

## Access to Justice During the COVID-19 Pandemic

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In a democratic society, the judiciary has an **obligation to protect human rights and ensure access to justice** for its state's population.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

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.

## 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.<sup>8</sup> 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."<sup>9</sup> 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.<sup>10</sup>

**Limitations** to rights are those that limit but do not entirely suspend a right, do not require a legitimate declaration, and can be challenged by courts, human rights bodies, and the legislative branch of the country.<sup>11</sup> States can also limit rights for a wide variety of reasons, including to protect public health or matters of national security.<sup>12</sup>

**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."**<sup>13</sup> 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..."<sup>14</sup>

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Derogable rights are rights that states can suspend or limit during national emergencies.

A legitimate derogation must meet the principle of proportionality.

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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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**.<sup>20</sup> 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.<sup>21</sup> A measure is considered necessary if it addresses an actual and imminent danger, and is explicitly limited in "duration, geographical coverage and material scope."<sup>22</sup>

States must allow the judiciary to monitor restrictions to rights and guarantee access to effective remedies, even during emergencies.

Although states can limit or derogate rights, **states must allow the judiciary to monitor these restrictions,<sup>23</sup> and guarantee access to effective remedies, even during emergencies.<sup>24</sup>** The Human Rights Committee's *General Comment No. 29* emphasizes states' obligations to ensuring effective remedies during a state of emergency.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup>**

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.

### GLOBAL EXAMPLES OF COURTS SHIFTING MODALITIES

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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> In Portugal, all lower courts are now hearing all cases remotely and issuing judgements virtually.<sup>34</sup> 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.<sup>35</sup> In the United States, the Supreme Court and Federal Appeals Court are now hearing all cases remotely, and all judgements are issued virtually.<sup>36</sup>

## 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.<sup>37</sup> 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.<sup>38</sup>
3. **Court documents** (e.g., briefs, non-physical evidence) should be **submitted via secure online transaction** wherever possible.

## Endnotes

1. International Commission of Jurists' (ICJ), *Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, Principles 1 and 4 and pp. 1-15, 57-75 of the Commentary (2011) [hereinafter ICJ, *Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*]; Principle B.3(c) and Article 16.1 of the Paris Minimum Standards of Human Rights Norms in a State of Emergency; Principle 1(b) of the Singhvi Declaration; Principle 10(b) of the Beijing Statement on the Independence of the Judiciary in the LAWASIA Region; Principle 24(b) of the Council of Europe Recommendation No. R (2009) of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system; Principle 4 of the UN Basic Principles on the Role of Lawyers; Chapter VII of the Council of Europe Recommendation CM/Rec(2010) of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities; Preamble of Council of Europe Recommendation No. R (2000) of the Committee of Ministers on the freedom of exercise of the profession of lawyer; Principle F(h) and Principle I(i) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.
2. Office of the High Commissioner for Human Rights (OHCHR), *Coronavirus Emergency: Challenges for the Justice System*, Special Rapporteur on Independence of Judges (2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25810&LangID=E> [hereinafter OHCHR, *Coronavirus Emergency, Challenges for the Justice System*].
3. See, International Covenant on Civil and Political Rights (ICCPR), adopted Dec. 16, 1966, art. 3, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, art. 3, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976) [hereinafter ICESCR]; Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, (77<sup>th</sup> Sess., 2001) paras. 3, 14, 15, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) [hereinafter Human Rights Committee, *Gen. Comment No. 29*]; see also ICJ, *Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, *supra* note 1; Matt Pollard, *The Courts and COVID-19*, INTERNATIONAL COMMISSION OF JURISTS, (April 6, 2020), available at <https://www.ici.org/wp-content/uploads/2020/04/Universal-ICJ-courts-covid-Advocacy-Analysis-brief-2020-ENG.pdf>.
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.
6. African Charter on Human and Peoples' Rights, adopted June 27, 1981, art. 62, O.A.U. Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) (ratified Nov. 17, 1989) [hereinafter Banjul Charter]; American Convention on Human Rights, adopted Nov. 22, 1969, art. 27, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/ II.23, doc. 21, rev. 6, (entered into force July 18, 1978) [hereinafter American Convention]; European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted Nov. 4, 1950, art. 15, 213 U.N.T.S. 222, Eur. T.S. No. 5 (entered into force Sept. 3, 1953) [hereinafter ECHR].
7. African Commission on Human and Peoples' Rights, *Press Statement on human rights-based effective response to the novel COVID-19 virus in Africa*, para. 10, available at <https://www.achpr.org/pressrelease/detail?id=483>; OHCHR, *Emergency Measures and COVID-19 Guidance*, (April 27, 2020), available at [https://www.ohchr.org/Documents/Events/EmergencyMeasures\\_COVID19.pdf](https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf) ("[o]rdinary courts should maintain their jurisdiction to adjudicate complaints for violations of non-derogable rights."); Inter-American Commission on Human Rights, *Pandemia y Derechos Humanos en las Américas*, Res.1/2020 (adopted April 10, 2020), available at <http://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-20-es.pdf> [hereinafter Inter-American Commission, *Pandemia y Derechos Humanos en las Américas*]; see also International Commission of Jurists, *COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health*, Opinio Juris, (April 1, 2020), available at <https://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-1/>.

