

OBLIGATIONS OF STATES IN THE FIELD OF HUMAN RIGHTS IN THE CONTEXT OF COVID-19

In times of emergency, International and European Human Rights Law enable States to derogate from their obligations and enter a different regime of legality; provided they respect some fundamental principles. The aim of this paper is to set out the strict procedural and substantive rules States must follow when entering a situation of *de jure* derogation, i.e. officially notifying the international community that they will adopt measures impacting the human rights of their citizens. From a geographical point of view, the paper covers the application of derogatory measures in European and Central Asian States, to which the International Covenant on Civil and Political Rights and the European Convention on Human Rights apply.

The paper is intended to serve as a practical tool to monitor that *de jure* derogating States respect all conditions legally set out. However, it is also crucial to carefully monitor the situation in *de facto* derogating States i.e. States which do not notify that they are adopting measures derogating from their obligations, although they are practically doing so. The risk, when States do not officially activate the derogating framework, is the lack of clear limits on the content, impact and duration of the measures adopted. The danger is that supposedly exceptional emergency powers and measures become normalcy. To ensure a prompt return to the full implementation of human rights in *de facto* derogating States, it is thus essential that any measure adopted are proportionate and applied in a non-discriminatory manner. The principles detailed below can also serve as an indicator of how and what to monitor in such States.

It must be noted that both *de jure* and *de facto* derogating States remain liable and under the scrutiny of the Human Rights Committee and the European Court of Human Rights. Any measure they adopt can be judicially challenged by applicants when allegedly creating an illegitimate interference with their fundamental rights.

I. GENERAL LEGAL FRAMEWORK

In the context of serious public health threats and public emergencies threatening the life of the nation, States can adopt measures restricting some human rights. Such restriction must have a legal basis, be strictly necessary, be based on scientific evidence and neither arbitrary nor discriminatory in application, of limited duration, respectful of human dignity, subject to review, and proportionate to achieve the objective.

- The International Covenant on Economic, Social and Cultural Rights guarantees everyone the right to “the highest attainable standard of physical and mental health”. The UN Committee on Economic, Social and Cultural Rights, the body monitoring state compliance with the covenant, indicated that the right to health is closely related to and dependent upon the

realization of other human rights, including the rights to human dignity, life, non-discrimination and equality.

- The Siracusa Principles, adopted by the UN Economic and Social Council in 1984 and UN Human Rights Committee general comments on states of emergency and freedom of movement provide guidance on State's obligations in relation to human rights, in times of emergency. Notably, they must **take into consideration the disproportionate impact on specific populations or marginalized groups** of any restrictions on rights.
- European Social Charter, 1961, and European Social Charter (Revised) 1996, Article 30 "In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."
- The International Covenant on Civil and Political Rights, 1966 and the European Convention on Human Rights both provide for the possibility of derogation in times of emergency. However, such derogation is strictly regulated.

II. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS – Conditions of derogation

ARTICLE 4(1)

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent **strictly required** by the exigencies of the situation, provided that such measures are **not inconsistent with their other obligations under international law** and do **not involve discrimination** solely on the ground of race, colour, sex, language, religion or social origin." In their interpretation of similar provisions concerning non-discrimination, UN treaty bodies considered that sexual orientation¹ and gender identity² are protected grounds as well. Such interpretation must a fortiori apply in times where minorities are even more at risk.

GENERAL COMMENT No. 29 adopted in July 2001: "Article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards"³

PURPOSE OF THE DEROGATION

"The **restoration of a state of normalcy** where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant."⁴

¹ Toonen v Australia (488/1992) CCPR/C/50/D/488/1992, 1-3 IHRR 97 (1994), para. 8.7.

² Concluding observations of the HRC on Ireland (CCPR/C/IRL/CO/4), para. 7, and on the United Kingdom (CCPR/C/GBR/CO/6), at para. 5; and, CESCR, General Comment No. 20 (n 8), para. 32.

