



Justice and COVID-19: A Guide for Judges, Public Prosecutors and Lawyers in Palestine

Joint Guidance Note by UN Human Rights oPt, High Judicial Council, Attorney General's Office, Palestinian Bar Association, Ministry of Justice, and Independent Commission for Human Rights

Introduction

Amid the outbreak of coronavirus COVID-19 in the State of Palestine, President Mahmoud Abbas declared a state of emergency on 5 March 2020 for a period of 30 days followed by the issuance of Decree-Law no. 7 (2020), which included a number of preventive and precautionary measures. Human rights and fundamental freedoms must be guaranteed also during states of emergencies, though derogations from some rights might be made if applied in accordance with domestic and international human rights law. To that end, justice sector actors such as judges, prosecutors and lawyers play a vital role in ensuring the effective protection of human rights during states of emergencies.

This document briefly outlines specific obligations and recommendations to the justice sector in the State of Palestine, during the state of emergency related to the outbreak of COVID-19, and provides guidance to judges, prosecutors and lawyers on ensuring human rights and fundamental freedoms.

The impact of the state of emergency on human rights

The current international health emergency has required states to take unprecedented measures to contain the spread of COVID-19. These measures have resulted in imposing restrictions on some rights, mainly the right to freedom of movement. The State of Emergency is regulated under articles 110-114 of the Palestinian Basic Law. Article 111 prohibits restrictions on fundamental rights and freedoms when declaring a state of emergency, except to the extent necessary to fulfill the purpose stated in the Decree-Law declaring the state of emergency. Article 112 provides specific guarantees in cases of arrests resulting from the state of emergency. In accordance with International Human Rights Treaties which Palestine acceded to in 2014, derogations from certain rights are permissible if the conditions set out under Article 4 of the International Convention on Civil and Political Rights (ICCPR) are met. These conditions include the requirement that any derogation must be of an exceptional and temporary nature, and limited to the extent strictly required by the exigencies of the situation. The State must: 1) act within their constitutional and other provisions of law that govern such proclamation; 2) the exercise of emergency powers must be in accordance with its international obligations; and 3) measures taken must be non-discriminatory, and with sufficient attention given to vulnerable and marginalized groups, taking into account the disproportionate effect on women and children in particular.

Although temporary derogations are allowed under International Human Rights Law, some rights are considered non-derogable under all circumstances, including states of emergencies. These include some rights enshrined in the ICCPR provisions:

- The right to life (Article 6);
- The obligation not to subject individuals to torture or cruel or degrading treatment (Articles 7);
- Prohibiting all forms of slavery and servitude (Article 8, Paragraphs 1 and 2);
- The inability of anyone to be imprisoned for failing to fulfill contractual obligations (Article 11);
- The principle of non-retroactivity of laws (Article 15);
- Recognition of the individual as a legal personality (Article 16); and
- Freedom of thought, conscience, and belief (Article 18).

On 30 March 2020, the Palestinian Government communicated a note verbale notifying States parties to ICCPR - through the Secretary General of the United Nations - on the declared state of emergency, and the rights derogated from namely article 9 on the right to liberty and security of persons; and article 12 on the right to freedom of movement and article 21 on the right of freedom of assembly while complying with the conditions stipulated under article 4.

In light of the abovementioned, safeguards should be imposed to ensure that human rights are guaranteed, and that any restriction or derogation imposed does not constitute unnecessary interference, and does not result in a violation of non-derogable rights. This position was also reiterated by a group of UN experts comprised mainly of Special Procedures of the UN Human Rights Council through a joint statement released on 16 March 2020, where they stated that “restrictions should be narrowly tailored and should be the least intrusive means to protect public health.”

Justice sector actors such as judges, prosecutors and lawyers, play an essential role in ensuring effective protection of the rights against any unnecessary interference, and ensuring that the enjoyment of non-derogable rights is guaranteed to individuals. To that end, judges, prosecutors and lawyers must be allowed to pursue their duty to enforce the rule of law, including the protection of fundamental human rights in an impartial and independent manner. Prosecution and courts must prevent any excesses in the field of human rights committed in the name of an emergency situation.

