

Emergencies in the Inter-American Human Rights System: the Example of Ecuador in Times of COVID-19

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1 Introduction

The COVID-19 pandemic was a stress test for many states. It brought numerous restrictions on liberties and social guarantees and put states in the following dilemma: while they needed to take effective measures to counter the pandemic, for this, partly far-reaching encroachments on human rights and fundamental freedoms became necessary. In Latin America, several states declared states of emergency between 2020 and 2021 accordingly, namely Argentina, Bolivia, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Panama, Paraguay, Peru, Suriname and Venezuela.¹

The COVID-19 pandemic therewith inscribes itself into a trajectory of emergency situations on the continent. Latin America has indeed a history of emergencies in the course of past dictatorships, where exceptional measures have served on many occasions to abolish the constitution and to overthrow legitimate governments in order to usurp power.² True, the COVID-19 health-related emergency, in light of the concrete threats it poses, may be considered slightly different from previous emergencies which were based on national security considerations and more diffuse dangers such as terrorist threats, therewith lending themselves somehow easier to misuse. Still, the question arises as to how to bring exceptional situations back into the law to minimize the risk of abuses of power.

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1 List of suspensions of the Organization of American States Department of Public International Law, at <http://www.oas.org/en/sla/dil/inter_american_treaties_suspension_guarantees.asp> last accessed (as any subsequent URL) on 10 June 2023.

2 Also, states of emergency have often been used to conceal a military coup or as a curtain to hide the early stages of tyrannical regimes. See Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, “War” in the Jurisprudence of the Inter-American Court of Human Rights’ (2011) 33/1 Human Rights Quarterly, 148, 168–169; citing Hector Gros Espiell, ‘La Convention américaine et la Convention européenne des droits de l’Homme – Analyse comparative’, (1989) 218 Recueil des Cours, 167, 296.

The following argues that human rights and rule of law guarantees are essential safeguards to deal with states of emergency. Of most importance seem, from a substantive human rights perspective, absolute limits, proportionality assessments and non-discrimination considerations; from a procedurally/rule of law-oriented perspective, effective remedies and an independent judiciary. Guarantees at the domestic level are required by the regional emergency constitution (Article 27 of the American Convention on Human Rights, ACHR) as well as by Article 4 of the International Covenant on Civil and Political Rights (ICCPR).³ The practical importance of such domestic safeguards/guarantees is shown in the case of Ecuador where careful crisis management in particular by the Ecuadorian Constitutional Court has responsibly contained executive emergency powers also in times of COVID-19.

On this basis, this contribution will start with general conceptual and theoretical considerations on emergencies, human rights and the COVID-19 pandemic (Section 2). Then, it will discuss the human rights framework for emergencies in the Inter-American system (Section 3). On this basis, the case study of Ecuador in times of COVID-19 will be explored, as a 'good' example of a domestic emergency regime (Section 4). A brief appreciation concludes (Section 5).

2 Emergencies and the Law: State of Exception and the COVID-19 Pandemic

Pandemics such as COVID-19 or other emergencies, *e.g.* disasters, civil unrest or terrorist threats, may require states to take extraordinary measures. As stated by the Venice Commission in the Rule of Law Checklist on Emergencies: 'The security of the State and of its democratic institutions, and the safety of its officials and population, are vital public and private interests that deserve protection and may lead to a temporary derogation from certain Human Rights and to an extraordinary division of powers'.⁴ States, under exceptional situations, may thus be required to interfere with basic human rights guarantees. This became particularly visible during the COVID-19 pandemic which made

³ Note that, given the relevance of the regional emergency framework (Art. 27 ACHR) for the case study of Ecuador, the following analysis will be limited to the Inter-American system. This seems justified also in light of the general overlap between Art. 27 ACHR and Art. 4 ICCPR as regards safeguards.

⁴ Council of Europe, European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist, Venice, 11–12 March 2016, CDL-AD(2016)007, para. 51.

severe restrictions to protect the rights to health and life of the respective states' population necessary, in Latin America and globally.

A tension thus arose between states' obligation to protect their population and related restrictions of human rights and fundamental freedoms. When faced with the emergency, states reacted quite differently to the challenge. While some states did not find it necessary to suspend human rights in light of the health emergency, others (as stated, a total of 15 states in Latin America), relied on emergency powers and suspended human rights guarantees in accordance with Article 27 ACHR.⁵

The COVID-19 pandemic-related health emergency indeed came along with severe encroachments on human rights and fundamental freedoms across the region. More than a third of the countries established mandatory isolation under time restrictions through curfews; in 33 states educational establishments were closed to prevent the spread of the virus; and 34 states adopted restrictions on their borders to prevent the circulation of the virus.⁶ More generally, the pandemic, as well as according containment measures, severely impacted a wide range of rights, with repercussions on the rights to health, work, education, freedom of expression, internet access and data protection, the right to judicial protection, the right to private and family life and the right to liberty and security.⁷ The disproportionate impact on vulnerable groups, including persons deprived of their liberty, indigenous peoples, and people in a situation of human mobility and displacement, was considered especially problematic.⁸

Moreover, a turn to the executive branch (government, President) was observable, with limitations in checks and balances, rule of law and separation of powers. Along these lines, the Inter-American Commission of Human Rights (IACHR, Inter-American Commission) observed a risk of abuse in several states such as Jamaica, noting, among others, a shift to the executive,

5 See list of suspensions (n 1). In Europe, 10 states (mainly Eastern European ones) suspended guarantees in accordance with Art. 15 ECHR in light of the COVID-19 pandemic; only two of these (Serbia, Romania) maintained the derogation in August 2022. See Stefan Kadelbach, 'Menschenrechte in Zeiten des Notstands' in Philipp Donath et al. (eds.), *Der Schutz des Individuums durch das Recht* (Springer 2023), 255, 261, for further reference.

