

BRIEFER

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# International Legal Framework Governing Public Health Emergencies

## Normative Standards Governing Emergency Situations

This brief highlights the international legal framework that governs emergency situations in the context of the COVID-19 global pandemic. It covers existing international human rights treaties that set out the parameters for protecting fundamental rights during times of emergency, and various guidelines developed by human rights mechanisms of the United Nations (UN) and the African Commission on Human and Peoples' Rights (ACHPR) to assist states in ensuring a rights-respecting response to the COVID-19 health crisis.

## Derogations During Public Health Emergency

Article 4 of the **International Covenant on Civil and Political Rights** (ICCPR) allows states to derogate from their obligations to protect certain rights during a time of public emergency, such as the ongoing COVID-19 health crisis, which threatens the life of the nation. States can do so only to the extent that it is strictly required by the emergency situation and provided that such measures are not inconsistent with the State's obligations under international law.

In its **General Comment no. 29**, the UN Human Rights Committee also noted that measures derogating from the provisions of the ICCPR must be exceptional (i.e. the scale of threat must reach a high threshold) and temporary in nature.<sup>1</sup> This implies that any derogation in response to COVID-19 must be limited in severity, duration and geographical coverage, to ensure that it is directed only to the actual, present, or imminent danger, and not merely presumptive.<sup>2</sup>

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<sup>1</sup> UN Human Rights Committee, General Comment No. 29 on States of Emergency, CCPR/C/21/Rev.1/Add.11 (2001), para 2, 4

<sup>2</sup> See, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Article 54

International law further obligates states to conduct an objective assessment of the emergency situation in order to determine to what extent, if any, it poses a threat to the life of the nation, and that the specific measures derogating from its treaty obligations are necessary and legitimate in the circumstances.<sup>3</sup> A State cannot invoke derogation where reasonable restrictions on certain rights can be adequate to deal with the public health emergency.<sup>4</sup>

Even in times of emergency, a state cannot deviate from non-derogable rights such as the right to life, prohibition of torture, inhuman and degrading treatment, slavery and servitude, prohibition of imprisonment for the inability to fulfil contractual obligations, application of ex post facto laws and freedom of thought, conscience, and religion.<sup>5</sup> Similarly, exercising derogation under ICCPR does not justify violating state obligations under humanitarian law.<sup>6</sup>

## PROCEDURAL AND SUBSTANTIVE REQUIREMENTS

### 1. FORMAL PROCLAMATION

A state exercising the right to derogation must first officially proclaim the existence of the public emergency in line with procedures laid out under domestic law and immediately notify other States Parties to the ICCPR, through the United Nations Secretary-General, identify the provisions it has derogated from, and its reasons.<sup>7</sup> This ensures that the measures taken by the State are strictly required by the exigencies of the public health situation, and also permits other States parties to monitor compliance with the provisions of the ICCPR.<sup>8</sup> Notification requirements also apply when the derogation terminates.<sup>9</sup>

### 2. CONDUCT HUMAN RIGHTS DUE DILIGENCE

The state has a duty to evaluate the measures taken and their effect on the enjoyment of the rights and freedoms contained in relevant human rights treaties in order to mitigate any adverse consequences.<sup>10</sup> This calls for constructive partnerships with civil society organisations who can provide technical expertise and share good practices on rights-respecting response measures.

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<sup>3</sup> Siracusa Principles, *ibid*, Article 62

<sup>4</sup> Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1984/4 (1984), Article 53

<sup>5</sup> ICCPR, Article 4 (2); UN Human Rights Committee, General Comment No. 29, (*ibid*) para 7

<sup>6</sup> For instance, by taking hostages, imposing collective punishments, through arbitrary deprivations of liberty or deviating from fundamental principles of fair trial, including the presumption of innocence: UN Human Rights Committee, General Comment No. 29, (*ibid*) para 11

<sup>7</sup> Article 4 (3), ICCPR

<sup>8</sup> UN Human Rights Committee, General Comment no. 29, (*ibid*), para 17

<sup>9</sup> *Ibid*

<sup>10</sup> UN Human Rights Council: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism\*, Fionnuala Ní Aoláin, A/HRC/37/52, 27 February 2018, para 21

