

# COVID-19 AND HUMAN RIGHTS

## States' obligations and businesses' responsibilities in responding to the pandemic

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**The COVID-19 pandemic is exacerbating existing human rights violations, and enabling others. However, it is also stimulating opportunities to further the human rights agenda. A robust framing is needed to hold duty bearers to account, and to help governments and communities to build back better.**

**This paper provides an overview of the issues through the lens of five key human rights principles. It uses a human rights framing to assist governments, business and civil society to understand their obligations and ways they can help manage the impacts of the pandemic.**

**This is an advance version of the paper for discussion. The paper will be revised to take account of comments and a final version will be published in the coming months. To comment, please contact [jsaunders@oxfam.org.uk](mailto:jsaunders@oxfam.org.uk)**

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# 1 INTRODUCTION

*'The crisis has revealed weaknesses that human rights can help to fix.'*

United Nations (2020) 'COVID-19 and human rights: we are all in this together'<sup>1</sup>

The language and principles of human rights relate to the rights that underpin the survival and basic wellbeing of communities and individuals, including their rights to life, health and an adequate standard of living. Human rights law places obligations on states and responsibilities on business – and provides a normative framework for governments, policy makers, parliamentarians, businesses and civil society organizations (CSOs) to respond to the COVID-19 pandemic and its social and economic consequences.

In March 2020, the Chairpersons of the 10 global UN Treaty Bodies set out specific measures global leaders should take to tackle the public health threat posed by the COVID-19 pandemic.<sup>2</sup> They stressed that women are at a disproportionately high risk because in many societies they are the main caregivers for sick family members, and urged governments 'to take extra care of those particularly vulnerable to the effects of COVID-19, including older people, people with disabilities, minorities, indigenous peoples, refugees, asylum seekers and migrants, people deprived of their liberty, homeless people, and those living in poverty.'<sup>3</sup>

Using human rights as a frame is a useful way to ensure that groups and individuals particularly vulnerable to COVID-19 – and its social and economic impacts – can demand their rights.

The international dimensions of human rights are particularly relevant to the pandemic. The virus does not respect state borders, so requires a collective effort. In view of their universality, effective human rights protection requires collective protection and international solidarity. Recognizing that states have differing resources and norms, human rights laws and guidance can provide a basis for assessing how well governments' measures promote people's human rights, while protecting public health.

## **Box 1: Guidance from the Office of the United Nations High Commissioner for Human Rights for a people-centred COVID-19 response**

*'Health strategies should address not only the medical dimensions of the pandemic but also the human rights and gender-specific consequences of measures taken as part of the health response:*

- *Emergency powers must be used for legitimate public health goals, not used as basis to quash dissent or silence the work of human rights defenders or journalists.*
- *Containment measures, such as social distancing and self-isolation, need to take account of the needs of people who rely on the support of others to eat, dress and bathe. Many persons, including persons with disabilities, rely on home and community services.*
- *It is also vital that any tightening of border controls, travel restrictions or limitations on freedom of movement do not prevent people who may be fleeing from war or persecution from seeking asylum and safety.*
- *Fiscal stimulus and social protection packages aimed directly at those least able to cope with the crisis are essential to mitigating the devastating consequences of the pandemic. Immediate economic relief measures such as guaranteed paid sick leave, extended unemployment benefits, food distribution, and universal basic income can help safeguard against the acute effects of the crisis.*

- *LGBTI people also face heightened risks during this pandemic, and specific measures should be incorporated into response plans to address these impacts.*
- *States should take into account indigenous peoples' distinctive concepts of health, including their traditional medicine, consult and consider the free prior and informed consent of indigenous peoples in the development of preventive measures on COVID-19 and ensure that specific vulnerabilities due to historic discrimination or other factors are addressed in the response.*
- *People deprived of their liberty, including in prisons, pre-trial detention, immigration detention, institutions, and other places of detention are at heightened risk of infection in the case of an outbreak. Their situation should be specifically addressed in crisis planning and response.*
- *Medical professionals and relevant experts, including scientists, must be able to speak freely and share information with each other and the public.'*

Source: <https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx>

## FIVE PRINCIPLES

*'We have seen how the virus does not discriminate, but its impacts do – exposing deep weaknesses in the delivery of public services and structural inequalities that impede access to them. We must make sure they are properly addressed in the response'.<sup>4</sup>*

António Guterres, UN Secretary-General

Five core human rights principles are particularly relevant to pandemic responses: equality and non-discrimination, participation, proportionality, human dignity and care, and the rights to freedom of expression, assembly and information.

### Equality and non-discrimination

Forms of discrimination intersect to cause inequality, and are particularly relevant to the coronavirus outbreak. People may be more vulnerable to COVID-19 if they are older, have disabilities, and, in some countries, are of a particular ethnicity (although it is not yet clear to what extent this vulnerability is caused by other inequalities).

### Participation

Participation is critical to an understanding of how governments can and should take the views of communities into account, with the advantage that the solutions adopted will be more effective and accepted. Participation is also intrinsic to the way businesses meet their human rights responsibilities – i.e. through meaningful good faith engagement with their stakeholders. Participation should be highlighted in businesses' due diligence processes throughout their supply chains, down to the primary level of producers. Meaningful participation is also important to ensure genuine and informed consent.

### Proportionality

Proportionality is significant, because where governments see a need for special measures that might put at risk the normal application of human rights standards, human rights law requires that any special measures are permitted by law, and are necessary, proportionate and time-limited.

## Human dignity and care

Protecting the dignity of people suffering from COVID-19 poses enormous challenges to health and social care systems. Dignity requires states, businesses and individuals to avoid stigma and hatred during and after the pandemic. The SPHERE humanitarian standards state:

*'Dignity entails more than physical well-being; it demands respect for the whole person, including the values and beliefs of individuals and affected communities, and respect for their human rights, including liberty, freedom of conscience and religious observance.'*<sup>5</sup>

As well as the undeniable challenge of dealing with a crisis of this magnitude, we all now have an opportunity to build on the shared experiences of a world in lockdown to stress and affirm our common humanity. In Europe, supermarket workers, care home workers and garbage collectors are now recognized as key (or essential) workers. Social norms may be shifting: according to polling, programmes that provide immediate support directly to vulnerable groups are extremely popular.<sup>6</sup> There may also be a dawning realization by some men of the disproportionately small role they have played until now in unpaid household, care and family duties.<sup>7</sup> It is too early to say whether these shifts will be permanent, but the unprecedented effects of a global lockdown may affect norms for years to come.

## Freedom of expression, assembly and information

Article 19 of the Universal Declaration of Human Rights protects the freedom of expression, which is given legally binding effect through Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and many regional human rights treaties. Although it is not an absolute right, any restrictions are carefully delimited. Whistle-blowing protection plays a valuable part in building public confidence in government responses to the coronavirus crisis by allowing free and open debate on the measures taken. Freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, both key elements of a thriving civic space. Article 19(2) ICCPR also makes explicit that this right includes the right to information.

## STRUCTURE OF THIS PAPER

**Part 2** explores key themes in a human rights-focused approach to the COVID-19 pandemic, starting with the rights to life and health. **Part 3** considers how the above principles apply in practice. **Part 4** discusses the gendered dimension of the response and the needs of vulnerable groups. **Part 5** addresses the temporary ways in which states may introduce emergency measures in a manner consistent with their international and domestic human rights duties. It considers the obligation to cooperate with other states, and issues that arise in ensuring that social and economic rights are respected during and after the pandemic. It also discusses the right to information, and the role of courts. **Part 6** turns to the role of business and the responsibility to respect human rights, with a focus on supply chains, due diligence, the rights of workers in the formal and informal economies, and environmental impacts. **Part 7** explores the heightened risk to freedoms of expression, association and assembly, and the challenges of closing civic space.

**Box 2: Issues for further discussion, and a disclaimer**

This discussion paper is exactly that, an encouragement to discussion. The pandemic is a complex global emergency that will have lasting impacts. Its challenges are profound, and many aspects may only come to light later. This paper illustrates some ways in which human rights can strengthen and render our response to the pandemic more effective. They are neither comprehensive nor equally applicable in all contexts, although the overall principles are the same. The bibliography and notes provide links to other more specific and comprehensive reports.

To facilitate a more in-depth discussion, the final version of this paper may also refer to short thematic papers addressing the different rights and regional approaches.

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## 2 RIGHTS TO LIFE AND HEALTH

*'To deny people their human rights is to challenge their very humanity.'*<sup>8</sup>

Nelson Mandela

States have committed themselves, through the UN Charter, to promote human rights; the Universal Declaration of Human Rights emphasizes, in Article 25, the fundamental importance of health and social protection. While the Declaration is not a legally binding instrument, it is the basis for a number of legally binding human rights treaties; its principles have been turned into law at the global, regional and national levels; and to a large extent it forms part of customary international law.<sup>9</sup> Human rights are a shared international creation, and states from across Africa, Asia and Latin America played a crucial role in their development.<sup>10</sup>

### THE RIGHT TO LIFE

*'The right to live isn't the absence of death, it's living a life with dignity.'*

Ayesha Al Omary, Executive Assistant Director, Justice Centre for Legal Aid, Jordan

The right to life, as affirmed in Article 6 of the ICCPR and many regional instruments, is the starting point for states' human rights obligations. The Human Rights Committee describes it as 'the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies which threatens the life of the nation'.<sup>11</sup>

In an authoritative 2018 commentary on this right (General Comment 36), the Human Rights Council examined positive duties arising from the right to life, noting:

*'The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include...the prevalence of life threatening diseases, such as AIDS, tuberculosis or malaria.'*<sup>12</sup>

This reference to 'appropriate measures' is useful as part of a human rights framework for considering states' decisions on what measures to put in place to address COVID-19, as the Human Rights Council explained:

*'the measures called for addressing adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health-care, electricity and sanitation, and other measures designed to promote and facilitate adequate general conditions...'*<sup>13</sup>

So, in considering their response to COVID-19, states should, within their available resources, adopt measures which promote 'adequate conditions' for the realization of the right to life. In its report *COVID-19 and human rights: we are all in this together*, the United Nations provides examples of fiscal, financial and economic measures to mitigate the negative impact of COVID-19 on their populations:

*Provision of emergency water supplies to slum areas;*

*Suspension of housing evictions for unpaid rent during the crisis;*

*Preserving jobs and wages through targeted economic measures, in some cases close to providing universal income, and support to employers and businesses;*  
*Providing or extending paid sick leave to workers or unemployment benefits;*  
*Securing emergency shelter for the homeless;*  
*Expanding domestic violence responses for victims of abuse;*  
*Providing child care for essential service workers.<sup>14</sup>*

**Part 6** of this paper sets out the responsibilities of businesses, and **Part 7** addresses the role of civil society, in addressing what General Comment 36 calls ‘the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity’.

