

THE IMPACT OF COVID-19 ON HUMAN RIGHTS: A CRITICAL ANALYSIS OF THE LAWFULNESS OF MEASURES IMPOSED BY STATES DURING THE PANDEMIC UNDER INTERNATIONAL LAW

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Abstract

The COVID-19 pandemic provided ideal conditions for the violation of human rights. In efforts to curb the spread of the virus, numerous states violated their international law obligations outlined in treaties and customary international law. This article aims to analyse state responses to the global pandemic and will consider how their lawfulness should be measured. To this end, the framework of due diligence is utilised as a system to regulate and assess the legality of state actions amidst times of emergency. Furthermore, this article argues that the principle of due diligence must be developed to sufficiently regulate instances of derogation that extend beyond restrictions. This development must also be informed by an intersectional approach that prioritises the protection of vulnerable groups, owing to the disproportionate impact of COVID-19 on these communities. Stemming from this analysis, the article will conclude by considering the landscape of state actions in handling COVID-19 under the banner of due diligence and imagines a construction of international law that more adequately protects human rights amid regional and global crises.

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‘Human rights in general, and dignity in particular, emphasise the notion that each person is entitled to be treated according to his or her own full merits. In the words of Ronald Dworkin, the concept of human rights requires that each person is entitled to ‘equal concern and respect. This means we should not simply be treated equally but also need to be taken seriously as separate and irreplaceable individuals’.¹

- Professor Christof Heyns

1 Introduction

A semblance of normality appears to be returning to many corners of the globe with vaccination drives underway and masks being deemed as non-essential by many states. Despite this shift in thought to a post-COVID world, it is necessary to glance back at how states have responded to the pandemic. Specifically, the lawfulness of state responses must be analysed in the context of international law, as many states have fallen short of their treaty and customary duties. The question begged by this article is: How do we determine whether a restriction is lawful or whether it, by exceeding the bounds of proportionality and necessity, violates human rights?

In attempting to answer this question, part one begins by outlining the response of a broad and representative collection of states to the COVID-19 pandemic. Part two then sets out an international law framework to evaluate the lawfulness of the restrictions imposed by states during COVID-19 under the umbrella of due diligence. Part three extends the discussion beyond restrictions and analyses the imposition of derogations during COVID-19 and the adequacy of due diligence to regulate these instances. The impunity that has accompanied derogations from human rights treaties and their disproportionate impact on marginalised groups is discussed in part four. Flowing from the analysis of derogations and the impunity that has been tied to them, the article concludes in part five by exploring how the derogation system could possibly be reformed under international law.

2 How states have responded to COVID-19

When COVID-19 arrived unannounced in December 2019, countries were ill-prepared and, overall, not sufficiently proactive in curbing its proliferation. After four months, the virus had spread to 185 states.² This pervasive spread led to a reported three million cases and 211

1 C Heyns ‘Autonomous weapons in armed conflict and the right to a dignified life: An African perspective’ (2017) 33 *South African Journal on Human Rights* at 67.

2 C Breitenbach et al ‘The first 100 days of COVID-19 coronavirus – How efficient did country health systems perform to flatten the curve in the first wave?’ (2020) 8872 *Munich Personal Repec Archive* at 1.

000 deaths.³ Within the first 100 days, 92% of states had realised the need for health and containment policies. By 08 April 2020, 92% of the world was in one form of lockdown or another.⁴

The difficulties that states experienced in their efforts to respond to COVID-19 are appreciated. This is particularly true of the first days of the pandemic when the quick spread necessitated rapid reactions without any certainty and with very limited data.⁵ The responses from states in the early stages of COVID-19 vary markedly. On one end of the spectrum, states such as Sweden, Belarus, and Japan opted against imposing onerous restrictions on movement and gatherings.⁶ On the other end, China, Spain, and India imposed some of the most stringent and longest lockdown orders.⁷ These contrasting policies adopted by states illustrate the difficulties faced in reacting to this virus and emphasises the need for a consistent framework to regulate the legality of state action in international law.

Responding to a disease outbreak is not a new phenomenon for humanity. As far back as ancient times, the bubonic plague devastated Europe, Asia, North Africa, and Arabia, resulting in the death of 30-50 million people.⁸ A century ago, the Spanish Flu spread across the world and caused 20-25 million casualties globally.⁹ More recently, epidemics such as SARS, Ebola, and the Swine Flu have threatened the public health of many states and led to thousands of deaths.¹⁰ With the spread of COVID-19, states are once again tasked with responding to a health emergency with the duty to protect individuals and prevent – or at the very least limit the loss of human life.

