GETTING TO PHI: THE CASE FOR EXCUSATORY DEROGATIONS FROM ICCPR RIGHTS

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Abstract

This Article highlights the need for excusatory derogations from human rights. Currently, there is exclusive reliance on justification when upholding derogations from International Covenant on Civil and Political Rights ("ICCPR") rights. In contrast, an excusatory derogation accentuates the requisite international policy intervention to assist national and subnational governments toward a proportional response to public emergencies. The right to mobility under the ICCPR, and its renditions in the constitutions of Australia and Canada, are used to illustrate this proposition. Border closures in response to the coronavirus pandemic provide context to elucidate how

different types of public emergencies dictate different approaches to analyzing government responses. Recent case law from Australia and Canada on the validity of border closures in response to the pandemic evinces a conflation of excusatory and justificatory reasoning. The consequence is that there is no requirement on government to seek assistance to devise alternative responses to minimize infringement on human rights. International instruments such as the ICCPR need to distinguish public emergencies that require excusatory derogation from those requiring justificatory derogation to help improve the response to future pandemics, and public emergencies more generally. To this end, the Article explains the theoretical underpinnings of the principles of (excusatory and justificatory) necessity, proportionality, and precaution.

I. INTRODUCTION

The motivation for this Article stems from national responses to the coronavirus pandemic. The issue has been articulated as follows:

> The lack of certainty regarding the scope, meaning and implementation of international human rights obligations during an unprecedented global health emergency has enabled inappropriate and violative public health responses across nations. As the world's struggle against the coronavirus stretches on, we must begin to consider how global health law and human rights law can be harmonized – not only to protect human dignity in the face [*sic*] future global health crises, but also to strengthen effective public health responses with justice.[1]

I argue that part of the envisaged harmonization comes from understanding the legal and practical effects of two types of reasoning: excusatory and justificatory reasoning. Applying the right type of reasoning depends on the nature of each public emergency. Clarity as to the distinction between excuse and justification allows for "strengthen[ing] the effective public health response"[2] because, under excusatory reasoning, there is a need for policy interventions analogous to those which inform this distinction in criminal law, especially in civil law jurisdictions.

The orthogonality of excusatory and justificatory reasoning can be traced back to ancient Greece, where the letter Theta (Θ) was known as the "unlucky letter" because it was used on court ballots for juries imposing criminal sentences.[3] Theta represented the death (θάνατος) penalty.[4] The Greek symbol for this letter was derived from

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1 Roojin Habibi, Benjamin Mason Meier, Tim Fish Hodgson, Saman Zia-Zarifi, Ian Seiderman & Steven J. Hoffman, *Harmonizing Global Health Law and Human Rights Law to Develop Rights-Based Approaches to Global Health Emergencies*, INT'L COMM'N OF JURISTS (Feb. 24, 2021), https://www.icj.org/harmonizing-global-health-law-and-human-rights-law-to-develop-rights-based-approaches-to-global-health-emergencies/ [https://perma.cc/J5VP-APRL].

2 *Id.*

3 *Theta Symbol and Its Meaning – Theta Letter/Sign in Greek Alphabet and Science*, MYTHOLOGIAN.NET, https://mythologian.net/theta-symbol-meaning-theta-letter-sign-greek-alphabet-science/ [https://perma.cc/SP3H-F6QQ] (last visited Feb. 28, 2022).

4 *See* 1 WILLIAM EDWARD HARTPOLE LECKY, HISTORY OF THE RISE AND INFLUENCE OF THE SPIRIT OF RATIONALISM IN EUROPE 205 n.2 (D. Appleton 1919) (1865).

the Phoenician letter Teth (⊗), signifying an enclosed space with two intersecting lines.[5] In Greece, the two lines were also represented as a plus sign (⊕).[6] Eventually, the vertical line survived only in the letter Phi (Φ). The other line, representing the horizon, distilled the essence of Theta: a cautionary contrast between the invisible and the visible.[7] The vertical line that survived only in Phi became synonymous with proportionality. Phi itself came to denote the golden ratio, an irrational number that underpins the optimal proportionality of a plethora of designs seen in nature and the arts.[8]

A taxonomical orthogonality between Theta and Phi was thus born. This orthogonality has historically informed excusatory and justificatory defenses in criminal law and continues to inform the precautionary and proportionality principles today.[9] The title "Getting to Phi" uses this stylized contrast between Theta and Phi to illustrate the Article's main thesis: public emergencies such as the coronavirus pandemic are characterized by incomplete information that prohibits identifying the lowest burden on human rights among alternative

5 KIEREN BARRY, THE GREEK QABALAH: ALPHABETIC MYSTICISM AND NUMEROLOGY IN THE ANCIENT WORLD 73, 204 (1999).

6 *Id.* at 73.

7 Foteini Tyraski, *Decoding Hidden Meanings of Ancient Greek Alphabet Letters*, GREEK REP. (Oct. 12, 2013), https://greekreporter.com/2013/10/12/decoding-hidden-meanings-of-ancient-greek-alphabet-letters/ [https://perma.cc/UL6G-VXHY].

8 The number is given by the formula: $\phi = \frac{1+\sqrt{5}}{2}$. *See* MARIO LIVIO, THE GOLDEN RATIO: THE STORY OF PHI, THE WORLD'S MOST ASTONISHING NUMBER (2002) (explaining the influence of Phi on some of the greatest artists and scientists through the ages); Adam Mann, *Phi: The Golden Ratio*, LIVE SCI. (Nov. 25, 2019), https://www.livescience.com/37704-phi-golden-ratio.html [https://perma.cc/7G9B-CFTC]. For some of the scientific applications of the golden ratio, see Marco Iosa, Giovanni Morone & Stefano Paolucci, *Phi in Physiology, Psychology and Biomechanics: The Golden Ratio Between Myth and Science*, 165 BIOSYSTEMS 31 (2018) (reviewing the polar positions on the relevance of Phi to a number of scientific disciplines, including psychology and physiology); RICHARD A. DUNLAP, THE GOLDEN RATIO AND FIBONACCI NUMBERS (1997) (exploring the fundamental properties of the golden ratio as found in philosophy and mathematics). *But cf.* Clement Falbo, *The Golden Ratio—A Contrary Viewpoint*, 36 COLL. MATHEMATICS J. 123 (2005) (arguing the existence of the golden ratio in art and science to be artificial).

9 *Precaution*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=precaution [https://perma.cc/62RE-6VC4] (last visited Feb. 4, 2022) ("prudent foresight (to prevent mischief or secure good results"); *Proportion*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=proportion [https://perma.cc/VZ5L-RYHS] (last visited Feb. 4, 2022) ("due relation of one part to another").

government responses.[10] Excusing rather than justifying government action puts a duty on governments to take reasonable steps to resolve the uncertainties surrounding the public emergency.

Public emergencies are not homogenous.[11] There is a continuum based on the nature of available mitigation or elimination responses. The etymology of the word "emergency" comes from the Latin verb "emergere," which relates to coming into light;[12] "[t]he notion is of rising from a liquid by virtue of buoyancy,"[13] suggesting a connotation of unforeseeability. Hence emergencies are defined as an "unforeseen combination of circumstances or the resulting state that calls for immediate action."[14] Emergencies can also be foreseeable, however, as "situations, *often* unforeseen, in which there is a risk of significant harm and a need to act urgently if the harm is to be averted or minimized."[15] Compare definitions one and two with the phrase "state of emergency," where the word "emergency" signifies "a situation in which a government is granted special powers, by constitutional or legal provision, to deal with a *perceived threat* to law and order or public safety, as during a time of riot or natural disaster."[16] While the first definition suggests that the essential characteristic of an emergency is unforeseeability,[17] the second definition envisages emergencies that result from an anticipated event,[18] while, implicitly, the third definition envisages varying degrees of unforeseeability in the form of riots and natural disasters.[19] The third definition, relating to a state of emergency, is limited to a threat to law and order or public safety,

10 *See generally* Taylor v. Newfoundland and Labrador, 2020 NLSC 125 paras. 55–115 (Can.) (canvasing the opinion of epidemiologists on the transmission risk of the coronavirus); *Palmer v Western Australia* [2021] HCA 5 ¶¶ 16–23 (Austl.) (summarizing the uncertainties surrounding coronavirus transmission as found by Judge Rangiah at the Federal Court of Australia level).

11 *See* Tom Sorell, *Morality and Emergency*, 103 PROC. ARISTOTELIAN SOC'Y 21, 26–27, 31–33, 36–37 (2003).

12 *Emerge*, CONCISE OXFORD ENGLISH DICTIONARY (Judy Pearsall ed., 2003).

13 *Emerge*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/emerge [https://perma.cc/948S-PE2A] (last visited Feb. 4, 2022).

14 *Emergency*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/emergency [https://perma.cc/TW9H-SPMN] (last visited May 3, 2022).

15 François Tanguay-Renaud, *Making Sense of 'Public' Emergencies*, 8 PHIL. MGMT. 31, 31 (2009) (looking critically at the concept of public emergency and its moral implications) (emphasis added).

16 *Emergency*, MACQUARIE DICTIONARY (7th ed. 2017) (emphasis added).

17 *Id.*

18 *Id.*

19 *Id.*

rather than the more general formulation under the first definition of a combination of circumstances that give rise to a significant risk, or situations inducing a risk of significant harm under the second definition.[20] The extent of the special powers that need to be granted to a government to deal with the emergency will depend on the nature of the perceived threat to law and order or to public safety.

Given that the above definitions differ in how they relate to the legal concept of foreseeability, the essential characteristic of emergencies lies in the distinction between the statistical concepts of risk and uncertainty. Risk can be analyzed as having two components: the consequences of the exposure to the harm and the likelihood of the occurrence of such exposure.[21] The distinction between risk and uncertainty is based on the ability to ascertain the consequences and likelihood of exposure.[22] Risk envisages known or knowable probabilities, while uncertainty acknowledges that sometimes the consequences and/or the likelihood are neither known nor can they be objectively estimated.[23]

All three definitions imply risk: "exposure to the chance of injury or loss; a hazard or dangerous chance."[24] The first definition implies risk through the call for immediate action. This definition is silent on the nature of the risk; it envisages only the need for immediate action. The second definition is more explicit on the existence of a risk of significant harm. According to this definition, the essential characteristic of an emergency is risk. The third definition requires for a state of emergency a perceived threat to law and order or public safety. Hence, while the first and second definitions apply even if the risk "confront[s] individuals in a private capacity,"[25] the progression of

20 *Id.*

21 Int'l Org. for Standardization, ISO Guide 73:2009(en) (2009), https://www.iso.org/obp/ui/#iso:std:iso:guide:73:ed-1:v1:en [https://perma.cc/NAP8-9EM2].

22 FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 199 (1921) ("we are concerned only to emphasize the fact that knowledge is in a sense variable in degree and that the practical problem may relate to the degree of knowledge rather than to its presence or absence *in toto*.").

23 *See e.g.*, Itzhak Gilboa, Andrew W. Postlewaite & David Schmeidler, *Probability and Uncertainty in Economic Modeling,* 22 J. ECON. PERSPS. 173 (2008) (explaining the difference between objective and subjective probabilities. Only the latter is associated with uncertainty); *see also* Neil S. Grigg, *Uncertainty and Legal Foreseeability in Flood Risk Management*, 6 ASCE-ASME J. RISK & UNCERTAINTY ENG'G SYSTEMS, PART A: CIVIL ENGINEERING 1 (Technical Note) (2020) (discussing the misalignment between legal foreseeability and engineering risk-analysis under uncertainty).

24 *Risk*, MACQUARIE DICTIONARY (7th ed. 2017).

25 Sorell, *supra* note 11, at 21–22.

specificity as seen in the third definition suggests that the extent of the risk of harm motivates the designation of an emergency as "public."[26] A public emergency signifies a risk of harm that affects a nation or a large community,[27] for example, a subnational entity like a state within a federation. The third definition also incorporates risk through the phrase "perceived threat," which is informative as to the relevance of scientific knowledge on the presence of the emergency. Foreseeability is an objective concept, while perception could also be subjective. The third definition, therefore, also allows for subjective probabilities, i.e., uncertainty as to the existence and consequences of the emergency.

It follows that foreseeability can be impacted by incomplete information. A mistake of fact could result from incomplete information on the status of the coronavirus as a pandemic, i.e., its transmission rate and footprint (geographical extent), which leads to an erroneous assessment of the likelihood of the occurrence of harm. A mistake of fact could also result from incomplete information on the effect of becoming infected with the coronavirus, which leads to an erroneous assessment of the consequences of the harm. This point is informative as to the type of reasoning that would be required to respond to emergencies.

In summary, information is the essential characteristic distinguishing public emergencies. The existence of risk does not entail mistake of fact, although a mistake of fact can influence the assessment of risk. Therefore, where there is incomplete information as to the risk created by a public emergency, the validity of government responses can be analyzed only through excusatory reasoning as found under necessity, or, if foresight of the harm is possible, through the precautionary principle.