## THE RIGHT TO HEALTH

The right to health is found in legal instruments at international, national and regional levels, including Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR):

*‘States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’ Article 12(2) includes the steps states should take towards ‘(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.’*

As with the right to life, more detailed authoritative interpretation for states is contained in a General Comment of the Human Rights Council (see **Box 3**). In terms of the current pandemic, it is useful to note the requirements for measures to prevent, treat and control disease; public education and access to information; and training for health personnel, including on human rights.

### **Box 3: Human Rights Council General Comment 14 on the Right to the Highest Attainable Standard of Health**

Paragraph 44 reads:

*‘The Committee also confirms that the following are obligations of comparable priority:*

*(a) To ensure reproductive, maternal (prenatal as well as post-natal) and child health care;*

*(b) To provide immunization against the major infectious diseases occurring in the community;*

*(c) To take measures to prevent, treat and control epidemic and endemic diseases;*

*(d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;*

*(e) To provide appropriate training for health personnel, including education on health and human rights.’*



Human rights are interdependent and intersectional, so detailed recommendations and prescriptions for the implementation of the right to health are contained in international and regional instruments and national laws, covering various groups and themes. At the global level, these include:

- Article 24 of the Convention on the Rights of the Child;<sup>15</sup>
- Articles 11 and 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>16</sup>
- Article 25 of the Convention on the Rights of Persons with Disabilities (CRPD);<sup>17</sup>
- Article 28 (urgent medical care) of the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;<sup>18</sup>
- the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care;<sup>19</sup>
- the WHO International Health Regulations (2005);<sup>20</sup> and
- International Labour Organization (ILO) Convention No 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.<sup>21</sup>

Governments will also find important and useful guidance in regional treaties and interpretations, for example:

- the African Charter on Human and Peoples' Rights;<sup>22</sup> and
- the American Convention on Human Rights,<sup>23</sup> and its Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).<sup>24</sup>

## Vaccines and essential health supplies as public goods

*'A COVID-19 vaccine must be seen as a global public good – a people's vaccine, which a growing number of world leaders are calling for.'*

UN Secretary-General, António Guterres, at the Global Vaccine Summit on 4 June 2020<sup>25</sup>

To end the pandemic and save millions of lives, we need a safe and effective vaccine that is delivered free to everyone on earth who needs it, as soon as possible. There is a strong risk that rich countries and huge pharmaceutical corporations could stop or delay the vaccine from reaching the people who need it, especially people living in poverty in poor countries, who need it not only for the enjoyment of their right to health, but also to uphold their other human rights at risk from the social and economic impacts of the pandemic. Other vital supplies, such as oxygen, diagnostic tests, ventilators and personal protective equipment may not be available because of rich nations trying to monopolize access to them.<sup>26</sup> The head of the African Centre for Disease Control has written about how African nations have found themselves forced to the back of the queue, being told they will have to wait six months for vital equipment, as it has all been bought by rich nations.<sup>27</sup>

The response from pharmaceutical companies has been mixed, some waiving their patents on potential therapies, others responding with aggressive steps to protect their commercial position.<sup>28</sup> Meanwhile, a group of 140 world leaders, including many heads of state, called in May 2020 for a mandatory worldwide pooling of patents and for the sharing of all knowledge, data and technologies related to COVID-19 to ensure that any country can produce or buy affordable doses of vaccines, treatments and tests.<sup>29</sup> They also asked for a guarantee that COVID-19 vaccines, treatments and tests be provided free of charge to everyone, everywhere, with priority given to frontline workers, vulnerable people and poor countries with the least capacity to save lives.<sup>30</sup>

Intellectual property law is addressed in the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This sometimes rubs

uncomfortably with human rights, but states may invoke the flexibility given in the 2001 Doha Declaration on the TRIPS Agreement, which affirmed that ‘the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health, which was strengthened with effect from 2017 when the flexibility mechanism became permanent’.<sup>31</sup> In particular, the Declaration confirms safeguards to protect public health and enhance access to medicines for poor countries, and permits states to authorize compulsory licensing of medicines to address a public health emergency.<sup>32</sup>

Several countries have started to take steps to implement the Doha Declaration for the COVID-19 emergency.<sup>33</sup> For example, the Parliament of Chile, citing the right to health in Article 12 of the ICESCR, adopted a unanimous resolution declaring that the pandemic justifies the use of compulsory licensing to facilitate access to vaccines, drugs, diagnostics, devices and other technologies.

## POLICY AND PRACTICAL GUIDANCE

There is a wealth of guidance in relation to all areas of human rights at global, regional and national levels.

### International guidance

At a global level, the UN Treaty bodies have all produced guidance on the pandemic within their areas of expertise.

Alongside UN Special Rapporteurs, working groups and experts, the Human Rights Council’s ‘Special Procedures’ system involves a number of independent human rights experts covering 44 thematic and 12 country mandates, dealing with civil, cultural, economic, political and social human rights.<sup>34</sup> In addition, many CSOs work internationally and have published additional guidance.

### Regional guidance

Inter-governmental bodies have provided toolkits at regional level; for example the *Practical Guide to Inclusive and Rights-based responses to COVID-19* by the Organization of American States (OAS)<sup>35</sup> and the Council of Europe’s *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis*.<sup>36</sup> The African Union and the OAS also have special rapporteurs, working groups and commissions. For example, the African Commission’s Special Rapporteur on Freedom of Expression and Access to Information has written useful commentaries on the pandemic.<sup>37</sup>

### Country-level guidance

National human rights institutions (NHRIs) provide detailed guidance and can play an important role in advising local and central governments on the implementation of their equality and human rights obligations, and in monitoring their implementation (see **Part 7**). Many NHRIs have quasi-judicial powers, and can include both human rights and other issues, hearing individual complaints, referring cases to courts, and being involved in conciliation, mediation and negotiation.

### 3 FIVE PRINCIPLES IN PRACTICE

Although this paper cannot address every issue related to the pandemic, it is possible to identify relevant human rights principles. These broader lessons can then be applied by governments, businesses and CSOs to inform their decision making, and the development, implementation, and monitoring of the COVID-19 response. In this chapter, we will focus on:

1. Equality and non-discrimination;
2. Participation;
3. Proportionality;
4. Human dignity and care; and
5. The rights to freedom of expression, assembly and information.

#### EQUALITY AND NON-DISCRIMINATION

The response to the coronavirus pandemic requires an understanding of the multiple and intersecting impacts of inequality and discrimination on people on the basis of gender, race or ethnicity, and/or other status. The UN CEDAW Committee General Recommendation 24 states in para 6:

*'While biological differences between women and men may lead to differences in health status, there are societal factors that are determinative of the health status of women and men and vary among women themselves. For that reason, special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women and women with physical or mental disabilities.'*<sup>38</sup>

The Committee on the Rights of Persons with Disabilities, in General Comment 3 (of 2016) on Article 6 of the CRPD goes further:

*'4. ...'Intersectional discrimination' refers to a situation where several grounds interact with each other at the same time in such a way as to be inseparable. Grounds for discrimination include age, disability, ethnic, indigenous, national or social origin, gender identity, political or other opinion, race, refugee, migrant or asylum seeker status, religion, sex and sexual orientation.*

*5. Women with disabilities are not a homogenous group. They include indigenous women; refugee, migrant, asylum-seeking and internally displaced women; women in detention (hospitals, residential institutions, juvenile or correctional facilities and prisons); women living in poverty; women from different ethnic, religious and racial backgrounds; women with multiple disabilities and high levels of support; women with albinism; and lesbian, bisexual and transgender women, as well as intersex persons. The diversity of women with disabilities also includes all types of impairments, in other words physical, psychosocial, intellectual or sensory conditions that may or may not come with functional limitations. Disability is understood as the social effect of the interaction between individual impairment and the social and material environment, as described in article 1 of the Convention on the Rights of Persons with Disabilities.'*<sup>39</sup>

A human rights approach can help identify and address unintended discriminatory practices in the allocation of public health goods. States must pay attention to the differential impact of the virus on vulnerable people, including those facing mental health issues, elderly people,

people with disabilities, and the LGBTQIA+ community. Human rights law makes clear that such unintended practices may amount to unlawful indirect discrimination, which principle therefore provides a foundation for the provision of health services that avoid stigma.

Where there is evidence of specific vulnerabilities to COVID-19 among certain ethnic groups, this should be investigated and responded to urgently by states.

With many schools closed, and many people having to care for family members, the private sector also has a responsibility in their employment practices to avoid discriminating against women who provide care.

**Part 4** addresses equality and non-discrimination in more detail by reference to gendered impacts and by reference to a variety of groups living in conditions of vulnerability, and **Part 5** provides further examples in relation to state obligations.

## PARTICIPATION

International law contains numerous references to the right to participation, and it is embodied in several human rights mechanisms at regional level. For example, the Maputo Protocol on the Rights of Women to the African Charter<sup>40</sup> seeks to ensure ‘participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes’ (Article 19). The right to participation has also been developed in a number of judicial cases, particularly regarding indigenous peoples.<sup>41</sup>

Participation in decision making that affects people’s lives reflects the concept of human dignity. As Martha Nussbaum puts it, it provides for their active participation and agency instead of making them ‘passive recipients of benefit’. Participation is crucial during the pandemic, for medical workers caring for their patients in hospitals around the world, including those in conflict zones; for those ensuring that food supplies are delivered to vulnerable people in cities, villages and refugee camps; for carers providing essential care to their families and loved ones; and for children trying to continue their education online or having to work to support their families. As Hilary Gbedemah, Chair of the Committee on the Elimination of Discrimination against Women said in a UN announcement in March 2020: ‘Only by including all people in COVID-19 strategies can the pandemic be combatted.’<sup>42</sup>

Participation operates in many layers. General Comment 14 on the Right to the Highest Attainable Standard of Health states:

*‘Promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if States secure people’s participation.’<sup>43</sup>*

Learning from the experience of HIV/AIDS responses, the response to COVID-19 should include communities, patient’s rights groups and trade unions.

