International human rights law - lessons in the era of COVID-19

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The COVID-19 pandemic has brought the connections between law and public health into stark relief. The pandemic has demonstrated both the essential nature of global cooperation and international regulation to promote universal rights to life and health, and the potentially harmful impacts of limitations imposed on human rights in time of emergency. It has also tested the international human rights framework, which allows for permissible limitations on human rights where required, but which remains subject to widely varying domestic implementation. In this paper, we explore the relationship between international human rights law and the COVID-19 pandemic, including a focus on the rights of vulnerable individuals and communities who have experienced disproportionate impacts from both the pandemic itself and from measures that constrain the exercise of human rights. We propose that the inquiry and monitoring mechanisms of the UN human rights bodies provide important avenues for addressing the human rights implications of COVID-19 and Government responses to the pandemic. We also review Australia's domestic implementation of international human rights law and its relevance in the era of COVID-19, noting the piecemeal approach to human rights protection under Australian law. We conclude that this time of emergency provides an opportunity for the progressive development of international human rights law, via principles of reciprocity, social protection, human rights preparedness, and comprehensive normative protection for a right to public health.

Keywords: COVID-19, international human rights law, pandemics, balancing rights, state of emergency, Australia.

Introduction

In our lifetime, the COVID-19 pandemic is unprecedented, causing us to examine the value we place on human life and the capacity of world leaders to protect life in the face of a global health crisis. The relevance of law to managing a public health crisis has become clear – swift legislative and policy responses were, and continue to be, required to stop the spread of the virus. Further, as a global pandemic, the importance of international co-operation facilitated by international institutions is paramount. Measures recommended by international institutions, such as social distancing, isolation, restrictions on gatherings and travel, and contact tracing were adopted by countries around the world. These steps were taken to protect the most fundamental of our human rights, the right to life, but in doing so, imposed restrictions on other human rights, including freedom of movement and association, the right to education, the right to work, the right to privacy, and many others. Germane to international human rights law is the principle of protecting people from unfettered government power (Klamberg 2020, 54), and so although it is permissible in some circumstances to restrict human rights, international law imposes limits on any restrictions. Conversely, in addition to these negative duties whereby governments must refrain from certain acts, governments also have positive duties to realise rights – such as the rights to life and the highest attainable standard of health (Tomuschat 2013). Considerable social, political and academic commentary relating to COVID-19 has explored human rights themes and the global nature of the pandemic has highlighted the centrality of international human rights law to this contemporary challenge (Joseph 2020, 249–69).

As the pandemic progresses into its second year, this article takes the opportunity to reflect on the lessons we can learn with regard to international human rights law in a time of unprecedented global health emergency. We first explore the significance of international

human rights law during the COVID-19 pandemic, examining allowable limitations on usual human rights provisions. We then discuss the specific rights of vulnerable communities disproportionately affected by the pandemic and the positive duties of governments to protect their rights. Next, we analyse the role of key international legal institutions in the pandemic and consider potential further interventions and remedies available through those institutions. Domestic implementation of international human rights law is essential for the effective realisation of human rights 'on the ground', and we note Australia's piecemeal approach in this regard. In the Discussion and Conclusion, we propose innovative public health and pandemic related solutions in international human rights law and legal institutions.

International human rights law and COVID-19

There has long been a realisation that globalisation necessitates multilateral co-operation with regard to health (Taylor 2004). Despite this, and notwithstanding the right of everyone to the enjoyment of the highest attainable standard of physical and mental health ('right to health') in international human rights treaties, global health governance has been piecemeal. Lobbying continues for a Framework Convention on Global Health (FCGH Alliance 2020), first proposed in 2007, which could advance the right to health (Gable and Meier 2013). It has been suggested that such a treaty could be helpful for tackling future pandemics (Bertscher et al. 2020). More recently, there have been proposals for a dedicated 'International Pandemic Treaty' (Davis 2021). Further, Murphy and Whitty (2009, 220–5) have exposed the lack of 'human rights preparedness' for public health emergencies. In this section, we explore how international human rights law is implicated in the COVID-19 pandemic, including through limitations on human rights (Part a), the particular experiences of vulnerable groups (Part b) and the responses of international legal institutions (Part c). Finally, (Part d) we briefly examine domestic implementation of international standards.

Limitations to human rights: Government responses to the pandemic

Some of the most common legislative and policy responses to COVID-19 around the world have included: travel restrictions on people entering and leaving countries and also within countries; containing transmission by requiring people to stay at home with only immediate family or housemates; banning indoor and outdoor gatherings of people, or allowing some gatherings but with a maximum number of people; requiring people to quarantine or self-isolate; postponing face-to-face teaching in schools and universities and moving to online classes; closing certain businesses (such as cafes, gymnasiums etc.) or restricting how they operate; postponing elective surgeries; and mass-scale testing and contact tracing programs. As these practices restrict human rights, they deserve international human rights law scrutiny, which we offer below. It is also worth noting however, that some governments have not moved quickly to introduce restrictions, thus heightening risks to health and life (Velasco 2020).