Using the current framework for analyzing derogations from the mobility right under Article 12 of the International Covenant on Civil and Political Rights ("ICCPR"), Part II of this Article evinces an exclusive reliance on justificatory reasoning in upholding the legality of such derogations.[28] To assist in understanding the need for an

26 Tanguay-Renaud, *supra* note 15, at 31–32.

27 *Public*, MACQUARIE DICTIONARY (7th ed. 2017).

28 *See e.g.*, Daniel O'Donnell, *Commentary by the Rapporteur on Derogation*, 7 HUM. RTS. Q. 23, 30 (1985) ("The inclusion of Article 4 in the Covenant on Civil and Political Rights constitutes an attempt to regulate departures from the usual standards during times of acute crisis, that is, to extend the Rule of Law to this domain rather than create an exception to it. The Human Rights Committee has indicated, *inter alia* in the *Salgar de Martejo Case*, that the derogating state has the burden of justifying its actions"); Rep. of the Hum. Rts. Comm., *Views of the Human*

excusatory analysis, Part III rationalizes defining crimes as violations of human rights. This step prompts a comparison between the criminal defense of necessity and the principles of proportionality and precaution in their (constitutional) human rights context. Part III also renders precise the analytical structure of the necessity, proportionality, and precautionary principles by using an illustrative example where, in response to the danger to life posed by the transmission of the coronavirus, a subnational government closes its borders to prevent residents from contracting the virus.[29] Part IV explains the applicability of excusatory reasoning in the specific context of derogations from mobility rights in response to the coronavirus pandemic. Finally, Part V concludes with some remarks on how the proposed framework can provide guidance for analyzing derogations from other rights and in response to public emergencies other than the coronavirus pandemic.

II. DEROGATION MEASURES UNDER ARTICLES 4 AND 12 OF THE ICCPR

The first step is to explain the problem with the current approach to analyzing the legality of derogations from human rights. This explanation requires understanding how international law categorizes emergencies. This Part illustrates the current approach through analyzing guidance from the United Nations Human Rights Committee and the Siracusa Principles on interpreting Article 4 derogations and restrictions on the mobility right under Article 12 of the ICCPR.

A. Guidance on Derogations from the ICCPR

Guidance on derogations from human rights during public emergencies can be found in the ICCPR. As this Article will explain, the

Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. A/37/40(SUPP), at 168 (1982) (regarding Case No. 15/64, submitted by Salgar de Martejo concerning Colombia).

29 One recent example of such sub-national border closures comes from the Supreme Court of Newfoundland and Labrador ("SCNL"). The court found that provincial restrictions on entering the province in response to the spread of the Coronavirus were justified under section 1 of the Canadian Charter of Rights and Freedoms ("the Charter"). *See* Taylor v. Newfoundland and Labrador, 2020 NLSC 125 (Can.). A similar example comes from Western Australia. The state introduced a hard border closure on all travelers, including other Australians. The closure was later challenged in the High Court of Australia ("HCA") on the ground that the border closure infringed a constitutional mobility right. The challenge failed due to the lack of scientific evidence that can prove the efficacy of other responses to the spread of the Coronavirus pandemic. *See Palmer v Western Australia* [2021] HCA 5 ¶ 15 (Austl.).

ICCPR provides a classification of public emergencies, but only in relation to their severity—namely, the consequences of the exposure to the harm. Uncertainty does not inform this taxonomy. The ICCPR is silent on how public emergencies can also differ on the uncertainty of exposure to the harm, and therefore on the urgency of the required response.

To begin: a note on the use of "emergency" and "derogation" in the ICCPR. The word "emergency" appears only in Articles 4 and 8. The phrase "public emergency" appears only in Article 4.[30] Article 8(3)(c)(iii)—on the right not to be enslaved—refers to a type of public emergency—a "calamity"—where the emergency threatens "the life or well-being of the community."[31] The word "derogation" and its derivatives appear only in Articles 4, 5, and 6.[32] Article 5 ensures that derogation measures are not interpreted as a right to destroy "any of the rights and freedoms recognized" in the ICCPR or to limit these rights and freedoms "to a greater extent than is provided for in the" ICCPR.[33] Article 6 relates to the inherent right to life and stipulates that "nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide."[34]

Article 4 relates to the circumstances under which States Parties can derogate from some of their obligations under the Covenant, stipulating three conditions for the validity of such derogation measures. First, there must be a specific type of public emergency, one "which threatens the life of the nation."[35] This condition relates to the magnitude of the public emergency in terms of the nature and geographic extent of the harm. Second, the public emergency must be "officially proclaimed," which suggests a preexisting mechanism for declaring public emergencies.[36] Third, the derogation measures are only imposed "to the extent strictly required by the exigencies of the situation."[37] This third condition limits the type of envisaged public emergencies to ones where there is enough information to ascertain the

30 International Covenant on Civil and Political Rights art. 4(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

31 *Id.* art. 8(3)(c)(iii).

32 *Id.* arts. 4–6.

33 *Id.* art. 5(1).

34 *Id.* art. 6(3).

35 *Id.* art. 4(1).

36 *Id.*

37 *Id.*

proportionality between the derogatory measures and the public emergency. The other two paragraphs of Article 4 enumerate ICCPR articles to which derogation measures do not apply and introduce a procedural requirement once such derogation measures are introduced.[38] Article 4, therefore, identifies one type of public emergency based on complete information on the severity of exposure to the harm, namely a public emergency that "threatens the life of the nation."

ICCPR articles to which Article 4 derogation measures could potentially apply are Articles 12, 13, 14, 18, 19, 21, and 22.[39] Here we find implicit references to public emergencies. Like Article 4, these articles differentiate among public emergencies only based on the extent of the perceived risk of harm, which in turn informs the nature of permissible limitations on rights protected under these articles. Under Article 12(3), there can be "restrictions" on the "rights" introduced in Articles 12(1) and 12(2).[40] Article 12(3) also refers to only one type of public emergency based on severity, namely public emergencies that affect "national security, public order (ordre public), [or] public health or morals."[41] Article 13 on the rights of aliens relates to public emergencies that affect "national security," while Article 14 on equality before courts and tribunals and the right to a fair trial relates to public emergencies affecting "morals, public order (ordre public) or national security."[42] Similarly, Article 18 on freedom of thought, conscience, and religion, envisages limitations that "are necessary to protect public safety, order, health, or morals."[43] The same type of public emergencies can be found in Article 19 on the right to hold opinions without interference, where the Article identifies public emergencies affecting "national security or of public order (ordre public), or of public health or morals."[44] Article 21 on the right of peaceful assembly also refers to public emergencies affecting "national security or public safety, public order (ordre public), [or] the protection of public health or morals."[45] Article 22 on the right to freedom of association with others also relates to public emergencies affecting "national security

38 See *id.* art. 4(2)–(3).

39 *See* Hum. Rts. Comm., General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter General Comment No. 29].

40 *See* ICCPR, *supra* note 30, art. 12(3).

41 *Id.*

42 *Id.* arts. 13, 14(1).

43 *Id.* art. 18(3).

44 *Id.* art. 19(3)(b).

45 *Id.* art. 21.

or public safety, public order (ordre public), [or] the protection of public health or morals."[46]

Given the similarity among ICCPR articles when identifying public emergencies that could attract derogations under Article 4, I will focus on one article that has recently been extensively limited during the coronavirus pandemic, namely the mobility right in Article 12.

Under Article 12(1), relating to intramobility—the ability to travel within a given country—"[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."[47] Note how the right in Article 12(1) is formulated as a "liberty of movement," which seems to suggest that what is envisaged is a freedom from government intervention, rather than an individual right. Notwithstanding, the fact that this freedom is stated as a right, Article 12(1) envisages a legal duty on governments to protect this right, such as, for example, a constitutional right protecting liberty of movement within the country. In contrast, at first instance, the freedom under Article 12(1) to choose residence within a country seems to import no legal duty on government to enforce this freedom. There is only an obligation on a government not to unduly limit this freedom.

The same distinction between a right and a freedom also informs the freedom in Article 12(2) relating to only one aspect of intermobility, the freedom to leave a county, rather than entering it, even if it is one's own country.[48] Hence, Article 12(2) states that "[e]veryone shall be free to leave any country, including his own."[49] This freedom does not envisage a legal duty to protect interstate travel, but only an obligation on governments not to unduly limit this freedom. There could be, therefore, a dichotomy between an intramobility right encompassing liberty of movement and residence within the territory of a State, and an intermobility freedom encompassing the liberty to leave any country, including one's own country.

Restrictions on intrastate mobility rights and freedom of interstate mobility must meet a three-part test. This restrictions test is also informed by the derogations test in Article 4(1). Under the test in Article 12(3), first, restrictions must be "by law."[50] Second, they must be "necessary to protect national security, public order (ordre public),

46 *Id.* art. 22(2).
47 *Id.* art. 12(1).
48 *See id.* art. 12(2).
49 *Id.*
50 *Id.* art. 12(3).

public health or morals or the rights and freedoms of others."[51] Third, they must be "consistent with the other rights recognized in the present Covenant."[52] The first part of Article 12(3) corresponds to the second condition under Article 4 which requires an official proclamation of a state of emergency. The second part corresponds to the first condition under Article 4, requiring the existence of a specific type of public emergency—namely, one that threatens the life of a nation.

The distinction between rights and freedoms informs the meaning of Article 12(3) "restrictions" in their application to the right in Article 12(1) and the freedom in Article 12(2). The word "restrict," for the purposes of Article 12(3), takes its ordinary meaning: to deprive someone of his or her freedom of movement.[53] However, the restriction on the intramobility right envisages derogation from an existing legal duty, where the derogation measure can be absolute; while in the case of intermobility, there can be only a duly imposed limitation on this freedom. Note, however, that Article 12(3) refers to "[t]he above-mentioned rights,"[54] which seems to conflate the nature of rights and freedoms. The fact that Article 12(3) refers to "rights" seems to suggest that at least the freedom in Article 12(1) is also envisaged to create a legal duty on government to ensure honoring this right. In other words, the freedom in Article 12(1) is interpreted as a right to liberty to choose to reside anywhere within the territory of a State. The better view is to construe the opening phrase in Article 12(3) as "[t]he above-mentioned rights and freedoms." This construction helps prevent conflating the analysis of rights and freedoms by elucidating the application of the Article 12(3) test for the validity of restrictions on the rights and freedoms in Articles 12(1) and 12(2).

B. HRC Guidance on ICCPR Derogations

This Section illustrates how ICCPR derogations are informed only by a justificatory reasoning. In this Part, I argue that the general guidance from the United Nations Human Rights Committee ("HRC") on derogation measures under Articles 4 and restrictions under Article 12 provides one analytical framework for all types of emergencies,

51 *Id.*

52 *Id.*

53 "*Restrict*," from Latin "*restringere*," to restrain, meaning to "confine (someone or something)." *Restrict*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=restrict [https://perma.cc/L2L5-QJDK] (last visited Feb. 28, 2022).

54 *See* ICCPR, *supra* note 30, art. 12(3).

namely one based on proportionality. HRC guidance is silent on unforeseeability of public emergencies, and therefore on the need for an excusatory reasoning.

In 1981, the Office of the High Commissioner for Human Rights issued a General Comment on the derogation from rights under Article 4 of the ICCPR.[55] In relation to, *inter alia*, the mobility right, the 1981 General Comment explains that before any derogation from the mobility right, there must be: (1) a public emergency that (2) threatens the life of the nation, and (3) an officially proclaimed state of emergency.[56] The Comment further explains the extent for permissible derogation by stating that "measures taken under article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened . . . ."[57]

In 1999, the HRC issued General Comment No. 27 on Article 12.[58] Paragraph 2 of the Comment outlines the permissible derogations from the mobility right.[59] Paragraphs 11 to 18 elaborate on the nature of these limitations.[60] Paragraph 14 contains an explicit and exclusive reliance on proportionality in testing the validity of derogations from the mobility right.[61] This reliance is explained by the presumption that we are dealing with public emergencies, the response to which is guided by complete information on the severity of the harm and on the available alternatives to mitigate or eliminate this harm.

In 2001, the HRC replaced its 1981 General Comment with General Comment No. 29.[62] General Comment No. 29 emphasizes the exceptional and temporary nature of derogation under the ICCPR,[63] and elaborates on the "specific regime of safeguards" that must regulate this derogation,[64] especially the "predominant objective" of "restoration of a state of normalcy."[65] The Comment reiterates the

55 Hum. Rts. Comm., CCPR General Comment No. 5: Article 4 (Derogations), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (1981) [hereinafter General Comment No. 5], *replaced by* General Comment No. 29, *supra* note 39.

56 *Id.* ¶ 1.

57 *Id.* ¶ 3.

58 Hum. Rts. Comm., CCPR General Comment No. 27: Article 12 (Freedom of Movement), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999) [hereinafter General Comment No. 27].

59 *See id.* ¶ 2.

60 *See id.* ¶¶ 11–18.

