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SELECTED ISSUES RELATED TO THE INTERACTION OF INTERNATIONAL HUMAN RIGHTS CONVENTIONS WITH A PROPOSED TREATY ON PANDEMICS

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I have been invited to talk about the call to action for pandemics and international law. I want to approach this from an international human rights law perspective, which is my area of expertise. I would like to touch upon a few selected issues of this complex interaction. First, I believe international human rights law and its international machinery are exceptionally relevant to any effort by the international community to develop a comprehensive international instrument on epidemics and pandemics.¹ It is a particularly well-settled field of international law with a sophisticated implementation machinery and a wide array of supervisory mechanisms.

This field of international law is also particularly well integrated with the constitutional and legal systems of several states that have incorporated these international standards as part of their juridical systems. There are many ways in which these standards have developed an intense relationship with national law. For example, some states refer to them as a “constitutional block” indicating that international human rights norms are part of the constitutional

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1. See generally Natalie Samarsinghe, *Human Rights: Norms and Machinery*, in OXFORD HANDBOOK ON THE UNITED NATIONS (Thomas G. Weiss & Sam Daws, eds., 2d ed. 2018) (noting the United Nation’s role in creating the international human rights system and considering opportunities for norm development and institutional advances).

framework and carry their supreme authority.² Others incorporate these norms through national implementing legislation.³ Therefore, it is very important to refer to relevant international human rights law when designing specific provisions in an international instrument regarding pandemics and epidemics, considering that such human rights norms are already alive in domestic law in many domestic systems.⁴

I would like to approach this question from a two-fold perspective when we deal with these international human rights regimes, as I believe international human rights law has a dual interaction with the proposed effort on pandemics. First of all, I must refer to the arguments that stress the need to have state action controlling, confronting, and preventing pandemics.⁵ International human rights standards reinforce these obligations, which states may have under customary international law and other international instruments.⁶ International human rights obligations consider and recognize

2. See, e.g., Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1592 (2011) (providing that in Latin America, a common feature of constitutional reform is the openness of domestic legal systems to international human rights law).

3. See *Implementation*, ICELANDIC HUM. RTS. CTR., <https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/implementation> (last visited May 26, 2021) (explaining implementation of international human rights law at the domestic level).

4. See generally *International Human Rights Law*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx> (last visited May 26, 2021) (indicating that most states formally protect basic human rights in their constitutions and other laws).

5. See, e.g., David Cooper & Jaimie Worker, *The Coronavirus Pandemic Requires State and Local Policymakers to Act, in Addition to Demanding a Strong Federal Response*, WORKING ECON. BLOG. (Mar. 17, 2020, 11:41 AM), <https://www.epi.org/blog/the-coronavirus-pandemic-requires-state-and-local-policymakers-to-act-in-addition-to-demanding-a-strong-federal-response> (emphasizing the need for strong state action to adequately and holistically address the pandemic).

6. See generally *International Standards and Principles*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/issues/olderpersons/pages/internationalstandards.aspx> (last visited May 26, 2021) (explaining the existing international human rights standards and principles).

substantive rights that imply correlative duties to states, such as the duty to respect the right to life, the right to personal integrity, and the right to health, among other relevant rights.⁷

These international human rights law regimes pursue many of the same objectives that the efforts to develop an international instrument to manage pandemics are pursuing. There is a complementary and mutually reinforcing relationship between international human rights law and the proposed instrument.⁸ Moreover, it is important to remember that the generic obligations under international human rights law call states to ensure the rights I just mentioned, and these positive obligations are essential for the effort of preventing pandemics.⁹ Such a notion of prevention can compel states to adopt measures that states are arguably obliged to follow under international human rights treaties.¹⁰ For example, adequate medical services are required under certain circumstances as part of general obligations that states have under certain international human rights treaties.¹¹ They work in congruence with

7. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966; 993 U.N.T.S. 3 [hereinafter ICESCR].

8. See Haik Nikogosian & Ilona Kickbusch, *The Case for an International Pandemic Treaty*, 372 B.M.J. 1, 1–2 (2021) (arguing that an international pandemic treaty would protect human rights).

9. See, e.g., *Human Rights Dimension of COVID-19 Response*, HUM. RTS. WATCH (Mar. 19, 2020, 12:01 AM), <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response> (“International human rights law guarantees everyone the right to the highest attainable standard of health and obligates governments to take steps to prevent threats to public health and to provide medical care to those who need it.”).