When considering limitations on rights, there are some international legal norms that cannot be subject to derogation – namely *jus cogens* or peremptory norms (Kolb 2015). For example, States cannot derogate from rights to freedom from torture, freedom from slavery and the right to life. Aside from these, however, most human rights are not considered to be absolute. Rather, they may be subject to derogation or other limitations where necessary. Limitations may only be imposed by law to protect values such as national security, public order and the rights of others in a society, and any limitation must be proportionate and non-discriminatory (UN Human Rights Committee 2020; *The Siracusa Principles* 1984, Art. 10). Sometimes rights obligations are limited by the language of the provision that protects them (ICCPR, art. 9). In other cases, specific exceptions are permitted. For example, Article 19 of the International Covenant on

> Civil and Political Rights (ICCPR) provides for freedom of expression with 19(3) providing for restrictions '…only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

As noted in the introduction, restrictions imposed during the pandemic can be regarded as prioritising the right to life, which has *jus cogens* status in international law and is protected in Article 6 of the ICCPR. The Human Rights Committee's General Comment No. 36 (2019) further provides 'it also constitutes a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.'

General Comment No. 36 also makes clear that States parties to the ICCPR have a duty to protect life, which includes an obligation to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats (para. 18). In this sense, restrictions imposed by governments in order to protect life in the face of the COVID-19 pandemic can be framed as giving effect to State obligations under international human rights law and failing to do so (including expeditiously), could risk breaching Article 6 of the ICCPR.

Those States which sought to protect the right to life during the pandemic introduced significant restrictions on ICCPR rights, most notably freedom of movement and the right to enter one's own country (Article 12), the right to liberty and security and the right not to be detained arbitrarily (Article 9), the right to privacy (Article 17), the right of peaceful assembly (Article 21), and freedom of association (Article 22). Rights to freedom of movement, peaceful assembly and association are all subject to express limitation clauses which prohibit restrictions

to these rights, except where provided by law and necessary to protect national security, public order, public health or morals or the rights and freedoms of others (ICCPR 1966, art. 12(3), 21, 22(2)). As such, some restrictions introduced in response to COVID-19 may constitute permissible limitations on these rights on public health grounds. The right to privacy (potentially undermined by contact tracing and other public health responses) and the right to enter one's own country are not subject to such express limitation clauses, however the potential for legal limitation of these rights is implied by the use of the terms 'unlawful' and 'arbitrary' in Article 17 and 'arbitrarily' in Article 12(4).

Beyond these rights-specific allowances for limitations, the ICCPR allows for States to derogate from their obligations by relying on Article 4 in the case of a 'public emergency which threatens the life of the nation'. Article 4(3) provides that to avail themselves of the right of derogation, States parties must immediately inform the UN Secretary-General of the provisions from which they have derogated and of the reasons for this action. Despite this, as we discuss below, there have been very few notifications of derogation from ICCPR. Many States have declared emergencies or are using emergency laws to manage COVID-19 but have not necessarily formally derogated under the ICCPR.

The case of *Lawless v Ireland (No. 3)* (1961) 1 Eur Court HR (ser A) [47], jurisprudence from the European Court of Human Rights, acknowledged as influential in international law (Benvenisti 1998–9, 850–3), accepts that notification of derogation under the European Convention on Human Rights can be delayed and can come after taking the relevant measures. The Lawless judgment is recognised as a leading authority on derogation in international human rights law (Nugraha 2018, 194–206). However, the UN Human Rights Committee (24 April 2020) expressed concern at the lack of derogation notifications despite widespread use

of emergency measures globally and called on all States parties which had taken emergency measures that derogate from Covenant obligations to comply with their duty to provide immediate notification.

The Committee noted that States parties should not derogate from ICCPR provisions when they *can* attain their public health objectives through invoking the permissible restrictions (including public health grounds) in the ICCPR and the 'possibility of introducing reasonable limitations on certain rights, such as article 9 (right to personal liberty) and article 17 (right to privacy), in accordance with their provisions'. These articles refer to procedures established in accordance with law or prohibit 'arbitrary' interference, but they *do not* contain express limitation clauses setting out reasons for limitations, including public health; guidance on how to achieve this can be found in General Comments No. 16 and No. 35. The Committee also suggested that where possible, States parties should replace COVID-19-related measures that prohibit activities relevant to the enjoyment of rights under the ICCPR with less restrictive measures that allow such activities to take place subject to restrictions such as physical distancing (para 2(b)).

