



Chapter 16

The administration of justice during states of emergency

Facilitator's Guide

Learning objectives I

- To familiarize course participants with the specific legal provisions that condition the right of States to derogate from international human rights obligations
- To provide details of non-derogable rights and obligations
- To familiarize the participants with the basic principles which apply to derogable rights

Learning objectives II

- To create awareness among the participating judges, prosecutors and lawyers of their essential role as pillars of the enforcement of the rule of law, including the protection of human rights, also in states of emergency
- To stimulate discussion on, and awareness of, alternative conflict resolution measures

Questions I

- Is it possible in the legal system within which you work to derogate from the full enjoyment of human rights and fundamental freedoms?
- If so:
 - In what circumstances can this be done?
 - Which organ decides?
 - Which rights can be affected by a decision to derogate from their full enjoyment?

Questions II

- If a state of emergency is declared in the country where you work, what remedies are available to:
 - Challenge the decision to declare the state of emergency?
 - Challenge the decision to derogate from the full enjoyment of specific human rights?
 - Examine the full enjoyment of the non-derogable rights?
 - Challenge the necessity of an emergency measure as applied in a specific case (e.g., extrajudicial deprivation of liberty for a suspected terrorist)?

Questions III

- In your view, what is, or should be, the purpose of a declaration of a state of emergency and the derogation from human rights obligations?
- In your view, why could it be necessary, in order to deal with a public emergency, to suspend the full enjoyment of human rights and fundamental freedoms?
- Could there, in your view, be any reason why it might be counterproductive for a Government to derogate from the full enjoyment of some human rights in order to deal with a public emergency?

Questions IV

- In your view, are there any human rights that might be particularly vulnerable in a public emergency?
- Would there in your view exist any means other than derogations from human rights obligations whereby States could deal constructively with a public emergency?

Key legal instruments I

Universal instruments

- The International Covenant on Civil and Political Rights, 1966
- The International Covenant on Economic, Social, and Cultural Rights, 1966
- The International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- The Convention on the Elimination of All Forms of Discrimination against Women, 1979
- The Convention on the Rights of the Child, 1989
- The Declaration on the Protection of All Persons from Enforced Disappearances, 1992

Key legal instruments II

Regional instruments

- The African Charter on Human and Peoples' Rights, 1981
- The American Convention on Human Rights, 1969
- The Inter-American Convention to Prevent and Punish Torture, 1985
- The Inter-American Convention on Forced Disappearance of Persons, 1994
- The European Convention on Human Rights, 1950
- The European Social Charter, 1961, and the European Social Charter (Revised), 1996

Key legal texts I

The notion of a public emergency/the notion of an exceptional threat (1)

Article 4 (1) of the International Covenant on Civil and Political Rights:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Key legal texts II

The notion of a public emergency/the notion of an exceptional threat (2)

Article 27 (1) of the American Convention on Human Rights:

In time of war, public danger, or other emergency that threatens the independence or security of a State party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

Key legal texts III

The notion of a public emergency/the notion of an exceptional threat (3)

Article 15 (1) of the European Convention on Human Rights:

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

Key legal texts IV

The notion of a public emergency/the notion of an exceptional threat (4)

Article 30 (1) of the 1961 European Social Charter:

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

The wording of article F (1) of the European Social Charter as revised in 1996 is in substance identical to this provision. Only the word “Contracting” has been left out.

Derogations from international human rights treaties

The *travaux préparatoires*:

Lessons learned I

Some of the major international human rights treaties allow State parties to derogate from some of their obligations under these treaties in exceptional crises.

The right to derogate is a flexible instrument aimed at helping Governments to overcome exceptional public emergencies.

Derogations from international human rights treaties

The *travaux préparatoires*:

Lessons learned II

The right to derogate does not mean that the derogating State can escape its treaty obligations at will. It is a right that is circumscribed by several conditions, such as the principle of non-derogability of certain rights, the principle of strict necessity and the principle of international notification.

It is clear from the preparatory works that the right to derogate was not intended to be used by authoritarian regimes aiming at the elimination of human rights and that it cannot be used to save a specific Government.

