

RESOLUTION 2/2024

COMMITTEE ON HUMAN RIGHTS IN TIMES OF EMERGENCY

The 81st Conference of the International Law Association, held in Athens, Greece, from 25 to 28 June 2024:

HAVING CONSIDERED the Final Report of the Committee on Human Rights in Times of Emergency, presented at the Athens Conference (2024) and which should be considered together with the Committee's Interim Report, presented at the 80th Lisbon Conference (2022);

TAKES NOTE of the work of the ILA Committee on the Enforcement of Human Rights which considered the same topic and led to the adoption of the "Paris Minimum Standards of Human Rights in a State of Exception", which were adopted by the 61st Conference of the ILA in 1984 in Paris, and the "Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency," approved by the 64th Conference of the ILA in 1990, in Queensland, Australia;

TAKES NOTE of the fact that 34 years have passed since the work of the previous committee ended and that the human rights world has evolved significantly since that time, the purpose of this Committee on Human Rights in Times of Emergency was designed to assess the changes that have occurred and the practice that has developed by UN bodies and regional human rights systems in monitoring states of emergency since 1990;

TAKES NOTE of the fact that the global public health epidemic, COVID-19 and the Russian invasion of Ukraine, raised additional issues, not foreseen, when this study was begun;

ENDORSES the following conclusions and recommendations set forth in the Final Report;

REQUESTS the Secretary- General of the International Law Association to transmit this resolution, together with the Committee's Final Report, to the Secretary-General of the United Nations for further dissemination;

ALSO REQUESTS the Secretary-General of the International Law Association to forward a copy of this Resolution, together with the Committee's Final Report, to the UN Human Rights Council, the UN Human Rights Committee, to the UN Human Rights Special Rapporteurs, to the Office of the High Commissioner for Human Rights, to the Registrar of the International Court of Justice, to the General Secretariat of the Organization of American States, to the African Union Commission, to the ASEAN Secretariat and the Secretariat of the Council of Europe;

RECOMMENDS to the Executive Council that the Committee on Human Rights in Times of Emergency, having accomplished its mandate, be dissolved.

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I. Conclusions

We observe great diversity in State practice regarding the situations that are claimed to give rise to states of emergency: war/armed conflict, coups d'État, acts of terrorism, organised crime, natural and technological disasters, including pandemics and other health emergencies (e.g. COVID-19 pandemic), financial or economic crises, migration.

Considerable diversity can also be noted in respect to the form that states of emergency take. We documented emergencies that are declared at the domestic level and notified to the relevant international authorities (derogation), domestically declared emergencies (*de jure*), and non-declared (*de facto*)

emergencies. *De jure* and *de facto* emergencies are the most prevalent forms of states of emergency encountered in State practice.

Given the difficulty in detecting *de facto* emergencies, the report suggests a number of process descriptors that can be used to identify them. First, a *de facto* emergency may begin as a declared state of emergency that fails to comply with approval or extension requirements, or that is used for situations different from those for which it was instituted. Second, *de facto* emergencies can be situations where emergency powers are incorporated into ordinary law. Third, *de facto* states of emergency can be situations where factual emergency conditions exist, the State takes extraordinary measures, yet fails to formally proclaim a state of emergency.

Regardless of which form of state emergency is at issue – derogation, *de jure*, *de facto* –, and irrespective of whether measures taken pursuant to them are ultimately found to be compatible with international human rights standards, the report has demonstrated that they have a profound impact on a broad range of human rights and a systemic impact on democratic governance and the rule of law.

As the interim report has shown, in cases engaging treaty derogation clauses, international and regional human rights bodies have developed standards on threshold, declaration of emergency & notification of derogation, duration, domestic safeguards as well as on non-derogable rights, necessity & proportionality and non-discrimination. As regards derogations from international human rights treaties, the HRCtee and the IACtHR tend to apply stricter standards as regards procedural requirements and necessity of judicial remedies, which are held to be non-derogable. The ECtHR, conversely, at times also considers non-judicial remedies to be sufficient.