At time of writing, of the 193 UN member States, only 18 had notified the Secretary-General of derogation from ICCPR rights (Centre for Civil and Political Rights, 2021) and Australia was not one of them. Of those who had done so, the provisions most commonly derogated from were Article 9 (liberty and security), Article 12 (freedom of movement), Article 17 (right to privacy), Article 21 (freedom of assembly), and Article 22 (freedom of association). However, it is clear that some States have introduced (or intend to introduce) measures that encroach extensively on civil liberties. For example, Estonia derogated from Articles 9, 12, 14 (equality before the courts and the right to a fair trial), 17, 21 and 22. Colombia derogated from Articles

12, 13 (providing that 'aliens lawfully in the territory of a State party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law…'), 19 (freedom of expression) and 21. The obvious risk is that States' responses to COVID-19 and the consequent restrictions on civil and political rights exceed what is required by the public health crisis. Grogan has noted that some States notify derogations to the ICCPR and / or regional instruments, and are on paper, compliant with the rule of law and individual rights but in practice, reveal worrying trends in their use of emergency powers (Grogan 2020).

General Comment 29 on States of Emergency provides further guidance on derogations, specifying that they must be strictly necessary and proportionate in the context of the emergency, and undertaken in conformity with other international obligations. Further guidance can be found in the Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR ('Siracusa Principles'). Regarding limitations on rights to protect public health, the Siracusa Principles reiterate that these 'measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured' (Article 25).

Rights protected under the International Covenant on Economic, Social and Cultural Rights (1966) have also been impacted. These include the rights to work (Article 6), just and favourable conditions of work and a safe work environment (Article 7), social security (Article 9), the right to and adequate standard of living (Article 11), the highest attainable standard of physical and mental health (Article 12) including the prevention, treatment and control of epidemics (Article 12(c)), education (Article 13), and taking part in cultural life and benefiting from scientific progress (Article 15).

As with civil and political rights, some measures that States have taken during the pandemic have aimed to advance some social, economic and cultural rights, most especially the right to physical health and the control of epidemics under Article 12. On the other hand, some States have been criticised for inadequate responses, impacting the health and lives of their populations. The Committee on Economic, Social and Cultural Rights (CESCR) notes in General Comment 14 that violations of the right to health can occur through States' acts of omission, including the failure to take appropriate steps towards the full realisation of everyone's right to the highest attainable standard of physical and mental health or the deliberate withholding or misrepresentation of information vital to health protection or treatment (CESCR 2000). Where States have not adequately responded to COVID-19 risks, individuals may decide to pursue domestic remedies for breaches of the right to health (Meier et al. 2012, 3), a growth area for litigation internationally (Global Health & Human Rights Database 2020).

The picture has been mixed, also, in terms of the right to social security protections (Article 9). Some States have taken positive measures to offer improved social security protections as a direct response to COVID-19. Notably, States with pre-existing gaps in their social safety nets have found it especially challenging to support the social security needs of the millions now impacted by the pandemic, especially groups already experiencing additional vulnerabilities. For instance, pre-existing social inequities in the United States (US) have resulted in the overrepresentation of African-Americans in morbidity and mortality rates during the pandemic (Pirtle 2020).

The ICESCR does not provide for derogation, and despite arguments for closer integration of ICESCR and ICCPR rights (Scott 1999, 633–660), economic, social and cultural rights are

recognised as inherently distinct from civil and political rights and implementation of the ICESCR (1966) is based largely - although not exclusively - on the principle of 'progressive realisation' (Article 2). Article 4 provides for 'such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. However, the CESCR has clarified that 'issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights…[but] the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States' (CESCR 2000, para 28), and that any limitations must be proportionate and where limitations on grounds of public health are permitted, they should be of limited duration and subject to review (para 29).

Governments' positive duties to protect the rights of vulnerable groups in the pandemic

As discussed, restrictions on rights that aim to protect health must be necessary, proportionate and non-discriminatory. In practice, the vulnerability of some groups has been exacerbated by COVID-19 and we examine some of these here. Evidently, the 'fine balance between protecting health, minimising economic and social disruption and respecting human rights' (WHO 2020) can be harder to strike for these groups

In some countries, lockdowns have disproportionately affected vulnerable communities who have lost access to necessities including food, shelter and health. COVID-19 has driven the first increase in global poverty in decades, with an estimated additional 71 million people living in extreme poverty as of 2020 (ECOSOC 2020). Poorer people who live in overcrowded and unsanitary circumstances are at significantly higher risk of contracting the virus and of death.

1.6 billion workers in the informal economy, almost half of the world's total workforce, 'stand in immediate danger of having their livelihoods destroyed' (ILO 2020a).

CESCR General Comment 14 notes that, 'given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing states in this regard' (CESCR 2020, para 40). Some OECD states (but not all) have announced specialised official development assistance packages targeted towards COVID-19 related issues in the Global South (OECD 2020). While we highlight the value of harnessing human rights and human rights mechanisms, we note Moyn's (2018) argument that the ICESCR conceptualises economic and social rights as providing the bare minimum of basic needs, and the system has not tackled the underlying causes of poverty.