The notion of a public emergency/ the notion of an exceptional threat I

It is for the State party invoking the right to derogate to prove that it is faced with a public emergency as defined in the respective treaty.

The ultimate purpose of derogations under international law is to enable the State party concerned to return to normality, that is, to re-establish full respect for the constitutional order where human rights can again be fully guaranteed.

The notion of a public emergency/ the notion of an exceptional threat II

It is the right and duty of the international monitoring organs, in the cases brought before them, to make an independent assessment of the public emergency in the light of the relevant treaty provision.

At the European level, a wide margin of appreciation is granted to the Contracting States in deciding on the presence within their borders of a “public emergency threatening the life of the nation”.

The notion of a public emergency/ the notion of an exceptional threat III

The public emergency justifying the derogation must be so serious as to actually constitute a threat to the life of the nation (universal and European levels) or its independence or security (the Americas). This excludes, for example, minor riots, disturbances and mass demonstrations.

National law must carefully define the situations in which a state of emergency can be declared.

The notion of a public emergency/ the notion of an exceptional threat IV

The exceptional nature of derogations means that they must be limited in time and space to what is strictly necessary by the exigencies of the situation. The obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality.

An official proclamation of a state of emergency is essential for the maintenance of the principles of legality and rule of law at times when they are most needed.

The State parties cannot lawfully extend their exceptional powers beyond the territories mentioned in their derogation notices.

Derogations under international human rights law must not adversely affect the substance of the rights as such – these rights being inherent in the human person – they can only lawfully limit their full and effective exercise.

Non-derogable rights and obligations I

Key legal texts (1)

Article 4 (2) of the International Covenant on Civil and Political Rights:

No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

Furthermore, under the Second Optional Protocol (art. 6), there can be no derogation from the prohibition on the death penalty.

Non-derogable rights and obligations II

Key legal texts (2)

Article 27 (2) of the American Convention on Human Rights:

The foregoing provision does not authorize any suspension of the following articles: article 3 (right to juridical personality), article 4 (right to life), article 5 (right to humane treatment), article 6 (freedom from slavery), article 9 (freedom from ex post facto laws), article 12 (freedom of conscience and religion), article 17 (rights of the family), article 18 (right to a name), article 19 (rights of the child), article 20 (right to nationality), and article 23 (right to participate in Government) or of the judicial guarantees essential for the protection of such rights.

Non-derogable rights and obligations III

Key legal texts (3)

Article 15 (2) of the European Convention:

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

Furthermore, according to article 3 of Protocol No. 6 to the Convention relating to the abolition of the death penalty, there shall be no derogation from the provisions of this Protocol under article 15 of the Convention. As to the principle of *ne bis in idem* proclaimed in article 4 of Protocol No. 7 to the Convention it is similarly non-derogable under its article 4 (3).

Non-derogable rights and obligations IV

The right to life

States must at all times take positive steps to protect the right to life.

States must at no time participate in, or condone, the arbitrary or extrajudicial taking of human life.

Even in public emergencies threatening the life of the nation, States have a strict legal duty to prevent, investigate, prosecute, punish and redress violations of the right to life.

Non-derogable rights and obligations V

The prohibition of torture, or cruel, inhuman or degrading treatment or punishment (1)

The resort to torture, or cruel, inhuman or degrading treatment or punishment is prohibited at all times, including in wars and other public emergencies threatening the life of the nation.

The prohibition on torture and other forms of ill-treatment is thus also strictly prohibited in the fight against terrorism and organized crime.

Torture or other forms of ill-treatment may not, consequently, be used in order to extract information or confessions from suspects.

Non-derogable rights and obligations VI

The prohibition of torture, or cruel, inhuman or degrading treatment or punishment (2)

Prolonged incommunicado detention can amount to a form of ill-treatment prohibited by international law even in public emergencies.

Non-derogable rights and obligations VII

The right to humane treatment

The positive right of all persons deprived of their liberty to be treated humanely is to be guaranteed at all times, including in public emergencies.

