

Guidelines for stakeholders to monitor violations of the **International Covenant on Civil and Political Rights (ICCPR)** by States' measures taken in the context of COVID-19 pandemic



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© Centre for Civil and Political Rights (CCPR Centre), January 2021

Visiting address: Rue de Varembé 1, CH-1202 Geneva, Switzerland

Postal address: PO Box 183, CH-1211 Geneva, Switzerland

Tel: +41 (0)22 33 22 555;

Email: info@ccprcentre.org;

Website: www.ccprcentre.org

Author: Daisuke Shirane (Asia Pacific Coordinator, CCPR Centre)

Design: Celacanto Producciones

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Published with support of:



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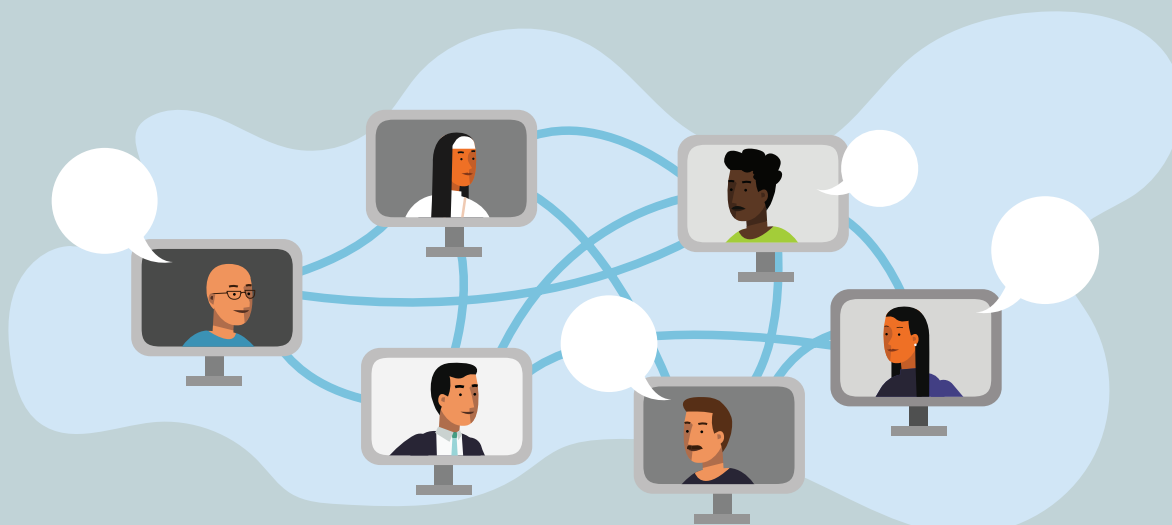
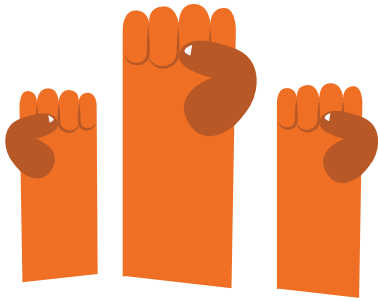


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Foreword

The manner in which States confront emergency situations offers an important insight on the extent to which they have internalized the value of human rights. Human rights are not just 'fair weather friends' that ought to be respected when conditions for their application are hospitable; to the contrary, human rights often mean most at the most difficult and challenging circumstances. This is because 'when the going gets tough', the temptation to sacrifice the rights of some for the greater good of the many is particularly strong. Furthermore, history shows that times of emergency are often times in which, under the cover of the public panic caused by a crisis, power is applied in abusive ways. The need to respect human rights in times of emergency does not mean, of course, that human rights can and should be applied in exactly the same manner that they are applied in ordinary times. Even in ordi-



nary times, the human rights of one person need to be applied in ways that reasonably accommodate the human rights of others and important public interests; in emergency situations, such considerations apply with a greater force, since the risks attendant to the situation often threaten the basic rights of many individuals and implicate the most essential public interests. A delicate balance between taking human rights seriously and applying human rights sensibly therefore needs to be struck.

The International Covenant on Civil and Political Rights (ICCPR) lays down in article 4 – a provision dealing with emergency situations – important requirements for applying human rights in times of emergency, providing States with flexibility in some respects and imposing rigid conditions in other aspects. States can derogate from some, but not from all, of their human rights obligations; derogations must be strictly necessary (and, according to the Human Rights Committee, they must also be proportionate in nature) and meet conditions of international lawfulness and non-discrimination. The greater flexibility provided by the regime of derogations invites, however, closer international scrutiny of the measures taken – hence, the need for States to publicly declare and notify the international community of the intent to derogate from human rights obligations by virtue of an emergency situation.

The COVID-19 crisis represents one of the most dramatic, and certainly the most global emergency which the world has encountered in recent decades. According to data collected by the CCPR Centre, almost 80 countries have officially declared states of emergency, and 18 of them submitted a notification to the UN. Among the emergency steps taken by States were severe movement restrictions, limits on assembling and congregating, business shut downs and the application of a variety of surveillance measures for contact tracing purposes, and the compatibility of some of these measures with the obligations States have assumed under the Covenant and other international human rights law instruments can be questioned. To be clear, there is little doubt that COVID-19 represents a real medical emergency, which could merit some measures of derogation – but State responses to the pandemic have been, at times, excessive, lacking basis in fact and law or outright abusive. In other words, the balance between measures of restriction and derogation from human rights, on the one hand, and the competing rights and interests whose protection allegedly justified the said measures, has been skewed sometimes.

It is against this background, that the CCPR Centre has taken upon itself in the present publication to render more accessible for civil society groups the legal standards of the Covenant relevant for evaluating State conduct in times of emergency in general, and during the COVID-19 pandemic in particular. This publication aims to provide such groups with a framework of legal questions and legal conditions, which they can then explore and integrate in their advocacy work, especially in shadow reporting to the Human Rights Committee and other international human rights monitoring bodies. The significance of this task cannot be overestimated: As indicated above, human rights are most vulnerable during times of emergency, and international supervision is a critical safeguard intended to minimize misapplication and abuse of emergency powers. Human rights defenders at the national level can facilitate international supervision if they submit relevant information to UN bodies on adherence to international human rights law norms on states of emergency; and the more their reporting follows the legal analysis likely to be applied by UN bodies, the more useful and effective such reporting is expected to be.

With the human rights stakes being so high during the COVID-19 crisis, it is essential that supervision be as factually and legally accurate as possible, and civil society groups are indispensable participants in this effort, without which bodies such as the Human Rights Committee would be at loss. The CCPR Centre, in turn, with its tireless efforts – including through excellent and incredibly useful publications such as the present one – also plays an indispensable role in bringing all stakeholders together, and in supporting the quality of their professional interaction. This is highly appreciated by all of us who work in the field of international human rights law.

