

2021

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Recommended Citation

Saez, Macarena (2021) "Pandemics and the Disproportionate Impact on Vulnerable Groups," *American University International Law Review*. Vol. 36 : Iss. 5 , Article 11.

Available at: <https://digitalcommons.wcl.american.edu/auilr/vol36/iss5/11>

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PANDEMICS AND THE DISPROPORTIONATE IMPACT ON VULNERABLE GROUPS

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Few matters require more international cooperation than health issues related to pandemics. COVID-19 is the latest pandemic the world has experienced, creating one of the most complex health crises, and we know that,, unfortunately, may not be the last one.¹ International law, therefore, will become crucial for the protection individuals and communities worldwide. As Covid-19 showed us, with each health crisis, governments will take different approaches and their impact in individual and communities' rights will differ.

The U.N. Economic and Social Council adopted in 1984 the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.² These principles state that:

No state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the

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1. See Emily Landon, *Interview with COVID 2025: Facing the Threat of Future Pandemics*, CHICAGO NEWS (July 16, 2020), <https://news.uchicago.edu/videos/covid-2025-facing-threat-future-pandemics-emily-landon>.

2. Comm'n on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, annex (Sept. 28, 1984).

nation.³

This provision, however, leaves a lot of room for measures that may make sense from a public health point of view. However, it may create pockets of people who will have to carry the burden regarding restrictions of rights at higher rates than other groups.

We know inequities related to social determinants of health are magnified during crises.⁴ The Human Rights Committee stated in its General Comment No. 29: Article 4: Derogations during a State of Emergency:⁵

According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (arts. 2, 3, 14, para. 1, 23, para. 4, 24, para. 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.

Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law.⁶

According to international law, therefore, any measure taken to protect the population that restrict people's rights and freedoms must

3. *Id.* ¶ 58.

4. Michelle Williams, *COVID-19 and the Social Determinants of Health*, HARV. MED. SCH. CTR. FOR PRIMARY CARE (July 28, 2020), <http://info.primarycare.hms.harvard.edu/blog/covid-social-determinants-health>.

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

6. *Id.* ¶¶ 8–9

be lawful, necessary, and proportionate.⁷ States of emergency need to be limited in duration and measures must take into consideration the disproportionate impact on specific populations or marginalized groups.⁸

This is the point that we need to elaborate further. What does it mean that a measure is disproportionate? There is no question that international and national crises require communal sacrifices. There is, there should be, a sense that we are all in this together, and that we all need to do our share to get out of the crisis. That burden, however, is not shared equally. Some groups suffer the burden at a higher rate, which is what we need to avoid.⁹ To the highest possible extent, we must ensure that the burden of resisting a crisis, and the recovery from it, does not burden any group more than the others.

The traditional methodology used in law to determine if a measure complies or not with international law is, first, to look at its literal meaning.¹⁰ We know, however, that we cannot measure impact by only looking at the way a statute or measure is construed. There are still measures around the world that openly target specific groups based on animosity against them.¹¹ Those are complex cases, but they are easy to identify as discriminatory in its intent and impact.¹² This is the case, for example, of places where HIV patients saw their treatments denied or delayed under the pretense that it was necessary as part of COVID restrictions.¹³ The most complicated and pervasive

7. See *Human Rights Dimensions 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>.

8. *Id.*

9. *Impact of COVID-19 on Minoritized and Marginalized Communities*, AMA, <https://www.ama-assn.org/delivering-care/health-equity/impact-covid-19-minoritized-and-marginalized-communities> (last updated Oct. 7, 2020).

10. See Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

11. See generally *Addressing Stigma and Discrimination in the COVID-19 Response*, UNAIDS (Oct 8, 2020), https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2020/october/20201008_reduce-stigma-discrimination-during-covid19-responses.

12. *Id.*

13. See *id.*

cases of restrictions of rights, however, come from measures facially neutral in countries where discrimination against a particular group was already embedded in the societal structure.¹⁴ In those cases, neutral measures obviously deepen the impact on specific populations.

The easiest way to measure impact is *ex post*—once we can understand what happened. Even then, however, if we are not attentive to looking for disproportionate impact, we may not see it. In other words, we need to have a specific intersectional gaze to understand what happens with neutral measures in specific populations, and we need to gather—for example—disaggregated data on the impact of specific measures.

Ex post analysis, however, can only help improve a situation for the future. Such analysis consequently fails to protect specific groups.¹⁵ We must therefore ensure that we use *ex ante* analyses and provide countries with tools to understand what concrete measures need to be in place to fulfill their international law obligations.¹⁶ More importantly, in order to protect their populations more efficiently, the analysis on disproportionate impact must be integrated to the decision-making process for each specific measure.