In the Global North, the COVID-19 pandemic and the measures undertaken to control the spread, including physical distancing, quarantine, and 'stay at home' orders, have had especially significant impacts on the lives of temporary migrants and refugees, people from migrant backgrounds, Indigenous populations, older persons in aged care facilities, people in detention and women, particularly those in situations of family violence. Those from migrant backgrounds – especially those whose legal status is irregular or temporary – are at increased risk of COVID-19 infection and transmission, both because their economic situations often require continuation of work despite government requirements to stay at home, and because the nature of low wage employment in areas like retail or health care typically requires face to face interaction (UN CWM 2020).

Migrants and their families represent a high percentage of people who have lost employment or experienced a decrease in income during the pandemic (UN CWM 2020, para 3) which has broader global impacts as remittance flows from migrant workers to low and middle-income countries were estimated at 700 billion dollars in 2019 and represented their largest source of external financing (Moroz et al 2020). It is predicted that due to COVID-19 remittances will fall by almost 14 percent in 2021 (World Bank 2020).

In this context it is imperative that States take more action to ensure economic and social rights to migrants in their communities. The International Labour Organization has highlighted the importance of access to paid sick leave and other benefits to ensure payments in cases of quarantine and self-isolation (ILO n.d.; Cubrich 2020, 186). Providing access to these rights makes good sense for economies and public health and denial of access to financial help will create increased demand for public health and homelessness services (Kooy 2020). In light of the impact of the pandemic on migrant workers, it is unfortunate that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families enjoys such low levels of ratification (56 States parties, UN Treaty Collection 05/08/21). Migrants and other groups vulnerable to racism are also protected by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (although with some exclusions for non-citizens Art. 1(2)), yet we see increased racial discrimination in border policies and a rise in anti-migrant rhetoric (Devakumar et al. 2020, 1194).

Also protected by ICERD and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) are Indigenous populations around the world who have been identified as high risk during COVID-19 due to reduced access to healthcare, significantly higher rates of

communicable and non-communicable diseases, and lack of access to essential services, sanitation and clean water etc (EMRIP 2020). In Australia, Aboriginal and Torres Strait Islander communities are at greater risk of negative outcomes if exposed to COVID-19 due to pre-existing health issues, lack of accessible healthcare, high rates of mobility and travel, and more restrictive measures on some remote communities. In Australia, deaths in Indigenous communities have so far been low as Indigenous health services worked rapidly to ensure public health messaging was locally appropriate and in language, an approach aligned with self-determination under Article 4 of UNDRIP (Oscar 2020). At time of writing, the second wave of the pandemic again poses threats to Indigenous communities in Australia.

Human rights concerns have also been raised in relation to all places where people are deprived of their liberty, including prisons, places of immigration detention and closed psychiatric facilities. Article 10 of the ICCPR provides for the humane treatment of persons deprived of their liberty and General Comment No. 9 reiterates that this is a basic standard of universal application and that it applies to all institutions where people are lawfully held against their will, not only in prisons but also, for example, hospitals, detention camps or correctional institutions (para 1). Close confinement and lack of appropriate hygiene can lead to rapid spread of a virus in detention facilities. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings (n.d.) has labelled places of detention as ‘a possible disaster zone’ and called for them to be treated as such.

Some jurisdictions have established licensed release programs to reduce the numbers of people in detention, other low-risk detainees have been denied early release. Some of these detainees have since become sick or died from COVID-19 (Saloner et al. 2020). The Office of the High Commissioner for Human Rights (OHCHR) and the WHO have issued guidance to states

urging release of vulnerable individuals from places of detention. Iran for example released, at least on a temporary basis, around 100,000 prisoners – some 40 percent of the entire prison population and Indonesia announced it would be releasing some 30,000 prisoners convicted of minor crimes (OHCHR, 3 April 2020a).The UN Standard Minimum Rules for the Treatment of Prisoners provide that states must ensure that people in detention have access to the same standard of health care as those in the community (2016, Rule 24(1)), and that use of isolation or quarantine must be proportionate, necessary and for the shortest period of time. Lockdowns and restrictions on visits in places of detention have the potential to significantly impact the mental well-being of individuals so alternative interaction, such as telephone calls or video conferencing should be provided, to ensure that interference with the right to family is not arbitrary or unlawful.

Other groups disproportionately affected by COVID-19 include people with disabilities and older persons, particularly those living in institutional, group home or nursing / aged care home settings. Older people resident in nursing homes have been reported to be the group most at risk of adverse outcomes and mortality during the current pandemic (United Nations 2020a, 3; Fallon et al. 2020). The risks for these two groups are manifold and include more complex medical needs and therefore poorer outcomes if infected with COVID-19, weak social protection and unaffordable health care in many countries (United Nations 2020b; WHO and UNESCWA 2020, 3). A particular challenge in many countries around the world has been the difficulty in managing transmission in shared accommodation environments (Connolly 2020). Further, formal oversight mechanisms (Connolly and Steward 2020), and informal oversight by visiting family and friends has been reduced in aged care facilities due to lockdown measures, thus heightening risks of mistreatment, neglect and exploitation. Such developments undermine compliance with the UN Principles for Older Persons and the UN Convention on

the Rights of Persons with Disabilities in emergency situations, and support Murphy and Whitty's critique of 'human rights preparedness' as discussed previously

