

Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses

September 2020



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SUMMARY AND OVERVIEW

According to the World Health Organization, as of 31 August 2020 COVID-19 had infected a confirmed total of 25,118,689 people worldwide and contributed to at least 844,312 deaths.¹ International news and social media sources, to be sure, have conveyed some of the devastating impacts of COVID-19 in some of the hardest hit areas at different stages, including in China, the United States, the European continent, Brazil and South Africa. However, the overall global impact of the pandemic is less well documented, seldom presented as a composite picture, and infrequently evaluated against the legal obligations of States, individually and collectively, to respect, protect and fulfill the right to health of people under their jurisdiction.

As the UN Committee on Economic, Social and Cultural Rights has aptly noted, the devastation and “suffering” wrought by COVID-19 has not been equally distributed amongst all people.² Global statistics, as chilling as they are, cannot reveal the individual impacts and experiences of either persons who have died of COVID-19, or those who suffer the personal, social, economic and political consequences of the pandemic.

Mama Yuli, an Indonesian transwoman, explained that many elderly transwomen “feel like they live like people who die slowly” as a result of COVID-19.³ Her statement of exasperation is perhaps an apt articulation of a more common sentiment of millions of people around the world. Referring to the difficulty of surviving COVID-19 in the context of extreme poverty, Sbu Zikode of the South African shack dwellers’ movement Abahlali BaseMjondolo observed that: “it does not seem possible to prevent this virus from spreading when we still live in the mud like pigs”.⁴

Fear, anxiety and pressure caused by COVID-19 itself,⁵ coupled with the pandemic’s economic devastation, have driven many to extreme measures. Ginny Butcher, a wheelchair user in the United Kingdom said that she was “very anxious” because people in her position had been given “zero guidance” on how to effectively protect themselves from COVID-19 and this meant women with disabilities “were left wondering how they were going to get out of bed in the morning”.⁶ Indigenous Malaysian activist, Bedul Chemai, told reporters that to survive COVID-19

¹ WHO Coronavirus Disease (COVID-19) Dashboard (31 August 2020), available at: <https://covid19.who.int/>. The data on this site is updated regularly.

² UN Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, U.N. Doc. E/C.12/2020/1 (7 April 2020): <https://undocs.org/E/C.12/2020/1> (“CESCR COVID-19 Statement”).

³ A Amindoni, Transgender’s struggle during the coronavirus pandemic – “Living like a person who dies slowly” (2 May 2020), available at: <https://www.bbc.com/indonesia/indonesia-52500732>.

⁴ S Ebrahim & TF Hodgson, Abahlali baseMjondolo: You can’t stop the virus while living in the mud (27 March 2020): <https://www.dailymaverick.co.za/article/2020-03-27-abahlali-basemjondolo-you-cant-stop-the-virus-while-living-in-the-mud/>.

⁵ WHO, Substantial investment needed to avert mental health crisis (14 May 2020): <https://www.who.int/news-room/detail/14-05-2020-substantial-investment-needed-to-avert-mental-health-crisis>; WHO, Mental health and psychosocial considerations during the COVID-19 outbreak (18 March 2020): https://www.who.int/docs/default-source/coronaviruse/mental-health-considerations.pdf?sfvrsn=6d3578af_2.

⁶ L Webster, Coronavirus: Why disabled people are calling for a Covid-19 inquiry (4 July 2020), available at: <https://www.bbc.com/news/uk-53221435>.

some indigenous Malaysians had been compelled to go “back into the forest, to isolate ourselves and find food”.⁷

The devastation wrought on public health has created an overwhelmingly difficult situation for healthcare workers worldwide, who have been central to States’ response to COVID-19. Peruvian doctor Jesus Valverde starkly describes the invidious position faced by health workers: “We started off so ill-equipped for this tragedy... We have to choose who will be saved and who won’t. It’s terrible... we’re exhausted, but we draw strength to go on from wherever we can”.⁸

These and numerous other experiences illustrate that the magnitude of the tragedy of COVID-19 is, in the words of distinguished Indian novelist and activist Arundhati Roy, “immediate, real [and] epic”.⁹ In this context, perhaps unsurprisingly, the COVID-19 pandemic has had a ubiquitous impact on the protection of human rights globally.

The pandemic, and States’ responses to it, have had a dramatic effect on civil, cultural, economic, political and social rights. The declaration of COVID-19 as a global pandemic by the WHO in early March was accompanied by a statement that called on all States to “strike a fine balance between protecting health, minimizing economic and social disruption, and *respecting human rights*”.¹⁰ Yet, at best, human rights –including the right to health – have been peripheral to much of the public discourse and official responses to COVID-19 globally.

COVID-19 is at its core a public health crisis of potentially catastrophic proportions. The response of State authorities to the pandemic should be evidence-based and must lean significantly on the guidance of public health experts. However, the individual and collective responses of States must also be shaped and guided by obligations and responsibilities that they themselves have assumed in respect of the right to health. Such obligations in terms of the right to health include obligations to adopt effective measures to ensure the prevention, treatment and control of epidemic, endemic, occupational and other diseases. This clearly includes obligations to take measures to ensure the prevention, treatment and control of COVID-19. And these obligations must be pursued not only through the individual laws, policies and practices of each State, but also through collective international cooperation.

This report details the **international human rights law and standards in relation to the right to health**, with a particular focus on the International Covenant on Economic, Social and Cultural Rights (ICESCR). It highlights States’ obligations, including those which must be prioritized and given effect

⁷ R Latiff et al, Malaysia's indigenous people flee into forests to escape coronavirus (3 April 2020): <https://www.thejakartapost.com/seasia/2020/04/03/malysias-indigenous-people-flee-into-forests-to-escape-coronavirus.html>.

⁸ New York Times, In Harms Way (24 June 2020), available at: <https://www.nytimes.com/interactive/2020/world/coronavirus-health-care-workers.html>.

⁹ A Roy, The Pandemic is a Portal (3 April 2020), available at: <https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca>.

¹⁰ WHO, WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020 (11 March 2020), available: <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

immediately. It also emphasizes the responsibilities of non-State actors including international agencies like the WHO and businesses.

While a wide range of international human rights are engaged by the COVID-19 pandemic, **because it is a public health crisis that engagement necessarily runs particularly deep in relation to the right to health.** A number of international authorities, such as UN Treaty Bodies, independent experts of the UN Human Rights Councils, UN agencies, and CSOs including the International Commission of Jurists have recognized the critical importance of a rights-based approach involving in particular the right to health.¹¹ Protection of the right to health nonetheless must be applied in conjunction with other human rights obligations, since human rights interrelated, interdependent and mutually reinforcing.

States must **respect, protect and fulfill the right to health**, through measures that are non-discriminatory. While some aspects of the right may be realized progressively over time, a minimum core of the right must be observed at all times. Indeed, almost all States have taken legal and practical measures to address the public health emergency caused by COVID-19. The measures, whether through declarations of states of emergency, disaster or any other measures, must comply with international human rights obligations irrespective of a State's national law arrangements.

While certain limitations on human rights may be undertaken to confront the public health crisis, such **limitations must be for a specific public health purpose**, established by law, non-discriminatory and necessary and proportionate to addressing public health. Any derogation from civil and political rights obligations due to a public health emergency (including restrictions to movement which have been widespread) must also be necessary and proportionate to specific threats posed by COVID-19. Certain rights are never subject to derogation.

As a general principle of law, all measures taken by States **must comply with the prohibition of discrimination** of any kind. The prohibition on discrimination prohibits both formal discrimination, which is often explicit, and substantive discrimination which may result from formally neutral policies and laws which nevertheless have discriminatory impacts.¹² States are obliged to ensure provision of health services, goods and facilities to *all* persons within its jurisdiction without any discrimination. This includes access to prevention measures, testing and treatment for COVID-19 and any other necessary measures. States must use the maximum of their available resources in protecting the right to health, including financial resources, natural resources, human resources (importantly including healthcare workers) and technological resources.

¹¹ International Commission of Jurists, Human Rights in the time of COVID-19: Front and Centre – ICJ news, articles, op-eds, legal blogs, videos (6 April 2020) available at: <https://www.icj.org/human-rights-in-the-time-of-covid-19-front-and-centre/>. See in particular I Siederman & TF Hodgson, COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health (Part 1) (1 April 2020), available at: <http://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-1/>; I Siederman & TF Hodgson, COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health (Part 2), 1 April 2020), available at: <https://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-2/>.

¹² Discrimination under international human rights law is prohibited on a non-exhaustive list of grounds including: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth sexual orientation, gender identity; age; gender; citizenship; nationality or migration status; health status; disability; socio-economic status; or "other status".

States should **expand their existing pool of resources** to combat the COVID-19 pandemic, including through international co-operation and assistance with other States and international agencies such as the WHO, as well as through either voluntary or compelled private contributions (including from companies).

States must also **regulate the conduct of private participants in the healthcare sector**, including hospitals, pharmaceutical companies, and laboratories. Given the inequitable access to healthcare services, goods and facilities in many countries, extraordinary measures may be necessary to ensure that resources held by private healthcare actors are mobilized towards combatting COVID-19. Denying COVID-19 testing and treatment or failing to deploy available resources towards combatting COVID-19 may constitute a dereliction of responsibilities of private participants in healthcare. These responsibilities are, for example, engaged in the role private pharmaceutical companies will play in the development and distribution of prospective COVID-19 vaccines.¹³

To date there have been a wide array of disproportionate and discriminatory impacts that COVID-19 responses have had on individuals from groups that have been rendered particularly vulnerable to violations of their right to health. **Migrants, refugees and stateless persons** often face discrimination in healthcare services, while COVID-19 response measures often directly exclude non-citizens. Even in countries where COVID-19 testing and treatment has been made available to non-citizens, they often lack access to other critical needs, such as food, water, sanitation and/or housing. There is also a well-documented pattern of heightened vulnerability of **older persons**, to serious sickness and death from COVID-19. Older persons have struggled to access essential healthcare services, while lockdown measures place especially onerous restrictions on their freedom of movement. Blanket rules about movement, work and other aspects of life which are based solely on age may amount to prohibited discrimination. Older persons living in “nursing facilities” and other institutions face even further compounded vulnerability to COVID-19.

Globally, **women and girls** commonly undertake the role of primary caregivers for children and sick family members, exposing them to greater risk of COVID-19 transmission and increasing their burden of unpaid domestic labour. Women also comprise the significant majority of healthcare workers, therefore increasing their disproportionate exposure to COVID-19. There has been a marked increase in domestic and gender-based violence during lockdown periods when women have often been confined to their homes with potential abusers. Such violence has serious short and long-term health consequences for women. In many States, the criminalization of and discrimination against **LGBT persons** persist. Some States have taken COVID-19 responses that have had adverse impacts on access to healthcare services of LGBT persons. The deprioritization of sexual and reproductive health services to which LGBT persons are entitled, purportedly in order to focus efforts on COVID-19 responses, has also resulted in discrimination against LGBT persons. Many LGBT persons have faced increased risks of violence during the COVID-19 pandemic, including in their own homes.

¹³ UNAIDS et al, Uniting behind a people’s vaccine against COVID-19, (14 May 2020): https://www.unaids.org/en/resources/presscentre/featurestories/2020/may/20200514_covid19-vaccine-open-letter.

Persons with disabilities are often particularly vulnerable to sickness including COVID-19 transmission. Inadequate State responses to ensure support measures sometimes necessary for persons with disabilities to live independently, increases the risk of COVID-19 transmission to persons with disabilities. For a large proportion of persons with disabilities, there is an increased chance of presence of “co-morbidities” increasing the chance of serious sickness and death upon transmission. These risks are even more severe for those compelled to live in institutions. Persons with disabilities have also faced discrimination in accessing lifesaving COVID-19 treatment because of triage processes which may even exclude them purely on the basis of disability.

In the context of COVID-19, **persons deprived of their liberty** are vulnerable to COVID-19 transmission and often do not receive adequate healthcare services if they are infected. Detainees have also experienced restrictions to their right to challenge the lawfulness of their detention in line with COVID-19 response measures. Unhygienic and overburdened quarantine facilities have also resulted in COVID-19 transmission to healthcare workers and family members visiting their loved ones to ensure they are provided with basic necessities such as food.

Healthcare workers acting to combat COVID-19 often operate under severely inadequate and unsafe conditions. Shortages of basic PPE are commonplace and widespread in countries, regardless of their status or level of economic development, resulting in a higher risk of COVID-19 infection for healthcare workers. Healthcare workers have been refused access to public transport and had their children forced to leave daycare centres. They have been threatened with eviction or actually evicted and chased away from homes.

The lives of **sex workers** in the majority of the world have been upended by COVID-19, with the majority having lost major sources of their income and nearly all of their work opportunities. COVID-19 relief measures typically exclude sex workers whose work remains criminalized in the majority of the world. Sex workers who continue to operate in person despite COVID-19 face significantly increased risks of COVID-19 transmission. Sex workers have also commonly experienced limitations in access to essential healthcare services.

The obligation of States to respect and protect the **rights to freedom of expression and information, privacy and health** are directly engaged in the context of COVID-19. Facilitating freedom of expression and information and providing extensive, accurate, transparent and regular health information improves the success of efforts to combat COVID-19. Yet States have often attempted to justify restrictions on such rights as necessary to combat COVID-19. Internet shutdowns or restrictions are a clear example of measures which unduly restrict access to health information and thereby significantly harm efforts to combat COVID-19 and protect the right to health. States have also used overly broad and unwarranted measures, purportedly to prohibit the spread of false information online during the pandemic, to crack down on political participation and expression disfavoured by authorities. Many States have implemented expanded surveillance mechanisms, most particularly through “contact tracing” applications, to assist in curbing the spread of COVID-19. Though carefully designed contact tracing measures may be effective, if adequate protections or safeguards for the rights to privacy and health are not provided, such measures risk serious and unjustifiable rights violations.

The **rights to health, housing, water, sanitation** and food are critical in themselves and as “social determinants” of health. Without access to housing, water, sanitation and food of an adequate level it is not possible for persons to enjoy the right to health. States must ensure a continuous and constant provision of water, soap and sanitizer to communities and individuals who do not have access to them during the COVID-19 pandemic. However, for many people living in poverty across the world, such basic resources remain unavailable. In addition, governments in many countries have failed to provide even emergency water access to many people and continue to allow disconnections of water and sanitation services for those who cannot afford to pay for them.

Forced evictions continue in many parts of the world and, even in States where moratoriums have been implemented, they have often been unduly limited to narrow categories of persons or for limited periods. Evictions do not only lead to large movements of people, which increases COVID-19 transmission, but also make it impossible to “stay at home”, a critical measure to combat COVID-19. Where they do exist, shelters for those without housing are often inadequate and lack provision for basic necessities for inhabitants.

Limited access to food and water directly and clearly impacts on the healthcare of persons so deprived and increases chances of COVID-19 transmission. Already, there have been reports of starvation deaths resulting from COVID-19 lockdown measures. In other instances, lacking any means of employment, persons are forced to wait for food parcels in long queues which increase their risk of COVID-19 transmission. In some places people have been assaulted or harassed by police when attempting to access food from community kitchens.

Historically pandemics have often catalyzed significant social change. As historian of epidemics Frank Snowden puts it: “epidemics are a category of disease that seem to hold up the mirror to human beings as to who we really are”.¹⁴ Simply put, one way or another, “the world we live in will never be the same”.¹⁵

For human rights to remain real and not illusory in the context of COVID-19, State and non-State actors will have to dramatically increase their efforts to produce human rights and rule of law-compliant COVID-19 responses. It is these individual and collective responses of State and non-State actors that could, as this report shows, ultimately serve as exemplars for a more humane future rather than “cautionary tales” of a painful and embarrassing past.¹⁶

¹⁴ I Chotiner Q&A with Frank Snowden, How Pandemics Change History (3 March 2020): <https://www.newyorker.com/news/q-and-a/how-pandemics-change-history>; F Snowden, Epidemics and Society: From the Black Death to the Present (26 November 2019) New Haven: Yale University Press.

¹⁵ President Cyril Ramaphosa, Statement by President Cyril Ramaphosa on further economic and social measures in response to the COVID-19 epidemic (21 April 2020), available at: <http://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-further-economic-and-social-measures-response-covid-19>.

¹⁶ Per Sotomayor J in *Lady Curtis Valentine v Bryan Collier* 590 US SC (14 May 2020), available at: https://www.supremecourt.gov/opinions/19pdf/19a1034_new_kifl.pdf.

I. INTRODUCTION: WHY THE RIGHT TO HEALTH?

On 6 April 2020, the UN Committee on Economic, Social and Cultural Rights (CESCR) issued its “Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights”.¹⁷ The statement acknowledges that COVID-19 is “threatening to overwhelm public health care systems” and that “tens of thousands of lives have already been lost, including those of doctors and nurses providing front-line medical treatment”.¹⁸ It therefore notes that COVID-19 has had “deep negative impacts on the enjoyment of economic, social and cultural rights, ***especially the right to health*** of the most vulnerable groups”.¹⁹

The CESCR’s then timely statement provided States with a clear understanding that they are “under an obligation to take measures to prevent, or at least to mitigate” the negative impacts of COVID-19 and that they must do so “within a human rights framework”.²⁰ Though noting the wide range of impacts of COVID-19, the CESCR characterizes the pandemic as “essentially a global health threat”.²¹

This framing is partly reflected in the responses of States too, many of which appear to consider COVID-19 as first and foremost a public health issue requiring emergency public health responses. However, recognizing the crisis as a public health emergency requiring public health measures, as, for example, States might have approached the 1918 influenza pandemic, is not enough for COVID-19 in 2020. Both the analysis and the responses must be made rights-based, both because there is a legal obligation to do so, and because this is the most effective way of protecting public health. Measures merely protecting public health in a general sense are necessary but may well be insufficient. Rather, what is required is ensuring the execution of all of the States obligations in terms of the *right to health* and all that a rights-based response entails.²² The UN Human Rights Committee, though primarily responsible for State obligations in respect of civil and political rights under the International Covenant on Civil and Political Rights (ICCPR), has affirmed this general obligation, stressing that “in the face of the COVID-19 pandemic, States parties must take effective measures to protect ***the right to life and health*** of all individuals within their territory and all those subject to their jurisdiction”.²³

Most recently, the *UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, released a statement emphasizing the “binding obligations ground on the right to health framework” which require States to provide adequate “health goods, services and facilities” and ensure a “broader social response” including the

¹⁷ UN Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, U.N. Doc. E/C.12/2020/1 (7 April 2020): <https://undocs.org/E/C.12/2020/1> (“CESCR COVID-19 Statement”).

¹⁸ Id, para 1.

¹⁹ Id, para 2. Emphasis Added.

²⁰ Id.

²¹ Id, para 3.

²² I Siederman & TF Hodgson, COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health (Part 1) (1 April 2020), available at: <http://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-1/>.

²³ UN Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2 (30 April 2020), available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>.

provision of housing, water, sanitation, food, social security and protection from violence.²⁴

The CESCR also notes that COVID-19 has arisen and spread at a time at which “health-care systems and social programmes have been weakened by decades of underinvestment in public health service”, thus limiting States’ capacity to respond effectively.²⁵ This means that failures to ensure the full realization of the right to health in the past have made it more difficult for states to ensure they **respect, protect** and **fulfil** the right to health during the COVID-19 pandemic.

The importance of international assistance and cooperation to address the pandemic cannot be understated. The obligation to realize rights through international cooperation and assistance, contained in ICESCR article 2, is critical in the context of an infectious disease which is global in character, affecting virtually every country on earth and the transmission of which respects no national boundaries. It also immediately draws attention to the potential importance of cooperation between public and private health sectors in ensuring effective and comprehensive responses to COVID-19.

This report summarizes the applicable international human rights law and standards on the right to health and explains their specific application to the context of COVID-19. Using case studies from across the world it highlights some of the specific right to health-related challenges arising in the context of COVID-19 and provides examples of best practices in realizing the right. It also provides recommendations for States that may assist in ensuring that their responses to COVID-19 are compliant with their legal obligations in terms of the right to health.

²⁴ Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, COVID-19 measures must be grounded first and foremost on the right to health, (10 June 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25945&LangID=E>.

²⁵ CESCR COVID-19 Statement, para 4.

II. THE RIGHT TO HEALTH IN INTERNATIONAL HUMAN RIGHTS LAW

Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which presently has 171 States Parties, obliges States Parties to ensure the realization of the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.²⁶ As a shorthand formulation, this right is commonly identified simply as the “right to health”.

Article 12(2) of ICESCR sets out the contours of the right in the following terms:

“The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

...

(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.”

Article 12(c)-(d) of ICESCR is therefore of direct application in the context of the COVID-19 pandemic. Article 12(c) places an explicit duty on all States to prevent, treat and control all diseases including epidemic diseases such as COVID-19. Moreover, Article 12(d) requires States to create conditions that allow for medical treatment “in event of sickness”, including sickness arising from COVID-19.

The CESCR issues General Comments which set out in greater specificity the scope and nature of particular rights under the ICESCR and has done so in respect of the right to health in its General Comment 14 on “The Right to the Highest Attainable Standard of Health” (General Comment 14). Though not a right to “be healthy”, the right to health is a right to a functioning “system of health protection” and “to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health”.²⁷

Moreover, the Convention on the Rights of the Child, which has 196 States Parties (all States except for the United States) sets out very specific standards for “enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health” for children.²⁸

Certain aspects of the right to health are also protected under human rights treaties including notably: the International Covenant on Civil and Political

²⁶ International Covenant on Economic, Social and Cultural Rights (“ICESCR”), Article 12.

²⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/2000/4 (11 August 2000) (“General Comment 14”), paras 8-9.

²⁸ Convention on the Rights of the Child, Article 24 (“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health”); UN Committee on the Rights of the Child (CRC), General comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24 of the Convention on the Rights of the Child) CRC/C/GC/15 (17 April 2013).

Rights;²⁹ the Convention on the Elimination of All Forms of Discrimination Against Women;³⁰ and the Convention on the Rights of Persons with Disabilities.³¹

Various regional human rights instruments also protect the right to health including: the African Charter on Human and Peoples' Rights;³² the European Social Charter;³³ and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights and its Additional Protocol (Protocol of San Salvador).³⁴

Article 2(1) of ICESCR sets out States' obligations in terms of all ICESCR rights. It requires States to:

"to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."³⁵

The CESCR has explained that States' obligations to realize the right to health include obligations to: **respect** the right to health; **protect** the right to health; and **fulfil** the right to health.³⁶

Moreover, while, in accordance with Article 2(1) of ICESCR, some of States' obligations in terms of the right to health may be achieved progressively, others are obligations of "immediate effect". These "immediate obligations" include, broadly the obligations of:

1. **Taking Steps:** Take steps towards realizing the right to health in full;
2. **Non-retrogression:** Avoid any retrogressive steps decreasing existing access to health;
3. **Non-discrimination:** Ensure that health services, facilities and goods are available to all without discrimination; and
4. **Minimum Core Obligations:** Ensure immediate access to at very least the "minimum essential level" of health services, facilities and goods.