Prof. Yuval Shany
Former Chair of Human Rights Committee

Introduction

Amid the unprecedented public health crisis caused by the COVID-19 pandemic, various measures have been taken by State and local authorities including those restricting rights and freedoms of individuals. In many cases, such restrictions appear necessary to effectively deal with the virus outbreak and protect the rights to life and health of all. Indeed, restrictions of certain civil and political rights are permitted under the International Covenant on Civil and Political Rights (ICCPR) in limited circumstances, including those involving a real risk to public health. In addition, when facing serious national emergency situations, such as the one caused by the COVID-19 crisis, State parties to the ICCPR may, on a temporary basis, derogate from some of their obligations under the ICCPR, if requirements and conditions are met as provided by article 4 of the ICCPR.



Still, concerns have been raised over the extent, impact and duration of some of the measures taken to protect public health that might have gone beyond the scope of restrictions and derogations permitted under the ICCPR. Allegations have also been made that some State actors have been using the COVID-19 crisis as a window of opportunity to consolidate authority, introduce new extraordinary powers, or crack down on civil society organizations (CSOs), Human Rights Defenders (HRDs) or the political opposition. Importantly, it must also be noted that marginalised groups who have been more vulnerable to human rights violations due to structural deficits in the national system and deep-rooted issues in the society are disproportionately affected by the COVID-19 outbreak, as well as by the negative impact of the measures taken in response to it.

The ICCPR gives the UN Human Rights Committee (HR Committee), the monitoring body of the ICCPR, the competence to determine whether or not there is an actual violation of the ICCPR. This requires a rigorous case-by-case examination of specific situations, mainly in the context of state reporting obligations, for which crucial information is often provided by national stakeholders, in particular CSOs and HRDs.

Against this background, this Guidelines seek to equip relevant stakeholders, especially CSOs, HRDs and National Human Rights Institutions (NHRIs), with tools to effectively monitor and assess the negative impact on the enjoyment of civil and political rights caused by measures taken by States in the context of COVID-19 pandemic. It provides an overview and simple explanation of ICCPR articles that permits restrictions in particular circumstances (Chapter 2); required procedures and conditions for a legitimate derogation from the ICCPR (Chapter 3); and the rights enshrined in the ICCPR, from which no derogation is permitted under any circumstance, even in a state of emergency (Chapter 4).

Each section is accompanied by several guiding questions that could help stakeholders on the ground detect patterns and risks of ICCPR violation in a practical and effective manner. It can also serve as a basis for further actions by different actors to identify and address violations of civil and political rights during public emergency, including the development of a human rights-based approach to public health crisis and strengthening local and national human rights protections.

CHAPTER 1: ICCPR ARTICLES THAT PERMIT RESTRICTIONS IN LIMITED CIRCUMSTANCES

Articles **12** (freedom of **movement**), **18 §3** (freedom to **manifest one's religion**), **19** (freedom of **expression**), **21** (freedom of **peaceful assembly**), and **22** (freedom of **association**) of the ICCPR contain explicit language **permitting restrictions** on the freedoms set out in them in **specific circumstances and contexts**. As explained below, States parties are allowed to introduce restrictions, without derogating from their obligations under the ICCPR, when all conditions set out in respective articles are met. Certain limitations may also be permissible under exceptional circumstances with respect to ICCPR articles 6 (right to life), 9 (right to liberty), 12 §4 (right to re-enter one's own country) and 17 (right to privacy), if they are NOT regarded as "arbitrary" deprivation (arts. 6, 9 and 12 §4) or interference (art. 17), whereby unlawful, illegitimate, unnecessary or disproportionate deprivation or interference are considered arbitrary in nature.

When restrictions are put in place, States parties are required to provide the HR Committee, through their periodic reports, with specified information about them, in particular, their:

- Nature and exact scope;



- Circumstances and context;
- Justification; and
- Effect¹.

The Committee will examine the relevant country situation and determine whether the restriction put in place is actually justified during the periodic review of States party reports. General Comments (GC) of the HR Committee can be further consulted with for more details on how rights under the Covenant should be protected and when they can be restricted (See e.g., GC 36 for article 6, GC 35 for article 9, GC 27 for article 12, GC 16 for article 17, GC 22 for article 18, GC 34 for article 19 and GC 37 for article 21; currently there is no General Comment on article 22).

A) ART. 12 - FREEDOM OF MOVEMENT

Article 12 protects: the **right of everyone lawfully within the territory of a State to liberty of the movement** and the **freedom to choose own residence** within that State (§1); **right of everyone to the freedom to leave any country, including one's own** (§2); and the **right of everyone to enter own country** (§4).

Article 12 §3 permits restrictions on §1 and §2 if they are provided by law and are necessary to protect:

- National security;**
- Public order (ordre public);**
- Public health;**
- Public morals; and**
- Rights and freedoms of others**

Restrictions must be **provided by law**, meaning that the “*law itself has to establish the conditions under which the rights may be limited*”² using “*precise criteria and may not confer unfettered discretion on those charged with their execution*”³.

1. E.g. HR Committee's General comment No.22 (CCPR/C/21/Rev.1/Add.4), §8

2. HR Committee's General Comment No.27 (CCPR/C/21/Rev.1/Add.9), §12

Restriction on grounds other than the ones listed above are not permitted.

Measures taken for restriction “*must conform to the principle of proportionality*”, meaning that they must “*be appropriate to achieve their protective function*”, “*be the least intrusive instrument amongst those which might achieve the desired result*”, and “*be proportionate to the interest to be protected*”⁴.

The principle of proportionality must be respected “*not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law*”.⁵

Any restrictions “*which are not provided for in the law or are not in conformity with the requirements of article 12, paragraph 3*” would be regarded as a violation of the rights guaranteed by ICCPR article 12 §1 and/or §2.⁶

Furthermore, any restrictions on article 12 need to be consistent with “*the fundamental principles of equality and non-discrimination*” and it will be a clear violation of the ICCPR if restrictions make “*distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”.⁷ In case of aliens, if “*a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3*”⁸.

Article 12 §4 prohibits arbitrary deprivation of the right of everyone to enter own country. Restrictions of this right, even if they are provided by law, must be reasonable in the particular circumstances and in accordance with the provisions of the IC-CPR.⁹ For example, a State party must not strip one’s nationality or expel individuals to a third country for the purpose of preventing this person from returning.