So, how do we do this?

An *ex ante* approach requires governments' commitment to analyze each potential measure before it is implemented with a human rights perspective.¹⁷ This means that countries must

14. See *Covid-19 Triggers Wave of Free Speech Abuse*, HUM. RTS. WATCH (Feb. 11, 2021, 3:00 AM), <https://www.hrw.org/news/2021/02/11/covid-19-triggers-wave-free-speech-abuse>.

15. Cf. EX-POST ASSESSMENT OF REGULATION: PRACTICES AND LESSONS FROM OECD countries, OECD 10 (2018), [https://www.oecd.org/centrodemexico/publicaciones/OECD%20\(2018\)%20Expost%20assessment.pdf](https://www.oecd.org/centrodemexico/publicaciones/OECD%20(2018)%20Expost%20assessment.pdf) (noting that *ex post* analysis completes the regulatory cycle by providing insights that can improve future regulations.)

16. See generally Richard Banks, *Ex-Ante-Evaluations: Strengths, Weaknesses and Opportunities* (Sept. 19, 2000), https://ec.europa.eu/regional_policy/archive/sources/docconf/edimbourg/pdf/banks_en.pdf (last accessed Mar. 3, 2021) (explaining State *ex-ante* analysis and including challenges, weaknesses, and solutions to government's efforts to transparently improve policies).

17. *Id.* (describing the ways governments may use this type of analysis for

recognize, first, that there are some groups of society that are more vulnerable than others.¹⁸ Second, governments must analyze how each measure will impact the identified vulnerable groups instead of thinking about the population of a country as a whole.¹⁹ The goal should be that each measure has a similar impact in each individual.²⁰ If a required measure will have a disproportionate impact in a specific segment of society, governments must include complimentary measures to reduce the negative impacts.²¹

Any group suffering from structural inequalities will most likely be impacted negatively by measures that are not thought of with those groups in mind.²² This is the case with women.²³ In a world that has been structured with women fulfilling specific roles, any measure that curtails freedoms even for legitimate reasons, will have a gendered impact.²⁴ COVID has shown us already the disproportionate impact the pandemic and the measures to curtail its devastating effects have had on women around the world.²⁵

For example, lockdowns are the most used measures against COVID around the world.²⁶ As necessary as this measure may be, it has had a disproportionate negative impact on women.²⁷ In most countries, for a large number of women, their sources of income come from informal labor markets, which are immediately shut down or prohibited with lockdowns.²⁸ Moreover, overall, women are

social measures).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. U.N. Dep't of Econ. and Soc. Affairs, *World Social Report 2020: Inequality in a Rapidly Changing World*, at 3–5, U.N. Doc. ST/ESA/372, U.N. Sales No. E.20.IV.1 (2020).

23. *Id.* at 85, 94–96.

24. See, e.g., Anu Madgavkar et al., *COVID-19 and Gender Equality: Countering the Regressive Effects*, MCKINSEY & CO. (July 15, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects>.

25. See generally *id.*

26. See *id.*

27. See generally *id.*

28. See *After Low-Income Women Lose Their Jobs in the COVID-19 Economy, What Happens to Them?*, GATES FOUND.,

poorer than men because of their more limited access to steady jobs and property.²⁹ In countries where retirement funds are accrued individually, women also tend to be poorer.³⁰ Even if they participated in formal markets and contributed to an individual pension fund, women live longer and have less years of formal work due to childbearing and rearing.³¹ Moreover, in some countries, women are formally allowed or mandated to retire earlier.³²

Another key pressing issue of lockdowns is domestic violence. Women also are affected by domestic violence at significantly higher rates than men.³³ In lockdowns, some countries experienced a decrease on help line calls but an increase on cases of domestic violence in hospitals and police calls.³⁴ Control of women's movements by partners increased, violence increased, but options for women experiencing violence decreased.³⁵ In some countries, lockdowns affected shelters—despite an increase in need, the shelters were no longer open to receive new victims.³⁶

Another example of a response with a disproportionate impact on women is the restriction of public mobility based on gender. Some countries—such as Perú,³⁷ Colombia,³⁸ and Panamá³⁹—restricted

<https://ww2.gatesfoundation.org/ideas/articles/coronavirus-economic-impact-women> (last visited Feb. 23, 2021).

29. See *Women and Retirement: The Gender Gap Persists Why Women Face a Gender Gap in Retirement Savings*, NAT'L COMM. TO PRES. SOC. SEC. & MEDICARE, <https://www.ncpssm.org/eleanors-hope/issue-briefs/women-and-retirement-the-gender-gap-persists/> (last visited May 21, 2021).