³ UN doc. GAOR, A/56/40 (vol. I), p. 202, para. 1.

CONSEQUENCES:

- ⇒ A State party may, of course, only derogate from article 4 of the Covenant for as long as it is genuinely confronted with a “public emergency which threatens the life of the nation”.
- ⇒ Emergency legislation cannot therefore remain in force for so long that it becomes institutionalized so that it is the rule rather than the exception.⁵
- ⇒ As soon as the situation ceases to constitute a threat to the life of the nation, the derogations must be terminated.⁶
- ⇒ States parties continue to be bound by the principle of legality and the rule of law throughout any “public emergency which threatens the life of the nation”.⁷

Concrete example:

Our members in Uzbekistan: reports about abuse and attack against LGBT have decreased because of quarantine. They are also concerned that once quarantine is over, many LGBT will return to their usual practices of dating which might put them under higher risk of being lured into fake dates by anti-LGBT groups. There are also issues with shelter since many lost their jobs because of quarantine, but then they are unsure how to provide safe shelter. (More info: Nurbek).

→ States have an obligation to proactively ensure full respect of human rights of all when returning to a state of normalcy, including by taking specific measures concerning vulnerable populations.

NOTIFICATION AND REPORTING:

ARTICLE 4(3) – “Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

→ The HUMAN RIGHTS COMMITTEE holds that

- ✓ “Notification is essential not only for the discharge of the Committee’s functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to **permit other States parties to monitor compliance with the provisions of the Covenant**”
- ✓ In view of the “summary character” of many of the notifications received in the past, the Committee emphasizes that “the notification should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding the law. Additional notifications are required if the State party

⁴ UN doc. GAOR, A/56/40 (vol. I), p. 202, para. 1.

⁵ OHCHR, “Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers”, *Professional training series No. 9*, United Nations, New York and Geneva, 2003, Chapter 16, p. 824. [Hereinafter OHCHR, 2003, Chapter 16.]

<https://www.ohchr.org/Documents/Publications/training9chapter16en.pdf>

⁶ OHCHR, 2003, Chapter 16, p. 825.

⁷ OHCHR, 2003, Chapter 16, p. 825

subsequently takes further measures under article 4, for instance by extending the duration of a state of emergency. The requirement of immediate notification applies equally in relation to the termination of derogation.”⁸

→ States must provide reports to the Committee including “careful justification not only for their **decision to proclaim a state of emergency** but also for **any specific measures** based on such a proclamation.”⁹

NON-DEROGABLE RIGHTS

- Articles 6 (right to life), 7 (the right to freedom from torture, cruel, inhuman and degrading treatment or punishment, and medical or scientific experimentation without one’s free consent), 8 (the right to freedom from slavery, the slave trade and servitude), 11 (the right not to be imprisoned on the ground of inability to fulfil a contractual obligation), 15 (the right not to be subjected to retroactive legislation (ex post facto laws)), 16 (the right to recognition as a person before the law), 18 (the right to freedom of thought, conscience and religion) of the Covenant
- Article 6 of the Second Optional Protocol (the right not to be subjected to the death penalty).

CONDITION OF STRICT NECESSITY OF THE MEASURES

- Proportionality is a “fundamental requirement” relating to “duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency”¹⁰
- The Committee will make its own assessment of the strict necessity of any derogatory measures taken.¹¹

III. EUROPEAN CONVENTION ON HUMAN RIGHTS – Conditions of derogation

COVID-19

States that submitted derogations from the ECHR under Article 15: Georgia, Estonia, Armenia, Romania, Latvia.

→ Conditions of interferences with fundamental rights: these interferences must be clearly linked to the pandemic, limited in time and strictly necessary.

→ The Court has the competence to review any measures taken during COVID-19 that impacts enjoyment of fundamental rights.

⁸ UN doc. GAOR, A/56/40 (vol. I), p. 207, para. 17.

⁹ UN doc. GAOR, A/56/40 (vol. I), p. 203, para. 5.