To this end, measures have been introduced in the fight against COVID-19. Chief amongst these are lockdown orders. Of the 188 states

3 A Lubrano 'The world has suffered through other deadly pandemics. But the response to coronavirus is unprecedented' 28 April 2020 <https://www.inquirer.com/health/coronavirus/coronavirus-philadelphia-spanish-flu-world-war-two-civil-war-pandemic-aids-20200322.html> (accessed 17 June 2021).

4 M Canales & I Berman-Vaporis 'How the coronavirus outbreak grew from a few cases in China to a global pandemic in less than three months' 13 October 2020 <https://www.nationalgeographic.com/magazine/graphics/the-first-100-days-how-5-countries-grappled-with-covid-19s-spread> (accessed 17 June 2021).

5 R Mbuva & T Marwala 'On Data-Driven Management of the COVID-19 Outbreak in South Africa' (2020) *medRxiv* at 6; E Bertone et al 'Effectiveness of the Early Response to COVID-19: Data Analysis and Modelling' (2020) 8(2) *Systems* at 21; G Babu et al 'Pandemic preparedness and response to COVID-19 in South Asian countries' (2021) 104 *International Journal of Infectious Diseases* at 169.

6 International Centre for Not-for-Profit Law 'COVID-19 Civic Freedom Tracker' 7 April 2020 <https://www.icnl.org/covid19tracker/?location=63&issue=&date=&type=> (accessed 11 June 2021).

7 International Centre for Not-for-Profit Law (n 6).

8 Lubrano (n 3).

9 P Wilton 'Spanish flu outdid WWI in number of lives claimed' (1993) 148(11) *Canadian Medical Association Journal* at 2037.

10 D Huremović 'Brief History of Pandemics (Pandemics Throughout History)' in D Huremović (eds) *Psychiatry of Pandemics* (2017) at 24-26.

that have reported COVID-19 cases, more than 80 have implemented lockdowns prohibiting gatherings with greater than 10 people, while a further 57 restricting gatherings between 10 and 100 people.¹¹ The remainder either opted for no restrictions at all, limitations of gatherings with more than 100 people, or lacked reportable data on the matter.¹²

The Massachusetts Institute of Technology (MIT) concluded in a 2020 study that there is a legitimate rationale behind these restrictions. It was found that large gatherings disproportionately contribute to the scourge that is COVID-19.¹³ MIT stressed that COVID-19 super-spreader events – that is, events during which one person infects more than six other people – are far more frequent than anticipated and have an outsized contribution to coronavirus transmission.¹⁴ Therefore, restrictions on public movement, for instance, may have a legitimate and justifiable rationale. It is necessary, however, to assess whether such restrictions fall within the bounds of legality. Arguably one of the fundamental frameworks that may be useful in this assessment is ‘the duty of due diligence’ under international law.

3 The duty of due diligence under international law

Coco and de Souza Dias posit that there is an international obligation for states to prevent and halt the COVID-19 outbreak.¹⁵ They argue that the applicable legal framework of due diligence provides a lens through which to assess state responses to the pandemic. ‘Due diligence’ describes the principle of international law concerned with assessing the adequacy of a state’s response in addressing certain risks, harms, or threats according to the means available.¹⁶ Under the umbrella of due diligence, states are not judged on whether or not they are successful in mitigating the particular harm. Instead, the fulfilment of this duty is measured according to the reasonable steps that should have been taken by a state.¹⁷ In other words, it is an obligation of conduct as opposed to an obligation of result. This principle has been acknowledged as far back as 1927 in the *Lotus*

11 T Hale et al ‘A global panel database of pandemic policies (Oxford COVID-19 Government Response Tracker)’ (2021) 5 *Nature Human Behaviour* at 531-532.

12 Hale et al (n 11) 532.

13 F Wong & JJ Collins ‘Evidence that coronavirus superspreading is fat-tailed’ (2020) 117(47) *PNAS* at 29416.

14 As above.

15 A Coco & T de Souza Dias ‘Prevent, Respond, Cooperate: States’ Due Diligence Duties vis-à-vis the Covid-19 Pandemic’ (2020) 11(2) *Journal of International Humanitarian Legal Studies* at 218.