61 *See id.* ¶ 14.

62 *See* General Comment No. 29, *supra* note 39.

63 *Id.* ¶ 1, 2.

64 *Id.* ¶ 1.

65 *Id.*

prerequisites for any derogation as two "fundamental conditions," namely, the existence of a public emergency which threatens the life of the nation and the official proclamation of a state of emergency.[66] The Comment confirms that any derogation must be "limited to the extent strictly required by the exigencies of the situation."[67] The Comment goes further to explain that "[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1."[68] The distinction is informed by the "duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency."[69]

Therefore, as a gloss on the exclusive reliance on the principle of proportionality that we saw under General Comment No. 27, General Comment No. 29 indicates that restrictions on the mobility right in Article 12 must be analyzed, without exception, using a justificatory rationale.[70] General Comment No. 29 elaborates this analytical framework, first by delineating the requirement for justifying the derogation, and second by applying the principle of proportionality to derogations.[71] The official proclamation of a state of emergency must be justified by evidence supporting the existence of a public emergency that threatens the life of the nation, while the extent of the derogation is assessed through the criteria of (1) necessity and (2) legitimacy in the circumstances. The Comment elaborates further as follows:

> 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*.[72]

In fact, use of the principle of proportionality to analyze derogations under the ICCPR precedes the 1981 Comment by the HRC. In 1977, the United Nations Economic and Social Council, on the recommendation of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, authorized a Special Rapporteur, Nicole

66 *Id.* ¶ 2.
67 *Id.* ¶ 4.
68 *Id.* ¶ 3.
69 *Id.* ¶ 4.
70 *See id.* ¶ 5.
71 *Id.*
72 *Id.* ¶ 4 (emphasis added).

Questiaux, to conduct an analysis on the relationship between a state of emergency and the protection of human rights.[73] The Questiaux Report, submitted to the Sub-Commission in 1982, suggested proportionality as one of the substantive guarantees where a public emergency leads to a derogation from ICCPR rights.[74]

There is therefore exclusive reliance on proportionality, whether under Article 12 limitations or the more general derogations under Article 4. In the next Section, I illustrate how the same emphasis on analyzing derogation measures through proportionality can be found in the 1985 Siracusa Principles.[75]

C. The Siracusa Principles

The 1985 Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR were drafted in a colloquium held in Siracusa, Italy, and sponsored by many non-governmental organizations.[76] The colloquium was initiated by the American Association for the International Commission of Jurists ("AAICJ") in the spring of 1984 and was attended by thirty-one experts in international law.[77]

Under Part II of the Siracusa Principles, derogation measures are available "only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation."[78] The type of emergency that can give rise to derogation measures is one that:

> (a) affects the whole of the population and either the whole or part of the territory of the state; and

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73 See Nicole Questiaux (Special Rapporteur on the Prevention of Discrimination and Protection of Minorities), Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, ¶ 1, U.N. Doc. E/CN.4/Sub.2/1982/15 (July 27, 1982) [hereinafter Questiaux Report]; see generally SARA ABIOLA, OPEN SOC'Y INST., THE SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION PROVISIONS IN THE INTERNATIONAL COVENANT FOR CIVIL AND POLITICAL RIGHTS (ICCPR): HISTORY AND INTERPRETATION IN PUBLIC HEALTH CONTEXT (2011) (presenting the history of the Siracusa Principles and their use in the context of protecting ICCPR human rights during an emergency).

74 Questiaux Report, *supra* note 73, ¶¶ 60–63.

75 *See* AM. ASS'N OF THE INT'L COMM'N OF JURISTS, SIRACUSA PRINCIPLES ON THE LIMITATION AND DEROGATION PROVISIONS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1985), https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf [https://perma.cc/BJX2-L6RJ] [hereinafter SIRACUSA PRINCIPLES].

76 ABIOLA, *supra* note 73, at 4–5.

77 SIRACUSA PRINCIPLES, *supra* note 75, at 3.

78 *Id.* ¶ 39.

> (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.[79]

Further, the Principles note that "[d]erogation from rights recognized under international law to respond to a threat to the life of the nation 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."[80] Derogation is "an authorized and limited prerogative to respond adequately to a threat to the life of the nation. The derogating state shall have the burden of *justifying* its actions under law."[81]

Similarly, Part I of the Principles interprets the term "necessary" in the context of limitations to mean proportionate to a legitimate end, hence importing objective considerations.[82] We saw the same approach in General Comment No. 27, which stated that there are permissible restrictions when exceptional circumstances threaten national security, public order, public health, or morals.[83] Imposing an implicit homogeneity on relevant public emergencies in relation to their unforeseeability and urgency led to adopting one analytical framework based on the principle of proportionality.

The Siracusa Principles also exclusively envisage a justificatory reasoning. However, as discussed in Part I, testing the validity of the derogation cannot always import an analysis based on proportionality because proportionality analysis cannot be carried out where there is incomplete information on the nature and consequences of the threat and the cause of the public emergency. Instead, derogation can only be guided by excusatory reasoning, such as under the precautionary principle.

III. UNDERSTANDING EXCUSATORY AND JUSTIFICATORY REASONING

This Part clarifies the division between excuse and justification as it applies to analyzing infringements on (international) human rights. I explain the distinction between necessity, proportionality, and precaution in the context of German law. Opting for a German delineation of these concepts allows for a comparison in the jurisdiction

79 *Id.*
80 *Id.* ¶ 61.
81 *Id.* ¶ 64 (emphasis added).
82 *Id.* ¶ 10(d).
83 *See* General Comment No. 27, *supra* note 58, ¶ 11.

where the principles of proportionality and precaution were first introduced.[84] The starting point is to motivate using a formulation of the principle of necessity that comes from the German Penal Code to inform derogations from human rights.[85]

A. Defining Violations of Human Rights as Crimes

While the principle of necessity has its origins in criminal law,[86] its use in the context of analyzing excusatory derogations from human rights is predicated on defining violations of human rights as crimes. Specifically, the actus reus of any crime can be reconstructed as a violation of some human right, with intention as the requisite mens rea—that is, the (subjective) state of mind of the actor, namely achieving an objective through the act.[87] For example, through this formulation of crimes, a Canadian province commits a crime if it closes its borders to Canadian citizens residing in other provinces.[88] The actus reus is the

84 *See* Jane McManamon, The Origin and Migration of Proportionality 9 (2010) (LLM Research Paper, Victoria University of Wellington), https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/5364/paper.pdf?sequence=1 [https://perma.cc/JFU3-KCZH] (explaining that the legal concept of proportionality was introduced in the late eighteenth century in German administrative law) (citing AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 175–208 (David Dyzenhaus & Adam Tomkins eds., Doron Kalir trans., 2012); MAHENDRA PAL SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE (1985)); Marko Ahteensuu & Per Sandin, *The Precautionary Principle*, *in* HANDBOOK OF RISK THEORY: EPISTEMOLOGY, DECISION THEORY, ETHICS, AND SOCIAL IMPLICATIONS OF RISK 961, 966 (Sabine Roeser, Rafaela Hillerbrand, Per Sandin & Martin Peterson eds., 2012) (explaining that "[a] commonly agreed predecessor of the precautionary principle is the *Vorsorgeprinzip* which was introduced to German environmental law and policy in the 1970s").

85 Strafgesetzbuch [StGB] [Penal Code], §§ 34, 35, https://www.gesetze-im-internet.de/englisch_stgb/ [https://perma.cc/K63M-TFCK] (Ger.).

86 Such origins are at least in Anglo-American law. *See* Benjamin L. Berger, *A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity*, 39 ALTA. L. REV. 848, 852 (2002) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: BOOK THE FOURTH 28–31 (1765) (for the proposition that "Blackstone wrote that he would recognize four kinds of necessity in the criminal law").

87 *See, e.g.*, WILLIAM LAWRENCE CLARK & WILLIAM EPHRAIM MIKELL, HANDBOOK OF CRIMINAL LAW 206–18 (3d ed. 1915) (in the context of discussing common law murder); KENNETH J. ARENSON, MIRKO BAGARIC & PETER GILLIES, AUSTRALIAN CRIMINAL LAW IN THE COMMON LAW JURISDICTIONS: CASES AND MATERIALS (4th ed. 2015).

88 *See* Taylor v. Newfoundland and Labrador, 2020 NLSC 125 (Can.); *see also Palmer v Western Australia* [2021] HCA 5 ¶ 13 (Austl.) (similar factual in Western Australia).

infringement on the mobility right. The mens rea is the foreseen consequences of border closures on the right to mobility.

The argument for defining violations of human rights as crimes is clearest in humanistic criminology.[89] The historicity of human rights, on which the definition is predicated, requires evincing the moral imperative of human rights in established institutions, just like the alternative definition of crimes must establish "functional imperatives [in] established institutions or political economies."[90] I interpret the words "established institutions" in the above quotation as systems of rules-in-equilibrium,[91] "where the rules are summarized by the agents [(governments)] using some kind of symbolic representation,"[92] such as international covenants or constitutions.[93] This

89 *See* Herman Schwendinger & Julia Schwendinger, *Defenders of Order or Guardians of Human Rights?*, *in* CRITICAL CRIMINOLOGY 113, 132 (Ian Taylor, Paul Walton & Jock Young eds., 1975) (arguing that the functional imperative of modern social and political institutions itself is contributing to harm because it is based on a natural-law conception of crime that is divorced from the political structures that define crimes). The essence of this argument is embedded in Marxist criminology; the production of harm is inherent in the *modus operandi* of capitalism. *See* Paddy Hillyard & Steve Tombs, *Towards a Political Economy of Harm: States, Corporations and the Production of Inequality*, *in* BEYOND CRIMINOLOGY: TAKING HARM SERIOUSLY 30, 43 (Paddy Hillyard, Christina Pantazis, Dave Gordon & Steve Tombs eds., 2004). *But cf.* MARK COWLING, MARXISM AND CRIMINOLOGICAL THEORY: A CRITIQUE AND A TOOLKIT 47 (2008) (suggesting that human rights are more relevant to a "normative political theory" than to criminology). *See also* ROB WHITE, FIONA HAINES & NICOLE L. ASQUITH, CRIME AND CRIMINOLOGY 122–23 (5th ed. 2012) (explaining how "crime has been redefined in a broader sense to encompass any activity that interferes with *basic human rights*," including in the Marxist conception of crimes as violations of human rights); Paddy Hillyard & Steve Tombs, *From 'Crime' to Social Harm?*, 48 CRIME, L. & SOC. CHANGE 9 (2007) (providing a brief critique of criminology to illustrate the difficulty of defining crimes).

90 Schwendinger & Schwendinger, *supra* note 89, at 132.

91 *See* Frank Hindriks & Francesco Guala, *Institutions, Rules, and Equilibria: A Unified Theory*, 11 J. INSTITUTIONAL ECON. 459 (2015) (arguing that equilibrium-based and rule-based definitions of institutions can be reduced to a rules-in-equilibrium theory). *But cf.* Geoffrey M. Hodgson, *On Defining Institutions: Rules Versus Equilibria*, 11 J. INSTITUTIONAL ECON. 497, 501 (2015) (arguing that institutions cannot be defined as rules in equilibria because equilibria relate to analyzing institutions which bears no relevance to defining them).

92 Hindriks & Guala, *supra* note 91, at 468.

93 International law can be interpreted as a system of rules-in-equilibrium. *See* Jens David Ohlin, *Nash Equilibrium and International Law*, 23 EUR. J. INT'L L. 915, 920 (2012) (arguing that international law is a Nash equilibrium). Constitutions can also be interpreted as such intuitions. *See* Roland Kirstein & Stefan Voigt, *Constitutions as Equilibria: A Game-Theoretic Approach to Positive Constitutional Economics* 3 (Ctr. for the Study of L. & Econ., Discussion Paper No. 9904, 1999)

interpretation is a generalization of the philosophical approach where institutions are interpreted as "*constitutive rules* that assign statuses and functions to physical entities."[94] The equilibrium requirement "view[s] institutions as behavioural patterns or regularities . . . . Such regularities 'can be best described as non-cooperative equilibria' . . . because out-of-equilibrium actions are unstable and are unlikely to be repeated in the course of many interactions."[95] This requirement is central to understanding the need for different responses to different public emergencies. What is critical is that international law and constitutions (*qua* institutions) can be, but are not always, in equilibrium. Where there is only incomplete information on the nature of the threat posed by a given public emergency, such institutions are not in equilibrium.[96] They are in a transient phase that imposes Theta reasoning on ascertaining the validity of infringements on human rights. With the understanding of institutions as rules-in-equilibrium, I proceed to analyze the moral imperative in the established institution of international law.

The moral imperative of human rights is clearest in relation to violations of *jus cogens* norms, where there is congruence between crimes against humanity and violations of certain human rights.[97] The moral imperative is identified as human dignity.[98] Such norms constitute *obligatio erga omnes* which cannot be derogated.[99] International law instruments have defined some violations of human rights as

(explaining constitutions as non-cooperative equilibrium in the post-constitutional stage that complies with the social contract from the pre-constitutional stage).

