Routledge Handbook of Human Rights and Disasters

Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari, Giulio Bartolini

Limitation and Derogation Provisions in International Human Rights Law Treaties and Their Use in Disaster Settings

Publication details
Emanuele Sommario
Published online on: 26 Mar 2018

How to cite :- Emanuele Sommario. 26 Mar 2018, Limitation and Derogation Provisions in International Human Rights Law Treaties and Their Use in Disaster Settings from: Routledge Handbook of Human Rights and Disasters Routledge
Accessed on: 04 Oct 2023

PLEASE SCROLL DOWN FOR DOCUMENT

Full terms and conditions of use: https://www.routledgehandbooks.com/legal-notices/terms

This Document PDF may be used for research, teaching and private study purposes. Any substantial or systematic reproductions, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The publisher shall not be liable for an loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.
Introduction

The Inter-Agency Standing Committee’s Operational Guidelines on the Protection of Persons in Situations of Natural Disasters remind us that people affected by natural disasters do not live in a legal vacuum. They belong to the population of countries that have ratified international and regional human rights instruments and enacted constitutions, laws, rules and institutions that should protect these rights. Indeed, even in such dire predicaments, individuals affected by calamitous events continue to enjoy the protection of International Human Rights Law (IHRL), and nothing suggests that its safeguards lose force when a community is struck by a disaster. On the contrary, States remain responsible for respecting, protecting and fulfilling the rights of all individuals living under their jurisdiction, especially when they are most in need. While there is currently a general lack of human rights treaties specifically addressing the protection of persons affected by disasters, IHRL remains highly relevant, as are the enforcement mechanisms it offers.

Over the last decade much attention and work has been devoted to exploring the relationship between disaster prevention and response and human rights law. Contributions by international human rights courts and tribunals have mainly focused on obligations concerning the prevention and mitigation of risks connected to hazardous events and on elucidating how human rights provisions can be interpreted in the context of disasters to identify assistance obligations incumbent on the affected States. In addition, IHRL has been used to shape disaster management and response strategies, leading many humanitarian actors to adopt a rights-based approach to disaster relief and reconstruction actions.

The International Law Commission (ILC) has also offered its insights on the subject. In 2006, it identified the topic ‘Protection of persons in the event of disasters’ for inclusion in its programme of work, and its work culminated in 2016 in the adoption of a set of Draft Articles bearing the same title. These Draft Articles address limitations and derogations under international human rights law treaties, and their various mechanisms in the context of disasters.

Limitation and Derogation Provisions in International Human Rights Law Treaties and their Use in Disaster Settings

Emanuele Sommario
Limitation and derogation provisions:

Already in his preliminary report, Special Rapporteur Eduardo Valencia-Ospina recognised international human rights law as one of the immediate legal sources regulating international disaster protection and assistance. In its commentary to the article, the ILC considered that the reference to human rights incorporated both the rights and limitations that exist in the sphere of international human rights law and includes, in particular, its treatment of derogable and non-derogable rights. This statement recognises that, even in situations of disaster, national and international legal regimes envisage the possibility to restrict or suspend certain rights to safeguard common societal interests, such as public order or public health. The nature and scope of these restrictions vary depending on the prevailing situation, with more severe circumstances calling for more severe limitations. However, so far, scholars have paid little attention to permissible restrictions on human rights in disaster settings. The present contribution aims to fill this gap.

This chapter will start by briefly illustrating the legal framework developed under international law concerning limitations on the enjoyment of human rights in disaster situations. The attention will then shift to the actual practice of treaty monitoring bodies in reviewing situations in which States have made use of the above powers when faced with natural or technological disasters. Considering that, so far, treaty bodies have never formally examined derogations triggered by disaster situations, we will test the compatibility in abstracto of the derogation notices presented with the relevant normative framework. The analysis will be based on a perusal of the decisions of the main human rights bodies, and in particular of the European Court of Human Rights (ECtHR or Strasbourg Court) and the United Nations (UN) Human Rights Committee (HRComm). In fleshing out the normative framework, reference will also be made to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) that elaborate on the standards developed by treaty monitoring bodies. Finally, while public emergencies may also have profound consequences for the enjoyment of economic, social and cultural rights, their application in disaster settings is addressed elsewhere in this volume, and we will therefore limit our discussion to civil and political rights.

Limitations to the enjoyment of individual rights in human rights treaties

Human rights treaties envisage at least three different techniques to limit the enjoyment of individual rights. The first two allow States to impose ordinary limitations on certain rights, without the need to alter the prevailing treaty regime. The third requires instead that the situation reaches a particular threshold of gravity and that State authorities formally suspend the applicability of some treaty provisions, in order to introduce extraordinary limitations.

Starting with ordinary limitations, these are usually made possible by including the option to interfere with individual rights when certain qualifying conditions are met. This model draws direct inspiration from the general limitation clause contained in Article 29(2) of the 1948 Universal Declaration of Human Rights (UDHR), according to which: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Such limitations are commonly considered to be in the result of the need to balance community interests with the rights and liberties bestowed on individuals."
A second way to impose ordinary limitations is to determine that certain conduct fall outside the protection of the treaty. For instance, Article 8(3)(c)(iii) of the International Covenant on Civil and Political Rights (ICCPR) expressly states that any “service exacted in cases of emergency or calamity threatening the life or well-being of the community” does not amount to “forced or compulsory labour”, which the provision otherwise prohibits. Similarly, Article 5(1) of the European Convention on Human Rights (ECHR or Convention) features an exhaustive list of circumstances which would not constitute violations of the right to liberty and security, such as the “lawful detention of persons for the prevention of the spreading of infectious diseases".

Clearly both these examples are relevant for our purposes, as both “emergencies and calamities” and “the spreading of infectious diseases” might, under certain circumstances, meet the threshold of gravity envisaged by the definition of “disaster".

Moving to extraordinary limitations, the third option available is to derogate from some of the provisions contained in human rights treaties all together. However, resort to the derogation clause is only possible when authorities face a “public emergency which threatens the life of the nation”. Again, certain procedural and substantial conditions need to be fulfilled in order to make valid use of this prerogative. The next two sections will deal in turn with ordinary and extraordinary limitations and analyse the practice that emerged in relation to their use in disaster settings.

Ordinary limitations on human rights in case of disaster

As mentioned above, most human rights are amenable to limitations in favour of overriding public or private interests. Yet the drafters of human rights treaties have included specific safeguards, so as to protect those rights against arbitrary or excessive infringements.

The legal parameters

The text of most limitation clauses provides that restrictions on the freedoms they guarantee are only permissible under certain circumstances. The relevant provisions set out the protected rights in their first paragraph, which are then qualified by listing the conditions under which they can be lawfully restricted. These include the requirement that possible limitations (a) are provided by law; (b) pursue a legitimate aim (i.e. that they serve one of the purposes for interference that are enumerated in the specific provision); and (c) are necessary to achieve said aim, which implies a balancing between the rights restricted and the interest that the limitation seeks to protect. As we shall see, although these requirements are not explicitly spelled out with respect to limitations which are realised by excluding certain conduct from the protection provided by the treaties, monitoring bodies have nevertheless used these or similar conduct rules with regard to such types of limitations.

