lack of enforceability of the duties imposed on States Parties.⁹⁹ As acknowledged recently by the Chair of the Review Committee on the Functioning of the International Health Regulations (2005), the IHR “lack . . . teeth.”¹⁰⁰ WHO has historically favored the formulation of recommendations over the imposition of binding obligations. There is no compliance mechanism to monitor and review the conduct

ORG. 10, 13 (2017); ADAM KAMRADT-SCOTT, MANAGING GLOBAL HEALTH SECURITY: THE WORLD HEALTH ORGANIZATION AND DISEASE OUTBREAK CONTROL 145 (2015); Adam Kamradt-Scott, *The International Health Regulations (2005): Strengthening Their Effective Implementation and Utilisation*, 16 INT’L ORGS. L. REV. 242, 252 (2019).

93 *Strengthening Response to Pandemics and Other Public-Health Emergencies: Report of the Review Committee on the Functioning of the International Health Regulations (2005) and on Pandemic Influenza (H1N1) 2009*, WORLD HEALTH ORG. 62, 80-81 (2011), https://www.who.int/ihr/publications/RC_report/en; David Fidler, *Epic Failure of Ebola and Global Health Security*, 21 BROWN J. WORLD AFFS. 179, 189 (2015); Trygve Ottersen, Steven Hoffman & Gaëlle Groux, *Ebola Again Shows the International Health Regulations are Broken: What Can Be Done Differently to Prepare for the Next Epidemic?*, 42 AM. J. L. & MED. 356, 377 (2016).

94 *Report of the Ebola Interim Assessment Panel*, WORLD HEALTH ORG. 12 (2015), <https://www.who.int/csr/resources/publications/ebola/report-by-panel.pdf>; Ottersen, Hoffman & Groux, *supra* note 93, at 377; Tsung-Ling Lee, *Making International Health Regulations Work: Lessons from the 2014 Ebola Outbreak*, 49 VAND. J. TRANSNAT’L L. 931, 965 (2016).

95 WORLD HEALTH ORG., *supra* note 73. Subsequent updates by WHO are silent on whether the organization received more reports from States Parties.

96 Von Tigerstrom & Wilson, *supra* note 43, at 2; von Bogdandy & Villarreal, *supra* note 68, at 16.

97 Andrea Spagnolo, *(Non) Compliance with the International Health Regulations of the WHO from the Perspective of the Law of International Responsibility*, 18 GLOB. JURIST 1 (2018).

98 David Heymann et al., *Global Health Security: The Wider Lessons from the West African Ebola Virus Disease Epidemic* 385 LANCET 1884, 1888 (2015).

99 Ali Tejpar & Steven Hoffman, *Canada’s Violation of International Law during the 2014-16 Ebola Outbreak*, 54 CANADIAN Y.B. INT’L L. 366, 370 (2016); Kumanan Wilson, John Brownstein & David Fidler, *Strengthening the International Health Regulations: Lessons from the H1N1 Pandemic*, 25 HEALTH POL’Y & PLANNING 505, 507 (2010); Ottersen, Hoffman & Groux, *supra* note 93, at 378-79; Robert Frau, *Law as an Antidote: Assessing the Potential of International Health Law Based on the Ebola-Outbreak 2014*, 7 GOETTINGEN J. INT’L L. 261, at 287-88 (2016).

100 *Statement to the 148th Executive Board by the Chair of the Review Committee on the Functioning of the International Health Regulations (2005) During the COVID-19 Response*, WORLD HEALTH ORG. (Jan. 19, 2021), [https://www.who.int/news/item/19-01-2021-statement-to-the-148th-executive-board-by-the-chair-of-the-review-committee-on-the-functioning-of-the-international-health-regulations-\(2005\)-during-the-covid-19-response](https://www.who.int/news/item/19-01-2021-statement-to-the-148th-executive-board-by-the-chair-of-the-review-committee-on-the-functioning-of-the-international-health-regulations-(2005)-during-the-covid-19-response).

of States Parties,¹⁰¹ and no consequences follow from breaching the regulations.¹⁰² As a result, States Parties have little incentive to fulfill their duties¹⁰³, and non-compliance pays off.¹⁰⁴

Despite being an international legal instrument, the IHR resemble a soft law document,¹⁰⁵ with compliance based on persuasion.¹⁰⁶ While it is hoped that reporting obligations “nudge” States to comply with temporary recommendations,¹⁰⁷ this “soft” diplomatic approach has not been assertive enough. In addition, breaches of the IHR are not met with firm reactions from

101 Fidler, *supra* note 63, at 390. The Review Committee notes:

The lack of a robust compliance evaluation and accountability mechanism was identified during the interviews as reducing incentives for adequate preparedness and cooperation under the Regulations and as deterring timely notifications of events and public health information. Such criticism was raised in particular with regard to the adoption of additional health measures in view of their transboundary social and economic consequences. A robust system of compliance evaluation built into the Regulations was cited during the interviews as a potential approach to strengthening the overall framework of the Regulations and its credibility as a legal instrument; such an approach could include consideration of a universal peer review mechanism.

WORLD HEALTH ORG., *supra* note 61, at ¶ 12. While Article 56(5) of the IHR (“settlement of disputes”) provides that disputes between WHO and one or more States Parties concerning the interpretation or application of the regulations shall be submitted to the Health Assembly, this is not a fully-fledged, structured review mechanism. One may also question whether this avenue could be used to review the fulfillment of obligations contained in Article 43 of the IHR. Be it as it may, this mechanism has never been used. Ruger, *supra* note 64, at 437; Allyn Taylor et al., *Solidarity in the Wake of COVID-19: Reimagining the International Health Regulations*, 396 LANCET 82, 83 (2020).

102 WORLD HEALTH ORG., *supra* note 93, at 13; Joseph Dute, *World Health Organization—Revision of the International Health Regulations*, 12 EUR. J. HEALTH L. 269, 271 (2005); Wilson, Brownstein & Fidler, *supra* note 99, at 507; JEREMY YOUDE, BIOPOLITICAL SURVEILLANCE AND PUBLIC HEALTH IN INTERNATIONAL POLITICS 166 (2010); Colin McInnes, *WHO’s Next? Changing Authority in Global Health Governance After Ebola* 91 INT’L AFFS. 1299, 1314-15 (2015); Brigit Toebes, Lisa Forman & Giulio Bartolini, *Toward Human Rights-Consistent Responses to Health Emergencies: What Is the Overlap between Core Right to Health Obligations and Core International Health Regulation Capacities?*, 22 HEALTH & HUM. RTS. J. 99, 102 (2020).

103 David Bishop, *Lessons from SARS: Why the WHO Must Provide Greater Economic Incentives for Countries to Comply with International Health Regulations*, 36 GEO. J. INT’L L. 1173, 1193 (2005); Lee, *supra* note 94, at 965; Lauren Asher, *Confronting Disease in a Global Arena*, 9 CARDOZO J. INT’L COMPAR. L. 135, 151 (2001).

104 Lee, *supra* note 94, at 965; Jennifer Nuzzo & Gigi Gronvall, *Global Health Security: Closing the Gaps in Responding to Infectious Disease Emergencies*, 4 GLOB. HEALTH GOVERNANCE 1, 10 (2011); Catherine Worsnop, *Provoking Barriers: The 2014 Ebola Outbreak and Unintended Consequences of WHO’s Power to Declare a Public Health Emergency*, 11 GLOB. HEALTH GOVERNANCE 7, 20 (2017).

105 David Fidler, *The Role of International Law in the Control of Emerging Infectious Diseases*, 95 BULL. DE L’INSTITUT PASTEUR 57, 63-64 (1997).

106 David Fidler, *Return of the Fourth Horseman: Emerging Infectious Diseases and International Law*, 81 MINN. L. REV. 771, 849 (1997).

107 Frau, *supra* note 99, at 237.

WHO.¹⁰⁸ The organization is normally careful not to antagonize members about the measures they adopt,¹⁰⁹ and the same happened in the context of COVID-19.¹¹⁰ Several authors have suggested that it be more proactive and emphatic in requesting States Parties to justify their measures.¹¹¹ While WHO has the power to “name and shame” violating States, this tool has not been deployed.¹¹² In practice, the regulations are too restrained in regulating when and how States Parties can adopt additional health measures. The focus seems to be on engaging States in multilateral cooperation without impinging upon their sovereignty.¹¹³

These problems are well known within WHO. Several months into the pandemic, the Chair of the Review Committee on the Functioning of the International Health Regulations (2005) acknowledged that “[t]he role of WHO in relation to travel recommendations as well as incentives for States Parties to comply with their obligations related to travel measures need to be further examined.”¹¹⁴ The Committee is considering the introduction of new tools to monitor and evaluate compliance with the IHR, namely a peer-review mechanism similar to the Universal Periodic Review used by the Human Rights Council.¹¹⁵ This proposal is currently being pilot tested under the “Universal Health and Preparedness Review,” an initiative launched in November 2020.¹¹⁶

The weakness of the IHR in achieving their stated purpose is deeply associated with the use of non-binding recommendations. In the end, they are “a guide more than a legal mandate.”¹¹⁷ While the value of “soft law” standards should not be

108 Stefania Negri, *Communicable Disease Control*, in RESEARCH HANDBOOK ON GLOBAL HEALTH LAW 265, 299 (2018).

109 Antoine Puyvallée & Sonja Kittelsen, “Disease Knows No Borders”: *Pandemics and the Politics of Global Health Security*, in PANDEMIC, PUBLICS, AND POLITICS: STAGING RESPONSES TO PUBLIC HEALTH CRISES 59, 66 (Kristian Bjørkdahl & Benedicte Carlsen eds., 2019).

110 Lee et al., *supra* note 38, at 1593.

111 Gostin, DeBartolo & Friedman, *supra* note 24, at 2225; Wilson, Brownstein & Fidler, *supra* note 99, at 508; *see also* WORLD HEALTH ORG., *supra* note 93, at 113.

112 Adam Kamradt-Scott, *WHO’s to Blame? The World Health Organization and the 2014 Ebola Outbreak in West Africa*, 37 THIRD WORLD Q. 401, 411 (2016).

113 Goldfarb, *supra* note 41, at 808.

114 *Statement to the Resumed 73rd World Health Assembly by the Chair of the Review Committee on the Functioning of the International Health Regulations (2005) During the COVID-19 Response*, WORLD HEALTH ORG. (Nov. 9, 2020), <https://www.who.int/news/item/09-11-2020-statement-73rd-wha-chair-of-the-review-committee-IHR-covid-19>.

115 *Id.*; WORLD HEALTH ORG., *supra* note 100; *see also* WORLD HEALTH ORG., *supra* note 61, at ¶ 18.

116 *See WHO Director-General’s Opening Remarks at 148th Session of the Executive Board*, WORLD HEALTH ORG. (Jan. 18, 2021), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-148th-session-of-the-executive-board>.

117 James Hodge, Jr., *Global Legal Triage in Response to the 2009 H1N1 Outbreak*, 11 Minn. J. L. Sci. & Tech. 599, 608 (2010).

downplayed,¹¹⁸ as non-binding duties may also hold some sway over States,¹¹⁹ the universal refusal by States Parties to follow WHO's advice raises red flags about the regime's effectiveness in coordinating responses to international health crises.

B. Human Rights Law

International mobility is protected with much more intensity and detail by human rights law, where it is framed as the right to freedom of movement. This right is linked to the notion of individual self-determination.¹²⁰ Based on natural law, international law theoreticians have long asserted the existence of a *jus intergens*: a human right to travel.¹²¹ But this idea has only been formally recognized recently. The right was first enshrined in the Universal Declaration of Human Rights of 1948, which states:

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.¹²²

While the first paragraph refers to the domestic dimension, the second describes the cross-border facet of freedom of movement. The right to transnational mobility is charted broadly, encompassing different groups—from tourists to migrants, refugees to stateless persons.¹²³

Freedom of movement, both within and across borders, is also protected by the International Covenant on Civil and Political Rights (ICCPR), Article 12 of which proclaims:

1. Everyone lawfully within the territory of a State shall,

¹¹⁸ Lawrence Gostin et al., *Towards a Framework Convention on Global Health*, 91 BULL. WORLD HEALTH ORG. 790, 792 (2013).

¹¹⁹ Burkle, *supra* note 51, at 571.

¹²⁰ Harvey & Barnidge, *supra* note 33, at 2.

¹²¹ Siegfried Wiessner, *Blessed Be the Ties That Bind: The Nexus Between Nationality and Territory*, 56 MISS. L.J. 447, 457 (1986).

¹²² *Universal Declaration of Human Rights*, UNITED NATIONS at art. 13, <https://www.un.org/en/universal-declaration-human-rights>. See Atle Grahl-Madsen, *Article 13*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 203 (Asbjørn Eide et al. eds., 1993) (commenting on Article 13). The Universal Declaration of Human Rights does not have binding force but is normally acknowledged as customary international law. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law* 25 GA. J. INT'L & COMPAR. L. 287, 323 (1998); see also Ilias Bantekas & Lutz Oette, INT'L HUM. RTS. L. & PRAC. 62 (2013) (describing the legal consequence of a rule of customary international law).

¹²³ Ved Nanda, *The Right to Movement and Travel Abroad: Some Observations on the U.N. Deliberations*, 1 DENVER J. INT'L L. & POL'Y 109, 113 (1971).

within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

...

4. No one shall be arbitrarily deprived of the right to enter his own country.¹²⁴

The right to freedom of movement is also enshrined in many universal¹²⁵ and regional¹²⁶ human rights treaties, which argue in favor of the right being part of general international law.¹²⁷ The reference to freedom of movement as a human right is also well established in doctrinal writings.¹²⁸ This freedom has been

124 Off. of the High Comm'r for Hum. Rts., *International Covenant on Civil and Political Rights*, UNITED NATIONS at art. 12 (Mar. 23, 1976), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [hereinafter ICCPR]. See generally Stig Jagerskiold, *The Freedom of Movement*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 166, 166-82 (Louis Henkin ed., 1981) (describing Article 12). The Covenant, in force since 1976, is "probably the most important human rights treaty in the world." SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 3 (3d ed. 2013).

125 Among universal instruments, see Off. of the High Comm'r for Hum. Rts., *International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS at art. 5(d)(ii) (Jan. 4, 1969), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>; Off. of the High Comm'r for Hum. Rts., *Convention on the Rights of the Child*, UNITED NATIONS at art. 10(2) (Sept. 2, 1990), <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [hereinafter *Convention on the Rights of the Child*]; Off. of the High Comm'r for Hum. Rts., *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, UNITED NATIONS at art. 8 (Dec. 18, 1990), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx> [hereinafter *International Convention on the Protection of the Rights of All Migrant Workers*].

126 Among regional instruments, see *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUR. at art. 2 (Sept. 16, 1963), https://www.echr.coe.int/Documents/Library_Collection_P4postP11_ETS046E_ENG.pdf; *European Social Charter*, COUNCIL OF EUR. at art. 18(4) (May 3, 1996), <https://rm.coe.int/168007cf93>; *American Convention on Human Rights*, INTER-AM. COMM'N ON HUM. RTS. at art. 22 (Nov. 22, 1969), <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>; *African Charter on Human and Peoples' Rights*, AFR. COMM'N ON HUM. & PEOPLES' RTS. at art. 12 (Oct. 21, 1986), <https://www.achpr.org/legalinstruments/detail?id=49>; *Arab Charter on Human Rights*, art. 27 (Mohammed Amin Al-Midani & Mathilde Cabanettes trans.), http://www.eods.eu/library/LAS_Arab%20Charter%20on%20Human%20Rights_2004_EN.pdf.