16 Coco & de Souza Dias (n 15) 219.

17 As above.

case.¹⁸ The International Court of Justice confirmed the importance of due diligence by asserting that there was a due diligence duty upon Albania flowing from its treaty and customary obligations in the *Corfu Channel* case.¹⁹ More recently, the *Pulp Mills* case emphasised that due diligence is a relevant international law principle in the particular field of international environmental law.²⁰ These, amongst other cases and academic writings, motivated the International Law Association to form a study group on the matter. The group stressed the importance of the concept and concluded that it remains an important consideration for state actions under international law.²¹

In the context of COVID-19, Coco and de Souza Dias identify five relevant due diligence duties that states are bound to, namely: the no-harm principle; the protection of the right to life; the protection of the right to health; several obligations under the 2005 International Health Regulations (Health Regulations); and the duty to protect persons in the event of a disaster.²² For the purposes of this article, emphasis is placed on the duty to protect the rights to life and health under international human rights law, while the Health Regulations obligations are briefly touched on, as these are the most relevant. The no-harm principle falls beyond the scope of this discussion as it primarily concerns the relationship between states instead of the link between states and their citizens.

Treaties and international customary law have concretised states' duty to protect their citizens from events and risks that pose harm within the legal framework of international human rights law. With regard to COVID-19, there is a clear obligation to protect the right to life. The Human Rights Committee in General Comment 6 emphasises that states are obliged to institute measures for the protection of life during epidemics.²³ In *Hristozov & Others v Bulgaria*,²⁴ the European Court of Human Rights confirmed this position by ruling that the actions or failures by states in terms of their healthcare policies could violate the right to life. The right to health is also relevant during the pandemic. Under Article 12 of the International Covenant on Economic, Social and Cultural Rights (CESCR) states are mandated to: 'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.²⁵ Housed within this right is the duty imposed on states to prevent, treat, and control

18 *S.S Lotus (France v Turkey)* PCIJ (7 September 1927) (1927) Ser. A No. 10 at 68.

19 Case of the *Corfu Channel United Kingdom v Albania* ICJ (9 April 1949) (1949) ICJ Reports 4.

20 Case of the *Pulp Mills on the River Uruguay Argentina v Uruguay* ICJ (20 April 2010) (2010) ICJ Reports 14.

21 International Law Association 'Working Session Report: Study Group on Due Diligence In International Law' (2016) at 6.

22 Coco & de Souza Dias (n 15) 221-222.

23 UN Committee on Human Rights General Comment 6: Article 6 (Right to Life) (30 April 1982) para 30.

24 (2012) ECHR 106.

epidemics and other diseases.²⁶ Similar wording is employed by various other international instruments such as Article 11 of the European Social Charter, Article 16 of the African Charter of Human and Peoples' Rights and Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.²⁷

These obligations are not limited to the realm of international human rights law. They carry significance in the specialised field of the right to health under the Health Regulations.²⁸ These regulations, adopted by the World Health Organisation (WHO) and binding upon 196 states, carry a host of due diligence obligations relevant to COVID-19.²⁹ The Health Regulations are not a treaty but operate as a legally binding instrument. The WHO, empowered by Article 21 of the Health Regulations, can issue binding regulations to combat the international spread of disease.³⁰

The obligations in the Health Regulations include the requirements to detect, assess, notify, and report on disease outbreaks; respond promptly and effectively to public health emergencies; and provide accurate and timeous information on health emergencies to the public.³¹

This framework of due diligence provides clear duties that states must fulfil and consider in their policies and these principles offer an effective mechanism for assessing the duty to respond reasonably to COVID-19. As such, limitations on large gatherings – and any other COVID-19 restriction – should be weighed up against these principles. It is imperative that these measures operate within this legal framework in order to curb the proliferation of the virus while upholding human rights.

While due diligence provides an adequate framework for pandemic restrictions, it does not go far enough to protect human rights amidst emergency situations such as the COVID-19 pandemic. This structure must be extended to account for instances of derogations that are more invasive and pose a greater threat to human rights as states depart entirely from certain rights for some time in response to a national threat. The next part of this article is

25 International Covenant on Economic, Social and Cultural Rights (16 December 1966) United Nations Treaty Series (993) 3 (ICESCR) Art 12.