Steps taken to realize the right to health include legislative, judicial, administrative, financial, educational and social measures.³⁷ Retrogressive

²⁹ International Covenant on Civil and Political Rights, Article 6 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life"); UN Human Rights Committee (HRC), General Comment No. 36: The Right to Life (art.6 of the International Convention on Civil and Political Rights) CCPR/C/GC/35 (3 September 2019), paras 8, 25, 26.

³⁰ Convention on the Elimination of All Forms of Discrimination Against Women, Article 12 ("States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning"); UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Women and Health (art.12 of the Convention on the Elimination of All Forms of Discrimination Against Women), A/54/38/Rev.1 (1999).

³¹ Convention on the Rights of Persons with Disabilities, Article 25 ("States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability").

³² African Charter on Human and Peoples' Rights ("Banjul Charter"), Article 16 ("Every individual shall have the right to enjoy the best attainable state of physical and mental health"). See also African Charter on the Rights and Welfare of the Child, Article 14.

³³ European Social Charter, Article 11 ("the right to the protection of health").

³⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), Article 10 ("Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being").

³⁵ ICESCR, Article 2(1).

³⁶ See section III(B), below.

³⁷ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), available at: http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html, para 6; Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), available at: <https://www.icj.org/wp-content/uploads/2012/12/Maastricht-ETO-PrinciplesENG-booklet.pdf>, para 24.

measures are presumed to be violations of the right to health and may only be taken on “most careful consideration of all alternatives”. States have a burden to show that such measures “are duly justified”.³⁸

All persons are entitled to protections afforded by the right to health.³⁹ Discrimination of any kind in access to health facilities, goods, services is prohibited. Under international human rights law, the non-exhaustive grounds of non-discrimination include prohibited grounds of discrimination under the ICESCR: “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*”.⁴⁰

Since the adoption of a large range international covenants, international human rights law standards, and international human rights jurisprudence have developed such that other specific grounds can be clearly identified as falling under “other status”, so that it now includes, among other grounds: sexual orientation or gender identity; age; gender; citizenship; nationality or migration status; health status; disability and socio-economic status.⁴¹ CESCR has also noted that “widespread stigmatization of persons on the basis of their health status” exists and amounts to prohibited discrimination.⁴²

Graph 1 summarizes the content of minimum core obligations pertaining to the right to health. These core obligations must be met *immediately*, not merely progressively, as set out in CESCR’s General Comments 14⁴³ and 22.⁴⁴ Core obligations must read alongside core obligations in terms of other rights such as housing, water and food detailed in Graphs 2, 3 and 4 below respectively.

³⁸ General Comment 14, para 32.

³⁹ See section III(A) below.

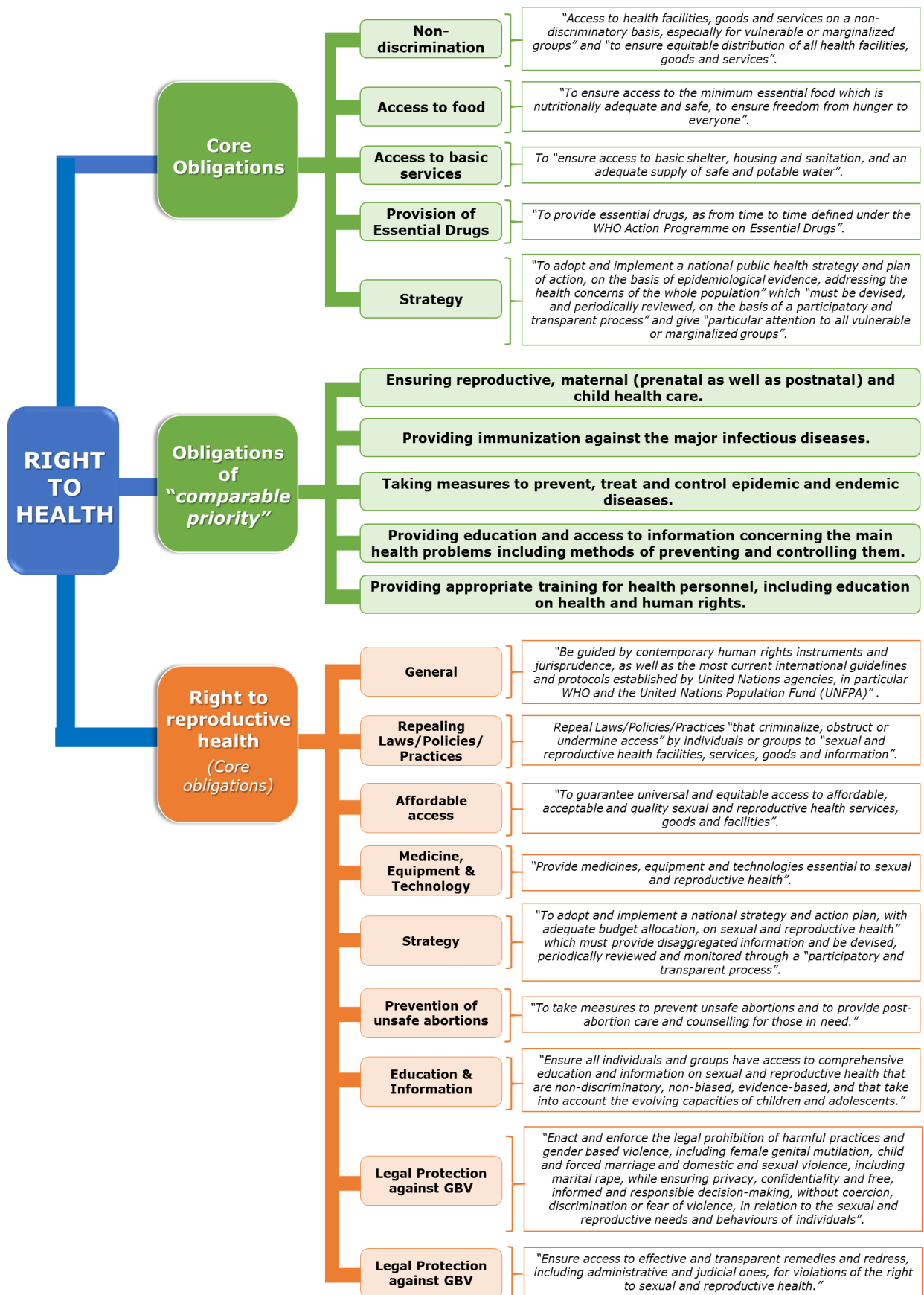
⁴⁰ ICESCR, Article 2. Emphasis Added.

⁴¹ International Commission of Jurists, A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa (August, 2019), p 196, available at: <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf> (“ICJ SA ESCR Guide”); General Comment 14, para 18-19.

⁴² UN Committee on Economic, Social and Cultural Rights, General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20 (2 July 2009), para 33 (“General Comment 20”).

⁴³ International Commission of Jurists “A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa” (August, 2019), p 58-59.

⁴⁴ UN Committee on Economic, Social and Cultural Rights, General comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22 (2 May 2016) (“General Comment 22”), para 1.



Graph 1. Source: own elaboration.

III. RIGHT TO HEALTH AND COVID-19

In its statement on COVID-19, the CESCR makes several recommendations to States regarding the realization of the right to health. Overall, it indicates that obligations concerning the right to health requires that States' responses to the pandemic are "based on the best available scientific evidence to protect public health".⁴⁵ States are generally obliged to grant any person who requires it full and uninhibited access to COVID-19 prevention, screening and treatment measures.⁴⁶

Certain States have taken exceptional measures in a genuine or purported effort to confront the public health crisis engendered by the COVID-19 crisis. In a few instances, such measures have been taken pursuant to declared states of emergencies, or similar states of exception. As a general matter, the CESCR has been clear that such measures must be: "necessary to combat the public health crisis posed by COVID-19", "reasonable and proportionate", "should not be abused", and "should be lifted as soon as they are no longer necessary for protecting public health".⁴⁷

Unlike the International Covenant on Civil and Political Rights (ICCPR), the ICESCR does not expressly provide for derogations pursuant to states of emergencies, nor do any of its provisions contain limitation clauses of the kind found in the ICCPR. It is beyond the scope of this report to discuss the lawfulness of such measures under the ICCPR pertaining of their derogation or limitation of civil and political rights. However, it is critical to note that measures to combat COVID-19 taken pursuant public health or any other grounds which have the intent or effect of limiting the exercise of ICCPR-protected rights, must comply with the terms of the ICCPR.

Where states of emergency are at play, derogation from any ICCPR rights may only be undertaken pursuant to a declared state of emergency, notified to States Parties through the office of the UN Secretary General, which threatens the life of the nation. Any such measure must be non-discriminatory, and each derogating measure must be strictly necessary to meet the threat to the life of the nation. Certain rights may never be derogated from, even in emergency situations. Obligations concerning derogations and states of emergency are set in article 4 of the ICCPR and clarified in further depth in the Human Rights Committee's General Comment 29.⁴⁸

In most instances, measures that may serve to restrict human rights will be undertaken pursuant to limitations allowed for certain rights protected under the ICCPR (eg. the freedoms of expression, association, assembly and movement). Such limitations, which have been common to many States' COVID-19 response measures which have commonly included "lockdowns" and "quarantines", are permissible only for one of several specified purposes, one of which is protection of public health. However, any such limitations must be provided by law and be necessary and proportionate to this protective purpose. Only those measures that are least intrusive on the enjoyment of human rights will be permissible.

⁴⁵ CESCR COVID-19 Statement, para 10.

⁴⁶ Id, I Siederman & TF Hodgson, COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health (Part 1) (1 April 2020), available at: <http://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-1/>.

⁴⁷ CESCR COVID-19 Statement, para 11.

⁴⁸ UN Human Rights Committee (HRC), General Comment No. 29: Derogations during a State of Emergency (art. 4) CCPR/C/21/Rev.1/Add.11 (31 August 2001).

The Siracusa Principles on the Limitations and Derogation Provisions of the International Covenant on Civil and Political Rights,⁴⁹ together with subsequent jurisprudence of the UN Human Rights Committee, constitute an authoritative interpretation of the permissible scope of limitations and derogations of rights even in public emergencies and disasters. They set out the following standards and restrictions for any limitation or derogation of rights in such circumstances.⁵⁰ These Principles affirm that, to be lawful, an exceptional measure must be:

1. Provided for and carried out in accordance with the law;
2. Based on scientific evidence;
3. Directed toward a legitimate objective;
4. Strictly necessary in a democratic society;
5. The least intrusive and restrictive means available;
6. Neither arbitrary nor discriminatory in application;
7. Of limited duration; and
8. Subject to review.

Importantly in the context of the right to health, the Siracusa Principles indicate that any limitations or derogations of rights in the name of a “public health” emergency must be “specifically aimed at preventing disease or injury or providing care for the sick and injured”.⁵¹ Given the human rights obligations pertaining to the right to health outlined above, it is clear that the “public health” objectives that emergency measures and restrictions are undertaken to cure must be specifically aimed at *both* addressing public health imperatives in general terms *and* realizing the right to health of all persons in a State’s jurisdiction without discrimination.

Finally, even in the narrow circumstances in which some human rights may be limited or derogated from in order to resolve a public health emergency, such as COVID-19, the minimum core obligations in terms of the right to health described are generally not subject to such limitations or restrictions. As the CESCR Committee indicates unambiguously in General Comment 14:

“a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.”⁵²

These core obligations, therefore, even in the context of a public health emergency such as COVID-19, must be implemented *immediately*, as opposed to progressively. Consistently with this, in its statement on COVID-19 the CESCR has

⁴⁹ For a detailed treatment of different aspects of the application of Siracusa Principles in the context of COVID-19, see: B Sander & J Rudall (eds), COVID-19 and International Law Opinio Juris Symposium (March-April 2020), available at: <http://opiniojuris.org/wp-content/uploads/B.-Sander-J.-Rudall-eds-COVID-19-and-International-Law-Opinio-Juris-Symposium-copy-1.pdf>.

⁵⁰ UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights E/CN.4/1985/4 (28 September 1984) (“Siracusa Principles”).

⁵¹ Id para 25-26 which read in full: “Public health may be invoked as a ground for limiting certain rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured. Due regard shall be had to the International Health Regulations of the World Health Organization.”

⁵² General Comment 14, para 47.

indicated that “minimum core obligations imposed by the Covenant should be prioritized” in States responses to the epidemic.⁵³

Regarding the possibility of limiting or restricting ESCR, articles 4 of ICESCR provides that:

“in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

In the specific context of the right to health CESCR has clarified that Article 4 is “primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States”.⁵⁴ To be lawful, restrictions on the right to health must be: in accordance with law; compatible with the nature of the right to health; in pursuit of legitimate, lawful aims; strictly necessary; proportionate; the least restrictive alternative available; of limited duration; and subject to review.⁵⁵ For COVID-19 emergency measures to justifiably limit or restrict access to healthcare facilities, goods and services, such measures must comply with these requirements.

A. Non-discrimination: The Right to Health of “everyone”

The content of the rights to equality and equal protection of the law, both of which incorporate the principle of nondiscrimination, are central to international human rights law. There is a baseline of universal standards in respect of equality and non-discrimination that are not particular to ESCR but are part of general international law and rule of law principles. In international human rights law, a succinct expression of the right to equality and equal protection is contained in article 26 of the ICCPR, which provides that:⁵⁶

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, **the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground** such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This is reflective of article 7 of the Universal Declaration of Human Rights, which was also reinforced in the 1993 Vienna Declaration and Programme of Action agreed to by all States.⁵⁷ These standards are further developed, for example, in General Comment 28 (equality between women and men)⁵⁸ and General Comment 18 (on non-discrimination)⁵⁹ of the UN Human Rights Committee.

⁵³ CESCR COVID-19 Statement, para 12.

⁵⁴ General Comment 14, paras 28-9.

⁵⁵ Id.

⁵⁶ International Covenant on Civil and Political Rights], Article 26.

⁵⁷ World Conference on Human Rights in Vienna, Vienna Declaration and Programme of Action (25 June 1993), para 5, available: <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>.

⁵⁸ UN Human Rights Committee (HRC), General Comment No. 28: The Equality of Rights Between Men and Women (art.3 of the International Convention on Civil and Political Rights) CCPR/C/21/Rev.1/Add.10 (29 March 2000).

⁵⁹ UN Human Rights Committee (HRC) General Comment No. 18: Non-discrimination (art.2 of the International Convention on Civil and Political Rights) HRI/GEN/1/Rev.1 (10 November 1989).

Moreover, particularized expressions of the principles of equality and non-discrimination are common to all of the principal treaties of the international human rights system. There are various treaties and other standards aimed at protecting persons from particular groups that are vulnerable to discrimination and the denial of equality and equal protection. These include, as examples:

- the **International Convention on the Elimination of All Forms of Racial Discrimination** (providing for substantive equality on the ground of race);⁶⁰
- the **Convention on the Elimination of all Forms of Discrimination Against Women** (providing for substantive equality on the grounds of sex and gender);⁶¹
- the **Convention on the Rights of the Child** (providing for substantive equality for children regardless of their various identities and expressions);⁶²
- the **Convention on the Rights of Persons with Disabilities**; (providing for substantive equality for persons with disabilities);⁶³
- the **United Nations Declaration on the Rights of Indigenous Peoples** (providing for substantive equality for indigenous persons);⁶⁴
- the **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities** (providing for substantive equality for ethnic, religious and linguistic minorities);⁶⁵ and
- the **Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity** (providing for substantive equality relating to sexual orientation and gender identity).⁶⁶

In addition to the general protections of non-discrimination and equal protection, all human rights treaties place obligations on States to ensure that the rights protected thereunder are guaranteed without discrimination. Thus, Article 2(2) of ICESCR imposes an obligation on States to guarantee ESCR without discrimination. The CESCR has indicated that nondiscrimination “is an immediate and cross-cutting obligation”.⁶⁷ Importantly, the CESCR has consistently affirmed that equality should also encompass substantive equality and not merely formal equality.⁶⁸ Based on this understanding of equality CESCR has indicated: “nondiscrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights”.⁶⁹

⁶⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(iv).

⁶¹ Convention on the Elimination of All Forms of Discrimination Against Women, Article 12.

⁶² Convention on the Rights of the Child, Article 24.

⁶³ Convention on the Rights of Persons with Disabilities, Article 25.

⁶⁴ United Nations Declaration on the Rights of Indigenous Peoples (2 October 2007), Article 21.

⁶⁵ United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (3 February 1992).

⁶⁶ The Yogyakarta Principles, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007), Principle 17, available at: <https://www.refworld.org/pdfid/48244e602.pdf>, (Principle 17); The Yogyakarta Principles Plus 10, Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (10 November 2017) available at: <https://www.refworld.org/docid/5c5d4e2e4.html>.

⁶⁷ General Comment 20, para 7.

⁶⁸ Id, para 8.

⁶⁹ Id.

This approach to the equality and the requirement of non-discrimination have various consequences which cannot be fully explored here. However, it is worth noting that this substantive approach is accepted to require, among other things:

1. **Multiple and intersecting discrimination:** Consideration of "multiple" and intersectional forms of discrimination;⁷⁰
2. **Public and Private discrimination:** Requirement that States enacts laws to prevent discrimination by both public and private actors;⁷¹
3. **Temporary Special Measures:** Recognition that "positive discrimination" in the form of "temporary special measures" is permissible and may be required to combat existing and historical discrimination;⁷²
4. **Reasonable Accommodations:** Recognition that the prohibition of discrimination includes a positive requirement to provide reasonable accommodations to persons with disabilities and others who may require such accommodations;⁷³ and
5. **System Discrimination:** Growing acceptance of a positive duty to act against "systemic discrimination".⁷⁴

As a general principle of international human rights law,⁷⁵ nearly all human rights,⁷⁶ must be guaranteed to all people, irrespective of citizenship status, including in the context of the full range of ESCR. According to CESCR:

"The ground of nationality should not bar access to Covenant rights...The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."⁷⁷

This approach is similar to that which has been adopted by the African Commission on Human and Peoples' Rights,⁷⁸ the Inter-American Court on Human Rights,⁷⁹ and the European Court on Human Rights.⁸⁰

In the direct context of healthcare all health facilities, goods and services must be "accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds".⁸¹ Discrimination on any prohibited grounds listed above with the "intention or effect" of "nullifying or impairing the equal enjoyment or exercise of the right to health" is unlawful.⁸² As an immediate obligation, the CESCR has

⁷⁰ Id para 27.

⁷¹ Id para 37.

⁷² Id para 38-9.

⁷³ Id paras 9, 28.

⁷⁴ Id paras 12, 39.

⁷⁵ International Commission of Jurists, Promoting Non-Citizens' Right to Work in South Africa, (April 2020), available at: <https://www.icj.org/wp-content/uploads/2020/04/South-Africa-Non-Citizens-Right-to-Work-Advocacy-Analysis-Brief-2020-ENG-.pdf>, pp 9-15.

⁷⁶ Certain political rights protected in ICCPR Article 25, for example, are guaranteed only to citizens.

⁷⁷ General Comment 20, para 30.

⁷⁸ See for example *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola*, African Commission on Human and Peoples' Rights, Comm. No. 159/96 (1997): <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/1997/6>, para 18.

⁷⁹ Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A, para 5.

⁸⁰ For a summary of relevant jurisprudence see: European Court of Human Rights, *Guide on the case-law of the European Convention on Human Rights: Immigration*, (31 August 2019) available at: https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf.

⁸¹ General Comment 14, para 12(b).

⁸² Id, para 18.

stressed that non-discrimination in access to health must be ensured “even in times of severe resource constraints”.⁸³

The CESCR also expands on the healthcare needs and rights of persons vulnerable to discrimination. These include women, LGBTQ persons, children and adolescents, older persons, migrants, persons with disabilities and indigenous peoples.⁸⁴ It has also expanded on the “right to sexual and reproductive health” in a separate General Comment.⁸⁵ Generally stated, the right to sexual and reproductive health, “entails a set of freedoms and entitlements” including:

“the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one’s body and sexual and reproductive health.” The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health under article 12 of the Covenant.⁸⁶

Other international treaties expressly and through the commentary of their supervisory bodies have expanded on the content of the right to non-discriminatory access to health facilities, good and services.⁸⁷

B. State Obligations to realize the Right to Health

The CESCR and other authorities have conceptualized the obligations of States as falling into three levels: “**respect, protect and fulfill**”. These obligations can be briefly summarized as follows:

“CESCR has identified three types or levels of obligations that apply to the substantive rights under the ICESCR: 1) **The obligation to respect**, requiring States to refrain from measures or conduct that hinder or prevent the enjoyment of rights; 2) **The obligation to protect**, which requires States to act to prevent third parties, such as businesses or armed groups, from interfering with or impairing the enjoyment of these rights; and, 3) **the obligation to fulfil** rights by taking positive measures towards their realization.”⁸⁸

⁸³ Id.

⁸⁴ Id paras 18-27.

⁸⁵ General Comment 22, para 5.

⁸⁶ Id.

⁸⁷ See as examples: UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Women and Health (art.12 of the Convention on the Elimination of All Forms of Discrimination Against Women), A/54/38/Rev.1 (1999); UN Committee on the Rights of the Child (CRC), General comment No. 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24 of the Convention on the Rights of the Child) CRC/C/GC/15 (17 April 2013); UN Committee on the Rights of the Child (CRC), General comment No. 20: The Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20 (6 December 2016); UN Human Rights Committee (HRC), General Comment No. 36: The Right to Life (art.6 of the International Convention on Civil and Political Rights) CCPR/C/GC/35 (3 September 2019).

⁸⁸ International Commission of Jurists, Practitioners Guide on Adjudicating Economic, Social and Cultural Rights at National Level, No.8, (2014) available at: <https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no8-Publications-Practitioners-guide-2014-eng.pdf> (“ICJ ESCR Practitioners Guide”), p 53; ICJ SA ESCR Guide, pp 33-41.

As with its interpretations of other ESCR, the CESCR further specifies the scope of these obligations in the context of the right to health in some detail in its General Comments.⁸⁹

1. The obligation to respect the right to health

The **obligation to respect** requires States to refrain from interfering with existing access to health facilities, good and services. Such interference may be direct or indirect. A violation of the obligation to respect includes, in general: “abstain[ing] from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity” of individuals health rights.⁹⁰

Though often cast as a “negative obligation”, or a duty to avoid harming existing enjoyment of or access to ESCR, the duty to respect will often require States to take positive measures to prevent interference with ESCR including, as examples:⁹¹

- the establishment of appropriate institutions to ensure the respect of ESCR;
- the provision for an effective system of administration of justice to conduct proper investigations relating to the violation of ESCR; and
- the provision for access to and effective remedy and reparation in response to any breach of obligations by the State.