127 Francesca De Vittor, *Nationality and Freedom of Movement*, in THE CHANGING ROLE OF NATIONALITY IN INTERNATIONAL LAW 96 (Serena Forlati & Alessandra Annoni eds., 2013).

128 See, e.g., Rosalyn Higgins, *The Right in International Law of an Individual to Enter, Stay in and Leave a Country*, 49 INT'L AFFS. 341 (1973); Jane McAdam, *An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty*, 12 MELBOURNE J. INT'L L. 27 (2011). Some authors phrase it as a "right to travel." See, e.g., Nanda,

depicted as a “basic”¹²⁹ human right and “the first and most fundamental of man’s liberties.”¹³⁰

On its cross-border dimension, freedom of movement is composed of two interdependent rights: the right to leave and the right to return.¹³¹ The two facets are closely interrelated, but they satisfy different needs or aspirations. Individuals may want to leave their country for tourism, to migrate, or to seek refuge, whereas people going in the opposite direction normally wish to return “home.”¹³²

1. *Right to Leave*

General Comment No. 27, issued by the Human Rights Committee in 1999,¹³³ sheds light on the scope of the right to leave:

Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus travelling abroad is covered, as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee. As the scope of [A]rticle 12, paragraph 2, is not restricted to persons lawfully within the territory of a State, an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State.¹³⁴

All individuals benefit from the right to leave, whether they are citizens,

supra note 123, at 109; Turack, *supra* note 34, at 8; Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. MARSHALL J. INFO. TECH. & PRIV. L. 639 (2014); Scott, *supra* note 34. One author talks about a “right to move.” Tamás Foldesi, *The Right to Move and Its Achilles’ Heel, the Right to Asylum*, 8 CONN. J. INT’L L. 289 (1993).

129 Francis Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled Iron Curtain*, 65 TUL. L. REV. 849, 850 (1991); Satvinder Juss, *Free Movement and the World Order* 16 INT’L J. REFUGEE L. 289, 290 (2004); Christian Enemark, *Ebola, Disease-Control, and the Security Council: From Securitization to Securing Circulation*, 2 J. GLOB. SEC. STUD. 137, 140 (2017).

130 MAURICE CRANSTON, *WHAT ARE HUMAN RIGHTS?* 31 (1973).

131 Vincent Chetail, *Freedom of Movement and Transnational Migrations: A Human Rights Perspective*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 47, 54, 57 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003); De Vittor, *supra* note 127, at 97.

132 Kathleen Lawand, *The Right to Return of Palestinians in International Law*, 8 INT’L J. REFUGEE L. 532, 540 (1996).

133 *General Comment No. 27: Article 12 (Freedom of Movement)*, HUM. RTS. COMM., <https://www.refworld.org/docid/45139c394.html>. The General Comment can be said to constitute “persuasive authority on the freedom of movement provision of the ICCPR.” Jessica Leal, *Stateless with Nowhere to Go: A Proposal for Revision of the Right of Return According to the International Covenant on Civil and Political Rights*, 46 GEO. WASH. INT’L L. REV. 677, 687 (2014).

134 HUM. RTS. COMM., *supra* note 133, at ¶ 8.

residents, or foreigners, even if they are in the country illegally.¹³⁵ The right covers temporary visits as well as permanent leave for emigration purposes.¹³⁶

2. *Right to Return*

The personal scope of application of the right to return is narrower. General Comment 27 starts by noting that “[t]he right of a person to enter his or her own country recognizes the special relationship of a person to that country.”¹³⁷ The Human Rights Committee emphasizes:

The wording of [A]rticle 12, paragraph 4, does not distinguish between nationals and aliens (“no one”). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase “his own country.” The scope of “his own country” is broader than the “country of his nationality.” It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.¹³⁸

The ICCPR only gives the right of entry into a country to persons who “have a strong attachment to that country,” for example, its nationals and residents.¹³⁹ In the words of one author, it is “innate in human nature to yearn to be back home.”¹⁴⁰ This “natural desire for a base or a homeland” has been said to demonstrate the rational association of freedom of movement with the right to a nationality.¹⁴¹ In this sense, the right to return is closely connected with the concept of nationality.¹⁴²

¹³⁵ JOSEPH & CASTAN, *supra* note 124, at 400; Chetail, *supra* note 131, at 54.

¹³⁶ *Id.*

¹³⁷ HUM. RTS. COMM., *supra* note 133, at ¶ 19.

¹³⁸ *Id.* at ¶ 20.

¹³⁹ See Andraž Zidar, *WHO International Health Regulations and Human Rights: from Allusions to Inclusion*, 19 INT’L J. HUM. RTS. 505, 515 (2015).

¹⁴⁰ D. Nseroko, *The Right to Return Home*, 21 INDIAN J. INT’L L. 335, 336 (1981).

¹⁴¹ Maurice Cranston, *The Political and Philosophical Aspects of the Right to Leave and to Return*, in THE RIGHT TO LEAVE AND TO RETURN: PAPERS AND RECOMMENDATIONS OF THE INTERNATIONAL COLLOQUIUM HELD IN UPPSALA, SWEDEN, 19-20 JUNE 1972 at 21, 28 (Karel Vasak & Sidney Liskofsky eds., 1976).

¹⁴² Higgins, *supra* note 128, at 342; Lawand, *supra* note 132, at 540.

However, because the covenant employs broad language (“his own country”), without restricting this scenario to a nationality link, it is frequently argued that the provision also covers categories such as long-term (or permanent) residents.¹⁴³

3. *No Right to Enter a Foreign Country*

Importantly, human rights treaties do not guarantee an unfettered right to access a country other than one’s own. In other words, there is no human right to enter a foreign state.¹⁴⁴ States have the sovereign power to decide matters concerning their territory and population, including border security and migration policies.¹⁴⁵ The Human Rights Committee confirmed this in 1986, stating that “[t]he [ICCPR] does not recognize the right of aliens to enter or reside in the territory of a State [P]arty. It is in principle a matter for the State to decide who it will admit to its territory.”¹⁴⁶

4. *Limitations and Derogations*

Naturally, freedom of movement is not an absolute right and may be subject to restrictions based on the need to pursue and protect other public values.¹⁴⁷ Human rights treaties typically include two mechanisms that can interfere with human rights: limitations and derogations. The possibility of imposing limitations results from the acknowledgment that most human rights are not absolute and must be weighed against collective interests.¹⁴⁸ Limitations should not affect the “core of the right,”¹⁴⁹ striking a balance between the protection of individual and

143 Chetail, *supra* note 131, at 57; Jeremie Bracka, *Past the Point of No-Return? The Palestinian Right of Return in International Human Rights Law*, 6 MELBOURNE J. INT’L L. 272, 298-300 (2005); *see also* HUM. RTS. COMM., *supra* note 133, at ¶ 20 (“The language of [A]rticle 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.”). In principle it is up to the individual to prove that the State in question is “his own country.” *See THE LAW AND PRACTICE OF EXPULSION AND EXCLUSION FROM THE UNITED KINGDOM* 47-48 (Eric Fripp ed., 2015).

144 Karl Doehring, *Aliens, Admission*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 11, 12 (1985); Chetail, *supra* note 131, at 57; De Vittor, *supra* note 127, at 96; Higgins, *supra* note 128, at 344.

145 De Vittor, *supra* note 127, at 96, 103.

146 *General Comment No. 15: The Position of Aliens Under the Covenant*, HUM. RTS. COMM. ¶ 5, <https://www.refworld.org/pdfid/45139acfc.pdf>.

147 In the words of Sir Hersch Lauterpacht, “[i]t is axiomatic that the natural rights of the individual find a necessary limit in the natural rights of other persons.” Hersch Lauterpacht, *INTERNATIONAL LAW AND HUMAN RIGHTS* 366 (1st ed. 1968) (1950).

148 Dominic McGoldrick, *The Interface Between Public Emergency Powers and International Law*, 2 INT’L J. CONST. L. 380, 383 (2004).

149 Toebe, *supra* note 32, at 497.

community interests.¹⁵⁰ Derogations, on the other hand, result in the complete suspension of the right.¹⁵¹ While the first mechanism compresses the protection of some human rights, the second temporarily interrupts their enjoyment.¹⁵²

Specifically apropos limitations to freedom of movement, Article 12(3) of the covenant provides:

The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.¹⁵³

The “above-mentioned” rights are domestic freedom of movement and the right to leave. While the ICCPR seems to establish a strong presumption in favor of freedom of movement,¹⁵⁴ balancing individual rights with other societal imperatives may still be necessary. A serious threat to public health may qualify as one such case. In fact, it may be necessary to constrain the freedom of individuals if that is necessary to avoid or mitigate potential damages for other persons and the broader community.¹⁵⁵ In the case of an epidemic, limitations may be grounded on the need to protect both “public health” and “the rights and freedoms of others.”

General Comment No. 27 offers specific parameters on the permissible limitations of the right to freedom of movement. The General Comment starts by affirming that “[l]iberty of movement is an indispensable condition for the free development of a person” that “interacts with several other rights enshrined in the

¹⁵⁰ Spadaro, *supra* note 28, at 320.

¹⁵¹ Toebees, *supra* note 32, at 496; Spadaro, *supra* note 28, at 321.

¹⁵² Zidar, *supra* note 139, at 507.

¹⁵³ ICCPR, *supra* note 124, at art. 12(3). Other human rights treaties also allow for the restriction of the right to freedom of movement when necessary to protect other interests, including public health. See *Convention on the Rights of the Child*, *supra* note 125, at art. 10(2); *International Convention on the Protection of the Rights of All Migrant Workers*, *supra* note 125, at art. 8(1); *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 126, at art. 2(3); *American Convention on Human Rights*, *supra* note 126, at art. 22(3); *African Charter on Human and Peoples’ Rights*, *supra* note 126, at art. 12(2). The Universal Declaration of Human Rights makes no reference to public health as a ground for limitations: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” *Universal Declaration of Human Rights*, *supra* note 122, at art. 29(2).

¹⁵⁴ See HURST HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* 21 (1987).

¹⁵⁵ Enemark, *supra* note 31, at 201; Meier, Evans & Phelan, *supra* note 70, at 227.

Covenant.”¹⁵⁶ Importantly, the Human Rights Committee added:

The permissible limitations which may be imposed on the rights protected under [A]rticle 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in [A]rticle 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.¹⁵⁷

If States decide to impose limits to freedom of movement, they need to ensure that such interventions conform to human rights. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (“Siracusa Principles”) offer useful guidance in this regard.¹⁵⁸ This set of soft law rules was drawn up by a group of thirty-one experts in international law and is “widely recognized as a legal standard for measuring the validity of limitations on human rights.”¹⁵⁹ The Principles establish several requirements for limitations to be lawful:

Whenever a limitation is required in the terms of the Covenant to be “necessary,” this term implies that the limitation:

- a. is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant;
- b. responds to a pressing public or social need;
- c. pursues a legitimate aim; and

156 *General Comment No. 27: Article 12 (Freedom of Movement)*, *supra* note 133, at ¶ 1. One author has even claimed that “[t]he right to travel is the basis of all other rights, since they depend upon freedom of movement.” Darren O’Byrne, *On Passports and Border Controls*, 28 ANNALS TOURISM RSCH. 399, 413 (2001).

157 *General Comment No. 27: Article 12 (Freedom of Movement)*, *supra* note 133, at ¶ 2.

158 *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, INT’L COMM’N JURISTS (Apr. 1985), <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> [hereinafter *Siracusa Principles*].

159 Lawrence Gostin & Benjamin Berkman, *Pandemic Influenza: Ethics, Law, and the Public’s Health*, 59 ADMIN. L. REV. 121, 146 (2007). The Principles are “[n]on-binding but authoritative.” Roojin Habibi et al., *The Stellenbosch Consensus on Legal National Responses to Public Health Risks: Clarifying Article 43 of the International Health Regulations*, INT’L ORGS. L. REV. 1, 53 (2020) [hereinafter *Stellenbosch Consensus*].

d. is proportionate to that aim.¹⁶⁰

Proportionality is key to this balancing test, involving “a delicate equation evaluating the importance of the social aim, the importance of the right guaranteed, and the degree of encroachment.”¹⁶¹ The Siracusa Principles also contain a provision specifically dealing with limitations of rights for public health reasons, stating:

Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.¹⁶²

Instead of being limited, the human right to freedom of movement may be derogated. Indeed, a public health crisis of exceptional severity may be invoked as a reason to derogate from human rights. There is a continuum between the two types of measures, and states should only resort to derogations when limitations are insufficient.¹⁶³ Derogations require a more demanding assessment of the seriousness of the threat to public interests and its implications in protecting other human rights.¹⁶⁴

Derogation clauses operate as an escape valve, allowing States to suspend some human rights obligations in extreme scenarios.¹⁶⁵ Article 4 of the ICCPR permits the derogation of otherwise legally protected rights as long as several requirements are met:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations

¹⁶⁰ *Siracusa Principles*, *supra* note 158, at ¶ 10.

¹⁶¹ Frédéric Mégret, *Nature of Obligations*, in INTERNATIONAL HUMAN RIGHTS LAW 96, 112 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., 2014).

¹⁶² *Siracusa Principles*, *supra* note 158, at ¶ 25.

¹⁶³ Spadaro, *supra* note 28, at 321-322; McGoldrick, *supra* note 148, at 384.

¹⁶⁴ Zidar, *supra* note 139, at 507.

¹⁶⁵ Emilie Hafner-Burton, Laurence Helfer & Christopher Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT'L ORG. 673, 674 (2011); Gentian Zyberi, *Some Reflections on Countering the Covid-19 Pandemic: Moving from Emergency to the “New Normal” Without Trampling on Human Rights?*, INT'L L. OBSERVER (Dec. 15, 2020), <https://internationallawobserver.eu/some-reflections-on-countering-the-covid-19-pandemic-moving-from-emergency-to-the-new-normal-without-trampling-on-human-rights>.

under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from [A]rticles 6, 7, 8 (paragraphs I and 2), 11, 15, 16, and 18 may be made under this provision.¹⁶⁶

Article 4(1) of the ICCPR requires a “public emergency which threatens the life of the nation” for rights to be derogated.¹⁶⁷ The concept of “public emergency” is very broad and includes public health emergencies, as long as it meets all other criteria—that is, that it represents “a direct, exceptional and actual or imminent threat to the life of the nation.”¹⁶⁸ When is this the case? In the words of the Human Rights Committee, “[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation.”¹⁶⁹ And it adds:

If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement ([A]rticle 12) or freedom of assembly ([A]rticle 21) is generally sufficient during such situations and no derogation from the provisions in question

¹⁶⁶ ICCPR, *supra* note 124, at art. 4.

¹⁶⁷ *Id.*

¹⁶⁸ Zidar, *supra* note 139, at 508.

¹⁶⁹ *General Comment No. 29: Derogations During a State of Emergency*, HUM. RTS. COMM. ¶ 2, <https://www.refworld.org/docid/453883fd1f.html>. According to the Siracusa Principles, “[a] state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 . . . only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the state; and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.” *Siracusa Principles*, *supra* note 158, at ¶ 39.

would be justified by the exigencies of the situation.¹⁷⁰

Even though the Committee does not expressly refer to the case of pandemics, its considerations seem to apply in such instances.¹⁷¹ The concept of PHEIC, as defined in the IHR, is particularly helpful in this regard: “[A]n extraordinary event which is determined, as provided in these Regulations: (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response.”¹⁷² According to WHO, “[t]his definition implies a situation that: is serious, unusual or unexpected; carries implications for public health beyond the affected State’s national border; and may require immediate international action.”¹⁷³ Thus, a PHEIC may amount to a public emergency for states under Article 4 of the ICCPR.¹⁷⁴

Due to its severe impact—yet to be fully determined—the COVID-19 pandemic is likely one of those circumstances where the “life of the nation is at stake,” and so the derogation of certain human rights may be justified.¹⁷⁵ There are, however, important safeguards and requirements to the derogation of human rights, which are based on the principles of legality and the rule of law.¹⁷⁶ As stated in the Siracusa Principles, derogation “is not exercised in a legal vacuum. It is authorized by law, and as such, it is subject to several legal principles of general application.”¹⁷⁷ The Principles also add that provisions allowing for certain derogations in a public emergency are to be interpreted restrictively.¹⁷⁸

It should be noted that the right to return is not bound by the restrictions contained in Article 12(3) of the ICCPR, based on the need to protect national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others, as it is not one of the “above-mentioned rights.”¹⁷⁹ Article

¹⁷⁰ *General Comment No. 29: Derogations During a State of Emergency*, *supra* note 169, at ¶ 5.