The principle of participation is considered in **Part 4** in relation to the rights of children, older people, people with disabilities, and internally displaced people, and **Part 7** further reviews the right of participation in considering the role of civil society.

## PROPORTIONALITY

Curfews, increased surveillance, compulsory testing for COVID-19, and censorship have all been implemented by states arguing that the COVID-19 public health emergency justifies

special measures. These measures are likely to interfere with human rights, raising the question whether they can be justified within the framework laid down by human rights law. To the extent that a measure can be justified within that framework, it will not be unlawful, but if it cannot be justified, it will violate the human rights in question.

The principle of proportionality is common, though the details may vary from one system to another.

In **Part 5** we consider the issue of proportionality in emergency legislation, and the guidance from the UN Human Rights Committee on derogations from the ICCPR, along with other examples of the proportionality test, noting that there is no equivalent provision in the ICESCR. As we shall see, in addition to determining whether the measure is proportionate when it is introduced, emergency laws should be time-limited.

## HUMAN DIGNITY AND CARE

The impact of the pandemic and the responses to it on all areas of life challenges us to acknowledge our own agency, and to recognize and respect the agency of others. As Martha Nussbaum put it in *Creating Capabilities: the Human Development Approach*, ‘In a wide range of areas, moreover, a focus on dignity will dictate policy choices that protect and support agency, rather than choices that infantilize people and treat them as passive recipients of benefit’.<sup>44</sup> The principle of human dignity underpins human rights, and is seen across the spectrum of human rights standards, from the Universal Declaration to the right to health, from the Convention on the Elimination of Racial Discrimination (CERD) to the WHO’s International Health Regulations.

The fundamental importance of the principle of human dignity is discussed in **Part 2** (in relation to the right to life) and **Part 4** (in relation to children and older people). **Part 5** notes that states cannot derogate from their duty to treat all persons with humanity and respect for their dignity and notes the importance of dignity in relation to health in the World Health Organization’s Guidelines. **Part 6** emphasises that the principle of dignity is also embedded in the private law of businesses, and **Part 7** focuses on the role of civil society in promoting respect for human dignity.

## FREEDOM OF EXPRESSION, ASSEMBLY AND INFORMATION

*‘This is not the time for states to take a restrictive approach to freedom of expression and information. The global effort to combat COVID-19 will not be successful unless there is full transparency about the spread of the virus, the sharing of accurate public information and independent media coverage. Governments, the media and social media companies all have a role to play in ensuring the free flow of information during this global health crisis.’*

Quinn McKew, Executive Director of Article 19<sup>45</sup>

Freedom of expression is a fundamental human right, laid out in Article 19 of the Universal Declaration of Human Rights. It is closely connected to the Article 20 rights that ‘Everyone has the right to freedom of peaceful assembly and association’.<sup>46</sup> States not only have an obligation to protect peaceful assemblies, but should also take measures to facilitate them.<sup>47</sup> The principle of freedom of expression is also recognized and guaranteed in regional agreements, such as the African Union’s revised Declaration of Principles of Freedom of Expression and Access to Information in Africa (2019), anchored in Article 9 of the African Charter, which adds to the body of ‘soft law’ norms developed by the African Commission.

These include the Model Law on Access to Information for Africa (2013), and the Guidelines on Access to Information and Elections in Africa (2017).

Within the scope of freedom of expression, the right to information has become increasingly recognized, often in the context of securing other rights. Transparency is critical: during the coronavirus emergency, we all depend on accurate information and its corollary, the clarification of false information, such as the peddling of false treatments. We depend on good-quality journalism, and where any limitations have been imposed, governments must demonstrate that their limits are legally permitted, necessary and proportionate, and have an end date.

Targeted internet shutdowns by governments during the pandemic can exacerbate the risks to vulnerable communities, particularly where refugee communities are targeted, and may be a violation of the right of freedom of expression and the associated right to information.<sup>48</sup> The need for digital rights extends to the use of the digital sphere by women and men to further their own livelihoods, and to access essential services. Indeed, inequality in access to digital services further exacerbates the socioeconomic vulnerabilities of people living in poverty.

**Part 5** explores the obligations of government in relation to freedom of expression and information, and **Part 7** discusses the correlative rights of civil society, and refers to valuable resources from the International Center for Not-for-Profit Law (ICNL), the UN Special Rapporteur on Freedom of Expression, Association and Assembly, and others.

# 4 UNEQUAL IMPACTS OF COVID-19

Long before the COVID-19 pandemic, a range of entrenched injustices and inequalities were recognized in human rights laws at international, regional and national levels. These inequalities are relevant to COVID-19 and the responses to it. In this part, we will consider gendered impacts, and the effects on vulnerable groups.

## GENDERED IMPACTS

### Gender-based violence

Violence against women and girls is a serious violation of human rights and is addressed in detail in General Recommendation 19 of the Committee on the Elimination of Discrimination Against Women. Consequences of gender-based violence can include physical and sexual harm, altered mental health, loss of income and, too often, death. Pre-existing gender inequalities and social norms, rises in stress levels, and lockdown conditions have led to increased violence against women, mostly by intimate partners. Reports of domestic violence have gone up during the lockdowns, for example, by 30% in France,<sup>49</sup> 25% in Argentina and 33% in Singapore.<sup>50</sup> Preventing and addressing such grave violations of women's human rights can involve a wide range of strategies. In the immediate response, there is a need for telephone and online helplines; special lockdown provisions and shelters/safe spaces for survivors; training for police, social and medical services to provide an appropriate response; and economic, psychosocial and legal support for survivors. In the medium and long terms, however, the fight against gender-based violence will require a change in the social norms that harm women and girls, but ultimately damage us all.

### Sexual and reproductive health and rights

The pandemic is limiting access to sexual and reproductive services. According to UNFPA, 47 million women in 114 low- and middle-income countries may not be able to access modern contraceptives, and 7 million unintended pregnancies are expected to occur if lockdowns carry on for 6 months and there are major disruptions to health services.<sup>51</sup> Due to disrupted programmes on female genital mutilation and child marriage prevention, a sharp increase in these human rights violations is expected.<sup>52</sup>

The legal framework is set out in detail in *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions*,<sup>53</sup> published by the Danish Institute for Human Rights.

### Unpaid care work and the right to care

New research by Oxfam and partners in five selected countries reveals that, while COVID-19 and the related containment efforts have caused increases in unpaid care workloads for women and men, women are still doing the bulk of this work.<sup>54</sup> Women living in poverty, single mothers and essential workers, as well as those belonging to racial and ethnic minorities, are being pushed furthest to the margins.<sup>55</sup> Some women have continued to work from home, while still taking on the largest part of household and care work. Others, including essential paid workers – such as nurses, doctors and supermarket employees – have seen their time squeezed across multiple demands and sometimes impossible choices, especially those heading single-parent families.



The human rights obligations of states with regard to unpaid care are well described by then-UN Special Rapporteur Magdalena Sepulveda Carmona in her report to the General Assembly on Unpaid Care Work and Women's Human Rights: *'States' neglecting or failing to address women's disproportionate unpaid care workload can be seen as a major failure to comply with the obligations regarding equality and non-discrimination which are the pillars of international human rights law.*<sup>56</sup>

Further commitments are set out in the Sustainable Development Goals (SDGs). Under SDG target 5.4, governments must commit to regular collection and analysis of national time-use data as part of their commitments to monitoring progress to recognize and value unpaid care and domestic work.<sup>57</sup> This becomes even more important with the increase in unpaid care work as a result of the pandemic.

There is a grave risk that COVID-19 will widen inequality by affecting carers' livelihoods and their opportunity to flourish later in life. States should explicitly address these issues in planning and assessing the impact of their responses to the pandemic, in social protection programmes, in protecting childcare infrastructure, and in support for basic infrastructure as core to their recovery plans.<sup>58</sup>

## VULNERABLE GROUPS

### People living in poverty

*'This is a crisis that disproportionately affects poor people, who are more likely to have health complications, live in crowded housing, lack the resources to stay at home for long periods, and work low-paid jobs that force them to choose between risking their health or losing their income.'*

Former UN Special Rapporteur on Extreme Poverty and Human Rights Philip Alston<sup>59</sup>

Basic sanitation, including access to soap and water, is essential for reducing the spread of COVID-19. In rural and urban areas, especially informal settlements where social distancing is impossible, governments need to provide the resources to ensure that essential services for water, sanitation and primary healthcare are available. A human rights response can help to identify actions that are needed by law makers, civil servants, ministers and local government officials. Monitoring bodies and civil society can use the framework of human rights to hold governments to account. Considering the need for cross-border efforts, Alston went on: 'the coronavirus is poised to wreak havoc in poorer countries. Wealthy States should direct support to governments that need it, suspend or cancel foreign debt, and stop monopolising medical equipment and coronavirus tests.'

### Children

As Koulla Yiasouma, Chair of the European Network of Ombudspersons for Children, has noted, the pandemic may aggravate the conditions of the most vulnerable children, many of whose education will suffer.<sup>60</sup> International, regional and national human rights laws safeguard children's rights. At the international level, the Food and Agricultural Organization (FAO), UNICEF and WHO have all issued recommendations.<sup>61</sup> The principles are referenced in the Convention on the Rights of the Child<sup>62</sup> and other regional instruments and national laws:

- non-discrimination (Article 2) in the quality of education (relating to vulnerable and stigmatized children);
- participation (Article 12), especially of children in relation to decision making;



- proportionality: not directly in the Convention, but indirectly insofar as any derogation from the Article 28 right to education is subject to the principle of proportionality, for example in considering quarantine and school re-openings;
- dignity (Article 23), especially for mentally or physically disabled children;
- freedom of expression (Article 13) and the right to information about education, especially in areas with reduced access to schooling.