94 Hindriks & Guala, *supra* note 91, at 463.

95 *Id.* at 460, 461 (quoting ANDREW SCHOTTER, THE ECONOMIC THEORY OF SOCIAL INSTITUTIONS 24 (1981)).

96 *See* Christian W. Bach & Andrés Perea, *Incomplete Information and Equilibrium* 3, 25 (Epicenter Rsch. Ctr. for Epistemic Game Theory, Working Paper No. 9, 2017) (explaining that even though with incomplete information agents face uncertainty, there is an equilibrium based on "rationalizability," where agents can act under minimal constraints if it is common knowledge that they act rationally).

97 *See* Juan Pablo Pérez-León Acevedo, *La Relación Cercana entre Violaciones Serias de los Derechos Humanos y Crímenes de Lesa Humanidad: Criminalización Internacional de Serios Abusos* [*The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses*], 17 ANUARIO MEXICANO DE DERECHO INTERNACIONAL [MEXICAN Y.B. INT'L L.] 145 (2017) (arguing that international law instruments point to an intrinsic relationship between serious human rights and crimes against humanity).

98 THOMAS WEATHERALL, JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT 71 (2015).

99 *See* M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes*,* 59 L. & CONTEMP. PROBS. 63 (1996) (explaining the binding nature of *jus cogens* norms in international criminal law).

crimes to ensure that there can be no derogation from these rights.[100] Such "crimes include genocide, aggression, crimes against humanity, war crimes, piracy, slavery (and slave-related practices) and torture."[101]

While there is no defense to *jus cogens* violations, the necessity defense would be available for derogations from some human rights under certain conditions. It is important to clarify that extending the nexus between crimes and violations of human rights does not deny that there are different value judgments that people assign to different human rights.[102] This value judgment, as further explained below, informs not only the defense of justificatory necessity, but also the operation of the precautionary principle. The extension builds instead on the proposition that "all human rights could be derived from a small set of fundamental rights that are interconnected and that incorporate all ulterior possible specific rights."[103] The argument is that the moral imperative of all human rights flows out from the core set of human rights recognized under *jus cogens* norms because all human rights are rationalized under human dignity.[104]

It follows that defining all crimes as a violation of some human right does not extend the congruence that already exists between crimes against humanity and some human rights. What is extended is

100 Anees Ahmed & Merryn Quayle, *Can Genocide, Crimes Against Humanity and War Crimes Be Pardoned or Amnestied?*, 79 AMICUS CURIAE 15, 17 (2009). Ahmed & Quayle explain that "[t]he 'most conspicuous consequence' of a crime reaching *jus cogens* status is that it cannot be derogated from by states, either 'through international treaties or local or special customs or even general customary rules not endowed with the same normative force." *Id.* at 17 (citing Prosecutor v Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 153 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998)). Ahmed and Quayle add that "[i]n the Furundzija decision, the Trial Chamber of the ICTY ruled that because of the *jus cogens* value of serious international crimes, treaties or customary rules which authorise or otherwise provide for amnesties for those crimes are null and void." *Id.* at 18.

101 *Id.* at 17.

102 John D. Montgomery, *Is There a Hierarchy of Human Rights?*, 1 J. HUM. RTS. 373, 373, 376 (2002) (arguing that people assign higher value to human rights that are most relevant to their daily lives).

103 Fernando Suárez Müller, *The Hierarchy of Human Rights and the Transcendental System of Right*, 20 HUM. RTS. REV. 47, 47 (2019) (providing a review of the problem of hierarchy of rights to motivate the author's transcendental approach where all rights originate from a first transcendental value).

104 For example, the preamble to the Universal Declaration of Human Rights begins with the following words: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

the availability of the defense of necessity in relation to violation of some human rights. Under this approach, the defense is available where international human rights instruments explain that there can be derogations from a given right under certain conditions—for example, in Article 4 of the ICCPR.[105] Under the proposed approach, Article 4(1) is interpreted as providing a defense to a crime. The derogation is interpreted as a crime, but one where the defense of necessity is available. In contrast, crimes against humanity cannot be justified or excused using this, or any other, defense. To clarify the argument further, I use Article 12 of the ICCPR to specify the relevant human right. The relevance of necessity "to the extent strictly required by the exigencies of the situation" in Article 4(1) is made explicit in Article 12(3).[106] The proposed definition interprets the necessary restrictions in Article 4(1) as those permitted under the elements of the criminal defense of necessity; its elements inform the crime of derogating from this mobility right.

The German version of the mobility right reads as follows:

> All Germans shall have the right to move freely throughout the federal territory.
>
> This right may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is *necessary* to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a *Land*, *to combat the danger of an epidemic*, to respond to a grave accident or natural disaster, to protect young persons from serious neglect or to prevent crime.[107]

Like Article 12 of the ICCPR, the German version envisages limiting the mobility right in response to public emergencies. The same language of necessity found in the ICCPR is employed in the context of "combat[ing] the danger of an epidemic."[108]

Other versions of the mobility right in Article 12 can be found in the constitutions of Canada and Australia. For example, on the right to move within "the territory of a State,"[109] specially to cross subnational

105 ICCPR, *supra* note 30, art. 4(1).

106 *See id.* arts. 4(1), 12(3).

107 Grundgesetz [GG] [Basic Law], art. 11, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0061 [https://perma.cc/328T-7RCS] (emphasis added).

108 *Id.*

109 ICCPR, *supra* note 30, art. 12(1).

borders in federal states, section 6(2) of the Canadian Charter of Rights and Freedoms states that: "Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province."[110] The Australian version of Article 12 is stated as follows: "On the imposition of uniform duties of customs, trade, commerce, and *intercourse among the States*, whether by means of internal carriage or ocean navigation, shall be absolutely free."[111] While the constitutions of Canada and Australia do not provide a defense of necessity for derogations from the right to mobility, the interpretation of the ICCPR version of this right as a crime to which necessity is a defense illustrates how these versions of the mobility right should be analyzed by domestic courts. To elaborate on this point, in the next Section I analyze the application of the criminal defense of necessity, as well as the principles of precaution and proportionality, in the context of the response to the coronavirus pandemic.

B. The Essence of Necessity, Proportionality, and Precaution

With the above definition of violation of human rights as crimes, this Section applies the German Penal Code formulation of the necessity defense to border closures during the coronavirus pandemic. The objective is to build on the clear distinction between excusatory and justificatory necessity in the Penal Code when analyzing the principles of proportionality and precaution. The resulting framework will be applied in Part IV to derogations from mobility rights.[112] The analysis

110 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 6(2)(a) (U.K.).

111 *Australia Constitution* s 92 (emphasis added).

112 Strafgesetzbuch [StGB] [Penal Code], §§ 34, 35, translation at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0191 [https://perma.cc/R26R-MA9P] (Ger.). For the origins of excusatory and justificatory defenses in common law, see 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 192 (1883) (explaining the relevance of excuse and justification to nineteenth century English criminal law). Since the twentieth century, this distinction has withered in most common law jurisdictions, at least relative to civil law ones. *See* Albin Eser, *Justification and Excuse*, 24 AM. J. COMPAR. L. 621, 623 (1976) (explaining how the distinction between excuse and justification is "firmly entrenched" in German criminal law). The distinction was perceived as a theoretical burden, as a source of confusion that did not provide any analytical value when assessing culpability. *See* 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 11 (1883) (suggesting that the distinction between justifiable homicide and excusable homicide "has some historical interest, though at present it involves no legal consequences"). Nonetheless, in civil law jurisdictions, there is a clear distinction between defenses based on justifying the wrongful act and

shows that the elements of necessity, proportionality, and precaution are dictated by informational constraints on ascertaining the effect of public emergencies on human rights.

1. The Principle of Necessity

The Penal Code distinguishes between justificatory necessity and excusatory necessity. Following this distinction, I start with an analysis of justificatory necessity. The analysis suggests that justification requires balancing analyses that cannot be carried out under incomplete information.

a. Justificatory Necessity

Justificatory necessity (*Rechtfertigender Notstand* [justifying emergency]) as expressed in the Penal Code can be restated as an if-then statement: if a person is faced with a present danger to "life, limb, liberty, honour, property or another legal interest" and there is no legal act that can avert said danger, then the person can commit an illegal act adequate to avert the danger.[113] This act is deemed legal if the degree of the danger facing the person substantially outweighs the degree of interference with "affected legal interests."[114] Hence, when

excusing the actor. The distinction between excuse and justification is, however, supported by many common law scholars. *See, e.g.*, George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974) (arguing for a clear distinction between excuse and justification in criminal law defenses); G. L. Radbruch, *Jurisprudence in the Criminal Law*, 18 J. COMPAR. LEGIS. & INT'L L. 212, 217–19 (1936) (explaining why the distinction between excuse and justification was lost in the context of homicide, and motivates the assertion that "in at least four relations justifiable and excusable acts have different legal consequences"); *see also* GWYNN NETTLER, EXPLAINING CRIME (3d ed. 1984); JOHN HAGAN, MODERN CRIMINOLOGY: CRIME, CRIMINAL BEHAVIOR, AND ITS CONTROL (1984) (presenting seven approaches to identifying crime, including a human rights approach); Jeanette Garwood, Michelle Rogerson & Ken Pease, *Sneaky Measurement of Crime and Disorder*, *in* DOING CRIMINOLOGICAL RESEARCH 157 (Victor Jupp, Pamela Davies & Peter Francis eds., 2000); Nicola Lacey, *Legal Constructions of Crime*, *in* THE OXFORD HANDBOOK OF CRIMINOLOGY 179, 186 (Mike Maguire, Rod Morgan & Robert Reiner eds., 4th ed. 2007) (explaining the relationship between legal and social constructions of crime); David Downes & Rod Morgan, *No Turning Back: The Politics of Law and Order into the Millennium*, *in* THE OXFORD HANDBOOK OF CRIMINOLOGY 201 (Mike Maguire, Rod Morgan & Robert Reiner eds., 4th ed. 2007); Kristian Lasslett, *Crime or Social Harm? A Dialectical Perspective*, 54 CRIME, L. & SOC. CHANGE 1 (2010).

113 Strafgesetzbuch [StGB] [Penal Code], § 34, translation at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0191 [https://perma.cc/R26R-MA9P] (Ger.).

114 *Id.*

protecting life during the coronavirus pandemic (the purpose), using necessity as the justification, preventing the transmission of the coronavirus (the objective of the act) through border closures (the unlawful act) could be deemed lawful based on four elements: (1) legitimacy of the purpose of the actor (the government's protection of life by averting the present danger of becoming infected with the coronavirus); (2) adequacy of the unlawful act in averting the present danger (infection with the coronavirus pandemic); (3) lack of legal alternatives to the act that can equally achieve the purpose of the actor; and (4) the purpose of the actor must substantially outweigh the burden on the affected interest (the mobility right).

As explained below, only elements two and three require information relating to the specific nature of the present danger (the public emergency). Changes to available information explain the distinction between justification and excuse. Analysis under justificatory necessity starts and ends with a level of abstraction, with macroanalyses under the first and fourth elements that require little or no reliance on the factual matrix presented by a public emergency (such as the coronavirus pandemic).[115] However, the other elements require objective probabilities, which may not be available during extreme public emergencies.

Under the first element, the focus is on the purpose of the unlawful act. The actor must have the purpose of protecting one of the legal interests enumerated in the section, namely "life, limb, liberty, honour, property or another legal interest."[116] The purpose must therefore fit an enumerated list of legal interests, with the phrase "another legal interest" interpreted as interests *ejusdem generis*.[117] Note the distinction between "purpose," from Old French "*porpos*" meaning intention, and "objective," from Latin "*objectum*" meaning "objective to the

115 This observation, namely that analyzing necessity starts and ends with abstraction or macroanalysis, can also be found in negligence, where the analysis starts with establishing the existence of the duty of care, and ends with policy considerations as to whether there should be liability. *See generally* Vladislava Stoyanova, *Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations Under the European Convention on Human Rights*, 24 INT'L J. HUM. RTS. 632, 635–36 (2020) (discussing the relevance of policy considerations to finding a duty of care); Steven Yannoulidis, *Causation in the Law of Negligence*, 27 MONASH UNIV. L. REV. 319, 321 (2001) (discussing the argument that "attributive causation is ultimately a question of legal policy").

116 Strafgesetzbuch [StGB] [Penal Code], § 34, translation at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0191 [https://perma.cc/R26R-MA9P] (Ger.).