26 ICESCR (n 25) Art 12.

27 Coco & de Souza Dias (n 15) 235.

28 Coco & de Souza Dias (n 15) 224.

29 World Health Organisation *International Health Regulations* (2005) (Health Regulations); World Health Organisation 'International Health Regulations: Overview' https://www.who.int/health-topics/international-health-regulations#tab=tab_1 (accessed 12 September 2021).

30 Health Regulations (n 29) Art 21.

31 Health Regulations (n 29) Arts 6(2) & 13(1).

dedicated to the analysis of the existing derogation system and evaluating the need for its reform.

4 Derogation

Human rights are often the first casualties of a crisis.³² This sentiment has rung true with COVID-19 as many states have opted against the protection of human rights. Instead, they have elected to suppress certain human rights entirely by invoking or implementing derogations. The due diligence framework does not adequately address these instances of derogation. Therefore, a more specific response is required.

Derogation, as defined by the International Committee of the Red Cross, typically refers to the suspension or suppression of law under specific circumstances.³³ Put differently, derogation is ‘a rational response to [the] uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties’.³⁴

Proponents of derogations claim that these clauses do not go against the spirit of human rights as they are only invoked in specific emergency contexts such as COVID-19.³⁵ Moreover, they serve to protect fundamental rights such as the protection from torture and the right to life.³⁶ It follows that these rights are non-derogable.³⁷ Additionally, derogations are accompanied or are supposed to be accompanied by safeguards for implementation. One such example is Article 4(1) of the International Covenant on Civil and Political Rights which provides that states may only derogate from a right ‘to the extent strictly required by the exigencies of the situation’.³⁸

In response to COVID-19, more than 40 states have formally derogated from treaty obligations through notification to the United Nations.³⁹ Such states include Armenia, Romania, Moldova, Peru, Ecuador, Colombia, Ethiopia, Namibia, Paraguay, Senegal, and

32 C Fariss et al ‘Emergency and Escape: Explaining Derogations from Human Rights Treaties’ (2011) 65(4) *International Organisation* at 673.

33 International Committee of the Red Cross ‘Derogations’ <https://casebook.icrc.org/glossary/derogations#:~:text=The%20term%20derogation%20is%20used,treaty%20rights%20in%20emergency%20situations> (accessed 18 June 2021).

34 Fariss (n 32) 674.

35 LR Helfer ‘Rethinking Derogations from Human Rights Treaties’ (2021) 115(1) *American Journal of International Law* at 35.

36 GL Neuman ‘Constrained Derogation in Positive Human Rights Regime’ in EJ Criddle (ed) *Human Rights in Emergencies* (2016) at 15-31.

37 International Covenant on Civil and Political Rights (16 December 1966) United Nations Treaty Series (999) 171 (ICCPR) Art 4.

38 ICCPR (n 37) Art 4(1).

39 Laws on the Rights of Peaceful Assembly Worldwide ‘Derogations by States Parties from Article 21 ICCPR, Article 11 ECHR, and Article 15 ACHR on the Basis of the COVID-19 Pandemic’ (2020) at 1-4.

Thailand.⁴⁰ These states have attempted to soften the blow by imposing ‘sunset clauses’ to limit the timeframe of the derogation.⁴¹ Unfortunately, this has not always provided the intended protection. Many states have perpetually extended their derogation clauses owing to the unpredictable and pervasive nature of the pandemic. This is evidenced in the practice of Guatemala, Armenia, Ecuador, South Africa, and Peru.⁴² Consequently, individuals are left unprotected as their rights are indefinitely suspended.

It is also concerning that the state practice illustrated above only outlines the official derogations during COVID-19. While more than 40 states submitted their derogations, over 100 states have imposed severe suspensions on individual rights.⁴³ This is concerning as states have ignored and disregarded their obligations to provide notice of their intention to derogate. For example, both France and the United States of America (USA) declared states of emergency and instituted measures characteristic of derogation procedures yet failed to make notifications in this regard, as obliged by the ICCPR.⁴⁴

While some states are unwilling to submit notifications of derogation, others lack the avenue to derogate altogether. Unlike the ICCPR and ECHR, a multitude of other global and regional human rights treaties lack an express derogation clause altogether.⁴⁵ Consequently, many states have suppressed individual rights without a legal framework within which to properly administer these restrictions, such as under the African Charter.⁴⁶

The effect of these failing sunset clauses and unmonitored derogations is that individual rights are left in constant flux as states are left to their own devices in deciding which rights are dispensable when responding to a pandemic. These unregulated expressions of power are especially alarming in the context of COVID-19 when states wield heightened authority in response to a health emergency of this magnitude.