The right to be treated humanely implies, inter alia, that people deprived of their liberty must be held in conditions respectful of their human dignity.

Non-derogable rights and obligations VIII

The right to freedom from slavery and servitude

Slavery, the slave trade, servitude and trafficking in women and children are strictly prohibited at all times, including in public emergencies threatening the life of the nation (universal and European levels) or the independence or security of the State (the Americas).

Even in times of armed conflict or other kinds of emergencies, States are consequently under a legal obligation to take positive measures to prevent, investigate, prosecute and punish such unlawful practices as well as to provide redress to the victims.

Non-derogable rights and obligations IX

The right to freedom from ex post facto laws (1)

Every person has the right not to be found guilty of any criminal offence for an act or omission that was not a criminal offence, under national or international law, when committed.

At the European level, the prohibition of the retroactive application of criminal law also means that a criminal offence must be clearly defined in law and that the law cannot be interpreted extensively to the accused person's disadvantage.

Non-derogable rights and obligations X

The right to freedom from ex post facto laws (2)

International human rights law also prohibits the retroactive application of penalties to the disadvantage of the convicted person.

The International Covenant on Civil and Political Rights and the American Convention on Human Rights further guarantee the right of a guilty person to benefit from a lighter penalty introduced after the commission of the offence.

Non-derogable rights and obligations XI

The principle of *ne bis in idem*

The principle of *ne bis in idem* is non-derogable under the European Convention on Human Rights and protects against double jeopardy with regard to proceedings taking place in one State.

These rights must be effectively guaranteed at all times, including in wars and other public emergencies.

Non-derogable rights and obligations XII

The right to recognition as a legal person

Every human being has the right at all times to be recognized as a legal person before the law. No circumstances or beliefs can justify any limitation to this fundamental right.

Non-derogable rights and obligations XIII

The right to freedom of thought, conscience and religion

Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, the right to freedom of thought, conscience and religion must be guaranteed at all times and cannot be derogated from in any circumstances.

In wars or other public emergencies the right to manifest one's religion and beliefs must exclusively be determined by the ordinary limitation provisions.

Non-derogable rights and obligations XIV

The right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation

The right not to be imprisoned for being unable to comply with contractual obligations must be guaranteed by all States at all times, including in wars and public emergencies.

Non-derogable rights and obligations XV

The rights of the family

The rights of the family, including, inter alia, the right of men and women to marry with their free and full consent, as well as the right to raise a family, have been made expressly non-derogable under the American Convention on Human Rights and must be protected at all times.

Non-derogable rights and obligations XVI

The right to a name

The right of every person to a name under the American Convention on Human Rights, and the right of every child to a name under the Convention on the Rights of the Child, must be guaranteed at all times, including in wars and other public emergencies.

Non-derogable rights and obligations XVII

The rights of the child

The right of the minor child to measures of special protection has been made expressly non-derogable under the American Convention on Human Rights.

The child has the right to enjoy full and effective protection of all non-derogable rights, and special measures must be taken at all times, including in wars and other public emergencies, to protect the child against all forms of ill-treatment and exploitation.

Non-derogable rights and obligations XVIII

The right to a nationality

The right to a nationality is non-derogable under the American Convention on Human Rights and must consequently be guaranteed at all times.

Non-derogable rights and obligations XIX

The right to participate in Government

The right to participate in Government must be guaranteed at all times under the American Convention on Human Rights, including in public emergencies threatening the independence or security of the State parties to the American Convention on Human Rights.

Non-derogable rights and the right to effective procedural and judicial protection I

In international human rights law, the principle of legality and rule of law must be guaranteed at all times, including in public emergencies threatening the life of the nation (the International Covenant and the European Convention) or the independence or security of the State (the American Convention). This means that, in a constitutional order respectful of human rights and fundamental freedoms, law governs the conduct of both the State and individuals.

Non-derogable rights and the right to effective procedural and judicial protection II

The non-derogable rights must be fully protected in public emergencies. To this end, States must at all times provide *effective domestic remedies* allowing alleged victims to vindicate their rights before domestic courts or other independent and impartial authorities. No measures of derogation, however lawful, are allowed to undermine the efficiency of these remedies.