6 IACHR, 'Pandemic and Human Rights', OEA (Ser.L/V/II, Doc 396), 9 September 2022, 16–17 (para. 33).

7 *Ibid.*, 62 ff.

8 *Ibid.*, 104 ff.

without oversight by parliament or the judiciary.⁹ Problematic tendencies were also detected in El Salvador.¹⁰

This reflects more general concerns in emergency situations. Reliance on emergency powers usually comes with a shift in power to the executive, faster decision-making as well as limitations of human rights. The obvious danger of abuse by authoritarian governments¹¹ seems particularly burning in many Latin American states with generally weak checks and balances/separations of powers and a predominance of the executive branch.¹² Therewith, the COVID-19-related health emergency, across the region, refers back to the question of where the balance between necessary measures to contain the emergency situation and undue limitations of human rights/an excessive reliance on emergency powers is to be struck.

According yardsticks in terms of human rights and the rule of law are offered first at the international/regional level, i.e. in the Americas, mainly the ACHR.¹³

3 The Emergency Constitution of the Inter-American Human Rights System

The regional human rights framework for emergencies such as COVID-19 is laid down in quite a stringent manner in the ACHR. The Convention contains

9 *Ibid.*, 18 (para. 36).

10 *Ibid.*, 18 (para. 37). See also Mariela Morales Antoniazzi and Silvia Steininger, 'How to Protect Human Rights in Times of Corona? Lessons from the Inter-American Human Rights System' (EJIL:Talk!, 1 May 2020) <www.ejiltalk.org/how-to-protect-human-rights-in-times-of-corona-lessons-from-the-inter-american-human-rights-system/>, '[i]n practice, however, we observe worrying developments in several states which could amount to an abuse of the state of emergency. Researchers have warned that police and military forces are being used to repress the population in the name of health and sanitary provisions. For instance, in Honduras, the emergency decree provides that any individual who violates the restrictions on movement shall be arrested, while in Bolivia, the authorities authorized the use of force via coercive measures to maintain public order. Moreover, in Bolivia and Chile crucial political events such as the constitutional convention and presidential elections were postponed.'

11 See Burgorgue-Larsen/Úbeda de Torres (n 2) 168 ff.

12 Indeed, Latin American states continue to declare states of emergency also in non-pandemic contexts: A list of derogations dating back to 2014 illustrates the relative frequency of suspensions with, e.g., Peru, Jamaica and Ecuador derogating at least once from their guarantees under the ACHR in 2018 and 2019. See the list of suspensions (n 1).

13 At domestic level, according human rights/fundamental freedoms and separation of powers guarantees are generally incorporated in different states' constitutions. They serve as framework to bring *per definitionem* exceptional/emergency situations, as the COVID-19 pandemic, back into the law. See for details below, Section 4.

several pertinent guarantees, mainly in the field of civil and political rights but also as regards economic, social and cultural rights (Article 26 ACHR). Article 27 ACHR provided the relevant framework for derogations during the COVID-19 pandemic.

3.1 *The Elements of Article 27 ACHR*

Article 27 is divided into three paragraphs, reflecting its main parts.¹⁴ Article 27(1) ACHR establishes the substantive elements for a declaration of a state of emergency. It outlines four conditions: first, there has to be a war, public danger, or other emergency that threatens the independence or security of the state; second, the derogation of a human rights norm has to be proportionate; it must be strictly required by the exigencies of the situation as regards the extent and period of the derogation; third, the derogation must not be inconsistent with other obligations under international law such as obligations under consular and diplomatic law (especially immunities) or humanitarian law in case of armed conflicts; fourth, the measure must be non-discriminatory; *i.e.* it must not involve discrimination on the ground of race, colour, sex, language, religion, or social origin. In particular, the condition that emergency measures are strictly required by the exigencies of the situation, thus implying a proportionality element, and the non-discrimination criterion appear as crucial yardsticks in health emergencies such as COVID-19.