The requirement of a legal basis

Rights can be restricted only if such possibility is provided for by law. In all major human rights treaties, the term “law" has been understood to indicate a general and abstract act or, in the case of common law systems, an equivalent unwritten norm. The State wishing to impose a given limitation must point to some specific legal rule or regime – recognised in its legal order – which authorises the interfering act.

The law must however present additional features. First, it must be adequately accessible, so that citizens are able to have an indication that it exists and the provisions it contains. The law must also indicate the norm that is sufficient precision to enable the citizen to regulate his conduct. The law must also be adequate, so that citizens are able to have an indication that it exists and the provisions it contains. The law must also indicate the norm that is sufficient precision to enable the citizen to regulate his conduct. This criterion is satisfied if the law is formulated with sufficient precision to enable the citizen to regulate his conduct. This criterion is satisfied if the law is formulated with sufficient precision to enable the citizen to regulate his conduct.
Limitation and derogation provisions

with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.

Furthermore, a law may not confer unfettered discretion for the restriction of individual rights on those charged with its execution. In other words, if the law grants some latitude to public authorities, it must be framed with sufficient clarity and specify the manner in which such discretion will be exercised. In the words of the HRComm, “the law itself has to establish the conditions under which the rights may be limited”. Moreover, later imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.

The need for a legitimate aim

If it wishes to limit individual rights, a State must identify the purpose of its interference. Each provision protecting limitable rights presents an exhaustive list of aims on which restrictions can be based. These include public order (ordre public), public health, public morals, national security, public safety, and the rights and freedoms of others. The right to property — protected by Article 1 of Protocol No. 1 of the ECHR — mentions ‘public interest’ and ‘general interest’ as possible reasons for the imposition of limitations. Of course, limitations are only permitted on the basis of grounds that are explicitly listed in the specific provision. However, the scope of most of the grounds for interference is rather wide, and States can usually make a plausible case that they have a legitimate reason for interfering with the right.

In cases of interference imposed to counter the effects (or to prevent the occurrence) of disasters, the grounds on which these are most commonly based are the maintenance of public order (ordre public) and public safety (e.g. to evacuate and prevent movement to a highly contaminated area); the preservation of public health (e.g. compulsory vaccination to prevent the spreading of lethal infectious disease); or, in the case of the right to property, the protection of a ‘public’ or ‘general’ interest (e.g. to expropriate land or goods necessary to tackle the effects of a disaster).

Necessity and proportionality of limitations

In addition to being lawful and serving a legitimate purpose, any restriction must be ‘necessary’ to achieve its purpose. When restrictions are introduced, States must demonstrate their necessity and only take such measures as are proportionate to the protection of legitimate aims. To prove that a limitation meets this test, it must be shown that the action taken is in response to a pressing social need and that the interference with the rights protected is no greater than is necessary to achieve such need. The latter element is usually referred to as the test of proportionality, through which treaty monitoring bodies balance the severity of the interference against the importance of the public interest. Note, however, that limitations cannot be interpreted strictly and in favour of the rights at stake and cannot be applied or invoked in a manner that would impair the essence of a Covenant right. The relevant provisions do specify that restrictions must be necessary to ensure the democratic society. However, this qualification imposes further restrictions on the use of restrictions to alter, in national law, the relevance of the standards of protection that they do not impair the democratic functioning of the State.

Under the ECtHR case law, States have been granted a ‘margin of appreciation’ in deciding on the nature and scope of the limitations required to protect the general interest. In the Handyside case, the Strasbourg Court stressed that the Convention leaves “to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines”, adding that:

- is aware of their direct and continuous contact with the realities of their country, State authorities are in principle in a better position than the international judge to judge
The margin of appreciation doctrine is applied both with respect to limitations and derogations from the ECHR; but its exact meaning and scope can sometimes be troublesome. The discretion left to States may, in fact, vary depending on the nature of the rights at issue and on the balancing of competing rights. Generally, however, the meaning will be narrower when the right at stake is crucial to the individual's effective enjoyment of intimate or key rights and will disappear with respect to the Convention's non-derogable rights.

Ordinary limitations in the practice of treaty monitoring bodies

There is no abundance of practice concerning ordinary limitations imposed in disaster settings. All of the cases which will be briefly presented have been decided by the bodies tasked with supervising the ECHR, i.e. the ECtHR and the (now extinct) European Commission on Human Rights (ECommHR or Commission). The practice analysed contains examples of the first two kinds of limitations described above, i.e. cases of generic limitations, as well as cases in which a given conduct is explicitly excluded from protection under the relevant article.

Generic limitation clause

The case of I v. Italy concerned the admissibility of a complaint brought in front of the ECommHR for an alleged violation of the right to property protected by Article 1 of Protocol No. 1 to the ECHR. The applicant owned a flat in Naples, which he had rented out, and was living in another, smaller flat in the same city. Having formed a family, he wished to move into the flat he owned and took proceedings against the tenant to have the lease terminated and to secure the use of the property. Meanwhile the applicant was obliged to leave Naples because the flat he was renting had become too small for him and his family, and he had not found any other suitable accommodation. He complained to the ECommHR that the measures introduced to deal with the housing crisis prevented him from using his flat and thus rendered his right to ownership meaningless. He therefore alleged that his right to property had been unlawfully interfered with.

The relevant parts of the article at stake read as follows:

(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. . . .
(2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The Commission determined that the application of the decree represented a restriction on the applicant's right of property, and as such an interference possibly falling under the limitation clause envisaged by the provision. It was thus required to consider two questions: (i) whether
Limitation and derogation provisions:

the legislation at issue pursued a legitimate aim that was in accordance with the ‘general interest’ and (b) whether the control thereby exercised over the applicant’s use of his property was proportionate to the aim pursued.

As to the first question, the decision found that the suspension of eviction orders came under the emergency legislation which was made necessary by the need to deal with a housing crisis in the aftermath of a natural disaster, a purpose that was both legitimate and in accordance with the general interest. The ECommHR thus moved to consider the issue of proportionality by examining the element, the Commission noted that the suspension of the eviction orders had only lasted 16 months during which time the applicant was still able to collect the rent for the flat. It took note of the very serious situation the Italian authorities were confronted with and accepted that their decision to maintain the status quo could not be considered unreasonable, also given the limited time which had elapsed. Particular weight was given to the fact that the necessity of the measure was reviewed at regular 6-month intervals.