Finally, evidence shows that women are impacted disproportionately by the economic and social consequences of COVID-19, termed a 'shadow pandemic' (UN Women 2020a) and a 'perfect storm' for an increase in women's vulnerability to family violence and femicide (Usher et al. 2020). Stay at home orders have left some women more exposed to perpetrators of violence, and their risk is aggravated by reduced options for support. At the time of writing, emerging data showed reports of family violence and calls to emergency helplines in several countries (UN Women 2020b). Data from the first two months of restrictions in Brazil showed a 22 per cent increase in femicide (World Bank Group n.d.). At most risk are women who face multiple forms of oppression including older women, rural and remote women, women with disabilities, Indigenous women, migrant women and victims of trafficking (UN Special Rapporteur on violence against women 2020).

There have been many other disproportionate impacts of State responses to the pandemic on women including closure of sexual and reproductive health services classified as non-essential (Cousins 2020, 301–302;) Barriers for women seeking access to contraception, safe abortion and post-abortion care have also increased (Marie Stopes International 2020) and isolation and lack of social networks for post-partum women raises concerns about maternal mental health (Gausman and Langer 2020).

Globally it is estimated that women constitute 70 per cent of health worker employees (Boniol et al. 2019), many of whom are exposed to the virus at work. The ILO has found the pandemic has caused stress across health systems, leading to a rapid deterioration in working conditions

with direct and disproportionate impact on women's right to health, (ILO 2020b, 3). Women are also over-represented in areas of employment which have faced sudden layoffs such as hospitality, retail, domestic work, community work and social care (ILO 2020b, 1). Women are often the primary caregivers of children and as such, have faced disruptions to employment due to school closures and for those able to work remotely, there has been increased stress on women's health and well-being (Gausman and Langer 2020).

The UN Committee on the Elimination of Discrimination against Women has noted that the Convention on the Elimination of Discrimination Against Women (CEDAW) obliges States to ensure that responses to the COVID-19 pandemic do not directly or indirectly discriminate against women and girls, and to protect women from gender-based violence and enable women's socio-economic empowerment (CEDAW 2020). The CEDAW Committee and the OHCHR (2020b) have urged State health institutions and governments to involve women and girls in decision-making processes to ensure strategies are gender-responsive and do not further discriminate or exclude those most at risk (Gausman and Langer 2020); reinforced by Denmark in a statement to the HRC (2020) on behalf of 56 States, urging States to ensure that women's and girls' health and rights are integrated in all COVID-19 responses.

Increased and nuanced risks facing specific groups in society is well addressed through the suite of treaties and other instruments discussed above. The increased vulnerability faced by these groups during the pandemic testify to the importance of this differentiated approach to rights protections. Further, international human rights norms are based on the principle of a common humanity (Hope 2020, 211), and the current pandemic has sharply focused this abstract concept into a concrete reality; the failure to respect the human rights of marginalised

and vulnerable groups undermines efforts to control the spread of the pandemic (Berger et al. 2020).

International legal institutions: responses to COVID19

COVID-19 has exposed weaknesses in accountability and transparency for a globalised response to a cross-border pandemic, where both the limitations of state sovereignty and legal responsibility for managing the pandemic have caused tension. State responses to understanding the source and spread of the pandemic have exacerbated inter-State tensions and required careful international diplomacy, with a WHO resolution eventually gaining consensus. The initial responses of governments mostly ignored the needs of vulnerable groups, and the UN moved to highlight these gaps. The strongest messages from the OHCHR (2020c) have revealed how states have used the pandemic as 'cover' for repressive human rights actions. The UN Secretariat, and in particular the Secretary General and the OHCHR, had to step into an advocacy role very early in the crisis, using strong diplomatic language to argue for the centrality of human rights both in response to the pandemic and in recovery measures such as stimulus packages. For example, in UN Secretary General Guterres' 2020 Mandela lecture, he stated that 'inequality defines our time' (UN Secretary General 2020b).

In terms of the individual international institutions of relevance, the WHO is receiving perhaps unprecedented attention. One of the requirements of the WHO's International Health Regulations (IHR) is timely notification by States of possible public health emergencies of international concern (2005, Art 6,7). Questions have been raised as to whether China fully complied with these obligations and some commentators suggest pursuing a case against China under the dispute settlement mechanism in Article 56 of the IHR, but this would rely on the unlikely eventuality of China consenting to arbitration. It has also been argued that Article 75

of the WHO Constitution could be used to refer the matter to the International Court of Justice (ICJ) (Tzeng 2020), and that the ICJ has acknowledged this jurisdiction (Armed Activities (New Application, Democratic Republic of the Congo v Rwanda), Judgment, 2006 I.C.J Rep. 5, 99;) and the standing of the WHO to seek an advisory opinion (Request for advisory opinion made by the World Health Organization, 3 September 1993, No. 93/26).