¹⁰ General Comment No. 29, in UN doc. GAOR, A/56/40 (vol. I), p. 203, para. 4.

¹¹ OHCHR, 2003, Chapter 16, p. 853.

LEGAL BASIS FOR DEROGATION: ARTICLE 15

“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

ROLE OF THE COURT:

- Control a posteriori: Applicants can always complain there has been a unlawful breach of their fundamental rights, even when the said breach happened during a “state of emergency”.
- Power of review: the Court can rule on whether the States have gone beyond the “extent strictly required by the exigencies” of the crisis.¹²
- NON-DISCRIMINATION: In determining whether the State has exceeded its power, the Court will ascertain whether the measures at stake involved any unjustifiable discrimination¹³

NON-DEROGABLE RIGHTS (Article 15 § 2)

Even in this situation of crisis, States cannot breach the right to life (Art.2), prohibition of torture and other forms of ill-treatments (Art. 3) and slavery (Art. 4) and retrospective implementation of criminal punishment (Art. 7).

STATE OBLIGATION:

The State should make “every effort...to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness”¹⁴

NOTIFICATION REQUIREMENT – ARTICLE 15§3

“Any High Contracting Party availing itself of this right of derogation shall keep the **Secretary General of the Council of Europe** fully informed of the **measures** which it has taken and the **reasons** therefore. It shall also inform the Secretary General of the Council of Europe when such measures have **ceased** to operate and the provisions of the Convention are again being fully executed.”

→In the absence of an official and public notice of derogation, Article 15 does not apply to the measures taken by the respondent State.¹⁵

¹² Ireland v. the United Kingdom, 18 January 1978, Series A no. 25, § 207.

¹³ A. and Others v. the UK, [GC], no. 3455/05, ECHR 2009, § 190

¹⁴ Mehmet Hasan Altan v. Turkey, no. 13237/17, 20 March 2018, § 210.

¹⁵ Cyprus v. Turkey, no. 8007/77, Commission report of 4 October 1983, §§ 66-68.

FORMAL PROCEDURE :

- ✓ Writing a letter explaining ALL the relevant measures taken and reasons behind + attaching copies of the legal texts under which the emergency measures will be taken, with an explanation of their purpose.¹⁶
- ✓ “Fully informed”: indicates that the State must provide comprehensive information about the derogatory measures taken.
- ✓ The State must notify the measures without any unavoidable delay.
- ✓ Article 15 § 3 also implies a requirement of **permanent review** of the need for emergency measures.¹⁷

IV. OBLIGATIONS OF STATES IN TIMES OF EMERGENCY

1. ENSURING THE PROTECTION OF RIGHT TO LIFE AND RIGHT TO BE FREE FROM TORTURE AND FROM CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Even though these rights are non-derogable, both in international and European law, they are most frequently violated in times of emergency, hindering a prompt and full return to a normal situation.

LGBTI SPECIFIC ISSUE: Many trans people are unable to access identity documents presenting their correct name, gender marker, or photo, and increased police identity and paperwork checks can expose them to **increased harassment, discrimination, and violence** in this context.

Concrete example (See Iulia’s post on Slack, Monday 30/03)

“Ukraine: trans woman was not allowed to board public transportation to go to work (although being essential personnel - she works in a pharmacy) by police due to papers not matching physique (she was in the process of changing her ID, but the process was frozen due to anti-covid governmental measures)”

→ Prohibition of torture and other ill-treatments remain mandatory for States => lack of LGR recognition and its consequences in times of crisis cannot justify violence against trans and intersex people.

- The RIGHT TO LIFE:
 - ✓ States must at all times take positive steps to protect the right to life. States must at no time participate in, or condone, the arbitrary or extrajudicial taking of human life.
 - ✓ Even in public emergencies threatening the life of the nation, States have a strict legal duty to prevent, investigate, prosecute, punish and redress violations of the right to life.¹⁸
- The RIGHT TO BE FREE FROM TORTURE AND FROM CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT:

¹⁶ Lawless v. Ireland (no. 3), 1 July 1961, Series A no. 3, § 47.

