In a democratic society, the judiciary has an **obligation to protect human rights and ensure access to justice** for its state’s population.¹ This obligation does not erode in times of crisis, but rather becomes even more essential to the protection of human rights and ensuring that the executive branch of government does not abuse its additional power, strengthened to respond to a national emergency.² Courts and the judiciary have a legal responsibility under both international human rights law and humanitarian law to continue to operate during a declared national emergency to protect fundamental human rights.³

The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Human Rights Committee’s *General Comment No. 29* affirm that states cannot suspend access to justice during a public emergency.⁴ The Special Rapporteur on Independence of Judges similarly issued guidance stating that “matters to protect rights, when serious crimes are committed (including corruption connected to this [COVID-19] crisis) and cases of domestic violence” should be prioritized.⁵

Regional instruments, including the African Charter on Human and People’s Rights, the American Convention on Human Rights, and the European Convention on Human Rights underscore the importance of the protection of fundamental human rights at all times.⁶ The African Commission on Human and People’s Rights, the European Commission on Human Rights, and the Inter-American Commission on Human Rights have all issued recent guidance reinforcing **states’ obligations to maintain an independent judiciary to protect human rights and monitor any restrictions or limitations placed on rights** during the COVID-19 pandemic.⁷
LIMITATIONS ON RIGHTS DURING THE COVID-19 PANDEMIC

International human rights instruments and international humanitarian law allow states to limit or derogate certain rights during emergencies, such as war, a major natural catastrophe, or a public health crisis. The ICCPR establishes strict parameters on states’ ability to restrict rights, noting “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.” Furthermore, when states limit or derogate rights, the state, through an independent judiciary, must monitor the restrictions or suspensions of rights and adjudicate any challenges to those limitations or derogations.

Limitations to rights are those that limit but do not entirely suspend a right, do not require a legitimate declaration, and can be challenged. Derogation of a right entirely suspends that right for a specific period of time. Under the Siracusa Principles and the ICCPR, states can only derogate rights “when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation.” States can only consider a “threat to the life of the nation” when the threat impacts the entire population of the state, and at least part of the state’s territory, and “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…”
According to the Human Rights Committee’s General Comment No. 29, in order for a state to legitimately derogate rights, the state must issue a declaration that is authorized under national law, detailing the reasons for the derogation, receive confirmation from the legislature, and permit the national constitutional court to review the derogation.15

The rights that states can suspend during emergencies are called **derogable rights**. However, foundational legal instruments, such as the ICCPR, the ICESCR, the American Convention on Human Rights, and the European Convention on Human Rights specify rights that cannot be suspended or limited in any way, even during times of emergency.16 These are known as **non-derogable rights**, and, although there are slight variances regarding other rights, human rights instruments agree that **states can never suspend the following rights**: (1) the right to life, (2) the right to be free from torture and cruel, inhuman or degrading treatment, and (3) prohibition of slavery.17 The ICCPR articulates an elaborate list of non-derogable rights, and obligates states to allow the judiciary to continue to hold the state accountable and provide effective remedies for violations of any non-derogable rights during emergencies.18 In addition, the Human Rights Committee’s General Comment No. 36 on the Right to Life explicitly notes that reproductive rights, namely access to safe abortion services, are included in the right to life, a non-derogable right.19

When determining whether the state legitimately limited or derogated a right, the judiciary should objectively consider whether **the limitation or derogation meets the principle of proportionality**.20 The principle of proportionality establishes that the measure is strictly necessary to resolve the threat, and is proportionate to the nature and extent of the threat.21 A measure is considered necessary if it addresses an actual and imminent danger, and is explicitly limited in “duration, geographical coverage and material scope.”22
Although states can limit or derogate rights, states must allow the judiciary to monitor these restrictions, and guarantee access to effective remedies, even during emergencies. The Human Rights Committee’s General Comment No. 29 emphasizes states’ obligations to ensuring effective remedies during a state of emergency. Therefore, it is essential that courts hear any cases challenging the legitimacy of a limitation or derogation during this time to ensure that the executive and legislative branches of government are not overstepping their boundaries during the pandemic. For example, some states may attempt to limit or suspend protections for human rights defenders under the guise of public health protections, and for this reason, the Inter-American Commission on Human Rights has urged states to consider human rights defenders as essential workers during this pandemic, and should not disrupt or hinder their work.

