

Rights & Obligations during COVID 19:

A look at Selected UN Statements, 2020

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**Statement on the coronavirus disease
(COVID-19) pandemic and economic,
social and cultural rights-**

Statement by the Committee on
Economic, Social and Cultural Rights
[E/C.12/2020/1 , April 2020]

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COVID-19 GUIDANCE- UN Office of
the High Commissioner [April, 2020]

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**EMERGENCY MEASURES AND
COVID-19: GUIDANCE -** UN Office of
the High Commissioner [April, 2020]

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I. Introduction

The world is witnessing an unprecedented health crisis. There are concerted efforts being made by states & communities to secure and protect the right to life and health of people around the world. Despite these measures, human rights of many individuals remain vulnerable and threatened. The UN Secretary General while urging for solidarity amongst all faiths expressed that *the COVID-19 pandemic is not just a global health emergency. It is a human crisis that is upending lives, destroying livelihoods and deepening mistrust around the world.*²

The United Nations Organization has been making attempts to universalise key agendas in order to address the gravity of human rights situations around the world. In April 2020, the UN Office of the Commissioner of Human Rights & Committee under ICESCR [International Covenant on Economic, Social, Cultural Rights] issued general and special statements addressing the challenges being faced by individuals & States in light of the prevailing global health crisis.

The statements highlight the key human rights principles and standards applicable in light of COVID 19. At the same time, developments around the world open up for scrutiny questions on

the current status of human rights and responsibilities. Several themes have become critical including the power of the state to declare emergency, the permissible human rights derogations, the scope and applicability of rights including scientific information, and the regulation of profiteering and patenting on drugs and tools.

The following are the standards re-emphasised in the statements.

II. The Underlying Themes

A closer look at the three reports highlights the following as key principles or standards applicable in context of COVID 19.

1. HUMAN RIGHTS ARE CENTRAL

Statements issued by the UN clearly express that the steps and measures being taken by States to address the global health crisis must be taken keeping in mind the human rights mandate and commitments. That includes *the mandate of states* under the human rights treaties.

The OHCHR statement³ says *human rights are central to the whole process*. The *centrality of human rights* is also being endorsed by other UN & other entities.⁴

² UN News, "UN chief appeals to 'common humanity' across all faiths, in tackling the coronavirus", May 2020. Available at <https://news.un.org/en/story/2020/05/1063782>

³ **COVID-19 GUIDANCE-** UN Office of the High Commissioner [April, 2020]

⁴ Also See Amnesty International Statement on Responses to COVID 19 & States Human Rights Obligations, March 2020.

Quoting from Statement; *Human rights must be at the centre of all prevention, preparedness, containment and treatment efforts from the start, in order to best protect public health and support the groups and people who are most at risk. However, many of the*

2. ADDRESSING VULNERABILITY

There is greater emphasis on factors or conditions of vulnerability of persons and populations. The approach is pushing for a refinement in the traditional accepted frameworks and concepts on vulnerability and vulnerable groups.

Emphasis on expressions such as “particularly vulnerable” and “most affected” are backed by reports and experiences of persons and populations around the world. Greater emphasis can be seen also on *categorizations* including detainees/prisoners, health personnel & families of health personnel etc.

3. MAINSTREAMING SPECIFIC RIGHTS

There is a larger canvas of specific human rights being debated and discussed in light of COVID 19. These include the human right to scientific information/knowledge, adequate housing, social security etc.

At the same time, there is wider discussion on the limits to derogations from human rights provisions in domestic & international laws.

4. OBLIGATIONS

Prevention of harm & loss is an essential feature of the human rights mandate for state and non-state entities. The same are also being emphasised by different human rights treaty bodies. States are

measures to contain the spread of COVID-19 appear to have been proposed and implemented without full consideration of potential consequences for the enjoyment of all human rights by all, whether infected, at risk, or part of the wider population.

obligated to take steps to prevent and particularly mitigate the impacts of the health crisis. The statement being relevant and applicable also the business sector.

Also applicable to states is the *minimum core obligation* and the obligation to use their *maximum available resources* to the full realization of all economic, social and cultural rights, including the right to health.⁵

The duty to consult has been greatly emphasised. According to the ICESCR Statement, health professionals in particular should be consulted during decision making and should be free to share information.

There are *obligations* on states and regional bodies to inform/notify the UN about emergency measures being undertaken. [Obligations provided under the ICCPR & Regional Documents].⁶

Statements also point towards the duty and need to *strengthen multilateralism and international cooperation by States and all actors in a spirit of global solidarity and shared responsibility*. [COVID 19 Guidance Statement].

5. EMERGENCY MEASURES

Emergency measures are being undertaken by states across the world. These measures are placing conditions on the exercise of few recognized human rights including freedom of movement,

⁵ Statement by the Committee on Economic, Social and Cultural Rights [E/C.12/2020/1. , April 2020] page 3, recommendation no. 12.