### 3. PROVIDE A TIME-LIMIT

Emergency legislation should have a limited duration (e.g., 30 or 60 days), and include safeguards such as sunset or review clauses, in order to ensure return to ordinary laws as soon as the emergency situation is over.<sup>11</sup> The State must also comply with notification under the ICCPR if further measures are introduced extending the duration of a state of emergency.<sup>12</sup>

### 4. ENSURE PUBLIC PARTICIPATION IN DESIGNING, MONITORING, AND IMPLEMENTING EMERGENCY MEASURES

The state must undertake an inclusive, consultative, and participatory process that involves various stakeholders in the process of drafting, reviewing, and monitoring the implementation of emergency laws and regulations.<sup>13</sup> The State should conduct proactive outreach to civil society organizations, including through online consultations, in the absence of in-person meetings. Special consideration should be made to ensure participation of marginalised groups who are disproportionately affected by the pandemic such as victims of gender-based violence. Participation goes hand in hand with guarantees of widespread access to information to the public and transparent decision-making processes by the State in measures to regulate the pandemic.

### 5. PROVIDE RECOURSE TO EFFECTIVE REMEDY

Emergency legislation must protect individuals' right to an effective remedy to guarantee redress to persons affected by the emergency measures, or those seeking to challenge their necessity. In line with the rule of law.

### 6. INTEGRATE OVERSIGHT MECHANISMS

International law requires legislative authorisation and oversight of emergency measures. Emergency law should thus provide for prompt and periodic independent review by the legislature of the necessity for emergency measures and consistent with rights-based protections to prevent overreach of emergency powers.

## Principles Governing Permissible Restrictions on Rights during Public Emergencies

International law allows States to restrict the exercise of certain fundamental rights such as freedom of assembly, association, and expression when dealing with a serious threat to the health of the population or individual members of the population.<sup>14</sup> The

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<sup>11</sup> OHCHR: Guidance on Emergency Measures and COVID-19, 27 April 2020

<sup>12</sup> UN Human Rights Committee, General Comment no. 29, (ibid), para 17

<sup>13</sup> See, OHCHR Guidance, ibid, note 11

<sup>14</sup> UN Siracusa Principles, Article 25

restrictions must comply with overriding principles of legality, necessity, proportionality and non-discrimination in accordance with international law.

### PRINCIPLE OF LEGALITY

This means that any restrictions on rights during emergencies must be provided by law that is clear and accessible to all and in line with international human rights standards. As such:

- The mandate and exercise of emergency powers must be sufficiently clear to avoid arbitrary interpretation.
- Vague laws, which confer undue discretion on executive authorities, in the context of public health emergency, are inconsistent with the legality principle and should be revised.
- The law should include adequate safeguards and effective remedies against illegal or abusive imposition or application of limitations on rights.<sup>15</sup>

### PRINCIPLE OF NECESSITY & PROPORTIONALITY

This means that any restriction must be strictly necessary and the least intrusive means to protect public health. In line with the proportionality principle, human rights mechanisms have called upon States to replace COVID-19-related measures that prohibit the enjoyment of rights with less restrictive measures that allow such activities to take place, while subjecting them to necessary public health requirements such as physical distancing.<sup>16</sup> For instance, rather than issue absolute prohibitions on gatherings, measures can be provided to allow assemblies to proceed with limited restrictions such as reduced number of participants and ensuring compliance with health precautionary measures in consultation with organizers.

### PRINCIPLE OF NON-DISCRIMINATION AND EQUALITY

Emergency measures that restrict rights must not be used to target or discriminate anyone on the basis of any prohibited grounds.<sup>17</sup> As human rights experts have noted, it is imperative that the crisis not be used as a pretext to suppress rights in general or to target particular individuals or groups, including minorities, human rights defenders, journalists and other groups. The state must also adopt safeguards to

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<sup>15</sup> Siracusa Principles, Article 18

<sup>16</sup> UN Human Rights Committee Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2, 30 April 2020

<sup>17</sup> Prohibited grounds of discrimination such as race, color, sex, sexual orientation and gender identity, disability, language, religion, political or other opinion, national or social origin, property, birth, or other status

protect against any adverse impact on minorities and vulnerable groups, such as women, children, and elderly persons.<sup>18</sup>

## Positive Measures During Implementation of Emergency Laws

### PROACTIVE INFORMATION DISCLOSURE

The State must conduct timely, regular, and widespread dissemination of information on emergency measures, including robust implementation of laws protecting the right to freedom of information to ensure that all individuals, especially journalists, have access to information.