117 *See id.*

mind."[118] Based on this etymology, purpose is related to the actor, through intention, while the objective is related to the act, through foreseeable consequences of the act. In relation to government responses to the coronavirus, the issue under this element is whether the government (the actor) has a legitimate purpose, namely, protecting "life" from a "present danger" (the coronavirus pandemic). Notwithstanding this distinction, purpose is part of the foreseeable consequences of the objective of the act (preventing the transmission of the virus), as much as the foreseeable consequences of the act are part of intention.[119] However, the purpose is formulated at a higher level of abstraction.[120] For example, the purpose of protecting life by averting a present danger incorporates many objectives, one of which is preventing the transmission of the coronavirus. The objective of preventing this transmission must be informed by specific information on the effectiveness of the unlawful act (border closure) in averting the danger (preventing the infection). This distinction between purpose of the actor and objective of the act helps uncover some of the analytical difficulties inherent in proportionality compared to necessity.[121]

In summary, the first element focuses on the intention of the actor, rather than the foreseeable consequences of the unlawful act. The unlawfulness of the act arises from its objective because of the foreseeable consequence of infringing on other legal interests (the mobility right), rather than advancing an illegitimate purpose. While this

118 *Purpose*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=purpose [https://perma.cc/2NYN-G8FZ] (last visited Mar. 2, 2022); *Objective*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=objective [https://perma.cc/H94H-FN7E] (last visited Mar. 2, 2022).

119 *See, e.g.*, Raymond Lyons, *Intention and Foresight in Law*, 85 MIND 84, 84 (1976) (discussing "the presumption in English law that a person intends the *natural* consequences of his acts").

120 The distinction between purpose of the actor and objective of the act follows the distinction between "direct intention" and "oblique intention." *See* IRYNA MARCHUK, THE FUNDAMENTAL CONCEPT OF CRIME IN INTERNATIONAL CRIMINAL LAW: A COMPARATIVE LAW ANALYSIS 11 (2014) (citing DAVID ORMEROD, SMITH AND HOGAN CRIMINAL LAW 98 (12th ed. 2008); C.M.V. CLARKSON, H.M. KEATING, & S.R. CUNNINGHAM, CLARKSON AND KEATING CRIMINAL LAW: TEXT AND MATERIALS 119 (6th ed. 2007)) (explaining that "'direct intention' means that the prohibited consequence is intended when it is the aim or the objective of the actor. Putting it differently, a result cannot be regarded as intended unless it was *the actor's purpose*. The concept of 'oblique intention' views the prohibited consequence as intended when it is foreseen as a virtual, practical or moral certainty") (emphasis added). The objective (*qua* oblique intention) is therefore less abstract given that it is based on more certain, or specific, information.

121 *See* discussion *infra* Section III.B.2.

condition is implicit in justificatory necessity, it will become explicit in the formulation of the principle of proportionality.[122]

Under the second element, the act must be adequate in protecting life by averting infection with the coronavirus. This element, therefore, requires the objective of the act (preventing transmission of the coronavirus) to be aligned with the purpose of the actor (protecting life by averting the danger of infection with the virus), which in turn requires information relating to the effect of the pandemic (the present danger) on life. This is the first information set. The German Penal Code uses "*ein angemessenes Mittel*" [an adequate means], which follows the etymology of the words "adequate" and "*angemessen*."[123] The required standard, therefore, is that the unlawful act (border closure) must be equal to what is necessary to protect life by averting the danger. Viewed from a different angle, this element requires a causal link between the objective of the act (preventing transmission) and the purpose of the actor (averting infection).

It follows that the adequacy standard envisages an act that eliminates the danger. This point requires an elaboration on the meaning of the word "avert." The word "avert," from Latin "*advertire*," came to mean "prevent the occurrence of."[124] This requirement is therefore a binary requirement. An act can either avert or not avert the danger. In the context of the coronavirus pandemic, only an act that can bring the probability of contracting the virus to zero would be deemed to have averted the danger. This inference would be open only if there is sufficient evidence to show how if the act (border closure) was not taken, life would be at risk of infection by the coronavirus, and that the unlawful act was no more than what was adequate to eliminate that risk. Where the principle of proportionality is analyzed below, this point clarifies the main theoretical difference between this element of justificatory necessity and the second element of proportionality (suitability).[125]

Under the third element, there are no alternative actions "to avert the danger" to life arising from the pandemic. An alternative is an

122 *See* discussion *infra* Section III.B.2.

123 The etymology of the word "*angemessen*" comes from the Latin word "*aequalis*" which also informs the etymology of the word "adequate." *See* Francis A. Wood, *Germanic Etymologies*, 11 MOD. PHIL. 315, 322 (1914); *Adequate*, THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (T.F. Hoad ed., 2003).

124 *Avert*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=avert [https://perma.cc/6G7M-GGE5] (last visited Mar. 2, 2022).

125 *See* discussion *infra* Section III.B.2.

action that averts the present danger (infection with the coronavirus), and hence is an alternative that would have secured the purpose of the actor, albeit through a different objective than that of the unlawful act (preventing transmission of the disease). However, when the aversion requirement is read with the second element's adequacy requirement, alternatives to the unlawful act must have an *identical* effect on the present danger (infection), and hence on the protected interest (life), although they can have different onerous effects on the infringed interest (mobility). An action that does not avert the danger is not an alternative to the unlawful act. Similarly, an alternative that averts the danger but is more than what is adequate for this purpose, is also not an alternative.

What is required for identifying an alternative is for the alternative to effect the intended aversion only adequately—the act must not overshoot or undershoot what is required to eliminate the danger. For example, the policy of imposing short lockdowns, which has the objective of slowing down the transmission of the virus rather than eliminating the possibility of transmission, is not an alternative to the unlawful act of border closure. It is not an alternative because it must have an identical effect on the present danger (infection), and hence on the protected interest (life). The third element, therefore, requires a second information set that relates to the availability of alternatives to the unlawful act that would have been adequate in averting the danger.

Information sets one and two, relating to elements two and three, depend on the availability of scientific knowledge on the effect of the present danger (infection with the virus) on the protected interest (life). Ascertaining whether the danger to life brought about by the pandemic cannot be averted except through border closures (the unlawful act) depends on the first and second information sets. There needs to be scientific evidence that border closures are adequate in preventing death because of contracting the coronavirus and that border closures are the only alternative that is adequate for this protection. Each balancing exercise requires an objective standard of adequacy. For adequacy and effectiveness in averting the present danger, evidence needs to establish that the present danger can cause death, and that the unlawful act and its identified alternatives, if any, can eliminate the probability of this outcome. Where the present danger is an unknown disease such as the coronavirus, there is paucity in expert evidence at the early stages of infection, although more scientific information can become available over time.

The fourth and final element under justificatory necessity requires balancing the protected interest (life) and the affected interest

(mobility). It is not enough that the utility from protecting life outweighs the utility from protecting mobility. The utility of the protected interest (life) must be substantially higher than the affected interest (mobility). The word "substantial" comes from the Latin word "*substantialis*," meaning real or material.[126] The requirement is therefore for a material difference between the two utilities. Imposing this type of differential between the utilities is explained by the fact that balancing to this standard allows for a moral argument to be made, thus obviating the need for the precision of scientific calculus. Put differently, balancing under the fourth condition requires a value judgment—on the magnitude of the utility of protecting life and on the magnitude of the utility of protecting the mobility right. The value judgment does not entertain a tradeoff between the two interests, even if such a tradeoff exists. This assertion does not deny that there are empirical elements in value judgments. After all, they are rational expectations based on society's norms.[127] But these elements do not outweigh their subjective nature.[128] The normativity of value judgments is moral rather than scientific in the sense that they are predicated on practices rather than knowledge.[129] For example, when ascertaining whether protecting life substantially outweighs protecting mobility, the values of life and mobility do not change with the availability of external information on a present danger. To assign a value on human life in exchange for mobility entails a utilitarian calculus which, even if scientifically valid, would be outside the norms informing (moral) value judgments.[130]

126 *Substantial*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=substantial [https://perma.cc/UW7F-SJ5Q] (last visited Mar. 22, 2022).

127 *See, e.g.*, Robin M. Williams, *The Concept of Values*, *in* INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCES 283–87 (1968) (arguing that the empirical elements in value judgment arise from human experience).

128 *See* John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955) (arguing that values are subjective).

129 *See* Nancy Luxon, *Ethics and Subjectivity: Practices of Self-Governance in the Late Lectures of Michel Foucault*, 36 POL. THEORY 377 (2008) (arguing that when faced with uncertainty, individuals make decisions on a "body of practice" that is independent of an external "body of knowledge").

130 The issue is clearest in economic models of the response to the coronavirus pandemic. *See, e.g.*, Greg Kaplan, Benjamin Moll & Giovanni L. Violante, *The Great Lockdown and the Big Stimulus: Tracing the Pandemic Possibility Frontier for the U.S.* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27794, 2020) (providing a modelling approach for quantifying the trade-off between saving lives and preserving livelihoods).

In summary, justificatory necessity can be formulated as having four elements. First, the actor must have a legitimate purpose from the enumerated list of "life, limb, liberty, honour, property or another legal interest."[131] Second, the unlawful act must be adequate to avert the present danger. Third, there cannot be alternative legal action that is adequate to achieve the purpose of the actor (to protect life by averting the present danger posed by becoming infected by the coronavirus). Fourth, the protected interest (life) must substantially outweigh the affected interest (mobility). Sufficient evidence is required only for the balancing analyses under the second and third elements. In contrast, the fourth element requires value judgments on the competing interests.

b. Excusatory Necessity

In contrast to justificatory necessity, necessity as excuse (*Entschuldigender Notstandreferred*, referred to as "necessity as defence" in the English translation of the German Penal Code), focuses not on the act (the derogation from the mobility right) but on the actor (the government).[132] The objective is not to make the act (border closures) lawful because it is justified, but to excuse the actor. The act remains unlawful even if the defense is successful. The argument under excusatory necessity is that there can be no culpability due to the lack of the requisite mental element. Section 35 of the German Penal Code states that: "Whoever, when faced with a present danger to life, limb or liberty *which cannot otherwise be averted*, commits an unlawful act to avert the danger from themselves, a relative or close person acts without guilt."[133] The defense is based on negating guilt rather than making the unlawful act lawful, which explains why excusatory necessity does not require "that the act committed is an adequate means to avert the danger," as required under justificatory necessity.[134] Under the first justificatory information set, if the balancing is impossible because of uncertainty as to the *adequacy* of the unlawful act, or where this standard cannot be met, only excusatory necessity can provide a defense to an infringement on a human right.

131 Strafgesetzbuch [StGB] [Penal Code], § 34, translation at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0191 [https://perma.cc/R26R-MA9P] (Ger.).

132 *See id.* § 35(1).

133 *Id.* (emphasis added).

134 *Id.* § 34.

Excusatory necessity has three elements. The first is that the unlawful act must have a legitimate purpose of "life, limb or liberty."[135] Compared to the first condition under justificatory necessity, the legitimate purpose is limited to only three, excluding "honour, property or another legal interest," as found under justificatory necessity.[136] It is possible therefore to infer that the legitimacy of the purpose of the unlawful act under excusatory necessity, namely protecting "life, limb or liberty," has a higher value compared to "honour, property or another legal interest," because protecting the latter would not be enough for removing guilt, while protecting the former requires only two of the conditions under justificatory necessity. The unlawful act has the requisite purpose, and the act has averted the present danger. The value differential merits formulating a lower threshold defense for protecting "life, limb or liberty," which explains why a value judgment like that under the fourth element of justificatory necessity is not required under excusatory necessity.

The second element is that the unlawful act is effective in averting the present danger. The proof standard of the relationship between the protected interest (life) and the averted danger (death due to contraction of the virus) is different under excusatory necessity. The absence of the adequacy standard under excusatory necessity is informative as to the excusatory objective standard: the action (closing borders) must avert the danger. The unlawful act, while rational, might be unreasonable because it is much more than what would be adequate to avert the danger. But it still averts the danger. Unlike under justificatory necessity, there is no adequacy standard, and hence, no expectation of proportionality between the unlawful act and averting danger.

The third element is identical to that under justificatory necessity. There must be no other alternative legal act that averts the danger, making the second information set also relevant to this defense. The difference is that, under excusatory necessity, in the absence of an adequacy standard, the alternative legal act can overshoot, but not undershoot, the effectiveness of the unlawful act in averting the danger—because undershooting would negate aversion. However, overshooting is likely to infringe some legal interests (other than mobility), which therefore makes the alternative an illegal act, and hence not an alternative to the unlawful act committed by the actor. For example, instead of border closures, the government could have imposed mandatory coronavirus testing at the border. Assuming that the test is

135 *Id.* § 35(1).
136 *Id.* § 34.

effective in detecting the virus even in asymptomatic persons and hence achieves the objective of zero transmission rate, this policy is not an alternative to border closures for the purposes of excusatory necessity given its infringement on personal autonomy or, potentially, other legal interests.[137]

The balancing analysis under the fourth element of justificatory necessity is irrelevant because the objective is not to make the unlawful act lawful, but to assess the guilt of the actor. The social norms that guide the balancing analysis under justificatory necessity inform the relationship of the protected interest to the affected interest, while guilt is informed by, first, the intention of the actor, that is, the purpose of the actor must be to protect "life, limb or liberty," and second, the effectiveness of the unlawful act in averting the present danger. Put differently, the constraint on the legitimate purpose under excusatory necessity makes the balancing with the effected interest irrelevant. Another way of explaining why the balancing analysis is irrelevant is that, where only the protected interest is in the set of "life, limb or liberty," the outcome of the balancing analysis will always show that the value of the protected interest is higher than the affected interest. On the other hand, where both the protected and affected interests are in the set, the requisite value judgment under justificatory necessity cannot be established, given the inherent immorality in imposing a utilitarian calculus among "life, limb or liberty."