7. Since the outbreak of COVID-19 special regulations have been issued by the justice sector actors, including a number of decisions and circulars issued by Interim Chief of Justice H.E. Issa Abu Sharar regulating courts functionality and operations, including decision

no. (194/2020), which stated that during the period between 11 March to 26 March 2020 courts will only consider, inter alia, postponing cases, urgent requests that cannot be postponed, and detention and release requests. Three other decisions and circulars were also issued to regulate the functioning of courts until 15 April 2020, and inclusive of precautionary measures regarding the work of judges and staff, including exemption from work for those who contacted persons infected or might be infected with the virus; in addition to regulating the process of postponing cases and notifications that cannot be reviewed during the state of emergency in coordination with the IT department. Such decision emphasizes that some rights such as judicial review of detention are non-derogable even during the state of emergency. The judiciary must continue functioning, without interference, through accessible, independent and impartial courts that exercise control so that the derogatory measures do not – either in general or in specific cases – exceed the limits of what is strictly required to deal with the emergency situation and so that rights that are not derogated from continue to be fully ensured in practice. Prosecutors and judges shall ensure that perpetrators of human rights violations are held accountable, and victims are provided with effective remedies including the right to compensation. Lawyers must be allowed to continue defending individuals against human rights violations and unnecessary interference.

These mutually reinforcing duties of justice sector actors must be fulfilled in a manner that takes into consideration the health concerns and measures resulting from COVID-19, but should not be halted or narrowed as a result of these. Alternatives must be sought whenever necessary to ensure that the role of the justice sector actors remains effective and functioning in guaranteeing human rights and fundamental freedoms throughout this challenging period.

Death penalty

The right to life is a non-derogable right which means that it must be protected by law and that no person may at any time be arbitrarily deprived of her/his life. The State of Palestine has acceded to the Second Optional Protocol to ICCPR aiming at the abolition of the death penalty, therefore, measures shall be taken to ensure that no executions are carried out at all times, including during the state of emergency, within the territory of the State of Palestine.

Deprivation of Liberty for the Exercise of Freedom of Expression or for Violation of Restrictive measures during SOE

During states of emergencies, concerns arise regarding deprivation of liberty resulting i.e. from the exercise of the right to freedom of expression including against human rights defenders. States often justify such deprivation of liberty as necessities deriving from the state of emergency. However, restrictions on the right to freedom of expression shall meet the strict tests of necessity and proportionality, shall be designed to achieve the legitimate aim, and shall be provided by law in a clear and precise manner. The Palestinian Basic Law in article 111 stipulates that “It is not allowed to impose restrictions on fundamental rights and freedoms when declaring a state of emergency except to the extent necessary to fulfil the purpose stated in the decree declaring the state of emergency.”

Lawyers, prosecutors and judges must ensure the right of anyone “who is deprived of his liberty by arrest or detention ... to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful” (art. 9(4)) ICCPR.

Fair trial guarantees

Fair trial guarantees are stipulated under the International Human Rights Treaties and the Palestinian law. The Palestinian Basic Law (2003) stipulates the right to “personal freedom” and that “It is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law. Article 12 stipulates that “[e]very arrested or detained person shall be informed of the reason for their arrest or detention. They shall be promptly informed, in a language they understand, of the nature of the charges brought against them. They shall have the right to contact a lawyer and to be tried before a court without delay.” And article 14 stipulates the presumption of innocence. The law specifies the period of pre-trial detention and that imprisonment or detention shall only be permitted in places that are subject to laws related to the organization of prisons.”

These articles from the Basic Law are complemented by the Palestinian Penal Code and the Code on Criminal Procedure. For example, the extension of detention must be considered in accordance with the law, and the periods specified therein. In accordance with Article 105 of the Criminal Procedure Code, “The interrogation must be conducted within twenty-four hours from the date the accused is sent to the deputy prosecutor, who shall order his detention or release.” the prosecutor may order the extension of detention for additional 48 hours, any additional extension must be ordered by court. Other extensions by courts are regulated under Articles 119 and 120, if the investigation requires it.

It is necessary for prosecutors to expedite the investigation process and indictment or release in cases of pre-trial detention and ensure that detainees are not kept detained for long periods of time without being charged. Judges should ensure that any extension of detention is well justified, and must seek alternatives whenever possible.