Having once more stressed ‘the special circumstances of the case’, and considering the elements of proportionality to which states are entitled, the ECommHR found that the sacrifice demanded of the applicant ‘was not unreasonable when weighed against the legitimate aim pursued’. Hence the limitation was proportionate to the general community interest, and the Commission deemed the application inadmissible.

Another case involving the restriction of individual rights to protect common interests concerned compulsory vaccination against diphtheria, a highly infectious and virulent disease. In Solomakhin v. Ukraine, the applicant complained, inter alia, that there had been no reason for vaccinating him, as there had been no outbreak of diphtheria in his hometown at the relevant time and the vaccine had been strongly contraindicated for him. The Government agreed that the compulsory vaccination had constituted an interference with the applicant’s private life, protected by Article 8 ECHR. However, given the complicated epidemiological situation in the region, it maintained that the interference had been necessary to protect the health of the applicant and of the public at large.

The Court agreed with the Government. It initially noted that the interference was clearly provided by law and pursued a legitimate aim. Elaborating on the issue of proportionality, the Court recalled that the medical staff had checked the applicant’s suitability for vaccination prior to carrying it out, which suggests that necessary precautions had been taken to ensure that the medical treatment would not be to the detriment of an extent that could upset the balance of interests between the applicant’s personal integrity and the public interest of protecting the health of the population. Another decisive element in the Court’s reasoning was the fact that the applicant’s allegations had been thoroughly examined by the domestic courts and found to be unsubstantiated and that he had failed to produce any evidence to challenge the findings of the domestic authorities.

Although the cases surveyed had different outcomes, in all of them the monitoring bodies accepted that the rights at stake could not be compromised to preserve a public interest threatened by a (present or potential) disaster situation. The decisions analysed are therefore not unusual when it comes to the standards used to assess the conduct of the parties. While in I v. Italy the Commission clearly recognised the State’s margin of appreciation in deciding how far it could go in limiting individual rights to preserve the public interest, no mention of said doctrine is present in cases decided by the Court. This means that each apparent inconsistency may be due to different factors, including the importance of the specific right at stake, the presence of a general consensus among State parties regarding the admissibility of a certain restriction and the weight of the interest to be protected through the interference. Yet the quantity of practice makes the identification of a general approach to limitations adopted to tackle or avoid the occurrence of disasters rather difficult.
Limitations imposed by excluding certain conduct from the protective scope of IHRL

Certain provisions included in IHRL instruments explicitly exclude a number of situations from the protective scope of the treaty itself. Article 4(3)(c) ECHR, for instance, considers outside the scope of ‘forced and compulsory labour’ any service that is ‘exacted in a case of emergency or calamity threatening the life or well-being of the community’. As recalled above, Article 5 ECHR prohibits deprivation of liberty save in a number of circumstances, which include ‘the lawful detention of persons for the prevention of the spreading of infectious diseases’ (Article 5(1)(e)). Let us briefly consider the import of both provisions based on the (scant) case law of the ECtHR.

Examining first the forced labour exception, it must be recalled that the provision is clearly inspired by the 1930 Special Convention of the International Labour Organization (ILO) on Forced Labour (ILO Convention). Article 2(d) of this treaty defines the concept of emergency as war or . . . calamity or threatened calamity, such as fire, flood, famine, earthquakes, virulent epidemics or epizootic diseases, intense by animal, insect or vegetable pests, and in general any circumstances that would endanger the existence or the well-being of the whole or part of the population.

A systemic interpretation of the ILO Convention and of the human rights law provisions banning forced labour would suggest that the imposition of special duties in case of emergency should only be tolerated to the very limited extent laid down in the ILO Convention. In S v. Federal Republic of Germany, one of the few cases in which the Strasbourg organ discussed the scope of Article 4(3)(c), the applicant objected to the request of German authorities that he assist in the gassing of foxholes as part of a campaign against a rabies epidemic. The ECommHR argued that, even assuming that the obligation could be considered compulsory labour, the requirement that a hunting tenant participate in measures to control epidemics could be justified under the provision.

The case suggests that treaty monitoring bodies have identified a rather low threshold of gravity with respect to situations that would allow the imposition of compulsory service in case of emergency. Even circumstances considerably less serious than the ones prevailing in times of ‘disaster’ would allow public authorities to impose compulsory duties on individuals. Clearly, fully fledged natural or human-made disasters would allow similar sorts of restrictions.

The second type of limitation, i.e. the possibility of forcibly hospitalising individuals carrying infectious diseases, has so far only been scrutinised by the ECtHR. In Enhorn v. Sweden, the applicant was a homosexual man who was diagnosed with HIV. After discovering that he had unknowingly infected another man, medical authorities issued a number of instructions to the applicant, designed to minimize the risk that he transmitted the virus to others. Among them was the attendance of periodic medical appointments. When the applicant failed to attend a number of them, the Swedish authorities issued an order imposing on him compulsory hospital isolation for 3 months. He was then arrested and interned, and the detention order was renewed several times. However, he repeatedly absconded thereafter with the result that he was in fact deprived of his liberty for a total of about 18 months over a 7-year period.

Having accepted that Enhorn’s detention potentially fell under the exception provided by Article 5(1)(e) ECHR, the ECtHR had to determine whether it was also ‘prescribed by law’. The applicant complained that the piece of domestic legislation according to which he was detained was not precise enough and that too much discretion was granted to the medical officers who had
Limitation and derogation provisions

105

to determine whether he posed a risk to society. The Court acknowledged that, if deprivation of liberty is involved, it is particularly important that the principle of legal certainty be satisfied. It was therefore essential that the conditions for detention be clearly defined and that the law be foreseeable in its application. At the same time, however, the Court accepted that it is for national courts to interpret and apply domestic law. In the case at hand, the Swedish courts had carefully examined the instructions given to the applicant and had concluded that the requirements of the relevant domestic legislation were fulfilled. The ECtHR was therefore satisfied on that basis that the detention was prescribed by law.

The Court then turned to the substantive requirements of Article 5 and determined that the essential elements when assessing the ‘lawfulness’ of the detention of a person for sanitary purposes are (a) whether the disease ‘is dangerous to public health or safety’ and (b) whether detention of the person infected is ‘the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest’.

Regarding the first leg of the test, the Strasbourg judges had no problems in recognising that the HIV virus constituted a serious threat to public health and safety. Yet, with respect to the necessity of the measure, the judgment found that ‘the compulsory isolation of the applicant was not a last resort in order to prevent him from spreading the HIV virus because less severe measures had been considered and found to be insufficient to safeguard the public interest’. Clearly, the judgment attempted to strike a balance between the interference in the right to personal liberty and the necessity to preserve the general interest of society, thereby mirroring the process adopted to assess the necessity and proportionality of generic limitation clauses.