30. Estelle James et al., *The Gender Impact of Pension Reform: A Cross-Country Analysis*, WORLD BANK 3–5 (2003), <https://openknowledge.worldbank.org/handle/10986/18163>.

31. *Id.* at 5.

32. *Id.* at 3, 6.

33. See generally Megan L. Evans et al., *A Pandemic Within a Pandemic — Intimate Partner Violence during Covid-19*, 383 NEW ENG. J. MED. 2302 (2020).

34. Sarah Fielding, *In Quarantine with an Abuser: Surge in Domestic Violence Reports Linked to Coronavirus*, GUARDIAN (Apr. 3, 2020), <https://www.theguardian.com/us-news/2020/apr/03/coronavirus-quarantine-abuse-domestic-violence>

35. Evans, *supra* note 33.

36. *Id.*

37. See Ana Bazo Reisman, *¿Por qué falló Perú con el 'Pico y Género' Para Contener el Covid-19?*, FRANCE24 (Apr. 17, 2020), <https://www.france24.com/es/20200417-peru-fallo-pico-y-genero-coronavirus->

public mobility by gender for some periods of time, mandating that some days of the week (for example, Monday, Wednesday, Friday and Sundays) women could go out and the other days men could go out.⁴⁰ These measures, which can be viewed as facially neutral since they affect both men and women, left gender non-conforming individuals in a vulnerable state.⁴¹ Anyone, not only police forces, could target people who do not conform to gender stereotypes about male and female, prohibiting access to supermarkets and banks or simply harassing them in the streets.⁴² This happened in places where the measure was imposed.⁴³ This measure also revealed that when women were out, they were taking care of domestic chores more than men.⁴⁴ In Bogota, for example, on the days that women could go out, supermarkets were busier than when men could go out.⁴⁵

These are just two examples of the effect of lockdown and mobility restrictions during COVID that have disproportionately impacted women. However, these measures do not only affect women. They also affect other marginalized communities such as ; the trans community and people with disabilities.⁴⁶ Before

confinamiento.

38. See Redacción Canal Trece, *Se Levanta el 'Pico y Género' en Bogotá, lo que Debes Saber*, TRECE (May 11, 2020), <https://canaltrece.com.co/noticias/pico-genero-sexo-cedula-bogota-cuarentena-hoy-mujeres-hombres-trans-gays-lesbianas-intersexuales>.

39. See Cristian González Cabrera, *Cuarentena Por Género Acorrala a Mujer Trans en Panamá*, HUM. RTS. WATCH, (Apr. 2, 2020), <https://www.hrw.org/es/news/2020/04/02/cuarentena-por-genero-acorrala-mujer-trans-en-panama>; Alcaldía de Bogotá, *¿Me pueden pedir la cédula por el pico y género?*, (Apr. 28, 2020), <https://bogota.gov.co/mi-ciudad/integracion-social/cuarentena/me-pueden-pedir-la-cedula-por-el-pico-y-genero>.

40. See Cabrera, *supra* note 39; see also de Bogotá, *supra* note 39.

41. See Cabrera, *supra* note 39.

42. See *id.*

43. See, e.g., *id.*

44. Catalina Oquendo & Santiago Torrado, *La Restricción Por Género Desnuda los Prejuicios de Bogotá*, EL PAÍS (Apr. 21, 2020), <https://elpais.com/sociedad/2020-04-21/la-restriccion-por-genero-desnuda-los-prejuicios-de-bogota.html>.

45. *Id.* (discussing supermarket lines almost doubling during days women were allowed to be out of their homes).

46. Jennifer Bitterly, *Pandemic Pulls Latin America's Trans Community into the Spotlight*, CHRISTIAN SCI. MONITOR (May 2, 2020), <https://www.csmonitor.com/World/Americas/2020/0713/Pandemic-pulls-Latin->

implementing any extraordinary measures to protect individuals from pandemics, governments must do a situated analysis of those measures in groups that suffer structural inequalities. Once measures have been implemented, it is important to monitor the impact of such measures in specific groups such as incarcerated individuals, indigenous communities, children, and low-income families.

In concluding, I want to stress that the problem I am referring to specifically is the disproportionate impact that we do not openly see. We still have problems of open discrimination. We need to ensure that countries are not using the pandemic as an excuse to target specific populations. Equally important and more difficult to perceive, however, we need to ensure that we are not inadvertently allowing one group to bear the burden of the community. Pandemics affect communities as a whole and they must be faced with community-based solutions and sacrifices. The burden should not be on those with less, but, on the contrary, on those with more privilege and tools to face a crisis. We should avoid health crises from becoming human rights crises as well.