Fair trial guarantees are part of the State of Palestine’s international obligations included under article 14 of the ICCPR, complemented by other articles such as 9 and 10. Such guarantees are considered a cornerstone for the protection of all other rights during the state of emergency and thus its fundamental requirements remain implicitly non-derogable. Fair trial guarantees including the i) presumption of innocence, ii) convictions for criminal offences to be delivered only by competent courts after due process, and iii) regular review of lawfulness of detention by courts should be effectively enforced at all times. Other guarantees such as being informed of the reasons for arrest and the charges, the right to defense, habeas corpus: the right to challenge detention before a court, and prohibition of double jeopardy also apply during this state. The violation of norms relating to the right to fair trial might give the deprivation of liberty an arbitrary character.

Judges and prosecutors hold a primary responsibility in ensuring the effective enforcement of the right to fair trial. This includes their role in ensuring that detainees are brought before

a competent authority in accordance with the law, that judicial review is kept intact during the state of emergency, and that persons denied the right to fair trial are granted this right or immediately released. Lawyers also hold an important role in defending the rights of persons against violations pertaining to the right to fair trial, and ensuring that motions are submitted in a timely manner to ensure the protection of fair trial guarantees as stipulated in international human rights law and domestic law.

While ensuring fair trial guarantees, special health-related considerations are needed to ensure the protection of detainees from COVID-19. In that regard judicial facilities and courthouses should be cleaned and disinfected regularly. Hygiene standards such as regular hand washing should apply to everyone including judges, public prosecutors, lawyers and defendants. Products such as hand sanitizers should be provided in the judicial facilities, in addition to masks and gloves if necessary. Overcrowding in judicial facilities including courtrooms should be avoided to reduce risks. It is recommended to designate some staff members as focal points to respond to concerns regarding the functionality of courts and regarding individuals’ ability to appear before courts. For example, individuals who might be unable to attend due to suspected infection should be able to coordinate and inform the judicial bodies through their lawyers or the administrative staff of their inability to attend. The same applies to those unable to commute due to movement restrictions. Judges should be attentive to motions asking to release individuals from their obligation to appear before the court. Regular testing for symptoms for all concerned parties should be conducted as part of the precautionary measures. In all cases, alternatives to physical presence in courts and public prosecution offices should be organized, such as using technology in conducting video hearings or email correspondence when deemed necessary and appropriate, for example releasing motions in cooperation with all parties and the Bar Association. Additionally, it is important to ensure that sufficient distance is allowed between individuals to allow social distancing, including in courts, offices of the public prosecution and detention facilities.

Right to trial by Civilian Courts

Civilians have the right to be tried by a civilian court as a constitutional principle ingrained in International Human Rights Law and military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, military tribunals should not be substituted for civilian courts as this could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.

The role of judges, prosecutors and lawyers with regard to arbitrary detention and prohibition of torture and ill-treatment

According to international law, the prohibition of torture and ill-treatment can in no circumstance be derogated from during a state of emergency. The treatment of all persons deprived of their liberty, including those quarantined, must be humane and respectful of their dignity, a fundamental and universally applicable standard in all circumstances.

Judges and prosecutors must ensure that individuals are not subjected to torture and ill-treatment. Prosecutors must intervene to stop incidents of torture and ill-treatment, open investigations into such allegations and prosecute those responsible for such violations. Individuals who have been subjected to arbitrary detention shall be promptly released, and in all cases extension of detention shall be done in accordance with the law and only through the competent judicial authority as well as in accordance with the domestic law and international human rights law. Moreover, courts and prosecutors must ensure that evidence acquired under torture, is deemed inadmissible except if used to prove that torture and ill-treatment took place.

It is necessary for prosecutors to expedite the investigation process and indictment or release in cases of pre-trial detention and ensure that detainees are not kept detained for long periods of time without being charged or released. Judges should ensure that any extension of detention is well justified, and must seek alternatives whenever possible.

Furthermore, prosecutors and judges are responsible for conducting inspection visits to places of deprivation of liberty as elaborated below. The public prosecution should activate effective complaints mechanisms to receive allegations or arbitrary detention and/or torture and ill-treatment, a right that must also be recognized in domestic law. Prosecutors must urgently and impartially investigate and prosecute in cases of arbitrary detention and/or torture and ill-treatment, and judges must ensure that perpetrators are held accountable and that victims are provided with effective remedies including the right to compensation.

At the same time, lawyers hold a responsibility to defend individuals in the case of any allegations of torture and ill-treatment, through their regular representation and consultation to clients in places of deprivation of liberty whether through physical visits -while taking all precautionary measures in light of the current health emergency- or phone and virtual communication. Whenever there are concerns regarding arbitrary detention and/or torture and ill-treatment, lawyers must submit motions to stop the torture and on the inadmissibility of evidence in these cases. Confidentiality of communication and correspondence with lawyers must be ensured at all times by all relevant parties including in the context of preventive health measures. Lawyers should inform ICHR and other human rights organizations when concerns regarding such violations persist.