¹⁷ Brannigan and McBride v. the United Kingdom, 26 May 1993, Series A no. 258-B, § 54.

¹⁸ OHCHR, 2003, Chapter 16, p. 834.

- ✓ The use of torture and of cruel, inhuman or degrading treatment or punishment is prohibited at all times, including in time public emergency threatening the life of the nation.
- ✓ Prolonged incommunicado detention amounts to a form of ill-treatment prohibited by international law even in emergency situations.

2. NON-DEROGABLE RIGHTS AND THE RIGHT TO EFFECTIVE PROCEDURAL AND JUDICIAL PROTECTION:

- In international human rights law, the principle of legality and rule of law must be guaranteed at all times, including in public emergencies threatening the life of the nation. This means that, in a constitutional order respectful of human rights and fundamental freedoms, law governs the conduct both of the State and of individuals.¹⁹
- “Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole...The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.”²⁰
 - ⇒ Non-derogable rights must be fully protected in such emergency situations. To this end, States must at all times provide effective domestic remedies allowing alleged victims to vindicate their rights before domestic courts or other independent and impartial authorities. No derogatory measures, however lawful, are allowed to undermine the efficiency of these remedies.
 - ⇒ The right to be tried by an independent and impartial tribunal is absolute under the International Covenant on Civil and Political Rights in cases in which criminal proceedings may result in the imposition of capital punishment. Such proceedings must at all times respect all the due process guarantees contained in article 14 of the Covenant which are also, to that extent, non-derogable. They must, of course, also be consistent with the prohibition of retroactive criminal law defined in the non-derogable provisions of article 15 of the Covenant.²¹

3. THE OBLIGATION NOT TO DISCRIMINATE

- According to article 4(1) of the International Covenant on Civil and Political Rights: derogatory measures must “not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”. →Extended to grounds of sexual orientation and gender identity.
- European Convention on Human Rights: No reference to the principle of non-discrimination. However, derogatory measures must not be “inconsistent” with the State’s other “obligations under international law”. Hence, discriminatory derogatory measures are not permitted neither.²²

¹⁹ OHCHR, 2003, Chapter 16, p. 851.

²⁰ 9UN doc. GAOR, A/56/40 (vol. I), p. 206, para. 16.

²¹ OHCHR, 2003, Chapter 16, p. 852.

²² OHCHR, 2003, Chapter 16, p. 879.

- Differentiations are lawful only if they pursue a legitimate aim and are proportionate to/reasonable in terms of that legitimate aim.

LGBTI SPECIFIC ISSUE: Policing of emergency measures can involve discrimination by the police as regards SOGIESC, in particular when making judgements about **who lives in a household** for same-sex couples and Rainbow Families, which is often worsened by intersecting factors such as race.

→ Authorities should have a wide understanding of the notion of “family” or “household”. The ECtHR has used the term of **de facto families in its case-law**. It makes sense for the authorities to adopt this terminology in COVID-19 times.

- ✓ *The Court* acknowledged the commitment to family values by LGBTI community members and in so doing reinforced the notion that the right to “family life” would equally apply to them.²³
- ✓ The Court reiterated that “the relationship of a cohabiting same-sex couple living in a stable *de facto* relationship falls within the notion of “family life” just as the relationship of a different-sex couple in the same situation would”.²⁴

WHAT WE MUST MONITOR:

- That States who are derogating from their obligations in International and European human rights law make a notification providing the appropriate and required information.
- That the implementation of the derogating measures are not discriminatory against the LGBT community.
- That the States comply with their positive and negative obligations in relation to the non-derogable rights.

²³ Bayev and Others v. Russia, App. nos. 67667/09, 44092/12 and 56717/12, 26 June 2017

²⁴ X and others v. Austria, No. 19010/07, 19 February 2013, §95