If any restriction is put on the article 12, States parties are required to provide all relevant information in their periodic reports to the HR Committee, including on:

- legal norms upon which restrictions are founded¹⁰;
- available remedies for challenging the restriction¹¹;
and
- if aliens, who are lawfully present within the State party, are affected differently by the restriction, the

3. HR Committee’s General Comment No.27 (CCPR/C/21/Rev.1/Add.9), §13

4. HR Committee’s General Comment No.27 (CCPR/C/21/Rev.1/Add.9), §14

5. HR Committee’s General Comment No.27 (CCPR/C/21/Rev.1/Add.9), §15

6. HR Committee’s General Comment No.27 (CCPR/C/21/Rev.1/Add.9), §12

7. HR Committee’s General Comment No.27 (CCPR/C/21/Rev.1/Add.9), §18

8. HR Committee’s General Comment No.27 (CCPR/C/21/Rev.1/Add.9), §4

9. HR Committee’s General Comment No.27 (CCPR/C/21/Rev.1/Add.9), §21

10. HR Committee’s General Comment No.27 (CCPR/C/21/Rev.1/Add.9), §12



circumstances underlying such different treatment and its justification¹¹.

HR Committee's General Comment No. 27 (CCPR/C/21/Rev.1/Add.9) can be referred to for more information on how the freedom of movement should be interpreted and protected in accordance with ICCPR article 12.

B) ARTÍCULO 18 §3 – FREEDOM TO MANIFEST ONE'S RELIGION

Article 18 protects the right of everyone to the freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of one's choice, and the freedom, either individually or in community with others and in public or private, to manifest religion or belief in worship, observance, practice and teaching.

Article 18 §3 allows certain **limitations on the freedom to manifest one's religion**, if they are **prescribed by law** and are **necessary to protect**:

- i. public safety;
- ii. public order;
- iii. public health;
- iv. public morals; and
- v. fundamental rights and freedoms of others.

No limitations are allowed on the **freedom of thought and conscience** and on the freedom to **have or adopt a religion or belief of one's choice**.

National security is **NOT** included in the permitted grounds for limiting freedom of religion. Limitations for the purpose of

12. HR Committee's General Comment No.27 (CCPR/C/21/Rev.1/Add.9), §4



Checklist for monitoring ICCPR violations in the context of COVID-19 outbreak:

If measures have been taken by the State authority that restrict freedom of movement as enshrined in the ICCPR article 12, are those measures:

- I. *Provided by law with clear definitions and precise criteria for the scope of the restriction on one's movement, choice of residence or freedom to leave a country?*
- II. *Absolutely necessary to protect public health from COVID-19 pandemic and least intrusive (there is no less harmful alternative that would equally protect public health)?*
- III. *Applied without any discriminatory purpose or impact on particular groups (e.g., there is no specific group particularly affected by the restriction without good reason)?*
- IV. *Equally protecting the health of everyone without any unjustified distinction (there is no particular group unjustifiably left out from the scope of protection)?*

If your answer is "NO" to any of the questions above, there is a risk of ICCPR violation, please check:

- *Which measures are restricting the right to the freedom of movement as enshrined in the ICCPR article 12, and in what way?*
- *Which law provides the basis for the restriction, and in what manner?*
- *What part of the restriction is unnecessary, disproportionate or unjustified in light of its purpose of protecting public health from COVID-19 outbreak, and in what sense?*
- *Which groups are discriminated against or particularly affected by the restrictions, and in what way?*
- *Which groups are left out from the scope of protection, and in what way?*



protecting morals should not derive exclusively from a single social, philosophical or religious tradition.¹³

Any limitations on the freedom to manifest one's religion must NOT be applied in a manner that would nullify the protection of the rights guaranteed in the article 18 and "*must be directly related and proportionate to the specific need on which they are predicated*".¹⁴

Restrictions may not be imposed for discriminatory purpose or applied in a discriminatory manner.¹⁵

HR Committee's General Comment No. 22 (CCPR/C/21/Rev.1/Add.4) can be referred to for more information on how the freedom of religion should be interpreted and protected in accordance with the ICCPR article 18.

C) ART 19 §2 - FREEDOM OF EXPRESSION INCLUDING THE RIGHT OF ACCESS TO INFORMATION

ICCPR article 19 protects the right of everyone to hold opinions without interference (§1) and to freedom of expression including to seek, receive and impart information and ideas (§2).

Article 19 §3 allows restrictions on §2 (freedom of expression including the right of access to information), if they are **provided by law** and are **necessary** for:

- i. respect of the rights or reputations of others; or
- ii. the protection of:
 - a. national security;
 - b. public order (ordre public);
 - c. public health; or
 - d. public morals.

No other grounds can be invoked in order to restrict freedom of expression or the right of access to information. No restric-

13. HR Committee's General Comment No.22 (CCPR/C/21/Rev.1/Add.4), §8

14. HR Committee's General Comment No.22 (CCPR/C/21/Rev.1/Add.4), §8

15. HR Committee's General Comment No.22 (CCPR/C/21/Rev.1/Add.4), §8



Checklist for monitoring ICCPR violations in the context of COVID-19 outbreak:

If measures have been taken by the State authority that restrict freedom of thought, conscience and religion as enshrined in the ICCPR article 18, are those measures:

- I. *Prescribed by law with clear definitions and precise criteria for the limitation of the freedom to manifest one's religion?*
- II. *Absolutely necessary to protect public health from COVID-19 pandemic and least intrusive (there is no less harmful alternative that would equally protect public health)?*
- III. *Applied without any discriminatory purpose or impact on particular groups (e.g., there is no specific group particularly affected by the restriction without good reason)?*
- IV. *Equally protecting the health of everyone without any unjustified distinction (there is no particular group unjustifiably left out from the scope of protection)?*

If your answer is "NO" to any of the questions above, there is a risk of ICCPR violation, please check:

- *Which measures are restricting the freedom of thought, conscience and religion as enshrined in the ICCPR article 18, and in what way?*
- *Which law provides the basis for the restriction, and in what manner?*
- *What part of the restriction is unnecessary, disproportionate or unjustified in light of its purpose of protecting public health from COVID-19 outbreak, and in what sense?*
- *Which groups are discriminated against or particularly affected by the restrictions, and in what way?*
- *Which groups are left out from the scope of protection, and in what way?*

tion is allowed under article 19 §1 (freedom of opinion).¹⁶ Any restriction imposed on freedom of expression and the right of access to information must be “*applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated*”¹⁷.