The obligation to respect the right to health therefore requires, at very least, that States *refrain from*:⁹²

- **Denying or limiting equal access** for any person or group of people to “preventive, curative and palliative health services”;
- **Any form of prohibited discrimination** in access to health;
- **Prohibiting or impeding traditional preventive care**, healing practices and medicines;
- **Marketing of unsafe drugs**;
- **Applying coercive medical treatments** unless on an exceptional basis including for the “prevention and control of communicable diseases”. Such exceptional instances must be “subject to specific and restrictive conditions, respecting best practices and applicable international standards”;
- **Limiting access to contraceptives** and other means of maintaining sexual and reproductive health;
- **Censoring, withholding or intentionally misrepresenting** “health-related information, including sexual education and information”;
- **Preventing people’s participation** in all “health-related matters”;
- **Polluting** air, water and soil; and
- **Limiting access to health services as a punitive measure**, including during armed conflicts in violation of international humanitarian law.

⁸⁹ A full list of CESCR’s General Comments are available here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11.

⁹⁰ *SERAC and CESR v. Nigeria, African Commission on Human and Peoples’ Rights*, Communication No. 155/96, African Commission on Human and People’s Rights (2001), paras 61-2.

⁹¹ ICJ SA ESCR Guide, p 35.

⁹² General Comment 14, para 34.

2. The obligation to protect the right to health

The **obligation to protect** the right to health requires States to proactively take measures – including commonly legal, policy and other regulatory measures – to prevent third parties (whether transnational corporations or national business enterprises local, private persons, armed groups or any other non-State actor) from interfering with the enjoyment of ESCR.⁹³ The CESCR has acknowledged that this obligation may require “a heightened measure” from a State “when there is a power imbalance between an individual and a third party”.⁹⁴

In general, the obligation to protect requires, among other things:⁹⁵

- **Adoption of legislation, policies and programmes** relating to ESCR;
- **Provision of protection against “threats”** to ESCR emanating from private sector activity;
- **Control and regulation of products and services** relating to ESCR;
- **Securing of compliance professional standards** by those providing services impacting on ESCR;
- **Prevention of harmful practices** limiting access to ESCR; and
- **Monitoring and regulation** of activities and actions of any third parties to ensure that they do not limit access to information relating to ESCR.

In addition to being required to take measures to prevent third party violations of ESCR, States may also themselves be directly responsible for “violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors”.⁹⁶

The **obligation to protect** the right to health therefore requires, at very least, that States take measures including:⁹⁷

- The *adoption of “legislation”* and other measures to ensure:
 - **Ensure equal access:** Equal access to “health care and health-related services provided by third parties”;
 - **Control effects of privatization:** That “privatization of the health sector” does not “constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services”;
 - **Control Marketing:** Control the marketing of “medical equipment and medicines”;
 - **Ensure Health Professional Standards:** All health professionals “meet appropriate standards of education, skill and ethical codes of conduct”;
- *Ensure that harmful social and traditional practices* “do not interfere with access to pre- and post-natal care and family planning” and prevent coercion of women and those vulnerable gender-based violence in particular in this context; and
- *Ensure that third parties do not limit* “people’s access to health-related information and services”.

⁹³ ICJ SA ESCR Guide, pp 35-6.

⁹⁴ ICJ ESCR Practitioners Guide, p 59.

⁹⁵ ICJ SA ESCR Guide, p 37.

⁹⁶ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), available at: http://hrlibrary.umn.edu/instreet/Maastrichtguidelines_.html.

⁹⁷ General Comment 14, para 35.

3. The obligation to fulfil the right to health

The **obligation to fulfil** the right to health comprises three further sub-obligations: the obligations to “facilitate”, “provide”, and “promote” the right to health.⁹⁸ To begin with the obligation to fulfill generally involves State establishment of the “institutional machinery essential for the realization” of ESCR.⁹⁹

In general, the **duty to facilitate** requires the creation or facilitation of conditions by the State that allow right-holders to manage their own access to ESCR. This may include the removal of existing obstacles. The **duty to provide** obliges States to directly provide access to ESCR “when individuals or groups are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal” and/or through facilitatory measures. Finally, the **duty to promote** requires a wide range of proactive educational, informational and awareness-raising measures by States both about the ESCR as rights and about the subject matter covered by various ESCR including, as examples nutrition (right to food), hygiene (right to water) and health status and condition (right to health). This duty requires more than “symbolic, unstructured or token efforts”.¹⁰⁰

In general, the obligation to fulfil requires, among other things:¹⁰¹

- **Creation of procedural standards** for planning, implementing and monitoring services and goods for the provision of an ESCR;
- **Creation of systems, facilities and processes** necessary for the provision of ESCR;
- **Sufficient allocation of resources** for the provision of goods or services which form the content of an ESCR;
- **Enactment and implementation of adequate statutory provisions** specifying State obligations for the provision of an ESCR;
- **Provision of goods and services** to individuals (at very least including those who for reasons beyond their control cannot access ESCR themselves) to ensure the realization of ESCR.

The **obligation to fulfil** the right to health, spelled out most clearly by the CESCR in its General Comment 14, therefore requires States, among other things, to:

- **Law and policy:** Recognize the right to health in the “national political and legal systems, preferably by way of legislative implementation” and adopt a “national health policy with a detailed plan” for realizing the right to health;
- **Create, maintain and restore health:** Take measures to “create, maintain and restore the health of the population” including through dissemination of health information and “supporting people in making informed choices about their health”.
- **Provision:** Ensure provision of health goods and services including “immunization programmes against the major infectious diseases”;

⁹⁸ Id, para 33.

⁹⁹ African Commission on Human and People’s Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, (2010), available at: <http://www.achpr.org/instruments/economic-social-cultural/>, para 10.

¹⁰⁰ ICJ SA ESCR Guide, pp 40-42.

¹⁰¹ ICJ ESCR Practitioners Guide, p 62.

- **Equal access:** Ensure equal access to health goods and services and “all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions”;
- **Public health infrastructure:** Provide adequate public health infrastructure and facilities (including hospitals, clinics and other health facilities) throughout their territory but particularly in rural areas;
- **Health professionals and medical personnel:** Ensure the appropriate training of “doctors and other medical personnel” for the provisions of all health services throughout their territory including reproductive health services and mental health services;
- **Health insurance systems:** Provide a “public, private or mixed health insurance system” which is affordable for all;
- **Medical Research:** Promote medical research, health education and information campaigns in particular on “HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, the abuse of alcohol and the use of cigarettes, drugs and other harmful substances”; and
- **Occupational and Environmental Hazards:** Take evidence-based measures to minimize environmental and occupational health hazards including by implementing and continuously reviewing a “coherent national policy”.

C. Maximum Available Resources

Article 2(1) of ICESCR requires states to realize these obligations to **respect, protect** and **fulfil** ESCR “individually and through international assistance and co-operation, especially economic and technical” and to the “**maximum of its available resources**”.¹⁰²

ICESCR is clear, however, that the “availability of resources”, although an important qualifier to the obligation to take steps, “does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction”.¹⁰³ It has therefore indicated that even when a State’s resources are “demonstrably inadequate”, it must still “ensure the widest possible enjoyment” of ESCR.¹⁰⁴ These interpretations apply to both progressive and immediate obligations in terms of ESCR.

It is important to understand that “resources” in this context are not limited to financial resources. They include, as examples: natural resources, human resources (such as medical professionals, community health care workers and volunteers), technological resources (such as the Internet and equipment for screening and testing), and informational resources (including information about COVID-19 and its spread).¹⁰⁵

¹⁰² ICESCR, Article 2(1).

¹⁰³ UN Committee on Economic, Social and Cultural Rights, An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant, Committee on Economic, Social and Cultural Rights, E/C.12/2007/1 (2007), para 9.

¹⁰⁴ Id.

¹⁰⁵ ICJ SA ESCR Guide, p 158-9; R Robertson, Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights, Human Rights Quarterly, Volume 16 (1994) p 695.

The understanding of available resources as including human resources is important in the context of COVID-19. For example, in addition to a violating the **obligation to protect** health workers rights as individuals, a failure to protect health care workers, as far as possible, from exposure to and infection with COVID-19 also violates States' **obligations to fulfil** ESCR within a maximum of available resources.

States must therefore realize the right to health not only within *existing* resources but "to the maximum of its available resources" which necessarily involve the mobilization of additional resources that they can make newly "available". In this regard, States are duty bound to:¹⁰⁶

1. **Maximize existing resources:** Use all resources it has at its disposal effectively; and
2. **Expand existing resources:** Enlarge its pool of resources through the support of international co-operation (of other States) and assistance, as well as the "private" contributions of companies, groups and individuals.

In the context of COVID-19, the CESCR's statement makes it clear that States must "devote their maximum available resources to the full realization of all economic, social and cultural rights, including the right to health".¹⁰⁷ Furthermore it emphasizes that States must "make every effort to mobilize the necessary resources to combat COVID-19" which it acknowledges requires an "***extraordinary mobilization of resources***" from States.¹⁰⁸

In doing so CESCR warns States that COVID-19 must be combatted in the "most equitable manner" possible so as to "avoid imposing a further economic burden on these marginalized groups" and explicitly indicates that allocation of resources should therefore "***prioritize the special needs of these groups***".¹⁰⁹

Many States have had to adjust budgets to focus their resources towards COVID-19 responses and relief measures. In the process of budget adjustment, adoption and implementation States should remain vigilant of their obligation to budget for the full realization of all human rights, including, but not limited to the right to health.¹¹⁰ This is why CESCR's statement on COVID-19 expresses a hope that resource mobilization to combat COVID-19 "provides the impetus for long-term resource mobilization towards the full and equal enjoyment" of Covenant rights.¹¹¹

States responses to COVID-19 should remain cognizant of the need to prevent budgetary reductions or reprioritizations for other measures to realize the right to health, particularly the core obligations. As examples, decreased quality of health services, cutting of health-related subsidies, and lower budgetary allocations to

¹⁰⁶ I Seiderman & TF Hodgson "COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health (Part 2)" *Opinio Juris* (1 April 2020): <http://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-2/>.

¹⁰⁷ CESCR COVID-19 Statement, para 14.

¹⁰⁸ *Id.*, paras 14 and 25.

¹⁰⁹ *Id.*, para 14.

¹¹⁰ For detailed guidance on human rights compliant budgeting in on context see: ICJ SA ESCR Guide, p 136-154.

¹¹¹ CESCR COVID-19 Statement, para 25.

health from budget to budget,¹¹² may constitute retrogressive measures in violation of the ICESCR.

Moreover, measures to realize the right to health including in COVID-19 responses, should not detract from core obligations in particular. As an example, South African lockdown regulations make it clear that lockdown measures must be implemented “as far as possible without affecting service delivery in relation to the realization of the rights” including the rights to housing and basic services, healthcare, social security and education.¹¹³ On the other hand, evidence based diversion of resources or freeing up scarce medical facilities from non-essential or elective services, where necessary, could be permissible and may not be considered retrogressive as temporary measure during the crisis.

Furthermore, the CESCR notes that States must, in this context, “adopt appropriate regulatory measures to ensure that health-care resources in ***both the public and the private sectors are mobilized and shared among the whole population*** to ensure a comprehensive, coordinated health-care response to the crisis”.¹¹⁴ This makes it clear that ICESCR requires the mobilization and use all available resources – whether public or private – towards efforts to combat COVID-19 and realize the right to health.

Finally, CESCR has noted in its Concluding Observations to at least one State that “preference for a private-sector approach to the management, financing and provision of services” may be “to the detriment of those who are unable to pay for such services”. This may contribute to its conclusions that a “budget allocated for the health sector is insufficient”.¹¹⁵

D. International Cooperation and Assistance

The **obligation of international cooperation** has been developed in the jurisprudence of the CESCR and in depth in the *Maastricht Principles on Extraterritorial State Obligations in the area of ESCR*.¹¹⁶ ICESCR itself contains an obligation for States to undertake CESCR obligations “individually and through international assistance and co-operation”.¹¹⁷

Meeting this obligation is indispensable in the context of the COVID-19 pandemic, which effects every country in the world, and where the transmission of the virus occurs through the movement of people across borders. Indeed, even prior to the COVID-19 pandemic the “increasingly transnational nature of health concerns”

¹¹² Global Initiative For Economic, Social and Cultural Rights, Private Actors in Health Services: Towards a Human Rights Impact Assessment Framework (2019), available at: <https://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/t/5dfb832f7894511787b02d52/1576764300874/Private+Actors+and+the+Right+to+Health+Report+-+December+2019.pdf>, p 17.

¹¹³ See GN 318 (18 March 2020), Regulation 2(4)(a) available at: https://www.gov.za/sites/default/files/gcis_document/202003/regulations.pdf.

¹¹⁴ Id. para 13.

¹¹⁵ UN Committee on Economic, Social and Cultural Rights, Concluding observations on the second period report of El Salvador E/C.12/SLV/CO/2 (27 June 2007), para 24.

¹¹⁶ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), available at: <https://www.icj.org/wp-content/uploads/2012/12/Maastricht-ETO-PrinciplesENG-booklet.pdf>; See also O De Schutter et al “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” Human Rights Quarterly 34 (2012) 1084–1169 available at: <https://www.icj.org/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf>.

¹¹⁷ ICESCR, Article 2(1).

was “exemplified by the near-instantaneous spread of novel pathogens through air travel” including SARS, H1N1 Influenza, Malaria and Ebola.¹¹⁸

In its General Comment on the right to health, of direct application to the COVID-19 pandemic, CESCR acknowledges that “given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem” and that “economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard”.¹¹⁹

This obligation means that “States should coordinate with each other, including in the allocations of responsibility”¹²⁰ and that each state must “separately, and, where necessary, jointly contribute to the fulfilment of ESCR extraterritorially, **commensurate with, inter alia, its economic technical and technological capacities, available resources, and influences in decision making processes**”.¹²¹ The former Special Rapporteur on the Right to Health, Anand Grover, emphasized the need for international co-operation on a continuous basis to ensure “sustainable international funding for health”:¹²²

“The right to health approach requires States to cooperate internationally in order to ensure the availability of sustainable international funding for health. **This includes a responsibility to pool funds internationally from compulsory contributions by States, based upon their ability to pay, and allocate funds to States, based upon their need,** in order to achieve cross-subsidization of resources for health globally.”

In addition, States must act in concert with each other through international agencies, such as the World Health Organization (WHO). States with fewer available resources should actively seek international assistance from other States and the WHO to ensure the effectiveness of their COVID-19 responses when, despite their best efforts, these States are unable to discharge this obligation on their own.¹²³ The WHO’s influence and responsibilities have increased as a result of the “changing global health order” in the context of globalization. As has been evident during the COVID-19 pandemic the WHO has a crucial role to play in particular in coordinating effective responses to global pandemics.¹²⁴ It must do so bearing in mind States’ obligations in terms of the right to health.

¹¹⁸ A Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Policies*, Cambridge University Press (2016). See in particular chapter 5 “Globalization, Health, and Human Rights”, p 161.

¹¹⁹ General Comment 14, para 40.

¹²⁰ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), available at: <https://www.icj.org/wp-content/uploads/2012/12/Maastricht-ETO-PrinciplesENG-booklet.pdf>, Principle 30.

¹²¹ *Id.*, Principle 31.

¹²² Interim Report of the United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health to the United Nations General Assembly, U.N. Doc. A/67/150 (2012) available: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/461/01/PDF/N1246101.pdf?OpenElement>.

¹²³ I Siederman & TF Hodgson, COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health (Part 1) (1 April 2020), available at: <http://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-1/>.

¹²⁴ See A Chapman, *supra*, chapter 5 “Globalization, Health, and Human Rights”, p 166 for some critical observations on the capacity and role of the WHO in the context of global pandemics. Chapman also concludes “Nor has WHO been an active proponent of a human rights approach” highlighting the need for the WHO to ensure an adjustment of its approach to global health. This despite the WHO’s Constitution beginning in the Preamble by recognizing that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being”.

IV. ROLE OF PRIVATE HEALTH PROVIDERS

The Global Initiative for Economic, Social and Cultural Rights highlights the threats presented by private sector participation in the provision of healthcare as follows:¹²⁵

“...The involvement of the private sector in health care poses particular challenges and risks to the realisation of the right to health and other human rights. Therefore, private actor involvement requires careful planning, regulation and accountability in order to protect human rights.”¹²⁶

The former UN Special Rapporteur on the Right to the Highest Attainable Standard of Health, Anand Grover has raised concerns that “in many cases, privatisation has led to increased out-of-pocket payments for health goods and services” and an “increased disparity in the availability of health facilities, goods and services among rural, remote and urban areas”.¹²⁷

There are a wide range of ways in which private sector participation in the provision of healthcare currently occurs which vary from State to State and may even vary within States, particularly those with federal structures. The same has been true of States responses to COVID-19. Possible involvement in provision of healthcare in States may include, as examples:

- **Complete or partial privatization** of health care system by a State;
- **Parallel private and public health care systems** permitted to operate within a State. Private systems may include private health care providers (hospitals, health professionals, insurance schemes etc);
- **Direct provision of specific healthcare goods and services** by private entities within public health care system;
- **Manufacturing of health goods and services** (including medication and equipment) by private entities;
- **Building of necessary health infrastructure** by private entities; and
- **Systems of health care financing** or health insurance systems operated by private entities.

Though participants in private health sectors are often businesses or other for-profit entities they may also include not-for-profit organizations or entities. As explained above, international human rights law sets clear standards for the protection of the right to health and places obligations on States to ensure that *all* non-state actors respect this right and act consistently with it.

States obligations to ensure private participants in the healthcare sector do not fall short of the standards set by the right to health fall predominantly under the **duty to protect** the right to health.

¹²⁵ Global Initiative For Economic, Social and Cultural Rights, Private Actors in Health Services: Towards a Human Rights Impact indicates that: “Private actor involvement in healthcare is understood as **activities conducted by non-state actors in this sector that impact on the realisation of the right to health.** This may be underpinned by the notion that private market incentives, including competition, should be a means of delivering social services...” Emphasis added.

¹²⁶ Id.

¹²⁷ Interim Report of the Special Rapporteur on the right of everyone to enjoyment of the highest attainable standard of physical and mental health, UN A/67/302 (13 August 2012).

A. States' duty to protect

In its General Comment 24 on business and human rights, CESCR indicates that in the context of healthcare in particular, private actors "should be subject to strict regulations that impose on them so-called "public service obligations". Private healthcare providers, it indicates, must be "prohibited from denying access to affordable and adequate services, treatments or information".¹²⁸

The obligation to protect the right to health requires States to proactively take measures – including commonly legal, policy and other regulatory measures – to prevent third parties (whether multi-national corporations, local companies, private persons, armed groups or any other non-state actors) from impairing the enjoyment of ESCR. This is affirmed in the jurisprudence of the CESCR, as well in other international law sources, including, with respect to business enterprises, the UN Guiding Principles on Business and Human Rights.

This requires the adoption of a range of legal and policy measures. Such measures, which include, "regulatory" measures to mitigate risks of private actors impairing the enjoyment of the right to health must be established in clear terms. CESCR is clear that they must ensure that privatization of the health sector" does not in any way "constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services".¹²⁹

States may adopt a range of policy choices in their implementation of their ESCR obligations. It is therefore not always a simple task to determine whether the regulatory measures they have taken violate the right to health. What is clear, however, is that the right to health includes a right to a "system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health".¹³⁰ If any health system, whether fully public, fully private, or hybrid public-private falls short of this standard it is unlawful and in contravention of the right to health.

This has results which may be surprising for some. It means, for example, although States may allow for "provision of a public, private or mixed health insurance system", that:

- 1) States must ensure that there exists some form health insurance system; and
- 2) Such health insurance system must be "affordable for all" and fully compliant with the standards set by the right to health.¹³¹

This has led CESCR to make, as examples, the following recommendations to States in its Concluding Observations to States which deal directly with the interaction between public and private health:

¹²⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities E/C.12/GC/24 (10 August 2017), para 21 ("General Comment 24").

¹²⁹ General Comment 14, para 35.

¹³⁰ Id, para 8.

¹³¹ Id, para 36.

"[The State must] **ensure that health insurance co-payments remain affordable for all, including socially disadvantaged groups**, and expand the list of prescribed medicines under the insurance scheme so as to limit out-of-pocket payments."¹³²

"[The State must] In the context of the highly privatized health system... ensure the adequacy of the coverage of national health insurance so that health care is affordable, especially for disadvantaged and marginalized groups. **To that end, the Committee recommends that the system cover preventive and curative services for illnesses and medical conditions, including non-communicable diseases**. It also urges the State party to ensure universal coverage by removing eligibility obstacles under national health insurance and the medical benefits scheme."¹³³

"[The State must] address the large disparities between the public and private health-care systems, as well as between rural and urban areas, by securing a sufficient number of medical professionals, improving medical equipment and expanding the range and improving the quality of public health-care services, particularly in the primary and community health-care sectors and in rural areas."¹³⁴

The CEDAW Committee has similarly repeatedly addressed the interaction between private and public health and its gendered impacts in the following terms:

"[The State must] balance the roles of public and private health providers in order to maximise resources and the reach of health services. It calls upon the State Party to monitor the privatization of health care and its impact on the health of poor women."¹³⁵

"The Committee is [...] further concerned at the wide privatization of the health system and the inadequate budget allocated to the health sector, in particular with regard to sexual and reproductive health-care services, especially in rural remote areas."¹³⁶

The CESCR also affirms that States should "provide an environment which facilitates the discharge" of responsibilities of non-State actors, including "the private business sector", "regarding the realization of the right to health" (which will be dealt with directly below).¹³⁷

Violations of the obligation to protect the right to health therefore include the "failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others".¹³⁸ Moreover, it is an

¹³² UN Committee on Economic, Social and Cultural Rights, Concluding observations on the second to fourth periodic reports of Viet Nam E/C.12/VNM/CO/2-4 (15 December 2014), para 6.

¹³³ UN Committee on Economic, Social and Cultural Rights, Concluding observations on the fourth periodic report of the Republic of Korea E/C.12/KOR/CO/4 (19 October 2017), para 45.

¹³⁴ UN Committee on Economic, Social and Cultural Rights, Concluding observations on the initial report of South Africa E/C.12/ZAF/CO/1 (29 November 2018), para 63.