5 The pandemic of impunity

The unregulated administration of increased state power creates an associated danger to the pandemic – the proliferation of human rights violations that go unpunished. Of concern is not only the failure

40 A Lebret ‘COVID-19 pandemic and derogation to human rights’ (2020) 7(1) *Journal of Law and the Biosciences* at 3; *Laws on the Rights of Peaceful Assembly Worldwide* (n 39) 1-4.

41 Helfer (n 35) 39.

42 *Laws on the Rights of Peaceful Assembly Worldwide* (n 39) 1-4.

43 International Centre for Not-for-Profit Law (n 6).

44 Lebret (n 40) 4; ICCPR (n 37) Art (4)1.

45 Helfer (n 35) 30.

46 As above.

to comply with these procedural safeguards but also that unmonitored derogations lay fertile soil for impunity. As noted by the European Commission for Democracy Through Law: ‘experience has shown that the gravest violations of human rights tend to occur in the context of states of emergency’.⁴⁷ This is not only an academic concern but a legitimate issue evident in the fact that states have limited additional rights to those relevant to the spread of the virus. Although derogations such as those to the right to movement are justified for the purposes of curbing the virus, many derogations have extended to the rights to privacy, a fair trial, and family life.⁴⁸ Some states have even transgressed non-derogable rights such as the right to life and the prohibition of torture and cruel, inhumane or degrading treatment.⁴⁹ States have also used the pandemic as an opportunity to suppress all political dissent.⁵⁰

Stories of this nature have littered headlines across the world for the past year. In Mexico, a 45% increase in attacks against the press was documented since 2019 with at least seven journalists being assassinated due to their work.⁵¹ In France, there have been reports of Islamophobia, racism, and police brutality.⁵² There have also been extrajudicial killings of civilians at the hands of police in Nigeria and Bolivia.⁵³ Hungary enacted emergency laws that provided unfettered power to rule by decree.⁵⁴ These stories depict gross human rights violations that often go unpunished.

47 European Commission for Democracy Through Law ‘Compilation of Venice Commission Opinions and Reports on States of Emergency’ (2020) at 5.

48 N Coghlan ‘Dissecting Covid-19 Derogations’ 5 May 2020 <https://verfassungsblog.de/dissectingcovid-19-derogations/> (accessed 16 June 2021).

49 K Dzehtsiarou ‘COVID-19 and the European Convention on Human Rights’ 27 March 2020 <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/> (accessed 16 June 2021).

50 Helfer (n 35) 30.

51 Article 19 ‘Mexico: Setbacks to freedom of expression in 2020’ 12 November 2020 <https://www.article19.org/resources/mexico-setbacks-to-freedom-of-expression-in-2020/> (accessed 12 June 2021).

52 S Desai ‘Protests in France against police impunity’ 21 March 2021 <https://www.aa.com.tr/en/europe/protests-in-france-against-police-impunity/2182965> (accessed 12 June 2021).

53 Amnesty International ‘Healing The Pandemic of Impunity 20 Human Rights Recommendations For Candidates In The 2020 Presidential Elections In Bolivia’ (2020) at 22-23; TF Abiodun et al ‘Unlawful Killings of Civilians by Officers of the Special Anti-Robbery Squad (SARS) Unit of the Nigerian Police in Southwest Nigeria: Implications for National Security’ (2020) 3(1) *African-British Journals* at 55-56.

54 S Gebrekidan ‘For Autocrats, and others, Coronavirus is a chance to grab even more power’ 30 March 2020 <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html> (accessed 18 June 2021).

A further justification for the reformation of the due diligence framework and derogation system is the need to rectify the disproportionate impact of restrictions and derogations. Vulnerable groups who find themselves on the margins of society pay the heaviest for the failings of governments.⁵⁵ COVID-19 has magnified and deepened pre-existing societal inequalities with heightened inequality exacerbating vulnerable groups' exposure to the virus.⁵⁶ In the USA, for example, studies of disproportionate COVID-19 cases suffered by ethnic and racial minorities compared to their white counterparts exemplify this point.⁵⁷ The report illustrates how individuals of Hispanic or Latino ethnicity have COVID-19 hospitalisation rates that are four times higher than that of non-Hispanic white persons.⁵⁸ Closer to home, Amnesty International has stated that a contributing factor to South Africa being the first African country to reach one million cases is the difficulty faced by most South Africans to socially distance as they live in poor quality and overcrowded housing in townships.⁵⁹