Alternatives to detention

As detention and release orders should be taken by the competent judicial authority, alternatives to detention should be applied whenever possible. In any case, detention and its continuation must be justified. In these particular circumstances, alternatives are essential to avoid overcrowding and hence, to reduce exposure to health risks. Alternatives should be sought prior to detention, and the release of some detainees should be considered particularly in cases of minor fiscal crimes and any case of failure to fulfill a contractual obligation including failure to pay civil debt; for persons with underlying health conditions, for persons above 60, and with specific attention and consideration to vulnerable and marginalized groups for Persons with disabilities; minors; women; pregnant women; pretrial detainees who cannot afford bail, in addition to any other cases where alternatives could be provided. In cases where detention is necessary, health examinations including a specific prior testing of the virus should be conducted, and those who might be infected should be quarantined accordingly to ensure isolation from other detainees until recovery or clearance. Additionally, those who are to be released should also be tested prior to their release.

In a recent development, with the view of reducing overcrowding in prisons, on 22 March, Palestinian President Mahmoud Abbas issued a decision granting a special pardon to inmates who have served half of their sentences in criminal cases. Excluded from the pardon are prisoners convicted of more serious crimes (collaboration, facilitating the takeover of land by enemy, homicide, disgracing, rape, corruption, armed robbery, drugs and arms trafficking) and those prisoners whose release is considered dangerous to the public order and civil peace. The public civil and military prosecution have the responsibility to regulate and implement the decision. The President's decision is welcomed amid the pandemic to ensure that deprivation of liberty facilities are not overcrowded.

Complaint mechanisms

Given the unprecedented nature of the COVID-19 health emergency, it may be essential for the Government, to establish dedicated mechanisms that would enable them to respond promptly and impartially to complaints deriving from the state of emergency. Such complaints might pertain to unnecessary restrictions to rights and freedoms in violation of article 111 of the Palestinian Basic Law (2003), and article 4 of the International Covenant on Civil and Political Rights. The complaint mechanisms could be activated through an electronic official platform, and public awareness must be raised on the availability and accessibility of such mechanisms, e.g. through social media, TV and others outlets.

Detention visits by judicial bodies: Judges, Prosecutors and MoJ

Judges and prosecutors hold a critical role as key actors in effecting adequate protection for detainees which should still apply during the state of emergency as per article 126 of the Criminal Procedure Law no. 3 (2001). In addition, Law No. 6 (1998) Concerning The Reform and Rehabilitation Centers “Prisons”, has expanded this capacity to the Ministers of Interior and Justice to conduct detention visits to reform and rehabilitation centers and to provide comments or suggestions as they deem proper provided they are recorded in a special register. The Minister of Interior, in coordination with the Minister of Social Affairs, may appoint qualified social inspectors and specialists to study the inmate’s psychological and social condition.

Within the framework of their supervisory powers in the outbreak of the Covid-19, justice sector actors must ensure the right to the highest attainable standard of physical and mental health of detainees and prisoners, which includes for instance the right to be free from interference; conduct extensive periodic examinations; ensure the place is suitable and appropriate in terms of ventilation, lighting, space and hygiene; providing personal protective equipment (masks, gloves, personal hygiene items, and medical kits); adequate medicines and medical supplements; adequate healthy food; constant review of health conditions; health education and awareness about the virus; and making sure, the suspected or infected persons are put in a safe place, fearing for their safety followed with mandatory procedures with emphasize on the prohibition of breaching the quarantining detainees or transferring them as a form of punishment or justified by punishment.

During the state of public emergency, it could be implied that the inspection duties of the judiciary and prosecution extend to include quarantine centers given these are places of deprivation of liberty and constitute a form of administrative detention. Hence, guarantees

applicable to persons deprived of liberty also apply to people subjected to quarantine, including the right to be brought before a judge to challenge ill-treatment, including the right to food and clean water, the right to be treated humanely, access to health care including a doctor to conduct check-ups and medical examinations, the right to be informed, the freedom of opinion and expression, and the right to privacy including preserving personal belongings. On the same note, on 30 March 2020 the United Nations Subcommittee on Prevention of Torture issued a detailed guidance on measures that should be taken by governments, and action to be taken by independent monitoring bodies to protect persons deprived of liberty during the COVID-19 pandemic, including quarantines. The guidance should be used as reference while inspecting places of deprivation of liberty including through governmental and monitoring by non-governmental bodies.