⁶ See UN COVID 19 Guidance Statement.

freedom of religion etc. Relying on existing human rights standards, focus is on assessing the reasonableness or the necessity of the measures being undertaken.

The ICCPR makes a provision for derogation in exceptional circumstances faced by the nation [though does not expressly mention an epidemic/pandemic]. The ICESCR does not include any such provision. A distinct classification on derogable and non-derogable rights can be found in regional documents.

The *UN COVID 19 Guidance Statement* indicates the permissible limits of derogation by states from certain provisions of international law. The derogations should be in furtherance of public health and safety of individuals, should be reasonable, non-intrusive & time bound.

The *UN Emergency Measures & COVID 19 Guidance Statement*, 2020 refers to four essential criteria to apply while undertaking emergency measures. These include legality, necessity and proportionality, and non-discrimination.⁷

Legislative and judicial scrutiny of emergency proclamations and measures is also being emphasised. Quoting from

Statement on Emergency Measures; any emergency legislation introduced under a state of emergency should be subjected to adequate legislative scrutiny. There should also be meaningful judicial oversight of exceptional measures or a state of emergency to ensure that they comply with the limitations described above.

6. PROTECT, PROVIDE, MITIGATE, RECOVER

Statements emphasise upon a comprehensive outlook which is needed in the management of the risks and harms coming as a resultant of COVID 19.

In addition to the existing mandate, States parties are required to take *immediate measures to protect the jobs, pensions and other social benefits of workers during the pandemic, and to mitigate its economic impacts through, for example, subsidizing wages, providing tax relief and establishing supplementary social security and income protection programmes.*

The comprehensive mandate of “protect, provide, mitigate & recover” needs further analysis.

7. INTERNATIONAL SOLIDARITY

The human right to solidarity has been emphasised as an critical right in

⁷ Quoting from UN Statement on Emergency Measures; *Legality*: The restriction must be “provided by law”. This means that the limitation must be contained in a national law of general application, which is in force at the time the limitation is applied. The law must not be arbitrary or unreasonable, and it must be clear and accessible to the public.

Necessity. The restriction must be necessary for the protection of one of the permissible grounds stated in the ICCPR, which include public health,

and must respond to a pressing social need. *Proportionality*. The restriction must be proportionate to the interest at stake, i.e., it must be appropriate to achieve its protective function; and it must be the least intrusive option among those that might achieve the desired result.

Non-discrimination. No restriction shall discriminate contrary to the provisions of international human rights law.

international law.⁸ One can view the positive and negative dimensions of the right as inclusive of a duty towards collective action & duty to restrain.⁹ Quoting from the ICESCR Committee Statement; *in particular, developed States should avoid taking decisions, such as imposing limits on the export of medical equipment that result in obstructing access to vital equipment for the world's poorest victims of the pandemic.*

Moreover, States parties should make sure that unilateral border measures do not hinder the flow of necessary and essential goods, particularly staple foods and health equipment.

*Any restriction based on the goal of securing national supply must be proportionate and take into consideration the urgent needs of other countries.*¹⁰

UNDP, WHO, and other agencies are emphasising on the right to international solidarity.

8. BUSINESS & HUMAN RIGHTS

The COVID 19 Guidance Statement refers to obligations of business as independent and distinct of the obligations of the state. The *obligations* are

required to be met even in the times of economic hardship, health crisis & irrespective of whether the state is able to fulfil its obligations or not.

A view of the current initiatives being undertaken by business entities can add greater insights as to how the community is responding at the time of the crisis.¹¹

III.

Addressing Vulnerability

Vulnerability to risk and harm is the key parameter in the measures being undertaken and the standards being adopted by states and the international community.

The statements are inclusive of risks to health and other risks emanating from the consequences of COVID 19. The latter include loss of livelihood. The assessment of vulnerability is based on several criteria including the following;

1. AGE: OLDER PERSONS & YOUTH

According to the statements, *older persons, with pre-existing health conditions...* are

⁸ See *Report of the Independent Expert on human rights and international solidarity* for details about the right to international solidarity. Human Rights Council, 38th Session, 2018.

⁹ ICESCR Statement, Recommendation No. 20.

¹⁰ Amnesty International Statement; *States must provide relevant information to other states and international organizations regarding the extent of the spread of COVID-19 in their jurisdiction, and information about the consequences and information they have about possible treatment. The rapid spread of COVID-19 has raised fears that it may impact several states that do not have the resources necessary to*

adequately respond to it. At this time, international cooperation and solidarity is crucial. All countries that can respond must do so as swiftly as possible. The response must itself be rights-respecting and should take account of long-term as well as immediate needs, keeping in mind the particular needs of specific, marginalized groups.