¹⁷¹ Spadaro, *supra* note 28, at 321.

¹⁷² IHR, *supra* note 3, at art. 1(1).

¹⁷³ *IHR Procedures Concerning Public Health Emergencies of International Concern (PHEIC)*, WORLD HEALTH ORG., https://www.who.int/ihr/revised_annex2_guidance.pdf.

¹⁷⁴ Zidar, *supra* note 139, at 508.

¹⁷⁵ Spadaro, *supra* note 28, at 322; Altea Rossi, *COVID-19: The ‘Fine Balance’ under Human Rights Law*, GENEVA CTR. FOR SEC. POL’Y (Apr. 17, 2020), <https://www.gcsp.ch/global-insights/covid-19-fine-balance-under-human-rights-law>; Audrey Lebrét, *COVID-19 Pandemic and Derogation to Human Rights*, 7 J. L. & BIOSCIENCES 1, 5 (2020).

¹⁷⁶ *General Comment No. 29: Derogations During a State of Emergency*, *supra* note 169, at ¶ 16.

¹⁷⁷ *Siracusa Principles*, *supra* note 158, at ¶ 61.

¹⁷⁸ *Id.* at ¶ 63.

¹⁷⁹ Barbara von Tigerstrom, *The Revised International Health Regulations and Restraint of National Health Measures*, 13 HEALTH L.J. 35, 64 n.147 (2005); Bracka, *supra* note 143, at 305; Leal, *supra* note 133, at 683; John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT’L L.J. 171, 201-02 (1998); Eric Richardson & Colleen Devine, *Emergencies End Eventually:*

12(4) only states that “[n]o one shall be arbitrarily deprived of the right to enter his own country.” The Human Rights Committee clarifies:

In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasise that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.¹⁸⁰

The right to return (just like the right to leave) may be derogated as long as the requirements set in Article 4(1) of the ICCPR are met. The assessment of whether the circumstances require derogation from a certain right is subject to the principle of strict proportionality. According to General Comment No. 29:

A fundamental requirement for any measures derogating from the Covenant, as set forth in [A]rticle 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage[,] and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the

How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights, MICH. J. INT’L L. 1, 29 (2021).

¹⁸⁰ *General Comment No. 27: Article 12 (Freedom of Movement)*, *supra* note 133, at ¶ 21. Still, the term “arbitrarily” may imply some limits to the exercise of the right. Chetail, *supra* note 131, at 58; Jagerskiold, *supra* note 124, at 181. States’ practice remains relatively sparse with regard to the concrete standards for assessing arbitrariness. Chetail, *supra* note 131, at 58. Moreover, all of the other international instruments do not refer to the term “arbitrarily” and guarantee an unrestricted right to return. *Id.*

requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State [P]arty. When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.¹⁸¹

The Siracusa Principles offer valuable guidance when designing and implementing derogatory measures:

51. The severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.
52. The competent national authorities shall be under a duty to assess individually the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by the emergency.
53. A measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitations clauses of the Covenant would be adequate to deal with the threat to the life of the nation.
54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger.
55. The national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.
56. Effective remedies shall be available to persons claiming that derogation measures affecting them are not strictly

¹⁸¹ *General Comment No. 29: Derogations During a State of Emergency*, *supra* note 169, at ¶ 4.

required by the exigencies of the situation.

57. In determining whether derogation measures are strictly required by the exigencies of the situation the judgment of the national authorities cannot be accepted as conclusive.¹⁸²

The ICCPR makes clear that freedom of movement may be limited or even suppressed for public health reasons. To be lawful, limitations and derogations need to comply with the safeguards and requirements contained in the ICCPR, on which the Siracusa Principles meticulously shed light. Derogations are particularly dangerous moments for human rights protection and should invite close scrutiny. According to the Principles, derogation is “an authorized and limited prerogative in order to respond adequately to a threat to the life of the nation” that the derogating state has the burden of justifying under the law.¹⁸³ A proclamation of a public emergency, and the imposition of derogations, should be made in good faith; otherwise, it qualifies as a violation of international law.¹⁸⁴

This Article does not question the good faith of states confronted with a “once in a century pandemic.”¹⁸⁵ While some governments have likened the pandemic to a war, the lawfulness of limitations and derogations should not be automatically assumed. This assessment should be based on respect for the conditions and requirements laid down in the ICCPR. Part II applies the canons of legality, necessity, proportionality, and non-discrimination to travel bans so as to determine whether they comply with international law.

II. THE (UN)LAWFULNESS OF TRAVEL BANS

As described in Part I, both the IHR and the ICCPR recognize that in some situations, it may be necessary to constrain the (international) freedom of movement of individuals to protect public health. The fact that WHO never recommended (at least explicitly) the implementation of travel bans does not automatically render these measures illegal under the IHR so long as the requirements of Article 43 are respected. When implementing additional health measures, states should bear in mind the important connections between the IHR and human rights, namely, the fact that such measures may result in the introduction of limitation to or of derogations from the human right to freedom of

182 *Siracusa Principles*, *supra* note 158, at ¶¶ 51-57.

183 *Id.* at ¶ 64.

184 *Id.* at ¶ 62.

185 Bill Gates, *Responding to Covid-19—A Once-in-a-Century Pandemic?*, 382 *NEW ENG. J. MED.* 1677 (2020).

movement.¹⁸⁶

References to human rights principles, including the “protection of the human rights of persons and travelers,” were explicitly incorporated in the IHR for the first time in 2005.¹⁸⁷ The basic principles are stated as follows:

1. The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.
2. The implementation of these Regulations shall be guided by the Charter of the United Nations and the Constitution of the World Health Organization.
3. The implementation of these Regulations shall be guided by the goal of their universal application for the protection of all people of the world from the international spread of disease.
4. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to legislate and to implement legislation in pursuance of their health policies. In doing so, they should uphold the purpose of these Regulations.¹⁸⁸

The inclusion of these provisions made human rights rules and principles part and parcel of the accurate interpretation and implementation of the IHR.¹⁸⁹ The new references were seen as a welcome addition,¹⁹⁰ revealing WHO’s willingness to exert its influence on matters of human rights¹⁹¹ and its “new normative discourse” on global health.¹⁹²

These provisions integrate human rights treaties into the construal and operation of the regulations, imposing on States the obligation to ensure that they

186 *Stellenbosch Consensus*, *supra* note 159, at 46.

187 IHR, *supra* note 3, foreword.

188 *Id.* at art. 3. Pursuant to Article 32 of the regulations, “[i]n implementing health measures under these Regulations, States Parties shall treat travellers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures . . .” *Id.* at art. 32; *see also id.* at art. 23 (health measures on arrival and departure).

189 David Fidler & Lawrence Gostin, *The New International Health Regulations: An Historic Development for International Law and Public Health*, 34 J. L. MED. & ETHICS 85, 87 (2006).

190 *Id.*; Michael Baker & David Fidler, *Global Public Health Surveillance Under the New International Health Regulations*, 12 EMERGING INFECTIOUS DISEASES 1058, 1058 (2006).

191 Lawrence Gostin, *Meeting Basic Survival Needs of the World’s Least Healthy People: Toward a Framework Convention on Global Health*, 96 GEO. L.J. 331, 378 (2008).

192 David Fidler, *Architecture Amidst Anarchy: Global Health’s Quest for Governance*, 1 GLOB. HEALTH 1, 12 (2007).

comply with both legal frameworks. The same connection between human rights treaties and the IHR is made in the Siracusa Principles, which provide that when limiting certain rights on public health grounds, “[d]ue regard shall be had to the international health regulations of the World Health Organization.”¹⁹³ As underlined by Negri, “[s]uch a reference to the IHR is particularly noteworthy because it stresses that in times of public health emergency national authorities have to comply with both the Regulations and human rights treaties, and that they are called to ensure consistency and coordination between the obligations stemming therefrom.”¹⁹⁴

The connection between the IHR and human rights treaties also stems from Article 57(1) of the IHR, under which “States Parties recognize that the IHR and other relevant international agreements should be interpreted so as to be compatible. The provisions of the IHR shall not affect the rights and obligations of any State Party deriving from other international agreements.”¹⁹⁵ This reinforces the central role of human rights law in guiding the interpretation of additional health measures under Article 43 of the IHR.¹⁹⁶ As recognized by WHO, “[i]n emergency situations, the enjoyment of individual human rights and civil liberties may have to be limited in the public interest. However, efforts to protect individual rights should be part of any policy.”¹⁹⁷ Specifically discussing the different measures that may restrict the freedom of movement, WHO stated:

These measures can often play an important role in controlling infectious disease outbreaks, and in these circumstances, their use is justified by the ethical value of protecting community well-being. However, the effectiveness of these measures should not be assumed; in fact, under some epidemiological circumstances, they may contribute little or nothing to outbreak control efforts, and may even be counterproductive if they engender a backlash that leads to resistance to other control measures. Moreover, all such

¹⁹³ *Siracusa Principles*, *supra* note 158, at ¶ 26.

¹⁹⁴ Negri, *supra* note 108, at 289-90.

¹⁹⁵ IHR, *supra* note 3, at art. 57(1).

¹⁹⁶ *Stellenbosch Consensus*, *supra* note 159, at 45-46; *see also id.* at 67 (“It is clear the IHR was conceived to be closely intertwined with international human rights law and international trade law. With respect to human rights law, Article 43 sets limitations to additional health measures by deferring to the rights contained in the UDHR, ICCPR and other international and regional human rights treaties. This symbiosis suggests that in cases where an additional health measure may curtail the rights and freedoms of individuals, states should at minimum apply the principles of legitimacy, necessity and proportionality to guide them in understanding the limited circumstances under which they may legally deviate from their human rights obligations.”)

¹⁹⁷ *Ethical Considerations in Developing a Public Health Response to Pandemic Influenza*, WORLD HEALTH ORG. 3 (2007), https://www.who.int/csr/resources/publications/WHO_CDS_EPR_GIP_2007_2c.pdf.

measures impose a significant burden on individuals and communities, including direct limitations of fundamental human rights, particularly the rights to freedom of movement and peaceful assembly.¹⁹⁸

WHO acknowledges that human rights rules and principles “provide the framework for evaluating the ethical acceptability of public health measures that limit individual freedom, just as human rights provide the foundation for other pandemic-related policies.”¹⁹⁹ Measures that limit individual rights and civil liberties must be necessary, reasonable, proportional, equitable, non-discriminatory, and comply with national and international laws.²⁰⁰ Thus, to conform to both the IHR and international human rights treaties, travel bans must cumulatively satisfy all of these (demanding) standards.

A. *Legal Basis*

The first requirement is that governmental measures have a legal basis.²⁰¹ With respect to limitations, Article 12(3) of the ICCPR invokes the principle of legality when it states that “[t]he above-mentioned rights shall not be subject to any restrictions except those which are provided by law.”²⁰² The Human Rights Committee stated:

The law itself has to establish the conditions under which the rights may be limited. State reports should therefore specify the legal norms upon which restrictions are founded. Restrictions which are not provided for in the law or are not in conformity with the requirements of [A]rticle 12, paragraph 3, would violate the rights guaranteed by paragraphs 1 and 2.²⁰³

It further added:

In adopting laws providing for restrictions permitted by [A]rticle 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right . . . ; the relation between right and restriction, between norm and

198 *Guidance for Managing Ethical Issues in Infectious Disease Outbreaks*, WORLD HEALTH ORG. 25 (2016), <https://apps.who.int/iris/handle/10665/250580>.

199 WORLD HEALTH ORG., *supra* note 197, at 9.

200 *Id.* at 3.

201 *General Comment No. 27: Article 12 (Freedom of Movement)*, *supra* note 133, at ¶ 11.

202 ICCPR, *supra* note 124, at art. 12(3). *General Comment No. 27: Article 12 (Freedom of Movement)*, *supra* note 133, at ¶ 11 (“To be permissible, restrictions must be provided by law . . .”).

203 *General Comment No. 27: Article 12 (Freedom of Movement)*, *supra* note 133, at ¶ 12.

exception, must not be reversed. The laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.²⁰⁴

In this regard, the Siracusa Principles stipulate:

15. No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.
16. Laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.
17. Legal rules limiting the exercise of human rights shall be clear and accessible to everyone.²⁰⁵

As for derogations, Article 4 of the ICCPR states that the existence of a public emergency that threatens the life of the nation shall be officially proclaimed.²⁰⁶ The State must immediately inform the other States Parties, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.²⁰⁷ The COVID-19 pandemic prompted a frantic legislative response.²⁰⁸ While some countries implemented measures pursuant to laws already in place, others passed specific statutes for that purpose.²⁰⁹ There are obvious

204 *Id.* at ¶ 13.

205 *Siracusa Principles*, *supra* note 158, at ¶¶ 15-17.

206 ICCPR, *supra* note 124, at art. 4(1). Similarly, Article 42 of the Siracusa Principles states that “[a] state party derogating from its obligations under the Covenant shall make an official proclamation of the existence of a public emergency threatening the life of the nation.” *Siracusa Principles*, *supra* note 158, at art. 42.

207 ICCPR, *supra* note 124, at art. 4(3); *see also General Comment No. 29: Derogations During a State of Emergency*, *supra* note 169, ¶ 17; *Siracusa Principles*, *supra* note 158, at arts. 44, 49.

208 *See Ronan Cormacain, Keeping Covid-19 Emergency Legislation Socially Distant from Ordinary Legislation: Principles for the Structure of Emergency Legislation*, 8 THEORY & PRAC. OF LEGIS. 245 (2020).

209 Bård Andreassen et al., *COVID-19: Human Rights Trade-offs, Challenges and Policy Responses*, NORWEGIAN CTR. FOR HUM. RTS. 16 (2020), <https://www.jus.uio.no/smr/english/research/publications/occasional-papers/oc-13-20.pdf>. Article 43 of the Siracusa Principles provides that “[p]rocedures under national law for the proclamation of a state of emergency shall be prescribed in advance of the emergency.” *Siracusa Principles*, *supra* note 158, at art. 43.

dangers to legislating in the context of a crisis,²¹⁰ namely that the use of emergency powers results in draconian measures by the executive.²¹¹

B. (Public Health) Necessity

The second fundamental tenet is that restrictive measures comply with the necessity test.

With respect to limitations of human rights, General Comment No. 27 provides: “To be permissible, restrictions must be . . . necessary in a democratic society for the protection of these purposes [protect national security, public order (ordre public), public health or morals and the rights and freedoms of others]”²¹² The Human Rights Committee further added: “Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them.”²¹³

The Siracusa Principles define “necessary” as follows:

Whenever a limitation is required in the terms of the Covenant to be “necessary,” this term implies that the limitation:

- a. is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant;
- b. responds to a pressing public or social need;
- c. pursues a legitimate aim; and
- d. is proportionate to that aim.²¹⁴

Any assessment as to the necessity of a limitation shall be made on objective considerations.