As the pandemic will continue indefinitely to impact the lives and health of people around the world, the indefinite postponement of cases and issues is no longer a feasible option. It is now essential that judiciaries introduce new modalities for hearings and judicial procedures in order to ensure both safety and access to justice. The Human Rights Committee’s statement regarding state obligations during COVID-19, explicitly obligates states to ensure continued access to court, justice, and effective remedies.
Courts in several countries have continued to operate during the pandemic, while altering the modalities of their hearings to accommodate the necessary protections to reduce the risk of COVID-19 transmissions. For example, courts in Kenya have been holding hearings telephonically or online, depending on the strength of the internet connection. In South Africa, the judiciary has issued explicit guidance on how to maintain courts during the pandemic, including by limiting physical presence in the courtroom to only “urgent and essential matters” and permitting civil cases not deemed “urgent or essential” to be held online or over the phone, at the discretion of each individual court. Courts in Nepal and India have also issued clear guidance on how courts can continue to operate safely during the pandemic, by allowing petitioners to submit applications and court documents via email, establishing safety measures on court premises, and permitting video conferencing for judicial custody hearings. Courts in the Philippines issued an administrative circular establishing safety measures in courtrooms, formed a task force to address concerns of the judiciary and issue necessary directives, and issued detailed guidelines outlining how courts will function during the pandemic. In Portugal, all lower courts are now hearing all cases remotely and issuing judgements virtually. Courts in Slovenia are now encouraging petitioners to submit court documents via mail or online, and have implemented strict disinfecting and distancing policies for anyone who must visit the court in person for an urgent matter. In the United States, the Supreme Court and Federal Appeals Court are now hearing all cases remotely, and all judgements are issued virtually.
RECOMMENDATIONS

In accordance with the Human Rights Committee’s recommendation to take measures to ensure access to courts and effective remedies, and drawing on examples of measures courts around the world have implemented successfully, we have developed the following recommendations to permit courts to safely and successfully operate during the COVID-19 pandemic.

1. Issue directive orders that remove all legal and policy barriers in order to ensure access to justice and concrete protection for human rights during the pandemic. For example, courts should remove requirements on physical presence in a courtroom for the majority of hearings. When reviewing a policy or a law that is effectively creating barriers ensure that this policy is removed.

2. Whenever possible, hearings should be held online or telephonically. Where virtual meetings are not possible, issue directives to establish and implement public health protocols in accordance with the World Health Organization’s recommendations for governments in the context of COVID-19.

3. Court documents (e.g., briefs, non-physical evidence) should be submitted via secure online transaction wherever possible.
Endnotes


4. See ICCPR, supra note 3, at arts. 4, 5, 14(1); ICESCR, supra note 3, at arts. 4, 5; Human Rights Committee, Gen. Comment No. 29, supra note 3, at paras. 14-15.

5. OHCHR, Coronavirus Emergency: Challenges for the Justice System, supra note 2.


9. ICCPR, supra note 3, at art. 4(1).


12. Id.

13. Id.


16. ICCPR, supra note 3, at arts. 4, 5, 14(1); ICESCR, supra note 3, at art. 5; American Convention, supra note 6, at arts. 2; European Convention, supra note 6, at arts. 15, 18.

17. Id.

18. ICCPR, supra note 3, at art. 4; Human Rights Committee, *Gen. Comment No. 29*, supra note 3, at paras. 14-15 (the following rights are non-derogable under the ICCPR: the right to life, the prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent, the prohibition of slavery, slave-trade and servitude, the prohibition of imprisonment because of inability to fulfil a contractual obligation, the principle of legality in the field of criminal law, the recognition of everyone as a person before the law, and freedom of thought, conscience and religion).


21. Id.

22. Id.


25. Human Rights Committee, *Gen. Comment No. 29*, supra note 3, at para. 14 [“...the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation...to provide a remedy that is effective.”].

26. Id.; OHCHR, *Emergency Measures and Covid-19: Guidance*, (April 27, 2020), available at https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf [“[a]ny emergency legislation introduced under a state of emergency should be subjected to adequate legislative scrutiny. There should also be meaningful judicial oversight of exceptional measures or a state of emergency to ensure that they comply with the limitations.”].


29. Id., at para. 2(d) [“Nor can States parties deviate from... ensuring respect for the rule of law and the principle of legality even in times of public emergency, including the right of access to court, due process guarantees and the right of victims to obtain an effective remedy.”].