## Older people

The highest mortality rates from COVID-19 are among older people. Disadvantages intersect; for example, people with dementia struggle to understand social distancing, and isolation increases loneliness. At the regional level, the Inter-American Convention on Protecting the Human Rights of Older Persons protects 'effective enjoyment of the right to life and the right to live with dignity in old age'.<sup>63</sup>

To the greatest extent possible, states should guarantee the principle of participation with older people fully involved in decision making about their support – with dignity. As care homes for the elderly have been devastated by the virus,<sup>64</sup> states should apply the principle of proportionality in any special measures, such as measures limiting access to visitors, physical restraint and surveillance, whether in hospitals, residential care or detention.

## People with disabilities

State obligations to people with disability are provided by the CRPD. States must take 'all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters' (Article 11). Necessary measures within Article 11 should include the provision of PPE for care workers, and financial support to ensure that care needs can be met, where the pandemic has made care more difficult and expensive. The principle of participation requires that states should engage people with disabilities through representative organizations in the design of measures to fight the pandemic. The UN Special Rapporteur on the rights of persons with disabilities stresses the right to information: 'Public advice campaigns and information from national health authorities must be made available to the public in sign language and accessible means, modes and formats, including accessible digital technology, captioning, relay services, text messages, easy-to-read and plain language.'<sup>65</sup>

## Indigenous peoples

*'I am receiving more reports every day from all corners of the globe about how indigenous communities are affected by the COVID-19 pandemic, and it deeply worries me to see it is not always about health issues. States of emergency are exacerbating the marginalisation of indigenous communities, and in the most extreme situations, militarisation of their territories is taking place. Indigenous peoples are being denied their freedom of expression and association, while business interests are invading and destroying their lands, territories and resources.'*

José Francisco Cali Tzay, UN Special Rapporteur on the rights of indigenous peoples<sup>66</sup>

ILO Convention No 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries illustrates the relevant human rights principles. Discrimination is prohibited (Article 3), and indigenous peoples' right of participation is mandated in Articles 5 and 7. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly in 2007 and is supported by a Special Rapporteur, the Expert Mechanism on the Rights of Indigenous Peoples, the UN Permanent Forum on Indigenous Issues, and the Inter-agency Support Group. Article 24(2) of UNDRIP further provides that indigenous

individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

## **Internally displaced people**

According to Cecilia Jimenez-Damary, the UN Special Rapporteur on the human rights of internally displaced persons *'Internally displaced persons know best the specific challenges they face. Their participation in identifying these challenges and designing tailored responses to COVID-19 is essential'*.<sup>67</sup> Principle 1 of the UN Guiding Principles on Internal Displacement states: 'Internally displaced people shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.'<sup>68</sup> The 30 guiding principles go on to require respect for a series of detailed rights. Governments should ensure internally displaced people receive information about the disease, increased humanitarian assistance, and that there is effective planning to manage the heightened risks given the challenges of social distancing in camps.

## 5 STATES' OBLIGATIONS

*'Coronavirus anywhere is a threat to people everywhere.'*

Ellen Johnson Sirleaf, former Liberian President<sup>69</sup>

By adopting a human rights-based approach to the pandemic, states can calibrate their response to the intersection of vulnerability, as described in **Part 3**, and fulfil their duties to eliminate discrimination. As well as the actions of governments and other public bodies, state liability extends to protecting the rights of individuals from violation by others. For instance, the Inter-American Court observed in the leading case of Velasquez Rodriguez on state responsibility under international law for the violation of the human rights of women:

*'An illegal act which violates human rights and which is directly not imputable to a State (for example, because it is the act of a private person or because the person involved has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of lack of the diligence to prevent the violation or to respond to it as required by the Convention.'*<sup>70</sup>

Similarly, the African Commission held that, where a state does not ensure rights under the African Charter, it violates the Charter 'even if the State or its agents are not the immediate cause of the violation', because 'the government had a responsibility to secure the safety and liberty of its citizens, and to conduct investigations into murders.'<sup>71</sup> This has particular resonance for the COVID-19 pandemic, where violations of human rights can arise where the state is not the immediate cause of the violation.

### Box 4: Tools to assist governments making decisions

Tools that can assist with this include UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Clément Nyaletsossi Voule's 10 guidelines for governments and law enforcement to avoid human rights abuses.<sup>72</sup> At regional level, the Council of Europe's toolkit *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: a toolkit for member States*,<sup>73</sup> and the OAS's *Practical Guide to Inclusive Rights-Focused Responses to COVID-19 in the Americas* provide practical guidance to states.<sup>74</sup>

## EMERGENCY LEGISLATION

Extraordinary legislative measures are governed by core constitutional principles, and national and international law. The human rights framework for health emergencies forms part of the body of law for emergencies generally. Parliamentary review is essential. Some states have considered a state of emergency unnecessary because other laws are already sufficient. If a state of emergency is declared, that triggers various obligations under international law.

As noted above, while derogations are permitted subject to strict conditions in the ICCPR, there is no equivalent authorization for derogations in the ICESCR, perhaps because the latter provides for progressive realization, which, as the Committee on Economic, Social and Cultural Rights (CESCR) explains in its General Comment (No 3):

*'imposes an obligation to move as expeditiously and effectively as possible towards that goal... any deliberately retrogressive measures in that regard would require the*

*most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources...*<sup>175</sup>

Whether the extraordinary laws and executive actions are under a state of emergency or not, some common themes appear. Some such laws restrict freedom of movement, such as curfews. Others involve privacy issues around tracking and tracing, compulsory testing, and surveillance. **Part 7** provides further examples, including censorship.

Emergency legislation must comply with legal principles and should be scrutinized thoroughly by parliamentarians and human rights commissions. Any temporary legislation that potentially impacts a state's human rights legislation must be legal and proportional. While human rights law permits certain limitations on human rights in narrowly applicable situations, these should comply with the 1984 Siracusa Principles on the Limitation and Derogation of Provisions.<sup>76</sup> This is grounded in the general principle of 'non-retrogression', meaning that states should not permit human rights protections to deteriorate unless there are strong justifications, which puts the burden of justification on the state to demonstrate that it has only adopted a retrogressive measure after it has considered all the options carefully, has assessed the impact, and has fully used its maximum available resources (see CESCR General Comment No 3 above). The UN's Human Rights Committee provided its own guidance on responses to the COVID-19 pandemic in a 24 April 2020 statement (see **Box 5**).

**Box 5: Tests from the Human Rights Committee Statement on derogations from the International Covenant on Civil and Political Rights in connection with the COVID-19 pandemic**

**Transparency.** Immediate communication to the UN Secretary-General: 'Notification by a State party must include full information about the derogating measures taken and a clear explanation of the reasons for taking them, with complete documentation of any laws adopted'. This also applies to termination of the derogation.

**Legality.** Derogation and implementation may not be 'in a manner that is discriminatory, or that violates other obligations that they have undertaken under international law, including under other international human rights treaties from which no derogation is allowed'.

**Limited duration, coverage and scope.** 'Derogations must, as far as possible, be limited in duration, geographical coverage and material scope, and any measures taken, including actions imposed in connection with them, must be proportional in nature'.

**Limited scope and proportionality.** No derogation is permitted when states 'are able to attain their public health or other public policy objectives' by other means, e.g. through permitted restrictions under Treaties. 'States may not derogate from their duty to treat all persons, including persons deprived of their liberty, with humanity and respect for their human dignity.'

**Ending COVID-19 measures.** 'Wherever possible, and in view of the need to protect the health and life of others, State parties should replace COVID-19 related measures that prohibit activities relevant to the enjoyment of rights under the Covenant with less restrictive measures that allow such activities to be conducted, while subjecting them as necessary to public health requirements, such as physical distancing.'

Source: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>

States may not fail to comply with their non-derogable obligations, including the duty to treat all persons with respect for their human dignity. Even when derogations are legal, human rights obligations remain in place. For example, under the African Charter, Article 5 on the prohibition of torture and cruel, inhuman and degrading treatment, and Article 6 on the right to personal liberty and protection from arbitrary arrest have not been suspended.<sup>77</sup>

## **Freedom of expression, assembly and association, and the right to information**

The right to freedom of expression is closely linked to the right to information. Article 19(2) of the ICCPR provides that:

*'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.'*<sup>78</sup>

General Comment No. 34 on Article 19 emphasizes the importance of internet and mobile (para 15 states 'State parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto'), and draws very narrow grounds for any interference in the right by states, in paras 21 to 49.<sup>79</sup> The right to derogate from this is severely restricted and time-limited. Using the human rights typology of negative and positive rights, states have negative duties to avoid censorship and misinformation, including avoiding criminal charges against journalists reporting on the pandemic in the name of criminalizing fake news, and positive duties to ensure access to information, including high-quality health information.

The related right of privacy is protected under international human rights law, at regional level, and in many human rights instruments.<sup>80</sup> It is important in assessing the actions governments take to track and trace people with COVID-19. As states have developed their privacy laws, and international standards such as Europe's General Data Protection Regulation<sup>81</sup> set a high bar, it is particularly important that health data is strictly protected and is not used for any broader non-health purposes. Governments should also respect strict time limits on the use of the data. For example, in South Africa, a former Justice of the Constitutional Court has been designated as a 'COVID-19 judge' to ensure that the privacy and personal information of people is protected when the government uses mobile data to find their contacts.<sup>82</sup>

## **THE DISPROPORTIONATE IMPACT ON GROUPS SUFFERING FROM HISTORIC DISCRIMINATION AND DISEMPOWERMENT**

### **Gendered impacts**

Women's human rights provide a good illustration of national courts interpreting their own laws to be consistent with international law. An early example from Botswana considered the CEDAW Convention in deciding in favour of Ms Unity Dow that the Citizenship Act 1984 was discriminatory against women and violated her constitutional rights, because her child by her non-citizen father was not granted citizenship. In another case, the Pakistan High Court held that it had to respect international human rights instruments to which Pakistan was a party, specifically citing CEDAW and the Cairo Declaration on Human Rights in Islam,<sup>83</sup> in upholding the case of a woman who had petitioned the court to quash charges against her by a man who had forcibly married her when she was already married to the man of her

choice, and found that she had the right freely to choose a spouse and enter into marriage only with her free and full consent.<sup>84</sup>

The significance of these cases for the state obligations in relation to COVID-19 is that even in dualist systems (i.e. countries in which legislatures must expressly incorporate international law for it to enter national law<sup>85</sup>), both acts of government and even legislation may be subject to international human rights law protecting women. It is also now clear that states have legally enforceable obligations both to avoid acts that the state may commit to violate rights, and also positive obligations to secure the enjoyment of fundamental rights.