Substantive/absolute human rights limits, which also COVID-19 pandemic impacted states must never suspend, may be derived from the list of non-derogable rights in Article 27(2) ACHR. It is essentially an emergency constitution, the *ius in tumulto*, which must always be maintained. The list

14 Art. 27 ACHR: '1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from *Ex Post Facto* Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.'

of non-derogable rights comprises, on the one hand, substantive rights.¹⁵ In addition, the judicial guarantees essential for the protection of these rights are explicitly established as non-derogable. Therefore, the effective judicial protection of the Convention's human rights guarantees must be upheld likewise during states of emergency. This presupposes functioning checks and balances at domestic level, to maintain the separation of powers and to restrain the executive's emergency powers.¹⁶

Finally, a mechanism of international monitoring is incorporated in Article 27(3) ACHR which contains the procedural obligation of a state to notify the other state parties of the ACHR through the Secretary General of the Organization of American States (OAS). The declaration must contain information on the provisions which should be suspended, the reasons for the suspension and the duration of the suspension, *i.e.* when the suspension will be terminated. The necessary notification of the other state parties through the OAS Secretary General enables international supervision of the relevant suspensions. In the Americas, especially the Rapid and Integrated Response Coordination Unit for COVID-19 Pandemic Crisis Management (SACROI COVID-19) established by the Inter-American Commission proved crucial to monitor state action during the COVID-19 pandemic.¹⁷ So, the most important institutional and substantive requirements are provided for in Article 27 ACHR.

3.2 *Article 27 ACHR in the Case Law of the Inter-American Monitoring Institutions*

An even more concrete framework for emergency situations such as COVID-19 may be deduced from the jurisprudence of the Inter-American monitoring institutions, especially the Inter-American Court of Human Rights (IACtHR, Inter-American Court), which has upheld and detailed the conditions for derogation of Article 27 ACHR.¹⁸ Most important, respectively, are the Court's emblematic case *Zambrano v. Ecuador* (2007)¹⁹ as well as several cases against Peru.²⁰ Moreover, two advisory opinions – on *Habeas Corpus in Emergency*

15 See Art. 27(2) ACHR for the enumeration of non-derogable rights.

16 As will be discussed in detail in Section 4, the relevance of judicial guarantees and essential role of domestic tribunals in situations of pandemic is shown in the case of Ecuador.

17 See Section 3.3.

18 See for further reference, Christina Binder, 'Human Rights in Times of Emergency: An Inter-American Perspective with Special Focus on the Defence of the Rule of Law' (2019) 13/2 *Zeitschrift für Menschenrechte*, 22.

19 IACtHR, *Zambrano and Others v. Ecuador*, Judgment (4 July 2007), Series C No 166.

20 See e.g., IACtHR, *Galindo Cárdenas et al. v. Perú*, Judgment (2 October 2015), Series C No 301; IACtHR, *Castillo Petruzzi et al. v. Perú*, Judgment (30 May 1999), Series C No 59.

Situations (1987)²¹ and on *Judicial Guarantees in States of Emergency* (1987)²² – are of relevance.

On the one hand, the IACtHR has generally dealt with the nature of Article 27 ACHR and the scope of guarantees incorporated therein.²³ For example, the Court outlined in its advisory opinion on *Habeas Corpus in Emergency Situations* the overall function of Article 27 ACHR as a ‘provision for exceptional situations only’ and thus affirmed the high threshold of Article 27(1).²⁴ Furthermore, the IACtHR emphasised the necessary link between the principle of legality, democratic institutions and the rule of law which must be upheld also during states of emergency:

The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. (...) When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the exceptional circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law.²⁵

Therefore, according to the case law of the IACtHR, general principles, and institutional and procedural safeguards put limits to a state’s emergency

21 IACtHR, *Habeas Corpus in Emergency Situations* (Arts. 27.2, 25.1 and 7.6 American Convention of Human Rights), Advisory Opinion OC-8/87 (30 January 1987).

22 IACtHR, *Judicial Guarantees in States of Emergency* (Arts. 27.2, 25 and 8 American Convention of Human Rights), Advisory Opinion OC-9/87 (6 October 1987).

23 IACtHR, *Habeas Corpus* (n 21), para. 18.

24 ‘It is clear that no right guaranteed in the Convention may be suspended unless very strict conditions – those laid down in Article 27 (1) – are met. Moreover, even when these conditions are satisfied, Article 27 (2) provides that certain categories of rights may not be suspended under any circumstances. Hence, rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency.’ (*Ibid.*, para. 21).

25 *Ibid.*, para. 24.

powers. They also provide guidance to interpret the somehow broader elements of Article 27(1) ACHR.

Moreover, this case law provides relevant elements for a substantive concretization, including the proportionality requirement. In the advisory opinion on *Habeas Corpus in Emergency Situations*, the Inter-American Court explicitly stressed the necessary proportionality (as well as the reasonableness) of measures:

Since Article 27 (1) [of the Convention] envisages different situations and since, moreover, the measures that may be taken in any of these emergencies must be tailored to ‘the exigencies of the situation,’ it is clear that what might be permissible in one type of emergency would not be lawful in another. The lawfulness of the measures taken to deal with each of the special situations referred to in Article 27 (1) will depend, moreover, upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures.²⁶

The necessary proportionality of emergency measures was also affirmed in *Zambrano v. Ecuador*, where the IACtHR established a violation of (*inter alia*) Article 27(1) ACHR by Ecuador on the basis that its declaration of emergency was broad and general:

The Court considers that once a military intervention with such a wide scope and based on purposes as broad and vague (...) has been carried out, the suspension of guarantees which took place in the instant case and which was admitted by the State through its acknowledgement of responsibility for the alleged violation of Article 27 of the Convention, exceeded the powers attributed to the States by the Convention in the first section of this provision. Although the facts of the instant case only refer to the enforcement of the said Decree-Law No. 86 - and the Court limits its analysis to this context – *it is of the utmost importance to remind that suspension of guarantees must be used as a strictly exceptional mean to face real situations of emergency “to the extent and for the period of time strictly required by the exigencies of the situation”, and not as a mean to fight common crime.* Thus, the Court views favorably the State’s declaration to the effect that it is currently “in the process (...) of democratizing (...) the regime of exception [, which] will be duly regulated and

26 *Ibid.*, para. 22.

strictly monitored (...) in the next Constitutional Assembly to take place in Ecuador [, ... in order to] limit (...) the indiscriminate use of state[s] of exception which can sometimes be made due to the Executive's power to decree a state of emergency.²⁷

Through this concretization of the necessary pre-conditions of emergencies' proportionality of measures, the IACtHR provides guidance to and, at the same time, limits the leeway of domestic authorities.

The Inter-American Human Rights institutions have also added relevant clarifications to the necessary 'non-discriminatory nature' of measures, i.e. that measures cannot be discriminatory on the grounds of race, colour, sex, language, religion or social origin. The Court qualified this requirement as amounting to *ius cogens* and thus considered it as non-derogable.²⁸ The Inter-American Commission has adopted a similar approach in its interpretation of Article 11 of the 1948 American Declaration on the Rights and Duties of Man, highlighting that '[t]he principle of non-discrimination was the backbone of the regional systems for the protection of human rights and the "linch-pin" of the Inter-American system'.²⁹ Accordingly, the regional human rights framework requires the non-discriminatory nature of (emergency) measures.

Likewise, due process guarantees, such as the right to an effective judicial remedy (*amparo*), were detailed by the Inter-American Court. The Court affirms their non-derogability also during states of emergency. The Court had confirmed already in its advisory opinions in 1987 that the specific remedy of *habeas corpus* (recourse to a court in case of deprivation of liberty to decide upon the lawfulness of arrest or detention) (Article 7(6) ACHR) and the general remedy of *amparo* (right to recourse in case of general violations of fundamental rights) (Article 25(1) ACHR) as well as the right to a fair trial (Article 8 ACHR) were non-derogable.³⁰ According to the IACtHR, the judicial guarantees set forth in Articles 7(6), 8(1) and 25(1) ACHR were all necessary to ensure the full and effective exercise of the rights and freedoms protected in Article 27 ACHR.

27 IACtHR, *Zambrano* (n 19), para. 52 (emphasis added).

28 See eg IACtHR, *Granier et al. v. Venezuela*, Judgment (22 June 2015), Series C No 293, para. 215. See for further reference, Ludovic Hennebel and H el ene Tigroudja, The American Convention on Human Rights. A Commentary (OUP 2022) 813. See also Section 3.3.

29 IACHR, *Undocumented Workers v. US*, Decision of 30 November 2016, Case No 12.834, Report No 50/16, para. 75; IACHR, *HRJSCH and MCS v. Mexico*, Decision of 28 October 2015, Case No 12.689, Report No 80/15, para. 78. See for further reference, Hennebel and Tigroudja (n 28) 800 ff.

30 IACtHR, *Habeas Corpus* (n 21).

This was upheld and further detailed *inter alia* in several cases against Peru³¹ where the Inter-American Court had to deal with *incommunicado* detentions in the fight against the Shining Path and the trial of persons by faceless military tribunals. The IACtHR held respectively that the judicial guarantees of Article 27(2) ACHR could not be exercised without the relevant due process guarantees (right to fair trial, Article 8 ACHR).³² Article 8 ACHR was thus non-derogable. Likewise, the right to judicial protection (*amparo*) and *habeas corpus* were confirmed to be non-derogable by the IACtHR. More generally, the Court stressed the importance of independent and impartial tribunals and established that faceless military tribunals did not qualify as tribunals in the meaning of Article 8 ACHR.³³ Therewith, judicial guarantees were considered as crucial during the emergency.

The IACtHR also dealt with the obligation to notify under Article 27(3) ACHR. In *Zambrano v. Ecuador*, the Court outlined the importance of Article 27(3) ACHR and the duty to notify in general terms:

The Court considers that the international obligation of States Parties to the American Convention under Article 27 (3) constitutes a mechanism within the framework of the notion of collective guarantee underlying this treaty, which aim and purpose is the protection of human beings. Such obligation also constitutes a safeguard to prevent the abuse of the exceptional powers of the suspension of guarantees and allows other State Parties to evaluate if the scope of this suspension is consistent with the provisions of the Convention. Therefore, the non-compliance of this duty to inform implies a breach of the obligation set forth in Article 27 (3) (...).³⁴

The Inter-American Court likewise established violations of the obligation to notify (Article 27(3) ACHR) in its own right, e.g., in *Caracazo v. Venezuela*³⁵ and in *Zambrano v. Ecuador*³⁶ because the other states parties had not been (immediately) informed through the OAS Secretary General of the respective states of emergency. With this emphasis on the obligation to notify, the IACtHR requires transparency towards other state parties (as well as towards the

31 See e.g., IACtHR, *Galindo Cárdenas* (n 20); IACtHR, *Castillo Petruzzi* (n 20).

32 See IACtHR, *Galindo Cárdenas* (n 20), para. 168.

33 See IACtHR, *Castillo Petruzzi* (n 20), para. 134. See also IACtHR, *Zambrano Vélez et al. v. Ecuador*, Judgment (4 July 2007), Series C No 166, paras. 67, 71.