The brief analysis of these cases shows that treaty monitoring bodies have adopted, with respect to this kind of restriction, the very same approach they developed to assess the legitimacy of generic limitations, i.e. first look at whether the restriction is prescribed by law (i.e. there exists a proportionality test in order to prevent him from spreading the HIV virus because less severe measures had been considered and found to be insufficient to safeguard the public interest) and then at whether the restriction is prescribed by law (i.e. there exists a proportionality test in order to prevent him from spreading the HIV virus because less severe measures had been considered and found to be insufficient to safeguard the public interest). Finally, a proportionality test is carried out, weighing the necessity of the interference against the interest of upholding a public interest or the rights of other individuals.

Extraordinary limitations on human rights in case of disaster: using the derogation clause

While calamitous events usually affect a limited portion of a State’s territory, certain natural or technological disasters may have exceptionally severe consequences that go beyond what is allowed by limitation clauses and are not compatible with the affected State’s international obligations under human rights law treaties. The drafters of human rights conventions acknowledged that the States needed to provide for States facing severe consequences with a mechanism that would enable them to ‘loosen the stranglehold of their obligations without running the risk of their membership of the community of States parties being called into question’. This is why the principal human rights instruments include a provision that effect Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR), for instance, provides that:

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 in the extent strictly required by the circumstances provided that such measures are not
Paragraph 2 of this provision goes on to list rights that cannot be derogated from, while paragraph 3 sets out the procedural steps states need to take if they intend to avail themselves of the clause. The right to such a derogation clause is of no little import, because it absolves the State invoking it from international responsibility for failing to fully respect its treaty obligations, provided that certain substantial and procedural rules are complied with.

However, before looking at said rules, it is worth underlining that natural or technological disasters could qualify as ‘public emergencies’ in the sense of Article 4 and hence fall within the sphere of application of derogation clauses. As is apparent from the letter of the provision, the draftsman chose to enframe them as exhaustive lists of situations in which the right to derogate could be invoked. They preferred instead to place the focus on the magnitude and effects of the emergency, irrespective of its nature or origin. Whereas in the vast majority of cases derogations have been justified with reference to situations of armed conflict or terrorist campaigns, there is nothing to indicate that major disasters having the potential to severely undermine the functioning of the State could not amount to ‘public emergencies’ as understood in human rights treaties. This view is supported by the preparatory works of the derogation clause contained in the American Convention on Human Rights (ACHR) but is also widely reflected in legal scholarship. Joseph, Schultz and Castan, for instance, maintain that a severe natural disaster, such as a major flood or earthquake, could qualify as a public emergency for the purposes of Article 4 ICCPR. Commenting on Article 15 ECHR, Boisson de Chazournes expresses the view that ‘[e]nvironmental disasters can . . . give rise to the right of derogation if the conditions of Article 15 are met’. However, as will be seen, the most important element that militates in favour of the application of derogation clauses to certain disasters is the practice of States which have actually invoked them when struck by earthquakes, hurricanes and other similar calamities.

The normative framework: substantial requirements

Once it has been ascertained that disasters may potentially trigger the application of derogation clauses, it needs to be determined under which exact circumstances this may happen and what substantial rules States must comply with to lawfully invoke them.

The requirement that the State faces an ‘exceptional threat’

As the HRComm points out, not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation. When it was called on to work out this notion in relation to Article 15 ECHR, the Strasbourg Court held that the natural and customary meaning of the words ‘other public emergency threatening the life of the nation’ is ‘an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State in question is composed’, and held that the expression indicated ‘an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State in question is composed’.

In the Greek case, the ECtHR elaborated upon the above definition, stating that a ‘public emergency’ must possess the following features:

1. It must be actual or imminent.
2. Its effect must involve the whole nation.
Limitation and derogation provisions:

3. The continuance of the organised life of the community must be threatened.

4. The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

A quick review of these four elements is called for in order to clarify their actual import. The ‘actual’ or ‘imminent’ notion of the emergency implies that derogation is not allowed when the threat is merely ‘latent’ or ‘perceived’. The element of ‘imminence’ sought assumes particular importance with reference to natural or man-made disasters as it could warrant suspension of certain rights before the calamity has actually hit a particular territory (e.g., a hurricane or a radioactive cloud is approaching). In A and Others v. UK, the ECtHR further expanded on the meaning of ‘imminent threats’, specifying that ‘the requirement of ‘imminence’ cannot be interpreted to mean merely to wait for disaster to strike before taking measures to deal with it’.65

The requirement that the emergency must involve ‘the whole nation’ has been loosened as it is accepted that the crisis situation may have a geographically limited scope while still affecting the entire population of the affected area. In Ireland v. UK, the respondent State had limited the applicability of the derogation measures to Northern Ireland, and neither the ECtHR nor Ireland contested its right to do so.66 The Paris Minimum Standards of Human Rights Norms in a State of Emergency67 have also endorsed this view, accepting that the emergency can affect ‘the whole population or the population of the area to which the declaration applies’.68 In other words, disaster situations affecting only part of the State’s territory would still justify resorting to the derogation clause.

The third criterion demands that ‘the continuance of the organised life of the community must be threatened’. According to Hartman, this implies that ‘some fundamental element of statehood, such as the functioning of the judiciary or legislature or the flow of crucial supplies, must be endangered’.70 In the same vein, the Siracusa Principles establish that the situation must be so serious as to imperil ‘the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or base functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant’.71 Again, it is quite likely that major natural or technological disasters may reach – at least during their peak phase – the threshold of severity required.

The last condition requires that a crisis be truly ‘exceptional’, a feature that is assessed on the basis of the quality and scope of the measures required to avert the emergency. Measures that are incompatible with conventional standards must be the last resort and can only be enacted when all ordinary measures are exhausted and have not been adequate to deal with the threat. While considering the prospect of derogation from the ICCPR during a natural catastrophe or a major industrial accident, the HRComm expressed the opinion that ‘the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement or freedom of assembly is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation’.72

Therefore, when crisis situations can be dealt with by resorting to ordinary restrictions, the crisis cannot be deemed to be ‘exceptional’, and derogation from the treaties would be prohibited.

As recalled when discussing ordinary limitations, the Strasbourg organs have left States a ‘wide margin of appreciation’ in deciding ‘whether a given situation qualifies as a public emergency under
Article 15 and (b) if the measures introduced to tackle it are ‘strictly required by the exigencies of the situation’. In Ireland v. UK, the Court has spelled out the concept by stating that:

'It falls in the first place to each Contracting State, with its responsibility for the life of [its] nation, to determine whether that life is threatened by a public emergency and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both as to the presence of such an emergency and as to the nature and scope of derogations necessary to meet it. In this matter Article 15 para. 1 (art. 15–1) leaves those authorities a wide margin of appreciation.'

While the Court was swift to add that it remains responsible for ensuring the observance of the States’ engagements and ‘is not empowered to rule on whether the States have gone beyond the “extent strictly required by the exigencies” of the crisis’, it nevertheless conceded that the limits of its powers in this area are particularly apparent where Article 15 . . . is concerned.