UN Women's Executive Director, Phumzile Mlambo-Ngcuka, emphasizes the need for governments to take action on gender-based violence. 'Even before the pandemic, violence against women was one of the most widespread violations of human rights. Since lockdown restrictions, domestic violence has multiplied, spreading across the world in a shadow pandemic. This is a critical time for action, from prioritizing essential services like shelter and support for women survivors, to providing the economic support and stimulus packages needed for broader recovery.'<sup>86</sup> State parties to CEDAW are required, as explained in General Comment 19, 'to prevent, investigate, and punish acts of violence against women whether committed by public authorities or not, and to provide for reparation'.<sup>87</sup> Women's rights are further protected at regional level, see the Convention of Belém do Pará in the Inter-American system, the Maputo Protocol in the African system, and Recommendation Rec (2002) 5 of the Council of Europe Committee.

## Refugees and internally displaced people

While states are closing borders, Filippo Grandi, the UN High Commissioner for Refugees, has warned states not to close off avenues of asylum in their responses to COVID-19:

*'Solutions exist. If health risks are identified, screening arrangements can be put in place, together with testing, quarantine and other measures. These will enable authorities to manage the arrival of asylum seekers and refugees in a safe manner, while respecting international refugee protection standards designed to save lives.'*<sup>88</sup>

States have an obligation not to force people to return to situations of danger. Article 33 (1) of the Convention relating to the Status of Refugees 1951 provides the principle of non-refoulement:

*'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group, or political opinion.'*

This is a non-derogable duty. The only exception is contained in Article 33(2), which relates to criminality by the asylum seeker, which is not applicable in the vast majority of cases. The duty is also non-derogable in regional Conventions, like the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa and the 1969 American Convention on Human Rights, and has been re-affirmed in the 1984 Cartagena Declaration on Refugees.

Even though some states are not party to the Refugee Convention, the principle of non-refoulement is binding as a matter of customary international law, as advised by UNHCR in its 2007 Advisory Opinion.<sup>89</sup>

The UN Guiding Principles on Internal Displacement, although not legally binding, 'are consistent with and reflect international human rights and humanitarian law, as well as refugee law by analogy'.<sup>90</sup> They provide an important framework of standards that are highly relevant to the millions of people who are internally displaced and at enhanced risk because

of both the health risk posed by the virus itself and its socioeconomic impacts. Social distancing is virtually impossible in camps. All the other provisions of human rights law, whether international, regional or national apply equally to people who are internally displaced within a country.

## SOCIAL AND ECONOMIC RIGHTS

Social and economic rights are of central importance in addressing both the health-related aspects of the pandemic and the wider impacts on people living in conditions of vulnerability. **Part 2** explored COVID-19 and the right to health. The wider impacts jeopardize many other rights, as explored in this paper, including the right to education (see section on children), the right to work (see the impact of India's lockdown in **Part 6**), and, where food security is at risk, the right to food. The financial consequences of the pandemic, and in some cases the security consequences, can lead to risks to the right to essential services such as water and sanitation, as well as social protection. Part of the benefit of a human rights approach to the pandemic is that it can improve compliance with these social and economic rights. As César Rodríguez-Garavito describes it:

*'Activists, academics, and courts in countries including Argentina, Colombia, India, Kenya, and South Africa have developed sophisticated legal doctrines and theories that have improved compliance with socio-economic rights. International human rights agencies such as the UN Special Rapporteurs, the African Commission, and the Inter-American Court are busy creating content and effectiveness for these rights. They do all this without diluting the idea of human rights into social justice, and without weakening civil and political rights.'*<sup>91</sup>

In the last two decades, judges from across the world have adjudicated on economic, social and cultural rights. There has been a rise in so-called 'structural judgments' in which courts have not just issued a simple decision finding for or against the claimant in its claims against the state but have instead made detailed rulings directing specific state action subject to detailed monitoring. Such cases can come back to the court many times for interim orders. For example, the ground-breaking decision of the Indian Supreme Court on the right to food, the People's Union for Civil Liberties v Union of India<sup>92</sup> in 2001, was significant because the court declared food to be a fundamental right, but also specified who the beneficiaries were, and which state organs were responsible. It gave directions for school meals, for example the daily number of calories and grams of protein, and asked governments to give preference to Dalits, Scheduled Castes and Scheduled Tribes in appointing cooks. Since its first ruling, the court has had numerous hearings and issued more than 40 interim orders.

Faced with the pandemic's risk to social and economic rights, states should take into account the solutions that these structural judgments have helped to provide, in designing their responses to COVID-19. The right to food litigation demonstrates the importance of governments in responding to food shortages to pay particular attention to the needs of particular groups. This in turn reflects constitutional requirements. Varun Gauri and Daniel Brinks provide a ground-breaking study in *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*.<sup>93</sup> In it they note that more and more countries have enshrined substantive social and economic rights in their constitutions: 'Of the 165 countries with available written constitutions, 116 made reference to a right to education and 73 to a right to health care'.<sup>94</sup>

International courts have also been active. In the 2006 case of the Sawhoyamaya Indigenous Community v. Paraguay,<sup>95</sup> the Inter-American Court of Human Rights considered whether the state had adopted the necessary measures that could reasonably have been expected to prevent or avoid risk to the life of community members, whose extreme poverty



and conditions of life (many living at the roadside) placed them in position of great vulnerability and risk. The court held:

*'the State has not adopted the necessary measures for the members of the Community to leave the roadside, and thus, abandon the inadequate conditions that endangered, and continue endangering, their right to life. (para 166)'*

The Inter-American Court's decision is helpful for any consideration of how states should prioritize the needs of community members living in extreme poverty, whose poverty is exacerbated by the pandemic. South Africa provides another instructive example. The South African constitution of 1996 stands out not only because of its socioeconomic rights provisions, but also because of its substantive understanding of democracy, inviting public participation, and a purposeful approach to overcoming poverty. As the President of the Constitutional Court put it in the case of *Soobramoney* (1998):

*'[T]he normative concept of socio-economic rights should always remain contingent and incomplete, allowing space for the evolution of new meanings in response to changing contexts and forms of injustice.'*<sup>96</sup>

Such cases across the world have addressed the rights to food, health, housing and social security, among others, and have been brought by different vulnerable groups. In the wake of COVID-19, we are likely to see extensive litigation that scrutinizes the decisions taken by governments as well as businesses in the light of the principles discussed.

## OBLIGATIONS TO COOPERATE WITH OTHER STATES, THE RIGHTS OF DISASTER-AFFECTED PEOPLE

*'To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors.'*

Article 11 of the Draft Articles on the Protection of Persons in the event of disasters<sup>97</sup>

The international nature of the COVID-19 pandemic makes it important to consider states' obligations to cooperate with each other. International law addresses inter-state cooperation, for example in the WHO International Health Regulations 2005,<sup>98</sup> which are the standard for almost all states. They include:

- the duty to 'develop, strengthen and maintain ... the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern' (Article 13);
- the duty to 'treat travellers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures' (Article 32); and
- the duty 'to collaborate with each other, to the extent possible, in: (a) the detection and assessment of, and response to, events as provided under these Regulations; (b) the provision or facilitation of technical cooperation and logistical support, particularly in the development, strengthening and maintenance of the public health capacities required under these Regulations; (c) the mobilization of financial resources to facilitate implementation of their obligations under these Regulations; and (d) the formulation of proposed laws and other legal and administrative provisions for the implementation of these Regulations.'



The World Health Organization has emphasised that low- and middle-income countries *'will require international assistance and cooperation to fully manage the impact of COVID-19 on their populations. Under international human rights law, the obligations undertaken by State parties beyond their borders, i.e. to international Assistance and Cooperation are akin to their domestic obligations, not subsidiary or secondary in any way.'*<sup>99</sup>

Although not exclusively or even primarily dedicated to medical emergencies, state obligations to other states in relation to the pandemic may also draw on the Draft Articles on the Prevention of Transboundary Harm from Hazardous activities 2001.<sup>100</sup>

However, when it comes to the obligation to ensure assistance for affected populations, a primary source is the Draft Articles on the Protection of Persons in the Event of Disasters 2016.<sup>101</sup> Although still in draft, the Articles reflect customary international law. Their relevance is apparent from the definition of disaster in Article 3: 'disaster means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society'. There is as yet no clarity on whether or not this would apply to the COVID-19 pandemic, and guidance from the International Law Commission may be needed. Articles 11 to 17 address the role of external assistance, starting with the duty of the affected state to seek external assistance. Article 15 provides for the facilitation by the affected state of external assistance.

The developing field of disaster law includes duties to protect people in the event of disasters using a proactive disaster risk reduction approach (as recently reaffirmed and strengthened by the 2015 Sendai Framework<sup>102</sup>), under which the UN Office for Disaster Risk Reduction has set out strategic objectives for the COVID-19 response, noting that 'With its cascading and devastating impacts, COVID-19 demonstrates the inter-connected nature of risk today, highlighting the urgent need for a concerted global effort to accelerate risk reduction activities.'<sup>103</sup> The framework applies to cooperation globally, regionally and at the national level.

## 6 BUSINESS AND HUMAN RIGHTS

After the initial shock of the pandemic for businesses, a nuanced picture is emerging. Many businesses are responding in an inclusive and responsible way that respects human dignity, embedding human rights principles and good practices into their plans. However, many others have failed to meet their responsibilities, and in too many cases have been complicit in violations, for which they may be held accountable legally.