Inequality does not only manifest in the contraction of disease but is also inextricably tied to the creation of policy itself.⁶⁰ The increased restriction of movement and stay-at-home orders provide a case-in-point. The imposition of self-containment has had a correlative relationship with an increase in domestic violence, with several states reporting raises in domestic abuse and violence of around 30%.⁶¹ While domestic abuse is an issue suffered by men and women, it disproportionately affects women and has prompted the WHO to declare it a public health issue.⁶² The UN Committee on the Elimination of Discrimination against Women has also declared the prohibition against gender-based violence a principle of customary international law.⁶³ It is concerning that the isolating conditions of the pandemic have made it more difficult to effect redress in this regard.

55 R Siegel & P Mallow 'The Impact of COVID-19 on Vulnerable Populations and Implications for Children and Health Care Policy' (2021) at 1-2.

56 As above.

57 JM Wilder 'The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States' (2021) 72 *Clinical Infectious Diseases Editorial Commentary* at 709.

58 Centers for Disease Control and Prevention Health Equity Considerations and Racial and Ethnic Minority Groups <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/increased-risk-exposure.html> (accessed 18 June 2021).

59 Amnesty International 'Failing to Learn the Lessons? The Impact of Covid-19 on a Broken and Unequal Education System' (2021) at 9.

60 Lebet (n 40) 9.

61 UN Women 'COVID-19 and Ending Violence Against Women and Girls' 2020 <https://www.unwomen.org/en/digital-library/publications/2020/04/issue-brief-covid-19-and-ending-violence-against-women-and-girls> (accessed 18 June 2021).

62 World Health Organisation 'Global status report on violence prevention' (2014) at 7-8.

63 Lebet (n 40) 9.

These findings have prompted the UN High Commissioner for Human Rights to condemn the disparity between those who have protection amidst the pandemic and those who are forced to fend for themselves. To rectify this state of affairs, the Commissioner stressed the need for ‘policies that uphold our equality, and which deliver universal and equal access to social welfare protections and health care’.⁶⁴ This article echoes the call from the Commissioner by arguing that a critical aspect of reforming due diligence and derogation systems is prioritising the protection of vulnerable individuals by considering the issues they face and how measures disproportionately impact them.

6 How should states respond?: Reforming derogation systems

As illustrated above, a duty to prevent, respond to, and curb COVID-19 has been established under the legal framework of due diligence. As a result, states must ensure that they respect, protect, promote, and fulfil human rights even amid a public health crisis.⁶⁵ In doing so, states will be able to strike a balance between protecting the life of the nation whilst upholding their international obligations in compliance with the principles of necessity and proportionality.

This does not go far enough, however, as it fails to provide an appropriate solution for the lawful implementation of derogation. To fill this lacuna, the work of Helfer is helpful. Helfer argues that the issues with derogation are rooted in the system itself and we must reshape it or risk violating the very essence of international law.⁶⁶ Five main remedies are proposed for the development of the derogation system. These are underpinned by a normative framework that holds that derogations ‘aim to reduce human rights violations during emergencies relative to the level of violations that would have occurred without such a mechanism’.⁶⁷ This position stands in contrast to those who claim that derogations are nothing more than a necessary evil to permit states a degree of freedom to administer their affairs amidst crisis as a product of their sovereignty.⁶⁸ Helfer rejects this idea by claiming that states are more – not less – likely to violate human rights during emergencies and that monitored

64 M Bachelet ‘Addressing the disproportionate impact of COVID-19 on minority ethnic communities’ 24 November 2020 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26541&LangID=E> (accessed 11 June 2021).

65 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, Communication 155/96, African Commission on Human and Peoples’ Rights, Thirtieth Annual Activity Report (2001) at 43.