Laws that can provide a basis for a restriction include “*laws of parliamentary privilege and laws of contempt of court*”, but exclude “*traditional, religious or other such customary law*”¹⁸. Those laws must be formulated with **sufficient precision** and made **accessible to the public**. They may not confer unfettered discretion for the scope and manner of the restriction on those charged with its execution, and must give sufficient guidance as to what sorts of expression are allowed and what not.¹⁹ Furthermore, laws restricting the article 19 §2, freedom of expression, must be compatible with the provisions, aims and objectives of the ICCPR and must not violate its **non-discrimination** provisions.²⁰

Any restriction on freedom of expression, including the right of access to information, must not be overbroad, but be proportional to its protective function and be the least intrusive measure for achieving this aim.²¹ This principle of proportionality must be respected in the law that frames the restriction and also in the actual application of the law.²²

The HR Committee also notes that “*Freedom of expression and access to information and a civic space where a public debate can be held constitute important safeguards for ensuring that States parties resorting to emergency powers in connection with the COVID-19 pandemic comply with their obligations under the Covenant*”²³. With regard to the right of access to information, State authorities “*should provide reasons for any refusal to provide access to information*” and arrangements “*for appeals from refusals to provide access to information as well as in cases of failure to respond to requests*”.²⁴

HR Committee’s General Comment No. 34 (CCPR/C/GC/34) can be referred to for more information on how the freedom of opinion and expression should be interpreted and protected in accordance with ICCPR article 19, including explanations about the role of media, right of access to information, freedom of expression and political rights, permitted restrictions on the freedom of expression, and the relationship between articles 19 and 20 of the ICCPR.

16. HR Committee’s General Comment No.34 (CCPR/C/GC/34), §9

17. HR Committee’s General Comment No.34 (CCPR/C/GC/34), §22

18. HR Committee’s General Comment No.34 (CCPR/C/GC/34), §24

19. HR Committee’s General Comment No.34 (CCPR/C/GC/34), §25

20. HR Committee’s General Comment No.34 (CCPR/C/GC/34), §26

21. HR Committee’s General Comment No.34 (CCPR/C/GC/34), §34

22. HR Committee’s General Comment No.34 (CCPR/C/GC/34), §34

23. CCPR/C/128/2, §2 (f)

24. HR Committee’s General Comment No.34 (CCPR/C/GC/34), §19

D) ART 21 - FREEDOM OF PEACEFUL ASSEMBLY

ICCPR article 21 stipulates that the right of peaceful assembly, whether outdoors, indoors, online, in public or private spaces, or a combination of thereof shall be recognized.²⁵ States parties are obliged to respect and ensure its exercise without discrimination, allow peaceful assemblies to take place without unwarranted interference, facilitate the exercise of this right and protect participants.²⁶

Article 21 allows restrictions, if they are “*imposed in conformity with the law*” and “necessary in a democratic society” in the interests of:

- national security;
- public safety;
- public order (*ordre public*);
- protection of public health or morals; or
- protection of the rights and freedoms of others.

While restrictions on other ICCPR articles (i.e., 12, 18, 19 and 22 as listed in this chapter) need to be prescribed or provided by law, those on article 21 should be “*imposed in conformity with the law*” i.e., either through law or administrative decisions based on law, which in turn need to be precise and may not confer unfettered or sweeping discretion on those charged with its implementation.²⁷

Any restrictions on peaceful assembly need to be interpreted narrowly, guided by the objective of facilitating the right, and must not be discriminatory or be aimed at discouraging participation or causing chilling effect.²⁸ Prohibition of a specific assembly must be a measure of last resort, while any restriction must be necessary, proportionate and the least-intrusive measures to serve a legitimate protective purpose.²⁹ The detrimental impact of the restriction cannot outweigh its benefit, or else it will be considered disproportionate in nature and therefore impermissible.³⁰

Furthermore, restrictions on peaceful assemblies must be content neutral i.e., they must not be related to the message conveyed by the assembly, as the very purpose of peaceful assemblies is to advance ideas and establish the extent of support they enjoy.³¹ Rules applicable for the freedom of expres-

25. HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §6

26. HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §8

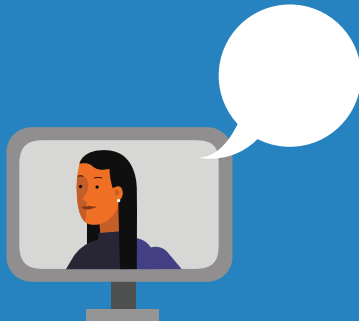
27. HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §39

28. Manfred Nowak: UN Covenant on Civil and Political Rights. CCPR Commentary (2005) p. 493, § 27; HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §9, §33, §36

29. HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §37, §40

30. HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §40

31. HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §48



Checklist for monitoring ICCPR violations in the context of COVID-19 outbreak:

If measures have been taken by the State authority that restrict freedom of expression as enshrined in the ICCPR article 19, are those measures:

- I. *Provided by law with clear definitions and precise criteria for the limitation of the freedom of expression including the freedom to seek, receive and impart information and ideas?*
- II. *Absolutely necessary to protect public health from COVID-19 pandemic and least intrusive (there is no less harmful alternative that would equally protect public health)?*
- III. *Applied without any discriminatory purpose or impact on particular groups (e.g., there is no specific group particularly affected by the restriction without good reason)?*
- IV. *Equally protecting the health of everyone without any unjustified distinction (there is no particular group unjustifiably left out from the scope of protection)?*

If your answer is "NO" to any of the questions above, there is a risk of ICCPR violation, please check:

- *Which measures are restricting the freedom of opinion and expression, including the right of access to information as enshrined in the ICCPR article 19, and in what way?*
- *Which law provides the basis for the restriction and in what manner?*
- *What part of the restriction is unnecessary, disproportionate or unjustified in light of its purpose of protecting public health from COVID-19 outbreak, and in what sense?*
- *Which groups are discriminated against or particularly affected by the restrictions, and in what way?*
- *Which groups are left out from the scope of protection, and in what way?*

sion (see above section) should be followed when dealing with the expressive elements of assemblies. Restrictions of peaceful assembly must not be used, for example, in order to stifle expression of political opposition, challenges to the political system or constitution, or the pursuit of self-determination; or to prohibit insults to the honour and reputation of official or State organs.³²

Assemblies that are NOT peaceful i.e. assemblies that entail violence (use of physical force by participants against others that is likely to result in injury or death, or serious damage to property), are not protected by the article 21, while mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to “violence”.³³ Isolated acts of violence by some participants should not be attributed to others, the organisers, or to the assembly as a whole.³⁴ The mere possibility that a peaceful assembly may provoke adverse or even violent reactions from some members of the public is not sufficient grounds for its prohibition or restriction; rather participants in such an assembly must be protected³⁵. At the same time, in accordance with the article 20 of the ICCPR, peaceful assemblies may not be used for propaganda for war, or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.³⁶

HR Committee’s General Comment No. 37 (CCPR/C/GC/37) can be referred to for more information on how freedom of peaceful assembly should be interpreted and protected in accordance with ICCPR article 21, including explanation about the scope of the right, obligations of the State parties, permitted restrictions, notification regimes, duties and powers of law enforcement agencies, assembly during states of emergency and armed conflict, and relationship between article 21 and other provisions of the ICCPR.

E) ART 22 - FREEDOM OF ASSOCIATION

ICCPR article 22 protects the right of everyone to the freedom of association, including the right to form and join trade unions (§1).