The need for an “official proclamation”

The ICCPR and the Arab Charter require that a state of emergency must be ‘officially proclaimed’. This act usually takes the form of a decision adopted by the political organs of the State and its adoption is normally subordinated to a number of substantive and procedural conditions. The consequences of such an act may involve not only the suspension of certain constitutional guarantees, but also a temporary modification in the allocation of powers and functions among the different State organs. From a human rights law perspective, the act serves the purpose of informing the community about possible extraordinary restrictions on the enjoyment of individual rights and about the changes in the institutional settings prompted by the emergency. The rationale behind its inclusion as the derogation clause appears to have been the desire to reduce ‘de facto’ emergencies by compelling States that intend to suspend human rights to do so openly, respecting the formalities required by national law. The HRComm emphasises that this requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. Both the HRComm and the Siracusa Principles stress that the act must be adopted by a competent body and in accordance with the relevant domestic legal regime. In all the instances of derogation motivated by natural disasters, the principle of official proclamation appears to have been fully observed, and the derogating authorities have made it a point of indicating that they were acting within the boundaries of municipal law.

Necessity and proportionality of derogation measures

Once it is established that a given event represents a public emergency, it must be asked whether the measures adopted to confront it are strictly required by the exigencies of the situation. As with ordinary limitations, the severity of the measures resorted to must strictly depend on – and correspond to – the gravity of the threat. The HRComm has deemed the principle of strict necessity to be ‘a fundamental requirement for any measures derogating from the Covenant’ and one which 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.

Looking first at the temporal dimension, the requirement stipulates that derogatory measures can only be kept in place as long as the emergency persists. In the words of the ECommHR:
Limitation and derogation provisions

Article 15, paragraph 3, clearly means that the measures of derogation which it provides for are only justified in the circumstances defined in paragraph 1, with the result that if they remain in force after those circumstances have disappeared they represent a breach of the Convention. As to the ‘geographic’ element, the principle of strict necessity demands that the applicability of any derogation measure be limited to the areas where the emergency actually unfolds, although one could think of situations in which certain rights may be suspended even outside said areas where this is absolutely necessary to counter the effects of the disaster.

Moving to the scope of the derogation measures enacted, States are again required to strike a balance between the rights and freedoms of individuals and the public interest that is imperilled by the emergency. In reviewing state compliance with the principle, treaty bodies have developed a number of criteria. In the first place, it must be asked whether a given measure is required at all, in light of the fact that ordinary measures are insufficient to meet the public danger. A derogation measure would fail this test if a course of action permissible under the substantive provisions of the treaties would accomplish the same end. Second, each measure of derogation must bear some relation to the threat and be apt to contribute to the solution of a specific problem that forms part of the emergency. In the words of the ECommHR, ‘there must be a link between the facts of the emergency on the one hand and the measures chosen to deal with it on the other’. Third, when more than one measure appears acceptable after balancing the right encroached upon with the exigencies of the situation, the least interfering measure must be chosen.

While assessing the requirement of strict necessity, much emphasis has been put on the availability of sufficient safeguards against the abuse of derogation measures. The need for a proper assessment of emergency legislation and for a periodic review of emergency powers by the legislature or by the judiciary have been identified as essential factors in this respect. A continuous review of derogation measures is particularly relevant in emergencies prompted by disasters, which are inherently dynamic phenomena whose gravity varies over time and which call for a continuous readjustment of the nature and scope of emergency measures. Closely linked to this requirement is that effective remedies remain available to persons affected by emergency legislation.

The prohibition on discriminatory measures

The derogation clauses in the ICCPR, the ACHR and the Arab Charter stipulate that emergency measures shall not entail discrimination based ‘solely on the ground of race, colour, sex, language, religion or social origin’. The HRComm, noting that neither Article 26 ICCPR (establishing equality before the law) nor other provisions related to non-discrimination are listed among the non-derogable provisions in Article 4, considers that ‘there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances’ and that the prohibition on discrimination ‘must be complied with if any distinctions between persons are made when measuring to what extent derogations from the Covenant are justified’.

In the context of disaster response, the prohibition on discrimination would prohibit measures that foster inimicable distinctions among individuals or communities with respect to the prioritisation in the provision of assistance. In this sense, non-discrimination can be seen as a facet of the duty of impartiality that States and humanitarian actors owe to disaster-stricken populations.
The conformity of derogation measures with the State’s other obligations under international law

Even if specific derogatory measures were found to comply with the criteria set out so far, a State would be barred from resorting to them if their introduction breached other international obligations to which it is bound. These will obviously vary from State to State, depending on their level of participation in multilateral and bilateral treaties. Yet, in assessing State responsibility for failure to comply with obligations stemming from other instruments, it must be borne in mind that these could include provisions allowing for their suspension or that the other parties to the treaty not agree to temporarily exempt the derogating State from its legal commitments. Furthermore, the treaty obligations could be terminated or suspended if it becomes impossible to perform them due to a fundamental change of circumstances.

The requirement of consistency has generated very little case law by treaty bodies. Commentators have indicated that the expression would include obligations under the UN Charter, International Humanitarian Law, other international or regional Human Rights treaties, European Union Treaties, ILO Conventions, Refugee Law treaties and the International Health Regulations. The HRComm includes International Criminal Law as a source of possible obligations. Also relevant are obligations stemming from Security Council resolutions and any rules of international law that would be violated. It would be difficult to overemphasize the importance of the derogation proviso during a disaster-related emergency, as it is intended to be applied in exactly those situations.

Reverting to the field of human rights law, a convincing argument can be made that a State derogating from a treaty listing only a limited number of non-derogable rights, which is also a party to another treaty containing a longer catalogue of non-derogable rights, is precluded from derogating from the supplementary rights that are included in the latter treaty.

Non-derogability of certain civil and political rights

One of the cornerstones of the derogation regime is the principle of non-derogability according to which certain rights can never be suspended, even in the presence of a public emergency. The different derogation clauses contain such a list of these rights, which – broadly, owing to the lapse of time between the adoption of the instruments – display certain differences. Those which are common to all human rights treaties are: the right to life; the prohibition of torture and cruel, inhuman and degrading treatment and punishment; the prohibition of slavery and the prohibition of retroactive application of criminal law, most of which are considered to reflect norms of jus cogens. The list of non-derogable rights goes beyond the ones here listed and is held to have been expanded through customary international law. However, these aspects are of little consequence for our purposes as no State has in fact ever attempted to derogate from any of the rights that are regarded as non-derogable. Also, no treaty monitoring body has so far claimed the status of non-derogability for the rights and freedoms that States have asked to suspend in times of disaster.