### ACCESS TO JUDICIAL MECHANISMS

The State should maintain robust and independent judicial access and oversight at all phases of the emergency situation. The UN Special Rapporteur on Independence of Justice and Lawyers has developed [seven key guidelines](#) setting out urgent actions for states to prevent blockages of the justice systems and to guarantee a functioning and independence justice. According to the Special Rapporteur, lockdowns and “social distances” shouldn’t prevent the judicial system from acting and following due process guarantees.<sup>19</sup>

### LAW ENFORCEMENT

Authorities tasked to implement emergency measures must comply with their legal obligations and should be held accountable for misuse of emergency powers under the law. The use of force by security officials during enforcement of emergency measures should abide by international standards – as a measure of last resort. All persons should be treated with humanity and with respect for their inherent dignity during law enforcement operations. Authorities should respect the principle of proportionality when imposing penalties for violations and ensure that penalties are not imposed in an arbitrary or discriminatory way.<sup>20</sup>

### DATA PROTECTION & PRIVACY

Rights-based legal safeguards must be put in place to regulate the appropriate use and handling of sensitive personal data collected and stored during the pandemic. In particular, all data processed in response to the crisis should be used only for the

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<sup>18</sup> UN Experts have underscored that emergency declarations based on the Covid-19 outbreak should not be used as a basis to target particular groups, minorities, or individuals. It should not function as a cover for repressive action under the guise of protecting health nor should it be used to silence the work of human rights defenders; See, Statement dated 16 March 2020

<sup>19</sup> See, Coronavirus emergency: challenges for the justice system, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25810&LangID=E>

<sup>20</sup> See, OHCHR Guidance, *ibid*, note 11

specific purpose of managing the COVID-19 pandemic and provide adequate oversight on such measures.<sup>21</sup>

## SURVEILLANCE SAFEGUARDS

In case surveillance measures are instituted:

- Surveillance powers must be exercised in a manner that is both necessary and proportionate.<sup>22</sup>
- The body responsible for supervising the use of surveillance powers must be independent and responsible to, and be appointed by, Parliament rather than the Executive.<sup>23</sup> The surveillance body should be required to obtain judicial approval before surveilling individuals combined with strict time limits on surveillance operations, and strict procedures on the use and storage of data obtained through surveillance.
- Individual surveillance or contact tracing and individual movement tracking must be tightly regulated. Expanded monitoring efforts related to COVID-19 should not fall under the domain of national security and intelligence entities and must be subject to effective oversight by appropriate independent bodies.<sup>24</sup>

## Monitoring and Oversight of Emergency Measures

### THE ROLE OF KEY STAKEHOLDERS

As human rights mechanisms have noted, various stakeholders play a key role in ensuring that emergency measures adopted by States in the COVID-19 response and recovery comply with their human rights obligations. The following key stakeholders play diverse and complementary roles as noted below:

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<sup>21</sup> Access Now: 'Recommendations on privacy and data protection in the fight against COVID19', March 2020 accessible at <https://www.accessnow.org/cms/assets/uploads/2020/03/Access-Now-recommendations-on-Covid-and-data-protection-and-privacy.pdf>; See also, OHCHR Guidance: Civic space and COVID-19; 4 May, 2020

<sup>22</sup> See, Necessary and Proportionate Coalition, Necessary & Proportionate Global Legal Analysis, (May 2014), available at: <http://necessaryandproportionate.org/global-legal-analysis>; citing, Klass and Others v. Germany, no. 5029/71, 6 September 1978, para. 37; Liberty and Others v. the United Kingdom, no. 58243/00, 1 July 2008 and Rotaru v. Romania, no. 28341/95, [GC], 4 May 2000 concerning surveillance carried out by the intelligence agencies.