Turning to derogations, the ICCPR provides, quite laconically, that States invoking the existence of a “public emergency which threatens the life of the nation” must also submit the reasons for their decision to derogate from their obligations and justify the need to introduce specific measures.²¹⁵ The Siracusa

210 Robyn Martin et al., *Pandemic Influenza Control in Europe and the Constraints Resulting from Incoherent Public Health Laws*, 10 BMC PUB. HEALTH 532 (2010).

211 Cormacain, *supra* note 208, at 251.

212 *General Comment No. 27: Article 12 (Freedom of Movement)*, *supra* note 133, at ¶ 11.

213 *Id.* at ¶ 14.

214 *Siracusa Principles*, *supra* note 158, at ¶ 10.

215 ICCPR, *supra* note 124, at art. 4(3); *see also General Comment No. 29: Derogations During a State of Emergency*, *supra* note 169, at ¶ 5.

Principles are very useful in this regard, as they elaborate with great detail on the contents of the notification:

45. The notification shall contain sufficient information to permit the states parties to exercise their rights and discharge their obligations under the Covenant. In particular it shall contain:
 - (a) the provisions of the Covenant from which it has derogated;
 - (b) a copy of the proclamation of emergency, together with the constitutional provisions, legislation, or decrees governing the state of emergency in order to assist the states parties to appreciate the scope of the derogation;
 - (c) the effective date of the imposition of the state of emergency and the period for which it has been proclaimed;
 - (d) an explanation of the reasons which actuated the government's decision to derogate, including a brief description of the factual circumstances leading up to the proclamation of the state of emergency; and
 - (e) a brief description of the anticipated effect of the derogation measures on the rights recognized by the Covenant, including copies of decrees derogating from these rights issued prior to the notification.
46. States parties may require that further information necessary to enable them to carry out their role under the Covenant be provided through the intermediary of the Secretary-General.
47. A state party which fails to make an immediate notification in due form of its derogation is in breach of its obligations to other states parties and may be deprived of the defenses otherwise available to it in procedures under the Covenant.²¹⁶

216 *Siracusa Principles*, *supra* note 158, at ¶¶ 45-47.

States Parties to the ICCPR can only derogate from their obligations under the covenant “to the extent strictly required by the exigencies of the situation.”²¹⁷ According to the Siracusa Principles, this principle of “strict necessity” requires that each measure “be directed to an actual, clear, present, or imminent danger and . . . not . . . imposed merely because of an apprehension of potential danger.”²¹⁸ WHO speaks, in this regard, of “public health necessity.”²¹⁹ By requiring that States Parties base their decisions on scientific evidence and information, Article 43(2) of the IHR requires the demonstration that additional health measures are necessary to protect public health.²²⁰ Measures need to “respond to a pressing public and social need” and have the purpose of “preventing and controlling the spread of communicable diseases.”²²¹ Assessing whether certain measures are strictly necessary—and therefore valid and legitimate—depends on the best available scientific evidence.²²² In this regard, WHO states:

Decisions to impose restrictions on freedom of movement should be grounded on the best available evidence about the outbreak pathogen, as determined in consultation with national and international public health officials. No such interventions should be implemented unless there is a reasonable basis to expect they will significantly reduce disease transmission. The rationale for relying on these measures should be made explicit, and the appropriateness of any restrictions should be continuously re-evaluated in light of emerging scientific information about the outbreak. If the original rationale for imposing a restriction no longer applies, the restriction should be lifted without delay.²²³

In deciding whether to implement additional health measures, States Parties shall²²⁴ base their determinations upon scientific principles;²²⁵ available scientific evidence of a risk to human health, or where such evidence is insufficient, the available information including from WHO and other relevant intergovernmental organizations and international bodies,²²⁶ and any available specific guidance or

217 ICCPR, *supra* note 124, at art. 4(1).

218 *Siracusa Principles*, *supra* note 158, at ¶ 54.

219 WORLD HEALTH ORG., *supra* note 32, at 29.

220 *Stellenbosch Consensus*, *supra* note 159, at 53; Fidler, *supra* note 63, at 382.

221 Negri, *supra* note 108, at 290.

222 Enemark, *supra* note 31, at 201; Negri, *supra* note 108, at 290.

223 WORLD HEALTH ORG., *supra* note 198, at 25-26.

224 The use of the word “shall” denotes the mandatory nature of this duty. *Stellenbosch Consensus*, *supra* note 159, at 22.

225 IHR, *supra* note 3, at art. 43(2)a.

226 *Id.* at art. 43(2)b.

advice from WHO.²²⁷

Temporary recommendations issued by WHO play a central role in determining whether a certain measure is strictly necessary. They clearly qualify as one of the elements that, according to the IHR, shall be the base of the decision to implement additional health measures (“any available specific guidance or advice from WHO”).²²⁸ WHO’s recommendations are a central element in determining the relevant scientific evidence.²²⁹ They are based on scientific principles²³⁰ and available scientific evidence²³¹ and information.²³²

WHO issued several recommendations and statements specific to COVID-19. Consistent with its position in previous PHEICs, WHO never explicitly recommended the implementation of travel restrictions, much less of travel bans.²³³ It is true that WHO’s official position somewhat evolved over time. While the first statement was unequivocally against the implementation of any travel restrictions,²³⁴ later pronouncements added ambivalent and flexible language, denoting that such measures could be adopted in some circumstances.²³⁵ This shift towards a more nuanced approach may have been influenced by the almost universal non-compliance with the original recommendations,²³⁶ with WHO seeking to strike a more flexible and conciliatory tone.

The effectiveness of temporary recommendations depends on States

²²⁷ *Id.* at art. 43(2)c.

²²⁸ IHR, *supra* note 3, at art. 43(2)c. See *Stellenbosch Consensus*, *supra* note 159, at 26.

²²⁹ Von Bogdandy & Villarreal, *supra* note 68, at 21.

²³⁰ IHR, *supra* note 3, at art. 1(1) (“[S]cientific principles’ means the accepted fundamental laws and facts of nature known through the methods of science . . .”).

²³¹ IHR, *supra* note 3, at art. 1(1) (“[S]cientific evidence’ means information furnishing a level of proof based on the established and accepted methods of science . . .”).

²³² IHR, *supra* note 3, at art. 17(c).

²³³ Before COVID-19, five events were declared a PHEIC under the IHR (2005): the 2009 H1N1 influenza pandemic, Ebola (2013-2015 and 2018-2020), poliomyelitis (2014 to present), and Zika (2016). See Annelies Wilder-Smith & Sarah Osman, *Public Health Emergencies of International Concern: A Historic Overview*, 27 J. TRAVEL MED. 1 (2020). According to Burci, “the Secretariat and the public health expertise represented in the emergency committees share a bias against general travel and trade restrictions as ineffective and counterproductive; recommendations in previous PHEICs focus on responsible behaviour by travelers or exit screenings at international airports.” Burci, *supra* note 70, at 214. Another author states: “The WHO’s sceptical attitude towards travel restrictions is to some extent built into its remit, which is based on the International Health Regulations . . .” Ruud Koopmans, *A Virus that Knows No Borders? Exposure to and Restrictions of International Travel and the Global Diffusion of COVID-19*, WZB 1, 2 (2020), <https://www.econstor.eu/handle/10419/225533>.

²³⁴ WORLD HEALTH ORG., *Statement on the Second Meeting of the International Health Regulations (2005)*, *supra* note 3.

²³⁵ See sources cited *supra* notes 71-73; see also Raymond Yiu, Chin-Pang Yiu & Veronica Li, *Evaluating the WHO’s Framing and Crisis Management Strategy During the Early Stage of COVID-19 Outbreak*, POL’Y DESIGN & PRAC. 1, at 7 (2020); Burci, *supra* note 70, at 215.

²³⁶ Von Bogdandy & Villarreal, *supra* note 68, at 16.

perceiving them as credible.²³⁷ The almost universal non-compliance with WHO's recommendations may have to do with the fact that the statement was too terse and not accompanied by a clear, detailed justification that could assuage States Parties' fears and anxieties.²³⁸ This may have given States the impression that such advice was incorrect and something bolder was needed.²³⁹ Still, if States Parties had doubts about the effectiveness of the measures recommended by WHO, they could have approached the organization requesting further advice.²⁴⁰

One author has argued that by sending a clear message about the seriousness of the outbreak, the declaration of a PHEIC serves as a signal to some states to overreact.²⁴¹ Still, a decision on such grave matters cannot be made in the spur of the moment—States Parties have the duty to justify their decision. The system follows the “basic logic . . . of comply or explain—a known instrument of global governance.”²⁴² Thus, even if one considers that the “available specific guidance or advice” from WHO did not rule out travel bans entirely, States Parties also had to “base”²⁴³ their determination upon scientific principles and available scientific evidence of a risk to human health, or where such evidence was insufficient, the available information including from WHO and other relevant intergovernmental organizations and international bodies.²⁴⁴

Decisions on additional health measures need to be evidence-based; that is, they must be “generated by the ‘methods of science’” and stand the test of scientific judgment.²⁴⁵ The duty to base additional health measures upon scientific principles

237 Gian Burci, *The Outbreak of COVID 19 Coronavirus: Are the International Health Regulations Fit for Purpose?*, EJIL:TALK! (Feb. 27, 2020), <https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/>; Burci, *supra* note 70, at 214-215; Von Tigerstrom, Halabi & Wilson, *supra* note 43, at 3.

238 Burci, *supra* note 70, at 215.

239 Eskild Petersen et al., *COVID-19 Travel Restrictions and the International Health Regulations—Call for an Open Debate on Easing of Travel Restrictions*, 94 INT'L J. INFECTIOUS DISEASES 88, 89 (2020); von Tigerstrom & Wilson, *supra* note 43, at 1; Nick Wilson, Lucy Barnard & Michael Baker, *Rationale for Border Control Interventions and Options to Prevent or Delay the Arrival of Covid-19 in New Zealand: Final Commissioned Report for the New Zealand Ministry of Health* 1, 3 (2020), https://www.health.govt.nz/system/files/documents/publications/final_report_for_moh_-_border_control_options_for_nz_final.pdf (“WHO advice on travel restrictions is very general and does not address the needs of islands or consider very severe pandemics.”).

240 IHR, *supra* note 3, at arts. 13(3), (6).

241 Worsnop, *supra* note 104, at 12, 20-21.

242 Von Bogdandy & Villarreal, *supra* note 68, at 15.

243 According to the *Stellenbosch Consensus*, the use of the word “base” “suggests that states have some margin of appreciation in how they render their determination of an additional health measure” *Stellenbosch Consensus*, *supra* note 159, at 22.

244 As noted in the *Stellenbosch Consensus*, “[t]he use of ‘and’ rather than ‘or’ in paragraph 2 signals that the sources of information listed in paragraphs 2(a) to 2(c) must be cumulatively present when states are determining whether to apply additional health measures.” *Stellenbosch Consensus*, *supra* note 159, at 22.

245 *Stellenbosch Consensus*, *supra* note 159, at 23-24.

and available evidence parallels similar requirements in the agreements of the World Trade Organization (WTO), namely the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).²⁴⁶ Therefore, decisions issued by WTO panels and the Appellate Body may be useful interpretive tools when examining Article 43 of the IHR.²⁴⁷ Drawing on the rich jurisprudence of the WTO, the Stellenbosch Consensus formulates the following rules:

First, before implementing additional health measures, states must consider whether there is a rational relationship between the measure being implemented and the scientific principles and available scientific evidence cited to support them. Second, scientific evidence may be derived from minority or non-dominant scientific experts, but the evidence must represent more than just an opinion and must consist of a bona fide scientific risk assessment exercise. Third, in determining whether a measure is necessary to achieve a stated objective, the measure must contribute substantially to the objective. Alternatives will be deemed as “reasonably available” if they practically serve the level of health protection chosen by a state and are not simply alternatives “in theory.”²⁴⁸

Science is the key metric in determining the necessity of additional health measures.²⁴⁹ Governments should defer to epidemiologists’ judgment concerning settled science, that is, in matters where a scientific consensus has been

²⁴⁶ Fidler & Gostin, *supra* note 189, at 91; Fidler, *supra* note 63, at 382. See The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), WORLD TRADE ORG. at art. 2(2), https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm (“Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.”); *id.* at art. 51(1) (“Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”).

²⁴⁷ *Stellenbosch Consensus*, *supra* note 159, at 45-46; *id.* at 59-60 (“Even if not an authoritative source of interpretation, case law from the WTO may provide invaluable insight or logic, and it certainly qualifies as a supplementary means of interpretation . . . since WTO case law constitutes an authoritative expression of the obligations in force for WTO member . . .”). Caroline Foster, *Justified Border Closures Do Not Violate the International Health Regulations 2005*, EJIL:TALK! (June 11, 2020), <https://www.ejiltalk.org/justified-border-closures-do-not-violate-the-international-health-regulations-2005> (“Together the IHR and the SPS Agreement form the leading international instruments on health-based border closures, whether to persons or to goods. Helpful insights into how the IHR may function in relation to border closures can be gained by reading the IHR in the light of the SPS Agreement.”).

²⁴⁸ *Stellenbosch Consensus*, *supra* note 159, at 59-60.

²⁴⁹ Fidler, *supra* note 93, at 184.

consolidated. However, governmental decisions about what measures to implement during a pandemic outbreak and when to implement them are often made in a context of scientific uncertainty.²⁵⁰ This is especially so when the nature and dangerousness of the disease are unknown: the decision-making process is clouded by interrogations about the incubation period, mode of transmission, fatality rate, etc.²⁵¹ In these circumstances, the degree of deference owed to epidemiologists is lower due to the absence of a reliable scientific consensus.²⁵² Some authors argue that COVID-19 is one such case, that is, that a scientific consensus has not yet been formed concerning the best course of action.²⁵³ The urgency in findings answers to the coronavirus even changed the way science is done.²⁵⁴

Governments have to decide based on incomplete, tentative information, not mature scientific evidence.²⁵⁵ In such a trying and uncertain context, it is only fair to concede a certain measure of deference to States' decisions about what measures they deem necessary²⁵⁶ instead of immediately assuming that such choices are unsubstantiated.²⁵⁷ According to Foster, the SPS Agreement provides useful guidance in this regard as it gives States greater regulatory freedom in situations

250 Gostin, *supra* note 8, at 571; Gostin & Berkman, *supra* note 159, at 147; Weituo Zhang & Bi-yun Qian, *Making Decisions to Mitigate COVID-19 with Limited Knowledge*, LANCET INFECTIOUS DISEASES 1 (Apr. 7, 2020); Lee et al., *supra* note 38, at 1594.

251 DAVIES, KAMRADT-SCOTT & RUSHTON, *supra* note 54, at 120-122; Suk, *supra* note 50, at 2; Kenwick & Simmons, *supra* note 8, at 3.

252 Neil Levy & Julian Savulescu, *Epistemic Responsibility in the Face of a Pandemic*, 7 J. L. & BIOSCIENCES 1, 2 (2020).

253 *Id.* at 7. *Id.* ("For those decision-makers who must settle policy, [COVID-19] is a perfect epistemic storm."); *see also* Foster, *supra* note 247.

254 Ed Yong, *How Science Beat the Virus. And What it Lost in the Process*, ATLANTIC (Dec. 14, 2020), <https://www.theatlantic.com/magazine/archive/2021/01/science-covid-19-manhattan-project/617262>.

255 The rush in finding answers may even compromise the credibility of research outcomes, with some scholarly papers being withdrawn after their fragilities had been exposed. *See* John Ioannidis, *Coronavirus Disease 2019: The Harms of Exaggerated Information and Non-Evidence-Based Measures*, 50 EUR. J. CLINICAL INVESTIGATION 1 (2020).