The normative framework: procedural requirements

Article 15 ECHR requires a State invoking the right to derogate to keep the Secretary-General of the Council of Europe fully informed of the measure it has taken and of the reasons for doing so. This is usually done by filing a so-called derogation notice, which the Secretary-General then circulates to other member States. The purpose of the procedural safeguard is twofold on
Limitation and derogation provisions

On the one hand, it allows the monitoring bodies to discharge their surveillance functions over the nature and scope of the derogation measures enacted; on the other hand, it enables other State parties to monitor compliance with the provisions of the treaties and to exercise their own rights accordingly. As to the timing, a State exercising its right of derogation under the ICCPR must ‘immediately inform’ the other State parties of the emergency measures undertaken. The ECHR has no requirement of ‘immediacy’, yet Article 15 ECHR has been interpreted as requiring notification ‘without delay’ after the entry into force of the measures concerned.

While there are no formal requirements for the notice, the HRComm demands that States provide ‘sufficient information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law’. Further notifications are required when the derogation regime is subject to modifications and when the State intends to withdraw the derogation. More generally, the scope and depth of the information regarding derogation measures must be such as to enable the other State parties and the monitoring bodies to appreciate the nature and extent of the derogation from the provisions of the Convention which those measures involve.

State practice regarding derogations in times of disasters

As mentioned above, practice under the ICCPR and ECHR – although rather scant – suggests the permissibility of derogations in case of major calamitous events. Article 4 ICCPR has been invoked by at least five States in cases of natural disasters. On 23 November 1998, Guatemala notified the UN Secretary-General that it intended to suspend several human rights guarantees in order to tackle the ‘public disaster’ generated by the passage of hurricane Mitch. The notice of derogation was accompanied by the text of the emergency decree enacted by the President describing the measures implemented. Pursuant to the decree, the Government could (a) ‘centralize all State and privately owned public services’, (b) ‘establish sanitary cordons, change or maintain people’s place of residence, limit vehicular traffic and prevent people from entering affected areas’, (c) ‘demand the necessary assistance and cooperation from members of the public to help control the affected areas’, (d) ‘organize the immediate evacuation of the inhabitants of the affected areas’, and (e) ‘with due and orderly authority to take all necessary steps to protect people and property’. The same State again invoked the derogation clause when confronted with the effects of hurricane Stan (October 2005). The state of emergency was declared for a period of 30 days, and it restricted ‘the right of liberty of movement and the right of freedom of action, except for the right of persons not to be harassed for their opinions or for acts which do not violate the law’. In May 2009, Guatemala again derogated to deal with the ‘violent social protest’. On that occasion, a ‘public health emergency’ was declared throughout the national territory for a period of 30 days, with a view to ‘preventing and mitigating the effects of the influenza A (H1N1) epidemic’. The government suspended Article 12 (right to liberty of movement), Article 19 (right to freedom of expression) and Article 21 (right of peaceful assembly) of the Covenant. A few months later (May–June 2010), Guatemala again invoked Article 4 ICCPR when it had to cope with the eruption of the Pacaya volcano and the devastations caused by tropical storm Agatha. With respect to the volcano eruption, a ‘disaster emergency’ was declared for 30 days in some of the country’s Departments, to safeguard the ‘safety and freedom from disturbance of persons and their property... and to prevent or reduce the impacts of the eruption’. On 13 November 2012, Guatemala again submitted a notice of derogation in response to a severe earthquake that struck the country one week earlier, asking to suspend the right to freedom of movement.

111
Jamaica also derogated from Articles 12, 19 and 21 of the Covenant in response to the devas-
tations caused by hurricanes Ivan in 2004 and Hurricane Dean in 2007. Chile filed a deroga-
tion notice in March 2010 stating its intention to suspend freedom of movement and freedom
of assembly in order to deal with the aftermath of the powerful earthquake that struck some
of the country’s regions. The measures were publicly announced through the adoption of a decree
declaring a 30-day constitutional state of disaster emergency. In March 2006, it was Georgia’s
turn to via Article 4 of the Covenant when authorities felt they had to suspend – in one of the
country’s districts – constitutional guarantees related to freedom of movement and to the right
to property in order to prevent further spread of the Avian Flu virus. Lastly, in June 2010, Peru
decided to suspend Article 15 of the Covenant in the provinces affected by a violent
earthquake, which caused almost 700 deaths and injured more than 16,000 people. According
to the Executive Order attached to the notice, suspension of the rights was done as a reaction
to prevent individuals affected by the disaster from returning to their homes, as these were still
unstable and potentially dangerous.

The lawfulness of the above derogations has not been tested by the HRComm under the
individual communications procedure. However, to this author’s knowledge, none of the
UN human rights treaty monitoring bodies has so far expressed concern or disapproval at
the emergency measures adopted, nor have these been criticised by other State parties to
the Covenant.

**Conclusions**

While human rights treaty monitoring bodies have rarely dealt with cases of limitations or dero-
gations prompted by disasters, States often resort to special powers when faced with such predic-
taments. The reasons for the scarce involvement of expert bodies are difficult to explain. Certainly,
at least in the case of derogations, had the latter been of a hoary and temporally limited nature, it is likely that the proportionality of the exceptional measure introduced could not be called into question. More generally, it is reasonable to assume that individual rights are subject to restrictions due to catastrophes events might require emergency measures with mitigating, since public authorities are confronted with extremely dangerous and volatile situations, which can have the potential to severely jeopardise the safety of the population.

One thing limitations and derogations have in common is the balancing exercise between
the individual rights curtailed and the general interest that needs to be upheld. This requires
the application of the same legal principles (proportionality, non-discrimination, etc.), with the
notable difference that in the case of derogations, States are generally granted a greater leeway in
deciding which measures to implement (even more so under the ECHR jurisprudence, which
accords them a “wide margin of appreciation”).

One wonders, however, if derogating from human rights conventions in disaster situations is
really a necessary step. First of all, international treaties establish minimum standards of protec-
tion, and States often have the possibility to depart from these domestic standards without reach-
ing the “floor” established by international instruments. In other words, “abnormal” measures can
be used without violating the treaties (and, therefore, without the need to derogate). Moreover, quite often the rights derogated from in disaster settings have built-in limitation clauses, which are usually sufficient to accommodate restrictive measures. For instance, the need to compel members of the public to assist in dealing with the consequences of hurricane Mitch – which, according to the UN human rights committee, made it necessary to derogate from the
ICCPR – could probably have been accommodated by invoking Article 8(3)(c)(iii) of the treaty, which allows the imposition of compulsory labour in emergency situations.
Limitations and derogation provisions

However, resort to derogations to counter the effects of calamities seems on the rise. One possible explanation is that some States use the derogation clause as a sort of "safety net", as they are not completely sure whether the measures they introduce are compatible with normal convention standards. This means that derogation notices are often presented on precautionary grounds, to avoid international responsibility should emergency measures be found to be in conflict with convention obligations. In fact, States often indicate that there "may be derogation from the rights guaranteed" by the treaties, suggesting that it is not necessarily their intention to suspend them. Some degree of clarity on these matters could emerge from the practice of treaty-monitoring bodies. While, as a scholar, one would usually appreciate the opportunity to examine such practice, in this particular field, we are content with what little has been produced so far, as this means that no disaster has occurred or (more likely) that national authorities have not deemed it necessary to impose extraordinary constraints on individual rights.