10. Many treaties refer to the obligation of states to undertake judicial or other measures to protect life, personal integrity, and health. See ICCPR, *supra* note 7, art. 6; Organization of American States, American Convention on Human Rights, art. 2, Nov. 22, 1969, 1144 U.N.T.S. 123; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1940, Eur. T.S. No. 5; African Charter on Human and Peoples’ Rights, art. 16, June 27, 1981, 1520 U.N.T.S. 217; cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT] (defining and prohibiting torture, which violates the right to life, personal integrity, and health).

11. ICESCR, *supra* note 7, art. 12; Economic and Social Council, General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12), ¶ 2, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

states' efforts to confront pandemics.

A second dimension I would like to briefly discuss is the notion dealing with the consequences of a breach of international human rights law obligations. This particular breach could entail the violation of, for example, the right to life and the right to personal integrity and health in the context of a pandemic.¹² If a state fails to act diligently in confronting an outbreak that reaches the level of a pandemic, there are certain legal consequences for those breaches.¹³ I would like to focus on the *duty* to redress such breaches.¹⁴ This duty requires that a state found in breach of its international human rights obligations be legally compelled to secure restitution, compensation, rehabilitation, assurances of non-repetition, and satisfaction.¹⁵ Within the multiple aspects that the duty to redress entails, it is important to highlight the duty to rehabilitate the victims of human rights violations.¹⁶ This duty is particularly relevant in the specific context of pandemics, where such a duty should include the provision of medical services, psychosocial support, and other comprehensive health services.

It is very important to keep in mind that human beings are the ultimate beneficiaries of these rights. Human rights provisions are

12. See, e.g., *Human Rights Dimension of COVID-19 Response*, *supra* note 9 (providing an overview of the human rights concerns caused by COVID-19).

13. See generally Martin Paparinskis, *COVID-19 Claims and the Law of International Responsibility*, 11 J. OF INT'L HUMANITARIAN LEGAL STUD. 311 (2020) (considering the role of state responsibility in addressing claims and disputes about COVID-19). But see Sienho Yee, *To Deal with a New Coronavirus Pandemic: Making Sense of the Lack of Any State Practice in Pursuing State Responsibility for Alleged Malfeasances in a Pandemic—Lex Specialis or Lex Generalis*, 19 CHINESE J. OF INT'L L. 237, 237 (2020) (commenting on the absence of state practice in holding states responsible for alleged malfeasances in pandemics).

14. See International Health Regulations, May 23, 2005, 2509 U.N.T.S. 79; Int'l Law Comm'n, *Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/49(Vol. I)/Corr.4, 2001-II Y.B. Int'l L. Comm'n 26, at arts. 1–3 (2001).

15. United Nations Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3 (2012): Implementation of Article 14 by States Parties, U.N. Doc. CAT/C/GC/3 (2012).

16. See G.A. Res. 60/147, U.N. Doc. A/Res/60/147, ¶ 18 (Mar. 21, 2006) (providing that victims of gross violations of human rights law should be provided with full and effective reparation, including rehabilitation).

interpreted in a specific manner regarding certain vulnerable communities and populations. The non-discrimination principle serves as an example.¹⁷ Persons deprived of liberty, older persons, racial and ethnic minorities, women, children, persons with disabilities, and LGBTI+ communities are all particularly vulnerable in the circumstances of a pandemic, and consequently have heightened and specific protections under several international human rights treaties.¹⁸

The third dimension is the limits on state measures adopted in the context of pandemics that should answer the following question: how are states supposed to carry out their effort of controlling and preventing pandemics without violating human rights law? A comprehensive set of international norms is already in place to guide us in answering this question, in a two-fold approach. On the one side, you have the possibility of derogation and suspension of certain rights under several human rights treaties.¹⁹ On the other side exists the possibility of restrictions or limitations of certain rights when the state considers it necessary to adopt measures to confront the pandemic that could interfere in the exercise of those rights by persons under their jurisdiction.²⁰

I will not go into details about the test states have to comply with to implement permissible or lawful limitations or restrictions of human rights. However, I want to mention that there is a debate in

17. See *Non-Discrimination: Groups in Vulnerable Situations*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/Issues/Health/Pages/GroupsInVulnerableSituations.aspx> (last visited May 26, 2021) (discussing the non-discrimination principle).

18. There are many categories of persons that require specific and very nuanced measures as illustrated in standards developed in international case-law, country and thematic reports, general comments, and concluding observations, under several international human rights treaties.