In summary, excusatory necessity requires the unlawful act to have a purpose from a closed list: protection of "life, limb or liberty"; requires the unlawful act to be effective in averting the present danger to "life, limb or liberty"; and requires that there be no alternatives as effective in averting the danger as the unlawful act.

137 *See, e.g.*, Jaunius Gumbis, Vytaute Bacianskaite & Jurgita Randakeviciute, *Do Human Rights Guarantee Autonomy?*, *in* CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL [ESSAYS ON THE 60TH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE 10TH ANNIVERSARY OF THE VALENCIA DECLARATION OF HUMAN RESPONSIBILITIES AND DUTIES] 77 (2008) (arguing that personal autonomy is at the foundation of all human rights); Laura M. Bisaillon, *Human Rights Consequences of Mandatory HIV Screening Policy of Newcomers to Canada*, 12 Health & Hum. Rts. 119 (2010) (discussing a proportionality framework for reducing the burden on human rights from HIV mandatory testing for immigrants). *But cf.* Chris Bateman, *Mandatory Testing a 'Human Rights Imperative'*, 97 S. Afr. Med. J. 565 (2007) (arguing that protecting of the rights of children, in the absence of "adequate tracking system[s]" and "health information system[s]," requires mandatory testing of children for HIV).

2. The Principle of Proportionality

The proportionality principle (*Verhältnismäßigkeit*) has its origins in the German principle of necessity.[138] It was developed by German Administrative Courts in the 1950s to protect basic human rights.[139] The following analysis of this principle evinces an analytical structure that parallels that of the justificatory necessity defense under the German Penal Code, although it also uncovers important theoretical, rather than practical, differences between the two.

The principle of proportionality is usually formulated as requiring four elements.[140] The first is legitimacy, where the objective of an impugned act must be legitimate.[141] For legitimacy, "it is generally sufficient that [the impugned act is] lawful or – where the act of state under scrutiny is a statutory provision – not forbidden by the constitution."[142] This element differs from the first element under justificatory

138 *See* Gertrude Lübbe-Wolff, *The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court*, 34 HUM. RTS. L.J. 12, 12 (2014) ("The principle of proportionality was not entirely an innovation when first pronounced by the German Federal Constitutional Court (FCC). Administrative courts had developed a necessity standard in the late nineteenth century, restricting police powers ('police' to be understood in the historically very broad sense covering almost all administrative authorities) by requiring that interference with an individual's liberty or property should not go further than necessary for the intended purpose. In the administrative law literature, this had subsequently been termed the principle of proportionality.") (citing STEFAN NAAS, DIE ENTSTEHUNG DES PREUßISCHEN POLIZEIVERWALTUNGSGESETZES VON 1931, at 145–46 (2003)); *see also* Yutaka ARAI-Takahashi, *Proportionality — A German Approach*, 19 AMICUS CURIAE 11, 11 (1999) (explaining that "[a]fter the *Kreuzberg* [monument] decision (14 June 1882, PrOVG 9, 353), the Prussian Supreme Administrative Court examined whether the measures adopted by the police went beyond what was considered necessary for attaining a relevant objective"). The *Kreuzberg* decision was in relation to a police ordinance that prevented erecting buildings in the vicinity of a monument that commemorated victories of the Prussian army over Napoleon.

139 *See* Lothar Hirschberg, Der Grundsatz der Verh. . .ltnism. . .ßigkeit 6 (1981).

140 *See* Lübbe-Wolff, *supra* note 138, at 13; ARAI-Takahashi, *supra* note 138, at 12. Other formulations exist in the literature. *See e.g.*, Julian Rivers, *The Presumption of Proportionality*, 77 Mod. L. Rev. 409, 412 (2014) ("[P]roportionality requires (1) consideration of whether the measure resulting in that limitation is intended to pursue a legitimate public aim; (2) consideration of whether the limitation is capable of achieving that aim; (3) consideration of whether the limitation is necessary in the sense that there is no alternative course of action equally capable of achieving the aim, but at less cost to rights; (4) consideration of whether the advantage of pursuing the aim by the means in question outweighs the cost to rights.").

141 Rivers, *supra* note 140, at 412.

142 *See* Lübbe-Wolff, *supra* note 138, at 14 (explaining that "[u]nlike . . . the Canadian Supreme Court, the German FCC usually does not bring the importance of the objective and its relative weight in comparison with the affected individual right

necessity which requires the actor (the government) to have a legitimate purpose in pursuing the objective of the unlawful act. In the example of a response to the coronavirus pandemic, the objective (of the impugned act) is to prevent the transmission of the coronavirus. The means (the act) is border closures. The purpose (of the actor) is protecting life. The difference between the first element under justificatory necessity and this element of proportionality is that under the former, the focus is on whether the purpose (protecting life) of the actor (the government) can fit into an enumerated list, including similar legal interests.[143]

In contrast, under proportionality, the focus is on the act and its objective. The issue becomes the constitutionality of the act given its objective. In the context of a government response to the coronavirus, legitimacy is about whether preventing the transmission of the coronavirus (the objective) through border closures (the act) is not inconsistent with the constitution or other legal instruments. The shift in focus is explained by the absence of an enumerated list of legitimate purposes under the principle of proportionality. The only requirement is that the objective of the act is not unlawful; "any legitimate end . . . may serve as a possible justifying objective."[144] In this sense, proportionality has wider applicability than justificatory and excusatory necessity. The absence of an enumerated list of legal interests also explains why under proportionality this legitimacy requirement is an explicit first step in the analysis, while under justificatory necessity, this step is only implicit (in the formulation of the defense as stated in the German Penal Code). This step is intended to specify the relevant legitimate interest. Notwithstanding, it is also possible to treat legitimacy implicitly, as seen in the Penal Code formulation of the justificatory defense of necessity.[145] However, to elucidate the parallels between justificatory necessity and proportionality, I treat legitimacy explicitly, as the first element in the analysis.

The second element is suitability (*Geeignetheit*), where the impugned act (the means) must be "appropriate . . . to promote its objective."[146] In terms of the illustrative example of government response to the coronavirus, the act is border closure. This element focuses on

into play at this stage of the" analysis; "balancing operations are reserved for the final stage, the adequacy test").

143 *See infra* Section III.B.1.

144 *See* Lübbe-Wolff, *supra* note 138, at 14.

145 *See id.* at 13–14.

146 *See id.* at 13.

the suitability of this act to the objective of preventing the transmission of the coronavirus. In contrast, under justificatory necessity, the focus is on whether the act is adequate to achieve the purpose of the actor (protecting life by averting a present danger).[147] The difference is that, to achieve this objective under proportionality, "it is sufficient that the act in question be apt to *promote* the objective against which it is measured"[148]—that is, the transmission of the coronavirus pandemic—while under justificatory necessity the act must affect an aversion of the present danger.[149] The appropriateness standard, that the impugned act (border closure) is "apt" to "promote its objective"[150]—in other words, that this act is proper[151]—suggests that the act must be only partially effective in achieving its objective: "aptitude to secure full achievement is not required."[152] Therefore, the standard under this element allows for varying degrees of effectiveness.[153]

This understanding of the impugned act means that, under proportionality, if the objective of the response to the coronavirus pandemic, namely preventing transmission of the coronavirus, is only partially attained through the impugned act (border closure), the act is still

147 The difference under justificatory necessity is that the analysis of the first element is taken under a higher level of abstraction relative to the second element. This progressive reduction of abstraction can also be seen, *inter alia*, in negligence, where analyzing the first element for negligence, namely establishing the existence of a duty of care, envisages a level of abstraction, as evidenced in presumptions on the existence of the duty in certain relationships, for example between a patient and her physician. The abstraction is inherent in rules. In contrast, the application of these rules, such as in the second element of negligence, the breach of the duty, needs specifying the factual matrix of the abstract relationship giving rise to the duty. It is in the information set on the equilibrium of the relationship that we can operationalize negligence as a cause of action. *See* George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 UNIV. PA. L. REV. 401, 404 (1971) (arguing that "the idiom of presumptions is most dense in the context of difficult theoretical issues, such as the nature of the intent required for conviction and the relevance of mistake of law"). On the relevance of the common law tort of negligence to the analysis of human rights, see Stoyanova, *supra* note 115 (using common law negligence to analyze positive obligations under the European Convention on Human Rights).

148 *See* Lübbe-Wolff, *supra* note 138, at 15.

149 *See infra* Section III.B.1.

150 Lübbe-Wolff, *supra* note 138, at 13.

151 *Appropriate*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/search?q=appropriate [https://perma.cc/HB2R-CMSB] (last visited Mar. 2, 2022) (explaining that the word "appropriate" comes from the Latin verb "*propriare*" meaning proper. The word "proper" comes from Old French "*propre*" meaning "adapted to some purpose, fit, apt").

152 *See* Lübbe-Wolff, *supra* note 138, at 15.

153 *Id.*

deemed to effect said objective. It follows that an alternative action that only reduces the risk of transmission, for example, through social distancing, is a valid alternative to the impugned act (border closure).

The third element, however, requires alternatives to be as effective as the impugned act in achieving the objective. Notwithstanding, in comparison to the second element of justificatory necessity, under proportionality the act does not have to be adequate to avert the present danger (infection), that is, the act does not have to affect full aversion of the present danger. The act must only have a causal connection to reducing the danger (the probability of infection). The reason for this divergence on the impugned act and its alternatives will become clearer when we look next at the significance of the absence of an aversion requirement under the third element of proportionality.

The third element is necessity (*Erforderlichkeit*), where, in achieving the objective (of preventing the transmission of the coronavirus), the actor must choose from "among equally effective means" the one that is least onerous on the affected interest (the mobility right).[154] This element parallels the third element of justificatory necessity, where alternatives to the unlawful act must be as effective in averting the present danger (infection with the coronavirus). The alternatives under justificatory necessity must be as effective as the unlawful act not because of the aversion standard in the third element, but because of the adequacy standard in the second element. The adequacy standard ensures that the alternatives must be as effective as the unlawful act in averting the danger.[155]

It is therefore surprising that under proportionality, alternatives must be equally effective in achieving the objective, given that suitability does not envisage adequacy. In other words, the impugned act (border closure) does not have to fully achieve its objective (preventing the transmission of the coronavirus). Equality comes only from an adequacy standard as seen under the second element in justificatory necessity. When we are left only with effectiveness in responding to the present danger, an alternative can be effective even if it is unreasonable, such as imposing a long-term lockdown. Similarly, the requiring of personal protective equipment ("PPE") to be worn is an alternative that is effective in reducing the risk of transmission, even though it does not eliminate the risk entirely.[156] Unlike adequacy, there

154 ARAI-Takahashi, *supra* note 138, at 12.

155 *See* discussion *supra* Section III.B.1.

156 *See*, *e.g., Palmer v State of Western Australia [No. 4]* [2020] FCA 1221, ¶¶ 308–29 (discussing expert opinions on the efficacy of PPEs) (Austl.).

can be many degrees of effectiveness. The better view, therefore, is that the alternatives under proportionality would also include actions that are not *as effective* in responding to the present danger—that is, in fully achieving the envisaged end.

How can we then rationalize the imposition of the equal efficacy requirement under the third element of proportionality? The rationale seems to be guided by courts deference to the actor (the government). The equal efficacy requirement limits the set of alternatives that can challenge the government's action. To be able to compare proportionality to justificatory necessity, I follow the practice of requiring equally effective alternatives under both.

Finally, the fourth element is proportionality in the narrow sense (*stricto sensu*).[157] This element requires the utility from the protected interest to be greater than the disutility from the affected interest.[158] Unfortunately, this element is also interpreted using a standard of adequacy: the act must be "adequate (in German: 'angemessen'), i.e. the prejudice to the . . . right in question must not be inadequate in comparison with the weight of the interests supposed to justify the intervention."[159]

This adequacy standard is sometimes conflated with that under the second element of justificatory necessity. This conflation also explains the requirement under the third proportionality element that the alternatives to the impugned act must be as effective in achieving the objective of the impugned act. The following example illustrates this point:

> A decision of the Federal Administrative Court concerning ritual slaughter was found disproportionate insofar as it had read a provision of the animal protection act as requiring that for a permit allowing ritual slaughter without stunning it must be proved that the religion of the relevant consumers objectively and mandatorily bans the consumption of meat of animals that were not ritually slaughtered. Upon constitutional complaint of a Sunni Muslim butcher to whom a permit for ritual slaughter without stunning had been refused on the basis of that reading, the [German Federal Constitutional Court] held that *the general rules of the animal protection act prohibiting slaughter without stunning [(the objective of the act)] were appropriate and necessary for the protection*

157 *See* ARAI-Takahashi, *supra* note 138, at 12.

