Subject: Human Rights & Duties

Paper: Civil and Political Rights
Module: Non-derogable rights - 1

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<table>
<thead>
<tr>
<th><strong>Subject Name</strong></th>
<th>Human Rights and Duties</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Paper Name</strong></td>
<td>Civil and Political Rights</td>
</tr>
<tr>
<td><strong>Module Name/Title</strong></td>
<td>Non-derogable rights - 1</td>
</tr>
<tr>
<td><strong>Module Id</strong></td>
<td>29</td>
</tr>
<tr>
<td><strong>Pre-requisites</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Objectives</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Keywords</strong></td>
<td></td>
</tr>
</tbody>
</table>
Table of Contents

1. Learning Outcomes
2. Introduction
3. Non-Derogable Rights in the ICCPR
   3.1 Article 4 of the ICCPR
   3.2 Non-derogable Rights (Second Optional Protocol Article 6)
4. Non-derogable rights (General Comments)
   4.1 HRC, General Comment 29 on Article 18, ICCPR
   4.2 Other General Comments of the HRC that speak on no derogation
5. Non-derogable Rights: Peremptory Norms
   5.1 What are peremptory norms?
   5.2 Peremptory norms in the ICCPR
6. Summary
1. Learning Outcomes

- To give students an overview of those rights that are non-derogable on account of them being expressly stated as such in the international instruments as well as those rights that are non-derogable on account of being peremptory norms from which no State can derogate from by way of treaty;

- By the end of the module students will have an understanding of those civil and political rights that are enshrined in international instruments with respect to non-derogable rights with specific focus on the International Covenant on Civil and Political Rights, 1966 (ICCPR).

2. Introduction (Voice Over)

The concept of non-derogation is related to the idea of core human rights and comprises mostly of “first generation” rights. While international human rights treaties allow for derogations which may be understood as “the act of a state suspending the application and enjoyment of certain human rights upon its declaration of a state of public emergency affecting the life of a whole nation,” even in those exceptional situations, certain core human rights must apply at all times. These rights are understood to be non-derogable. This module familiarizes students with those specific civil and political rights that are understood to be non-derogable with specific focus on the ICCPR provisions and its authoritative interpretation by the Human Rights Committee in the General Comments. The module further deals with rights that are non-derogable on account of enjoying status of jus cogens.

3. Non-derogable rights in the ICCPR

The ICCPR specifically sets out a list of rights that state-parties may never derogate from. The Human Rights Committee (the treaty monitoring body for the ICCPR) (HRC) has further expounded this concept in its authoritative interpretations known as General Comments.

3.1. Article 4 of the ICCPR

Article 4 of the ICCPR is of paramount importance for the system of protection for human rights under the ICCPR. It specifies the circumstances in which derogation from the obligations enshrined in the ICCPR is permitted by state parties and also lists the rights that are non-derogable. According to Article 4(1), 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 ICCPR may take measures derogating from their obligations under the ICCPR to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under
international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. The HRC in General Comment 29: States of Emergency (Article 4) (General Comment 29) has clarified that measures derogating from the provisions of the ICCPR must be of an exceptional and temporary nature. Before a State moves to invoke article 4(1), two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. Further, the phrase “to the extent strictly required by the exigencies of the situation” implies that states justify measures on the basis of the principle of proportionality.

No measure derogating from the provisions of the ICCPR may be inconsistent with the State party’s other obligations under international law, particularly the rules of international humanitarian law. This is reflected in Article 5(2) of the ICCPR. For e.g. if action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity under the Rome Statute, Article 4 cannot be used as justification that a state of emergency exempted the State in question from its responsibility.

Article 4(2) lists out rights from which no derogation is possible as the rights are reflective either of peremptory norms or because these rights are such that derogation from them can never be justified in an emergency:

a) **Article 6**: Article 6 states that, every human being has the inherent right to life. This right shall be protected by law and no one shall be arbitrarily deprived of his life. It further states that, when deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the ICCPR to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. At the time of drafting of the ICCPR, there was general agreement among States Parties on the need to safeguard this right, however the scope and delineation of this right has been the subject of much discussion. For instance a heavily debated question is whether abortion or contraception is limiting the inherent right to life under Article 7 and should therefore be prohibited under domestic law. Another issue is with respect to dilution of right to life so as to permit death penalty.

b) **Article 7**: Prohibition of torture, cruel, inhuman and degrading treatment. The Human Rights Committee in General Comment 20 has held that, “the scope of the protection required goes beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment”.

c) **Article 7**: Prohibition of medical or scientific experimentation without consent. The HRC in its Universal Periodic Review exercise has opined that, more attention needs to be given in securing
observance of this right especially by countries whose scientific and medical capabilities are highly
developed. Special protection in regard to such experiments is necessary in the case of persons
not capable of giving their consent.

d) Article 8: Prohibition of slavery, slave trade and servitude. Slavery and servitude are terms with
separate connotations. While slavery implies destruction of juridical personality and is considered
the worst form of bondage intended to destroy the dignity of an individual, servitude was a more
generic idea covering all possible forms of domination of an individual.

e) Article 11: Prohibition of imprisonment because of inability to fulfil contractual obligation. It is
understood that this prohibition does not apply to crimes committed through the non-fulfilment
of obligations of public interest, imposed by statute or Court order, such as the payment of
maintenance allowances. It also does not apply if the debtor acts with malicious intent and
deliberately refuses to fulfil contractual obligations or neglects to do so.

f) Article 15: Principle of legality and non-retroactivity 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. Article 15 incorporates the principle of *nullum crimen sine lege* and *nulla poena
sine lege*, that is, there can be neither crime nor punishment unless there is a law that so declares.