Non-derogable rights and the right to effective procedural and judicial protection III

The fundamental requirements of fair trial under the International Covenant on Civil and Political Rights are non-derogable, including in particular in criminal proceedings that may result in the imposition of capital punishment; such proceedings must at all times respect all the due process guarantees contained in article 14 of the Covenant. They must, of course, also be consistent with the prohibition of retroactive criminal law defined in the non-derogable provisions of article 15 of the Covenant.

Non-derogable rights and the right to effective procedural and judicial protection IV

Under the American Convention on Human Rights, domestic remedies to ensure the full enjoyment of non-derogable rights must be *judicial* in nature, such as the writ of habeas corpus and *amparo*, and the proceedings concerned must respect the *principles of due process of law*. To this extent, those principles are consequently also non-derogable under the American Convention on Human Rights.

Derogations from human rights: the condition of strict necessity I

General interpretative approach (1)

Derogations from human rights obligations must not go beyond what is strictly required by the exigencies of the situation. This means that the relevant measures must be tailored to the exigencies of the situation with regard to their field of territorial application, material content and duration.

Measures of derogation that go beyond the condition of strict necessity are unlawful and will have to be judged in the light of the legal standards applicable in normal times.

Derogations from human rights: the condition of strict necessity II

General interpretative approach (2)

The international monitoring organs have a right and duty to make their own independent assessment of the strict necessity of any measures of derogation taken by State parties.

The Contracting States to the European Convention on Human Rights have a wide margin of appreciation in assessing the strict necessity of the measures concerned, a margin of appreciation that is, however, accompanied by European supervision.

Derogations from human rights: the condition of strict necessity III

The right to effective remedies

The legal duty of States to provide effective domestic remedies for violations of human rights remains in full force in public emergencies with regard to those rights which have not been derogated from, including the non-derogable rights which must be fully guaranteed at all times.

To the extent that States do resort to derogations from their obligations under human rights treaties, they have to provide effective remedies for the purposes of assessing the strict necessity of the emergency measures and preventing abuses both in general and in any given case.

The condition of strict necessity, the right to liberty and special powers of arrest and detention I

The right to effective protection against arbitrary State interference with a person's right to liberty is fundamental. To this end, the right to swift judicial control of deprivations of liberty plays an essential role in protecting the individual against arbitrary arrests and detentions.

The condition of strict necessity, the right to liberty and special powers of arrest and detention II

Special powers of arrest and detention may however be resorted to in public emergencies threatening the life of the nation (the universal and European levels) or the independence or security of the relevant State party (the Americas), but only to the extent and for the duration that such special powers are strictly required by the exigencies of the situation.

The condition of strict necessity, the right to liberty and special powers of arrest and detention III

Special powers of arrest and detention are lawful only to the extent that they are strictly proportionate to the threat posed by the emergency.

It is for the derogating State to prove that the measures are strictly required by the exigencies of the situation. It is implicit in this legal duty that the derogating State keep the necessity of the measures under constant review.

The condition of strict necessity, the right to liberty and special powers of arrest and detention IV

Special powers of arrest and detention may at no time lead to arbitrary arrests or detentions or to abuses of any kind. In order to prevent arbitrariness and abuses in the exercise of such powers, effective remedies and adequate safeguards must be preserved during public emergencies and be available to each person deprived of his or her liberty through arrest or detention:

- Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, the right to a judicial remedy such as habeas corpus must be available at all times to assess the lawfulness of the deprivation of liberty.

The condition of strict necessity, the right to liberty and special powers of arrest and detention V

- The jurisprudence under the European Convention on Human Rights varies according to the severity of the emergency faced by the derogating State and the safeguards made available; while the European Court has in its most recent case law accepted a seven-day detention without legal intervention but with adequate safeguards against abuse, including the existence of habeas corpus to test the lawfulness of the initial arrest and detention, it has not accepted as strictly required by the exigencies of the situation the holding of a detainee for 14 days without judicial intervention and without adequate safeguards.