256 Antonio Coco & Talita de Souza Dias, *Prevent, Respond, Cooperate: States' Due Diligence Duties Vis-à-Vis the COVID-19 Pandemic*, 11 J. INT'L HUMANITARIAN LEGAL STUD. 218, 220 (2020); Joan Hartman, *Derogation from Human Rights Treaties in Public Emergencies—A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT'L L.J. 1, 2 (1981); *see also* Evan Criddle, *Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference*, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW (Evan Criddle ed., 2014). More generally, *see* Andrew Legg, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY* (2012).

257 Cindy Nelson, *An Unnecessary Sacrifice: Restrictions on the Right of Freedom of Movement in an Effort to Establish an Effective Global AIDS Policy*, 13 DICK. J. INT'L L. 177, 184 (1994); von Tigerstrom & Wilson, *supra* note 43, at 2; von Bogdandy & Villarreal, *supra* note 68, at 16.

of scientific uncertainty than the IHR.²⁵⁸

This context of doubt may also increase the relevance of the precautionary principle, frequently invoked in situations of scientific uncertainty, namely in the field of environmental policymaking.²⁵⁹ Without offering a technical delineation of the concept,²⁶⁰ the European Commission stated that it is applicable in “those specific circumstances where scientific evidence is insufficient, inconclusive[,] or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection.”²⁶¹ Even if not expressly named, the principle has implicitly steered some public measures deployed in the context of pandemics,²⁶² for instance, justifying the implementation of lockdowns during COVID-19.²⁶³ It has been argued that the same approach can be taken regarding travel bans.²⁶⁴

The IHR acknowledge that in some cases, available scientific evidence is insufficient. In such situations, governments may instead refer to the available information from WHO and other relevant intergovernmental organizations and international bodies.²⁶⁵ However, the regulations do not clarify what level of scientific evidence or information qualifies as sufficient.²⁶⁶ According to the Stellenbosch Consensus, additional measures may not be based on evidence (because it is not available) but cannot be totally unscientific: “[A] process of risk assessment is not merely a formality; states can err on the side of caution during

258 Foster, *supra* note 247.

259 Lawrence Gostin & James Hodge Jr., *U.S. Emergency Legal Responses to Novel Coronavirus: Balancing Public Health and Civil Liberties*, 323 J. AM. MED. ASS’N 1131, 1132 (2020). See, e.g., JACQUELINE PEEL, *THE PRECAUTIONARY PRINCIPLE IN PRACTICE: ENVIRONMENTAL DECISION-MAKING AND SCIENTIFIC UNCERTAINTY* (2005); BIODIVERSITY AND THE PRECAUTIONARY PRINCIPLE: RISK AND UNCERTAINTY IN CONSERVATION AND SUSTAINABLE USE (Rosie Cooney & Barney Dickson ed., 2005).

260 See JOAKIM ZANDER, *THE APPLICATION OF THE PRECAUTIONARY PRINCIPLE IN PRACTICE: COMPARATIVE DIMENSIONS* 26-31 (2010) (discussing several attempts at a definition).

261 *Communication from the Commission on the Precautionary Principle*, EUR. COMM’N (Feb. 2, 2000), <https://op.europa.eu/en/publication-detail/-/publication/21676661-a79f-4153-b984-aeb28f07c80a/language-en>.

262 Gostin, Bayer & Fairchild, *supra* note 44, at 3232.

263 Levy & Savulescu, *supra* note 252, at 9.

264 Foster, *supra* note 247.

265 IHR, *supra* note 3, at art. 43(2)b. As noted in the *Stellenbosch Consensus*, the word “competent” is used in the French version of the IHR instead of the French equivalent for “relevant.” Because the two concepts do not have interchangeable meanings, it is preferable to favor the term “competent,” that is, to understand this provision as referring to international organizations or bodies that have the mandate and ability (such as the scientific expertise and technical resources) to issue such information. *Stellenbosch Consensus*, *supra* note 159, at 24-25 (offering a list of organizations that may be considered competent for the purposes of this provision).

266 *Stellenbosch Consensus*, *supra* note 159, at 24.

risk assessment, but the exercise of risk assessment itself . . . must be undertaken and must withstand scientific scrutiny.”²⁶⁷ The authors of the Consensus conclude:

At minimum, there should be a rational and proportional connection between the legitimate aim that the additional health measure is seeking to address and the scientific evidence underpinning the decision to implement the health measure. Such scientific evidence need not be the monolithic view or opinion of all scientists but must withstand scientific scrutiny in the discipline of public health.²⁶⁸

The crux of the question is thus the following: is there a rational connection between travel bans and the reduction of contagion? Infectious diseases need to move to propagate.²⁶⁹ Hence, common sense seems to dictate that if you prevent people from moving, you reduce the mobility of the virus and thereby the spread of the contagion. However, the epidemiological reality is not so black and white.

New Zealand, one of the countries that implemented strict travel restrictions, presented several public health rationales that may apply during the initial stages of the pandemic (nicknamed “keep it out” and “stamp it out” phases):

1. Opportunity to better understand the nature of the pandemic and its health impact to assess a proportionate response. This particularly applies to novel agents where key characteristics are unknown (far more rapid decisions will be possible for well characterised infectious agents)
2. Opportunity to decide whether a combination of border controls may be sufficient to entirely exclude a pandemic from a country or region
3. Opportunity to push the period of maximum transmission into a season with less respiratory pathogen transmission . . .
4. Opportunity to improve organisation of healthcare services to maximise effectiveness and ensure infection control
5. Opportunity to build trust with health authorities and better prepare the population psychologically, including for severe

²⁶⁷ *Id.* at 67.

²⁶⁸ *Id.* at 24.

²⁶⁹ Tim Cresswell, *Valuing Mobility in a Post COVID-19 World*, 16 *MOBILITIES* 1, 5 (2020).

outcomes and potentially for difficult rationing decisions

6. Opportunity for development, production, and distribution of vaccine
7. Opportunity for evolutionary processes to reduce severity of a novel infectious agent²⁷⁰

Travel restrictions and outright entry bans may be effective when the rate of transmission inside the country is still very low.²⁷¹ However, if local numbers are already at a high level, travel bans become less effective.²⁷² The particular circumstances of the case should be considered, namely the rate of local transmission, the rate of transmission in source countries, and the number of travelers entering the respective country.²⁷³ These measures may work better, for instance, in the context of island nations.²⁷⁴

While states enjoy some margin of appreciation to adjust measures to their particular context, travel bans and other measures must be in line with the public health considerations that underpin the IHR.²⁷⁵ If the contagion is already spreading locally, how can one claim that travel bans “contribute substantially” to their stated objective?²⁷⁶ And if the purpose of entry bans is to “keep the disease out,” what is the health rationale of exit bans? These measures seem hard to justify when border closure is normally perceived as a way to “keep the ill out.” Were countries that adopted exit bans doing it out of altruism for other States and their populations?

WHO recently stated that public health measures may reduce risk but not achieve a “zero risk,” arguing that a “risk-based approach to international travel is needed.”²⁷⁷ The problem is that entry bans treat travelers as a risk that cannot be

270 Wilson, Barnard & Baker, *supra* note 239, at 4.

271 Lindsay Wiley, *Public Health Law and Science in the Community Mitigation Strategy for Covid-19*, J. L. & BIOSCIENCES 1, 6 (2020); Russell et al., *supra* note 23, at e13; Koopmans, *supra* note 233, at 74.

272 Russell et al., *supra* note 23, at e13. The United States of America, for example, closed its borders to travelers from the European Union even though its infection rate was higher. *See* Lutterbeck, *supra* note 60, at 39.

273 Russell et al., *supra* note 23, at e13-e14, e19.

274 Matt Boyd et al., *Protecting an Island Nation from Extreme Pandemic Threats: Proof-of-Concept Around Border Closure as an Intervention*, 12 PLOS ONE 1, 10 (2017).

275 Stellenbosch Consensus, *supra* note 159, at 23.

276 *Id.* at 67; von Tigerstrom & Wilson, *supra* note 43, at 2 (“Any type of restriction that targets specific countries becomes increasingly difficult to justify once other countries begin reporting similar or larger numbers of cases.”).

277 *Considerations for Implementing a Risk-based Approach to International Travel in the Context of COVID-19*, WORLD HEALTH ORG. 1 (Dec. 16, 2020), <https://www.who.int/publications/i/item/WHO-2019-nCoV-Risk-based-international-travel-2020.1>.

tolerated. Again, citing WHO, “[i]nternational travellers should not be categorized as suspected COVID-19 cases.”²⁷⁸

C. Proportionality

The necessity test is closely associated with an element of proportionality. On limitations, General Comment No. 27 states²⁷⁹:

14. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.
15. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.
16. States have often failed to show that the application of their laws restricting the rights enshrined in [A]rticle 12, paragraphs 1 and 2, are in conformity with all requirements referred to in [A]rticle 12, paragraph 3. The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality.

According to the Siracusa Principles, “[i]n applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.”²⁸⁰ In addition, when limiting certain rights on public health grounds, “[d]ue regard shall be had to the international health regulations of the World Health Organization.”²⁸¹ Again, WHO’s recommendations are an important parameter to consider when conducting the proportionality test.²⁸²

²⁷⁸ *Id.* at 5.

²⁷⁹ *General Comment No. 27: Article 12 (Freedom of Movement)*, *supra* note 133, ¶¶ 14-15.

²⁸⁰ *Siracusa Principles*, *supra* note 158, at ¶ 11.

²⁸¹ *Id.* at ¶ 26.

²⁸² Von Bogdandy & Villarreal, *supra* note 68, at 17.

Regarding derogations from the ICCPR, such derogations are also subject to a requirement of proportionality. In its statement on ICCPR derogations related to COVID-19, the Human Rights Committee highlighted that any derogating measure should be strictly necessary and proportional.²⁸³ In line with the ICCPR's preference for limitations over derogations,²⁸⁴ the Committee also made the following recommendations:

Where possible, and in view of the need to protect the life and health of others, States parties should replace COVID-19-related measures that prohibit activities relevant to the enjoyment of rights under the Covenant with less restrictive measures that allow such activities to be conducted, while subjecting them as necessary to public health requirements, such as physical distancing;

States parties should not derogate from Covenant rights or rely on a derogation made when they are able to attain their public health or other public policy objectives by invoking the possibility to restrict certain rights.²⁸⁵

Turning to the IHR, they also recognize the principle of proportionality in Article 43(1). Article 43(1) requires that additional health measures “not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.”²⁸⁶ Again, the IHR are aligned with the logic of international human rights law and the SPS Agreement: all these instruments require that the implemented measures not be more restrictive than reasonably available alternatives.²⁸⁷

Apropos the principle of proportionality, WHO states that “governments should ensure there is a reasonable fit between the coercive measures imposed and the public health benefit they seek to achieve” and that “specific measures taken

283 *Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, HUM. RTS. COMM. ¶ 2, b (Apr. 30, 2020), <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>.

284 *General Comment No. 29: Derogations During a State of Emergency*, *supra* note 169, at ¶ 5 (“In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement ([A]rt. 12) or freedom of assembly ([A]rt. 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.”).

285 HUM. RTS. COMM., *supra* note 283, at ¶ 2, b, c.

286 *Stellenbosch Consensus*, *supra* note 159, at 53.

287 Fidler, *supra* note 63, at 383.

must be appropriate to prevent or reduce the threat.”²⁸⁸ Specifically regarding restrictions to freedom of movement, WHO adds:

Any restrictions on freedom of movement should be designed and implemented in a manner that imposes the fewest constraints reasonably possible. Greater restrictions should be imposed only when there are strong grounds to believe that less restrictive measures are unlikely to achieve important public health goals. For example, requests for voluntary cooperation are generally preferable to public health mandates enforced by law or military authorities.²⁸⁹

Saying that additional health measures should be proportional means that they must be calibrated to the risk posed. In the words of a leading expert:

Interventions should be the least restrictive alternative necessary to prevent or ameliorate the health threat. Requiring the least restrictive/intrusive alternative represents a means to impose limits on state interventions consistent with the traditions of privacy, freedom of association, and individual liberties. The standard does not require officials to utilize less-than-optimal interventions. However, they must choose the least intrusive alternative that can best achieve the health objective.²⁹⁰

This begs the question of whether there were reasonably available alternatives to travel bans that would achieve the appropriate level of health protection. An alternative is “reasonably available” when it achieves in practice the same level of health protection aimed by a State.²⁹¹ When choosing which measures to adopt, States will naturally compare the costs of different available measures. Just because a measure is cheap to implement (or, to put it differently, that alternatives are costlier) does not mean it is effective—and thus justified.²⁹² Naturally, the specific context and capacity of countries to deal with the pandemic may be a factor to consider.²⁹³

288 WORLD HEALTH ORG., *supra* note 32, at 29.

289 WORLD HEALTH ORG., *supra* note 198, at 26.

290 Gostin, *supra* note 8, at 572.

291 *Stellenbosch Consensus*, *supra* note 159, at 67 (drawing on the WTO case law).

292 WORLD HEALTH ORG., *supra* note 1988, at 26; *see also* Gostin, *supra* note 8, at 570. According to the Siracusa Principles, “[e]conomic difficulties *per se* cannot justify derogation measures.” *Siracusa Principles*, *supra* note 158, at ¶ 41.

293 Von Tigerstrom & Wilson, *supra* note 43, at 2; Jaya Ramji-Nogales & Iris Goldner Lang, *Freedom of Movement, Migration, and Borders*, 19 J. HUM. RTS. 593, at 598 (2020), <https://www.tandfonline.com/doi/full/10.1080/14754835.2020.1830045>

The goal of the IHR is to achieve an appropriate level of protection against the pandemic with minimum interference with international travel. How to operationalize this requirement is not clear, nor is the definition of an “appropriate” level of protection.²⁹⁴ Asymptomatic individuals are a major concern as they reveal no symptoms and therefore may go undiagnosed by health surveillance systems.²⁹⁵ Travel bans are imposed blindly, especially once reliable tests are available, and seem to presume that every international traveler is an asymptomatic carrier of the disease when, statistically, that is not the case. Regardless of whether the individual indeed represents “actual, clear, present, or imminent danger” to public health (to borrow from the language of the Siracusa Principles),²⁹⁶ his freedom of movement is suppressed. As argued by one author, “restrictions should be applied only to people suffering from the disease, or likely carriers, and not to regions or nations as a whole.”²⁹⁷

Caution recommends that risks be minimized. Ensuring that cautionary measures are proportionate is especially difficult in an emergency situation.²⁹⁸ Still, it seems particularly difficult to argue that the principle of proportionality is respected in the application of travel bans.²⁹⁹ Many governments seem to assume that strong measures are strictly necessary and that, in case of doubt, public health is best served by erring on the side of the harshest measure.³⁰⁰ There are, however, alternatives—some expressly suggested by WHO—that would be less restrictive of international travel, including social distancing, regular testing, quarantine, and contact tracing.³⁰¹ Quarantines and isolation also raise their own legal and ethical

294 *Stellenbosch Consensus*, *supra* note 159, at 30-32. This principle is especially difficult to operationalize when countries are faced with “an unusual outbreak.” Yiu, Yiu & Li, *supra* note 235, at 7; *see also* Ramji-Nogales & Goldner Lang, *supra* note 293, at 597 (emphasizing the scientific uncertainty surrounding COVID-19).

295 *See* Hongjun Zhao et al., *COVID-19: Asymptomatic Carrier Transmission Is an Underestimated Problem* 148 *EPIDEMIOLOGY & INFECTION* 1 (2020); Andreas Kronbichler et al., *Asymptomatic Patients as a Source of COVID-19 Infections: A Systematic Review and Meta-Analysis*, 98 *INT’L J. INFECTIOUS DISEASES* 180 (2020).