Attempts (successful and unsuccessful) to hold China accountable at the World Health Assembly (2020) have been well documented in the media (Hurst 2020). However, less-explored in academic commentary so far is the inherent potential of the UN's primary human rights body, the Human Rights Council (HRC). Given the significant global impacts of COVID-19 on human rights, a human rights-based investigation into the pandemic is worthy of consideration at the institutional level. The WHO reported following its investigation (WHO 2021), however, this was primarily a scientific, epidemiological study and did not include considerations such as human rights impacts and responses.

Should the HRC commit to a pandemic investigation, this would be informed by the HRC's commitment to *objectivity and equal treatment* of States as per General Assembly Resolution 60/251 - an approach of benefit in a politically charged global crisis. The HRC was designed with this feature as a direct counterpoint to the HRC's predecessor, the UN Human Rights Commission, which was accused of political bias (UN Secretary General 2005). Given the tensions that have arisen thus far with regard to inquiries, this 'equal treatment' provision could prove useful in terms of international diplomacy (although allegations of politicisation have also been levelled at the HRC) (Terman and Voeten 2018). In terms of investigative powers, the HRC can initiate inquiries, establishing a temporary body of a non-judicial nature to investigate allegations of violations of international human rights law and making

recommendations for corrective action (OHCHR 2015). An example of a previous inquiry is the Commission of Inquiry into the Democratic People's Republic of Korea (one of whose Commissioners was former judge of the High Court of Australia, Michael Kirby (Human Rights Council Resolution 22/13).

Should it decide to initiate an inquiry into the human rights implications of the pandemic, the HRC could helpfully inform subsequent international legal peer review and complaints processes. Given the extent of human rights impacts from the pandemic itself and pandemic measures, UN and regional human rights bodies and national courts must anticipate complaints from individuals. Further, the HRC's Universal Periodic Review (UPR) will undoubtedly focus on State management of pandemic conditions.

Monitoring COVID-19 through the UPR can be complemented by periodic reviews by UN treaty bodies. Treaty bodies are quasi-judicial and comprised of independent experts. Their recommendations tend to be in-depth and expert and can also be influential in informing the recommendations of the more political UPR mechanism discussed above (Carraro 2019), as the mechanisms are designed to be complementary.

The inquiry and monitoring mechanisms of the UN human rights bodies provide important avenues for addressing the human rights implications of COVID-19 and Government responses to the pandemic. Further, they offer a less adversarial approach than initial suggestions to use WHO mechanisms and the ICJ to hold China responsible, or to pursue resolutions that may be perceived to scapegoat one particular State at a time when international co-operation is critical.

Domestic implementation of international human rights law obligations

Domestic implementation of international obligations is essential for the effective implementation of rights 'on the ground'. Some countries have used human rights frameworks to help calibrate their response measures, maximising their effectiveness in combating the disease and minimising the negative consequences for human dignity (see, eg, *Andrew Borrowdale v Director-General of Health and Attorney-General* [2020] NZHC 2090). For example, the German Constitutional Court found that COVID-19 ruled that a blanket protest bans were incompatible with the German constitution, the Basic Law, as they did not allow for a proportional response and were unacceptable on human rights grounds (BVerfG, 1 BvR 828/20, Apr. 7, 2020,). It ordered that authorities should consider whether to allow protests on a case by case basis. The authorities then allowed a protest attended by fifteen participants, all wearing masks, who kept 1.5 metres away from each other and gave speeches by dictation into smartphones. That Court has also held that a blanket ban on all religious gatherings was an unjustified limitation on freedom of religion but has also refused interim relief against lockdown laws generally as they were directed at saving lives and preventing the collapse of the health care system (Bell 2020). Generally the role of domestic human rights frameworks has been to urge proportionate responses, scrutinise and monitor governance measures and their implementation, and maintain a focus on vulnerable groups.

Australia remains the only Western democracy without a constitutional or statutory bill of rights at a national level. At State and Territory level, though, the *Human Rights Act 2004* (ACT), the Charter of *Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter') and the *Human Rights Act 2019* (Qld) (QHRA) require governments, when introducing legislation, to table statements of compatibility with human rights or, in exceptional circumstances, make an "override declaration" that the human rights acts will not apply to certain legislation. This allows for a more transparent public record of the reasons the

parliament considers measures taken to be reasonable and proportionate. The Queensland COVID Emergency Response Bill 2020 (Qld) was accompanied by a COVID-19 Emergency Response Bill 2020 Statement of Compatibility (March 2020) – a 27-page analysis by the Attorney-General of the rights affected by the emergency measures. At the Commonwealth level, the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) also requires a level of transparency around government justification for extraordinary measures. The Parliamentary Joint Committee on Human Rights has regularly scrutinised Bills and legislative instruments made in response to COVID-19 (Australian Parliamentary Joint Committee on Human Rights. n.d.).