¹³⁵ UN Committee on the Elimination of Discrimination against Women, Concluding comments of the Committee on the Elimination of Discrimination against Women: India CEDAW/C/IND/CO/3 (2 February 2007), paras 40-41.

¹³⁶ UN Committee on the Elimination of Discrimination against Women, Concluding Observations on the fourth periodic report of Pakistan CEDAW/C/PAK/CO /4 (27 March 2013), para 31.

¹³⁷ General Comment 14, para 42.

¹³⁸ Id, para 51.

immediate, minimum core obligation for all States to ensure “equitable distribution of all health facilities, goods and services” which evidence clearly suggests may be compromised by under regulated private health sectors.¹³⁹

In the context of COVID-19, in which many States are struggling to ensure the adequacy of financial, human, technological and other resources to ensure the protection of the right to health of all people, States must actively consider taking action to ensure co-operation and co-ordination in COVID-19 responses. It must, for example, “maximize” the use of both private and public resources to ensure access to COVID-19 testing and treatment for all people without discrimination based on any factor including their financial means.

There are various ways States may permissibly approach the execution of this obligation. However it is achieved, the WHO has indicated that States’ response to COVID-19 should be “coordinated with actors in the private sector and civil society”.¹⁴⁰ This requires States to respond by “drawing on the capacities and resources of the private health sector” which is of particular importance in low and middle income countries.¹⁴¹

During health emergencies such as COVID-19 activities of the private health sector actors must therefore “be aligned with national response efforts”.¹⁴² This is because the private health sector often controls and manages critical resources which must be mobilize in such efforts. These include health facilities and health professionals those necessary to effectuate “surge capacity” for responding to COVID-19 and medical equipment and essential supplies including “isolation equipment, ventilators, oxygen, and personal protection equipment (PPE)”.¹⁴³ Overall, consistently with the right to health, the aim of private-public cooperation in combatting COVID-19 should be to:¹⁴⁴

“ensure that care-seekers experience **no material difference in terms of access or quality of services in public and private sector settings** while being tested and treated for essential services during the COVID-19 outbreak.”

The WHO also makes specific recommendations to States in this regard, including:¹⁴⁵

- **Planning and Systems:** Getting organized to work, plan and respond to COVID-19 together as private and public health sectors. This will also involve creating systems and mechanisms that make such coordination effective;
- **Capacity:** Securing private sector assets and capacity to increase surge capacity for COVID-19 treatment;
- **Staffing:** Mobilizing and rationalizing public and private health staff assignments according to COVID-19 related healthcare needs;

¹³⁹ Id, para 43(e). See also: A Chapman (*supra*) pp 115-152.

¹⁴⁰ WHO, An Action Plan To Engage The Private Health Service Delivery Sector In The Response To Covid-19, (April 2020), available:

https://www.uhc2030.org/fileadmin/uploads/uhc2030/Documents/Key_Issues/Covid19/AN_ACTION_PLAN_TO_ENGAGE_THE_PRIVATE_SECTOR_IN_THE_RESPONSE_TO_COVID-19.pdf.

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ Id, p 2.

¹⁴⁴ Id, p 3.

¹⁴⁵ Id, pp 3-7.

- **Supplies and Equipment:** Ensuring that all health facilities and staff have the supplies and equipment they need to respond to COVID-19;
- **Financing:** Ensuring that no-one is denied access to COVID-19 care in private facilities by measures, such as concluding agreements of cooperation between public and private sectors; requiring medical insurance to cover all COVID-19 related costs; and temporarily requisitioning private resources needed for COVID-19 responses.

States may, for example, be “effectively required”¹⁴⁶ to act by seeking out donations from private sources and administering such funds directly towards the realization of the right to health. Solidarity funds set up in **South Africa** by the government is an example of such an attempt.¹⁴⁷

States may also enter into agreements with private health sector actors to combine resources to fulfil obligations in terms of the right to health relating to COVID-19, as has, for example, occurred in the **United Kingdom**.¹⁴⁸

In other instances, the appropriate regulatory action, may be for States to “nationalize” existing private health resources (including health professionals and facilities) to ensure right to health compliant responses to COVID-19, as has occurred in **Spain**.¹⁴⁹

In **India**, the Supreme Court dismissed a petition which sought an order directing the government to nationalize all private hospitals to allow for an effective response to COVID-19. The Court found that “It is not a decision the court can ask the government to take. We cannot order nationalisation of hospitals. Government has already taken over some hospitals.”¹⁵⁰ In a later order, however, the Supreme Court did order that the government should take measures to ensure that the “cost of medical treatment for COVID-19 should not act as a deterrent to the patients suffering from the said pandemic resulting in denial of access to medical care”.¹⁵¹ The High Court of Gujarat also separately ordered the government to “initiate talks” toward the conclusion of memorandums of understanding between the government and eight named private hospitals for the provision of COVID-19 related health services.¹⁵²

In some countries private sector actors have responded by filling gaps in non-COVID-19 health provision brought up by resource redirection in the public sector

¹⁴⁶ I Seiderman & TF Hodgson “COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health (Part 2)” *Opinio Juris* (1 April 2020): <http://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-2/>.

¹⁴⁷ See: <https://www.solidarityfund.co.za/>.

¹⁴⁸ Financial Times, NHS enlists all English private hospitals to treat coronavirus (21 March 2020), available at: <https://www.ft.com/content/c9a9be78-6b7b-11ea-89df-41bea055720b>.

¹⁴⁹ Business Insider, Coronavirus: Spain nationalises all private hospitals, enters lockdown (17 March 2020), available at <https://www.businessinsider.co.za/coronavirus-spain-nationalises-private-hospitals-emergency-covid-19-lockdown-2020-3/>; D Montagu, Will Hospital Nationalization Help the Developing World respond to COVID-19? Lessons from Europe (27 April 2020), available at: <https://hsgovcollab.org/en/news/will-hospital-nationalization-help-developing-world-respond-covid-19-lessons-europe>.

¹⁵⁰ Economic Times India, Plea for nationalisation of healthcare sector during COVID-19 pandemic “misconceived”, says Supreme Court, (13 April 2020), available at: https://economictimes.indiatimes.com/news/politics-and-nation/plea-for-nationalisation-of-healthcare-sector-during-covid-19-pandemic-misconceived-says-supreme-court/articleshow/75126570.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst. See also *Sudhi v Union of India* D. NO.10816/2020, available at: https://main.sci.gov.in/supremecourt/2020/10816/10816_2020_33_1_21598_Order_13-Apr-2020.pdf.

¹⁵¹ *Sachin Jain v Union of India* 10918/2020 (14 July 2020), available at: https://main.sci.gov.in/supremecourt/2020/10918/10918_2020_31_20_22819_Order_14-Jul-2020.pdf.

¹⁵² A Saxena, Coronavirus and the Constitution – XXXIII: N-95 Masks and the Bombay High Court’s Dialogic Judicial Review (28 June 2020), available at <https://indconlawphil.wordpress.com/category/article-21-and-the-right-to-life/right-to-health/>.

as a result of COVID-19.¹⁵³ In **Indonesia**, for example, during March and April, a leading tele-medicine platform reported 61 million web visits, over 33 million active users and indicated that its application had been downloaded more than 5.5 million times with more than 750 000 patient-doctor interactions.¹⁵⁴ President Joko Widodo indicated that telemedicine services “should be enhanced” to “limit direct contact between doctors and patient”.¹⁵⁵ The Indonesian government reportedly implemented detailed regulations to allowing for some healthcare services to be provided during COVID-19 via applications and electronic systems under conditions which are legally regulated.¹⁵⁶

B. Business’s Responsibility to Respect the Right to Health

The CESCR’s recognition in General Comment 14 of the “responsibilities” of the “private business sector” in terms of the right to health, is, at very least, consistent with the accepted international norm recognized in the UN Guiding Principles on Business and Human Rights (UNGPR) of business’s “responsibility to respect” all ESCR.¹⁵⁷ The “responsibility to respect” applies to all “internationally recognized human rights”, including ESCR, and is spelled out in Principles 11 to 24 of the UNGPR.

The UNGPR broadly reflect international consensus that the responsibility to respect requires businesses to:¹⁵⁸

1. **Avoid “causing or contributing”** to adverse human rights impacts through their own activities,
2. **Address human rights impacts** that they have caused or contributed to “when they occur”;
3. **Prevent or mitigate human rights impacts** that are “directly linked to their operations, products or services by their business relationships” even if it has “not contributed to those impacts”.

Failure to perform such duties “does not entail any legal responsibility” under international law.¹⁵⁹ However, the assumptions undergirding the UNGPR is that by complying with their duty to protect, States will transform business’s **moral or social responsibility** to respect human rights into a **legal obligation** to respect human rights through the adoption of domestic law and other measures.¹⁶⁰

¹⁵³ P Balasubramaniam et al, A Voice From the Front Line: Reaching out of the box to engage private non-state healthcare actors in LMICs to combat COVID-19 (2 June 2020), available at: <https://healthsystemsglobal.org/news/a-voice-from-the-front-line-reaching-out-of-the-box-to-engage-private-non-state-healthcare-actors-in-lmics-to-combat-covid-19/>

¹⁵⁴ T Oktavianti, The time is right: COVID-19 gives more room for telemedicine to grow in Indonesia, (21 April 2020), available at: <https://www.thejakartapost.com/news/2020/04/21/the-time-is-right-covid-19-gives-more-room-for-telemedicine-to-grow-in-indonesia.html>.

¹⁵⁵ Id.

¹⁵⁶ F Pascoal, The Rise of Telemedicine in Indonesia (20 July 2020), available at: <https://www.dentons.com/en/insights/articles/2020/july/20/the-rise-of-telemedicine-in-indonesia>.

¹⁵⁷ United Nations Guiding Principles on Business and Human Rights (2011) HR/PUB/11/04, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (“UN Guiding Principles on Business and Human Rights”).

¹⁵⁸ Id, Principle 13.

¹⁵⁹ C López, The ‘Ruggie process’: from legal obligations to corporate social responsibility?, in Human Rights Obligations of Business, Beyond the Corporate Responsibility to Respect?, Surya Deva & David Bilchitz (eds), Cambridge University Press, 2013, p. 59

¹⁶⁰ See International Commission of Jurists, Corporate Accountability for Abuses of Economic, Social & Cultural Rights in Conflict and Transition, (2020) p 52, available: <https://www.icj.org/wp-content/uploads/2020/02/Universal-ESCR-accountability-guide-Publications-Reports-Thematic-report-2020-ENG.pdf>.

Even in the absence of such regulatory measures, the UNGPs encourage businesses to treat the risk of causing or contributing to “gross human rights abuses” in particular as a “legal compliance issue”, reflecting the fact that for at least some human rights abuses, the international legal responsibility of businesses is necessarily engaged.¹⁶¹ This is so, for example, in cases of gross human rights abuses amounting to crimes under international law. As the Commentary to the UNGP points out, this is impelled by the:

“expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, **corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses**”.¹⁶²

Moreover, the UNGP reflects international consensus that in terms of their duty to protect, States must:¹⁶³

- **Enforce laws requiring businesses to respect human rights** and periodically assess the adequacy these laws and address any gaps;
- **Provide effective guidance to businesses** on how to respect human rights throughout their operations; and
- **Encourage and/or require, businesses to communicate** how they are addressing their impact on human rights.

The **responsibility to respect** human rights applies to businesses irrespective of the State in which the business is domiciled or the State in which it is operating. While the responsibility to respect necessarily applies to all businesses, the degree of the responsibility “may vary” depending on the “size, sector, operational context, ownership and structure” of the business and the “severity” of its “adverse human rights impacts”.¹⁶⁴

This qualification is very important in the context of healthcare. It is frequently the case that large national and international hospital groups, health insurance schemes and pharmaceutical companies hold significant bargaining power both due to the perceived or actual state of public healthcare systems and their large market shares.¹⁶⁵

For example, business’s responsibility to respect the right to health will potentially be implicated in the context of the development of a COVID-19 vaccine. Billions of dollars are being spent on developing a vaccine for COVID-19, indeed “funding for a vaccine has never been greater”.¹⁶⁶ United Nations agencies and heads of States of have called for equitable access to and distribution of any vaccine

¹⁶¹ UN Guiding Principles on Business and Human Rights, Principle 23.

¹⁶² Id, pp 25-26.

¹⁶³ Id, Principle 3.

¹⁶⁴ Id, Principle 14.

¹⁶⁵ See for example Competition Commission of South Africa, Health Market Inquiry: Final Findings and Recommendations Report, (September 2019): <http://www.compcom.co.za/wp-content/uploads/2020/01/Final-Findings-and-recommendations-report-Health-Market-Inquiry.pdf>.

¹⁶⁶ E Mackintosh et al, Inside the multibillion dollar race for a Covid-19 vaccine (14 August 2020): <https://edition.cnn.com/interactive/2020/08/health/coronavirus-vaccine-race-intl/>.

globally.¹⁶⁷ Nevertheless private companies may have incentives to seek returns on their investments in vaccine productions in the form of profits.¹⁶⁸ A statement cosigned by UNAIDS therefore warned:

“Now is not the time to allow the interests of the wealthiest corporations and governments to be placed before the universal need to save lives, or to leave this massive and moral task to market forces. **Access to vaccines and treatments as global public goods are in the interests of all humanity. We cannot afford for monopolies, crude competition and near-sighted nationalism to stand in the way.**”¹⁶⁹

States are permitted in terms of WTO agreements,¹⁷⁰ and may be required in terms of their right to health obligations, to issue “compulsory licenses” for COVID-19 vaccines. Indeed, some governments have already taken preemptive steps towards compulsory licensing, which would allow them to make use of a vaccine without the permission of the company that has patented and produced it.¹⁷¹ In addition, it is also arguable that in these exceptional circumstances, the responsibility to respect the right to health requires extraordinary efforts from pharmaceutical companies to cooperate with governments to ensure the affordability of any COVID-19 vaccines consistently with States’ obligations to protect the right to health.

Finally, the UNGPs require businesses to “establish or participate in effective operational-level grievance mechanisms” when individuals and communities have had their rights adversely impacted by business operations.¹⁷² This requires a wide range of proactive measures to be taken by businesses themselves to form operational-level grievance mechanisms and ensure, as prescribed by the UNGPs, that they are:¹⁷³ legitimate; accessible; predictable; equitable; transparent; rights-compatible; a source of continuous learning; and based on meaningful dialogue.¹⁷⁴

¹⁶⁷ J Trudeau et al, The international community must guarantee equal global access to a covid-19 vaccine (15 July 2020): <https://www.washingtonpost.com/opinions/2020/07/15/international-community-must-guarantee-equal-global-access-covid-19-vaccine/>; UNAIDS, Uniting behind a people’s vaccine against COVID-19 (14 May 2020): https://www.unaids.org/en/resources/presscentre/featurestories/2020/may/20200514_covid19-vaccine-open-letter.

¹⁶⁸ A Narayanan, The COVID-19 Race To A Vaccine (27 May 2020): <https://www.humanrightspulse.com/mastercontentblog/the-covid-19-race-to-a-vaccine>; J Strasburg, If Oxford’s Covid-19 Vaccine Succeeds, Layers of Private Investors Could Profit (2 August 2020): <https://www.wsj.com/articles/if-oxfords-covid-19-vaccine-succeeds-layers-of-private-investors-could-profit-11596373722>; E Sagonowsky, Pfizer could earn \$15B-plus in COVID-19 vaccine sales: analyst (27 July 2020): <https://www.fiercepharma.com/pharma/pfizer-could-see-15b-covid-19-vaccine-sales-analyst>; A Weintraub, Pfizer CEO says it’s ‘radical’ to suggest pharma should forgo profits on COVID-19 vaccine: report (30 July 2020): <https://www.fiercepharma.com/pharma/pfizer-ceo-says-it-s-radical-to-suggest-pharma-should-forgo-profits-covid-19-vaccine-report>.

¹⁶⁹ UNAIDS, Uniting behind a people’s vaccine against COVID-19 (14 May 2020): https://www.unaids.org/en/resources/presscentre/featurestories/2020/may/20200514_covid19-vaccine-open-letter.

¹⁷⁰ World Trade Organization, Declaration on the TRIPS agreement and public health WT/MIN(01)/DEC/2 (20 November 2001): https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

¹⁷¹ A Green, COVID-19: Countries race to strengthen compulsory licensing legislation (30 June 2020): <https://www.devex.com/news/covid-19-countries-race-to-strengthen-compulsory-licensing-legislation-97595>.

¹⁷² UN Guiding Principles on Business and Human Rights, Principle 29.

¹⁷³ Id, Principle 31.

¹⁷⁴ International Commission of Jurists, Effective Operational-level Grievance Mechanisms, (2019) available: <https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf>.

V. DISPROPORTIONATE AND DISCRIMINATORY IMPACTS OF COVID-19

COVID-19 has had an indelible impact on the world as a whole. However, as CESCR has noted, its impact is disproportionately negative “especially [on] the right to health of most vulnerable groups”. These disproportionate or discriminatory impacts must therefore be prevented, mitigated and addressed to prevent an “increase [of] suffering of the most marginalized groups”.¹⁷⁵

States have an immediate obligation to ensure non-discrimination in access to health good, services and facilities. This is a core obligation in terms of the right to health and is non-derogable even during, or perhaps specifically during, public health emergencies such as COVID-19.

This section highlights the disproportionate impacts of COVID-19 on the right to health on some of the most “marginalized groups” of people, including:

- A. Migrants and other non-citizens;
- B. Older persons;
- C. Women and girls;
- D. LGBT persons;
- E. Persons with disabilities;
- F. Detained persons;
- G. Healthcare workers; and
- H. Sex workers.

This is **not** a comprehensive analysis of groups and individuals who face a disproportionate impact during as a result of COVID-19. As examples, notably excluded are detailed analyses of the impact of COVID-19 on: children;¹⁷⁶ persons with health conditions which are considered “co-morbidities”; religious and ethnic minorities;¹⁷⁷ indigenous persons;¹⁷⁸ and persons living in rural areas.¹⁷⁹ These and other exclusions in no way reflect the comparative importance or severity of situations faced by individuals and groups vulnerable to human rights violations as a result of COVID-19.

¹⁷⁵ CESCR COVID-19 Statement, para 2.

¹⁷⁶ UN Committee on the Rights of the Child, COVID-19 Statement (8 April 2020), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/STA/9095&Lang=en; A Borkowski et al, With Schools Closed, Hundreds of Millions of Children Are Not Receiving School Meals (24 March 2020), available at: <https://www.cgdev.org/blog/schools-closed-hundreds-millions-children-are-not-receiving-school-meals>.

¹⁷⁷ Open Letter On The Xenophobic, Racist And Inhuman Treatment Of Africans In China (15 April 2020), available at: <http://www.southernafricadefenders.africa/2020/04/15/open-letter-on-the-xenophobic-racist-and-inhuman-treatment-of-africans-in-china/>; United Nations Special Procedures, Statement on the Protests against Systemic Racism in the United States, (5 June 2020), available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25927&LangID=E>; O Suleiman, Like India, Sri Lanka is using coronavirus to stigmatise Muslims (20 May 2020) available at: <https://www.aljazeera.com/indepth/opinion/india-sri-lanka-coronavirus-stigmatise-muslims-200519134939934.html>.

¹⁷⁸ UN Special Rapporteur on the Rights of Indigenous Peoples, COVID-19 is devastating indigenous communities worldwide, and it’s not only about health – UN expert warns (18 May 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25893&LangID=E>.

¹⁷⁹ Rural Health Advocacy Project, RHAP Newsletter: COVID-19 AND RURAL HEALTH “Rural-proofing the Response”, available at: <http://rhap.org.za/rhap-newsletter-covid-19-and-rural-health-rural-proofing-the-response/>; Spotlight, COVID-19: How rural healthcare workers are preparing (8 April 2020), available at: <https://www.spotlightnsp.co.za/2020/04/08/covid-19-how-rural-healthcare-workers-are-preparing/>; La Via Campesina, Negligence, injustice, and insensitivity – Peasant situation under coronavirus crisis (22 April 2020), available at: <https://viacampesina.org/en/negligence-injustice-and-insensitivity-peasant-situation-under-coronavirus-crisis/>.

A. Migrants, Refugees, and Stateless persons

On 31 March 2020, the OHCHR, the IOM, the UNHCR, and the WHO issued a joint statement emphasizing that the rights and health of refugees, migrants and the stateless must be protected in COVID-19 responses.¹⁸⁰ The organizations highlighted that migrants, refugees and stateless persons should be ensured equal access to health services and “effectively included in national responses to COVID-19, including prevention, testing and treatment.”¹⁸¹

As explained above,¹⁸² the rights to equality and equal protection of the law are central elements to international human rights law. The right “to the enjoyment of the highest attainable standard of physical and mental health” extends to all individuals who live in their territories, regardless of their citizenship or migration status. Consequently, non-citizens,¹⁸³ a category that covers a diverse group of individuals such as migrants, refugees, asylum-seekers, and stateless persons,¹⁸⁴ have the right to access health facilities, goods and services without discrimination.¹⁸⁵

The CESCR has therefore repeatedly affirmed that nationality is a criterion that must not impede access to ESCR.¹⁸⁶ States must refrain “from denying or limiting equal access for all persons”,¹⁸⁷ including “asylum seekers and illegal immigrants” to health facilities, goods and services.¹⁸⁸

Similarly, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the Committee on the Rights of the Child (CRC) have stressed that “every migrant child should have access to health care equal to that of nationals, regardless of their migration status”.¹⁸⁹ As a consequence, migrant children should not be required to present a migration document to access health services.¹⁹⁰ The CMW and the CRC have also stressed that the right to health should be ensured to “all migrant workers and their families, regardless of their migration status”.¹⁹¹

Furthermore, the International Convention on the Protection of the Rights of all Migrant Workers and their Families, which presently has 55 States Parties, establishes that regardless of their migration status, all migrant workers have the

¹⁸⁰ World Health Organization, The Rights and Health of Refugees, Migrants and Stateless must be protected in COVID-19 response, (31 March 2020), available at: <https://www.who.int/news-room/detail/31-03-2020-ohchr-iom-unhcr-and-who-joint-press-release-the-rights-and-health-of-refugees-migrants-and-stateless-must-be-protected-in-covid-19-response>.

¹⁸¹ Id.

¹⁸² See: “Section A Non-discrimination: application to everyone”, Section III of this report

¹⁸³ A definition of non-citizens is provided by the UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live (1985). Article 1 of the Declaration defines alien as “any individual who is not a national of the State in which he or she is present”.