296 *Siracusa Principles*, *supra* note 158, at ¶ 54.

297 Polly Price, *Infecting the Body Politic: Observations on Health Security and the Undesirable Immigrant*, 63 *U. KAN. L. REV.* 926 (2015).

298 Alessio Paccès & Maria Weimer, *From Diversity to Coordination: A European Approach to COVID-19*, 11 *EUR. J. RISK REGUL.* 283, 286 (2020).

299 Richardson & Devine, *supra* note 179, at 26; Habibi et al., *supra* note 39, at 664.

300 Levy & Savulescu, *supra* note 252, at 13 (“[G]overnments may have an incentive to engage in spectacular interventions in the face of a public health crisis. The penalty, in terms of public opprobrium, for underreacting might be very much greater than the penalty for overreacting.”).

301 Meier, Habibi & Yang, *supra* note 39, at 1436; Gostin & Hodge Jr., *supra* note 259, at 1132; Micha Kaiser et al., *Interventions with Positive Side-Effects: COVID-19 Non-Pharmaceutical Interventions and Infectious Diseases in Europe*, *INST. LAB. ECON.* 12 (2020), <https://www.iza.org/publications/dp/13927/interventions-with-positive-side-effects-covid-19-non-pharmaceutical-interventions-and-infectious-diseases-in-europe>; Jakub Hlávka & Lisa Bari, *Travel Bans Should Be Based on Evidence, not Politics or Fear*, *STAT* (Jan. 22, 2021),

quandaries. Still, there is an alleged public health rationale to them: individuals are separated because they have been exposed to an infectious disease (quarantine) or have already been infected.³⁰²

Blanket travel bans are “indiscriminate, overbroad, excessive, or without evidentiary support” because there is no individualized risk assessment.³⁰³ The Secretary-General of the United Nations himself acknowledges this, stating:

While international law permits certain restrictions on freedom of movement, including for reasons of security and national emergency like health emergencies, restrictions on free movement should be strictly necessary for that purpose, proportionate and non-discriminatory. The availability of effective and generalised testing and tracing, and targeted quarantine measures, can mitigate the need for more indiscriminate restrictions.³⁰⁴

In the toolbox of public health measures available during a pandemic, travel bans are at one end of the harshness scale. The problem is that these measures are easier to implement than convincing the entire population of a country to implement domestic restrictions.³⁰⁵ It is easier to externalize the problem than to internalize solutions. In the words of one author, “border restrictions preserve possibly fictitious ideas that the threat is foreign, the State is competent, and the domestic population is and can be kept wholesome and healthy.”³⁰⁶ It is telling that

<https://www.statnews.com/2021/01/22/travel-bans-should-be-based-on-evidence-not-politics-or-fear>.

302 Wendy Parmet & Michael Sinha, *Covid-19 — The Law and Limits of Quarantine*, 382 NEW ENG. J. MED. 1 (2020); A. Wilder-Smith & D. O. Freedman, *Isolation, Quarantine, Social Distancing and Community Containment: Pivotal Role for Old-Style Public Health Measures in the Novel Coronavirus (2019-nCoV)*, 27 J. TRAVEL MED. 1 (2020). See Wiley, *supra* note 271, at 7 (“Imposing a travelers’ quarantine . . . requiring individuals entering the area to be separated from others for a reasonable incubation period, would provide a less restrictive alternative to completely closed borders.”); Lawrence Gostin, Eric Friedman & Sarah Wetter, *Responding to Covid-19: How to Navigate a Public Health Emergency Legally and Ethically*, 50 HASTINGS CTR. REP. 8, 11 (2020) (“Quarantine and isolation for Covid-19 should be ordered only if the person is known or highly suspected to have been exposed to the disease, and only for the maximum duration of incubation . . .”).

303 Gostin & Hodge Jr., *supra* note 259, at 1132.

304 *COVID-19 and Human Rights: We Are All in This Together*, UNITED NATIONS 4 (Apr. 2020), https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf.

305 Kenwick & Simmons, *supra* note 8, at 10-11; Pillinger, *supra* note 58 (“From a public-health standpoint, encouraging people to wash their hands and cough into their elbows is good policy. But politically, it’s insufficient to instill public confidence in health authorities; more dramatic action is needed.”).

306 Kenwick & Simmons, *supra* note 8, at 10.

more countries adopted border restrictions than social distancing rules.³⁰⁷

Travel bans are favored by States but also offer the domestic population a placebo. A study presented in March 2020 revealed that most respondents believed domestic travel restrictions are not effective while simultaneously defending the closure of borders.³⁰⁸ Previous studies have demonstrated that citizens overestimate the effectiveness of border restrictions.³⁰⁹ People prefer to close borders than to stay home—even if the virus is circulating in their city—and travel bans allow them to externalize their fears.³¹⁰

Crucially, the canon of proportionality also requires that measures be exceptional and temporally adjusted to what is strictly required to address the pandemic.³¹¹ As stated by the Human Rights Committee, measures should be adopted “on a temporary basis”³¹²; they should only be in place while the pandemic lasts.³¹³ Governments need to decide when to start implementing a measure and when to discontinue it.

Timing is of the essence. As mentioned, WHO made several statements where, without recommending the adoption of travel restrictions, it recognized that they might be effective under certain circumstances—namely, at the beginning of an outbreak.³¹⁴ According to WHO, this could allow countries to gain time and prepare their response measures.³¹⁵ There is a parallel between travel restrictions and derogations as tools that allow countries to “buy time.” Derogations, in general, are perceived by some authors as a rational response to uncertainty that allows governments to buy time and “breathing space” to confront a crisis.³¹⁶ WHO also recognizes that travel restrictions could be useful in countries with few international connections and limited response capacity.³¹⁷

For travel restrictions to produce some effect, they must be adopted at the

³⁰⁷ *Id.* at 6.

³⁰⁸ *Public Divided on Whether Isolation, Travel Bans Prevent COVID-19 Spread; Border Closures Become More Acceptable*, IPSOS (March 24, 2020), <https://www.ipsos.com/en-hk/public-divided-whether-isolation-travel-bans-prevent-covid-19-spread-border-closures-become-more> (“While it might seem like a contradiction that we question whether isolation will stop the virus but still want closed borders, the public supports strong action from governments even if they might question its efficacy . . .”) (quoting Darrell Bricker).

³⁰⁹ Worsnop, *supra* note 54, at 373.

³¹⁰ Kenwick & Simmons, *supra* note 8, at 2, 19.

³¹¹ *General Comment No. 29: Derogations During a State of Emergency*, *supra* note 169, at ¶ 2; Toebe, *supra* note 32, at 496; Spadaro, *supra* note 28, at 322-323.

³¹² HUM. RTS. COMM., *supra* note 283, at ¶ 2. The Committee adds that “[d]erogations must, as far as possible, be limited in duration, geographical coverage and material scope . . .” *Id.* at ¶ 2a.

³¹³ Federica Paddeu & Michael Waibel, *The Final Act: Exploring the End of Pandemics*, 114 AM. J. INT’L L. 698 (2020); von Bogdandy & Villarreal, *supra* note 68, at 21-22.

³¹⁴ WORLD HEALTH ORG., *supra* note 71, at 10; sources cited *supra* notes 72-73.

³¹⁵ Sources cited *supra* notes 71-73.

³¹⁶ Hafner-Burton, Helfer & Fariss, *supra* note 165, at 675, 680.

³¹⁷ WORLD HEALTH ORG., *supra* note 73.

earliest moment possible.³¹⁸ However, many countries only introduced travel bans several weeks into the pandemic when it was already too late to “stamp out” the virus.³¹⁹ In any case, such measures should be short in duration, proportional to public health risks, and reconsidered regularly.³²⁰ Even if such measures seem necessary and proportional at an early stage of a pandemic, that is no longer the case once the virus is already spreading within the community. Even worse, as discussed below, in many countries travel bans remained in place well beyond the initial stage of the pandemic. Therefore, such measures cannot be considered exceptional and temporarily adjusted: they became more permanent features of the fight against COVID-19.

D. Compatibility with Other Rights: Equality and Non-Discrimination

The third major requirement is that public health measures be consistent with all other rights recognized in the ICCPR.³²¹ Regarding limitations to the freedom of movement, the Human Rights Committee stated:

The application of the restrictions permissible under [A]rticle 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in [A]rticle 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³²²

318 Chad Wells, *Impact of International Travel and Border Control Measures on the Global Spread of the Novel 2019 Coronavirus Outbreak*, 117 PROC. NAT'L ACAD. SCI. 7504, 7507-08 (2020); Koopmans, *supra* note 233, at 74; von Tigerstrom & Wilson, *supra* note 43, at 2 (“By the time WHO acknowledged, in late February, that restrictions on travel might have some limited value, the window of opportunity to prevent a pandemic had long been closed.”).

319 This was the case in Europe. See Kevin Linka et al., *Outbreak Dynamics of COVID-19 in Europe and the Effect of Travel Restrictions*, 23 COMPUT. METHODS BIOMECHANICS & BIOMEDICAL ENG'G 710, 714 (2020); Sergio Carrera & Ngo Chun Luk, *In the Name of COVID-19: Schengen Internal Border Controls and Travel Restrictions in the E.U.*, EUR. PARLIAMENT 68-69 (2020), [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2020\)659506](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2020)659506).

320 Sources cited *supra* notes 72-73, 78.

321 *General Comment No. 27: Article 12 (Freedom of Movement)*, *supra* note 133, at ¶ 11.

322 *Id.* at ¶ 18; see also ICCPR, *supra* note 124, at art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property,

Measures adopted by states should not be arbitrary or discriminatory. In its discussion about the position of aliens under the covenant, the Human Rights Committee stated:

[T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in [A]rticle 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens ([A]rticle 25), while [A]rticle 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.³²³

The Committee also added:

Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with [A]rticle 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under [A]rticle 12, paragraph 3. Since such restrictions must, *inter alia*, be consistent with the other rights recognized in the Covenant, a State [P]arty cannot, by restraining an alien or deporting him to a third country, arbitrarily prevent his return to his own country ([A]rticle 12, para. 4).³²⁴

Regarding derogations, the Human Rights Committee stated, in the context of COVID-19: "States parties may not resort to emergency powers or implement derogating measures in a manner that is discriminatory, or that violates other obligations that they have undertaken under international law, including under other international human rights treaties from which no derogation is allowed"³²⁵

The IHR also prescribe that measures adopted by States shall be applied in a

birth or other status.").

³²³ HUM. RTS. COMM., *supra* note 146, at ¶ 2.

³²⁴ *Id.* at ¶ 8.

³²⁵ HUM. RTS. COMM., *supra* note 283, at ¶ 2d.

transparent and non-discriminatory manner.³²⁶ WHO considers “distributive justice” (the risks, burdens, and benefits of public health interventions to be shared fairly) as a significant ethical principle to consider when designing health measures.³²⁷ It states:

[P]rinciples of distributive justice require that public health measures do not place unfair burdens on particular segments of the population. Policy-makers should pay specific attention to groups that are the most vulnerable to discrimination, stigmatization[,] or isolation, including racial and ethnic minorities, elderly people, prisoners, disabled persons, migrants[,] and the homeless.³²⁸

Measures restricting freedom of movement (and other human rights for that matter) should be neutral and take into account how they may discriminate in practice against certain groups.³²⁹ The IHR enable WHO to recommend³³⁰ States Parties refuse entry of suspect³³¹ and affected³³² persons and refuse entry of unaffected persons to affected areas.³³³ But the regulations do not foresee the possibility of applying travel bans. These blank measures are not supported by any scientific evidence that those coming from outside pose a particularly high health risk. As stated by Vincent Chetail, “banning entry to any foreigners or those of a particular nationality is, by definition, a collective and automatic denial of admission without any other form of process.”³³⁴ Quarantining all incoming travelers would be much fairer, as it would apply to all travelers, regardless of their status. As stated by WHO, health measures should be applied equitably:

Restrictions on freedom of movement should be applied in the same manner to all persons posing a comparable public health risk. Thus, individuals should not be subject to greater or lesser restrictions for reasons unrelated to the risks they may pose to

326 IHR, *supra* note 3, at art. 42.

327 WORLD HEALTH ORG., *supra* note 32, at 29.

328 WORLD HEALTH ORG., *supra* note 198, at 9.

329 Criddle, *supra* note 256, at 51.

330 IHR, *supra* note 3, at art. 18(1).

331 *Id.* at art. 1(1) (“[S]uspect’ means those persons, baggage, cargo, containers, conveyances, goods or postal parcels considered by a State Party as having been exposed, or possibly exposed, to a public health risk and that could be a possible source of spread of disease . . .”).

332 IHR, *supra* note 3, at art. 1(1) (“[A]ffected’ means persons, baggage, cargo, containers, conveyances, goods, postal parcels or human remains that are infected or contaminated, or carry sources of infection or contamination, so as to constitute a public health risk.”)

333 *Id.* (“[A]ffected area’ means a geographical location specifically for which health measures have been recommended by WHO under these Regulations.”).

334 Chetail, *supra* note 46, at 2.

others, including membership in any disfavoured or favoured social group or class (for example, groups defined by gender, ethnicity, or religion).³³⁵

Discussing former U.S. President Donald Trump's ban on asylum seekers, Lawrence Gostin stated:

It makes no sense. In public health, any time there is a categorical classification—any time there is a category about who you apply your measure to or who you don't—is highly suspect. The courts suspect it. Public health people suspect it. There is no scientific evidence for it. And it's discriminatory.³³⁶

The same logic applies to other categories of international travelers. Travel bans are discriminatory, targeting the mobility of foreigners and migrants. Countries that organized repatriation flights while keeping their borders closed to foreigners were showing that, after all, it was possible to uphold public health without restricting international mobility.³³⁷

Imposing travel bans based on the nationality of travelers reflects a form of “othering.” Social scientists use this concept to describe the practice of treating a group of people as if there is something wrong with them, a phenomenon frequently associated with migrants in health crises.³³⁸ Again, this relates to the illusion that the health threat comes from “outside” and that by keeping “others” out, citizens are “safe.”³³⁹ In addition to being a useless exercise in scapegoating, this posture distracts policymakers and the population from other measures that

335 WORLD HEALTH ORG., *supra* note 198, at 27.

336 Joanna Naples-Mitchell, *There Is No Public Health Rationale for a Categorical Ban on Asylum Seekers*, JUST SEC. (Apr. 17, 2020), <https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers>; Letter from Leaders of Pub. Health Schs., Med. Schs., Hosps., & Other U.S. Insts. to HHS Sec'y Alex Azar & CDC Dir. Robert R. Redfield (May 18, 2020), https://www.publichealth.columbia.edu/sites/default/files/public_health_experts_letter_05.18.2020.pdf (“There is no public health rationale for denying admission to individuals based on legal status.”); *see also* León Castellanos-Jankiewicz, *COVID-19 Symposium: U.S. Border Closure Breaches International Refugee Law*, OPINION JURIS (Apr. 3, 2020), <http://opiniojuris.org/2020/04/03/covid-19-symposium-us-border-closure-breaches-international-refugee-law> (“Absent any proof that migrants constitute an important source of contagion, these new restrictions can hardly pass muster as being proportionate, legitimate or necessary, given that they seem disconnected from immediate public health concerns.”). Castellanos-Jankiewicz is discussing measures implemented by the Trump administration aimed at deporting migrants and asylum seekers, but his considerations apply nevertheless.

337 Ramji-Nogales & Goldner Lang, *supra* note 293, at 597-598.

338 Kim Dionne & Fulya Turkmen, *The Politics of Pandemic Othering: Putting COVID-19 in Global and Historical Context*, INT'L ORG. 1, 2-3 (2020) (online issue).