Selected bibliography


Notes

* The author is grateful to Annalisa Creta, Andrea de Guttry and Francesca Spagnuolo for their comments on earlier drafts of this chapter. Any remaining errors or omissions are, of course, entirely the author’s responsibility.


4 See, among many, the decisions of the ECtHR in Budayeva and Others v. Russia, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, Judgment of 20 March 2008), and Öneryildiz v. Turkey, App. No. 48939/99 (ECtHR, Judgment of 30 November 2004). See also M. Hesselman, 'Regional Human Rights Regimes and Humanitarian Obligations of States in the Event of Disaster' in A. Zwitter, C.K. Lamont, H.-J. Heintze and J. Herman (eds), Humanitarian Action: Global, Regional and Domestic Legal Responses (Cambridge University Press, 2014) 202–227.

5 See Creta’s chapter in this book.


Emanuele Sommario

I. Introduction

1. The concept of disaster has been adopted by a group of eminent legal experts in 1984 and reproduced in 7 Human Rights Quarterly (1985) 3.

2. The Siracusa Principles have been adopted by a group of eminent legal experts in 1984 and are reproduced in 7 Human Rights Quarterly (1985) 3.

II. Legal Framework

3. The concept of disaster considered is the one contained in the definition developed by the ILC in its report on the protection of persons in the event of disasters. According to draft art 3(a), the term indicates 'a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society'; see ILC Report, UN Doc. A/71/10 (n. 7) 14. See also Bartolini's chapter in this volume.

4. The notion of disaster considered is the one contained in the definition developed by the ILC in its report on the protection of persons in the event of disasters. According to draft art 3(a), the term indicates 'a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society'; see ILC Report, UN Doc. A/71/10 (n. 7) 14. See also Bartolini's chapter in this volume.

III. Legal Principles

5. The concept of disaster considered is the one contained in the definition developed by the ILC in its report on the protection of persons in the event of disasters. According to draft art 3(a), the term indicates 'a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society'; see ILC Report, UN Doc. A/71/10 (n. 7) 14. See also Bartolini's chapter in this volume.

6. The concept of disaster considered is the one contained in the definition developed by the ILC in its report on the protection of persons in the event of disasters. According to draft art 3(a), the term indicates 'a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society'; see ILC Report, UN Doc. A/71/10 (n. 7) 14. See also Bartolini's chapter in this volume.

IV. Legal Practice

7. The concept of disaster considered is the one contained in the definition developed by the ILC in its report on the protection of persons in the event of disasters. According to draft art 3(a), the term indicates 'a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society'; see ILC Report, UN Doc. A/71/10 (n. 7) 14. See also Bartolini's chapter in this volume.

V. Conclusion

8. The concept of disaster considered is the one contained in the definition developed by the ILC in its report on the protection of persons in the event of disasters. According to draft art 3(a), the term indicates 'a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society'; see ILC Report, UN Doc. A/71/10 (n. 7) 14. See also Bartolini's chapter in this volume.

References


10. The Siracusa Principles have been adopted by a group of eminent legal experts in 1984 and are reproduced in 7 Human Rights Quarterly (1985) 3.

11. The very same wording is used in art 4(3)(c) ECHR and in art 6(3)(c) ACHR (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

12. This requirement in also presupposed by art 18 ECHR, according to which 'restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'.


14. The very same wording is used in art 4(3)(c) ECHR and in art 6(3)(c) ACHR (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.


Limitation and derogation provisions:

34 See A. Legg, *The Adoption of International Human Rights Law* (Oxford University Press, 2006). According to this author, even the ECtHR (at 32) and the IACtHR (at 33) whilst not explicitly endorsing this doctrine have granted States a certain margin of appreciation when deciding cases (ibid at 81). However, in cases of the same sort, General Comments by the HRComm have explicitly endorsed the derogation doctrine. See HRComm, General Comment No. 34 (n. 19) para 36.

35 See Amato v. Turkey (ECtHR, Judgment of 25 March 1998) para 79.


37 While this provision is drafted under different terms, the limitations it has been applied by pretty much the same way as prior limitations to the right are only possible if provided for in law, justified for pursuing a collective interest and proportionate to said interest. See Rainey et al. (n. 12) 192–194, 203–205, 211.

38 A somewhat similar case was decided by the ECtHR in 2007, where it determined that the distinction of a united house that was damaged by an earthquake and disconnected public utilities, constituted a disproportionate interference with the applicant’s right to property, as a sort of compensation was known, see Enhorn v. Sweden (ECommHR, Decision of 25 January 2005) para 82.


40 See Connors v. UK (ECtHR, Judgment of 27 May 2004) para 82.

41 According to the ECtHR, ‘... the right to property is subject to certain limitations, which, however, does not mean that the right can be derogated in the same manner as other human rights’ (ibid para 44).

42 There is also a similar case decided by the ECommHR in 2007, where it determined that the destruction of a private house that was damaged by an earthquake and threatened public safety constituted a disproportionate interference with the applicant’s right to property, as a sort of compensation was known, see Amato v. Turkey (ECtHR, Judgment of 25 March 1998) para 79.

43 See Rainey et al. (n. 12) 192–194, 203–205, 211.

44 Ibid para 36.

45 On the factors influencing the use of the margin of appreciation doctrine by the ECtHR, see Harris et al. (n. 50) para 44.

46 As seen above, the exact same language is used in art 8(3)(c)(iii) ICCPR, while art 6(3)(c) ACHR speaks of ‘service exacted in time of danger or calamity that threatens the existence or the well-being of the community’. Convention Concerning Forced or Compulsory Labour (ILO Convention No 29) (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55.

47 The ECtHR’s conclusions in the Enhorn case do not necessarily rule out the legality of temporarily detaining individuals on the condition that the measures are proportionate and justified. See HRComm, General Comment No. 34 (n. 19) para 36.

48 The IACtHR has explicitly endorsed this doctrine – have granted States a certain margin of appreciation when deciding cases (ibid at 81). According to this author, even the IACtHR (at 33) whilst not explicitly endorsing this doctrine have granted States a certain margin of appreciation when deciding cases (ibid at 81). However, in cases of the same sort, General Comments by the HRComm have explicitly endorsed the derogation doctrine. See HRComm, General Comment No. 34 (n. 19) para 36.

49 While this provision is drafted under different terms, the limitations it has been applied by pretty much the same way as prior limitations to the right are only possible if provided for in law, justified for pursuing a collective interest and proportionate to said interest. See Rainey et al. (n. 12) 192–194, 203–205, 211.