34 IACtHR, *Zambrano* (n 19), para. 70.

35 IACtHR, *Caracazo v. Venezuela*, Judgment (11 November 1999), Series C No 58.

36 IACtHR, *Zambrano* (n 19), para. 71.

Inter-American human rights institutions). In this regard, international control may contribute to upholding the rule of law at the domestic level in view of the scrutiny exercised from the 'above'.

Overall, basic conditions/elements of an international/regional emergency constitution are therewith set up: proportionality, non-discrimination and procedural guarantees establish an according framework of reference to deal with emergency situations such as COVID-19.

3.3 *The Inter-American Human Rights System and the COVID-19 Pandemic*

The COVID-19 pandemic brought indeed further clarifications and refinements to the ACHR's emergency constitution in light of the declarations of emergencies by numerous states. The Inter-American monitoring institutions concretised and framed the emergency in accordance with human rights. On the one hand, the IACtHR, in April 2020, published a statement regarding the challenges posed by COVID-19, in which it urged member states to respect human rights standards and uphold their international obligations. Put differently, the Court reminded states of their human rights obligations, reiterating crucial elements already contained in the ACHR and emphasized in particular that all restrictions had to be 'temporarily limited, legal, adjusted to well-defined aims based on scientific criteria, reasonable, absolutely necessary and proportionate and in accordance with other requirements developed in Inter-American human rights law'.³⁷ In doing so, the Inter-American Court reiterated, albeit in broad terms, states' obligations during emergency situations with a focus on the COVID-19 pandemic. It therewith provided for criteria/a human rights framework to assess state action during the crisis.³⁸

Also, the Inter-American Commission adopted several Resolutions in light of the COVID-19 crisis. Although soft law and as such not legally binding, the Resolutions were of crucial relevance, providing relevant guidance for domestic action.³⁹ Most important seems Resolution 1/2020 of 10 April 2020, which laid out a framework for dealing with the COVID-19 emergency.⁴⁰ The Resolution acknowledged, on the one hand, the cross-cutting impact of the pandemic on the enjoyment of the rights to life, health as well as economic,

37 IACtHR, '*COVID-19 y Derechos Humanos: Los problemas y Desafíos deben ser abordados con perspectiva de derechos humanos y respetando las obligaciones internacionales*', CP-27/2020 (14 April 2020).

38 See Morales Antoniazzi, Steininger (n 10).

39 See Section 4, the example of Ecuador.

40 IACHR, '*Pandemic and Human Rights in the Americas*', Resolution No 1/2020 of 10 April 2020, para. 20.

social, cultural and environmental rights.⁴¹ At the same time, the Commission also set out standards for measures adopted by states that involve restrictions of rights or guarantees, in line with the conditions of Article 27 ACHR and the case law of the IACtHR; establishing that restrictions have to be in accordance with the requirements of 'legality, necessity, proportionality and timeliness'. Moreover, it reiterated that the measures must be non-discriminatory.⁴² Finally, the Commission also stressed the importance of the independence of the judiciary:

Bearing in mind that democracy and the rule of law are necessary conditions for achieving respect for human rights, and that the legal nature of limitations on those rights may have a direct impact on the democratic systems of States, the Commission reaffirms the fundamental role of the independence and of the actions of the public authorities and oversight institutions, in particular of the judiciary and the legislature, whose operations must be assured even in the context of a pandemic.⁴³

Moreover, Resolution 1/2020 identifies several new, progressive standards for state parties and thus develops the emergency criteria in light of the pandemic.⁴⁴ For example, the Commission found that restrictions had to be based on the best scientific evidence,⁴⁵ and the impact on the most vulnerable must not be disproportionate. The Inter-American Commission also maintained that states should inform the Secretary General of the OAS of their motives for suspending the guarantees of the Convention.⁴⁶ Further resolutions were adopted by the Inter-American Commission on the rights of COVID-19-infected persons (Resolution 4/2020)⁴⁷ as well as on vaccines in times of COVID-19 (Resolution 1/2021).⁴⁸

41 Note that these pose an even greater challenge for the states of the Americas, who suffer from sky-rocketing inequality and limited economic capacities.

42 IACHR, Pandemic and Human Rights (n 40): '22. Ensure that no emergency measure is, per se or as the result of its effects, discriminatory or counter to international law (...).'

43 Preamble of Resolution 1/2020 (*ibid.*).

44 See Morales Antoniazzi, Steininger (n 10).

45 Respectively, the IACHR mentioned particularly that the measures needed to be in accordance with the International Health Regulations, and the recommendations of the WHO and PAHO as applicable. For example, national action plans drawn up for the prevention, detection, treatment, control and monitoring of the pandemic should be based on the best scientific evidence. See IACHR, Pandemic and Human Rights (n 40) 7, 8.

46 *Ibid.*, para. 26.