Valuable jurisprudence has been developed on the limitations clause in the Victorian Charter, requiring reasonable proportionality between the limitations imposed on the rights or freedoms and the object or purpose which the limitation seeks to achieve (Evans and Petrie 2020, 175–9), a framework later also used by the Queensland Human Rights Commission in submission to the Queensland pandemic response referring to the *Queensland Human Rights Act 2019* (Qld) (Queensland Human Rights Commission (QHRC) 2020).

In each jurisdiction, the independent human rights commissions with monitoring powers under the legislation and wider advocacy groups were better able to raise the particular human rights impacts of the restrictions on vulnerable communities. Queensland also has a unique complaints function under the QHRA. The Commission reported to the Queensland Parliament in July 2020 that it had received just over 190 enquiries and 30 complaints relating to COVID-19.

These Australian jurisdictions demonstrably had heightened responses to protect the human rights of people in locked environments, such as state prisons, immigration detention (*BNL20 v Minister for Home Affairs* [2020] FCA 1180), and state-run aged care facilities. The human rights entities could take action on unresolved complaints that escalated the political consequences of certain restrictive policies, such as the treatment of First Nations people in prison (Human Rights Law Centre), or the lack of fresh air breaks in hotel quarantine (QHRC n.d.).

The Victorian Charter also allowed cases to be brought to court, as in the case of *Loielo v Giles* [2020] VSC 722. This was an unsuccessful challenge to the 9pm to 5am curfew imposed on residents of Melbourne by the Stay at Home Directions (Restricted Areas) (No 15), signed by the defendant, Associate Professor Michelle Giles, an authorised officer and senior medical adviser in the Department of Health and Human Services. A similar case was brought in the High Court of Australia by Mr Gerner, a restaurateur in Melbourne who alleged he had suffered a significant loss of earnings as a result of the lockdown and therefore had standing to challenge the decision (*Gerner v The State of* Victoria [2020] HCA 48 (10 December 2020)).

The legislative framework did not prevent the Executive taking particular actions but brought pressure to make those measures more proportionate and offered a framework for redress. For example, the Victorian Ombudsman found that the detention of about 3,000 residents of nine inner-Melbourne public housing towers on 4 July 2020 was a human rights breach (Glass 2020). Those jurisdictions with human rights legislation also saw more rigorous monitoring of delegated legislation to make sure emergency provisions ceased or were curtailed as the relevant threat to health lessened or passed.

Other states and territories with no specific human rights legislation can still provide oversight and scrutiny of government responses to COVID-19. For example, the South Australian Parliament has established a parliamentary committee overseeing COVID-19 legislation and the NSW Ombudsman has published a special report (2020). Further, the Australian Human Rights Commission has a complaints and inquiry function that may be engaged, and the Commission has published information on rights during the pandemic.

Discussion and Conclusion

There are a few key lessons from the COVID-19 pandemic thus far. First, human rights are not absolute and can be limited under international law, but Governments have responded in a number of ways to these permissible limitations, with some overstretching the limits and many not formally derogating from the ICCPR. Although limitations and derogations have been used in the past, there has been no one global event such as COVID-19 that has threatened life and health necessitated similar, contemporaneous responses by Governments around the world since the introduction of the UN human rights framework. It is a test of the limits of international human rights law and although there is a comprehensive framework in place to deal with such situations, whether governments are compliant with this requires ongoing scrutiny. Second, COVID-19 has also tested our ability to balance positive and negative rights – such as the right to life and the highest attainable standard of health, with severe restrictions of many civil and political rights. This is an area where States would benefit from further guidance, perhaps by way of HRC resolutions and treaty body General Comments – discussed further below. Third, international human rights law recognises the distinct risks facing particular groups in society – including women, Indigenous peoples, migrants, people with disabilities, older persons and those deprived of their liberty – and as well as universal application of all human rights, there are specific treaties and other instruments designed to

promote and protect the rights of these groups. This differentiated approach has proven invaluable during the pandemic. Fourth, the public health imperatives for protecting *all* members of society, including the most vulnerable, has reinforced some of the foundational principles of international human rights law: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…' (Universal Declaration of Human Rights (UDHR), Preamble). Fifth, the truly global nature of the pandemic reinforces the importance of international co-operation, careful diplomacy, and the role of a variety of international legal institutions, including the WHO but with further scope for greater communication between other significant international legal institutions.

A key challenge for governments has been the balance between competing rights and in particular, positive and negative rights. Mendes (2010, 20–1) has written that decision-makers faced with rights in conflict are challenged to find 'the contextual equilibrium between the two sets of rights that can do justice to both but not constitute such an intrusion on either right that the fundamental values underlying' the rights 'are seriously impaired'. Further, Hughes (2010) recommends characterising such circumstances as 'rights in tension', with the goal of achieving reconciliation of rights and Joseph (2020, 249) has commented: 'States must balance rights to health and life against the many rights detrimentally affected by their pandemic response measures, including almost all economic, social, cultural, civil and political rights'. Again, one of the complex challenges that States have had to face and where further UN guidance could be developed.