¹⁸⁴ International Commission of Jurists, Practitioners Guide No. 6: Migration and International Human Rights Law (2014), available at: <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>; International Commission of Jurists, Promoting Non-Citizens’ Right to Work in South Africa, A Briefing Paper (April 2020), available at: <https://www.icj.org/covid-19-the-icj-publishes-a-briefing-paper-on-promoting-non-citizens-right-to-work-in-south-africa/>.

¹⁸⁵ General Comment 14, paras 18 and 19.

¹⁸⁶ General Comment 20, para 30.

¹⁸⁷ General Comment 14, para 34.

¹⁸⁸ Id; See also, for example: UN Committee on the Elimination of Racial Discrimination, General Recommendation 30: Discrimination against Non-citizens, CERD/C/64/Misc.11/rev.3 (1 October 2002), para 36.

¹⁸⁹ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the UN Committee on the Rights of the Child, Joint General Comment No. 4: State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23 (16 November 2017), para 55.

¹⁹⁰ Id, para 56.

¹⁹¹ Id, para 58.

right to “receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned”.¹⁹² With respect to regular or documented migrant workers and their families, the Convention requires equal access to all health services on a par with citizens.¹⁹³

Similarly, Article 5 of the International Labour Organization (ILO) Migration for Employment Convention requires the 50 States that are party to it¹⁹⁴ guarantee appropriate medical services for migrants for employment and their families.¹⁹⁵ In the same way, Principle 12 of the Principles and Practical Guidance on the Protection of the Human Rights of Migrants in Vulnerable Situations establishes that health systems and national plans of action on health should “include migrants, regardless of their status”.¹⁹⁶

At the regional level, similar obligations are found:

- **Africa:** Article 16 of the African Charter on Human and Peoples' Rights sets out that “every individual shall have the right to enjoy the best attainable state of physical and mental health.” Article 14 of the African Charter on the Rights and Welfare of the Child establishes that the right to health of every child must be guaranteed “irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex language, religion, political or other opinion, *national and social origin*, fortune, birth or other status”. The African Commission on Human and Peoples' Rights has explained that the right to health “includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind”.¹⁹⁷ It has also stressed that the accessibility of needed medicines should be guaranteed “to everyone without discrimination”.¹⁹⁸
- **Americas:** Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) establishes that “everyone shall have the right to health”. Likewise, the Inter-American Court of Human Rights has stressed that States have the duty to guarantee equal access to health services to all persons.¹⁹⁹ The Inter-American Court has also underlined States' obligations to provide emergency health care services to migrants with irregular status.²⁰⁰
- **Europe:** The European Social Charter of 1961 establishes that “everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable”.²⁰¹ A similar provision is

¹⁹² International Convention on the Protection of the Rights of all Migrant Workers and their Families, Article 28.

¹⁹³ Id, Articles 43 (1)(e) and 45 (1) (c).

¹⁹⁴ International Labour Organization, Ratifications of C097 - Migration for Employment Convention (Revised), 1949 (No. 97), available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312242.

¹⁹⁵ International Labour Organization, C097 - Migration for Employment Convention (Revised), 1949 (No. 97), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312242.

¹⁹⁶ Office of the United Nations High Commissioner for Human Rights, Principles and Guidelines migrants in vulnerable situations (2018), available at: <https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>.

¹⁹⁷ African Commission on Human and Peoples' Rights, Purohit and others v The Gambia, Communication No. 241/2001 (May 2003), para 80.

¹⁹⁸ African Commission on Human and Peoples' Rights, Resolution on Access to Health and Needed Medicines in Africa - ACHPR/Res.141(XXXIV)08 (November 2008), available at: <https://www.achpr.org/sessions/resolutions?id=212>.

¹⁹⁹ Corte IDH, Caso Poblete Vilches y otros Vs. Chile, Fondo, Reparaciones y Costas, Sentencia de 8 de marzo de 2018, Serie C No. 349, para 122.

²⁰⁰ Corte IDH, Caso Nadege Dorzema y otros Vs. República Dominicana, Fondo, Reparaciones y Costas, Sentencia de 24 de octubre de 2012, Serie C No. 251, para 108.

²⁰¹ The European Social Charter of 1961, Part I, Article 11.

provided in Article 35 of the EU Charter of Fundamental Rights.²⁰² Along the same lines, the European Committee of Social Rights has held that “health care should be available to all who require it”.²⁰³ Importantly, the European Committee has also stated that it is contrary to the European Social Charter for any “legislation or practice” to deny “entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally”.²⁰⁴

Despite the existence of an international framework for the protection of non-citizens, they face obstacles to realizing their right to health globally. In general, States do not provide the same level of health services to non-citizens as to their own citizens.²⁰⁵ In the majority of States, non-citizens can only access to essential care or emergency health care services.²⁰⁶ For example, this is the case in **The United States**²⁰⁷ where, as a general rule, migrants with irregular status can only access emergency services. Similarly, in a considerable number of **European States**, “primary health care is inaccessible to people with irregular migration status”.²⁰⁸

1. COVID-19 and Non-Citizens Right to Health

Although certain States, such as **Portugal**²⁰⁹ and **Australia**,²¹⁰ have taken positive measures to guarantee the rights of non-citizens, generally speaking, non-citizens have remained in a highly vulnerable situation in respect of the effects of the COVID-19 crisis. In particular, “migrants and refugees are disproportionately vulnerable to exclusion, stigma and discrimination”.²¹¹ At the same time, some States’ responses to the pandemic have included “harsh and unprecedented measures against migrants, refugees, and other displaced persons”.²¹² Non-citizens, especially those who are undocumented, are more vulnerable to contract COVID-19 and are more likely to not be able to access adequate health care.²¹³

²⁰² The Article reads as follows: “Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”

²⁰³ European Committee of Social Rights, *European Roma and Travellers Forum (ERTF) v. the Czech Republic*, Complaint No. 104/2014 (17 May 2016), para 117.

²⁰⁴ European Committee of Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003 (8 September 2004), para 32.

²⁰⁵ World Health Organization, *Migration Research Series No. 60: Migrants and the COVID-19 pandemic: An initial analysis* (2020), p. 5, Available at: <https://publications.iom.int/system/files/pdf/mrs-60.pdf>

²⁰⁶ Office of the United Nations High Commissioner for Human Rights and World Health Organization, *The Right to Health*, Fact Sheet No. 31 (2008), Page 19.

²⁰⁷ Centers for Medicare and Medicaid Services, *Emergency health services for undocumented aliens* (9 May 2005), available at: <https://www.cms.gov/newsroom/fact-sheets/emergency-health-services-undocumented-aliens>

²⁰⁸ Platform for International Cooperation on Undocumented Migrants, *The COVID-19 pandemic: we need urgent measures to protect people and mend the cracks in our health, social protection and migration systems* (March 2020), available at: <https://picum.org/wp-content/uploads/2020/03/COVID-19-Statement-March-2020.pdf>

²⁰⁹ Reuters, *Portugal to treat migrants as residents during coronavirus crisis* (28 March 2020) available at: <https://uk.reuters.com/article/uk-health-coronavirus-portugal-idUKKBN21F0MC>

²¹⁰ K Curtis, *Non-citizens could receive coronavirus payments from Australian government*, 7NEWS (23 March 2020), available at: <https://7news.com.au/lifestyle/health-wellbeing/non-citizens-could-receive-virus-payments-c-759724>

²¹¹ World Health Organization, *the rights and health of refugees, migrants and stateless must be protected in COVID-19 response* (31 March 2020), available at: <https://www.who.int/news-room/detail/31-03-2020-ohchr-iom-unhcr-and-who-joint-press-release-the-rights-and-health-of-refugees-migrants-and-stateless-must-be-protected-in-covid-19-response>

²¹² Zolberg Institute on migration and mobility, Columbia Program on Forced Migration and Health, and the Cornell Migration and Human Rights Program, *Human mobility and human rights in the COVID-19 pandemic: Principles of protection for migrants, refugees, and other displaced persons*, p. 4, available at: https://zolberginstitute.org/wp-content/uploads/2020/04/Human-mobility-and-human-rights-in-the-COVID_final-1.pdf

²¹³ World Health Organization, *Migration Research Series No. 60: Migrants and the COVID-19 pandemic: An initial analysis* (2020), p. 4, available at: <https://publications.iom.int/system/files/pdf/mrs-60.pdf>

a) Exacerbation of existing problems in accessing to healthcare services

For non-citizens, the COVID-19 pandemic has exacerbated already existing problems in accessing healthcare services. This has occurred in a range of states.

In **Malaysia**, as pointed out by group of doctors: "In general terms, Malaysia doesn't even recognise the existence or concept of refugees, stateless people and illegal immigrants. As a result, non-citizens have almost no health rights and cannot meaningfully access Malaysia's health system either public or private."²¹⁴ Since 2001 healthcare providers have had the legal obligation under Malaysian law to report undocumented migrants to the police and migration authorities. Therefore, for years, "undocumented migrants have been living under a constant threat of arrest when visiting healthcare facilities".²¹⁵

Since May 2020, on the purported basis of the need to curb COVID-19 transmission, "the Malaysian government has launched a crackdown on refugees, asylum-seekers and migrant workers, carrying out a series of raids"²¹⁶ to arrest them. These raids were condemned by the Malaysian Human Rights Commission.²¹⁷ Around 2,000 people were arrested,²¹⁸ including Rohingya refugees from Myanmar.²¹⁹ These widescale arrests led to overcrowded detention facilities, and subsequently, in early June, these places became coronavirus "hotspots".²²⁰ Consequently, non-citizens were said now to be "less willing to come forward for any tests or medical treatment".²²¹ The Malaysian Defense Minister has publicly said that migrants with irregular documentary status should not be given special treatment and deportations would be carried out.²²²

b) Reduced options for undocumented migrants in accessing healthcare

The COVID-19 pandemic has reduced the options for undocumented migrants to access health services and treatment without proving and providing personal data. For many non-citizens, this requirement alone is enough of a bar to prevent them

²¹⁴ The Star, Proposing a Non-Citizens Health Act for Malaysia, available at: <https://www.thestar.com.my/opinion/letters/2020/01/11/proposing-a-non-citizens-health-act-for-malaysia>

²¹⁵ Doctors without borders, COVID-19 demonstrates the harm of exclusion to healthcare; Malaysia should repeal Health Circular 10/2001 (24 March 2020), Available at: <https://msf-seasia.org/blogs/18851>

²¹⁶ International Commission of Jurists, Malaysia: End harassment and intimidation of media workers and critics (11 July 2020), available at: <https://www.icj.org/malaysia-end-harassment-and-intimidation-of-media-workers-and-critics/>

In relation to the measures adopted by the Malaysian government on undocumented migrants during the pandemic, see: 101 East, Locked Up in Malaysia's Lockdown (3 July 2020), Available at: <https://www.aljazeera.com/programmes/101east/2020/07/locked-malaysia-lockdown-200702104523280.html>

²¹⁷ BBC, Malaysia migrant raids 'to reduce Covid-19 spread' (2 May 2020), available at: <https://www.bbc.com/news/world-asia-52515000>; Human Rights Commission of Malaysia (SUHAKAM), Press Statement No. 15 of 2020, Suhakam Urges Authorities to Cease Arrest of Undocumented Migrants during Covid-19 Crisis (3 May 2020), available at: <https://www.suhakam.org.my/press-statement-no-15-of-2020-suhakam-urges-authorities-to-cease-arrest-of-undocumented-migrants-during-covid-19-crisis/>

²¹⁸ E Fishbein & J T Hkawng, Immigration detention centres become Malaysia coronavirus hotspot, Aljazeera (2 June 2020), available at: <https://www.aljazeera.com/news/2020/06/immigration-detention-centres-malaysia-coronavirus-hotspot-200602004727890.html>

²¹⁹ The Guardian, Malaysia cites Covid-19 for rounding up hundreds of migrants (2 May 2020), available at: <https://www.theguardian.com/global-development/2020/may/02/malaysia-cites-covid-19-for-rounding-up-hundreds-of-migrants>

²²⁰ E Fishbein & J T Hkawng, Immigration detention centres become Malaysia coronavirus hotspot, Aljazeera (2 June 2020), available at: <https://www.aljazeera.com/news/2020/06/immigration-detention-centres-malaysia-coronavirus-hotspot-200602004727890.html>

²²¹ Human Rights Commission of Malaysia (SUHAKAM), Press Statement No. 15 of 2020, Suhakam Urges Authorities to Cease Arrest of Undocumented Migrants during Covid-19 Crisis (3 May 2020), available at: <https://www.suhakam.org.my/press-statement-no-15-of-2020-suhakam-urges-authorities-to-cease-arrest-of-undocumented-migrants-during-covid-19-crisis/>

²²² E Fishbein & J T Hkawng, Immigration detention centres become Malaysia coronavirus hotspot, Aljazeera (2 June 2020), available at: <https://www.aljazeera.com/news/2020/06/immigration-detention-centres-malaysia-coronavirus-hotspot-200602004727890.html>

from accessing healthcare services because they lack documentation and/or fear deportation, discrimination or other adverse consequences.

In **Germany**, where there are an estimated 200,000 – 600,000 undocumented migrants, all migrants have access to test and treatment for COVID-19. However, they have to provide personal information to obtain the test²²³ and it is reported that “undocumented immigrants seek treatment only if they can remain anonymous”.²²⁴

In **Thailand**, the International Labour Organization reported that migrant workers “have limited access to COVID-19 testing and treatment and might not seek medical support due to costs involved, and fear of the repercussions of engaging with authorities, including deportation for those in irregular status.”²²⁵ Such workers include informal sector workers, regular workers who were not enrolled in the social security system, and undocumented migrant workers.

c) Unequal access to information and safety measures relating to COVID-19

In many States, non-citizens do not have equal access to safety measures and information regarding COVID-19.

In **Singapore**, for example, the initial distribution of “face masks and hand sanitizer was limited only to citizens”.²²⁶ Non-citizens also often face language barriers to access to relevant and reliable information about the virus and health services, thus significantly impacting on their right to information accessibility in terms of the right to health. Among other things, this is because some governments have provided COVID-19 information only in the official language of the country.²²⁷

This occurred in **Germany**, where at the beginning of the pandemic,²²⁸ “almost all official information was available in German only”.²²⁹ Similarly, in **the Netherlands** migrants who do not speak Dutch have had to rely on volunteer translators to get information on COVID-19 related measures adopted by authorities.²³⁰ In **Sweden**, the initially disproportionate impact of coronavirus casualties in communities who do not speak Swedish led to the government to commit to providing coronavirus-related news in 15 languages.²³¹

²²³ DW, Coronavirus pandemic poses threat to undocumented migrants (13 May 2020), available at: <https://www.dw.com/en/coronavirus-pandemic-poses-threat-to-undocumented-migrants/a-53425104>

²²⁴ Id.

²²⁵ ILO, COVID-19: Impact on migrant workers and country response in Thailand (3 July 2020) available at:

https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/briefingnote/wcms_741920.pdf.

²²⁶ S Petcharamesree, COVID-19 in Southeast Asia: non-citizens have a right to protection too (29 May 2020), available at: <https://www.opendemocracy.net/en/pandemic-border/covid-19-southeast-asia-non-citizens-have-right-protection-too/>

²²⁷ On this topic, see: Translators without Borders, Do you speak covid-19? (March 2020), available at: https://translatorswithoutborders.org/wp-content/uploads/2020/04/TWB_PolicyBrief-COVID19.pdf

²²⁸ Currently, in Germany, there is COVID-19 information available in multiple languages. See: <https://handbookgermany.de/en.html>

²²⁹ DW, Coronavirus pandemic poses threat to undocumented migrants (13 May 2020), available at: <https://www.dw.com/en/coronavirus-pandemic-poses-threat-to-undocumented-migrants/a-53425104>

²³⁰ Voa news, Language Barriers Limit Access to Coronavirus News for Some European Migrants (2 April 2020), available at: <https://www.voanews.com/europe/language-barriers-limit-access-coronavirus-news-some-european-migrants>

²³¹ Id.

d) Lack of effective measures to guarantee other ESCR

The right to health of non-citizens may also be threatened due to the lack of effective measures to guarantee other ESCR, such as the right to food and the right to housing. As “social determinants” of health access to the services and goods protected by these rights also amount to violations of core obligations terms of the right to health.²³² In this respect, it is especially significant that access to COVID-19 related treatment has proven to be insufficient to guarantee the right to health of non-citizens, without the correct implementation of measures to guarantee the social determinants of health.

This outcome is manifest in the situation of Venezuelans migrants, refugees, and asylum seekers in **Colombia**.²³³ The political and economic upheaval and general human rights crises of recent years in **Venezuela**,²³⁴ has engendered widespread exodus of migrants and refugees.²³⁵ As of early August 2020, it was estimated that at least 5,180,615 Venezuelans had left their homeland.²³⁶ Colombia and Venezuela share a large border and Colombia “is the country that has received the largest number of refugees and migrants from Venezuela”.²³⁷ As of late May 2020, it was estimated that 1,764,883 Venezuelans were living in Colombia,²³⁸ more than half of them with irregular migration status.²³⁹

Venezuelans in Colombia do have access to some health services.²⁴⁰ In the case of undocumented migrants, they have access to emergency medical services.²⁴¹ These services “include the attention of directly transmitted diseases (*enfermedades de contagio directo*) as a measure of public health”.²⁴² Furthermore, with the outbreak of the COVID-19 pandemic, the Colombian government issued measures to guarantee equal access to screening and treatment of COVID-19 related diseases, including all migrants.²⁴³

Therefore, on paper, even before the COVID-19 crisis, all Venezuelans living in Colombia were guaranteed access to medical services for a pandemic disease. However, in practice, access to COVID-19 screening and treatment has not been

²³²See below, section VII.

²³³ On this point see: R Quintero & TF Hodgson, *The Right to Health of Venezuelans in Colombia: From Principle to Policy* (Part 1) (22 April 2020), available at: <http://opiniojuris.org/2020/04/22/the-right-to-health-of-venezuelans-in-colombia-from-principle-to-policy-part-1/>; R Quintero & TF Hodgson, *The Right to Health of Venezuelans in Colombia: From Principle to Policy* (Part 2) (22 April 2020), available at: <http://opiniojuris.org/2020/04/22/the-right-to-health-of-venezuelans-in-colombia-from-policy-to-practice-part-2/>

²³⁴ In that regard, the Inter-American Commission on Human Rights has stated that “*Venezuela is facing a humanitarian crisis characterized by shortages of food and medicine, regular cuts to public utilities such as drinking water and electricity, a public health system in critical condition, and high rates of violence and insecurity*”. See: Inter-American Commission on Human Rights, *Annual Report 2019*, Chapter IV.B, Venezuela, para 8.

²³⁵ See: Office of the United Nations High Commissioner for Refugees, *Global Trends, Force Displacement 2018*, P. 24.

²³⁶ Plataforma de Coordinación para Refugiados y Migrantes de Venezuela, *Respuesta a los venezolanos*, available at: <https://data2.unhcr.org/es/situations/platform>.

²³⁷ Coordination platform for refugees and migrants from Venezuela, *Refugee and migrant response Plan 2020 (revision)* (May 2020), p. 32, available at: <https://r4v.info/es/documents/download/76210>

²³⁸ Plataforma de Coordinación para Refugiados y Migrantes de Venezuela, *Respuesta a los venezolanos, Colombia*, available at: <https://data2.unhcr.org/es/situations/platform/location/7511>

²³⁹ Id.

²⁴⁰ Proyecto Migración Venezuela, *Necesidades en salud de la población migrante venezolana en Colombia*, available at: https://s3.amazonaws.com/semanaruralvzla/documentos/1586287509_informe_salud2020pdf.

²⁴¹ See: Corte Constitucional, *Sentencia SU-677 de 2017 and Sentencia T-210 de 2018*; Ministerio de Salud y Protección Social, *Plan de Respuesta del Sector Salud al Fenómeno Migratorio*, available at: <https://www.minsalud.gov.co/sites/rid/Lists/BibliotecaDigital/RIDE/DE/COM/plan-respuesta-salud-migrantes.pdf>

²⁴² R Quintero & TF Hodgson, *The Right to Health of Venezuelans in Colombia: From Principle to Policy* (Part 1) (22 April 2020), available at: <http://opiniojuris.org/2020/04/22/the-right-to-health-of-venezuelans-in-colombia-from-principle-to-policy-part-1/>

²⁴³ Ministerio de Salud y Protección Social, *Lineamientos para la prevención, detección y manejo de casos de COVID-19 para población migrante en Colombia* (March 2020), available at: http://s3.amazonaws.com/semanaruralvzla/carpeta_ckfinder/files/NPrieto/lineamientos.pdf

entirely effective, in part, due to the fact that other social and economic measures have not been properly implemented during the pandemic.

Specifically, since the adoption of a national quarantine in late March,²⁴⁴ a significant number of Venezuelans “have struggled to access sufficient food and to guard themselves against being evicted from their homes”.²⁴⁵ In early April, for example, a survey found that food (95%), housing (53%), and employment (45%) constituted pressing needs for Venezuelan households in Colombia, in the context of COVID-19.²⁴⁶

On the one hand, this is a consequence of the fact that the majority of Venezuelans in Colombia have informal jobs²⁴⁷ and were prevented from working by quarantine restrictions.²⁴⁸ On the other hand, despite significant efforts,²⁴⁹ “some Venezuelans have not been able to obtain economic assistance created by national and local authorities”.²⁵⁰ Mandatory and legally enforceable measures to avoid evictions during the pandemic have not been appropriately enforced by authorities.²⁵¹ In addition, humanitarian services for migrants have been reduced due to the restrictions of the quarantine.²⁵²

The lack of options to cover their basic needs and the real possibility of severe hunger and homelessness, have arguably led to a considerable percentage of Venezuelans in Colombia “to return to their country despite the health and protection risks”.²⁵³ In that regard, in early August, *Migración Colombia*, the Colombian migration authority, indicated that around 95,000 Venezuelans had returned to their country.²⁵⁴ Furthermore, *Migración Colombia* stated that during March, for the first time in five years, there had been a decrease in the number of Venezuelans in Colombia.²⁵⁵ This reduction happened in the middle of a pandemic

²⁴⁴ The national quarantine in Colombia started on started on 25 March 2020 and it remains in effect. See: *Decreto 457 de 2020* and *Decreto 1076 de 2020*.