Article 22 §2 allows restrictions on this freedom, only if they are **prescribed by law, necessary in a democratic society** in the interest of:

- i. national security or public safety;**

32. HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §49

33. HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §15

34. HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §17

35. HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §27, §52

36. HR Committee’s General Comment No. 37 (CCPR/C/GC/37), §50



Checklist for monitoring ICCPR violations in the context of COVID-19 outbreak:

If measures have been taken by the State authority that restrict freedom of peaceful assembly as enshrined in the ICCPR article 21, are those measures

- I. *In conformity with law?*
- II. *Absolutely necessary to protect public health from COVID-19 pandemic and least intrusive (there is no less harmful alternative that would equally protect public health)?*
- III. *Applied without any discriminatory purpose or impact on particular groups (e.g., there is no specific group particularly affected by the restriction without good reason)?*
- IV. *Equally protecting the health of everyone without any unjustified distinction (there is no particular group unjustifiably left out from the scope of protection)?*

If your answer is "NO" to any of the questions above, there is a risk of ICCPR violation, please check:

- *Which measures restrict the freedom of peaceful assembly as enshrined in the ICCPR article 21, and in what way?*
- *Which law provides the basis for the restriction and in what manner?*
- *What part of the restriction is unnecessary, disproportionate or unjustified in light of its purpose of protecting public health from COVID-19 outbreak, and in what sense?*
- *Which groups are discriminated against or particularly affected by the restrictions, and in what way?*
- *Which groups are left out from the scope of protection, and in what way?*



- ii. **public order (ordre public);**
- iii. **protection of public health or morals; or**
- iv. **protection of the rights and freedoms of others.**

The article extends its protection to all legal forms of association.³⁷ However, it allows the imposition of lawful restrictions on the freedom of association of members of the armed forces and of the police. In addition, associations with compulsory membership are not protected by the article.³⁸ Furthermore, the formation and activities of associations that promote propaganda for war or carry out the advocacy of national, racial or religious hatred which constitutes incitement to discrimination, hostility or violence must be prohibited by law in accordance with ICCPR article 20.³⁹

F) NON-ARBITRARY DEPRIVATION OR INTERFERENCE (ARTICLES 6, 9 AND 17)

ICCPR **article 6** prohibits arbitrary deprivation of life, **article 9** prohibits arbitrary arrest and detention, and **article 17** prohibits arbitrary interference with one's privacy, family, home or correspondence. By doing so, these provisions implicitly recognise that certain **limitation** of the **rights to life**, to **liberty and security**, and to **privacy** may be permissible, if it can be considered **non-arbitrary**, whereby the HR Committee notes that the notion of "arbitrariness" includes elements of inappropriateness, injustice, lack of predictability and due process of law as well as elements of reasonableness, necessity and proportionality.⁴⁰

Measures limiting these rights are only **non-arbitrary** and permissible, if they are:

- i. **established by law with sufficient precision;**
- ii. **reasonable, necessary and proportionate** in the light of

33. *Observación General N° 37 del Comité de Derechos Humanos (CCPR/C/GC/37)*, §15.

34. *Observación General N° 37 del Comité de Derechos Humanos (CCPR/C/GC/37)*, §17.

35. *Observación General N° 37 del Comité de Derechos Humanos (CCPR/C/GC/37)*, §27, §52.

36. *Observación General N° 37 del Comité de Derechos Humanos (CCPR/C/GC/37)*, §50.

37. Manfred Nowak: *UN Covenant on Civil and Political Rights. CCPR Commentary (2005)*, p. 498, § 6

38. Manfred Nowak: *UN Covenant on Civil and Political Rights. CCPR Commentary (2005)*, p. 499, § 9

39. Manfred Nowak: *UN Covenant on Civil and Political Rights. CCPR Commentary (2005)*, p. 505, § 20

40. *HR Committee's General Comments: No. 35 (CCPR/C/GC/35)*, § 12; and *No. 36 (CCPR/C/GC/36)*, § 12

particular circumstances;

- iii. accompanied with institutional or procedural **safeguards**; and
- iv. **consistent with** all relevant provisions of the **ICCPR** as well as other **international laws**.⁴¹

It is also important to note that even measures authorised by domestic law can be “arbitrary”, and thus not permissible, if any of the conditions above is not met.

41. *HR Committee’s General Comments: No. 16 (HRI/GEN/1/Rev.9), § 3, §4; No. 35 (CCPR/C/GC/35), § 11, § 12, § 14, § 18, § 19, § 22; and No. 36 (CCPR/C/GC/36), § 10, § 12, § 19*



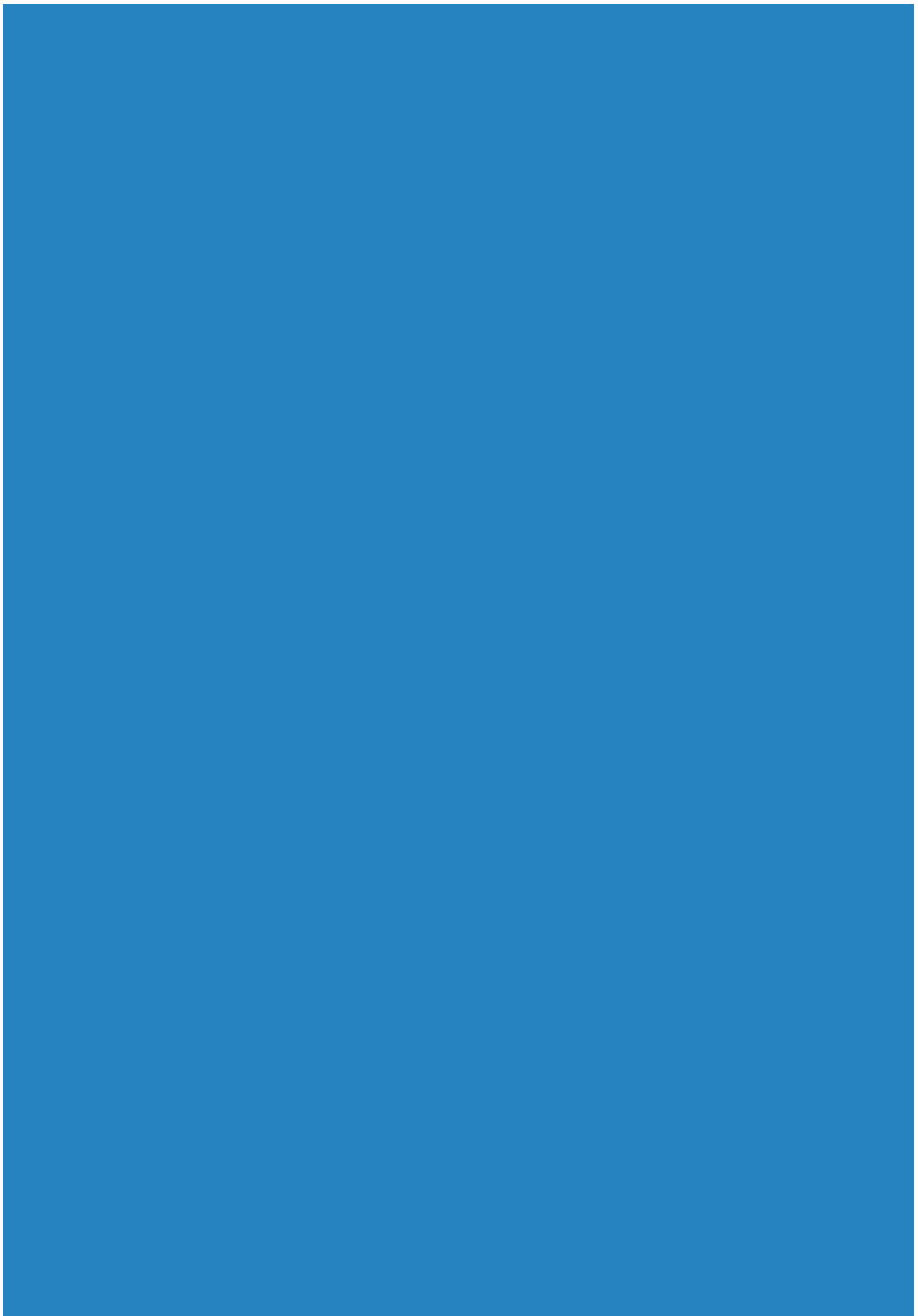
Checklist for monitoring ICCPR violations in the context of COVID-19 outbreak:

If measures have been taken by the State authority that restrict freedom of association as enshrined in the ICCPR article 22, are those measures ...:

- i. Prescribed by law with clear definitions and precise criteria for limitation of the freedom?*
- ii. Absolutely necessary to protect public health from COVID-19 pandemic and least intrusive (there is no less harmful alternative that would equally protect public health)?*
- iii. Applied without any discriminatory purpose or impact on particular groups (e.g., there is no specific group particularly affected by the restriction without good reason)?*
- iv. Equally protecting the health of everyone without any unjustified distinction (there is no particular group unjustifiably left out from the scope of protection)?*

If your answer is "NO" to any of the questions above, there is a risk of ICCPR violation, please check:

- Which measures are restricting the freedom of association as enshrined in the ICCPR article 22, and in what way?*
- Which law provides the basis for the restriction and in what manner?*
- What part of the restriction is unnecessary, disproportionate or unjustified in light of its purpose of protecting public health from COVID-19 outbreak, and in what sense?*
- Which groups are discriminated against or particularly affected by the restrictions, and in what way?*
- Which groups are left out from the scope of protection, and in what way?*



CHAPTER 2: REQUIRED PROCEDURE AND CONDITIONS FOR LEGITIMATE DEROGATION FROM THE ICCPR

In time of public emergency which threatens the life of the nation, States parties may take measures derogating from some of their obligations under the ICCPR as set out in the article 4 of the Covenant. The HR Committee acknowledges that public health crisis caused by the COVID-19 pandemic in many countries can be regarded as such public emergency as stipulated in the article 4, and thus, that States parties may take measures “to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction”, which “may, in certain circumstances, result in restrictions on the enjoyment of individual rights guaranteed by the Covenant”, and “on a temporary basis, resort to exceptional emergency powers and invoke their right of derogation from the Covenant ... provided that it is required to protect the life of the nation”.⁴²

However, to take such measures, proper **procedures** need to be followed by the States parties, including **official proclamation of a state of emergency** and **formal notification to the UN Secretary-General**. Furthermore, any measures derogating from the ICCPR must: pass the test of **strict necessity and proportionality**; be **exceptional and**



temporary; be in conformity with other international obligations; and, be non-discriminatory; while *there are certain rights from which no derogation can be made*, as described below.

States parties should not derogate from the ICCPR or rely on derogations already made, if the situation can be attained through restrictions or limitation of rights allowed under the ICCPR articles as listed in chapter 2 above.⁴³

A) REQUIRED PROCEDURE FOR DEROGATION

I. Official proclamation of a state of emergency

Derogation from the ICCPR must be exceptional and temporary and as such, fundamental conditions for the derogations are that “the situation **must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency**”.⁴⁴ In other words, it will be violation of their obligations under ICCPR, if States parties take any derogation measure without proclaiming a state of emergency or in a situation which does not reach the level of “public emergency” as set out in article 4.

ii. Notification to the UN SG

ICCPR article 4 §3 sets out that any State party to the ICCPR that are taking measures derogating from the obligations under the IC-CPR “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**”. It also stipulates that, through the same way, a further communication shall be made on the date on which the derogation had been terminated.

The HR Committee “emphasises that the notification by States parties should **include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law**”, whereby **prompt notification** is also required

42. CCPR/C/128/2, §2

43. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §4; CCPR/C/128/2, §2 (c); for the provisions of the ICCPR that allow restrictions or limitations, please refer chapter 2

44. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §2

when further measures are taken for derogation, including, for instance, **extension and termination of the state of emergency**.⁴⁵

In relation to the COVID-19 pandemic, the HR Committee has also called upon all States parties that have taken emergency measures, which derogate from their obligations under ICCPR, to comply without delay with their duty to notify the UN SG immediately.⁴⁶

B) CONDITIONS OF DEROGATING MEASURES

i. Strict necessity and proportionality of measures

A fundamental requirement for any measure derogating from the ICCPR is that “*such measures are limited to the extent strictly required by the exigencies of the situation*” and “*clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant*”.⁴⁷ As such, derogations “*must, as far as possible, be limited in duration, geographical coverage and material scope, and any measures taken, including sanctions imposed in connection with them, must be proportional in nature*”.⁴⁸

In this context, the HR Committee also emphasised that States parties should not derogate from the ICCPR or rely on derogations already made, if the situation can be attained through restrictions or limitation of rights allowed under certain articles of the ICCPR.⁴⁹

ii. Exceptional and temporary nature

Any derogation must be regarded as **exceptional** and only undertaken **temporarily**, to the extent strictly required by the exigencies of the emergency situation, and the **predominant objective** of the derogation must be **restoration of a state of normalcy** where full respect for the ICCPR can again be secured.⁵⁰

iii. Conformity with other international obligations

Any derogating measure must not “*be inconsistent with the State party’s other obligations under international law, particularly the international humanitarian law*” and no derogation can be made if it entails “*a breach of the State’s other international obligations*”⁵¹ including under other international human rights treaties from which no derogation is allowed⁵². As such, States parties to the ICCPR **may in no circumstances use deroga-**

Checklist for monitoring ICCPR violations in the context of COVID-19 outbreak (applicable only for the State party to ICCPR):

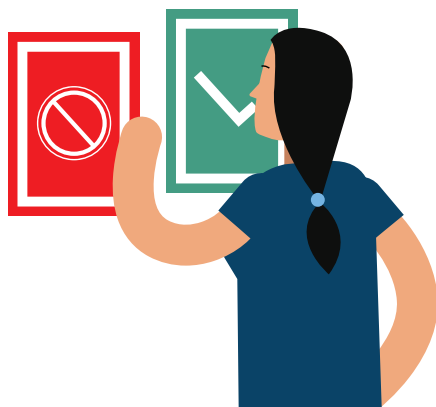
If there is any measure taken by the State authority that derogates from the obligations under ICCPR...:

i. Has your country formally declared a state of emergency?

ii. Has your country notified the UN Secretary General about the declaration, extension, and/or termination of the state of emergency?

iii. Does the notification to the UNSG include sufficient information about the exact measures taken, provisions derogated from; and the reason for the derogation?