19. See, e.g., ICCPR, *supra* note 7, art. 19 (allowing the right to freedom of expression to be restricted if necessary “(a) for respect of the rights or reputations of others” or “(b) for the protection of national security or of public order (ordre public), or of public health or morals”). See generally Diane Orentlicher, *Ensuring Access to Accurate Information and Combatting Misinformation about Pandemics*, 36 AM. U. INT’L L. REV. 969, 1076-86 (2021) (discussing the freedom of expression—and its limitations—in the context of misinformation surrounding the COVID-19 pandemic).

20. ICESCR, *supra* note 7, art. 5; ICCPR, *supra* note 7, art. 4.

the academic community of several countries and regions regarding the appropriate type of approach when confronting a pandemic and having to choose between suspension or restriction of certain rights under human rights law.²¹ Some aspects discussed in this debate about the selection of an appropriate approach to these situations refer, for example, to the level of supervision, and what would allow for closer judicial or international scrutiny of such measures.²² In this regard, it would be important to keep in mind that restrictions of rights remain in place as long as they are necessary and proportional, and they are subject to permanent scrutiny by national courts that could review their lawfulness.²³ Of course, the international machinery is also available with its individual complaint mechanisms that allow for further review to take place in international venues.²⁴ Furthermore, such national and international bodies may allow for a closer review of the legality of the restrictions, granting less deference to national authorities in the implementation of such measures.²⁵ Arguably, this provides a better supervisory regime of those restriction measures than suspension of rights, which may be subject to laxer scrutiny that confers more deference to national authorities making such determinations.

On the other hand, the temporal nature of suspensions exposes

21. Sébastien Touzé, *The Restriction Will Always Be Better than the Exemption . . .* (2020). For further discussion on suspension of rights in the context of COVID-19, see generally Audrey Lebre, *COVID-19 Pandemic and Derogations to Human Rights*, 7 J.L. BIOSCIENCES 1 (2020), <https://academic.oup.com/jlb/article/7/1/lsaa015/5828398>.

22. See, e.g., Lebre, *supra* note 21, at 15 (concluding that international human rights courts will scrutinize the necessity of certain measures and determine whether less severe measures could have achieved the same result).

23. See *id.* at 8 (asserting the importance that parliaments and national judges have the capacity to scrutinize the necessity and proportionality of government measures).

24. See INTER-STATE COMPLAINTS, <https://www.ohchr.org/EN/HRBodies/Petitions/Pages/InterStateComplaints.aspx> (last visited Apr. 22, 2021); HUMAN RIGHTS TREATY BODIES – INDIVIDUAL COMMUNICATIONS [hereinafter INDIVIDUAL COMMUNICATIONS], <https://www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx> (last visited Apr. 22, 2021).

25. INDIVIDUAL COMMUNICATIONS, *supra* note 24 (describing how complainants may seek recourse under international law for perceived violations of their rights caused by state-imposed restrictions).

them to stricter control on its temporal validity. Some indeed argue that derogations, being temporary, could be more appropriate, as they are tailored to the specific emergency and will expire once they are no longer required to confront the crisis.²⁶ However, review of core aspects of suspensions, such as the reasons to declare the emergency, appear to benefit from less strict control by affording a broader margin of appreciation to the local authorities.²⁷ In general, restrictions or limitations of rights are governed by a proportionality requirement.²⁸ Such proportionality implies that once the restricting measure is not necessary it will have to be rescinded.²⁹ In other words, to a certain extent, they are also temporary in the context of a pandemic. They must be periodically assessed in order to determine whether they remain appropriate under the proportionality requirement.³⁰ This consideration strengthens the argument that, in most situations in the context of pandemics, it is not necessary to resort to suspension or derogation of human rights to the extent that restrictions and limitations can achieve the desired result.

SOME ADDITIONAL QUESTIONS ON THE TOPIC

Regarding the question posed by one of the participants in this panel about identifying the consequences of the international legal obligations and mechanisms to guarantee access to medical facilities, I would like to approach it with a very specific example.

There are many tools that allow the international community to directly monitor places where persons are deprived of liberty, which are not limited to situations where people are in prisons or other

26. See generally Martin Scheinin, *COVID-19 Symposium: To Derogate or Not to Derogate?*, OPINIOJURIS (June 4, 2020), <http://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate>.

27. Richard Smith, *The Margin of Appreciation and Human Rights Protection in the 'War on Terror': Have the Rules Changed before the European Court of Human Rights?*, 8 ESSEX HUM. RTS. REV. 124, 126–27 (2011), <http://projects.essex.ac.uk/ehrr/V8N1/Smith.pdf>.