²⁴⁵ R Quintero & TF Hodgson, The Right to Health of Venezuelans in Colombia: From Principle to Policy (Part 2) (22 April 2020), available at: <http://opiniojuris.org/2020/04/22/the-right-to-health-of-venezuelans-in-colombia-from-policy-to-practice-part-2/>

²⁴⁶ Plataforma de Coordinación para Refugiados y Migrantes de Venezuela, Colombia: evaluación rápida de necesidades ante COVID-19 (May 2020), available at: <https://r4v.info/en/documents/download/76031>

²⁴⁷ Proyecto Migración Venezuela, Coronavirus: interrogantes sobre la atención a venezolanos en Colombia (22 March 2020), available at: <https://migravenezuela.com/web/articulo/como-atender-a-los-venezolanos-en-colombia-ante-la-crisis-del-coronavirus/1766>

²⁴⁸ R Quintero & TF Hodgson, The Right to Health of Venezuelans in Colombia: From Principle to Policy (Part 2) (22 April 2020), available at: <http://opiniojuris.org/2020/04/22/the-right-to-health-of-venezuelans-in-colombia-from-policy-to-practice-part-2/>

²⁴⁹ La Silla Vacía, Los trapos rojos pintan el drama por las ayudas que aún no llegan en Bogotá (8 April 2020), available at: <https://lasillavacia.com/silla-cachaca/los-trapos-rojos-pintan-drama-las-ayudas-aun-no-llegan-bogota-76156>; Colombia sin fronteras, 6 puntos del Gobierno para el Covid y migración, Available at: <https://colombiasinfronteras.com/6-puntos-del-gobierno-para-el-covid-y-migracion/>

²⁵⁰ R Quintero & TF Hodgson, The Right to Health of Venezuelans in Colombia: From Principle to Policy (Part 2) (22 April 2020), available at: <http://opiniojuris.org/2020/04/22/the-right-to-health-of-venezuelans-in-colombia-from-policy-to-practice-part-2/>

²⁵¹ Canal RCN, Más de 1.300 familias fueron desalojadas por no pagar el arriendo en Bogotá (1 April 2020), available at: <https://noticias.canalrcn.com/bogota/mas-de-1300-familias-fueron-desalojadas-por-no-pagar-el-arriendo-en-bogota-354842>

²⁵² Refugees International, En busca de un hogar: cómo la COVID-19 hace peligrar los avances en materia de integración de los venezolanos en Colombia (9 June 2020), available at: <https://www.refugeesinternational.org/reports/2020/6/5/en-busca-de-un-hogar-cmo-la-covid-19-hace-peligrar-los-avances-en-materia-de-integracin-de-los-venezolanos-en-colombia>; Consejo Noruego para Refugiados, Covid-19 obliga a migrantes y refugiados a volver a la crisis en Venezuela (23 April 2020), available at: <https://nrc.org.co/2020/04/23/covid-19-obliga-a-migrantes-y-refugiados-a-volver-a-la-crisis-en-venezuela/>

²⁵³ Coordination platform for refugees and migrants from Venezuela, Refugee and migrant response Plan 2020 (revision) (May 2020), P. 33, available at: <https://r4v.info/es/documents/download/76210> See also: Consejo Noruego para Refugiados, Covid-19 obliga a migrantes y refugiados a volver a la crisis en Venezuela (23 April 2020), available at: <https://nrc.org.co/2020/04/23/covid-19-obliga-a-migrantes-y-refugiados-a-volver-a-la-crisis-en-venezuela/>

²⁵⁴ Migración Colombia, Para finales del mes de mayo, el 3% del total de venezolanos que se encontraban en Colombia al comienzo de la pandemia había regresado a su país y un 2% más estaría a la espera de poder hacerlo (6 August 2020), available at: <https://www.migracioncolombia.gov.co/noticias/para-finales-del-mes-de-mayo-el-3-del-total-de-venezolanos-que-se-encontraban-en-colombia-al-comienzo-de-la-pandemia-habia-regresado-a-su-pais-y-un-2-mas-estaria-a-la-espera-de-poder-hacerlo>

²⁵⁵ Migración Colombia, número de venezolanos radicados en Colombia descende por primera vez en 5 años (28 May 2020), available at: <https://www.migracioncolombia.gov.co/noticias/numero-de-venezolanos-radicados-en-colombia-desciende-por-primera-vez-en-5-anos>

and without any evident improvement in the deplorable condition of the Venezuelan health system.²⁵⁶

Many Venezuelan migrants and refugees, including children and older persons are living on the streets of different cities in Colombia, waiting for help from the national government or local authorities so that they might be able to return home.²⁵⁷ Others have returned to Venezuela after walking for several days,²⁵⁸ sometimes using “irregular and dangerous crossing points”²⁵⁹ to avoid restrictions and requirements at the border. The Venezuelan authorities have also established limitations on the number of people who can cross the border²⁶⁰, which has created chaos. Venezuelan returnees are also made to wait several days before being able to cross the border.²⁶¹

Once they cross the border, the situation for such persons is typically not any better. Venezuelan returnees, who used regular border checkpoints, are placed in quarantine in overcrowded facilities, without “sufficient food or permanent access to drinking water”.²⁶² In addition, returnees have faced stigmatization by Venezuelan authorities,²⁶³ who have called them “irresponsible”, “fascists,” “camouflaged coup-plotters” and “biological weapons”²⁶⁴.

2. Recommendations to States relating to non-citizens rights to health

Based on their international legal obligations pertaining to the right to health of non-citizens, States should take at least the following measures:

- Design and adopted targeted measures, aimed at protecting the right to health, in consultation with non-citizens, including migrant, stateless, and refugee communities.²⁶⁵
- Ensure that all persons, including non-citizens, have access to adequate access to all necessary COVID-19 prevention, treatment and screening measures on an equal basis, even in situations of scarcity of resources.²⁶⁶

²⁵⁶ Human Right Watch, Venezuela: Urgent Aid Needed to Combat COVID-19 (26 May 2020), available at: <https://www.hrw.org/news/2020/05/26/venezuela-urgent-aid-needed-combat-covid-19>

²⁵⁷ Proyecto Migración Venezuela, En medio de la lluvia, 308 venezolanos esperan para retornar a casa (31 May 2020), available at: <https://migravenezuela.com/web/articulo/en-medio-de-la-lluvia-286-venezolanos-esperan-para-retornar-a-casa/1926>

²⁵⁸ Proyecto Migración Venezuela, El peligroso retorno a casa (16 May 2020), available at: <https://migravenezuela.com/web/articulo/el-peligroso-retorno-a-casa-de-los-venezolanos/1892>

²⁵⁹ R Quintero & TF Hodgson, The Right to Health of Venezuelans in Colombia: From Principle to Policy (Part 2) (22 April 2020), available at: <http://opiniojuris.org/2020/04/22/the-right-to-health-of-venezuelans-in-colombia-from-policy-to-practice-part-2/>

²⁶⁰ Migración Colombia, Nuevas restricciones en corredores humanitarios por parte de Venezuela (June 2020), available at: <https://www.migracioncolombia.gov.co/noticias/nuevas-restricciones-en-corredores-humanitarios-por-parte-de-venezuela>

²⁶¹ Proyecto Migración Venezuela, Suspenden corredores humanitarios para el retorno de venezolanos (10 June 2020), available at: <https://migravenezuela.com/web/articulo/migracion-colombia-suspende-corredores-humanitarios-para-el-retorno-de-venezolanos/1951>; Proyecto Migración Venezuela, La inclemente espera de los venezolanos que necesitan entrar a su tierra (June 2020), available at: <https://migravenezuela.com/web/articulo/la-inclemente-espera-de-los-venezolanos-que-necesitan-entrar-a-su-tierra/1948>

²⁶² Inter-American Commission on Human Rights, IACHR Calls on States to Protect the Rights of Venezuelans Who Return to their Country During the COVID-19 Pandemic (16 May 2020), available at: http://www.oas.org/en/iachr/media_center/PReleases/2020/112.asp

²⁶³ Id.

²⁶⁴ Human Rights Watch, Stuck at Venezuela’s Border with Covid-19 All Around (15 July 2020), available at: <https://www.hrw.org/news/2020/07/15/stuck-venezuelas-border-covid-19-all-around>

²⁶⁵ Civil Society Action Committee, First, Save Lives: Solutions for the COVID-19 Pandemic and New Solidarity with Migrants and Refugees (7 April 2020), available at: <https://csactioncommittee.org/wp-content/uploads/2020/04/Civil-Society-Statement-on-COVID-19-and-Migrants-final.pdf>; Zolberg Institute on migration and mobility, Columbia Program on Forced Migration and Health, and the Cornell Migration and Human Rights Program, Human mobility and human rights in the COVID-19 pandemic: Principles of protection for migrants, refugees, and other displaced persons, available at: https://zolberginstitute.org/wp-content/uploads/2020/04/Human-mobility-and-human-rights-in-the-COVID_final-1.pdf

²⁶⁶ Office of the United Nations High Commissioner for Human Rights, COVID-19 and the human rights of migrants: guidance, available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf

This requires the provision of information on COVID-19 itself and government responses to COVID-19 in languages which are accessible to all persons, including non-citizens.²⁶⁷

- Guarantee all persons, including non-citizens, access to COVID-19 prevention, treatment and screening services without prohibitive documentary requirements and/or the threat of being arrested or subjected to immigration control procedures.
- Ensure that requirements that personal data and information provided before or during the process of COVID-19 testing and treatment are kept confidential and used exclusively for health purposes.
- Refrain from requiring healthcare workers to report or hand over personal data relating to an individual documentary status, including citizenship, migration or statelessness status. Provide training for healthcare workers to ensure they understand that non-citizens should not in any way face discrimination when attempting to access COVID-19-related testing, treatment and other healthcare services.
- Refrain from using detention or unwarranted restrictions on freedom of movement of non-citizens as a control measure, including to curb the spread of COVID-19.
- Adopt relief or support measures to alleviate economic hardships arising from COVID-19 that cater for non-citizens, including actions to guarantee the rights to social security, water, food, education, and housing.²⁶⁸

B. Older Persons

Adults aged 60 and above,²⁶⁹ who for the purposes of this report are described as “older persons”, constitute a sector of the world’s population that has increased considerably in the past decades.²⁷⁰ States have an obligation to meet the physical and mental health needs of older persons.²⁷¹ In particular, as the CESCR has explained, States must guarantee access to good quality healthcare services for older persons, including “preventive, curative and rehabilitative health treatment”.²⁷² In doing so, States should recognize older persons as rights-

²⁶⁷ Id.

See also: Migrant Forum in Asia, Uphold Migrants’ Rights in Times of Crisis Situations, available at: <http://mfasia.org/uphold-migrants-rights-in-times-of-crisis-situations/#>

²⁶⁸ International Organization for Migration, COVID-19 Does Not Discriminate; Nor Should Our Response (20 March 2020), available at: <https://www.iom.int/news/covid-19-does-not-discriminate-nor-should-our-response>

²⁶⁹ Generally, the term “older persons” covers persons aged 60 and above. This is the standard age used by several United Nations agencies and the Inter-American Convention on Protecting the Human Rights of Older Persons (article 2). However, at the international level, it has not been established a specific chronological age to define a person as an older person. On this topic, the Department of Economic and Social Affairs of the United Nations Secretariat, in the report “World Population Ageing 2019”, has said: “The measures and indicators commonly used by the United Nations and other researchers to compare the sizes of different age groups are based on people’s chronological age, typically defining older persons as those aged 60 or 65 years or over”.

²⁷⁰ United Nations, Department of Economic and Social Affairs, World Population Ageing 2019 (2020), p. 2 ff; United Nations, Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/18/37 (4 July 2011), para 5 ff; United Nations, Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, E/1996/22 (8 December 1995) (“General Comment 6”), para 1.

²⁷¹ United Nations, Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/18/37 (4 July 2011), para 8. See also: Corte IDH, Caso Poblete Vilches y otros Vs. Chile. Fondo, Reparaciones y Costas, Sentencia de 8 de marzo de 2018, Serie C No. 349, para 127.

²⁷² General Comment 14, para 25. Also see: General Comment 6, para 35.

holders²⁷³ and implement measures that maintain an individual's functionality and autonomy despite advancing age.

In addition, it is worth highlighting that increasing international attention has been paid to the specific needs of this sector of the population and their need for distinct human rights protections. In particular, there have been regional developments that have addressed the human rights of older persons:²⁷⁴

- **Americas:** The Inter-American Convention on Protecting the Human Rights of Older Persons (2015) recognizes that older persons have the right to access to comprehensive health services.²⁷⁵ It provides a detailed description of the actions that States must undertake to guarantee the right to physical and mental health of older persons.²⁷⁶
- **Africa:** The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (2016) also recognizes that older persons have the right to access to comprehensive health services to meet their "specific needs".²⁷⁷

There is not, however, as yet, a comprehensive international framework for the human rights of older persons. On the contrary, the framework "is fragmented, uneven and incomplete".²⁷⁸ In order to tackle this problem, in 2010, the UN General Assembly established the intergovernmental Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons.²⁷⁹ The Working Group, which has held 10 sessions to date, is mandated to consider "the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures".²⁸⁰ In addition, in 2013, the Human Rights Council appointed an Independent Expert on the Enjoyment of all Human Rights by Older Persons.²⁸¹ To date the Independent expert has issued six report on a variety of themes,²⁸² such as the autonomy and care of older persons,²⁸³ and human rights of older persons in emergency situations.²⁸⁴

Finally, with regard to the right to health, one of the most prevalent problems for older persons is the risk of being discriminated against on the ground of age.²⁸⁵

²⁷³ United Nations, Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/18/37 (4 July 2011), para 14.

²⁷⁴ At the International level, it should be noted that in 1991, the General Assembly adopted "the United Nations Principles for Older Persons" (resolution 46/91). For other developments at the international level, see: <https://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/Background.aspx>

²⁷⁵ Article 12 of the Inter-American Convention provides: "Older persons have the right to a comprehensive system of care that protects and promotes their health (...)".

²⁷⁶ Inter-American Convention on Protecting the Human Rights of Older Persons, article 19.

²⁷⁷ Article 15 of the African Protocol sets out that States shall "guarantee the rights of Older Persons to access health services that meet their specific needs".

²⁷⁸ Office of the United Nations High Commissioner for Human Rights, UN Human Rights Chief offers her support for a new Convention on the rights of older persons (8 April 2014), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/RightsOfOlderPersons.aspx>

²⁷⁹ UN General Assembly, Follow-up to the Second World Assembly on Ageing, A/RES/65/182 (4 February 2011), para 28.

²⁸⁰ Id.

²⁸¹ The Human Rights Council, The human rights of older persons, A/HRC/RES/24/20 (8 October 2013), para 5.

²⁸² See: The Office of the High Commissioner for Human Rights, The Independent Expert on the enjoyment of all human rights by older persons, Annual reports, available at: <https://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/Reports.aspx>

²⁸³ Report of the Independent Expert on the enjoyment of all human rights by older persons, A/HRC/30/43 (13 August 2015).

²⁸⁴ Report of the Independent Expert on the enjoyment of all human rights by older persons, Enjoyment of all human rights by older persons, A/HRC/42/43 (4 July 2019).

²⁸⁵ United Nations, Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/18/37 (4 July 2011), para 38.

The CESCR has confirmed that “age is a prohibited ground of discrimination in several contexts”.²⁸⁶ The CESCR has also identified older persons as a group especially vulnerable to violations of the right to health.²⁸⁷ Therefore, States must adopt and implement measures to guarantee equality of access to health care and health services for this sector of the population.²⁸⁸

1. COVID-19 and Older Persons’ Right to Health

Older persons, and particularly those with pre-existing medical conditions, are more vulnerable to becoming seriously ill and/or dying from COVID-19.²⁸⁹ According to the WHO, the mortality rate of COVID-19 increases with age.²⁹⁰ In late July 2020, WHO’s Director-General, Dr Tedros Adhanom Ghebreyesus, noted that “the case fatality ratio in people over the age of 60 is almost 15%, which is ten times higher than that of younger people.”²⁹¹ COVID-19 therefore presents a substantial and disproportionate risk to the physical health of older persons.

a) Barriers to accessing integrated healthcare services

Older persons have typically experienced particular challenges in accessing integrated healthcare services. This is partially due to the fact that lockdowns and other COVID-19 related measures have made it more difficult to access healthcare services, in particular, for older persons with underlying medical conditions or with disabilities.²⁹²

In that regard, in the **United Kingdom**, the Coronavirus Act 2020²⁹³ has been criticized by Human Rights Watch because it “relaxes the rules and standards for social care services and supports”,²⁹⁴ which may reasonably be expected to have a significant impact on the quality of the services provided to older adults and older persons with disabilities.²⁹⁵

Similarly, older persons face age discrimination in medical care services²⁹⁶ “when their treatment is perceived to have less value than the treatment of younger persons”.²⁹⁷ For example, in the **Netherlands**, some older persons complained of being asked by their doctors whether they wanted to receive intensive care

²⁸⁶ General Comment 20, para 29.

²⁸⁷ General Comment 14, para 12 (b).

²⁸⁸ Id, para. 18 and 19;

See also: United Nations, Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/18/37 (4 July 2011), para 28.

²⁸⁹ Johns Hopkins Medicine, Coronavirus and COVID-19: Caregiving for the Elderly, available at: <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-caregiving-for-the-elderly>

²⁹⁰ World Health Organization, COVID-19 strategy update (14 April 2020), p. 3, available at: <https://www.who.int/publications-detail/covid-19-strategy-update---14-april-2020>

²⁹¹ World Health Organization, WHO Director-General's opening and closing remarks on older persons and COVID-19 (28 July 2020), available at: <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-and-closing-remarks-on-older-persons-and-covid-19---28-july-2020>

²⁹² United Nations, Policy Brief: The Impact of Covid-19 on Older Persons (May 2020), p. 5, available at: <https://unsdg.un.org/sites/default/files/2020-05/Policy-Brief-The-Impact-of-COVID-19-on-Older-Persons.pdf>

See also: “Section D. Access to Healthcare for Persons with Disabilities” of Section V of this Report.

²⁹³ The act is available at: http://www.legislation.gov.uk/ukpga/2020/7/pdfs/ukpga_20200007_en.pdf

²⁹⁴ Human Rights Watch, UK: COVID-19 Law Puts Rights of People with Disabilities at Risk (26 March 2020), available at: <https://www.hrw.org/news/2020/03/26/uk-covid-19-law-puts-rights-people-disabilities-risk>

²⁹⁵ Id.

²⁹⁶ United Nations, Policy Brief: The Impact of COVID-19 on older persons (May 2020), p. 2, available at: <https://unsdg.un.org/sites/default/files/2020-05/Policy-Brief-The-Impact-of-COVID-19-on-Older-Persons.pdf>

²⁹⁷ United Nations, Department of Economic and Social Affairs, COVID-19 and Older Persons: A Defining Moment for an Informed, Inclusive and Targeted Response (8 May 2020), available at: <https://www.un.org/development/desa/ageing/news/2020/05/covid19/>

treatment in case they contracted COVID-19.²⁹⁸ This was sometimes understood by older persons as doctors discouraging them to accept intensive care treatment because of their age.²⁹⁹

b) Risks to emotional well-being and mental health

The COVID-19 pandemic itself and the government responses, both pose a substantial risk to the emotional well-being and mental health of older persons.³⁰⁰ For instance, older persons with cognitive decline “may become more anxious, angry, stressed, agitated and withdrawn during the outbreak or while in quarantine”.³⁰¹ Similarly, older persons generally “have limited access to digital technologies and lack necessary skills to fully exploit them,”³⁰² which means they might not have means to be in touch with their families, friends, and support communities.³⁰³ For instance, in **Australia**, it has been estimated that “57% of Australians aged 70 and older have low to no digital literacy”.³⁰⁴ This significantly and disproportionately impacts on the right to the highest attainable standard of mental health of older persons.

Furthermore, “lockdown” or “quarantine” measures to halt the spread of the COVID-19 outbreak often disproportionately increase the social isolation of older persons. In this respect, some States have implemented quarantine measures for older persons that are stricter and will have a longer duration than those adopted for the general population.³⁰⁵

In **Colombia**, based solely on their age, the national government established a stay-at-home order for people over 70 years. The order had an initial duration of over two months (from 20 March to 30 May 2020).³⁰⁶ Subsequently, the order was prolonged for three more months (from 31 May to 31 August 2020).³⁰⁷

By contrast, measures for the general population have been less severe. In particular, government declared a national quarantine with an initial duration of

²⁹⁸ S van den Berg & A Deutsch, Dutch end-of-life debate flares as coronavirus tests healthcare limits, Reuters (2 April 2020), available at: <https://www.reuters.com/article/us-health-coronavirus-netherlands-elderly/dutch-end-of-life-debate-flares-as-coronavirus-tests-healthcare-limits-idUSKBN21K2B6>

²⁹⁹ S Vaessen, Hidden coronavirus tragedies: Dutch elderly advised against ICU, Aljazeera (12 May 2020), available at: <https://www.aljazeera.com/blogs/europe/2020/05/hidden-coronavirus-tragedies-dutch-elderly-forgotten-pandemic-200512111731507.html>

³⁰⁰ Council of Europe Commissioner for Human Rights, Older persons need more support than ever in the age of the Covid-19 pandemic (20 March 2020), available at: <https://www.coe.int/en/web/commissioner/-/older-persons-need-more-support-than-ever-in-the-age-of-the-covid-19-pandemic>; United Nations, Department of Economic and Social Affairs, COVID-19 and Older Persons: A Defining Moment for an Informed, Inclusive and Targeted Response (8 May 2020), available at: <https://www.un.org/development/desa/ageing/news/2020/05/covid19/>

Also see: Human Rights Watch, Rights Risks to Older People in COVID-19 Response (7 April 2020), available at: <https://www.hrw.org/news/2020/04/07/rights-risks-older-people-covid-19-response>

³⁰¹ World Health Organization, Mental health and psychosocial considerations during the COVID-19 outbreak (18 March 2020), available at: <https://www.who.int/docs/default-source/coronaviruse/mental-health-considerations.pdf>

³⁰² United Nations, Policy Brief: The Impact of Covid-19 on Older Persons (May 2020), p. 10, Available at: <https://unsdg.un.org/sites/default/files/2020-05/Policy-Brief-The-Impact-of-COVID-19-on-Older-Persons.pdf>

³⁰³ S LaFave, The impact of COVID-19 on older adults, HUB (5 May 2020), available at: <https://hub.jhu.edu/2020/05/05/impact-of-covid-19-on-the-elderly/>; AGE Platform Europe, COVID-19 and the human rights of older persons (1 April 2020), available at: https://www.age-platform.eu/sites/default/files/COVID-19_%26_human_rights_concerns_for_older_persons-April20.pdf

³⁰⁴ eSafety Commissioner, Social distancing without the isolation: helping older Australians connect online (18 March 2020), available at: <https://www.esafety.gov.au/about-us/newsroom/social-distancing-without-isolation-helping-older-australians-connect-online-3>

³⁰⁵ United Nations, Policy Brief: The Impact of Covid-19 on Older Persons (May 2020), p. 3, available at: <https://unsdg.un.org/sites/default/files/2020-05/Policy-Brief-The-Impact-of-COVID-19-on-Older-Persons.pdf>

³⁰⁶ Ministry of Health and Social Protection, *Resolución 464 de 2020*.