339 Lutterbeck, *supra* note 60, at 41.

could be much more effective.³⁴⁰ This illusory sensation of security has also been termed “border bias”: “[p]eople consider political boundaries (i.e., state borders) to be physical barriers that can limit the spread of disasters.”³⁴¹

Viruses do not discriminate; contagion knows no borders or nationalities. But measures based on nationality or residence do. As noted by Barbara von Tigerstrom and Kumanan Wilson:

Imposing restrictions based on nationality (rather than travel history) is always suspect, given the weak correlation between nationality and exposure to the virus. Excluding people based on the passport they carry also carries a greater risk of contributing to stigma and discrimination, and the IHR (2005) and other laws require states to respect human rights and avoid discrimination.³⁴²

In their reaction to the pandemic, many countries adopted a nationalistic response,³⁴³ forbidding the entry of non-nationals. Travel restrictions based on nationality or residence status discriminate and stigmatize certain individuals or groups.³⁴⁴ This type of measure leads to the “rise of a new ‘health securitization’ migration rhetoric,”³⁴⁵ where foreigners are blamed for the spread of the epidemic. They undermine the right to work and make a living without offering major public health benefits. As stated by one author, “[t]he attempt to protect citizens by shutting borders and excluding non-nationals ignores the propensity of the virus to traverse borders at will, including in the bodies of citizens whose entry is unrestricted and unmonitored.”³⁴⁶ This leads to discrimination between those within and outside borders and creates puzzling paradoxes:

³⁴⁰ Dionne & Turkmen, *supra* note 338, at 11.

³⁴¹ Arul Mishra & Himanshu Mishra, *Border Bias: The Belief That State Borders Can Protect Against Disasters*, 21PSYCH. SCI. 1582, at 1583 (2010).

³⁴² Von Tigerstrom & Wilson, *supra* note 43, at 2.

³⁴³ Peter Danchin et al., *The Pandemic Paradox in International Law*, 114 AM. J. INT’L L. 598, 600 (2020); Meier, Habibi & Yang, *supra* note 39, at 1436; Gostin, Habibi & Meier, *supra* note 38, at 378-379; Ferhani & Rushton, *supra* note 41, at 460; Sergio Carrera & Ngo Chun Luk, *Love Thy Neighbour? Coronavirus Politics and Their Impact on EU Freedoms and Rule of Law in the Schengen Area*, CTR. FOR EUR. POL’Y STUD. 37 (2020), <https://www.ceps.eu/ceps-publications/love-thy-neighbour>.

³⁴⁴ Lawrence Gostin, *International Infectious Disease Law: Revision of the World Health Organization’s International Health Regulations*, 291 J. AM. MED. ASS’N 2623, 2626 (2004); Robert Archer, *Pandemic Influenza Planning and Response—Transnational Issues for Governments*, in ADDRESSING ETHICAL ISSUES IN PANDEMIC INFLUENZA PLANNING: DISCUSSION PAPERS 85, 99 (2008).

³⁴⁵ Abhinav Chugh, *Will COVID-19 Change How We Think About Migration and Migrant Workers?*, WORLD ECON. F. (May 22, 2020), <https://www.weforum.org/agenda/2020/05/covid-19-coronavirus-migration-migrant-workers-immigration-policy-health-securitization-risk-travel-bubbles>.

³⁴⁶ Danchin et al., *supra* note 343, at 600.

But the irony is that in the context of a pandemic, such purported defense of sovereignty ultimately risks undermining it. This is evident in the tension between external border controls and internal protection measures. The opposing pulls of individual freedom and social order come to a head in the duality best described as “the right to protect, the freedom to infect”: whereby a state is buoyed by popular support for its exclusion of others but confronted by a populace unwilling to obey internal social distancing, lockdown, or mask-wearing requirements. Exclusion of others fits neatly into previous populist behavior, enjoying the same domestic support as populist border controls did pre-pandemic. The visible alien has become invisible: a disease rather than a person, but still couched in terms of the other. In contrast, internal measures are seen as a constraint on freedom, an unacceptable imposition on the lives of the everyday citizen.³⁴⁷

After several European states closed their borders, an exception emerged for migrant workers in qualifying “critical professions.”³⁴⁸ Yet, this exception was not based on any public health rationale. While it is understandable to restrict unnecessary traveling, such as tourism, this type of measure implies that some people should be allowed to travel while others should not, even if their reasons are also relevant, for example, for family reunions.

A few countries went even further and closed their border to their own nationals and residents. This is especially problematic as it affects not only foreigners but also people with a stable connection to the country, such as nationals and residents. Determining whether travel bans are lawful depends on the personal scope of the applicable rules. The IHR apply to “travelers,” defined as “natural person[s] undertaking an international voyage.”³⁴⁹ The IHR do not distinguish between nationals, residents, foreigners, etc. It applies to anyone who wishes to cross international borders. Differently, human rights treaties are more limited in their gamut, decomposing the freedom of movement into two different rights—the right to leave and the right to return, each one with its scope of application.

³⁴⁷ *Id.* at 604.

³⁴⁸ See Manès Weisskircher, Julia Rone & Mariana Mendes, *The Only Frequent Flyers Left: Migrant Workers in the E.U. in Times of Covid-19*, OPEN DEMOCRACY (Apr. 20, 2020), <https://www.opendemocracy.net/en/can-europe-make-it/only-frequent-flyers-left-migrant-workers-eu-times-covid-19>.

³⁴⁹ IHR, *supra* note 3, at art. 1(1) (An “international voyage” means “a voyage involving entry into the territory of a State other than the territory of the State in which that traveller commences the voyage.”) Richardson & Devine, *supra* note 179, at 13 (“The regulations specify a unique class of persons whose human rights may be impacted—travelers—as a subset of the class of all persons.”).

We have argued that denying entry to foreigners breaches the IHR as it is a disproportionate and discriminatory measure; there is no scientific evidence demonstrating that foreigners carry the disease any more than nationals do. Still, these measures are not a breach of the ICCPR as it does not recognize the right of aliens to enter or reside in the territory of a foreign country.³⁵⁰ Differently, entry bans, when extended to nationals and residents, are a breach of the return to return, which the ICCPR protects. During a pandemic, it is only natural that people feel an urge to return “home.” While the right to return home may be limited when individuals are infected, they should be allowed to return as soon as possible, namely, once they no longer present a risk of transmitting the virus.³⁵¹ In the words of Gostin, Ronald Bayer, and Amy Fairchild, “people have a right to a place to reside and should not suffer the indignity of forced exclusion from their home country.”³⁵²

Because the right to return is the most uncontroversial facet of freedom of movement, it has received scarce attention in scholarship.³⁵³ However, as in other respects, COVID-19 response measures raise the need to pay greater attention to how this human right is structured and implemented in practice. By closing their borders to their own nationals, States create two tensions. First, a tension between “resident and non-resident nationals, reinforcing a certain sense of the primacy of territory over nationality.”³⁵⁴ Second, “a tension between resident and non-resident nationals and between national and non-national residents.”³⁵⁵ It has been argued that, in the case of returning citizens, “the danger of transmission has to be weighed against a very clear stance by human rights in favor of the ability of nationals to re-enter their own country.”³⁵⁶ Because of the broad concept adopted in the covenant, the same reasoning should apply to other individuals with a strong attachment to the country, namely permanent residents and potentially even foreigners on a student visa.

Migrant workers were particularly affected by absolute entry bans. The United Nations Committee on Migrant Workers and the United Nations Special Rapporteur on the Human Rights of Migrants called on States to “protect the human rights of migrants and their families, irrespective of their migration

350 HUM. RTS. COMM., *supra* note 146, ¶ 5. See § 2.2c.

351 Gostin, Bayer & Fairchild, *supra* note 44, at 3235.

352 *Id.*

353 Mégret, *supra* note 37, at 323.

354 *Id.* at 323 (discussing the closure of borders by Morocco to its own nationals).

355 *Id.* at 326.

356 Mégret, *supra* note 37, at 323 (The right to return “is a freedom that cannot be denied lightly.”); Richardson & Devine, *supra* note 179, at 29 (“[A]ny COVID-19 restriction, such as closing borders, that does not allow individuals to return to their ‘own country’ would be overbroad and incompatible with the ICCPR.”).

status.”³⁵⁷ In particular, they urged States to:

Guarantee the right of all migrants and their families to return to the country of which they are nationals. Many of them are stranded all over the world as they try to reach their home countries due to border closures or travel restrictions within countries. This obligation must be harmonized with international health standards and guidelines issued by national health authorities, and covers, according to the conditions of each State, measures of protection, access to information, and assistance.³⁵⁸

Migrant workers have also been affected indirectly through the imposition, by a limited number of countries, of exit bans. The right to leave is closely connected with the right to return, as one does not make sense without the other. Article 12(2) of the ICCPR gives “everyone” the right to “leave any country, including his own.” This right may be limited for public health reasons (as it is one of the “above-mentioned rights” referred to in Article 12(3)). However, such limitations need to be consistent with the other rights recognized in the Covenant, including the right to return. If migrant workers are barred from leaving their “host country,” they cannot exercise their right to return to their “home” country. The United Nations Committee on Migrant Workers and the United Nations Special Rapporteur on the Human Rights of Migrants seem to have this scenario in mind when they call upon States Parties to “[g]uarantee the right of all migrants and their families to return to the country of which they are nationals.”³⁵⁹ Exit bans affect not only migrant workers but also other individuals (non-nationals, non-residents) who were abroad during the outbreak of the pandemic and did not have the chance to return to their home countries.

Finally, travel bans also undermine the protection of other fundamental human rights. The pandemic highlights the need to recognize the “interdependence and indivisibility” of human rights.³⁶⁰ Particularly important in connection to international mobility is the right to family reunification. Article 23(1) of the ICCPR states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”³⁶¹ The right to family reunification—normally discussed in the context of migration laws—derives from

357 Comm. on Migrant Workers & Special Rapporteur on the Hum. Rts. of Migrants, *Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants*, UNITED NATIONS (May 26, 2020) <https://www.ohchr.org/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf>.

358 *Id.* at ¶ 13.

359 *Id.*

360 Andreassen et al., *supra* note 209, at 3-4.

361 ICCPR, *supra* note 124, at art. 23(1).

this provision.³⁶² As recognized by WHO, “[e]ven short-term restrictions on freedom of movement can have significant—and possibly devastating—financial and social consequences for individuals, their families, and their communities.”³⁶³ Many countries that imposed travel bans provided no exemptions for nationals’ or residents’ family members.³⁶⁴ As a result, families with different nationalities or residential statuses could not reunite.

In this regard, it is instructive to recall the words of the Human Rights Committee:

It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and *respect for family life arise*.³⁶⁵

Both legal (human rights) and scientific (medical) principles serve as standards against which the validity of additional health measures should be assessed. Because WHO’s guidance on the protection of human rights during pandemics has been weak, States have been able to freely claim that they are taking necessary or effective measures.³⁶⁶ It seems difficult to demonstrate the public health rationale of travel bans, and therefore they breach Article 43 of the IHR. When it comes to the human rights level, one must distinguish according to the status of the individual. Entry bans covering nationals and residents clearly breach the right of return. Exit bans are also problematic because they affect the exercise of the right to return. Both types of measures indirectly prevent family members from exercising their right to family reunification. Foreigners do not have a right to entry to a foreign country but may be affected if they are prevented from leaving as they become unable to exercise their return to return to their home country.

362 See, e.g., Gallya Lahav, *International Versus National Constraints in Family-Reunification Migration Policy*, 3 GLOB. GOVERNANCE 349 (1997); Ryszard Cholewinski, *Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right*, 4 EUR. J. MIGRATION & L. 271 (2002).

363 WORLD HEALTH ORG., *supra* note 198, at 27.

364 Guofu Liu, *COVID-19 and the Human Rights of National Abroad*, 114 AJIL UNBOUND 317, 319 (2020).

365 HUM. RTS. COMM., *supra* note 146, at ¶ 5 (emphasis added).

366 Alicia Yamin & Roojin Habibi, *Human Rights and Coronavirus: What’s at Stake for Truth, Trust, and Democracy?*, HEALTH & HUM. RTS. J. (Mar. 1, 2020), <https://www.hhrjournal.org/2020/03/human-rights-and-coronavirus-whats-at-stake-for-truth-trust-and-democracy>.

III. REPORT, REVIEW, RE-OPEN, RESPECT?

Travel bans qualify as cases of additional health measures that significantly interfere with international traffic.³⁶⁷ Therefore, governments that implement such measures must provide WHO with the public health rationale and relevant scientific information for the measure within forty-eight hours of implementation.³⁶⁸ While the IHR do not clarify, it can be assumed that a public health rationale should consider the elements mentioned in Article 43(2): scientific principles, available scientific evidence of a risk to human health, and any available specific guidance or advice from WHO.³⁶⁹ Again, the level of scientific evidence required to justify additional health measures is unclear. According to the Stellenbosch Consensus, “additional health measures must be supported by a public health rationale that is, at minimum, based on the scientific evidence appraised in paragraph 2.”³⁷⁰

The IHR emphasizes epidemiology over sovereignty.³⁷¹ If States Parties decide to disregard specific guidance or advice from WHO, they bear the burden of justifying their decision. It is not enough to laconically claim to be intervening in the name of public health.³⁷² Additional health measures must be “evidence-based,”³⁷³ and the explanation of their public health rationale should be “adequate.”³⁷⁴ Experience shows that States Parties often fail to comply with these duties.³⁷⁵ This makes it impossible for WHO to exercise its power to, after assessing that information and other relevant information, request that the State Party reconsider the application of the measures.³⁷⁶ According to Adam Ferhani and Simon Rushton, WHO “seems to have been powerless either to demand an explanation from non-reporting states or to challenge the justifications of those who had reported additional health measures.”³⁷⁷

³⁶⁷ IHR, *supra* note 3, at art. 43(3).

³⁶⁸ *Id.* at arts. 43(3), 43(5). WHO shall share this information with other States Parties and share information regarding the health measures implemented. *Id.* at art. 43(3).

³⁶⁹ *Stellenbosch Consensus*, *supra* note 159, at 27-28.

³⁷⁰ *Id.* at 30.

³⁷¹ Fidler, *supra* note 93, at 184.

³⁷² Toebes, *supra* note 32, at 496.

³⁷³ *Report of the Review Committee on the Functioning of the International Health Regulations (2005) in Relation to Pandemic (H1N1) 2009*, WORLD HEALTH ORG. ¶ 28 (May 2011), https://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_10-en.pdf.

³⁷⁴ *Implementation of the International Health Regulations (2005): Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response*, WORLD HEALTH ORG. 80 (May 2016), https://apps.who.int/gb/ebwha/pdf_files/WHA69/A69_21-en.pdf.

³⁷⁵ Ferhani & Rushton, *supra* note 41, at 463; *Stellenbosch Consensus*, *supra* note 159, at 44; Burci, *supra* note 70, at 213.

³⁷⁶ Burci, *supra* note 70, at 213. See IHR, *supra* note 3, at art. 43(4).

³⁷⁷ Ferhani & Rushton, *supra* note 41, at 469.

