

The Courts and COVID-19

6 April 2020

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Under the International Covenant on Civil and Political Rights ([ICCPR](#)), the International Covenant on Economic, Social and Cultural Rights ([ICESCR](#)) and other sources of international human rights law, during a public health emergency such as the COVID-19 pandemic States have obligations to protect the [right to life](#) and [right to health](#) of their populations. At the same time, as in any other [emergency](#), the State's other human rights and rule of law obligations remain applicable to all institutions and organs of the State.

Whether based on the ordinary scope for limitations of rights, or on derogations, international human rights law requires that such protection measures satisfy requirements of legality, non-discrimination, necessity, and proportionality (and time-limitedness, particularly for derogations).

The criterion of proportionality may be particularly difficult to apply, at least in the short-term, to the COVID-19 crisis given the various uncertainties on transmission, degree of spread, and effectiveness of measures, and what is already known about the potential severity of its consequences. States must, however, keep the necessity and proportionality of restrictions or derogations under review, including by assessing their impact on an ongoing basis; as circumstances and knowledge about the new coronavirus develop, any measures that become unnecessary or disproportionate must be adapted or removed.

Around the world, in response to COVID-19, courts of law are adopting different modalities for the hearing of matters and limiting the range of matters than can be brought before them to only the most "urgent", while postponing all others. Such restrictions on access to justice, and limitations to the operations of courts, are the focus of this briefing note.

The special role of courts in international human rights law, including in situations of emergency

Judicial institutions primarily feature in international human rights law in three roles: the right to fair trial by an independent and impartial court (e.g. article 14 ICCPR); the right to judicial control of deprivation of liberty (e.g. article 9(3) and (4)); and the right to an effective remedy (e.g. article 2(3)). These three roles are reflected also in regional and subject-matter specific human rights treaties.

The judiciary also plays an essential role in securing the rule of law by ensuring that the actions of the other branches of government respect the law. Indeed, this role becomes even more [important in times of emergency or other crisis](#), and yet it is precisely in those situations that it is most often limited or threatened. Whenever the executive claims extraordinary powers there is a risk of deliberate abuse for improper motives; limiting the ability of courts to review and respond to executive action greatly increases this risk. Detecting and addressing such abuses should be a priority for human rights and rule of law mechanisms. The analysis set out below, however, focuses

on key human rights and rule of law considerations that should inform the adoption and application of good faith efforts.

[Independence of the judiciary](#) is essential for both human rights and the rule of law. Restrictions adopted by or at the request of the judiciary are generally more compatible with judicial independence than measures imposed on the judiciary by another branch of government.

It is not only the parties to a case and other affected individuals whose human rights must be considered in the context of the COVID-19 pandemic: individual actors within the court system are also rights-holders, and the right to life and right to health of individual judges, lawyers, prosecutors and court staff, for instance, must also be respected, protected and fulfilled. The fact COVID-19 mortality appears to increase with age may be a particular consideration if the judiciary in a country has a higher proportion of older persons than for other professions.

Some human rights treaty provisions expressly permit restrictions to the exercise of a right, even without a derogation, on grounds relevant for the current Coronavirus pandemic (see e.g. allowance for 'public health' restrictions in ICCPR articles 12 (freedom of movement), 18 (freedom to manifest one's religion or beliefs), 19 (freedom of expression), 21 (right of peaceful assembly), 22 (freedom of association), or concepts such as 'arbitrary' in for instance article 9(1) (prohibition of arbitrary arrest or detention) and 17(1) (right not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence)). Other rights can be limited only in situations of emergency that 'threaten the life of the nation' (for instance under article 4 ICCPR).

Articles 2, 9(3) and (4), and 14 ICCPR do not explicitly allow for 'public health' restrictions, but this does not necessarily mean there is no flexibility in their application. As regards article 14, the Human Rights Committee (HRC) has explained that '[a]ll trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly' and courts must 'provide for adequate facilities for the attendance of interested members of the public, within reasonable limits'. However, '[t]he requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pre-trial decisions made by prosecutors and other public authorities' (HRC [GC 32](#), para 28). Furthermore:

Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons... (HRC [GC32](#), para 29).

Elsewhere in the ICCPR, 'public order' and 'public health' are listed as distinct grounds; it appears then that generally limiting public access to court proceedings on health grounds may require a derogation in relation to publicity of hearings under article 14(1), at least in the absence of a substitute such as video broadcasting of proceedings.

Similarly, article 14 does not explicitly contemplate a denial or significant postponement of the general access of civil litigants, criminal accused, or their lawyers, to apply to or appear before the court and receive timely hearings, on any ground; so such a general denial or postponement may again require a derogation. The same may apply to the access of those claiming to be victims of human rights violations to any judicial remedies under article 2, and the access of persons deprived of liberty under articles 9(3) and 9(4). Furthermore, article 9(3) includes the right 'to trial within a reasonable time or to release' for persons deprived of liberty; raising the question whether anticipated delays caused by general and extended COVID-19 suspensions extend the period for

'trial within a reasonable time', or (at least absent derogation) would require the release of large numbers of persons from pre-trial detention (which may in any event be needed as a public health measure).