47 IACHR, Resolution 4/2020, 'Human Rights of Persons with COVID-19' (27 July 2020).

48 IACHR, Resolution 1/2021, 'COVID-19 vaccines in the framework of the Inter-American human rights obligations' (6 April 2021).

Moreover, a certain institutionalised response was provided. The Inter-American Commission established, as mentioned, already in March 2022 the Rapid and Integrated Response Coordination Unit for COVID-19 Pandemic Crisis Management to strengthen institutional capacities and develop a strategy to monitor and follow up on how the crisis affected the human rights of vulnerable people and groups⁴⁹ with special emphasis on their right to health and other economic, social, cultural, and environmental rights. Among its many objectives was the collection of evidence on the impact of the pandemic, proposing lines of action for state parties, providing technical assistance, and the identification of urgent cases to ensure timely responses. The pandemic-related measures by states were thus kept under tight scrutiny. The information gathered also fed into the IACHR's report on the 'Pandemic and Human Rights' of September 2022 where the Commission likewise included a section on emergencies as well as a more general overview of relevant human rights guarantees which had been impacted by the pandemic.⁵⁰

In sum, Inter-American human rights monitoring institutions have concretised states' human rights obligations in times of emergency and also provided for certain institutionalised responses; in general terms, when detailing the Article 27 ACHR derogation requirements in their case-law as well as specifically for COVID-19. In doing so, the Inter-American monitoring institutions 'put meat' on and contextualized the rather skeleton-style standards applicable to derogations in case of emergencies. Relevant conditions (proportionality, non-discriminatory nature of measures, need for effective remedy) are reiterated and adapted in relation to COVID-19. The Inter-American monitoring institutions thereby provided relevant guidance to states. The positive reflection on domestic institutions is positively shown in Ecuador and in particular the country's Constitutional Court's handling of the COVID-19 pandemic.

49 Among the vulnerable groups mentioned by the IACHR are 'historically excluded or high-risk groups, such as older people and people of any age who have pre-existing medical conditions, persons deprived of liberty, women, indigenous peoples, persons in a state of human mobility, children and adolescents, LGBTI people, people of African descent, persons with disabilities, working people, and people living in poverty and extreme poverty, particularly people working in the informal sector and street people, as well as human rights defenders, social leaders, health professionals, and journalists'. See IACHR, *Pandemic and Human Rights* (n 40) 6.

50 IACHR, *Pandemic and Human Rights* (n 40).

4 Country Case Study: Ecuador – State of Emergency and COVID-19

4.1 Introduction

Ecuador is a good example of the importance of due incorporation of the Inter-American system's human rights guarantees for times of emergency. This is even more, since the country displays all features of a 'typical' Latin American state, as a Presidential republic with a strong executive branch (characterized by some as 'hyper-presidentialism'). It is within the President's competence to decree a state of emergency *inter alia* in case of severe civil unrest, public calamity or natural disaster.⁵¹ More than 100 executive decrees have declared such a state of emergency since the adoption of the 2008 Ecuadorian Constitution. Likewise, when struck with the COVID-19 pandemic, on 16 March 2020, then-Ecuadorian President Moreno declared a state of emergency of 60 days for the entire national territory.⁵² On 23 March, he issued a second decree declaring the port of Guayaquil an emergency zone.⁵³ The emergency was prolonged repeatedly thereafter until August 2021.⁵⁴

The COVID-19-related health emergency in Ecuador raised relevant questions in terms of institutional checks and balances/rule of law requirements, in particular in light of the already mentioned strong position of the executive branch. Moreover, Ecuador is a country in ongoing institutional consolidation, as evidenced by more than 20 Constitutions since 1830.⁵⁵ It is thus of particular interest how the internal balance of power is struck between different Ecuadorian institutions in times of the COVID-19-related health emergency, especially as regards judicial oversight in terms of human rights and the role played by the Inter-American emergency Constitution/Article 27 ACHR.

4.2 Legal/Constitutional Framework Governing States of Emergency

The relevant framework governing the COVID-19 emergency is already established in the Ecuadorian Constitution which incorporates the ACHR, as other international human rights instruments, with high rank and as directly applicable law of the land. More particularly, Article 10 of the 2008 Ecuadorian

51 Art. 164 of the Ecuadorian Constitution.

52 Executive Decree No 1017 (16 March 2020), see e.g., Art. 13.

53 Executive Decree No 1019 (23 March 2020).

54 See e.g., the UNTC on CCPR derogations, <A-14668-Ecuador-08000002805b71f8.pdf (un.org)>; see also https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en#EndDec.

55 See for further reference Int IDEA, 'Constitutional History of Ecuador', Constitution-net, <<https://constitutionnet.org/country/constitutional-history-ecuador>>. Also, there have been several coup d'états in Ecuador comparatively recently (in 1997, 2000, 2005) caused by economic and political crises.

Constitution provides: 'Persons, communities, peoples, nations and communities are bearers of rights and shall enjoy the rights guaranteed to them in the Constitution and in international instruments. (...)'.⁵⁶ Therewith, international human rights instruments, including the American Convention with its 'emergency human rights Constitution', are directly applicable in Ecuador.