To the best of our knowledge, there is no publicly available information from WHO or other international organizations regarding additional health measures reported by states. This makes it impossible to know what arguments they used.³⁷⁸ In their study about European Union (EU) Member State's compliance with the requirements contained in the Schengen Borders Code, Sergio Carrera and Ngo Chun Luk concluded that "[n]one of the relevant ministries of interior provided any meaningful explanation of why they considered COVID-19 something 'foreign' from abroad when the virus was already present and spreading across their own territories and populations."³⁷⁹

States Parties to the IHR have a duty to provide a public health rationale where their measures interfere significantly with international traffic. Even if not expressly stated, the situation is quite similar to the evidentiary burden under the Schengen Borders Code: E.U. Member States have an incremental burden of proof to justify and provide evidence on their proportionality.³⁸⁰ The same idea should apply in the context of the IHR. The harsher and more intrusive the public health measure is, the more persuasive and rigorous the scientific evidence advanced to support it should be.³⁸¹ In addition, the burden of proof should increase as time goes by and measures remain in place.³⁸² If States Parties fail to justify their measures or present generic pretexts, they feed perceptions that travel restrictions are based on considerations other than public health (namely, concerns of an economic or political nature).³⁸³

In the human rights arena, the decision-making process by governments is also subject to close scrutiny. As stated in the Siracusa Principles, "[i]n determining whether derogation measures are strictly required by the exigencies of the situation

378 It can be assumed that at least New Zealand did report and justify its measures before WHO. Wilson, Barnard & Baker, *supra* note 239, at 3 ("While the WHO generally advises against travel restrictions, NZ has technically met its International Health Regulations (IHR) obligations by providing a rationale to WHO within the requisite timeframe . . .").

379 Carrera & Luk, *supra* note 319, at 69.

380 *Id.* at 16.

381 Errol Mendes, *Restrictions on Mobility Rights of Canadians During the Pandemic; The Critical Need for Proper Scientific and Public Health Rationales*, 41 NAT'L J. CONST. L. 57, 74 (2020) (discussing health measures from the perspective of Canadian Constitutional law).

382 Carrera & Luk, *supra* note 139, at 16. In the authors' opinion, most EU Member States failed to meet this test: "Most of the Ministries of the Interior have failed to provide evidence-based of the necessity and proportionality of border controls and travel bans, and their expected and documented impacts. . . . There has not been any robust independent evidence provided by the relevant national authorities to rationalise either the extra- or intra-EU travel restriction measures, which are prerequisites for conducting any proportionality test in EU borders and free movement law. And yet, any coercive public policies should be founded on compelling scientific evidence and presented with transparent, clear and robust respect for fundamental rights and ethical principles." Carrera & Luk, *supra* note 343, at 28.

383 *See, e.g.*, Ramji-Nogales & Goldner Lang, *supra* note 293, at 599; Chetail, *supra* note 46, at 2.

the judgment of the national authorities cannot be accepted as conclusive.”³⁸⁴ While the ICCPR does not refer to scientific evidence and principles, it does require States to assess risks.³⁸⁵ Governments have the burden of justifying their measures. As highlighted by the Human Rights Committee on its statement on derogations from the ICCPR in connection with COVID-19:

Where measures derogating from the obligations of States parties under the Covenant are taken, the provisions derogated from and the reasons for the derogation must be communicated immediately to the other States parties through the Secretary-General. *Notification by a State [P]arty must include full information about the derogating measures taken and a clear explanation of the reasons for taking them, with complete documentation of any laws adopted.*³⁸⁶

The Committee stated that several countries had already notified the Secretary-General of measures they had taken or were planning to take derogating from the ICCPR. Several other States Parties, however, had adopted measures without formal notification, and the Committee urged such States to notify the Secretary-General immediately.³⁸⁷ The statement delineates the different requirements and conditions that States must comply with to align their measures with human rights standards. Governments cannot simply base their submissions on the need to calm public anxiety or avoid panic³⁸⁸—measures should not be “imposed merely because of an apprehension of potential danger.”³⁸⁹ They should identify the measures they have implemented or plan to implement and explain why they believe they are appropriate to the risks created by the pandemic.³⁹⁰

The problem is that governments often file “notices of derogation [that] are too general, too brief, and do not give a clear indication of what articles . . . have been suspended.”³⁹¹ In the context of COVID-19, states do not even explain why

384 *Siracusa Principles*, *supra* note 158, at ¶ 57.

385 Von Tigerstrom, *supra* note 179, at 63.

386 HUM. RTS. COMM., *supra* note 283, at ¶ 2 (emphasis added).

387 *Id.* at ¶ 1. The Committee added that “the implementation of the obligation of immediate notification [is] essential for the discharge of its functions, as well as for the monitoring of the situation by other States parties and other stakeholders” *Id.*

388 See Francisco-José Quintana & Justina Uriburu, *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, 114 AM. J. INT’L L. 687, 692 (2020).

389 *Siracusa Principles*, *supra* note 158, at ¶ 54.

390 *Id.* at ¶ 52.

391 JAIME ORÀÀ, HUMAN RIGHTS IN STATE OF EMERGENCY IN INTERNATIONAL LAW 77 (1992); see also Hartman, *supra* note 256, at 21. Laurence R. Helfer, *Rethinking Derogations from Human Rights Treaties*, 115 AM. J. INT’L L. 20, 21 (2021) (“Most notices of derogation are short simple statements listing which rights have been suspended and for how long, and citing to domestic laws or decrees; only a few states have offered more detailed justifications of their actions.”).

a derogation is necessary instead of a restriction.³⁹² If governments challenge the scientific authority of WHO's recommendations without even bothering to justify their decision or do so loosely, they widen the gap between scientific evidence and political action.³⁹³ It is even harder to make such a determination when States do not even report the measures they implement.³⁹⁴ As many of these measures are being lifted, competent bodies may never review them.³⁹⁵

In addition to the obligation to report, States Parties to the IHR also have obligations to review additional health measures within three months of their implementation.³⁹⁶ The obligation to review such measures is a reminder of their temporary nature and the need to substantiate their public health rationale.³⁹⁷

The longer measures remain in place, the harder they become to justify. If travel bans could be justified in the early stages of the pandemic, they make less sense as time goes by. Travel bans are often presented as a way to “keep the ill out.” However, in most countries, this strategy did not work as the virus was already within the borders. As stated by one author, “no two airports in the world are separated by more than [thirty-six] hours of flying time, a period shorter than the incubation time for most infectious diseases.”³⁹⁸ Several months after the first cases of local transmission, were countries with travel bans in place still trying to prevent the “arrival” of the virus? The virus had made its way through national borders, so keeping them closed was an exercise in futility.

States must review their measures taking into account scientific principles, available scientific evidence, and any specific guidance or advice from WHO.³⁹⁹ In July 2020, WHO acknowledged that “[m]any countries ha[d] halted some or all international travel since the onset of the COVID-19 pandemic but now have plans to re-open travel,” offering some advice for national health authorities when resuming international travel.⁴⁰⁰ It also added:

392 Niall Coghlan, *Dissecting COVID-19 Derogations*, VERFASSUNGSBLOG (May 5, 2020), <https://verfassungsblog.de/dissecting-covid-19-derogations>.

393 Petersen et al., *supra* note 239, at 88; Alberto Alemanno, *Taming COVID-19 by Regulation: An Opportunity for Self-Reflection*, 11 EUR. J. RISK REGUL. 187, 194 (2020). Alemanno presents travel bans as an example of unprepared decision-making processes that resulted in unscientific outcomes. *Id.* at 193-94 & n.59.

394 Richardson & Devine, *supra* note 179, at 2.

395 Helfer, *supra* note 3911, at 21.

396 See IHR, *supra* note 3, at arts. 43(6)-(8).

397 Stellenbosch Consensus, *supra* note 159, at 29.

398 Eric Carter, *When Outbreaks Go Global: Migration and Public Health in a Time of Zika*, MIGRATION POL'Y INST. (July 7, 2016), <https://www.migrationpolicy.org/article/when-outbreaks-go-global-migration-and-public-health-time-zika>.

399 IHR, *supra* note 3, at art. 43(6).

400 *Public Health Considerations While Resuming International Travel*, WORLD HEALTH ORG. (July 30, 2020), <https://www.who.int/news-room/articles-detail/public-health-considerations-while-resuming-international-travel>.

The gradual lifting of travel measures (or temporary restrictions) should be based on a thorough risk assessment, taking into account country context, the local epidemiology and transmission patterns, the national health and social measures to control the outbreak, and the capacities of health systems in both departure and destination countries, including at points of entry. Any subsequent measure must be proportionate to public health risks and should be adjusted based on a risk assessment, conducted regularly and systematically as the COVID-19 situation evolves and communicated regularly to the public.⁴⁰¹

One wonders whether States will heed WHO's advice while re-opening borders as much as they did (not) when closing them.⁴⁰² Travel bans are intended to be exceptional and temporary: they are a "delay strategy," not a "preventative" one.⁴⁰³ As stated by the Human Rights Committee, "[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State [P]arty derogating from the Covenant."⁴⁰⁴ Similarly, when addressing the COVID-19 crisis, the Council of Europe stated that "the main purpose of the state of emergency regime (or alike) is to contain the development of the crisis and return, as quickly as possible, to the normality."⁴⁰⁵ According to the Siracusa Principles, "[a] state party availing itself of the right of derogation pursuant to Article 4 shall terminate such derogation in the shortest time required to bring to an end the public emergency which threatens the life of the nation."⁴⁰⁶ If travel bans remain in place indefinitely, people start questioning their effectiveness and wondering if governments are overlooking their economic and human rights impact.⁴⁰⁷ There is a risk that travel bans become the "new normal" and are used by governments to pursue goals other than strictly the fight against the pandemic.⁴⁰⁸ Experience shows that states frequently maintain derogations for long periods.⁴⁰⁹

401 *Id.*

402 Von Tigerstrom & Wilson, *supra* note 43, at 3.

403 Borame Dickens et al., *Strategies at Points of Entry to Reduce Importation Risk of COVID-19 Cases and Reopen Travel*, 27 J. TRAVEL MED. 1, 2 (2020).

404 *General Comment No. 29: Derogations During a State of Emergency*, *supra* note 169, at ¶ 1; see also HUM. RTS. COMM., *supra* note 283, at ¶ 2a.

405 *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: A Toolkit for Member States*, COUNCIL OF EUR. (April 7, 2020), <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>.

406 *Siracusa Principles*, *supra* note 158, at ¶ 48.

407 Gostin, *supra* note 8, at 571.

408 Danchin et al., *supra* note 343, at 605.

409 Paddeu & Waibel, *supra* note 313, at 704.

A troubling question is what consequences, if any, these breaches of international law will have. One of the things the IHR and human rights law have in common is pervasive non-compliance.⁴¹⁰ There is no established mechanism to monitor and review compliance of States Parties with the IHR. According to the Siracusa Principles, “[e]ffective remedies shall be available to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation.”⁴¹¹ However, the IHR do not incorporate a system to investigate human rights violations either.⁴¹² The ICCPR provides for a Human Rights Committee to which States Parties must periodically submit reports.⁴¹³ However, it has not been very effective. Without reports, there is no monitoring, much less enforcement.⁴¹⁴

CONCLUSION

Like prior agreements in the field of international health law, the IHR are repeatedly presented as a “balancing dynamic” between the protection of public health and the maintenance of international trade and travel.⁴¹⁵ This is admittedly “a difficult tightrope to walk.”⁴¹⁶ In the words of Gostin, “the international community cannot have it both ways—unimpeded travel and trade, with full public

410 David Fidler, *The Future of the World Health Organization: What Role for International Law*, 31 VAND. J. TRANSNAT’L L. 1079, 1104 (1998).

411 *Siracusa Principles*, *supra* note 158, at ¶ 56. Some scholars have interpreted these safeguards to mean that the state must provide a justification and that the individual has the right to challenge the ruling against him. HANNUM, *supra* note 154, at 24-26. The Siracusa Principles are, admittedly, quite aspirational:

On the termination of a derogation pursuant to Article 4 all rights and freedoms protected by the Covenant shall be restored in full. A review of the continuing consequences of derogation measures shall be made as soon as possible. Steps shall be taken to correct injustices and to compensate those who have suffered injustice during or in consequence of the derogation measures.

Siracusa Principles, *supra* note 158, at ¶ 50.

412 WORLD HEALTH ORG., *supra* note 93, at 63; Sara Davies & Jeremy Youde, *The IHR (2005), Disease Surveillance, and the Individual in Global Health Politics*, 17 INT’L J. HUM. RTS. 133, 144 (2013); Asher, *supra* note 103, at 156; Negri, *supra* note 108, at 300.

413 ICCPR, *supra* note 124, at arts. 28, 40.

414 Asher, *supra* note 103, at 168.

415 *Global Crises—Global Solutions: Managing Public Health Emergencies of International Concern Through the Revised International Health Regulations*, WORLD HEALTH ORG. 8 (2002), <https://apps.who.int/iris/handle/10665/67300>; Lawrence Gostin & Rebecca Katz, *The International Health Regulations: The Governing Framework for Global Health Security*, 94 MILBANK Q. 264, 267 (2016); Negri, *supra* note 108, at 274; Paul DeMuro, *The International Health Regulations—Restricting Travel in Emergency Health Situations and Issues Health Care Providers Should Consider*, 19 HEALTH LAW. 14 (2007); *Stellenbosch Consensus*, *supra* note 159, at 66.

416 Simon Rushton, *Global Governance Capacities in Health: WHO and Infectious Diseases*, in GLOBAL HEALTH GOVERNANCE CRISIS, INSTITUTIONS AND POLITICAL ECONOMY 60, 73 (Adrian Kay & Owain Williams eds., 2009).

health protection.”⁴¹⁷

While the stated purpose of the IHR is to “avoid unnecessary interference with international traffic and trade,”⁴¹⁸ the regulations make no reference to avoiding unnecessary interference with individual freedom.⁴¹⁹ The focus seems to be on minimizing the economic consequences of travel restrictions, not protecting individual rights.⁴²⁰ Still, it can be said that the tenet of avoiding “unnecessary interference with international traffic” can be used as a parameter to protect the rights of individuals.⁴²¹ This balancing dynamic should also consider human rights rules and principles,⁴²² namely, freedom of movement.⁴²³

Only time will tell how much economic and social harm and suffering could have been avoided or at least mitigated had countries not rushed to close their borders. COVID-19 is a vivid reminder that governments need to conform to both the IHR and human rights rules and principles when designing and implementing measures to address public health emergencies. It is crucial to strengthen the connection between the two domains. Decision-making and implementation processes should not be left to vague standards and rhetorical proclamations. Otherwise, too much discretion is given to national governments in devising their own policies, often inspired by non-scientific considerations. A proper balancing exercise calls for visible signposts based on sound medical evidence and informed by international best practices.

To enhance compliance with the regulatory framework, the WHO should increase its “precision” or “determinacy.”⁴²⁴ It is necessary to create visible markers about how and when States Parties may apply additional health measures that interfere with international mobility. This is no easy task, entailing a broad consensus—among medical but also legal experts— about the criteria that should determine the reasonable balance between public health and international mobility. It is also vital to increase the weight of human rights rules and principles in the balancing exercise between public health and freedom of movement. A coherent, holistic approach to international mobility requires a greater degree of precision about whether health measures comply with human rights standards.

⁴¹⁷ Gostin, *supra* note 344, at 2624.

⁴¹⁸ IHR, *supra* note 3, at art. 2.

⁴¹⁹ Heidi Lambertson, *Swatting a Bug without a Flyswatter: Minimizing the Impact of Disease Control on Individual Liberty Under the Revised International Health Regulations*, 25 PA. ST. INT’L L. REV. 531, 544 (2006).

⁴²⁰ *Id.*

⁴²¹ DeMuro, *supra* note 415, at 73.

⁴²² Lawrence Gostin, *Public Health Strategies for Pandemic Influenza: Ethics and the Law*, 295 J. AM. MED. ASS’N 1700, 1702-03 (2006); Gostin & Katz, *supra* note 415, at 267; Goldfarb, *supra* note 41, at 782.

⁴²³ Fidler & Gostin, *supra* note 189, at 87.

⁴²⁴ See Fernando Dias Simões, *Protecting International Travelers During Pandemics: Charting the Way Forward*, 31 MINN. J. INT’L L. (forthcoming 2022).