¹¹ For example, the US Chamber of Commerce in May 2020 published a State by State Business Opening Guidance applicable non-uniformly across the country.

See <https://www.uschamber.com/article/state-by-state-business-reopening-guidance>

particularly vulnerable to serious health consequences if infected by COVID-19.

Quoting from the COVID 19 Guidance Statement: *special attention should be paid to the particular risks faced by older persons, including isolation and neglect resulting from physical distancing and age-based discrimination in access to medical treatment and other support.*

The COVID 19 Guidance refers to the role of states towards ensuring *vulnerabilities of the youth* are also taken into account. Particularly livelihood.

2. LIVING ARRANGMENTS:

Groups living in closed group arrangements are at risk ... particularly those in residential care facilities or communal living arrangements, prisoners and persons in detention facilities, and residents of informal settlements or other areas where adequate access to water, soap or sanitizer is lacking.

Measures to release prisoners subject to conditions have been taken by different countries.¹²

3. NATURE OF WORK:

Categories of workers that owing to the nature of their work cannot exercise options of working from home with the use of technology, e.g., delivery workers, garbage collection workers...are seen as particularly vulnerable.

4. INADEQUATE PROTECTION:

Right to protection and safety has been strongly advocated. According to the WHO & several state initiatives, the health issues and physical safety of medical personnel have been a serious cause of concern. Included within this category are also immigrants, refugees, LGBT community¹³, and those living in conflict-affected countries or regions.

5. ECONOMIC LOSS:

Non-health criteria are also relevant in ascertaining the risks affecting populations.

Quoting from the statements; *several groups are severely disadvantaged by the economic consequences of measures adopted in a number of countries to contain the spread of COVID-19...Informal traders and a number of small businesses can no longer ply their trade or conduct business, resulting in profound economic insecurity for themselves and their dependants.*

IV.

Mainstreaming Rights

All human rights including civil, political, economic, social and cultural rights need to be protected and catered to at all times. And in the context of the global health crisis, new

¹² See, *Suo Motu Writ Petition* before the Supreme Court of India, *In Re Contagion of COVID 19 Virus in Prisons*, 2020.

¹³ The High Court of Kerala in India addressed a Petition highlighting the plight of the Transgender community in the State. The petitioners claimed that the transgender community in the State is

facing discrimination in relation to distribution of food essentials, lack of access to medicines & medical treatment, torture & degrading treatment, threats of eviction owing to inability to pay rent. [*Aneera Kabeer v. State of Kerala*, 2020]

conditions of vulnerability and discrimination must be addressed.

The human rights treaty framework is being tested and enlarged to meet the exigencies of the crisis. A few of the rights much debated and central to addressing vulnerabilities of populations include the following:

1. RIGHT TO MEDICAL TREATMENT

Right to *medical treatment* is an important human right central to the mandate of the state to ensure the right to health. Treatment is wide enough to include testing, access to hospitals, availability of medicines etc.

According to UN statements, treatment is *to be provided without discrimination* on the basis of age, sex, sexual orientation etc. The same is also qualified with the requirement of timely, appropriate & affordable treatment.

An important dimension also included is—*no person to be denied treatment because of inability to pay*.¹⁴

The debate on curbing profiteering and patenting of COVID 19 medical tools is also linked to the human right to treatment.

2. RIGHT TO EDUCATION

Online education is viewed as a measure to mitigate the impact of closure of schools and universities around the world. At the same time, the digital

divide amplifies the inequalities prevalent.

Availability and accessibility of the human right to the internet is key in this regard. Quoting the ICESCR Committee: *measures should also be taken to expedite access to affordable Internet services and vital technical equipment for all students, particularly those in poorer communities and regions, so that they can benefit equally from online learning programmes while schools and higher education institutions are closed owing to the pandemic*.

3. ACCESS TO JUSTICE

Domestic violence & acts of discrimination are some of the non-health based concerns during COVID 19.

Vulnerability of women & girls is mentioned in the COVID 19 Guidance Statement. Addressing incidents of violence and abuse within homes is a mandate for the states. Also, provision for reproductive rights and services is seen as essential and a priority during COVID 19.

There is also evidence for indicating discriminatory treatment being meted out to patients testing positive. The same is a clear violation of human rights.

In cases of non-derogable rights, the UN statement on Emergency Measures states that *courts must be operational to address complaints of violations*.

The questions around legal assistance, remedies, and protection are vital for the human rights protection of

¹⁴ See UN Statement on COVID 19 Guidance, 2020.

individuals and groups including older persons, women, children etc.

4. RIGHT TO INFORMATION

Misinformation, inadequate information, non-availability of information are seen as serious challenges during COVID 19.