The report has made two crucial findings concerning the standards applicable to States that have not derogated from international human rights treaty obligations, including because such a possibility is not provided by the instruments themselves, and those that employ *de facto* emergencies. First, even in these situations, States are bound by standards on threshold, duration, domestic control, non-discrimination, as well as proportionality *per se*, which are read into the necessity and proportionality requirement of the justification analysis. The salience of these common standards must be understood against the diverse constitutional and legislative practice of States relating to emergency situations. Second, States cannot evade non-derogability of certain rights by opting not to enter a formal derogation – thus, even in declared, but non-notified, and *de facto* situations of emergency, non-derogable rights remain non-derogable. Any other understanding is unsupported by the general rules of treaty interpretation and would be entirely contrary to the object and purpose of the treaty. However, to the extent that restrictions of the non-derogable right are possible under a justification clause, the latter continues to apply even in emergency situations.

This report has demonstrated that the review of emergency measures by international bodies is usually very strict, regardless of whether States have derogated or not. The HRCtee and the IACtHR have never found a measure to be justified under the emergency provision in case of derogation. In particular, the Inter-American system has greatly expanded the list of non-derogable rights beyond the list in Art. 27 ACHR; including, for example, due process and judicial remedies as non-derogable rights. Furthermore, in the inter-American system a state of emergency may only be declared to preserve the democratic form of government of the State. The picture is less clear for the ECtHR. While the ECtHR has traditionally afforded a “wide margin of appreciation” to derogating States, it has more recently shown a tendency to apply a stricter standard of review in situations in which States have derogated under Art. 15 ECHR.

The prevalence of *de jure* and *de facto* states of emergency poses particular challenges. Similar to declared emergencies, *de facto* emergencies can negatively affect the enjoyment of civil, political and socio-economic rights. It is their systemic impact which may be more profound: *de facto* states of emergency contribute to the perpetuation of threats, the normalisation of exceptional measures, and the securitization

and militarization of political, social, and economic life. It also poses challenges for monitoring by international bodies, a reality which this Committee seeks to address in its recommendations.

II. Recommendations

1. *Preliminary assessments*

States considering declaring a state of emergency at the national level and/or entering derogations to treaties should conduct a preliminary assessment of the measures they intend to take with a view to establishing whether:

- i) they can be accommodated by ordinary limitation clauses on rights,
- ii) they undermine the rule of law and principles of democratic governance.

In respect to the first limb, the assessment must pay due regard to the fact that certain rights are non-derogable under any circumstances, and that emergency measures, just like each and every interference with rights in normal times, are subject to necessity and proportionality standards, including threshold, duration, domestic control, non-discrimination standards, and proportionality *per se*. Under the second limb, States should assess whether the measures affect the principles of separation of powers and parliamentary and judicial oversight on executive action.

2. To facilitate this preliminary assessment, States should engage in prompt consultations with domestic legislatures, national human rights institutions, civil society organisations, and, whenever possible, international expert bodies. The outcome of the assessment and course of action pursued – to address the situation through a declaration of emergency, a derogation from one or more treaties, or to adopt new or adapt existing legislation – should be transparently justified in a public report.

3. A similar assessment should be conducted by sub-national authorities (State prime ministers, governors, mayors) who are empowered to take emergency measures.

4. *Notification of derogations*

When invoking derogation clauses, States must ensure that their notice of derogation includes all essential information to keep other States Parties, monitoring bodies, and domestic and international civil society organisations fully informed about the nature of the emergency and the measures implemented to address it. This should encompass details regarding the emergency legal and administrative framework, a list of the treaty provisions from which it has derogated, and the specified date of termination for the derogation.

5. *Monitoring of states of emergency and derogations at the international level*

a) When receiving a notice of derogation, the Secretary-General of the relevant international organisation should request additional information from the derogating State, if deemed necessary, to assess the nature and scope of the derogation.

b) UN treaty bodies – whether they monitor treaties that allow for derogations or not – should require all State Parties to report on the notified, *de jure* (including at sub-national level), and *de facto* emergencies as part of their periodic review obligations. Information on states of emergency, including an assessment of their impact on human rights and on the rule of law and democratic governance can be included as part of the ‘common core document’ and should be regularly updated.

c) A condition for the effectiveness of notifications is that treaty monitoring bodies engage in a robust review of States’ derogations rather than in a mere bureaucratic exercise

- d) Reporting on states of emergencies should be formally included as part of the Universal Periodic Review process. This can be achieved by amending the technical guidance provided to States, UN entities and civil society stakeholders, for inclusion in their respective documents, the national report, compilation of UN information, and the summary of stakeholders information.
- e) Based on their mandate, special procedures of the UN Human Rights Council should follow closely situations of emergency regardless of the existence of a formal derogation.