³⁰⁷ Ministry of Health and Social Protection, *Resolución 844 de 2020*.

less than a month (from 25 March to 13 April).³⁰⁸ The national government has since extended the quarantine eight times,³⁰⁹ with the most recent period at the time of writing expected to finish on 1 September 2020.³¹⁰

The cumulative effect has been that isolation measures for the general population have been analyzed and updated by the government more frequently than the similar but more taxing measures for older adults. Furthermore, quarantine exceptions have not applied in the same way to the general population and people over 70 years of age. Specifically, while people under 70 were permitted to go outdoors for exercise up to two hours every day, those over 70 were allowed up to one hour and only three times per week.³¹¹ As justification for the different treatment, Colombian authorities have stated that there is scientific evidence that people over 70 are more likely to contract COVID-19 and to die from it.³¹²

However, this blanket treatment of older persons is arguably discriminatory and a violation of equal protection of a range of their rights including their rights to health, work, liberty and security of person and freedom of movement. Although older persons are more vulnerable to suffer from adverse consequences if they contract COVID-19, the isolation measures are not a proportionate and effective solution.³¹³ This is so for a variety of reasons, including that:³¹⁴

- Older persons may live with young people who can infect them;
- The measures affect the dignity and mental health of older persons;
- The measures perpetuate the stereotype of older persons as non-autonomous people;
- The measures do not consider that many older persons are compelled to continue working because they do not have pensions or adequate savings/income; and
- It is possible to implement less invasive health policies, such as allocating more resources to the health system and educational programmes to promote self-care of older persons.

For these and other reasons, a group of older persons filed a constitutional action, amparo action (*acción de tutela*), challenging the legality of the isolation measures based solely on age. They argued the measures were discriminatory, and

³⁰⁸ *Decreto 457 de 2020*.

³⁰⁹ **Extension one:** from 13 April to 27 April 2020 (*Decreto 531 de 2020*); **Extension two:** from 27 April to 11 May 2020 (*Decreto 593 de 2020*); **Extension three:** from 11 May to 25 May 2020 (*Decreto 636 de 2020*); **Extension four:** from 25 May to 31 May 2020 (*Decreto 689 de 2020*); **Extension five:** from 1 June to 1 July (*Decreto 749 de 2020*); **Extension six:** from 1 July to 15 July (*Decreto 878 de 2020*); **Extension seven:** from 16 July to 1 August 2020 (*Decreto 990 de 2020*); and **Extension eight:** from 1 August to 1 September (*Decreto 1076 de 2020*).

³¹⁰ *Decreto 1076 de 2020*.

³¹¹ *Decreto 847 de 2020*.

³¹² El Tiempo, 'Restricción a adultos mayores no es para coartar libertad': Gobierno (10 July 2020), available at: <https://www.eltiempo.com/unidad-investigativa/coronavirus-en-colombia-gobierno-dice-que-restriccion-no-es-para-coartar-libertad-516408>

See also: Juzgado Sesenta y Uno (61) Administrativo del Circuito Judicial de Bogotá, Sección Tercera, Sentencia de Tutela no. 061, Radicado 110013343-061-2020-00111-00, 2 de julio de 2020. Available at: <https://www.ramajudicial.gov.co/documents/7819920/40845311/ArchivoFirmado+%283%29.pdf/291e6ffe-14d0-4e67-b866-25637759e0a5>

³¹³ See: Juzgado Sesenta y Uno (61) Administrativo del Circuito Judicial de Bogotá, Sección Tercera, Sentencia de Tutela no. 061, Radicado 110013343-061-2020-00111-00, 2 de julio de 2020. Available at: <https://www.ramajudicial.gov.co/documents/7819920/40845311/ArchivoFirmado+%283%29.pdf/291e6ffe-14d0-4e67-b866-25637759e0a5>

³¹⁴ See: R Uprimny, En defensa de la rebelión de las canas (26 July 2020), available at: <https://www.elespectador.com/opinion/en-defensa-de-la-rebelion-de-las-canas/>

See also: El Tiempo, *La encrucijada de los mayores de 70 años en la pandemia* (21 May 2020), available at: <https://www.eltiempo.com/salud/coronavirus-la-encrucijada-de-los-mayores-de-70-anos-en-la-pandemia-497832>

therefore, in violation of their constitutional rights.³¹⁵ In early July 2020, a court ruled in favour of the group of older persons.³¹⁶ Among other things, the judge suspended the application of legal regulations that only allowed people over 70 to be outdoors for one hour, three times per week. Although the national government appealed the decision, the extension of the government enforced quarantine in late July³¹⁷ permitted older persons to go outdoors for exercise on the same conditions as adults under 70 years.³¹⁸ In early August, a tribunal of second instance also found the initial measures adopted by the government to be discriminatory and indicated that similar measures should be avoided in the future.³¹⁹

Older persons are an extremely diverse group, with different interests, employment statuses and physical health and capacity. Nevertheless, older persons are often treated and seen as a relatively uniform category of individuals based solely on their age. It is not uncommon that older adults are labelled and stigmatized as frail, dependent, sick, and vulnerable.³²⁰

Although this misperception is not new,³²¹ the COVID-19 crisis has contributed to reinforcing stereotypes about older persons and as has been indicated above lockdown and quarantine rules of include crude distinctions based on age alone purportedly in the interests of protecting the life and health of all older persons.³²² However, the reality is that a considerable number of older persons have taken an active role during the pandemic working as health workers, caregivers, volunteers or community leaders.³²³

c) Vulnerability of persons living in “nursing facilities”

There is some international evidence that those who live in nursing homes³²⁴ “are experiencing high rates of mortality due to COVID-19”.³²⁵ There are also reports

³¹⁵ They invoked a violation of the right to equality (Article 13 of the Colombian Constitution), the right to freedom of movement (Article 24 of the Colombian Constitution) and right to free development of personality (Article 16 of the Colombian Constitution),

³¹⁶ See: Juzgado Sesenta y Uno (61) Administrativo del Circuito Judicial de Bogotá, Sección Tercera, Sentencia de Tutela no. 061, Radicado 110013343-061-2020-00111-00, 2 de julio de 2020. Available at: <https://www.ramajudicial.gov.co/documents/7819920/40845311/ArchivoFirmado+%283%29.pdf/291e6ffe-14d0-4e67-b866-25637759e0a5>

³¹⁷ The most recent extension was enacted on 28 July 2020. It established the quarantine will finish on 1 September 2020. See: Decreto 1076 de 2020.

³¹⁸ *Decreto 1076 de 2020.*

³¹⁹ See: Tribunal Administrativo de Cundinamarca, Sección Segunda, Subsección E, Radicado 11001-33-43-061-2020-00111-01, 10 de agosto de 2020, M.P.: Jaime Alberto Galeano Garzón, available at: <https://www.eltiempo.com/uploads/files/2020/08/11/Segunda%20Instancia%20-%20Rebelion%20de%20las%20Canas.pdf>

³²⁰ AGE Platform Europe, COVID-19 and the human rights of older persons (1 April 2020), available at: https://www.age-platform.eu/sites/default/files/COVID-19_%26_human_rights_concerns_for_older_persons-April20.pdf

³²¹ United Nations, Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/18/37 (4 July 2011), para 13 and 15.

³²² Council of Europe Commissioner for Human Rights, Older persons need more support than ever in the age of the Covid-19 pandemic (20 March 2020), available at: <https://www.coe.int/en/web/commissioner/-/older-persons-need-more-support-than-ever-in-the-age-of-the-covid-19-pandemic>; AGE Platform Europe, COVID-19 and the human rights of older persons (1 April 2020), available at: https://www.age-platform.eu/sites/default/files/COVID-19_%26_human_rights_concerns_for_older_persons-April20.pdf

³²³ British Society of Gerontology, Covid-19: Statement from the President and Members of the National Executive Committee of the British Society of Gerontology (21 March 2020), available at: <https://ageingissues.wordpress.com/2020/03/21/covid-19-statement-from-the-president-and-members-of-the-national-executive-committee-of-the-british-society-of-gerontology/>

³²⁴ Nursing homes are defined as “a place for people who can’t be cared for at home and need 24-hour nursing care”. In other words, they are full-time homes and settings of care. They are also known as long-term care facilities. See: Medicare, Find a nursing home, available at: <https://www.medicare.gov/nursinghomecompare/search.html>.

³²⁵ United Nations, Department of Economic and Social Affairs, COVID-19 and Older Persons: A Defining Moment for an Informed, Inclusive and Targeted Response (8 May 2020), available at:

on neglect or mistreatment in care homes.³²⁶ In that regard, for instance, the WHO has observed that “evidence shows that in many countries more than 40% of COVID-19 related deaths have been linked to long-term care facilities, with figures being as high as 80% in some high-income countries”.³²⁷

The situation of nursing homes in **the United States** is of particular concern.³²⁸ Since the beginning of the outbreak in the United States in January,³²⁹ nursing home residents have been hit hard by the COVID-19 pandemic.³³⁰ Federal authorities have acknowledged that “nursing homes have been ground zero for COVID-19”,³³¹ and their residents are considered to be “at the highest risk of being affected by COVID-19”.³³² Several factors have contributed to this situation:

- **Poor infection control:** Older persons living in nursing homes have been susceptible to an infectious disease outbreak before the COVID-19 outbreak. This is partially due to the fact that a considerable number of facilities do not have a satisfactory record of infection control.³³³
- **Underlying structural problems:** Many nursing facilities are overcrowded and have residents with underlying respiratory and mental health issues.³³⁴ There are also “staffing and resource deficiencies that long predate Covid-19”.³³⁵
- **Inadequate PPE:** When the COVID-19 outbreak started nursing staff were not provided with proper personal protective equipment (PPE) to guarantee residents’ health and their own health.³³⁶ Moreover, despite the early outbreak in nursing facilities, authorities did not test residents and staff thoroughly.³³⁷ In some cases, the difficult situation in nursing homes led to evacuate the residents³³⁸ or advise families “to take their loved ones home if possible”.³³⁹

<https://www.un.org/development/desa/ageing/news/2020/05/covid19/>

Also see: Human Rights Watch, Rights Risks to Older People in COVID-19 Response (7 April 2020), available at: <https://www.hrw.org/news/2020/04/07/rights-risks-older-people-covid-19-response>

³²⁶ United Nations, Policy Brief: The Impact of Covid-19 on Older Persons (May 2020), p. 3, available at: <https://unsdg.un.org/sites/default/files/2020-05/Policy-Brief-The-Impact-of-COVID-19-on-Older-Persons.pdf>

³²⁷ World Health Organization, Preventing and managing COVID-19 across long-term care services, policy brief (24 July 2020), p. V.

³²⁸ Centers for Disease Control and Prevention, COVID-19 in a Long-Term Care Facility — King County, Washington, February 27–March 9, 2020 (27 March 2020), available at: <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e1.htm>

³²⁹ The first laboratory-confirmed case of COVID-19 in the United States was confirmed on 20 January 2020.

³³⁰ Kaiser Family Foundation, Data Note: How might Coronavirus Affect Residents in Nursing Facilities? (13 March 2020), Available at: <https://www.kff.org/medicaid/issue-brief/data-note-how-might-coronavirus-affect-residents-in-nursing-facilities/>

³³¹ Centers for Medicare and Medicaid Services, Trump Administration Announces New Nursing Homes COVID-19 Transparency Effort (19 April 2020), available at: <https://www.cms.gov/newsroom/press-releases/trump-administration-announces-new-nursing-homes-covid-19-transparency-effort>

³³² Centers for Disease Control and Prevention, Preparing for COVID-19: Long-term Care Facilities, Nursing Homes (15 April 2020), available at: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html>

³³³ Centers for Disease Control and Prevention, CDC Reports on Serious Infections and Outbreaks Occurring in LTCFs, available at: <http://medbox.iab.me/modules/en-cdc/www.cdc.gov/longtermcare/staff/report-publications.html>; Kaiser Family Foundation, Data Note: How might Coronavirus Affect Residents in Nursing Facilities? (13 March 2020), available at: <https://www.kff.org/medicaid/issue-brief/data-note-how-might-coronavirus-affect-residents-in-nursing-facilities/>

³³⁴ Kaiser Family Foundation, Data Note: How might Coronavirus Affect Residents in Nursing Facilities? (13 March 2020), available at: <https://www.kff.org/medicaid/issue-brief/data-note-how-might-coronavirus-affect-residents-in-nursing-facilities/>

³³⁵ The Guardian, US nursing homes seek legal immunity as Covid-19 spreads ‘like wildfire’ (13 May 2020), available at: <https://www.theguardian.com/world/2020/may/13/us-nursing-homes-legal-immunity-coronavirus>

³³⁶ The Guardian, ‘We’re living in fear’: why US nursing homes became incubators for the coronavirus (15 April 2020), available at: <https://www.theguardian.com/world/2020/apr/15/were-living-in-fear-why-us-nursing-homes-became-incubators-for-the-coronavirus>

³³⁷ P Whoriskey, M Sacchetti & R Webster, Coronavirus cases surge at nursing homes as workers battle ‘almost perfect killing machine’, The Washington Post (21 March 2020), available at: <https://www.washingtonpost.com/business/2020/03/21/nursing-home-coronavirus-deaths/>

³³⁸ ABC 7 News, Coronavirus: 84 residents evacuated from Southern California nursing home after employees do not show up for work (8 April 2020), available at: <https://abc7news.com/coronavirus-riverside-county-nursing-home-senior-magnolia-rehabilitation-and-center/6086909/>

³³⁹ NBC News, Nursing homes overwhelmed by coronavirus: ‘It is impossible for us to stop the spread’ (1 April 2020), available at: <https://www.nbcnews.com/news/us-news/nursing-homes-overwhelmed-coronavirus-it-impossible-us-stop-spread-n1174171>

As a consequence of these and other problems, the death toll in long-term facilities has continued to climb.³⁴⁰ As of 30 July 2020, the New York Times reported that as many 362,000 people at some 16,000 facilities had been infected.³⁴¹ It also estimated that “deaths related to Covid-19 in these facilities account for more than 41 percent of the country’s pandemic fatalities”.³⁴² A similar account of the Foundation for Research on Equal Opportunity reports that, as of mid-July, the share of long-term care facility deaths in the United States is 45 percent.³⁴³

This reality contrasts sharply with procedures and guidelines issued by the Federal Government to try to protect nursing home residents from COVID-19, which have proved to be ineffective. Particularly, the Centers for Medicare and Medicaid Services (CMS)³⁴⁴ and the Centers for Disease Control and Prevention (CDC)³⁴⁵ have issued guidelines and recommendations aimed at slowing transmission of the disease and ameliorating the effects.³⁴⁶

2. Recommendations for States on protecting older persons right to health

In order to advance the realization right to health, States should take at least the following measures to ensure that the older persons have equal access to healthcare services:

- Design and implement COVID-19 response measures in a manner that recognizes older persons as a diverse group³⁴⁷ with varying needs.³⁴⁸
- Ensure the informed participation of older persons in the development of COVID-19 related responses and regulations.³⁴⁹

³⁴⁰ Kaiser Family Foundation, Rising Cases in Long-term Care Facilities Are Cause for Concern (21 July 2020), available at: <https://www.kff.org/coronavirus-covid-19/issue-brief/rising-cases-in-long-term-care-facilities-are-cause-for-concern/>

³⁴¹ The New York Times, More Than 40% of U.S. Coronavirus Deaths Are Linked to Nursing Homes (30 July 2020), available at: <https://www.nytimes.com/interactive/2020/us/coronavirus-nursing-homes.html>. These estimates are used in the absence of a comprehensive data collection by states and federal government regarding such deaths.

³⁴² Id.

³⁴³ The Foundation for Research on Equal Opportunity, Nursing Home Deaths From COVID-19: U.S. Historical Data (15 July 2020), available at: <https://freopp.org/nursing-home-deaths-from-covid-19-u-s-historical-data-b4ad44cfc48e>

³⁴⁴ The CMS is the agency within the US Department of Health and Human Services that administers major healthcare programs, develops and enforces quality and safety standards across the US health care system, and monitors the compliance of basic health and safety standards in hospitals, nursing homes, and other health care providers. Regarding CMS’s functions on nursing home facilities see: Centers for Medicare and Medicaid Services, Ensuring Safety and Quality in America’s Nursing Homes (15 April 2020), available at: <https://www.cms.gov/blog/ensuring-safety-and-quality-americas-nursing-homes>

³⁴⁵ The CDC is a US Federal Agency that is “responsible for controlling the introduction and spread of infectious diseases, and provides consultation and assistance to other nations and international agencies to assist in improving their disease prevention and control, environmental health, and health promotion activities”. See: <https://www.cdc.gov/maso/pdf/cdcmis.pdf>

³⁴⁶ Centers for Medicare and Medicaid Services, CMS Announces Actions to Address Spread of Coronavirus, 4 March 2020. Available at: <https://www.cms.gov/newsroom/press-releases/cms-announces-actions-address-spread-coronavirus>; Centers for Medicare and Medicaid Services, Upcoming Requirements for Notification of Confirmed COVID-19 (or COVID-19 Persons under Investigation), Among Residents and Staff in Nursing Homes (19 April 2020), available at: <https://www.cms.gov/files/document/qso-20-26-nh.pdf>; Centers for Medicare and Medicaid Services, toolkit on State Actions to Mitigate COVID-19 Prevalence in Nursing Homes (May 2020), available at: <https://www.cms.gov/files/document/covid-toolkit-states-mitigate-covid-19-nursing-homes.pdf>; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19) Preparedness Checklist for Nursing Homes and other Long-Term Care Settings, available at: https://www.cdc.gov/coronavirus/2019-ncov/downloads/novel-coronavirus-2019-Nursing-Homes-Preparedness-Checklist_3_13.pdf.

³⁴⁷ General Comment 6, para 16.

³⁴⁸ United Nations, Policy Brief: The Impact of Covid-19 on Older Persons (May 2020), p. 9, available at: <https://unsdg.un.org/sites/default/files/2020-05/Policy-Brief-The-Impact-of-COVID-19-on-Older-Persons.pdf>

³⁴⁹ United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, E/CN.4/2006/48 (2 March 2006), para 25; United Nations, Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/18/37 (4 July 2011), para 30; General Comment 14, para 54; and United Nations Principles for Older Persons, principle 7.

- Ensure that restrictions on freedom of movement conform with obligations under article 12 of the ICCPR and that such restrictions, including those effected by lockdowns and quarantines, are not based solely on age.³⁵⁰
- Adopt effective measures to tackle the social isolation of older persons in particular,³⁵¹ especially those on cognitive decline. These measures might include establishing a helpline for mental health and psychological support, implementing safety measures that allow family visits at long-term facilities, and helping older persons to use the internet to be in contact with family and friends.³⁵²
- Prohibit the making of medical decisions, including about access to COVID-19 testing, treatment and other healthcare services solely on the basis of a patient's age instead of a comprehensive clinical assessment.³⁵³
- Ensure free, prior, and informed consent for all COVID-19 related medical treatment. Prohibit healthcare workers from discouraging older persons from accepting COVID-19 related treatments solely based on age considerations.³⁵⁴
- Adopt clear and detailed guidelines for regulating the measures that must be taken in "nursing homes" and other institutions in which many older persons are living to ensure, among other things:
 - Prevention of transmission of COVID-19;
 - Access to all necessary hygiene control measures and PPE for both staff and residents of such facilities;
 - Access to testing and treatment for COVID-19; and
 - Human rights compliant responses to outbreaks of COVID-19 in such facilities.
- Collect and publicize disaggregated data on the specific needs of older persons and their increased vulnerability to COVID-19.

C. Women and Girls

Women and girls have been severely affected by the COVID-19 crisis which threatens to deepen gender inequalities globally.³⁵⁵ The Committee on the Elimination of Discrimination against Women (CEDAW Committee), in its Guidance Note "on CEDAW and COVID-19", highlights that some of the measures taken by States to respond to the pandemic have had an impact of limiting women and girls' access to healthcare.³⁵⁶ In an accompanying statement and "call to action," the Committee acknowledges that women and girls "have experienced multiple

³⁵⁰ Human Rights Watch, Rights Risks to Older People in COVID-19 Response (7 April 2020), available at: <https://www.hrw.org/news/2020/04/07/rights-risks-older-people-covid-19-response>. Under article 12 of the ICCPR, any limitation to freedom of movement on public health grounds must be provided in law, necessary and proportionate to protecting public health. As with other ICCPR rights, the limitations must be applied on a non-discriminatory basis.

³⁵¹ United Nations, Press release: "Unacceptable" – UN expert urges better protection of older persons facing the highest risk of the COVID-19 pandemic (27 March 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25748&LangID=E>

³⁵² World Health Organization, Preventing and managing COVID-19 across long-term care services, policy brief (24 July 2020), p. 28 and 29.

³⁵³ General Comment 14, para 37; United Nations, Thematic study on the realization of the right to health of older persons by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/18/37 (4 July 2011), para 24 and 61 ff; United Nations, The right to life of persons with disabilities and older persons infected by Covid-19, (27 April 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25829&LangID=E>

³⁵⁴ General Comment 6, para. 16; Corte IDH, Caso Poblete Vilches y otros Vs. Chile. Fondo, Reparaciones y Costas, Sentencia de 8 de marzo de 2018, Serie C No. 349, para 160 ff.

³⁵⁵ CESCR COVID-19 Statement, para 2, 5 and 8.

³⁵⁶ Committee on the Elimination of Discrimination against Women, CEDAW – Guidance Note on CEDAW and COVID-19 (14 May 2020), para 2, available at: <http://www.corteidh.or.cr/tablas/centro-covid/docs/Covid-19/CEDAW-Guidance-note-COVID-19.pdf>

and compounded forms of discrimination while on the front lines of responses, at home, in the health workforce and in various sectors of production".³⁵⁷

Though statistics vary between countries, overall COVID-19 has resulted in the death of more men than women, despite the fact that infection rates for women may be equal to or higher than that of men.³⁵⁸ While men therefore may possibly carry higher mortality risks, this does not tell the whole story of the gendered impact of COVID-19. The CEDAW Committee has called upon States to "address the disproportionate impact of the pandemic on women's health". Women have faced significant challenges in ensuring that their health needs are met during this health crisis. These include gender bias in the allocation of resources and diversion of funds during the pandemic; women's disproportionate burden of domestic care; and their higher representation in the health workforce which leaves them vulnerable to transmission of COVID-19.³⁵⁹

In assessing the impact of COVID-19 on the health of women and girls, the UN Office of the High Commissioner on Human Rights, noted that pre-existing barriers are exacerbated during health emergencies. These barriers include "social norms and gender based discrimination, criminalization (e.g. of abortion, same-sex sexual conduct, sex work, HIV transmission etc.), restricted freedom of movement, a lack of income, need of third party authorizations, and lack of child care options".³⁶⁰ These barriers hinder safe and confidential access to health services for women.