Measures are being undertaken to provide reliable information on situations including health safety warnings, emergency measures, availability of medicines etc.

Emphasis is being placed on regular and accessible information. Accessibility includes that the information should be in the language the relevant community can understand.

States are also under a duty to counter misinformation and false information which can put individuals and groups at risk.

5. RIGHT TO SCIENTIFIC EVIDENCE

The ICESCR Committee issued the much awaited General comment No. 25 (2020) on science and economic, social and cultural rights.

Quoting the Committee: *to respond to pandemics, for instance by sharing scientific information on potential pathogens ... If a pandemic develops, sharing the best scientific knowledge and its applications, especially in the medical field, becomes crucial to mitigate the impact of the disease and to expedite the discovery of effective treatments and vaccines.* [See GC No. 25 for details]

6. OTHER RIGHTS

Other human rights that are being viewed as a priority include the right to adequate housing, freedom from punishment for being homeless, right to food, right to privacy [in light of rapid use of surveillance and technology], freedom of movement, freedom of religion etc.

V. Critical areas

Although the Guidance Statements issued by the UN are exhaustive and a reiteration of the commitment of states towards human rights, they do raise pertinent unattended questions on the subject.

On the powers & limits of state power, the global crisis has brought forth several questions. The following are a few of the critical debates relating to COVID 19:

Power to Declare Emergency

The power to declare emergency by states is being viewed critically by international law scholars. The potential for abuse has been highlighted by a few.¹⁵

In light of treaties such as the ICCPR and regional arrangements, states are permitted to derogate from their obligations during an emergency. In relation to the COVID-19 derogations, it is still unclear for how long States will derogate from their obligations under human rights treaties.

There is no fixed parameter on the duration of the derogations. However, all derogation provisions require the States parties to (a) officially notify the

¹⁵ See Martin Scheinin, To Derogate or Not to Derogate, April 2020. Available at

<http://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>

respective treaty regime, (b) indicate the reasons for the derogation, and (c) notify when the derogation is terminated, whether the same are being implemented or not.¹⁶

The emergency measures, the justifications for declaring an emergency, the duration of the emergency, the suspension of derogable human rights are all factors requiring scrutiny.

Classification of essential & non-essential Services

While the UN Statements & statements from the WHO support and uphold the reproductive rights of women during the crisis, there are contradictory trends being seen in many states.¹⁷

Litigation in courts is being pursued because abortion rights and birth control measures are being placed in the category of non-essential service.¹⁸

The lack of access and availability of contraception in the times to come owing to manufacturing and supply disruptions is another concern as indicated by experts.¹⁹

¹⁶ See Kushtrim Istrefi, To Notify or Not to Notify: Derogations from Human Rights Treaties, 2020. Available at <http://opiniojuris.org/2020/04/18/to-notify-or-not-to-notify-derogations-from-human-rights-treaties/>

¹⁷ At the domestic level, on March 18, 2020 the American College of Obstetricians and Gynecologists (ACOG) and other reproductive health professional organizations issued a statement that they “do not support Covid-19 responses that cancel or delay abortion procedures.” See Michelle J. Bayefsky, B.A., Deborah Bartz, M.D., M.P.H., and Katie L. Watson, J.D., “Abortion during the Covid-19 Pandemic — Ensuring Access to an Essential Health Service”, The New England Journal of Medicine, May 2020.

Patenting & cost of drugs for treatment of COVID 19

The Statement issued by the ICESCR Committee maintains that regulatory measures should be adopted to prevent profiteering on ... essential medicines and supplies. [pg 4, pt. 17]

In March 2020, the humanitarian organization Doctors Without Borders [MSF] called for no patents or profiteering on drugs, tests, or vaccines used for COVID 19. The call asked governments to take measures such as price controls.

There is criticism and campaigning against pharmaceutical companies gearing to act differently.²⁰ In the more recent initiatives, MSF is advocating for steps to be taken to treat medical tools for COVID 19 as *Global Public Goods*.

The above issues are only a part of a growing field of human rights concerns

¹⁸ See Dennis Carter, Abortion Access During COVID-19, State by State, 2020. Available at <https://rewire.news/article/2020/04/14/abortion-access-covid-states/>

Also see, Abigail Abrams, *COVID-19 Could Permanently Make Abortions Harder to Access Nationwide*, April 2020. Available at <https://time.com/5816530/coronavirus-abortion-clinics-access/>

¹⁹ Chris Purdy, How will COVID-19 affect global access to contraceptives — and what can we do about it?, March 2020. Available at <https://www.devex.com/news/opinion-how-will-covid-19-affect-global-access-to-contraceptives-and-what-can-we-do-about-it-96745>

²⁰ Visit [msf.org](https://www.msf.org) for more details and statements.

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