If your answer is “NO” to any of the questions above, required procedure for the derogation from the ICCPR might not be (fully) followed by your country.



tion “as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the **presumption of innocence**”.⁵³ It should also be noted that, if “action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a **crime against humanity** by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct”.⁵⁴

iv. Non-discrimination

As the ICCPR article 4 §1 clearly states, any derogating measure may not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. HR Committee stresses that “*there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances*”⁵⁵.

In this context, particular attention should be paid to the rights of minorities, as international protection of their rights includes elements that must be respected in all circumstances, especially in relation to the prohibition against genocide as well as the non-derogable nature of certain aspects of ICCPR article 18 (freedom of religion and belief)⁵⁶. Similarly, the equal enjoyment of human rights by women must be protected during a state of emergency.⁵⁷

v. Prohibition of derogation from non-derogable rights

As described in the next chapter, there are certain rights i.e. articles of the ICCPR from which no derogation is al-

45. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §17

46. CCPR/C/128/2, §1

47. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §4; for the provisions of the ICCPR that allow restrictions or limitations in normal times, please refer chapter 2

48. CCPR/C/128/2, §2 (b)

49. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §4; CCPR/C/128/2, §2 (c); for the provisions of the ICCPR that allow restrictions or limitations, please refer chapter 2

50. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §1; CCPR/C/128/2, §2 (b)

51. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §9

52. CCPR/C/128/2, §2 (d)

53. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §11

54. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §12

55. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §8

56. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §13 (c)

lowed even in a state of emergency. States parties may in no circumstance take any measures derogating from these rights i.e. articles.

*57. HR Committee's General
Comment No.28 (CCPR/C/21/
Rev.1/Add.10), §7*



Checklist for monitoring ICCPR violations in the context of COVID-19 outbreak:

If there is any measure taken by the State authority that derogates from the obligations under ICCPR, are those measures:

- i. Absolutely necessary (there is no other options but derogation) to protect public health from COVID-19 pandemic?
- ii. Temporary i.e. limited in duration, at least planned to be ended when the situation of normalcy is restored?
- iii. NOT violating any other obligation of the State under international law, especially international humanitarian law?
- iv. Applied without any discriminatory purpose or impact on particular groups (e.g., there is no specific group particularly affected by the derogation without good reason)?
- v. Equally protecting the health of everyone without any unjustified distinction (there is no particular group unjustifiably left out from the scope of protection)?
- vi. NOT derogating from any of the articles i.e., elements of the ICCPR listed in the chapter 4?

If your answer is "NO" to any of the questions above, there is a risk of ICCPR violation, please check:

- Which (parts of) measures derogating from the ICCPR are not strictly necessary or unjustified in light of the conditions of derogation permitted under the ICCPR as well as their purpose of protecting public health from COVID-19 outbreak and restoration of normalcy, and in what way?
- Which obligations of the State under other international law, in particular international humanitarian law, is violated, and in what manner?
- Which groups are discriminated against or particularly affected by the derogation, and in what way?
- Which groups are left out from the scope of protection, and in what way?
- From which articles, rights and/or elements listed in the chapter 4 are the measures derogating, and in what way?

CHAPTER 3: NON- DEROGABLE RIGHTS UNDER THE ICCPR

Article 4 §2 sets out that no derogation can be made from following articles:

- Article 6
- Article 7
- Article 8 §1 and §2
- Article 11
- Article 15
- Article 16
- Article 18⁵⁸

Furthermore, there are also other provisions of the ICCPR from which no derogation can be made, although they are not listed in the article 4 §2.⁵⁹ All these rights i.e. provisions are listed below.



A) ART. 6 – RIGHT TO LIFE

1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*
2. *In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.*
3. *When deprivation of life constitutes the crime of genocide, it is understood 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.*
4. *Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.*
5. *Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.*
6. *Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

58. Except article 18 §3 – freedom to manifest one's religion, see chapter 2

59. HR Committee's General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §13



B) ART. 7 – PROHIBITION OF TORTURE

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

C) ART. 8 §1 AND §2 – PROHIBITION OF SLAVERY

1. *No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.*
2. *No one shall be held in servitude.*

D) ART. 11 – PROHIBITION OF IMPRISONMENT FOR FAILURE TO FULFIL CONTRACTUAL OBLIGATION

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

E) ART. 15 – NON-RETROACTIVITY OF CRIMINAL LAWS

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*
2. *Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*

F) ART. 16 – RECOGNITION AS A PERSON BEFORE THE LAW

Everyone shall have the right to recognition everywhere as a person before the law.

G) ART. 18 – FREEDOM OF RELIGION AND BELIEF⁶⁰

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.)*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

H) OTHER ELEMENTS OF THE ICCPR THAT CANNOT BE DEROGATED FROM

In addition to the rights and articles described above, the HR Committee clarifies that there are other elements of the ICCPR from which no derogation can be made even in a state of emergency, since they are essential for upholding the non-derogable rights listed in the ICCPR article 4 §2 and for ensuring the respect for the rule of law and the principle of legality.⁶¹ These rights i.e. articles are listed below.

I. Art. 10 §1

Art. 10 §1 reads:

All persons deprived of their liberty shall be treated with humanity

58. *Excepto la libertad de manifestar la propia religión como se establece en el párrafo 3 del artículo 18.*

59. CCPR/C/128/2, §2 (d).

60. *Except the freedom to manifest one's religion as set out in the article 18 §3*

61. CCPR/C/128/2, §2 (d)

and respect for the inherent dignity of the human person.