8. *E.g.*, ICCPR, *supra* note 3, at art. 4; International Committee of the Red Cross, Study on International Customary Law, *Rule 100*, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule100](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100).
9. ICCPR, *supra* note 3, at art. 4(1).
10. Human Rights Committee, *Gen. Comment No. 29*, *supra* note 3 at paras. 14-15; OHCHR, *Emergency Measures and Covid-19: Guidance*, (April 27, 2020), available at [https://www.ohchr.org/Documents/Events/EmergencyMeasures\\_COVID19.pdf](https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf)
11. United Nations Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, art. I, UN Doc E/CN.4/1984/4 (1984) [hereinafter UN Commission on Human Rights, *Siracusa Principles*].
12. *Id.*
13. *Id.*
14. *Id.*; Human Rights Committee, *Gen. Comment No. 29*, *supra* note 3, at paras. 14-15.
15. Human Rights Committee, *Gen. Comment No. 29*, *supra* note 3, at paras. 2, 9.
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).
19. Human Rights Committee, *Gen. Comment No. 36: On the right to life* (Art. 6 of the International Covenant on Civil and Political Rights), para. 8, U.N. Doc. CCPR/C/GC/36 (2018).
20. Human Rights Committee, *Gen. Comment No. 29*, *supra* note 3, at para. 4.
21. *Id.*
22. *Id.*
23. OHCHR, *Emergency Measures and Covid-19: Guidance*, (April 27, 2020), available at [https://www.ohchr.org/Documents/Events/EmergencyMeasures\\_COVID19.pdf](https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf)
24. *Id.*; UN Commission on Human Rights, *Siracusa Principles*, *supra* note 11.
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](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.”].
27. Inter-American Commission, *Pandemia y Derechos Humanos en las Américas*, *supra* note 7, at paras. 29-30.
28. Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, paras. 2(b),(d), U.N. Doc. CCPR/C/128/2, (April 30, 2020).
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”].
30. William Ouko, *Practice Notes for the Conduct of Court Business During the Global Coronavirus Pandemic*, Kenyan Court of Appeal, 21 Apr. 2020, <http://kenyalaw.org/kl/index.php?id=10327>.
31. MINISTRY OF JUSTICE AND CORRECTIONAL SERVICES, *Directions Issued in Terms of Regulation 10 of the Regulations under the Disaster Management Act, 2002*, No. R. 440, (issued March 31, 2020), available at [https://www.gov.za/sites/default/files/gcis\\_document/202004/43191rq11076-gon440.pdf](https://www.gov.za/sites/default/files/gcis_document/202004/43191rq11076-gon440.pdf).