66 Helfer (n 35) 34.

67 Helfer (n 35) 35.

68 As above.

derogations can provide regulation and constraint to the exercise of power.⁶⁹

First, there needs to be a stronger link between national and international law when invoking derogation. To this end, Helfer suggests that greater embeddedness offers a solution.⁷⁰ Notification should be attached to the domestic invocation of emergency powers.⁷¹ This hopes to facilitate greater compliance with derogation requirements while also constraining the powers of states amidst emergencies.⁷²

Second, an increase in engagement with these notifications is required. Regional and international bodies must go beyond merely accepting notifications and should begin questioning the need for derogation whilst considering the ramifications of human rights.⁷³

Third, greater engagement should not only come from human rights institutions but must also improve from states themselves. To this end, there must be a greater emphasis on sharing information and prioritising accountability. States should go beyond declaring derogations and should also explain the rationale behind them.⁷⁴

Fourth, the issue of timing must be addressed. The timing of derogation declarations requires attention as states often utilise derogations after the horse has bolted – that being after the suppression of human rights. Notifications of derogations should instead notify the intention to suppress rights. To rectify this, Helfer suggests that states should be incentivised to report promptly, or that an outer limit be imposed on the invocation of derogation.⁷⁵

The period between human rights violations and their ventilation before an international forum is another issue under this banner. The phrasing of exhaustion requirements often contributes to these prolongments and it appears unlikely that change will occur in this regard.⁷⁶ A better review of derogation notifications by international bodies is a more realistic and appropriate solution.⁷⁷

Finally, Helfer calls for greater clarity on the scope of derogations. This clarity must encompass the precise conditions necessary to invoke a period of derogation and proposes that, where they are sufficient, limitations should instead be invoked.⁷⁸ Clarity is required on whether derogation is at all possible under treaties

69 As above.

70 Helfer (n 35) 36.

71 As above.

72 Helfer (n 35) 36.

73 As above.

74 Helfer (n 35) 38.

75 As above.

76 As above.

77 Helfer (n 35) 39.

78 Helfer (n 35) 40.

without an express provision to this effect.⁷⁹ Scholars have argued that the African Charter and CESCRCR implicitly permit states to suspend certain rights during emergencies and COVID-19 has proven that an alternative conclusion does not deter states from suppressing rights in any event.⁸⁰ Therefore, it is necessary to review and revisit these treaties to gain clarity on this issue.

Helfer argues that these changes will reform the derogation system and move it away from its current use as a system that incentivises states to invoke extraordinary powers free from sufficient regulation or monitoring.⁸¹ While I concur with Helfer's normative baseline that reform could make strides towards a more comprehensive system that installs checks and balances on the exercise of state power, his amended system is insufficient as it stands. This amended system needs a more intentional and progressive normative framework. States must introduce policies with greater clarity, transparency, and timing and the considerations informing the policies must also evolve. COVID-19 has reaped the fruits of inequality and suffering from the seeds sown preceding this pandemic. Therefore, states must be deliberate in protecting marginalised groups and reversing the divisions present in society. In doing so, an intersectional approach must be adopted. This approach should prioritise the protection of groups marginalised on the basis of race, gender, sexual orientation, age, and every other relevant consideration.

Blueprints for this conscious approach are provided by those on the international stage. The United Nations Population Fund has developed a gender-based approach to COVID-19,⁸² while the Centre for Human Rights has detailed the unique and disproportionate impact of the pandemic on the LGBTQI+ community across Africa.⁸³ Similarly, Lebret aims to account for the disproportionate impact of derogations on vulnerable communities including the detained and the elderly.⁸⁴

States should draw inspiration from these approaches when deciding whether to derogate from rights and how their power will be exercised. The sun must set on the age of unregulated and unjustified derogations. Derogations in their current form facilitate impunity that is felt the most by the most marginalised in society. A new dawn is needed. One where states that derogate from rights must do so transparently and within the context of a commitment to the

79 As above.

80 As above.

81 Helfer (n 35) 40.

82 UN Population Fund 'Covid-19: A Gender Lens Technical Brief Protecting Sexual and Reproductive Health and Rights, and Promoting Gender Equality' (2020) at 5-6.

83 Centre for Human Rights 'Understanding the disproportionate impact of COVID-19 on LGBTQI+ persons in Africa' (2020) at 2-3.

84 Lebret (n 40) 12-15.

protection of these rights. The policies adopted must be borne from the people it protects as the citizens of a state will differ on a case-by-case basis.

7 **Conclusion**

COVID-19 is not the first health crisis and it certainly will not be the last. Periods of emergency are an inevitability but these times of disaster cannot continue to be defined by gross human rights violations that go unpunished. To curb this trend, states must exercise their power according to international law standards. To this end, due diligence should be utilised and evolved so that states can exercise power in a lawful and just manner. Derogation systems are in dire need of reform. Unless these changes are realised, human rights will continue to be the first casualties in times of crisis.