This provision, in the HR Committee's view, is a norm of general international law and closely related to article 7 (prohibition of torture) that cannot be derogated from.⁶² Furthermore, States parties must pay special attention to the adequacy of health conditions and health services in places of incarceration, and also to the rights of individuals in situations of confinement, and to the aggravated threat of domestic violence arising in such situations.⁶³

II. Prohibitions against taking of hostages, abductions or unacknowledged detention

These prohibitions are a norm of general international law, which cannot be derogated from even in a state of emergency.⁶⁴

III. Prohibition of forced displacement

*Deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned lawfully present, constitutes a crime against humanity. These acts are prohibited in all circumstances.*⁶⁵

IV. Art. 20 – prohibition of propaganda for war and advocacy of national, racial or religious hatred

States parties may, in no circumstance, “engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence”⁶⁶ or “tolerate” such advocacy of hatred⁶⁷. In this context, States parties must also “take steps to ensure that public discourse in connection with the COVID-19 pandemic does not constitute advocacy or incitement against specific marginalized or vulnerable groups, including minorities and foreign nationals”.⁶⁸

V. Art. 2 §3 – right of victims to obtain an effective remedy

Art. 2 §3 reads:

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwith-

62. HR Committee's General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §13 (a)

63. CCPR/C/128/2, §2 (e)

64. HR Committee's General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §13 (b)

65. HR Committee's General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §13 (d)

66. HR Committee's General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §13 (e)

67. CCPR/C/128/2, §2 (e)

68. CCPR/C/128/2, §2 (e)

standing that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

The provision constitutes a treaty obligation inherent in the Covenant as a whole, and as such, States parties must comply, even in a state of emergency, with the fundamental obligation to provide a remedy that is effective.⁶⁹

VI. Fundamental guarantee against arbitrary detention, right to habeas corpus

The fundamental guarantee against arbitrary detention is “non-derogable”, as even situations of emergency for which derogation is allowed cannot justify deprivation of liberty that is unreasonable or unnecessary under the given circumstances.⁷⁰

The procedural guarantees protecting liberty of person can never be derogated from, since such derogation would circumvent the protection of non-derogable rights. “In order to protect non-derogable rights, including those in articles 6 and 7, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation”.⁷¹

VII. Guarantees of fair trial

The HR Committee stresses that “the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights”⁷² and that “deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times”⁷³. As such, “the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency” and “only a court of law may try and convict a person for a criminal offence”.⁷⁴

69. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §14

70. HR Committee’s General Comment No.35 (CCPR/C/GC/35), §66

71. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §16; HR Committee’s General Comment No.35 (CCPR/C/GC/35), §67

72. HR Committee’s General Comment No.32 (CCPR/C/GC/35), §6

73. HR Committee’s General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §11

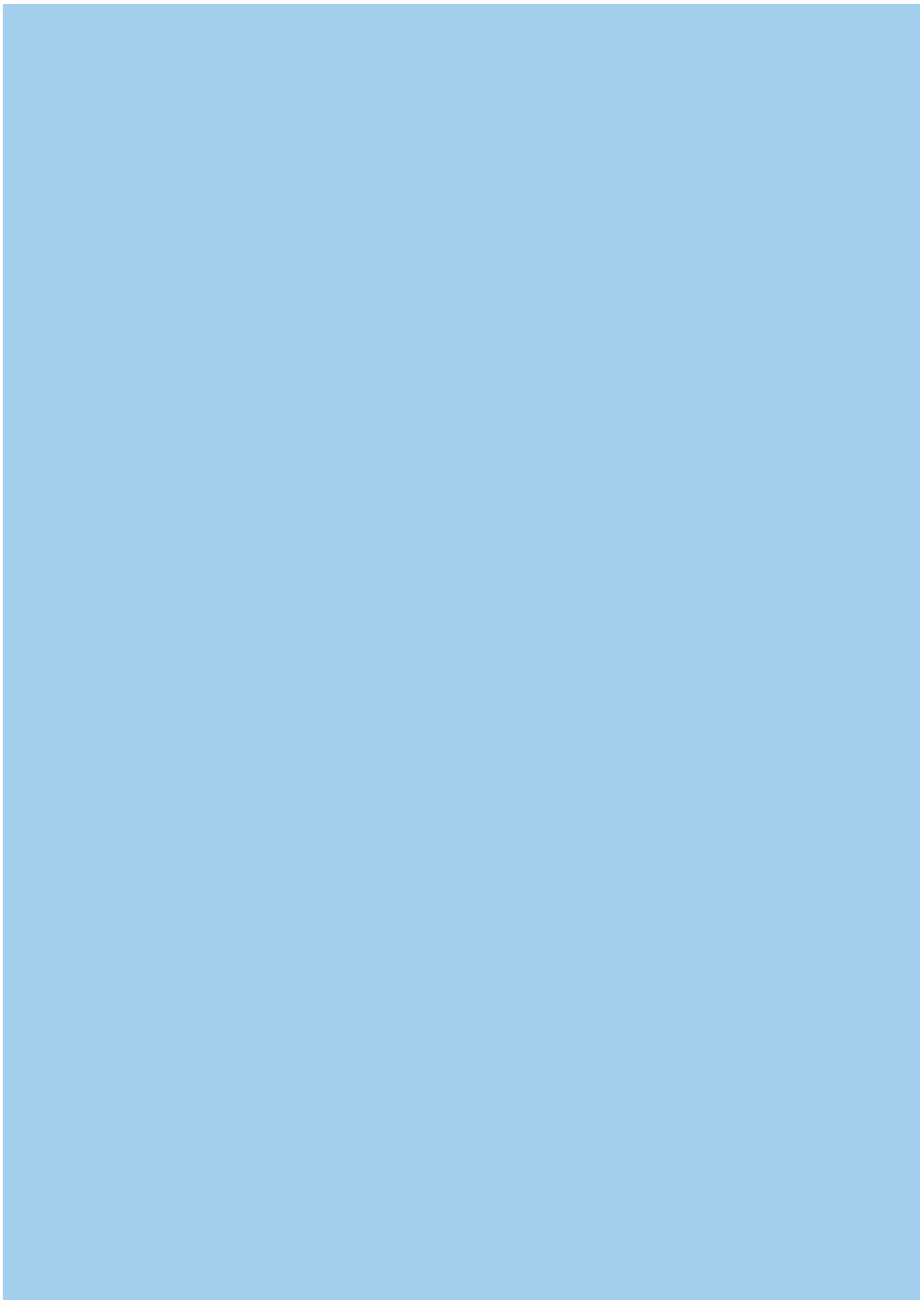
For example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the procedural safeguards set out by provisions of the ICCPR, in particular articles 14 and 15.⁷⁵ These safeguards include procedural guarantees such as the right to fair trial in death penalty cases as well as “accessible and effective measures to vindicate rights, such as the duty to take appropriate measures to investigate, prosecute, punish and remedy violations of the right to life”.⁷⁶

74. HR Committee's General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §16

75. HR Committee's General Comment No.29 (CCPR/C/21/Rev.1/Add.11), §15

76. HR Committee's General Comment No.6 (HRI/GEN/1/Rev.9 (Vol.I)), §67







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