Some rights or aspects of rights can never be limited in any circumstances, whether by explicit provision in the treaty or by inference, including several with particular relevance for the courts:

- While 'adjustments to the practical functioning of its procedures governing judicial or other remedies' for rights violations under article 2(3) may be permitted by derogation, 'a remedy that is effective' must always be available. (HRC [GC 29](#), para 14 and see [Inter-American Court of Human Rights](#)).
- 'It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2', such as the prohibition of torture and right to life, 'that they must be secured by procedural guarantees, including, often, judicial guarantees'. (HRC [GC 29](#), para 15).
- 'Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. [...] [T]he principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency' (HRC [GC 29](#), para 16). '[...]States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. [...] Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times' (HRC [GC 32](#), para 6).
- 'In order to protect non-derogable rights, 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 a State party's decision to derogate from the Covenant' (HRC [GC 29](#), para 16; [GC 35](#) paras 64-67, and see [Inter-American Court of Human Rights](#)).

It should also be recalled that under article 4 of the ICCPR, derogations are further subject to the requirement that they must not violate the State's other obligations under international law, and the Human Rights Committee has noted that this particularly includes the rules of international humanitarian law (HRC [GC 29](#), paras 9, 11 and 16), which includes specific provisions on the judiciary in situations of armed conflict (see e.g. [Geneva Convention IV](#), articles 54, 64; [Protocol I](#), article 75; [Protocol II](#), article 6; ICRC Study of customary international humanitarian law, [Rule 100](#)). The Human Rights Committee has further affirmed that practices prohibited by international humanitarian law in situations of armed conflict, should not be capable of justification under human rights law in other kinds of emergency (HRC [GC 29](#), para 16).

Courts and COVID-19: specific issues

With the above key provisions of international human rights law in mind, this briefing note will now consider a number of more specific issues including:

- Suspension of 'non-urgent' cases
- Changes in the modality of hearings
- Dealing with the consequences of postponement of cases
- Risk-tolerance and the fundamental role of judges

This analysis is informed by trends reflected in the measures adopted in a range of countries. In addition to a useful global [survey](#) published by the International Association of Judges, and ongoing [reporting](#) by Fair Trials, information on measures in [Australia](#), [Belgium](#), [Canada](#), [China](#), [Colombia](#), [France](#), [Guatemala](#), [Honduras](#), [India](#), [Ireland](#), [Italy](#), [Mexico](#), [New Zealand](#), [Norway](#), the [Russian Federation](#), [Singapore](#), [South Africa](#), [South Korea](#), [Spain](#), [Sri Lanka](#), [Switzerland](#), the [United Kingdom](#), the [United States of America](#), and [Zimbabwe](#), among others, has also been taken into account. However, this briefing note does not specifically analyze whether the particular measures in any of these countries do or do not meet the applicable criteria.

I. Suspension of “non-urgent” cases

In many cases, judiciaries are generally suspending all matters except those deemed ‘urgent’. The actual distinction between ‘urgent’ and ‘non-urgent’ measures varies between jurisdictions, but generally appears to be based on inferences about the categories of cases in which delay is most likely to cause irreparable harm.

As a general matter, it is worth also recalling in this connection the potential for interim injunctions or other forms of immediate relief, based on relatively brief and summary procedures, to preserve the situation and particularly to prevent irreparable harm, until a complex matter can be given a full hearing.

The following are especially worth considering in determining which matters should qualify as ‘urgent’:

- A) [Violations of human rights and constitutional rights, particularly those involving irreparable harm](#)

Retaining scope for judicial review by independent courts is essential to upholding human rights and the rule of law during states of emergency (see the International Commission of Jurists’ (ICJ) 2011 [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). In a 2008 report, the UN Special Rapporteur on the Independence of Judges and Lawyers similarly emphasised that national courts must remain competent and capable to evaluate and if necessary nullify any unlawful imposition or unjustified extension of emergency measures (see [report](#) paras 16-19, 66). While in performing such a role, the courts may accord a certain degree of deference or margin of appreciation on questions of a scientific or political matter, no emergency measure should be beyond some degree of judicial review.

A discussion paper published by the World Health Organization in 2008 on [pandemic influenza planning](#), for instance, concluded that ‘countries should have procedural mechanisms for groups to challenge the unjustified use of the quarantine or isolation power’, in order to comply fully with the Siracusa Principles and the ICCPR. (In so far as particular quarantine or isolation orders may not merely constitute restrictions on freedom of movement under art 12 ICCPR, but actually constitute deprivation of liberty under art 9 ICCPR, as noted above and below the Human Rights Committee has specifically indicated that the right to challenge the deprivation of liberty before a court cannot be restricted by derogation).

As was noted above, the right to an effective remedy is also treated by the Human Rights Committee as non-derogable, and where a judicial order would be necessary for the remedy to be

effective, this implies courts must always be available for such cases (see also ICJ Geneva Declaration principle 11 and Commentary pp. 181-196).