Moreover, as regards states of emergencies, the 2008 Ecuadorian Constitution (Articles 164–166) provides itself a rather detailed regulatory framework. The competence to decree a state of emergency is conferred to the President in listed situations, being aggression, armed conflict, domestic unrest, public calamity or natural disasters. Respectively, the Constitution requires that the executive decree establishing a state of emergency detail the reason for the declaration, the measures applied, and the territorial scope of the emergency and its duration (Article 164). The Constitution also establishes several limits: first, the maximum time-period for which emergencies may be declared is 60 days, renewable for additional 30 days (Article 166).⁵⁷ The catalogue of rights, which may be suspended is restricted to the inviolability of domicile, correspondence, freedoms of movements association/assembly and information (Article 165). The Constitution also specifies the list of measures to be adopted by the President when declaring a state of emergency: They include security zones in the territory, closure of seaports, airports, border-passes, the deployment of the armed forces and of the National Police (Article 165).

In terms of inter-institutional oversight, the Constitution provides that the National Assembly, the Constitutional Court as well as relevant international organizations be informed within 48 hours after the emergency-related decree is signed (Article 166). While the National Assembly may exercise political (*ex post*) control, the Constitutional Court is mandated to monitor the state of emergency *ex officio* (Article 436.8).⁵⁸

The Ecuadorian Constitutional framework therewith sets substantive and procedural limits, as are also required by Inter-American human rights guarantees. It introduces checks and balances at the domestic level as well as an additional layer of 'international supervision and control'. It is within this

56 See also Art. 417 of the Ecuadorian Constitution: 'The international treaties ratified by Ecuador shall be subject to the provisions set forth in the Constitution. In the case of treaties and other international instruments for human rights, principles for the benefit of the human being, the non-restriction of rights, direct applicability, and the open clause as set forth in the Constitution shall be applied'.

57 Guiding principles are proportionality, legality, temporariness, territoriality and reasonableness (Art. 164(2) of the Ecuadorian Constitution).

58 Art. 436 of the Ecuadorian Constitution: 'The Constitutional Court shall perform the following duties, in addition to those granted to it by the law: (...) 8. To ensure, by virtue of its office and immediately, monitoring of the constitutionality of the declarations of state of emergency, when this involves the suspension of constitutional rights'.

relatively tight framework that the COVID-19 related health emergency was declared in March 2020.

4.3 *The President's Declaration of a State of Emergency in Times of COVID-19*

More particularly, with Presidential Decree No. 1017 passed on 16 March 2020 in the context of the COVID-19 pandemic, the President declared a state of emergency for 'public calamity' for the entire territory to control the public health emergency. In the decree, the President mobilized the armed forces to restore public order in addition to the National Police (Article 2). Likewise, the decree suspended the freedom of movement as well as the rights to association and assembly (Article 3). Additional, more specific measures related to the decentralized implementation of the decree (Article 9, reference to villages with a high risk of infection) and border closures. On 23 March 2020, further measures were decreed for Guayaquil as a specific emergency zone (Presidential Decree No 1019). As regards international human rights treaties, Ecuador notified the Secretary General of the OAS on 17 March 2020 about its derogation in accordance with Article 27 ACHR.⁵⁹

4.4 *The Constitutional Court's Handling of the Health Emergency*

Of particular interest in relation to Ecuador's state of emergency are the checks and balances introduced by the Ecuadorian Constitutional Court, which, in several rulings, addressed the constitutionality of the state of emergency.⁶⁰ In doing so, the Ecuadorian Constitutional Court followed the criteria required by the ACHR.

Among the most relevant are the rulings from 19 March and 25 March 2020 (files #1-20-EE/20; #1-20-EE/20 A) where the Constitutional Court found the Presidential Decrees No 1017 of 16 March 2020 and No 1019 of 23 March 2020 to comply with the formal and material requirements necessary for a state of emergency and considered them constitutional. In doing so, the Constitutional Court emphasized, for instance, that the measures to fight the pandemic could not have been adopted in the 'normal' constitutional framework.⁶¹

59 See list of suspensions (n 1); Note that Ecuador also notified the UN Secretary General in accordance with Art. 4(3) of the International Covenant on Civil and Political Rights, see <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en#EndDec>.

60 For an overview of COVID-19 related case law, see *Corte Constitucional del Ecuador* (CC), *Boletín Jurisprudencial. Edición Especial COVID-19, Marzo-Septiembre 2020*.

61 CC, *Dictámenes* of 19 March and 25 March 2020 (files #1-20-EE/20; #1-20-EE/20 A), para. 35.

However, the Constitutional Court did not stop there. It also set out criteria for how to implement the decreed measures. The Court held, for instance, in relation to Decree No 1017 of 16 March 2020 that the closure of borders should not be absolute but must be in a way that Ecuadorian nationals and people with residence in Ecuador must nonetheless be allowed to enter;⁶² that the mobilization of the armed forces had to be effectuated in accordance with human rights;⁶³ that persons in situation of vulnerability had to be specifically protected;⁶⁴ that the technologies used to trace the virus (Article 11) needed to be applied with due respect of privacy, the principle of non-discrimination and other fundamental freedoms.⁶⁵ Similar guidelines/criteria were established for Presidential Decree No 1019 of 23 March 2020 relating to the special emergency in Guayaquil.⁶⁶