The five principles in **Part 3** impact on the responsibilities of businesses during and in the aftermath of the COVID-19 pandemic. For example:

- they must treat their workers equally and not discriminate, for example in hiring and firing decisions;
- proportionality is critical to any involvement by business in working with governments on tracking and tracing technology and surveillance;
- businesses should review their supply chains to take account of the pandemic, down to the primary level of producers, where participation is intrinsic to meaningful, gender-sensitive engagement;
- the pandemic highlights the human rights principle of dignity, which applies not only to state obligations, but also to the private law applicable to businesses, for example in relation to labour law;<sup>104</sup> and
- freedom of expression and information rights are vital in ensuring media businesses are not constrained in their journalism, but also require respect by business for the rights of their workers, including union activities.

### **Box 6: Business and the right to information, and digital rights**

Business has an important role in the provision of information and digital services through news channels, social media platforms and the provision of networks. The Global Network Initiative's report *Disconnected: A Human rights-based approach to network disruptions from Global Network Initiative*<sup>105</sup> shows how telecommunications can be used to empower or disempower groups of people. For instance, governments may order telecom operators to turn off internet access to target and further weaken certain segments of the population, constituting collective punishment of disenfranchised ethnic groups.

While there may be constraints on businesses' ability to operate during the pandemic, the right to information continues to play a crucial role in ensuring public health and other needs are met in accordance with legal principles. As the NGO Article 19 points out:

*'As long as the private bodies are continuing their operations that impact public health, the environment, or other areas, they should be required to continue monitoring and submitting the information and data required, and government bodies should continue making the information available, except when it can be clearly established that it is not possible to do so. In those cases, the information should continue to be collected and made public as soon as circumstances allow. In no cases should there be gaps in the information.'*<sup>106</sup>

The pandemic is not an excuse to restrict the right to information – rather, it highlights the need for it.

# UN GUIDING PRINCIPLES

The UN Guiding Principles on Business and Human Rights (UNGPs)<sup>107</sup> provide a framework by which business responses to the pandemic can be assessed. It includes three pillars:

1. states' duty to protect against human rights abuses by third parties, including business;
2. corporate responsibility to respect human rights; and
3. the need for more effective remedies, both judicial and non-judicial, when violations have occurred.

Each of these three pillars is relevant to the COVID-19 response. For example, the UN Working Group on Human Rights gives examples of second pillar responsibilities in its statement *'Ensuring that business respects human rights during the Covid-19 crisis and beyond: The relevance of the UN Guiding Principles on Business and Human Rights'*,<sup>108</sup> including ensuring the provision of personal protective equipment (PPE); meaningful consultation with workers, especially where temporary lay-offs are considered; and the responsibility of tech companies working on data collection and surveillance.

As the UNGP's author, John Ruggie, himself pointed out when introducing the UNGPs to the Human Rights Council, the UNGPs are not the end of the story: *'But Council endorsement of the Guiding Principles will mark the end of the beginning, by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.'*<sup>109</sup>

In addition to the UN Guiding Principles themselves, workers are also subject to general and specific human rights protection under international human rights law, including protection of their right to organize collectively. Businesses may for example be liable for discrimination if they treat disabled workers unfairly during the crisis. Workers in global supply chains are protected under the same international human rights standards.<sup>110</sup>

## Avoid and address, prevent or mitigate

UNGP 13 states that businesses must:

- avoid causing or contributing to adverse human rights impacts through their own activities, and addressing such impacts when they occur; and
- seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

All industries should consider their COVID-19 response through this lens. A business will be responsible for ensuring appropriate safe working conditions for its employees, which could include providing appropriate PPE, mandating social distancing and respecting employee labour and union rights. It must take care to avoid violating applicable privacy laws. A business also has responsibility to workers in its supply chain, and so must take positive steps to analyse, and get involved in preventing and mitigating measures where those workers' rights are violated, whether arising from unsafe working practices or otherwise.

Interestingly, the issue of business responsibility for providing PPE is not new in the COVID pandemic, for example in the UK: 'The Equality and Human Rights Commission's inquiry into employment in the meat and poultry processing sector in 2008 found that some workers did not have access to adequate personal protective equipment. Some agency workers also reported that they were forced to work overtime or threatened with losing their jobs. Businesses in this sector responded to the identified human rights risk and took remedial action. When the Commission reviewed progress in 2012, it found real improvements by the industry.'<sup>111</sup>

State failure to meet human rights obligations does not exonerate businesses from fulfilling their responsibilities as these exist independently of states' abilities and/or willingness to fulfil their own human rights, as laid out in the commentary for UNGP 11.

When the pandemic hit European countries in earnest in March 2020, the knee-jerk reaction of many UK fashion brands was to renege on contracts. Suppliers claim that some UK brands delayed payments, demanded discounts or even refused to pay for work that had already been completed. As a result, many factories in India and other parts of Asia had to shut down or lay off workers, leaving vulnerable garment workers destitute.<sup>112</sup>

The Business and Human Rights Resource Centre has tracked 35 leading fashion brands, and their garment manufacturers, and found good and bad examples of business responses.<sup>113</sup> They note: *'As the COVID-19 pandemic spreads across the globe, the actions taken by fashion brands to protect their profits have had profound impacts on garment workers. Brands are using their disproportionate power over factory suppliers to cancel agreed orders, pay suppliers substantially less than agreed, or to grossly extend payment terms.'*

It does not necessarily follow that reneging on a contract will result in a human rights violation. However, UNGP 13 makes clear that businesses should 'avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur.' And whether or not they have caused or contributed to the adverse impacts, they should seek to prevent or mitigate them where they are directly linked to their operations, products or services by their business relationships (UNGP 13(2)). As a minimum, they should have assessed the impact of the termination of the contracts and taken appropriate action (UNGP 19). This suggests there should be an assessment of the human rights impact before such a contract is terminated.

UNGP 23(c) further provides that businesses should treat 'the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate'.

Recent litigation against multinational companies for human rights violations in countries outside a business's home state often relates to abuses committed by companies within the corporate group, but also to complicity in violations committed by third parties.<sup>114</sup> UNGP 23 makes clear that 'contributing' to abuses does impose a responsibility.

In common law countries, recent cases have focused on the liability for negligence of parent companies for violations by foreign subsidiaries, including responsibility where the parent has failed to exercise their degree of supervision effectively.<sup>115</sup> In civil law countries, many of the cases involve criminal investigations in which prosecutors have extensive powers to order the disclosure of internal corporate documents – this may be followed by a civil law case against the parent company.<sup>116</sup> In some countries, the directors of the parent company may have a personal liability for the human rights violations of their subsidiaries.<sup>117</sup>

As discussed in **Part 7**, human rights defenders are more at risk in the wake of the pandemic. Where there is evidence of a risk of gross human rights violations, for example retaliatory action against human rights defenders, the business involved in an operation (directly or through a direct link) must take proactive and effective action to address that risk, which may include ending its involvement in the business activity concerned. In *Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders-Guidance for Companies*,<sup>118</sup> Freeman demonstrates that some business leaders can and do treat this responsibility with the utmost seriousness and take positive steps to combat abuses. Many others need to change their practices.

## Due diligence

Businesses cannot avoid or seek to prevent human rights abuses unless they take proactive steps to identify potential issues in their own operations and supply chains, and have systems in place to respond to any identified. Thus, in order to meet their responsibility to respect human rights, they should have in place policies and processes appropriate to their size and circumstances. This includes having a human rights due diligence process (HRDD) to identify, prevent, mitigate and account for how they address their impacts on human rights, as stated in UNGP 15(b).

UNGP 17(c) states that HRDD policies:

*'Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve'*<sup>119</sup>

In line with this, the human rights implications of COVID-19 require due diligence in business responses, including the effects on those in the supply chain, of laying off workers, and on the health and safety protection of all workers involved in the supply chain, with particular care to respect human dignity. As an initial step, businesses could consider using the UNDP's *Human Rights Due Diligence and COVID-19: a Rapid Self Assessment for Business*, noting it is not intended as a substitute for a fully-fledged HRDD,<sup>120</sup> for which see the *Handbook on Human Rights Impact Assessment*.<sup>121</sup>

### **Box 7: The impact of India's sudden lockdown on workers**<sup>122</sup>

Businesses should also consider what action they can take where there are gaps in social protection when people lose their livelihoods. For example, in March 2020, the Indian government imposed a national lockdown with four hours' notice. Millions of people were affected. Employers were not given the necessary time or guidance to arrange processes for workers. Governmental schemes were not in place to protect workers' rights, such as furlough or financial support for the self-employed. Preparations were not made to ensure that essential services, such public transport, continued.

Many millions of India's labour force are in casual employment without formal guarantees from employers and largely devoid of any social protections. Millions of internal migrant workers, who lost their livelihoods overnight, found themselves stranded and congregated in close proximity at train and bus stations, trying to travel home to their villages, sometimes thousands of miles away. The Inter-State Migrant Workers Act (1979), the only one of its kind that provides certain safeguards, is in practice obsolete and hardly ever enforced.

Making ends meet at times of death, illness and old age has always been a challenge. Now, in times of large-scale shocks and disruptions, without safety nets to fall back on it is even harder. The right to work, enshrined in Article 6 ICESCR, is the basis for life with dignity and for the realization of other human rights, while Article 9 recognizes the right of everyone to social security. This is a challenge both for states and for businesses, where the shock of unemployment is linked to their business, even where, as UNGP 13 makes clear, they did not contribute to those impacts.

## Remediation

UNGP 22 states that:

*'Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.'*

The UN Working Group clarifies that businesses struggling with the financial impacts of COVID-19 are not exempt:

*'Where a business has caused or contributed to adverse human rights impacts, the Guiding Principles clarify that it should provide for or cooperate in their remediation through legitimate processes. Even for businesses fighting for survival, the responsibility to respect human rights still applies.'*

Such remediation should meet standards of fairness and due process, and those with a complaint should have the right to be independently represented and advised. More detailed guidance on the implementation of UNGP is provided in the Commentary to the UNGP<sup>123</sup> and in the work of the Shift project:

*'Businesses must ensure that affected communities have access to non-state-based grievance mechanisms that complement state-based mechanisms. This includes mechanisms at the operational level (meaning that companies are involved in implementing them), at a national level, or as part of multi-stakeholder initiatives or international institutions.'*<sup>124</sup>

Given the violations that have already occurred during the pandemic, and the likelihood of further violations occurring, it is reasonable to assume that there will be an increase in complaints against businesses, both through courts and non-judicial mechanisms.