50 Connors v. UK (ECtHR, Judgment of 27 May 2004) para 82.

51 See Rainey et al. (n. 12) 192–194, 203–205, 211.

52 Ibid para 55.

53 Virtually identical provisions can be found in other treaties protecting civil and political rights, such as:

54 See A. Legg, *The Adoption of International Human Rights Law* (Oxford University Press, 2006). According to this author, even the ECtHR (at 32) and the IACtHR (at 33) whilst not explicitly endorsing this doctrine have granted States a certain margin of appreciation when deciding cases (ibid at 81). However, in cases of the same sort, General Comments by the HRComm have explicitly endorsed the derogation doctrine. See HRComm, General Comment No. 34 (n. 19) para 36.


56 For a general introduction to the derogation clauses and their operation see R. Ergec, *Les Droits de l’homme à l’épreuve des circonstances exceptionnelles – Etude sur l’article 15 de la Convention européenne des droits de l’homme* (Oxford University Press, 2012). According to this author, even the IACtHR (at 33) whilst not explicitly endorsing this doctrine have granted States a certain margin of appreciation when deciding cases (ibid at 81). However, in cases of the same sort, General Comments by the HRComm have explicitly endorsed the derogation doctrine. See HRComm, General Comment No. 34 (n. 19) para 36.
See for instance the text of the derogation notices filed under the ICCPR, reported in Novak (n. 17) 984–1041.


HRComm, General Comment No. 29. States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) para 3.

Ireland v. UK, App. No. 5310/71 (ECtHR, Judgment of 18 January 1978) para 205. The Court adopted a similar stance in Aksoy v. Turkey, App. No. 21987/93 (ECtHR, Judgment of 18 December 1996) para 70. See also R. Higgins, ‘Derogations under Human Rights Treaties’ 48 British Yearbook of International Law (1976–1977) 289–290, ft 5, listing a considerable number of derogations made by the UK under art 15 with respect to some overseas colonies to which it had extended the application of the Convention in accordance with art 63 of the treaty. Quite clearly, the disorders in those distant territories could hardly be considered to be a threat to the whole population of the UK.


Ibid 1073.

Ireland v. UK (n. 66) para 207.

Ibid.

Ibid. Interestingly, the drafters of the Siracusa Principles did not seem ready to accord States a margin of appreciation, at least with respect to the necessity and proportionality of the derogation measures. See Siracusa Principles (n. 10) N. 57.

While this requirement is not explicitly foreseen by the ECHR, the ECommHR has found that an urgent event, serious and grave, of a derivative nature, is necessary, and that which, in the absence of a derogation mechanism, states are prevented from the High Contracting Parties’ control, although at the same time emergency powers remain in force. See De Becker v. Belgium, App. No. 214/56 (ECommHR, Report of 8 January 1960) para 271. The principle was reaffirmed by the IACommHR in its Report on the situation of human rights of a segment of the Nicaraguan population of Miskito origin, OAS/Ser.L./V.II.62, Doc. 10 rev. 3 (29 November 1983) 117–118.
Limitation and derogation provisions:

82 Novak (n. 17) 98.

83 Description, these particular aspects of the right to property, for instance, could under given circum-
stances be restricted even within areas of the country not directly affected by a calamity, in order to
secure provision and self-sufficiency in the area worried problem.

84 In the HRComm, General Comment No. 29 (n. 61) para 7.

85 As observed above, this element is also present within the exception of article 15 ECHR. Yet, as with the
principle of non-discrimination, it could be argued that in those cases in the Convention that are not
covered specifically in article 14 ECHR, making discriminatory measures that are based on one of the
protected traits under article 15 ECHR, requires in addition one of the other derogation clauses.


87 The principle of non-discrimination is not mentioned in article 15 ECHR. Yet, as with the principle of
official proclamation, it could be argued that, for State parties to the Convention that are also parties
to the ICCPR, the prohibition on taking derogatory measures that may discriminate on one of the
ground listed in article 4(1) of the ICCPR represents one of the other obligations under international law
that must be respected when derogating from the ECHR.

88 Oraà (n. 56) 142.

89 Siracusa Principles (n. 10) Nn. 55–56.

90 The principle of non-discrimination is not mentioned in art 15 ECHR. Yet, as with the principle of
official proclamation, it could be argued that, for State parties to the Convention that are also parties
to the ICCPR, the prohibition on taking derogatory measures that may discriminate on one of the
ground listed in article 4(1) of the ICCPR represents one of the other obligations under international law
that must be respected when derogating from the ECHR.

91 HRComm, General Comment No. 29 (n. 61) para 8.


94 Ibid art 61.

95 Ibid art 62.


97 See Sommario (n. 16) 338–339.

98 HRComm, General Comment No. 29 (n. 61) para 13.

99 Ibid para 11.

100 See A. de Guttry, ‘Surveying the Law’ in de Guttry, Gestri and Venturini (eds) (n. 11) 3–44.

101 Oraà (n. 56) 205; Harris et al. (n. 32) 844.

102 The longer lists in the ICCPR, the ACHR and the Arab Charter are also explained by the different
rationale behind the inclusion of certain rights, which were added because they were perceived as
being absolutely central to the protection of individuals in emergency situations, but never because
their suspension could not be justified in such contexts, see HRComm, General Comment No. 29
(n. 61) paras 13, 15–16.

103 Questiaux (n. 54) 19.

104 For a detailed description of the conditions of right included in the various treaties, see Sommario
(n. 16) 342–343.

105 HRComm, General Comment No. 29 (n. 61) paras 15, 16.


107 HRComm, General Comment No. 29 (n. 61) para 17.

108 Lawless v. Ireland (n. 86) 73.

109 HRComm, General Comment No. 29 (n. 61) paras 17.

invoked the derogation clause due to emergencies caused by natural hazards, including a case of drought.

115 ICCPR, Notification under Article 4(3) of the Covenant: Georgia (7 March 2006) 2363 UNTS 465. In this case, Georgia also derogated from Article 25 (right to freedom of association and to form and join trade unions). The derogation was withdrawn on 27 October 2006, and the public emergency lasted from 15 September to 31 October 2006.

116 ICCPR, Notification under Article 4(3) of the Covenant: Jamaica (28 August 2007) 2466 UNTS 11–20. The derogation measures entered into force on 19 August 2007 and were withdrawn on 24 August 2007. A notification announcing the end of the public emergency was made to the UNHCR on 27 August 2007.

117 See ICCPR, Notification under Article 4(3): Chile (23 March 2010) 2659 UNTS 39. The derogation was then renewed in January 2011, when a 60-day state of emergency was declared; see ICCPR, Notification under Article 4(3): Ecuador (originally received 20 January 2011, further information provided 15 March 2011) A-14668-Ecuador-080000028049d4f5.pdf UNTS 1.

118 See supra, at 104. This is, for instance, the wording of the 2007 Jamaican derogation to the ICCPR, triggered by the violence of hurricane Dean (n. 116).