

Core Human Rights in the Two Covenants

What is meant by core human rights?

All rights are universal, indivisible, interdependent and interrelated. While international human rights law allows for legitimate limitations, derogations and reservations, they must be exercised under strict circumstances. Even in exceptional situations, certain core human rights must apply at all times.

Core rights are protected under international customary law and international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR) have identified and interpreted the core rights through their General Comments, which are authoritative interpretations of the relevant treaty provisions. Below is an illustration of the core rights.

What are the non-derogable rights in the ICCPR?

Article 4 of the ICCPR sets out the following rights in the ICCPR from which states can never derogate, even in times of public emergency that threatens the life of the nation:

- Right to life (art 6);
- Prohibition of torture, cruel, inhuman and degrading treatment (art 7);
- Prohibition of medical or scientific experimentation without consent (art 7);
- Prohibition of slavery, slave trade and servitude (art 8);
- Prohibition of imprisonment because of inability to fulfil contractual obligation (art 11);
- Principle of legality in criminal law i.e. the requirement that criminal liability and punishment is limited to clear and precise provisions in the law, that was in force at the time the act or omission took place, except in cases where a later law imposes a lighter penalty (art 15);
- Recognition everywhere as a person before the law (art 16);
- Freedom of thought, conscience and religion (art 18).

According to the HRC in General Comment 29, a fundamental requirement for derogations is that they are limited to the extent strictly required by the exigencies of the situation. This requirement

relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.

Furthermore, legitimate derogations should not involve any discrimination on the ground of race, colour, sex, language, religion or social origin (art 4(1)).

Are there non-derogable rights in the ICESCR?

Although the ICESCR does not contain a list of non-derogable rights, according to General Comment 3 of the CESCR, States are bound by a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights provided in the ICESCR, including:

- Minimum essential food which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger (GC 3, GC 12);
- Essential primary health care, including essential drugs under the World Health Organization's Action Programme on Essential Drugs (GC 3, GC 14);
- Essential basic shelter and housing, including sanitation (GC 3, GC 4) and the right not to be arbitrarily evicted from one's house (GC 7);
- Access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease (GC 15).

Furthermore, States must guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant (GC 20; GC 16).

Are there elements in other rights that cannot be subject to lawful derogation?

According to the HRC, the fact that some provisions of the ICCPR have been listed in article 4(2) as not being subject to derogation, does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists (GC 29).

In General Comment 29 the HRC identified the following examples of peremptory norms from which States can never derogate:

- Fundamental principles of fair trial, including the presumption of innocence (art 14(2));
- Prohibition of arbitrary deprivation of liberty (art 9(1));
- Prohibition of collective punishments.

In addition, the HRC states in General Comment 29 that in those provisions of the ICCPR that are not listed as non-derogable, there are elements that cannot be subject to lawful derogation, including the following illustrative examples:

- The right of persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person;
- Prohibitions of taking hostages, abductions or unacknowledged detention;
- The rights of persons belonging to minorities;
- Deportation or forcible transfer of population without grounds permitted under international law (art 7(1)(d) Rome Statute). The legitimate right to derogate from article 12 of the ICCPR during a state of emergency can never be accepted as justifying such measures;
- Prohibition of propaganda for war or advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

The HRC also considers that freedom of opinion is one element that is non-derogable since it can never become necessary to derogate from it during a state of emergency (GC 34).

Furthermore, in General Comments 24, 29, 32 and draft General Comment 35, the HRC has identified additional rights and prohibitions that cannot be subject to lawful derogation, including:

- The right to an effective remedy in the case of violations under the ICCPR (GC 29, GC24);
- The right to be tried by a competent, independent and impartial tribunal established by law (GC 32);
- The right to take proceedings before a court to enable the court to decide without delay the lawfulness of detention (GC 29, draft GC 35);
- The right not to be compelled to testify against oneself or to confess guilt (GC 32);
- Prohibition of statements or evidence that are obtained in violation of article 7 ICCPR (GC 32, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 15);

- Prohibition of prolonged incommunicado detention (draft GC 35);
- Prohibition of the death penalty for States that are party to the Second Optional Protocol to the ICCPR (GC 29).

In cases leading to the death penalty, all the safeguards in article 14 of the ICCPR must be complied with, including effective counsel and the right to appeal (GC 29, GC 32).

Are there rights that cannot be subject to reservations?

In General Comment 24, the HRC states that provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be subject to reservations.

According to the HRC, States may not reserve the right to:

- Engage in slavery (art 7);
- Engage in torture or subject persons to cruel, inhuman or degrading treatment or punishment (art 7);
- Arbitrarily deprive persons of their lives (art 6);
- Arbitrarily arrest and detain persons (art 8);
- Deny freedom of thought, conscience and religion (art 18);
- Presume a person guilty unless he proves his innocence (art 14(2));
- Execute women or children (art 6(5));
- Permit the advocacy of national, racial or religious hatred (art 20);
- Deny persons of marriageable age to marry (art 23(2));
- Deny minorities the right to enjoy their own culture, profess their own religion and use their own language (art 27);

While reservations to particular clauses of article 14 on the right to equality before courts and tribunals and to a fair trial, may be acceptable, a general reservation to the right to a fair trial would not be.

Reservations that deny peoples the right to freely determine their political status and freely pursue their economic, social and cultural development would be incompatible with the object and purpose of the ICCPR (GC 24).

Normative Standards and Further Reading

- HRC, General Comments: No. 24 on Reservations (1994); No. 29 on Derogations (art 4) (2001); No. 32 on the Right to equality before courts and tribunals and to a fair trial (art 14) (2007); No. 34 on Freedom of opinion and expression (art 19) (2011); Draft No. 35 on Liberty and security of persons (art 9) (2013).
- CESCR, General Comments: No. 3 on The nature of States Parties obligations (1990); No. 4 on The right to adequate housing (art 11) (1991); No. 7 on the Right to adequate housing (art 11) (1997); No. 12 on The right to adequate food (art 11) (1999); No. 14 on The right to the highest attainable standard of health (art 12) (2000); No. 15 on The right to water (arts 11 and 12) (2003); No. 20 on Non-Discrimination in economic, social and cultural rights (articles 2(2)) (2009).