## The role of states

UNGP 1 explains that states must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

A failure to take these steps is likely to constitute a breach of a state's international human rights obligations, which include those laid down in the Universal Declaration of Human Rights, the ICCPR and the ICESCR, coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.

These responsibilities of business should be underpinned in national legislation and in government policies. Critics of the current UNGP framework say that it is insufficient to ensure that businesses meet their international responsibility to respect human rights.<sup>125</sup> The case for a binding treaty on business and human rights will only be strengthened if businesses fail to meet the responsibilities and obligations laid down in the UNGP.

State policies that support business – including the provision of export credit and state subsidies – should not be provided unless the state has taken appropriate steps to prevent, investigate, punish and redress any abuses a business has caused or contributed to through its operations, products and services. Support should not be provided unless there is evidence that the business has addressed previous allegations of abuse and set up clear ways to prevent future abuse.

In the context of COVID-19, National Human Rights Institutions can investigate alleged abuses. Governments can require reporting by their own businesses of human rights issues, and can enforce existing standards, particularly health and safety and labour standards, through an effective regulatory system, and by providing a remedy for direct and indirect discrimination by businesses which violate human rights in unfair selection for dismissal or return to work.

## Indigenous people and land

*Indigenous peoples are being denied their freedom of expression and association, while business interests are invading and destroying their lands, territories and resources.*

José Francisco Cali Tzay, UN Special Rapporteur on the rights of indigenous peoples.<sup>126</sup>

As noted in **Part 4**, indigenous people have a range of protections under international human rights law. The Human Rights Council's Independent Expert Mechanism on the rights of indigenous people has warned that such protections may be particularly necessary with the increased risk of encroachment on indigenous land by illegal loggers and miners, among others, while attention is focused on the COVID-19 pandemic.<sup>127</sup>

Oversight mechanisms may find it harder to monitor and counter illegal activity at this time. As Lorenzo Cotula of the International Institute for Environment and Development cautions, 'there is a need for international action to keep a watch on what is happening and support local initiatives. This includes documenting developments as they unfold, linking up initiatives in different places and, where necessary, assisting governments and activists in providing effective responses.'<sup>128</sup> Businesses should take steps to ensure the rights of human rights defenders and environmental defenders are protected.<sup>129</sup>

Businesses investing in land must ensure that they meet the standards laid down in the UNGP. The FAO's 2012 CFS Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests in the Context of National Food Security (VGGT) addresses the protection of legitimate tenure rights.<sup>130</sup> While violation of these standards is not in itself a breach of human rights law, it is an indication that there is a risk that a breach of human rights may occur or already be occurring. Businesses will need to ensure that they avoid causing or contributing to such breaches and/or are seeking to prevent or mitigate any that are connected with their operations, products or services (as required by UNGP 13).

# 7 CIVIC SPACE AND CIVIL SOCIETY

*'Now, more than ever, the voices of people need to be heard. Civil society is instrumental in building and maintaining trust in the health system. Civil society can help identify flexible and smart solutions that respond to the most urgent needs. Open and vibrant civic space helps ensure targeted and candid feedback on COVID-19 measures to improve responses.'*

Office of the UN High Commissioner for Human Rights<sup>131</sup>

Civil society is fundamental to effective governance and sustainable recovery from crises. CSOs and local humanitarian actors push for accountability from state institutions to all citizens, and during crises continue to demand that authorities fulfil their obligations, including the protection of human rights. In this watchdog role, they enable citizens to organize, mobilize and speak collectively, acting as a critical enabler of active citizenship.

By facilitating engagement with governments and sharing information, civil society helps provide constructive outlets for people to pursue their interests and express their beliefs in a way that reinforces stability. Civil society organizations (CSOs) initiate, develop, and refine new ideas and approaches to address social challenges, pioneering solutions that strengthen the capacity of governments. The innovation fostered by a thriving civil society will be more important than ever as societies grapple with the catastrophic impact of the COVID-19 pandemic.

Civil society organizations are well positioned to engage in and support the delivery of a community-led pandemic response: providing life-saving services, running awareness campaigns, supporting women's rights and social protection, and addressing issues of livelihoods, among others. They can also support greater accountability of state institutions to all citizens, demanding that authorities fulfil their obligations during the emergency, including the protection of human rights, and monitoring their response. The innovation fostered by a thriving civil society will be more important than ever as societies grapple with the catastrophic impact of the COVID-19 pandemic.

## **Box 8: Toolkits and guidance**

At national level, many countries have networks of CSOs that have published guidance on human rights and COVID-19. At international level, several organizations publish guidance themselves, but also provide useful links to other sources, internationally, regionally and nationally. They all have guidance on civic space in general but have also published and linked to guidance on the COVID-19 pandemic and human rights and civic space in particular. Oxfam publishes its own resources, and links to other partners' resources.<sup>132</sup>

### **Resources to understand and monitor civic space include:**

CIVICUS Monitor: near real-time data on the state of civil society and civic freedoms in 196 countries. It provides links to various toolkits and resources and has detailed commentary on the impacts of COVID-19 on civil society, and the threats to human rights work.<sup>133</sup>

Oxfam's Civic Space Monitoring Tool: guidance on dimensions of civic space as they affect particular contexts.<sup>134</sup>



International Center for Not-for-Profit Law (ICNL): regular research and analysis on legislation affecting civic space in more than 100 countries.<sup>135</sup> ICNL's Coronavirus Issues pages provide a practical overview and analysis of how various laws and regulations play out in this context.<sup>136</sup>

**Other resources related to COVID-19 include:**

Frontline Defenders: training and materials on security and protection, including specific guidance on digital security during lockdowns and while working from home.<sup>137</sup>

VUKA! Coalition for Civic Action: a place for CSO and INGO members to share resources, toolkits and information on civic space during the pandemic.<sup>138</sup>

Amnesty International and Human Rights Watch have also published good information on COVID-19, human rights and civic space.<sup>139</sup>

## THE FIVE PRINCIPLES

### Equality and non-discrimination

States should work towards a climate of trust with CSOs, as that will enable society to come together to deal with the pandemic. For trust between authorities and people to flourish, key elements of transparency, accountability, participation and openness to criticism are needed. As a positive measure, states should engage with civil society to prevent and respond to the heightened incidence of violence during the pandemic, especially (but not only) gender-based violence, and in designing and implementing protective measures to protect women who are at greater risk of losing their homes during the pandemic, including as a result of discriminatory inheritance practices, and evictions. Action is required to stop violence against informal workers and other groups.

Challenging discrimination is the primary mandate of many CSOs, and a number have produced accessible responses to the impact of COVID-19. See, for example, the gender-related work by the Association for Women in Development (AWID),<sup>140</sup> PROMUNDO<sup>141</sup> and Womankind Worldwide.<sup>142</sup>

### Participation

The Office of the High Commissioner for Human Rights set out the legal basis for participation in its *Guidelines for States on the effective implementation of the right to participate in public affairs*.<sup>143</sup> These stress the need for collaboration with civil society actors for the identification and articulation of gaps, needs and solutions. An effective response is community-centred, making sure that the most marginalized and vulnerable people are involved and have an equal voice when it comes to the design and delivery of coronavirus responses.

The courts have also highlighted the importance of the principle of participation, drawing on the legal standards in the ICCPR. Most recently, the Supreme Court of India, in the case of *Indian Social Action Forum v Union of India* challenging the Foreign Contribution Regulation Act on 6 March 2020,<sup>144</sup> found 'any organisation that supports the cause of a group of citizens agitating for their rights without a political goal or objective cannot be penalised by being declared an organisation of political nature.' This was described by Oxfam India Executive Director Amitabh Behar as '*one of the most decisive affirmations of civil society's role as a political actor in India*'.<sup>145</sup> He continued: '*At the heart of this is the distinction between political action for political power on the one hand; and political action for furthering rights, development, human dignity, constitutional values, and democracy, on the other. The*

*court has clearly pronounced that political work as defined for democracy and rights is legitimate.'*

A further example relates to internally displaced people (IDPs) and refugees. As noted in **Part 4**, governments should respect all human rights of citizens and people living within their borders, including displaced communities and refugees. There is a lot of guidance available to humanitarian actors on the pandemic; however, it is not always as clear as it might be. As lawyer Paul White of UN Interagency Protection Project ProCap points out: *'From UN and INGO headquarters, a plethora of guidance and commentary on COVID-19 is arising. But it's imperative that agencies do not hide behind obscure, ambiguous or conflicting guidance: they must instead articulate clearly what protection actors can do to assist communities hit by this crisis. This means working together, managing camp conditions, clarifying ethics, engaging in contact tracing, collecting data, and not letting formal legal status (refugee, asylum seeker, IDP) get in the way of protection and assistance.'*<sup>146</sup>

The CRPD brings obligations for participation of CSOs representing people living with disabilities. Advice campaigns and the provision of information is important, and much of this is provided or supplemented by specific CSOs.

## **Proportionality**

CSOs have a vital role, alongside parliamentarians, NHRIs and other organizations with a monitoring and accountability mandate, to scrutinize the impact of emergency legislation and to call to account disproportionate use of force and violence, alongside other restrictions of human rights, in its enforcement. In the many cases in which governments have failed to comply with this principle in their response to the pandemic, CSOs must raise these issues, including through the courts where appropriate. Similarly, civil society organizations can provide evidence, engage in and support strategic litigation to challenge disproportionate surveillance.

CSOs should note that, when states fail to strike the appropriate balance, there are legally enforceable rights that can be used in litigation. They should also make clear to governments and other accountability mechanisms that the principle is enforceable and so should be respected – and litigation, by judicial review or other methods, is likely.

