

Update to Chapter 7 on the COVID-19 Pandemic

The coronavirus (COVID-19) pandemic has dramatically affected human rights around the world. At the time of this writing, there have been nearly 205.5 million confirmed cases and over 4.33 million deaths worldwide. The rights that are most directly affected by the disease are the rights to life and to health. These two rights are often treated as different in kind. The right to life is established in the ICCPR and is usually classified as a civil or political right, while the right to health appears in the ICESCR, as a social, economic, or cultural right. But the two evidently blur together in the context of the global pandemic.

As we discuss in the main text, human rights law generally establishes three kinds of obligations on states: (1) obligations *not to infringe* on the rights (i.e., obligations to respect), (2) obligations to *protect* the rights from infringements by third parties, and (3) obligations to take affirmative measures *to fulfill* the rights. The third kind of obligation is the most fluid and difficult to define in the abstract; the measures that states must take to fulfill specific rights depend on their social and political contexts and on their available resources. However, the jurisprudence of human rights treaty bodies and courts indicates that, where states fail to take adequate measures to control or treat life-threatening diseases, they violate both the ICCPR (right to life) and the ICESCR (right to health).

Moreover, under Article 2 of the ICESCR, each party must “take steps, individually and through international assistance and co-operation . . . to the maximum of its available resources” to fulfill rights. The question of whether this language obligates developed states to help less developed states realize their populations’ economic, social, and cultural rights has long been contentious. That question again arises in the context of the pandemic. For example, do developed countries have a legal obligation to distribute vaccine supplies or medical equipment to less developed states in order to assist them in combatting the disease?

The major human rights instruments also require states to realize rights without discrimination of any kind. The pandemic has exposed deep structural inequalities in the realization of rights not only across states (*e.g.*, between states of the Global North and the Global South) but also within each state. The UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, E. Tendayi Achiume, [explains](#):

Reports have also laid bare the meaning and persistence of structural racism—everywhere in the world, racial, ethnic and national minorities are hardest hit by the pandemic. These groups are disproportionately represented in employment sectors classified as essential services, and among those living in the sort of economic precarity that means “sheltering in place” denies them the only means they have to put food on the table. These groups are also disproportionately excluded from access to healthcare and housing under the best of circumstances. As a social construction, so much of what race does in contemporary society is shape access to fundamental rights, and the current pandemic makes this crystal clear.

Other vulnerable populations, such as migrants and persons with disabilities, have also been disproportionately affected by the disease.

The negative impacts of the disease have been compounded by the responses that governments have taken to address it, or in some cases to consolidate their own power by using public health as a subterfuge. A sizeable number of countries have invoked the derogation provisions of the human rights treaties—which give states more leeway to infringe on rights in times of emergency—to justify their measures to contain the disease. States that have not derogated have still taken advantage of carveouts and other limiting clauses that allow them to intrude on rights. Some of these measures, such as strict quarantines that restrict the freedoms of movement and assembly and the shutdown of economic sectors that deprive people of their livelihoods, might be permissible and legitimate under the relevant treaties. However, they still have a human rights impact, and they have not always been proportional to the problems that they are designed to address. Moreover, other measures have plainly exceeded the bounds of human rights law. For example, some governments have exploited the pandemic to arrest political opponents or further concentrate their own political power.

Finally, the pandemic creates situations in which states face seemingly competing duties under international human rights law. If a state needs to impose a “lock-down” to prevent the spread of the virus, thereby protecting the right to life, the result could be that economically disadvantaged residents are deprived of their sole source of income for food or housing. This problem arises most drastically in developing countries, where the government lacks the resources to replace lost income. Treaty bodies, special rapporteurs, and others have urged states not to protect one right at the expense of another, but in reality states may face extremely difficult choices.

Notes and Questions

1. How should human rights advocates respond to something as cataclysmic as the COVID-19 pandemic? Karima Bennoune argues that the “pandemic requires nothing less than a pan-normative approach . . . taking into consideration the range of rights: civil, cultural, economic, political, and social, while also recognizing . . . the centrality of the right to life.” *“Lest We Should Sleep”: COVID-19 and Human Rights*, 114 AM. J. INT’L L. 666, 673 (2020). What might such an approach entail? How should we assess whether a particular country is adequately satisfying the mix of obligations in play during the pandemic?

2. Human rights actors have been extremely vocal during the pandemic. Lisa Reinsberg [explains](#) that, between February and May 2020, “[t]he 56 United Nations special procedures, 10 U.N. human rights treaty bodies, three principal regional human rights systems (each with various components), and their respective ‘parent’ intergovernmental organizations have collectively put out more than 150 statements on respecting human rights during the pandemic.” Reinsberg also explains that the guidance has been diffuse, inconsistent, and imprecise; governments have been confronted with a barrage of

comments and suggestions to sift through, pick and choose from, and in many cases ignore. Is this dynamic a feature or a bug of the human rights system? What, if anything, should be done to improve it?

3. The pandemic has also raised numerous international law questions beyond human rights. Some have asked whether China might be held legally responsible for harm to other countries under the rules of state responsibility. Those rules are summarized in Chapter 3, Problem II. What would you need to know about the origin of the pandemic to answer that question? The pandemic also raises important questions under international economic law, e.g., the flexibility of states to respond to health emergencies under the WTO agreements and bilateral investment treaties. In addition, the issues discussed in Chapter 14, Problem III, regarding intellectual property rules for life-saving medicines may prove relevant, though as of the current time the main constraint on the production of more medicines seems to be the immense start-up time and costs to vaccine production.