32. SUPREME COURT OF NEPAL, *Press Release on COVID-19*, available at [http://www.supremecourt.gov.np/web/indexhttp://www.supremecourt.gov.np/web/assets/downloads/covid\\_19\\_press\\_20770128.pdf](http://www.supremecourt.gov.np/web/indexhttp://www.supremecourt.gov.np/web/assets/downloads/covid_19_press_20770128.pdf) [resource only available in Nepali]; Nepal Live, (April 7, 2020), available at [https://nepallive.com/story/214834?fbclid=IwAR0dr\\_c9SVhERKggw55fYy919boZHTb3DfiDZlijx-Xzenyow50-B7GnnC8w](https://nepallive.com/story/214834?fbclid=IwAR0dr_c9SVhERKggw55fYy919boZHTb3DfiDZlijx-Xzenyow50-B7GnnC8w) (reporting that the Nepali courts are holding hearings via video conferencing) [resource only available in Nepali]; SUPREME COURT OF INDIA, *Circular, New Delhi*, (March 14, 2020), available at [https://main.sci.gov.in/pdf/Notice/14032020\\_093925.pdf](https://main.sci.gov.in/pdf/Notice/14032020_093925.pdf) (establishing precautionary measures in all courts in response to the COVID-19 pandemic); SUPREME COURT OF INDIA, *Circular, Administrative General Branch*, F. No. 212/Misc/PF/2-2-/SCA(G), (March 14, 2020), available at [https://main.sci.gov.in/pdf/LU/15032020\\_072250.pdf](https://main.sci.gov.in/pdf/LU/15032020_072250.pdf) (issuing precautionary measures at the Supreme Court of India).
33. SUPREME COURT OF THE PHILIPPINES, *To All Concerned First and Second Level Court Judges and Personnel Regarding the Rising Cases of COVID-19 Infection*, Administrative Circular No. 26-2020, (Manila, March 12, 2020), available at <http://sc.judiciary.gov.ph/11183/>; SUPREME COURT OF THE PHILIPPINES, *Creating a Task Force to Address the Rising Cases of COVID-19 Infection*, Memorandum Order No. 26-2020, (Manila, March 13, 2020), available at <http://sc.judiciary.gov.ph/11023/>; SUPREME COURT OF THE PHILIPPINES, *To All Litigants, Justices, Judges, and Personnel of the Judiciary, and Members of the Bar Regarding the Rising Cases of COVID-19 Infection*, Administrative Circular No. 31-2020, (Manila, March 16, 2020), available at <http://sc.judiciary.gov.ph/11037/>.
34. LAW 360, *Coronavirus: The Latest EU Court Closures and Restrictions*, (last updated May 11, 2020), available at [https://www.law360.com/articles/1253873/coronavirus-the-latest-eu-court-closures-and-restrictions?nl\\_pk=cb03fbd8-cfbf-41b8-ac9b-1c2df4487315&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=special](https://www.law360.com/articles/1253873/coronavirus-the-latest-eu-court-closures-and-restrictions?nl_pk=cb03fbd8-cfbf-41b8-ac9b-1c2df4487315&utm_source=newsletter&utm_medium=email&utm_campaign=special)
35. *Id.*
36. Sarah Jarvis, *Coronavirus: The Latest Court Closures and Restrictions*, LAW 360, (last updated May 11, 2020), available at [https://www.law360.com/articles/1252836/coronavirus-the-latest-court-closures-and-restrictions?nl\\_pk=cb03fbd8-cfbf-41b8-ac9b-1c2df4487315&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=special](https://www.law360.com/articles/1252836/coronavirus-the-latest-court-closures-and-restrictions?nl_pk=cb03fbd8-cfbf-41b8-ac9b-1c2df4487315&utm_source=newsletter&utm_medium=email&utm_campaign=special)
37. See Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, paras. 2(b),(d), U.N. Doc. CCPR/C/128/2, (April 30, 2020).
38. World Health Organization, *Getting your workplace ready for COVID-19*, (March 19, 2020), available at <https://www.who.int/docs/default-source/coronaviruse/advice-for-workplace-clean-19-03-2020.pdf>; see also World Health Organization, *Overview of Public Health and Social Measures in the context of COVID-19*, (May 18, 2020), available at <https://www.who.int/publications-detail/overview-of-public-health-and-social-measures-in-the-context-of-covid-19>.