g) Article 16: Recognition everywhere as a person before the law. Article 16 is inspired by Article 6 of
the Universal Declaration on Human Rights. The expression ‘as a person before the law’
recognizes the legal status of every natural person and his capacity to exercise rights and enter
into contractual relations.

h) Article 18: Freedom of thought, conscience and religion. This freedom encompasses freedom of
thought on all matters, personal conviction and the commitment to religion or belief, whether
manifested individually or in common with others. The ICCPR uses belief and religion broadly and
seeks to promote a wide range of thoughts. Article 18 distinguishes between the freedom of
thought, conscience, religion or belief from the freedom to manifest religion or belief. The former
is protected absolutely, however; the latter is subject to restrictions set out in Article 18(3).
Therefore for e.g. right of proselytization can be limited but right to follow a particular belief may
not. No one can be coerced in a manner that impairs his freedom to have or to adopt a religion or
belief of his choice. The word ‘belief’ is to be understood in the widest terms to include even
atheism.

3.2 Non-derogable Rights (Second Optional Protocol Article 6)
Article 6 of the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of Death Penalty, 1989 states that, the right guaranteed in Article 1, of the Optional Protocol i.e. the right of any person within the jurisdiction of a State Party not to be executed shall not be subject to any derogation under article 4 of the ICCPR.

4. Non-derogable rights (General Comments)

4.1 Human Rights Committee, General Comment 29 on Article 18, ICCPR

In addition to Article 4 of the ICCPR, the General Comments of the HRC have added to the list of non-derogable rights through authoritative interpretation. General Comment 29 states that, even 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;
- The prohibitions against taking of hostages, abductions or unacknowledged detention;
- The rights of persons belonging to minorities;
- Prohibition on deportation or forcible transfer of population without grounds permitted under international law (this would be contrary to the Rome Statute of the International Criminal Court). The legitimate right to derogate from Article 12 of the ICCPR (freedom of movement and right to leave the country including one’s own) during a state of emergency can never be accepted as justifying such measures;
- No declaration of a state of emergency made pursuant to article 4(1), may be invoked as justification for a State party to engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence;
- Certain elements of the right to non-discrimination (even though article 26 or the other ICCPR provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2)

4.2. Other General Comments of the Human Rights Committee that speak on non-derogation

In General Comments 24, 29, 32 34 and draft General Comment 35, the HRC has identified additional rights and prohibitions that cannot be subject to lawful derogation, including:

- Freedom of opinion—although is not listed among those rights that may not be derogated from pursuant to the provisions of article 4 of the ICCPR, it has been understood to possess
elements that in the HRC’s opinion cannot be subject to lawful derogation, since it can never be necessary to derogate from it in an emergency (General Comment 34);

- The right to an effective remedy in the case of violations under the ICCPR (General Comment 29, General Comment 24);

- In order to protect rights explicitly recognized as non-derogable in Article 4(2) procedural safeguards and judicial guarantees must be provided for. The provisions of the ICCPR relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. For instance, as Article 6 of the ICCPR is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the ICCPR, including all the requirements of articles 14 and 15;

- The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Therefore, the right to be tried by a competent, independent and impartial tribunal established by law is non-derogable, (General Comment 32);

- The right to take proceedings before a court to enable the court to decide without delay the lawfulness of detention (General Comment 29, draft General Comment 35);

- The right not to be compelled to testify against oneself or to confess guilt. No statements or confessions may be obtained in violation of the principles of Article 14 (General Comment 32);

- Prohibition of statements or evidence that are obtained in violation of article 7 ICCPR (General Comment 32, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 15)

5. Non-derogable Rights: Peremptory Norms

5.1 What are peremptory norms?

Peremptory norms are certain overriding principles of international law exist which form “a body of jus cogens.” Article 53 of the Vienna Convention on the Law of Treaties is recognized as setting out the current internationally accepted definition of jus cogens. It provides that, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Some illustrative examples of peremptory norms are: (a) Principles of the Charter of the United Nations prohibiting the unlawful use of force; (b) prohibition on the performance of any other act criminal under international law; and (c) obligation on states to co-operate in the suppression of certain acts such as trade in slaves, piracy or genocide; (d) prohibition on torture (The Convention against Torture and
Other Cruel Inhuman or Degrading Treatment or Punishment, 1984 requires States parties to take effective measures to prevent acts of torture in any territory under their jurisdiction).

5.2 Peremptory norms in the ICCPR

The HRC, in General Comment 29, has stated that, 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 ICCPR may be subjected to derogations at will, even where a threat to the life of the nation exists. In fact, in General Comment 29 the HRC has observed that, the enumeration of non-derogable provisions in article 4 is “related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law”. While Article 4(2) enumerates some peremptory norms (for e.g. Article 6 and 7), there are additional peremptory norms which, though not specifically listed cannot be derogated from:

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

6. Summary

Thus, ordinarily States Parties have the right to express limitations, reservations from treaty obligations and may derogate from them in times of emergency or on grounds specified for derogation in the convention, however, there are close-knit group of inalienable rights that are so inviolable and so fundamental to human existence, they may not be derogated from in any circumstance. The ICCPR provides a list of such civil and political rights that may not be derogated from in Article 4(2). Besides the accepted peremptory norms may not be derogated from and any treaty conflicting with a *jus cogens* obligation shall be invalid. Further the HRC through its authoritative interpretation has given the ICCPR Article 4 a broader and more expansive meaning and has enlarged the scope of protections that an individual enjoys without the fear that States may derogate from their obligations to guarantee those rights.

QUADRANT II (E-Tutorial)

Professor José Zalaquett (Professor of human rights at the Law School of the University of Chile) on absolute rights and restrictions on rights not absolute:

[https://www.youtube.com/watch?v=j4zmdlOk9Dc](https://www.youtube.com/watch?v=j4zmdlOk9Dc)
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.