158 *See id.*

159 *See* Lübbe-Wolff, *supra* note 138, at 13 (citing BVerfGE 27, 211 (at 219); BVerfGE 104, 337 (at 347); BVerfGE 109, 96 (at 110); BVerfGE 121, 317 (at 346)).

> *of animals [(the protected interest)], that they would be disproportionate without an exception meeting the needs of religious groups [(the affected interest)]* (which the act provided for), and that in this context, is [*sic*] was not for state authorities but for the adherents of the religious group themselves to determine what their religion demands.[160]

The exception referred to in the quotation suggests an analysis based on justificatory necessity rather than proportionality. Under the fourth element of justificatory necessity, the Federal Constitutional Court ("FCC") decision suggests that the protected interest (relating to animals) does not substantially outweigh the affected interest (relating to religious groups). The exception suggests that religious groups interests must prevail over animal rights. However, under proportionality, what is required is that the prejudice to religious rights must not be inadequate in comparison to the weight of the animal rights supposed to justify the intervention. The required standard is that the utility of the protected right merely outweighs that of the affected right, rather than "substantially" outweighs, as under justificatory necessity. This adequacy is different from that under the second element of justificatory necessity, where the issue is whether the act (refusing to grant a permit for ritual slaughter) is adequate for averting the present danger to animals (i.e., ritual slaughter). However, the standard required under proportionality suggests added analytical difficulty because the FCC must make a value judgment under prevailing social norms in Germany as to whether animal rights prevail over religious rights. This goes to explain the conflation of the fourth element under proportionality with the adequacy standard under justificatory necessity.

In summary, proportionality has four elements: (1) the objective of the act must be lawful, i.e., not forbidden by the constitution (legitimacy); (2) the act must be effective in achieving its objective, even if it does not result in full achievement of this objective (appropriateness); (3) in comparison to equally effective alternatives, the act must be the least onerous on the affected interest (necessity); and (4) the burden created by the purpose of the actor on the affected interest must be a reasonable one.

160 *See* Lübbe-Wolff, *supra* note 138, at 15 (citing BVerfGE 104 at 337 (at 345)) (emphasis added).

3. The Precautionary Principle

Like the principle of proportionality, the precautionary principle emerged from German jurisprudence.[161] Its origin can be traced back to the 1970s, when the principle of foresight (*Vorsorgeprinzip*), translated into English as the precautionary principle,[162] allowed for precautionary measures to be adopted in response to an environmental or health danger, even in the absence of scientific evidence on the magnitude of this danger.[163] The rationale for this principle comes from the theory of foresight.[164] More broadly, the principle can be traced back to the French prospective principle and its implications on precautionary reasoning.[165] The following example elucidates the reasoning inherent in the original version of the principle:

> If Secundus proclaimed his intention to kill Primus, the man who knows himself threatened will be careful to take precautions particular with respect to the individual who threatens him. But with regard to the unknown motorist who, without knowing it, can give him death by accident, Primus obviously can take only very general precautions.[166]

Note the role of fear in the rationale for precautionary action. The actor "knows himself threatened," which triggers the precautionary response.[167] In the first scenario, the actor (Primus) knows the source of the threat and how to avert this threat. There is complete information on the required response. Under the second scenario, there is incomplete information, and the response to the threat can be only through

161 Hauke von Seht & Hermann E. Ott, *EU Environmental Principles: Implementation in Germany*, *in* WUPPERTAL PAPERS 7 (2000). *But cf.* Jacqueline Peel, *Precaution — A Matter of Principle, Approach or Process?*, 5 MELBOURNE J. INT'L L. 483, 484 n.1 (2004) (noting that some commentators "ascrib[e] Swedish heritage to the underlying idea that regulatory authorities 'do not have to demonstrate that a certain impact will occur; instead, the mere risk (if not too remote) is to be deemed enough to warrant protective measures or a ban on the activity'") (quoting Staffan Westerlund, *Legal Antipollution Standards in Sweden*, 25 SCANDINAVIAN STUD. L. 223, 231 (1981)).

162 Sonja Boehmer-Christiansen, *The Precautionary Principle in Germany — Enabling Government*, *in* INTERPRETING THE PRECAUTIONARY PRINCIPLE 31 (Timothy O'Riordan & James Cameron eds., 1994).

163 *See* C.J. Pereira Di Salvo & Leigh Raymond, *Defining the Precautionary Principle: An Empirical Analysis of Elite Discourse*, 19 ENV'T POL. 86 (2010) (explaining the background of the precautionary principle).

164 Éva Hideg, *Theory and Practice in the Field of Foresight*, 9 FORESIGHT 36, 36–37 (2007).

165 *See* BERTRAND DE JOUVENEL, L'ART DE LA CONJECTURE (1964).

166 *Id.* at 36.

167 *See id.* at 145–47 (elaborating on the role of fear in forming foresight).

general precautions. Therefore, whether the precautionary principle pertains to *ex-ante* decisions turns on the information set available to the actor at the time of making the decision. Paucity of information leaves only the option of "very general precautions."[168]

In terms of government responses to the coronavirus pandemic, the first scenario allows for justificatory analysis, which includes an application of the proportionality principle. The second scenario presents the actor (Primus) with incomplete information as to the likelihood of exposure to the threat (the motorist), albeit in the presence of objective probabilities as to the nature of the harm from exposure to this threat (death by accident). Had subjectivity been also present in assessing the existence of the threat, we would have had an excusatory necessity scenario. I elaborate on this point below.

In relation to German environmental policies, the (foresight) precautionary principle was formally introduced to the German federal parliament (*Bundestag*) in 1984.[169] A report defined the principle in the following terms:

> The principle of precaution commands that the *damages* done to the natural world (which surrounds us all) *should be avoided in advance and in accordance with opportunity and possibility*. Vorsorge further means the early detection of dangers to health and environment by comprehensive, *synchronized (harmonised) research, in particular about cause and effect relationships* . . ., it also means *acting when conclusively ascertained understanding by science is not yet available*. Precaution means to develop, in all sectors of the economy, technological processes that significantly reduce environmental burdens, especially those brought about by the introduction of harmful substances.[170]

This formulation of the principle suggests the following analytical structure: if there is a danger to health or environment, then there is a *short-term duty* to avoid this danger in accordance with the capabilities of the actor, even if there is incomplete information on the effects of said danger; and there is a *long-term duty* to ascertain these effects through comprehensive and harmonized scientific research. Hence,

168 *See id.* at 50.

169 *See* David Freestone & Ellen Hay, *Origins and Development of the Precautionary Principle*, *in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION 3, 4 (David Freestone & Ellen Hey eds., 1996) (stating that the "precautionary concept found its way into international law and policy as a result of German proposals made to the International North Sea Ministerial Conferences").

170 Boehmer-Christiansen, *supra* note 162, at 37 (emphasis added).

compared to the above example on the French prospective principle, there is an additional *hypotactic* imperative on eliminating the fear underpinning the reasoning that gives rise to the short-term duty.[171] This imperative can provide the path from short-term precautionary action to long-term proportionality action—from Theta to Phi reasoning, in a way analogous to the rationale for maintaining a distinction between excusatory and justificatory necessity.

The most predominant formulation of the precautionary principle can be found in the Rio Declaration on Environment and Development ("Rio Declaration"), which was adopted at the 1992 Rio de Janeiro Earth Summit.[172] Principle 15 of the Rio Declaration states that: "[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[173] Principle 15 can be reconstructed as follows: if an actor is faced with a threat of "environmental degradation," then the actor has a duty to take "cost-effective measures" to "prevent" "serious or irreversible damage" to the environment, according to the actor's "capabilities," even where there is scientific uncertainty as to the magnitude of the threat. While this formulation of the precautionary principle looks different from the principle of necessity, the following comparison between the two will uncover a common analytical structure with excusatory necessity.

As previously discussed, under excusatory necessity, if a person is faced with a present danger to "life, limb or liberty" and there is no legal act that can avert said danger, then the person can commit an illegal act to avert the danger, and the actor is deemed to have acted without guilt.[174] While there are differences between the precautionary principle and excusatory necessity on the nature of the relevant threat, the danger to life provides the link between the two. Unlike excusatory

171 *See* BENJAMEN GUSSEN, AXIAL SHIFT: CITY SUBSIDIARITY AND THE WORLD SYSTEM IN THE 21ST CENTURY ch. 7 (2019) (explaining the meaning of the principle of hypotaxis, also known as subsidiarity or spheres of sovereignty).

172 *See* Sven Ove Hansson, *How Extreme Is the Precautionary Principle?*, 14 NANOETHICS 245, 246 (2020); Pereira Di Salvo & Raymond, *supra* note 163, at 101 (explaining that "a large sample of articles by policy-relevant experts" suggests that "the predominant view of the [the precautionary principle] among intellectual elites" is one that hews relatively closely to the 1992 Rio formulation . . .").

173 U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), principle 15 (Aug. 12, 1992).

174 *See* discussion *supra* Section III.B.1.

necessity, the precautionary principle imposes a legal duty to avert the danger. Notwithstanding, this act would be a crime if it violates a human right.[175] In the illustrative government response example, the actor (the government) has a duty to prevent the transmission of the coronavirus according to its capabilities. Even if the government can prevent the threat to life from the virus only through border closures, this act would still be unlawful because it infringes on the right to mobility. However, given that the actor was carrying out a legal duty to the best of its capabilities, the negation of guilt under excusatory necessity is also present under the precautionary principle.

This leaves only one potential point of departure between the two principles: the certainty of the nature of harm from exposure to the threat under the precautionary principle, and the potential uncertainty of the existence of the threat itself under excusatory necessity. To clarify this point, the second subsection of the excusatory necessity provision in the German Penal Code must be analyzed: "If, at the time of the commission of the act, a person mistakenly assumes that circumstances exist which would provide an excuse under the terms of subsection (1), that person incurs a penalty only if the mistake was avoidable."[176] The Penal Code explains the doctrine of mistake of fact as follows: "Whoever, at the time of the commission of the offence, is unaware of a fact which is a statutory element of the offence is deemed to lack intention."[177] Under the Penal Code, the actor is deemed to lack intention, and hence the requisite guilt, if the actor "mistakenly assumes that circumstances exist which would provide an excuse" for committing the unlawful act.[178] The circumstances relate to being "faced with a present danger to life, limb or liberty which cannot otherwise be averted."[179] A mistake of fact can therefore result from four sources: (1) the existence of the threat; (2) the likelihood of the occurrence of the threat; (3) the nature of the harm from exposure to the threat; or (4) the existence of alternatives that can also avert the threat.

In the Primus example above, a mistake of fact could result from uncertainty as to the likelihood of being hit by a motorist (the second source). In the government response to the coronavirus example, a mistake of fact could result from facts as to the likelihood of

175 *See* discussion *supra* Section III.A.

176 Strafgesetzbuch [StGB] [Penal Code], § 35(2), translation at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0191 [https://perma.cc/R26R-MA9P] (Ger.).

177 *Id.* § 16(1).

178 *Id.* § 35(2).

179 *Id.* § 35(1).

contracting the coronavirus (the public emergency) and facts as to the effect on public health (life) of becoming infected with the virus (sources two and three). More generally, the precautionary principle deals with scientific uncertainty as to the consequences of exposure to the threat, making the second and third sources of mistake of fact the most relevant to a precautionary analysis.

Executory necessity is wider than the precautionary principle in that it allows for uncertainty, even in relation to sources one and four. For example, before the discovery of the coronavirus, acting on a mistake of fact as to the nature of this virus is analyzed under excusatory necessity. Similarly, acting on a mistake of fact as to the effectiveness of coronavirus vaccines in averting harm from contracting novel variants, such as the Omicron variant, also comes under excusatory necessity.[180] I develop this point further below to explain how a clear distinction between excusatory and justificatory reasoning can help minimize infringements on human rights.

In summary, the analytical structure for the precautionary principle is analogous to that under excusatory necessity. The precautionary analysis is applied to action *ex-ante* the event. For example, declaring a public emergency in response to the coronavirus pandemic. Declaring the emergency is the action. The event is community transmission of the virus. On the other hand, excusatory necessity analysis is carried out *ex-post* the event. In the example, the event has already occurred. Where the event is unforeseeable (uncertain), the response is always *ex-post* the event.

IV. THE HYPOTACTIC REQUIREMENT UNDERWRITTEN BY EXCUSATORY REASONING

In this Part, I use two recent border closure cases from Canada and Australia to illustrate the current conflation of excusatory and justificatory reasoning when analyzing restrictions on the mobility rights. Using the discovery of the Omicron variant, I then proceed to illustrate how the hypotactic intervention envisaged by excusatory reasoning can help reduce infringements on human rights.