These criteria subsequently allowed the Constitutional Court, when monitoring the execution of its judgments, to request information from the Ecuadorian government on how it lived up to its obligations. Indeed, the Court installed on 16 April 2020 an *ex officio* procedure to monitor governmental compliance with the criteria introduced in the rulings beforehand.⁶⁷ More specifically, the Court asked the executive branch to provide enforcement information in relation to different categories of rights: access to food and medicines; protection of vulnerable groups; entry into the country of nationals or residents remaining outside of Ecuador; protection of ‘first line’ public servants, including medical and security personnel fighting the outbreak of COVID-19; and access to justice and constitutional remedies by the population. At the same time, the Constitutional Court emphasized that it was necessary not to encroach upon the sphere of the executive in order to maintain the proper functioning of the state.

This approach and control of COVID-19-related measures allowed the Ecuadorian Constitutional Court to push for transparency and to control/supervise the measures introduced by the executive branch without limiting

62 *Ibid.*, para. 58, i.e.

63 *Ibid.*, i.f.

64 *Ibid.*, para. 1.a.

65 *Ibid.*, i.c.

66 CC, *Dictamen 1-20-EE/20* of 19 March 2020.

67 See CC, *Dictamen 2-20-EE, 3-20-EE, 5-0-EE*; see also CC, *Boletín Jurisprudencial. Edición Especial COVID-19*. See furthermore Gustavo Prieto, ‘How Ecuador’s Constitutional Court is Keeping the Executive Accountable During the Pandemic’ (Verfassungsblog, 24 April 2020) <verfassungsblog.de/how-ecuadors-constitutional-court-is-keeping-the-executive-accountable-during-the-pandemic/>.

the latter's leeway to effectively fight the COVID-19 pandemic.⁶⁸ It also showed the relevance of independent judicial supervision of the measures.

4.5 *Evaluation*

The Ecuadorian Constitutional Court's approach is a particularly good and creative example of how to uphold checks and balances and judicial-constitutional control in times of emergency. While being careful not to overly interfere with the executive's sphere, the Constitutional Court framed the pandemic-related emergency measures adopted by the executive in the language of rights.⁶⁹ It called for transparency and required the establishment of according (judicial) remedies at the domestic level.⁷⁰

What is more, in its rulings, the Constitutional Court also drew on international/regional human rights standards, in particular those established in Resolution No 1/2020 'Pandemic and Human Rights in the Americas' by the Inter-American Commission on 10 April 2020.⁷¹ By taking them as a domestic yardstick as regards rule of law requirements, vulnerable groups etc., the Court therewith 'hardened' criteria which had been specified at the regional level in an *a priori* non-binding way by the Inter-American Commission.

In sum, the Ecuadorian case and, in particular, the Constitutional Court's dealing with the crisis may serve as a model. Horizontally, at the domestic level, the Court managed to uphold the checks and balances without overly restricting the executive's powers to deal with the emergency. Vertically, the Court drew on regional ('soft law') human rights instruments for guidance, converting them into 'hard law' at the national level. This also illustrates the usefulness of international/regional human rights law to serve as a parameter and guidance in times of (health) emergencies.

68 See in this sense *ibid.*; see also Andrés Cervantes, 'Ecuador – Constitutionalism and Covid-19' (Verfassungsblog, 9 May 2020) <verfassungsblog.de/ecuador-constitutionalism-and-covid-19/>.

69 Prieto (n 67).

70 Note that the execution/implementation of the Ecuadorian Constitutional Court's judgments relating to the emergency remains problematic also in Ecuador. See IACHR, Pandemic and Human Rights (n 42), para. 222: 'With respect to Ecuador, the IACHR received information on the use of the armed forces to control the limitation of the rights of transit and assembly. The state of emergency was extended for several months exceeding the maximum of 90 days provided for in the Constitution and even though the Constitutional Court ordered the State to adopt protective measures in the face of the pandemic that do not result in the suspension of rights or the mobilization of the armed forces'. See furthermore as regards criticism, IACHR, Annual Report of the Inter-American Commission on Human Rights 2020 – Volume II. OEA/Ser.L/V/II Doc. 28 (30 March 2021), para. 565.

71 IACHR, Resolution No 1/2020 (n 40).

5 Concluding Appreciation

Overall, the Ecuadorian case is an excellent illustration of the importance of independent courts for upholding human rights guarantees in times of emergency. In due interaction with regional human rights monitoring institutions, the Ecuadorian Constitutional Court strived for a reasonable balance between the executive's emergency powers and judicial control or, to put it differently, for a way how to bring emergency situations as the COVID-19 pandemic back into the law.

The role of the judiciary is indeed crucial. That the IACtHR rightly establishes procedural remedies/judicial guarantees even as non-derogable, is beautifully exemplified by the key role played by the Ecuadorian Constitutional Court in striving to engage in pandemic management in line with human rights. All this points positively to a 'proceduralisation'/institutionalisation of states of emergency where judicial oversight remains important; with, at best, an interaction between the regional and domestic levels. In sum, especially in the case of highly problematic human rights situations/extreme cases such as COVID-19-related states of emergency, maintaining a solid rule of law is probably the most important.