B) Gender perspective, children, older persons, persons with disabilities

Judiciaries should give particular consideration to the situation of [women and children](#), [older persons](#), [persons with disabilities](#), and others, recognising the urgency of applications to the court for protective measures for persons from such groups who do or may face increased risks of violence, abuse or neglect, relative to others, whether as a result of general confinement measures, or who would otherwise be at greater risk if access to other protective orders were suspended or limited.

C) Persons deprived of liberty

Judicial guarantees have been particularly [recognised](#) (para 13) as necessary to protect non-derogable rights for persons deprived of their liberty, whether in police detention facilities, penitentiary institutions, immigration detention centres, psychiatric hospitals and social care homes or in compulsory quarantine for reasons of public health protection. Procedural guarantees such as the right to have access to a court to challenge any deprivation of liberty and the right of persons deprived of liberty on criminal law grounds to be promptly brought before a judge, may consequently be seen as [non-derogable](#) (para 67), and given the particular vulnerability of persons deprived of liberty, must be seen as urgent. Primarily to prevent the spread of COVID-19 in closed institutions, some States are releasing persons from pre-trial detention or prison to house arrest or other forms of monitoring or control, and/or ceasing to arrest or detain people for minor offences. Such measures can also reduce the burden on the judiciary to conduct judicial supervision of deprivations of liberty.

II. Changes in the modalities of hearings

In many proceedings, particularly at first instance, the litigants (or the prosecutors and accused), as well as their lawyers, and persons arrested or detained on criminal grounds, normally appear in person before the Court. Often documents must be filed in person at a court registry. In response to the COVID-19 outbreak, many judiciaries are increasing reliance instead on alternatives such as telephone- and video-conferencing, and electronic filing.

If they are based in law, time-limited and demonstrably necessary and proportionate in the local circumstances of the present outbreak, and do not for instance prevent confidential communication of a person with their lawyer, in principle such adaptations of modalities can be a proportionate response, at least in civil matters and criminal appeals (see e.g. [Vladimir Vasilyev v Russia](#), para 84; [Marcello Viola v Italy](#), paras 63-77; [Golubev v Russia](#); [Gankin v Russia](#)). The [limitations](#) of such technologies, which are not always self-evident, must be taken into account and the suitability of a matter for such modalities may need to be determined on a case-by-case basis. There will be some matters in which face-to-face in-person hearings will be indispensable (see e.g. as regards criminal matters, ICCPR article 14(3)(d) right 'to be tried in his presence', and article 9(3) right to 'be brought promptly before a judge' – although some States had [already](#) started to whittle away at these even before the current crisis). [Reserve capacity](#) for such hearings must be maintained if they are not capable of being postponed.

III. Dealing with the consequences of postponement

In the immediate term, States and judiciaries should be considering the impact of limitation periods and filing deadlines in the postponement of civil and criminal proceedings and, where the current circumstances would not already automatically extend such periods, consider amending the relevant laws or enacting an exception (see e.g. measures announced by the [European Court of Human Rights](#) and [Inter-American Court of Human Rights](#)).

Furthermore, particularly if postponements become very prolonged, judges will need to consider the implications for the right to trial 'without undue delay' (ICCPR 14(3)(c)) and the right of pre-trial detainees to release if not tried 'within a reasonable time' (ICCPR 9(3)).

Once the current crisis subsides sufficiently for the justice system to resume its activities at an increased or full capacity, the courts will face a considerable, possibly overwhelming, backlog of postponed proceedings, hearings and trials, as well as possibly greater-than-normal numbers of bankruptcy, insurance, labour law, and other such matters. It may not be possible for judiciaries to secure the resources to scale up capacity beyond pre-crisis levels, and so States may need to consider decriminalisation or amnesty for certain offences, presumably focussing on minor non-violent matters, increased use of mandatory ADR for a larger portion of civil litigation, and perhaps more fundamental reforms to areas of substantive law. Indeed, decriminalisation of some offences may simultaneously advance human rights: see for example the 2017 [Principles on the Decriminalisation of Petty Offences in Africa](#) and the ICJ's ongoing [decriminalization project](#).

IV. Risk-tolerance and the fundamental role of judges

There is no doubt that individual judges are entitled to measures to protect their right to life and right to health, and indeed the ability of the judiciary to continue to function depends on their well-being. At the same time, the question arises in the present circumstances whether judges might justifiably be asked to accept a higher degree of risk than that expected of other individuals that do not hold judicial office, given the essential role of the judiciary in securing human rights protection and the rule of law.

Courts have themselves taken into account the risks inherent in certain public functions when assessing the adequacy of protective measures for, for instance, members of [the armed forces](#), while nevertheless being ready to find States responsible for rights violations in appropriate circumstances. An acceptance of heightened risk may also follow from public service as a firefighter, police officer, medical practitioner, and so on.

In practice, most judiciaries and States do seem to recognise the special role and potentially increased risk-tolerance of judges, by ensuring for the moment access for urgent matters even while much of the rest of the population may be at home, and individual judges continue to demonstrate courage in this regard. But as the pandemic spreads and deepens, the question of how much risk judges must assume by nature of their office, may become more consequential in assessing the necessity and proportionality of further restrictions on access to and operation of the courts.