Persons under quarantine should have the right to file a complaint against any official, which requires follow up by the competent authority. Moreover, in all cases, the Ministry of Health or any competent authority may not detain, investigate or exercise powers other than those granted to them by law, or exceed the objectives of which quarantine was set for.

Although their inspection role remains vital during the state of emergency, it is equally necessary to ensure that supervisory and inspection actors are not exposed to any harm while conducting their duties. This could be carried out by providing them with protective clothing and equipment during inspection visits, so that the risk of exposure to them as well as the detainees is minimized during the visits. In addition, exceptional measures can be taken with a view to achieving the same objective, e.g. using virtual means of communication with detainees or prison departments.

Right to Privacy and Freedom of Opinion and Expression

The outbreak of Covid-19 has resulted in extensive information freely circulated, including news and medical advice through social media platforms, which included in some instances inaccurate or false information. While recognizing the risks associated with such spread of disinformation during the time of emergency health crisis, it is, nevertheless, necessary that any measure taken against such spread of information remains in conformity with the Palestinian domestic law, in addition to the international human rights law standards particularly the right to freedom of expression and the right to privacy. Individuals are protected against arbitrary or unlawful interference with the right to privacy, and any instance of interference “must be subject to a careful and critical assessment of its necessity, legitimacy and proportionality”. These guarantees include protection from interference with the right to privacy by private actors, such as releasing the names of persons allegedly diagnosed with COVID-19 or who were tested. Prosecutors and judges must ensure that any interference with the right to privacy is done in accordance with domestic and international law, including in regard to obtaining evidence and surveillance activities. Judges are responsible for dismissing any evidence obtained without prior judicial approval and must uphold the rights of individuals to privacy. Lawyers must defend individuals against arbitrary or unlawful interference with the right to privacy.

Special protections

Due to the current state of emergency which imposed movement restrictions on individuals including for accessing the workplace in certain cases, in addition to preventive instructions that advise individuals to stay in their homes except when exceptionally necessary. In this lies the important role of in particular the Public Prosecution particularly for cases that may arise from violations of the COVID-19 related restrictions or crimes committed during the state of emergency (commercial violations such as non-respect of mandatory closures, of malicious increasing of prices, or selling of fake products including fake medical supplies and medicines). Incidents such as these engage a wide range of rights such as the right to food, the right to clean drinking water, and the right to health and environmental rights.

Moreover, an increase in cases of gender-based violence might appear. The public prosecution and the judiciary must be able to respond promptly to complaints of domestic and gender-based violence, including through ensuring protective measure for women such as hotlines for complaints and shelters. Furthermore, coordination between all gender units in the judicial institutions and other ministries is necessary, especially in light of the inability of women to move and access services and service providers. Special attention must also be given to children, as they are among the most vulnerable groups in the context of the COVID-19 emergency response in light of concerns regarding harmful practices, exploitation, physical abuse, etc. This requires immediate intervention to guarantee child protection as well as criminal justice guarantees for juveniles.

Combating racism, xenophobia and stigmatization

In the context of the global spread of COVID-19, there are numerous reports that some individuals and groups are exposed to discrimination, including verbal harassment and physical attacks, often as a result of misinformation and general fear. The UN Human Rights Treaty Bodies have recently (24 March 2020) issued a statement warning “that fear and uncertainty from this pandemic could lead to scapegoating and prejudice. “States must take active steps to ensure a sense of solidarity prevails, including through protection against racism and xenophobia or the growth of unbridled nationalism”. Prosecutors must ensure that serious incidents are promptly investigated and prosecuted, while judges must ensure that perpetrators are held accountable. Justice sector actors in general must take steps to raise awareness about the prohibition of racism, xenophobia and stigmatization, and should take steps to ensure deterrence. Moreover, the authorities including within the justice sector must themselves refrain from engaging in any acts of racism, xenophobia and stigmatization. As recently (21 March 2020) stated by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance “Political responses to the COVID-19 outbreak that stigmatize, exclude, and make certain populations more vulnerable to violence are inexcusable, unconscionable, and inconsistent with States’ international human rights law obligations.”