## **Human dignity and care**

Civil society is at the forefront of meeting the human needs of communities affected both by the disease and its social and economic impacts, including gender-based violence. This is relevant to human rights, as Alison Brysk notes: *'The linkage between identity, dignity and discrimination mobilizes marginalized groups such as indigenous peoples in transformative rights campaigns.'*<sup>147</sup> Civil society has a key role to play in establishing the norms and language of rights, and to bring dignity centre stage.

## **Freedom of expression, assembly and information**

Civil society is grounded in the freedoms of expression, information, assembly and association set out in Articles 19 to 22 ICCPR. These create the conditions that enable people to join together and create political and social pressure that can shift the incentives and behaviour of governments, companies and institutions. We often see the combination of people power and human rights law leading to change. For this reason, Oxfam in its civic space work emphasizes people's support for civic space, strong civil society actors, an enabling human rights framework and political support for that framework, nationally and internationally.<sup>148</sup>

These four freedoms are given legal teeth through the International Covenants, and other international, regional and national laws that form the legal basis for states' responsibilities to enable and work with civil society. Nonetheless, these rights need special protection in the face of emergency regimes.

## CIVIC SPACE UNDER THREAT

Civic space is under threat in many countries.<sup>149</sup> The long-term trend of shrinking civic space is accelerating, and the risk is that the temporary measures being introduced by governments become permanent, as has been the case in past crises such as the 'War on Terror'.<sup>150</sup> Some of the new measures obviously relate to public health needs, which the principle of proportionality and the law of emergencies anticipate. They need to be scrutinized and made temporary, as the International Covenants and state obligations require. But many measures limiting civic space during the pandemic have gone significantly further with, for example, censorship of the media, crackdowns on dissent and critical voices, criminalization, regulations limiting freedom of expression and the right to privacy, and additional surveillance.<sup>151</sup> ICNL and its European counterpart ECNL have issued recommendations for how to analyse legislation and measures. The latter has also provided advice and guidance on how to protect the right of peaceful assembly during the pandemic.<sup>152</sup>

### Human rights and environmental defenders

*'Some governments, and other actors, are using this crisis to attack [human rights] defenders in new ways, stifle civic freedoms, and push through restrictive measures. Defenders become easier to target, when they isolate, which is compounded by the loss of protective accompaniment and the lack of media attention to their situation.'*

Business and Human Rights Resource Centre<sup>153</sup>

Vulnerable communities are often already more isolated and face additional barriers to using civic space to raise their voice. With stay-at-home measures, human rights activists and indigenous rights activists have become even more vulnerable, as it is clear where they are, and they can therefore be more easily targeted by opponents. Measures to protect activists are more difficult to implement in these circumstances; however, states are nonetheless accountable both for their negative obligations not to violate human rights, and their positive obligations to ensure the respect of these rights. In meeting their positive obligations, states should engage with CSOs in accordance with the principle of participation.

Human rights law does allow restrictions on some rights where necessary to protect public health, but imposes strict conditions on the exercise of those restrictions. As Clément Nyaletsossi Voule, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, says: *'Exemptions should be foreseen for civil society actors, particularly those monitoring human rights, trade unions, social services providing humanitarian assistance, and journalists covering the management of the crisis'*.<sup>154</sup>

Frontline Defenders provide useful advice and guidance on how to protect human rights defenders, for example in their guide *Physical, emotional and digital protection while using home as office in times of COVID-19*.<sup>155</sup>

### Box 9: Restricted freedom of assembly in Kyrgyzstan

*'The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others..'*

ICCPR Article 21

There are many examples of CSOs exercising their Article 21 rights during the pandemic.<sup>156</sup> However, many governments are using the emergency to stifle freedom of association and organizing. For example, courts in Bishkek imposed a four-month ban on assemblies in Bishkek, Kyrgyzstan.<sup>157</sup> The decision came days after a protest by the political opposition, and days before women (including members of the LGBTQIA+ community) were planning a march on International Women's Day. The court cited coronavirus as justification, even though there were no confirmed cases in the country.

The women proceeded with their march and were arrested, while men were permitted to gather in a traditional ceremony, sacrificing goats to ward off COVID-19.

## WORK WITH NATIONAL HUMAN RIGHTS INSTITUTIONS

NHRI schemes involve one government agency being given a role supervising another, in an analogous way to central banks and the judiciary.<sup>158</sup> Their scope and effectiveness vary between states. In 2018, the NHRI's accreditation under the Paris Principles on NHRIs, gave an A rating (fully compliant) to 77 NHRIs; a B rating (not fully compliant) to 33; and a C rating (fails to comply) to 10.<sup>159</sup>

Some handle complaints of 'individual situations'. This is a quasi-judicial power and can cover both human rights and other issues related to the COVID-19 response. The complaints mechanism should be free, simple and accessible to everyone. As well as the power to refer cases to courts, NHRIs can be involved in conciliation, mediation or negotiation. Not all NHRIs can hear individual complaints, some appear less interested in challenging states, and their powers vary; however, many can compel witnesses, and carry out site visits.

CSOs can partner with the more effective NHRIs, and a strategic approach can see NHRIs take on an approach, in which they build on a number of complaints to inform their overall mandate of holding the state to account. The Commonwealth Forum of National Human Rights Institutions and the European Network of National Human Rights Institutions have both provided guidance on how NHRIs can address the human rights impacts of COVID-19, working with civil society.<sup>160</sup>

Some NHRIs have an explicit strategic litigation policy, for example the UK's Equality and Human Rights Commission, which as well as handling individual complaints itself, can litigate selected cases in the UK courts and the European Court of Human Rights,<sup>161</sup> as well as inquiring into the impact of coronavirus on ethnic minority communities, which it states 'will help develop clear, evidence-based recommendations for urgent action to tackle entrenched racial inequalities in a specific area'.<sup>162</sup>

## DIGITAL RIGHTS

*‘There is already an urgent need for governments, social media platforms and other businesses to protect the fundamental pillars of democratic society, rule of law, and the full range of our rights online: a need for oversight, accountability and responsibility. As the digital frontiers expand, one of our greatest challenges as a human rights community will be to help companies and societies to implement the international human rights framework in the land we have not yet reached. This includes clear guidance on responsibilities of business as well as the obligations of States.’*

Michelle Bachelet, UN High Commissioner for Human Rights<sup>163</sup>

COVID-19 exacerbates trends. Online freedom is even more important when freedom of assembly is limited due to necessary health measures. Civic space is drastically affected by use, misuse, and non-use of the internet. Digital is neither inherently good, bad, or neutral and digital spaces often mirror the societies that create and use them. Intersectional inequalities are often mirrored in digital inclusion and in turn affect power dynamics within these emergent spaces. The digitization of parts of lives (or the absence of) has formed a complex spectrum of issues and opportunities when it comes to rights. In some cases, the digital age has merely provided new lenses for existing rights-based challenges and opportunities, and thus an increasing emphasis on the related derived rights. Civil society has a role in advocating to social media platforms, which should comply with the UNGPs discussed in **Part 6**.

The UN Special Rapporteur on Freedom of Expression, John Kaye, has produced a report to the General Assembly, *Disease pandemics and the freedom of opinion and expression*,<sup>164</sup> highlighting five major challenges:

- access to information;
- access to the internet;
- protection and promotion of the media;
- public health disinformation; and
- public health surveillance.

Digital services are increasingly important in a lockdown, and the trend for remote working will accelerate as part of the public health response. Yet even by 2023, three billion people are predicted to have no Internet access. The pandemic highlights this digital inequality, with widely varying access to the standards of connectivity required for many jobs. Internet access and digital literacy are public goods, and the provision of quality access should be considered an essential service. To this end, an important aspect of civil society’s response to COVID-19 is to advocate for digital inclusion.

At the same time, CSOs are active users of social networks and digital spaces.

As Zeynep Tufekci wrote in her 2017 book *Twitter and Tear Gas*,<sup>165</sup> digital technologies are integral to many social movements, enabling activists to ‘act as their own media, conduct publicity campaigns, circumvent censorship, and coordinate nimbly’. CSOs need to be aware of and protect themselves against disinformation, censorship and hate speech. Where appropriate, they should work with the media on COVID-19 issues, performing a watchdog function in relation to government, the media and the private sector more generally. In addition, the burgeoning field of fact-checking should be supported in line with international human rights standards.<sup>166</sup>

Digital and physical civic spaces need to be claimed and expanded to promote dialogue, dissent and activism to influence and hold governments, corporations and society at large accountable for their response to COVID-19, and to ensure that this response fosters

equality and social justice. They should be inclusive, safe, surveillance-free and vibrant in urban and rural settings, connecting with new forms of feminist and grassroots activism.

Digital spaces and the digital economy need to be designed and to operate around the principles of peoples' ownership of their data, of privacy, safety, accountability and equality; with the use of tracking apps as a particular focus of concern.<sup>167</sup>

For society to emerge from the pandemic and for communities everywhere to thrive, the framework of international human rights, and the large body of human rights laws, will remain key elements and resources to be defended, used and strengthened by civil society.

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### Selected relevant declarations and conventions

Universal Declaration of Human Rights (1948)

ICESCR (1966) International Covenant on Economic, Social and Cultural Rights

ICCPR (1966) International Covenant on Civil and Political Rights

CERD (1965) Convention on the Elimination of all forms of Racial Discrimination

American Convention on Human Rights (1969)

CEDAW (1979) Convention on the Elimination of all Forms of Discrimination Against Women

African Charter on Human and Peoples' Rights (1981)

CAT (1984) Convention Against Torture

CRC (1989) Convention on the Rights of the Child

ILO Convention No 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries

Cairo Declaration on Human Rights in Islam (1990)

Convention (1990) on the Protection of the Rights of All Migrant Workers and Members of their Families

Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991)

Convention of Belém do Pará (1994) on violence against women in the Americas

Guiding Principles on Internal Displacement (1998)

Maputo Protocol on the Rights of Women in Africa (2003)

WHO International Health Regulations (2005)

CRPD (2006) Convention on the Rights of Persons with Disabilities

Paris Agreement (on Climate Change) 2015

The Sendai Framework for Disaster Risk Reduction (2015–30)



# NOTES

(All links last accessed 7 July 2020, except where specified)

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