In grappling with a global pandemic and the use by some governments of 'states of emergency', we find ourselves drawing on extensive and well-established legal doctrine and yet, the current

situation is quite unique with regard to the post-World War II international legal framework. As such, perhaps we have opportunities to refine our legal response to such phenomena? After all, periods of crisis have previously led to rich international legal reform, including the establishment of the UN. Silva and Smith (2015), writing about public health emergencies and drawing on the context of Ebola, argued that the Siracusa Principles alone are insufficient to legitimise some of the restrictions imposed to respond to public health emergencies. They proposed that the principle of reciprocity, as explored in public health ethics scholarship, provides an important theoretical tool to complement the Siracusa Principles. Reciprocity maintains that when the State limits an individual's human rights due to a public health emergency, the State must support and compensate that individual for their loss, so they are not unduly harmed. In addition, Sirleaf (2018) proposed an alternative vision of responsibility in the context of public health crises, arguing that existing frameworks are inadequate. That proposal incorporates distinctive normative bases for differentiating responsibilities based on need, culpability, and capacity so that responsibility is distributed and less state-centric (non-state actors are included) while accounting for structural inequality (Sirleaf 2018, 285).

A complementary proposal, again advanced prior to the current pandemic, calls on States to invest in a 'social protection floor', as investing in social protection systems pays off in the short-term – by mitigating crises – and in the long term, by nurturing human development and productivity (ILO Advisory Group 2011). The UN Working Group on Discrimination Against Women and Girls (n.d.) has listed some global good practice in this area of social protection that would address structural inequalities. The UN human rights bodies have an important role to play in maintaining oversight of these developments. As a state-centric body charged with treating all States equally, the HRC holds particular promise.

The experience of the COVID-19 pandemic, the multifarious human rights concerns raised about the impact of the pandemic and government responses to it cause us to revisit the work of Silva and Smith, and Sirleaf as discussed above. We have also noted the need for further guidance on, *inter alia*, balancing rights. But can these suggestions be given effect in international human rights law? We note several means by which such progressive proposals, embedding concepts of reciprocity and differentiated responsibility, could be introduced to the international human rights framework, within which further guidance on limitations and balancing tights could be provided. These include the adoption of a specific public health and human rights instrument such as a Declaration (a common first step) or a legally binding treaty. Such provisions could be consolidated into an Optional Protocol to an existing human rights treaty, with the ICESCR perhaps being the most obvious choice due to its provisions on health. Less substantive but more easily achieved would be the publication of a treaty body (or joint treaty bodies) General Comment providing fresh interpretation of existing treaty provisions. By this means treaty bodies help to ensure that treaties are living documents. Further, the HRC could also play a role in by establishing a dedicated UN Special Rapporteur with a thematic mandate for public health or, more specifically, pandemics. Other options include the mainstreaming of broad human rights considerations – and pandemic-related concepts such as reciprocity and differentiated responsibility – into other international legal instruments. For example, Davis (2021) has argued that any potential 'International Pandemic Treaty' established under the remit of the WHO should be informed by international human rights law.

Around the world, domestic courts and human rights bodies have looked to national and regional human rights norms to inform their decisions and approaches to restrictions on human rights due to the pandemic – laws which generally give effect to international legal obligations. Although Australia does not have a Federal Bill of Rights, the three Australian States and

Territories which do have human rights legislation had more engagement with the human rights questions raised. The pandemic therefore provides renewed impetus for Australia to consider a Federal Charter of Rights.

Due to the global nature of the pandemic, international human rights legal fora play a critical role in States' response to the pandemic and given the horizontal nature of international law, international co-operation is essential - diplomacy rather than 'naming and shaming' is likely to prove more fruitful (Milewicz and Goodin 2016). The importance of the domestic implementation of international human rights law has also been discussed here – there is some evidence of it providing a useful framework for decisions requiring a balance in competing rights and important checks and balances on State actions. Future research could include systematic analysis of actual State compliance with international human rights law during the COVID-19 pandemic as well as to assess the actual influence of international human rights law in domestic decision-making.

The current pandemic must give impetus to stronger global health governance, given the obvious lack of 'human rights preparedness' (Murphy and Whitty 2009, 220–5) for public health emergencies. Perhaps the time is now for the Framework Convention on Global Health? Times of global crisis have often led to significant progress in international law and there is potential for COVID-19 to lead to positive international legal reform. Amidst the widespread death, illness and trauma caused by the pandemic, a glimmer of positivity has been the need to focus on vulnerable groups within societies, reaffirming the principle of a common humanity – a foundation of international human rights law (Hope 2020).

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