The condition of strict necessity, the right to liberty and special powers of arrest and detention VI

Safeguards that are considered adequate at the European level are, in addition to judicial review in the form of habeas corpus, effective access to a lawyer, the right of access to a medical doctor and the right to inform a family member or friend of the arrest and detention. The European Court usually examines the adequacy of these safeguards in the aggregate.

The condition of strict necessity, the right to liberty and special powers of arrest and detention VII

- Although the European Court of Human Rights has expressed the desirability of having adequate judicial or at least administrative remedies from the outset of the introduction of special powers of arrest and detention, it has accepted as being strictly required by the exigencies of the situation cases of long-term detention or internment without such remedies but with alternatively designed safeguards. The trend in Europe appears to be towards a strengthening of the rights of persons deprived of their liberty by virtue of emergency powers.

The condition of strict necessity, the right to liberty and special powers of arrest and detention VIII

- The international monitoring organs have emphasized the importance of judicial review of the lawfulness of a deprivation of liberty to protect detainees against torture and other forms of ill-treatment.

The condition of strict necessity, the right to a fair trial and special tribunals I

Every person has the right at all times to be tried by a court or tribunal which is competent, independent and impartial and which respects the right to a fair trial and related due process guarantees as well as the right to presumption of innocence.

The condition of strict necessity, the right to a fair trial and special tribunals II

Trials by special courts may not per se violate the right to a fair trial and due process guarantees. However, vigilance is required to ensure that such courts comply with all the basic due process requirements of a fair trial, as well as the requirements that the court is competent, independent and impartial. Like regular courts, specially established tribunals must strictly respect the principle of equality before the law and the prohibition of discrimination.

The condition of strict necessity, the right to a fair trial and special tribunals III

Military courts must be competent, independent and impartial, and must comply with all basic due process guarantees for a fair trial as established in international human rights law. The Human Rights Committee has determined that, “trials of civilians by military or special courts should be exceptional, i.e., limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.”

The condition of strict necessity, the right to a fair trial and special tribunals IV

The due process standards defined in international humanitarian law for a fair trial provide a minimum threshold for due process guarantees that States must respect in all circumstances, including during armed conflict and public emergencies threatening the life of the nation.

The condition of strict necessity, the right to a fair trial and special tribunals V

The minimum guarantees to be ensured in criminal trials as prescribed in article 14 (3) of the International Covenant on Civil and Political Rights, article 8 (2) of the American Convention on Human Rights and article 6 (3) of the European Convention on Human Rights, provide an important, if not sufficient, yardstick as to fair trial guarantees that should be applicable at all times, including in public emergencies threatening the life of the nation (the universal and European levels) or the independence or security of the State (the Americas).

The condition of consistency with other international legal obligations

When resorting to measures derogating from their obligations under international human rights law, States must ensure that these measures are not inconsistent with their “other obligations under international law”, such as international humanitarian law, as well as any other relevant standards binding on the derogating States by virtue of international treaty obligations, international customary law or general principles of law.

The condition of non-discrimination I

When resorting to measures derogating from their legal obligations under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, the State parties must ensure that these measures do not “involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

The condition of non-discrimination II

In general all derogating States have at all times to ensure the principle of equality and the prohibition of discrimination which is a fundamental principle of international human rights law and general international law. According to international jurisprudence, the prohibition of discrimination contains an inherent flexibility so that not all distinctions between people are illegal. However, States that derogate from their international obligations can only take measures strictly necessary to combat a public emergency provided that the measures pursue a legitimate aim, are reasonable and proportionate in the light of this aim, and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.

The condition of international notification I

Although the specific conditions vary somewhat according to the treaty concerned, it can be said in general terms that, whenever resorting to its right to derogate under the international human rights treaties, the derogating State party must notify the other State parties through the Secretary-General of the respective organization of the measures of derogation, by providing details of these measures, the reasons why they were taken, and, under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, the provisions from which they have derogated.

The condition of international notification II

The condition of international notification is an important tool to prevent abuses of the right to derogate by allowing an improved monitoring of State actions by other State parties as well as the monitoring organs.