28. U.N. Human Rights Committee, CCPR General Comment No. 29: Article 4: Derogations During a State of Emergency, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

29. *Id.*

30. *Id.*

detention facilities.³¹ This can also happen in the context of hospitals or psychiatric institutions in which the state has taken restrictive measures regarding individuals so that these persons are effectively under the custody of the State. Furthermore, other situations of detention include migrants in custody of the authorities, where the pandemic has prolonged their detention beyond what is reasonable and proportional for their circumstances.³² In this regard, when designing an international instrument on pandemics, an effort should be made to articulate and align this instrument with some existing international and national bodies such as the mechanisms established by the Optional Protocol to the U.N. Convention Against Torture (CAT), which created the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) with a mandate to perform visits to state parties' places of detention and report on such visits, including medical facilities where persons are deprived of liberty.³³

This Protocol also establishes the obligation of states to create a National Preventive Mechanism (NPM) with the main purpose of performing periodic visits to places of detention.³⁴ This domestic NPM is a very useful tool that articulates its mandate with the work of the Sub-Committee on the international level.³⁵ I believe the tools that exist in the context of international human rights treaties, such as the Optional Protocol, should be taken into account when designing an international instrument on pandemics that could benefit from coordination in the relevant area in which they can make contributions. A lot has happened in the last few decades, and this is one of the interesting international developments that should be kept in mind when designing an international instrument on pandemics.

31. *See, e.g.*, OAS: RIGHTS OF PERSONS DEPRIVED OF LIBERTY AND TO PREVENT AND COMBAT TORTURE, <https://www.oas.org/en/iachr/pdl/default.asp> (last visited Apr. 22, 2021).

32. *See, e.g.*, ABA: IMPACT OF COVID-19 ON THE IMMIGRATION SYSTEM, https://www.americanbar.org/groups/public_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system (last visited Apr. 22, 2021).

33. Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, 2375 U.N.T.S. 262.

34. *Id.* art. 3.

35. *Id.*

Regarding the content itself, let me mention that the treaty bodies have not met in Geneva since the outbreak of the COVID-19 pandemic.³⁶ However, this does not mean that work has stalled. Rather, work is being completed through many of the tools provided for in the treaty body mechanisms—including the U.N. Committee Against Torture, where I have the honor of being a member.³⁷ We have seen statements from several of the treaty bodies regarding the content of relevant human rights provisions in their corresponding conventions.³⁸ Furthermore, in approaching the specific issues that have been mentioned in this event, decisions in individual complaints are going to be important tools to inform about applicable standards that will have to be taken into account in an international instrument on pandemics. It will take some time to see such decisions, but treaty bodies are indeed receiving complaints that deal with these very important issues in the context of the COVID-19 pandemic.³⁹

Additionally, I would like to mention that many of the treaty bodies and the Committee Against Torture are including in the list of issues prepared for the state reports to specifically include information about the measures that have been adopted in the context

36. See *Committee against Torture Opens Seventieth Online Session*, MIRAGE NEWS (Apr. 27, 2021, 12:12AM), <https://www.miragenews.com/committee-against-torture-opens-seventieth-549654/> (describing how the suspension of in-person meetings of both the Committee against Torture and other human rights bodies had slowed down their work).

37. See *id.* (noting that despite the inefficiencies posed by the suspension of in-person meetings, treaty bodies had completed twenty-seven States party reviews, thirty-nine concluding observations, and 239 views and decisions related to individual communications).

38. *UN torture prevention body: COVID-19 shows need to strengthen national preventative mechanisms*, U.N. NEWS (July 2, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26031&LangID=E>; *Governments must do more to prevent slavery and exploitation during COVID-19 pandemic*, U.N. NEWS (Nov. 30, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26552&LangID=E>.

39. See generally UNITED NATIONS, COVID-19 AND HUMAN RIGHTS: WE ARE ALL IN THIS TOGETHER (Apr. 2020), https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf (describing the myriad ways in which the COVID-19 pandemic threatens human rights, thus raising the specter of potential violations).

of the COVID-19 pandemic, particularly on the impact these measures have had on specific vulnerable groups. For example, CAT is focusing on persons deprived of liberty, situations of confinement in homes for the elderly, hospitals, and institutions for persons with mental and psychosocial disabilities.⁴⁰ The concluding observations that CAT will adopt in these reviews are going to be important sources of nuanced and specific information of good practices and problems regarding the implementation of these international obligations in the context of the current pandemic.

40. UNCAT, *supra* note 10.