<sup>23</sup> See, Necessary and Proportionate Coalition, Necessary & Proportionate Global Legal Analysis, (May 2014), available at: <http://necessaryandproportionate.org/global-legal-analysis>; citing, Klass and Others v. Germany, no. 5029/71, 6 September 1978, para. 37; Liberty and Others v. the United Kingdom, no. 58243/00, 1 July 2008 and Rotaru v. Romania, no. 28341/95, [GC], 4 May 2000 concerning surveillance carried out by the intelligence agencies

<sup>24</sup> See, OHCHR Guidance: Civic space and COVID-19, *ibid*, note 21.

**PARLIAMENT**<sup>25</sup>

- Enact and oversee the adoption of emergency frameworks to regulate and ensure rights-based emergency response.
- Monitor implementation of emergency legislation to ensure compliance with human rights standards and applicable treaty obligations.
- Provide independent review and periodic evaluation of sustained emergency measures to assess the necessity of the measures taken or proposed to deal with the specific dangers posed by the emergency.
- Appoint and oversee bodies tasked with the responsibility to enforce emergency laws including surveillance units.
- Ensure timely phase-out of emergency legislation when the emergency situation lapses.

**JUDICIARY**<sup>26</sup>

- Ordinary courts should maintain their jurisdiction to adjudicate any complaint that a non-derogable right has been violated and to facilitate prompt judicial redress in line with fair trial guarantees.<sup>27</sup>
- Courts have a duty to review the necessity and efficacy of emergency measures that are continually extended or sustained. There must be judicial review of emergency measures to ensure these are consistent with human rights obligations and exercised within the limits of permissible emergency regulation.
- Oversee compliance with legal safeguards regarding the scope, necessity, and duration of emergency measures, including communications surveillance. Any surveillance mechanism should be required to obtain judicial approval before conducting individual surveillance.

**NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIS)**<sup>28</sup>

By virtue of their distinct mandate, NHRIs play a vital role in safeguarding the protection of human rights and civic space during COVID-19 emergency response in collaboration with other key stakeholders. Some of the measures that can be taken by NHRIs during the COVID-19 pandemic include:

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<sup>25</sup> See, UN Special Rapporteur on countering terrorism, Fionnuala Ní Aoláin, report, *ibid*, note 10

<sup>26</sup> See, UN Special Rapporteur on Independence of Justice and Lawyers has developed [seven key guidelines](#) providing urgent actions for states to prevent blockages of the justice systems and to guarantee a functioning and independence justice

<sup>27</sup> Siracusa Principles, Paragraph 60

<sup>28</sup> See, NHRI responses to the COVID-19 pandemic, <https://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIS-and-Covid-19.aspx>

- Advise the government by issuing statements and recommendations on how to respond to the pandemic while protecting human rights; and emphasizing the importance of applying specific and targeted measures to protect the most vulnerable groups in society.
- Monitor and ensure rights protection during the introduction, implementation, and phase-out of emergency legislation to ensure compliance with human rights norms.
- Undertake human rights analysis on the emergency legislation and its implementation.
- Provide effective remedy for victims of human rights violations, including ensuring virtual access to NHRI services during lockdown.
- Share information with right holders about protection of human rights standards during the pandemic and their rights.
- Advocate for the application of a non-discriminatory approach in the scope and application of the emergency legislation including protection of marginalised or at-risk groups.
- Ensure timely phase-out of emergency legislation when the emergency situation lapses.

#### CIVIL SOCIETY<sup>29</sup>

UN human rights mechanisms have underlined the obligation by States to consult with civil society recognizing that it plays a vital role in ensuring targeted and candid feedback on COVID-19 measures that can further improve state responses.<sup>30</sup> In particular, civil society should:

- Participate in the legislative process during the adoption of emergency legislation.
- Review emergency legislation in line with relevant human rights norms.
- Monitor the implementation of emergency legislation to ensure rights-respecting response.
- Check arbitrary exercise of executive authority.
- Ensure timely phase-out of emergency legislation when the emergency situation lapses.

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<sup>29</sup> See, OHCHR Guidance: Civic Space and COVID-19, *ibid*, note 21

<sup>30</sup> *Ibid*