In May of 2020, in response to the spread of the coronavirus in neighboring Nova Scotia, Canada, the Chief Medical Officer of Health for Newfoundland and Labrador introduced intermobility restrictions

180 *Classification of Omicron (B.1.1.529): SARS-CoV-2 Variant of Concern*, WORLD HEALTH ORG. (Nov. 26, 2021), https://www.who.int/news/item/26-11-2021-classification-of-omicron-(b.1.1.529)-sars-cov-2-variant-of-concern [https://perma.cc/XX7N-2T4Y].

on those wanting to enter the province—with some exceptions.[181] Kimberley Taylor was one of those denied entry to attend her mother's funeral.[182] Ms. Taylor brought proceedings challenging the decision, *inter alia*, under the mobility right in the Canadian Charter of Rights and Freedoms.[183] The General Division of the Supreme Court of Newfoundland and Labrador held that while Ms. Taylor's mobility right had been infringed, the infringement was a reasonable limit prescribed by the province's emergency powers and was thus justified in response to the coronavirus pandemic.[184] The justification, however, was guided by the precautionary principle,[185] which resulted in excluding alternatives to border closures, such as testing, self-isolation, and contact tracing.[186]

A similar conflation of justification and excuse can be found in the High Court of Australia ("HCA") analysis of the constitutional validity of border closures by Western Australia ("WA"). In April of 2020, the State Emergency Coordinator issued a direction to close the state borders, subject to some exceptions.[187] Clive Palmer, who owned commercial interests in the state, was denied entry into WA.[188] Mr. Palmer brought proceedings arguing that restricting his mobility right is invalid under the Australian Constitution.[189] Findings on remitter from the Federal Court established the existence of uncertainties as to community transmission if border closures were lifted.[190] These findings required adopting a precautionary response to the pandemic.[191] Therefore, as in *Taylor*, these findings left "little room for debate about effective alternatives,"[192] under the required justificatory analysis.[193]

In comparison, excusatory reasoning would have upheld the constitutionality of the actus reus (border closures) given the lack of mens

181 *See* Taylor v. Newfoundland and Labrador, 2020 NLSC 125 para. 483 (Can.).

182 *Id.* para. 5.

183 *See* Canada Act 1982, c. 11, § 6(1) (UK).

184 *See Taylor*, 2020 NLSC 125 para. 402 (justifying the infringement on Ms. Taylor's mobility right under section 1 of the Charter).

185 *See id.* paras. 60, 467–87.

186 *Id.* para. 482.

187 *Palmer v Western Australia* [2021] HCA 5 ¶¶ 1, 7 (Austl.).

188 *Id.* ¶ 10.

189 *Id.* ¶ 13 (arguing that the mobility right under section 92 of the Australian Constitution cannot be restricted by denying Australian citizens entry into WA).

190 *Id.* ¶¶ 23, 79.

191 *Id.*

192 *Id.* ¶ 80.

193 *Id.* ¶¶ 76, 264 (opting for the principle of proportionality); *id.* paras 94, 192 (opting for justificatory necessity).

rea (intention to infringe on the mobility right). As explained by paragraph 62 of the Siracusa Principles, the latter is negated by good faith in declaring the public emergency leading to border closures.[194] It follows that the infringement on the mobility right is constitutionally valid, and thus no issues of resistance to government directions, nor of assistance in carrying out these directions, would arise.[195]

The Principles also state that "[t]he 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."[196] In addition, "[t]he 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."[197]

Similarly, in *Taylor*, the Court was careful to explain that the pandemic "presents as a moving target and as a consequence the necessity of the travel restriction is regularly reassessed."[198] However, just like the Principles, while the Court recognized the dynamic nature of the pandemic, hence there is regular review of the travel restrictions, it does not envisage provincial and federal governments actively seeking to introduce alternatives to border closures. Even recent World Health Organization ("WHO") directions fall into the same static views: "*where capacity exists* and in coordination with the international community," countries were asked to "perform field investigations and laboratory assessments to improve understanding of the potential impacts of the [Omicron variant] on COVID-19 epidemiology, severity, effectiveness of public health and social measures, diagnostic methods, immune responses, antibody neutralization, or other relevant characteristics."[199]

In contrast, under excusatory reasoning, there would have been a rehabilitation-like duty on the government to take reasonable steps to

194 *See* The Siracusa Principles, *supra* note 75, ¶ 62.

195 *See* J.C. SMITH, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW 8 (1989) (explaining that "[e]xcusable conduct may be resisted by a person who is *threatened* by it," and that "[e]xcusable conduct may not lawfully be assisted by another") (emphasis added); Jeremy Finn, *Emergency Situations and the Defence of Necessity*, 34 L. CONTEXT 100, 106–07 (2016) (explaining the need for excusatory necessity in the case of volunteers assisting rescuers and strangers more broadly).

196 The Siracusa Principles, *supra* note 75, ¶ 52.

197 *Id.* ¶ 55.

198 Taylor v. Newfoundland and Labrador, 2020 NLSC 125 para. 485 (Can.). A similar point was made in *Palmer*. *See Palmer*, [2021] HCA 5 ¶ 165.

199 Classification of Omicron (B.1.1.529): SARS-CoV-2 Variant of Concern, supra note 180 (emphasis added).

ensure finding alternatives to border closures.[200] This duty includes accepting international assistance, including competence transfer, to help find alternatives. Hence, for example, the WHO directive on responding to the Omicron variant would be for countries to coordinate with the international community "to improve understanding of the potential impacts of the [Omicron variant] on COVID-19."[201] An example would be Morocco. Notwithstanding its heavy reliance on tourism, the country imposed a travel ban on all incoming flights.[202] As there is paucity of information on the effectiveness of existing coronavirus vaccines in inoculating against the Omicron variant,[203] this response would be upheld as a valid restriction on the mobility right. However, only where these restrictions are excused rather than justified would there be a legal duty to work with the international community to bring about alternatives to these border closures.

An excusatory reasoning emphasizes not only the temporal nature of responses to public emergencies, but also the need for policy intervention that rehabilitates national or subnational governments toward a proportional response to emergencies. In other words, the distinction between excusatory and justificatory reasoning in criminal law also informs the legal and practical consequences of precaution and proportionality in the context of derogations from human rights. Crossing the divide between Theta and Phi has the same motivation as found under criminal law.

In the context of analyzing derogations from human rights in response to public emergencies, the need for a clear distinction between justification and excuse is motivated by the principle of hypotaxis. A justificatory reasoning suggests that the government response to a given emergency is optimal under the circumstances. However, this

200 *See* Eser, *supra* note 112, at 623.

201 Classification of Omicron (B.1.1.529): SARS-CoV-2 Variant of Concern, supra note 180.

202 *Morocco Suspends All Incoming Flights Over Omicron*, AL JAZEERA (Nov. 28, 2021), https://www.aljazeera.com/news/2021/11/28/morocco-suspends-incoming-flights-over-new-covid-variant-omicron [https://perma.cc/YC9Z-VXMC].

203 *Update on Omicron*, WORLD HEALTH ORG. (Nov. 28, 2021), https://www.who.int/news/item/28-11-2021-update-on-omicron [https://perma.cc/3Q59-8L8M]; *see also* Emily Waltz, *The Algorithm That Mapped Omicron Shows a Path Forward*, IEEE SPECTRUM (Feb. 1, 2022), https://spectrum.ieee.org/omicron-covid-variant [https://perma.cc/TLC5-9ZLM] (furnishing an antigenic map of COVID-19 that illustrates the large difference between the Omicron variant and other major variants of the virus, such as Alpha, Beta, Gamma, Delta, and D614G, which in turn casts doubt on the effectiveness of existing vaccines in protecting against the Omicron variant).

might not be the case given that some emergencies impose a level of uncertainty that prevents proportional action depending on the (static) competencies of a given government. On the other hand, excuse means that the impugned government response is not optimal, and that steps should be taken collectively by international institutions to help this government deliver a proportional response to the emergency.[204]

In summary, Theta reasoning through the precautionary principle and excusatory necessity should be kept orthogonal to Phi reasoning. Theta reasoning imposes a duty on governments to seek assistance in transitioning to alternatives posing lower burdens on human rights. This way, we can resolve uncertainties due to incomplete information. Phi reasoning (through proportionality and justificatory necessity) would thus become feasible.

V. CONCLUDING REMARKS

There is a need for an excusatory interpretation of derogations from human rights. The example of the mobility right under the ICCPR and the constitutions of Australia and Canada illustrates exclusive reliance on justificatory interpretation. Distinguishing between analyses applicable to extreme emergencies and other types of public emergencies is necessary to reduce infringements on human rights. The first step in analyzing derogations, therefore, must ascertain the level of incomplete information involved, and whether there is a need to help a national or subnational government in transitioning its response to one that minimizes any infringement on human rights.

The requisite distinction between excuse and justification can be traced back to ancient Greece, where the citizenry informed the symbols for the Greek letters Theta and Phi, respectively. The Greeks were careful to distinguish between reasonable fear of the unknown and the purview of analyzing what can be observed. This orthogonality continues to inform the principles of necessity, proportionality, and precaution.

The original formulation of these principles in German jurisprudence shows that a distinction between excuse and justification, as seen in criminal defenses, is also relevant in a constitutional context. To rationalize this extension, the moral imperative of human rights, as part of rules-in-equilibrium, reconceptualizes crimes as violations of

204 *See* Benjamen Franklen Gussen, *Australian Constitutionalism Between Subsidiarity and Federalism*, 42 MONASH UNIV. L. REV. 383 (2016) (explaining the three rules of hypotaxis: non-interference, assistance, and competency transfer).

human rights. Excusatory defenses remove criminal culpability by negating the mental element of a crime. The charged act, the actus reus, however, remains unlawful.[205] In contrast, under justification, the act is deemed lawful.[206] The fact that under excuse the act remains unlawful means that "certain measures of rehabilitation or security may attach to" the act.[207]

Public emergencies that differ on foreseeability and urgency dictate different frameworks for analyzing the constitutional validity of a government response to a risk of harm. Extreme emergencies are characterized by incomplete information (informational asymmetries) that prevent a justificatory analysis based on the proportionality principle, given that the ability to identify the lowest social cost associated with a bundle of alternative government response is hampered by the lack of information. The prime example of such extreme emergencies is the coronavirus pandemic. Sometimes, therefore, the principle of proportionality cannot be applied to determine the validity of derogations from human rights. Some public emergencies can pose challenges when ascertaining the consequences of infection and the likelihood of becoming infected. The exigencies of the situation are unknown. In an extreme public emergency, such as an unknown pandemic, the inherent scarcity of information on the risk posed by the pandemic is distinct from circumstances where there is enough information to engage in a proportional limitation of rights. For example, while Article 12(3) of the ICCPR limits derogations to those that "are necessary to protect . . . public health,"[208] where there is incomplete information, the feasible analysis is different from that under the principle of proportionality.

The principles of necessity, precaution, and proportionality guide the response to public emergencies—but only disjunctively. Early stages of an unknown pandemic such as the coronavirus pandemic that are characterized by incomplete information as to the existence and consequences of the pandemic, require excusatory (Theta) reasoning. Later stages of the response can be guided by justificatory (Phi) reasoning as more information becomes available.[209] Crossing the divide

205 *See* Arnold N. Enker, *In Support of the Distinction Between Justification and Excuse*, 42 TEX. TECH L. REV. 273, 282 (2009) ("[A] justified act should not be resisted; an excused act should be prevented.").

206 *Id.* at 280.

207 Eser, *supra* note 112, at 623; *see also* Finn, *supra* note 195, at 101–102.

208 ICCPR, *supra* note 30, art. 12(3).

209 This thesis does not suggest that constitutional rights are not open to proportionality analysis, for example, as argued by Robert Alexy. The thesis explains when

between Theta and Phi to minimize the burden on human rights is predicated not only on clarifying the role of the principles of necessity, proportionality, and precaution in guiding different stages of the response, but also on instituting hypotactic assistance. Empowering national and subnational governments to guide the global response to future pandemics and public emergencies more generally comes from a duty to take reasonable steps to devise alternatives that minimize infringements on human rights.[210]

Where harm is foreseeable, we need to ascertain the objectivity of estimating the likelihood of consequences brought about by the harm. Lower levels of objectivity necessitate a precautionary approach. Where harm is unforeseeable, for example due to an unknown pandemic, analyzing the validity of derogations from human rights should be guided by executory necessity. The precautionary principle envisages foreseeability of existence of the threat, but not the effects of the threat. Where the threat is unforeseeable, and foresight is not possible, excusatory necessity explains why such incomplete information would still negate guilt. Put differently, precaution is a decision to prevent a mistake of fact, while excusatory necessity upholds a decision notwithstanding a mistake of fact. On the other hand, where there is information as to likelihood of the consequences of the threat, deference to the actor (the government) decides whether justificatory necessity or proportionality should be applied to the analysis.

this type of analysis is not available. *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002) (arguing that the nature of constitutional rights as principles implies the principle of proportionality).

210 For a delineation of these elements, see GUSSEN, *supra* note 171, at 199–238.