The 189 States Parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention) have an obligations to address these and other disproportionate impacts of COVID-19 on women and girls' health, including by ensuring that there is no "gender bias in the allocation of resources and diversion of funds during pandemics" which will "worsen existing gender inequalities, often to the detriment of women's health needs".³⁶¹

The obligation to provide access to health care without discrimination, including on the basis of gender and sex, is also an immediate, core obligation under the ICESCR which States must discharge even during situations such as public health or other emergencies. In particular, this immediate, core non-discrimination

³⁵⁷Committee on the Elimination of Discrimination Against Women, Call for joint action in the times of the COVID-19 pandemic (21 April 2020), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/STA/9158&Lang=en accessed 26 June 2020.

³⁵⁸ S Bhopal et al, Sex differential in COVID-19 mortality varies markedly by age (13 August 2020), Lancet, available at: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31748-7/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31748-7/fulltext); UN Women, COVID-19: Emerging Gender Data and Why it Matters (26 June 2020), available at: <https://data.unwomen.org/resources/covid-19-emerging-gender-data-and-why-it-matters>; John NG et al, COVID-19 Mortality Rates by Age and Gender: Why Is the Disease Killing More Men than Women? (10 July 2020), available at: <https://www.rgare.com/knowledge-center/media/research/covid-19-mortality-rates-by-age-and-gender-why-is-the-disease-killing-more-men-than-women>.

³⁵⁹ Committee on the Elimination of Discrimination against Women, CEDAW – Guidance Note on CEDAW and COVID-19 (22 April 2020), para 1, available at: <https://www.corteidh.or.cr/tablas/centro-covid/docs/Covid-19/CEDAW-Guidance-note-COVID-19.pdf>

³⁶⁰Office of the United Nations High Commissioner for Human Rights, COVID19 and women's human rights: Guidance (15 April 2020), p. 3, available at: https://www.ohchr.org/Documents/Issues/Women/COVID-19_and_Womens_Human_Rights.pdf See also: Joint United Nations Programme on HIV and AIDS, Rights in the time of COVID-19 Lessons from HIV for an effective, community-led response 2020, Available at: https://www.unaids.org/sites/default/files/media_asset/human-rights-and-covid-19_en.pdf; N Sun and L Zilli, COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Exposure and Transmission, Part I (3 April 2020), available at: <http://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-exposure-and-transmission-part-i/>; N Sun and L Zilli, COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Enforcement of Public Health Measures, Part II (3 April 2020): <http://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-enforcement-of-public-health-measures-part-ii/>.

³⁶¹ Committee on the Elimination of Discrimination against Women, Guidance Note on CEDAW and COVID-19 (22 April 2020), P. 3, para 1. Available at: https://www.ohchr.org/Documents/HRBodies/TB/COVID19/Compilation_statements.pdf

obligation applies even during public health crises such as the COVID-19 pandemic. The CEDAW Convention also prohibits gender-based discrimination in access to healthcare, including sexual and reproductive healthcare and family planning services.³⁶²

Similarly, regional human rights treaties such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol),³⁶³ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol Of San Salvador),³⁶⁴ the European Social Charter³⁶⁵ and the Council of Europe's Istanbul Convention on preventing and combatting violence against women and domestic violence³⁶⁶ also guarantee aspects of women's right to health, including sexual and reproductive health, and they place an obligation on States to protect this right without discrimination.

1. COVID-19 and gender discrimination in access to health

The COVID-19 pandemic has resulted in a number of gender-related health impacts. Failure to plan against and address these gendered impacts results in violations of the prohibition on discrimination in access to healthcare in international human rights law.

a) High risk of COVID-19 transmission

Globally, women are commonly the primary caregivers for children and sick family members, which has meant an additional domestic burden during the COVID-19 pandemic,³⁶⁷ functions which pose additional risks of COVID-19 transmission.

This risk of COVID-19 transmission is also high for women as they comprise some 70 percent of health workers and therefore face greater exposure in this regard.³⁶⁸ As the CEDAW Committee affirms, States should protect health workers and frontline workers from contagion through, for example, dissemination of necessary precautionary information and adequate provision of PPE as well as psychosocial support.³⁶⁹

³⁶² Convention on the Elimination of All Forms of Discrimination Against Women, Article 12.

³⁶³ Article 14 (1) of the Maputo Protocol Africa provides as follows: "States Parties shall ensure that the right to health of women including sexual and reproductive health is respected and promoted."

³⁶⁴ Article 10 of the Protocol of San Salvador guarantees the right to health, and Article 3 establishes the obligation for states to provide this right without discrimination.

³⁶⁵ European Social Charter (Revised), Article 11.

³⁶⁶ Article 20(2) of the Istanbul Convention provides as follows: "Parties shall take the necessary legislative or other measures to ensure that victims have access to healthcare and social services and that services are adequately resourced and professionals are trained to assist victims and refer them to the appropriate services".

³⁶⁷ Office of the United Nations High Commissioner for Human Rights, Raising Women's voices and leadership in COVID-19 Policies, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25818&LangID=E>

See, also: H Lewis, The Coronavirus Is a Disaster for Feminism, The Atlantic (19 March 2020), available at:

[https://www.theatlantic.com/international/archive/2020/03/feminism-womens-rights-coronavirus-covid19/608302/;](https://www.theatlantic.com/international/archive/2020/03/feminism-womens-rights-coronavirus-covid19/608302/)

N Aschoff, COVID-19 Should Be a Wake-Up Call for Feminists, Jacobin, available at: <https://jacobinmag.com/2020/04/covid-19-coronavirus-pandemic-feminism>

³⁶⁸ Office of the United Nations High Commissioner for Human Rights, COVID-19 and women's human rights: Guidance, available at: https://www.ohchr.org/Documents/Issues/Women/COVID-19_and_Womens_Human_Rights.pdf

See also: Oxfam South Africa, The Right to Dignified Healthcare Work is a right to Dignified Health (29 June 2020), available at: [https://www.oxfam.org.za/research-report/;](https://www.oxfam.org.za/research-report/) "Section F. Healthcare workers" of Section V of this document.

³⁶⁹ Committee on the Elimination of Discrimination against Women, Guidance Note on CEDAW and COVID-19, para 1, available at: <http://www.corteidh.or.cr/tablas/centro-covid/docs/Covid-19/CEDAW-Guidance-note-COVID-19.pdf>

Pregnant women and girls and those who have just given birth are also particularly vulnerable to infectious diseases including COVID-19.³⁷⁰ States should therefore proactively take measures to ensure that information on the risks of COVID-19 is provided to pregnant women. States should also ensure that healthcare workers attending to pregnant women are guided as to how to reduce COVID-19 transmission during pregnancy, at birth and post-delivery.³⁷¹

b) Limited or no access to sexual and reproductive healthcare

States' responses to COVID-19 have sometimes led to health services for women being interrupted or shut down entirely, thereby depriving women and girls of the enjoyment of their right to health in violation of States' core obligations. This is because in many States women and girls' sexual and reproductive health rights and services "are not regarded as a life-saving priority" in the face of COVID-19.³⁷² In many parts of the world, mobile clinics and community based care outlets, which provide crucial sexual and reproductive health services, have been severely affected, scaled down or even closed.³⁷³ Such services include access to contraception, maternal healthcare, cervical cancer screening, delivery services for pregnant women HIV related services, abortion services, and those services aimed at addressing gender based violence.

There have also been major disruptions to provision of family planning services, with millions of women in low and middle-income countries, in particular, projected to be unable to access contraceptives.³⁷⁴ In her statement on COVID-19, the Special Rapporteur on the Rights of Women in Africa highlighted that many women in Africa have "limited access" to sexual and reproductive health care services during this health crisis.³⁷⁵ But these problems are by no means limited to countries of the global south.

- In the **United States**, the COVID-19 crisis has arguably been exploited to restrict women's access to essential healthcare services like abortion. As noted by the UN Working Group on Discrimination Against Women, certain individual states have invoked COVID-19 as the basis for emergency orders suspending procedures "not deemed immediately medically necessary" in order to restrict access to abortions.³⁷⁶ Women are now forced to travel out of state in order to seek abortion services, thereby exposing them and others to COVID-19 transmission in direct contradiction of public health

³⁷⁰ Office of the United Nations High Commissioner for Human Rights, COVID-19 and women's human rights: Guidance, p. 3, available at: https://www.ohchr.org/Documents/Issues/Women/COVID-19_and_Womens_Human_Rights.pdf

³⁷¹ World Health Organization, Pregnancy, Childbirth, breastfeeding and COVID-19, available at: <https://www.who.int/reproductivehealth/publications/emergencies/COVID-19-pregnancy-ipc-breastfeeding-infographics/en/>

³⁷² International Development Law Organization et al, Justice for Women Amidst COVID-19, (2020), p. 20, available at: https://www.idlo.int/sites/default/files/pdfs/publications/idlo-justice-for-women-amidst-covid19_0.pdf

³⁷³ International Planned Parenthood Federation, Covid-19 pandemic cuts access to sexual and reproductive healthcare for women around the world (9 April 2020), available at: <https://www.ippf.org/news/covid-19-pandemic-cuts-access-sexual-and-reproductive-healthcare-women-around-world>.

See also: UN Women, The first 100 days of COVID19 in Asia and the Pacific: A gender lens (2020), available at: https://www2.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2020/04/ap_first_100-days_covid-19-r02.pdf?la=en&vs=3400

³⁷⁴ United Nations Population Fund (UNFPA), Impact of the COVID-19 Pandemic on Family Planning and Ending Gender-based Violence, Female Genital Mutilation and Child Marriage (24 April 2020), available at: https://www.unfpa.org/sites/default/files/resource-pdf/COVID-19_impact_brief_for_UNFPA_24_April_2020_1.pdf

³⁷⁵ African Commission on Human and Peoples' Rights, Press Release of the Special Rapporteur on the Rights of Women in Africa on violations of women's rights during COVID19 pandemic (6 May 2020), available at: <https://www.achpr.org/pressrelease/detail?id=495Press>

³⁷⁶ Office of the United Nations High Commissioner for Human Rights, United States: Authorities manipulating COVID-19 crisis to restrict access to abortion (27 May 2020), available at: <https://yubanet.com/usa/united-states-authorities-manipulating-covid-19-crisis-to-restrict-access-to-abortion-say-un-experts/>

guidelines.³⁷⁷ In certain states, such decisions to restrict access to abortion services, were successfully challenged and lifted,³⁷⁸ but in Texas, for example, abortions were banned until recently, and have now been lifted “because of easing of restrictions on “elective” medical procedures”.³⁷⁹

- In **Poland**, there are also ongoing efforts to enact a total ban on abortion, with human rights defenders restricted from assembling to protesting these laws during COVID-19.³⁸⁰
- Challenges in accessing abortion have also been reported in other parts of **Europe**, especially in countries with travel bans.³⁸¹ This has been the case in **Malta** for example, where women face difficulty in accessing abortions abroad due to travel bans.³⁸²
- The stoppage of abortion services due to the COVID-19 pandemic has also been reported in **Brazil**, where at least one abortion clinic was closed, purportedly, to prevent the spread of COVID-19.³⁸³
- In **Zimbabwe**, pregnant women have been put at risk by measures responding to COVID-19.³⁸⁴ This because many women in rural areas have struggled to access prenatal care due to lockdown with many of them being forced to deliver at home due to the lack of transport to clinics.

The decrease in access to reproductive health services is a retrogressive measure in direct violation of the obligation of non-retrogression in the realization of ESCR. States taking retrogressive measures may do so only where it is strictly necessary to do so for a legitimate purpose and where less restrictive alternatives are unavailable. In addition, States must ensure that any limitations of rights are directed towards a legitimate objective, are strictly necessary and not arbitrary or discriminatory in application. Many global stoppages or restrictions on access to reproductive health services are unlikely to meet these standards and therefore violate States’ core obligations in terms of the right to health.

c) Increased Gender-based Violence

There has been a global increase in gender based violence since the implementation of “stay-at-home restrictions,” as an increased number of women and girls are trapped in abusive situations with abusers.³⁸⁵ This pattern is not unique to the COVID-19 outbreak as similar patterns have been observed where

³⁷⁷ ibid

³⁷⁸ Penn Law, International Women’s Human Rights: COVID-19’s impact on domestic violence and reproductive rights (20 April 2020), available at <https://www.law.upenn.edu/live/news/9986-international-womens-human-rights-covid-19s-impact>

³⁷⁹ A Maqbool, Coronavirus: Texas banned abortions – how did that affect women? (6 May 2020), available at: <https://www.bbc.com/news/world-us-canada-52535940>

³⁸⁰ International Women’s Health Coalition, Feminists Defend Abortion Access Amid Pandemic (7 May 2020), available at: <https://iwhc.org/2020/05/feminists-defend-abortion-access-amid-pandemic/>

See, also: BBC, Poland abortion: Protesters against ban defy coronavirus lockdown (15 April 2020), available at: <https://www.bbc.com/news/world-europe-52301875>

³⁸¹ Council of Europe, COVID-19: Ensure women’s access to sexual and reproductive health and rights (7 May 2020), available at: <https://www.coe.int/en/web/commissioner/-/covid-19-ensure-women-s-access-to-sexual-and-reproductive-health-and-rights>

³⁸² Doctors for Choice, Impact of COVID19 on women in Malta seeking abortions: An overview (24 May 2020), available at: <https://www.doctorsforchoice.mt/post/impact-of-covid-19-on-women-in-malta-seeking-abortion-an-overview?fbclid=IwAR3Ik2CEDui9xlmUPFVdZOdwx9t4Pjq001XhVVrk8CUEFiIF7bmqq45QkYU>

³⁸³ International Women’s Health Coalition, Feminists Defend Abortion Access Amid Pandemic (7 May 2020), available at <https://iwhc.org/2020/05/feminists-defend-abortion-access-amid-pandemic/>

³⁸⁴ N Dlamini, Zimbabwe: Coronavirus- Lockdown Puts Pregnant Zim women At Risk, All Africa (25 April 2020), available at: <https://allafrica.com/stories/202004270656.html>

³⁸⁵ Office of the United Nations High Commissioner for Human Rights, COVID-19 and Women’s Human Rights: Guidance (15 April 2020), para 1, available at: https://www.ohchr.org/Documents/Issues/Women/COVID-19_and_Womens_Human_Rights.pdf

gender-based violence (GBV) “increases during every type of emergency – whether economic crises, conflict or disease outbreaks”.³⁸⁶

There have been reports of a surge in various forms of sexual and gender-based violence, including intimate partner violence, in the **United Kingdom, Brazil, Germany, Italy, Spain, Thailand** and the **United States**.³⁸⁷

Quarantine measures have also heightened the risk of gender-based violence for women with intersecting vulnerabilities. For example, in **India** a woman migrant, who was quarantined alone in a school, was subjected to gang rape.³⁸⁸ Similarly, in **South Africa**, a teenage girl was raped at a temporary homeless camp erected as part of the COVID-19 response.³⁸⁹ In some instances, states have reduced prevention and protection efforts, social services and care needed by victims of GBV during the pandemic, including healthcare and shelter services. This has had the effect of undermining efforts to combat GBV.³⁹⁰

Violence against women has serious short and long term health consequences for women, including physical, sexual and reproductive and mental health consequences.³⁹¹ Survivors of GBV should be provided with timely treatment for sexually transmitted infections, treatment for physical injuries, mental health treatment, and abortion services.³⁹² States should therefore ensure that adequate healthcare services are accessible and provided to survivors of gender based violence during the COVID-19 pandemic.

2. Recommendations for States on gendered impact of COVID-19 on health

States should take proactive measures to address the impact of COVID-19 on women and girls. States should ensure in particular that retrogressive measures are not taken and that access reproductive health services and other essential healthcare services needed by women and girls are not restricted during this pandemic. States should adopt targeted measures to mitigate the gendered impacts of COVID-19 on the health of women and girls, particularly those who are in marginalized or disadvantaged situations. These measures include:

- Provide comprehensive sexual and reproductive health as essential services during the COVID-19 pandemic. This includes the provision of modern forms of contraception, safe abortion and post abortion services with full and informed consent. Such provision should be ensured to women and

³⁸⁶ United Nations Development Programme, Gender Based Violence and COVID-19 (11 May 2020), available at: <https://www.undp.org/content/undp/en/home/librarypage/womens-empowerment/gender-based-violence-and-covid-19.html>

³⁸⁷ International Federation for Planned Parenthood, COVID-19 and the rise of gender-based violence (22 April 2020), available at: <https://www.ippf.org/blogs/covid-19-and-rise-gender-based-violence>; Bangkok Post, Abuse on rise amid outbreak (8 May 2020) available at: <https://www.bangkokpost.com/thailand/general/1914484/abuse-on-rise-amid-outbreak>.

³⁸⁸ TNN, Woman quarantined in school gang-raped by 3 men in Rajasthan (26 April 2020), available at: <https://timesofindia.indiatimes.com/city/jaipur/woman-quarantined-in-school-gangraped-3-held/articleshow/75384270.cms>

³⁸⁹ IOL, Suspect held for teen’s rape at Strandfontein camp for homeless, 11 April 2020. Available at: <https://www.iol.co.za/news/south-africa/western-cape/suspect-held-for-teens-rape-at-strandfontein-camp-for-homeless-46588855>

³⁹⁰ United Nations Population Fund, Impact of the COVID19 Pandemic on Family Planning and Ending Gender-based Violence, Female Genital Mutilation and Child Marriage (24 April 2020), available at: https://www.unfpa.org/sites/default/files/resource-pdf/COVID-19_impact_brief_for_UNFPA_24_April_2020_1.pdf

³⁹¹ Health Cluster, Gender-based violence in health emergencies, available at: <https://www.who.int/health-cluster/about/work/other-collaborations/gender-based-violence/en/>

³⁹² Id.

girls at all times, through toll-free lines and easy to access procedures such as online prescriptions which are, if necessary, free of charge.

- Protect the mental and physical health of women and girls with comorbidities including older persons, persons with disabilities and those with pre-existing health conditions.
- Ensure adequate health care access and sufficient social assistance for women and girls living in poverty, including those without health insurance and/or income during COVID-19.
- Take measures to respond to the COVID-19 pandemic which prioritize the provision of pre- and post-natal healthcare services in a manner that does not risk COVID-19 transmission.
- Ensure that the comprehensive package of health services necessary for survivors of GBV – including timely treatment for sexually transmitted infections and physical injuries, mental health needs, and abortion services – are designated essential services and remain accessible even during lock-down periods.

D. LGBT Persons

The prohibition of discrimination in international human rights law includes a prohibition on discrimination on the basis of sexual orientation and gender identity/expression.³⁹³ Although “sexual orientation”, “gender identity” or “gender expression” are not expressly mentioned by the vast majority of international human rights instruments as prohibited discrimination grounds, the prohibition of discrimination based on sex³⁹⁴ and the one on “other status” have been repeatedly interpreted by UN Treaty bodies to include sexual orientation and gender identity/expression.³⁹⁵

In the context of the right to health,³⁹⁶ Article 12(1) of the ICESCR provides for the right of *everyone* to “the highest attainable standard of physical and mental health”. The CESCR has confirmed “sexual orientation” and “gender identity” as prohibited grounds of discrimination in access to ESCR, including the right to health.³⁹⁷ State parties to the ICESCR are therefore obliged to ensure unimpeded access to “health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups”, including LGBT persons.³⁹⁸

³⁹³ As has been stated by the Inter-American Court of Human Rights, the terminology to refer to the different groups of people who do not assume conventional or traditional gender roles “is not fixed and evolves rapidly”. In the text, we are using the most common acronym: LGBT. However, the use of this acronym does not imply a lack of acknowledgment of other manifestations of sexual orientation or gender identity expression.

On this point see: Corte IDH, *Identidad de género, e igualdad y no discriminación a parejas del mismo sexo*, Opinión Consultiva OC-24/17, 24 de noviembre de 2017, Serie A No. 24, para. 32.

³⁹⁴ See, e.g., Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), “8.7 The State party has sought the Committee’s guidance as to whether sexual orientation may be considered an “other status” for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.” See also: International Commission of Jurists, *Practitioners Guide No.4: Sexual Orientation, Gender Identity and International Human Rights Law* (2009), available at: <https://www.icj.org/wp-content/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf>; International Commission of Jurists, *SOGI Casebook*, available at: <https://www.icj.org/sogi-casebook-introduction/>.

³⁹⁵ Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal* (2012), p. 41, available at: <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>; Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal*, 2ed) (2019) HR/PUB/12/06/Rev.1, available at: https://www.ohchr.org/Documents/Publications/Born_Free_and_Equal_WEB.pdf; General Comment 20, para. 27.

³⁹⁶ See: section A, Non-discrimination: The Right to Health of “everyone”, Section III of this report.

³⁹⁷ General Comment 14, para 18. General Comment 20, para. 32.

³⁹⁸ General Comment 14, para. 43(a)

In 2006, a set of legal principles on the application of international law to human rights violations based on sexual orientation and gender identity/expression (SOGIE) were developed by human rights specialists.³⁹⁹ These principles, referred to as the “Yogyakarta Principles” and have since been updated in 2017 by the “Yogyakarta Principles plus 10”.⁴⁰⁰ Collectively, they provide further detail on States’ binding obligations regarding SOGIE relating to the full range of human rights.

Principle 17 provides for the “right to the highest attainable standard of health” in the following terms:

“Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.”

Principle 17 also sets out concrete recommendations for States of measures necessary to facilitate access to healthcare for LGBT persons without discrimination. Some examples include the non-discriminatory provision of sexual and reproductive healthcare, goods, services and facilities; and access “by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support”.

Despite these protections under international human rights law, globally LGBT persons continue to face systemic discrimination and barriers in their access to justice, healthcare⁴⁰¹ and other human rights, especially in countries where LGBT identity and expression remains criminalized.

The UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (UN Independent Expert on SOGI) has noted that during the COVID-19 pandemic, for LGBT persons, “criminalisation laws, still existing in 70 countries” have created a “higher risk of police abuse and arbitrary arrest and detention during curfews, and hindered meaningful data collection.”⁴⁰² In addition, in the past, UN human rights independent experts have spoken out against harmful, abusive and coercive practices that have target LGBT persons during COVID-19, and noted that pathologization of LGBT people continues to be used as a justification for severe human rights violations.⁴⁰³

³⁹⁹ The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, undertook a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States’ human rights obligations. In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, in Indonesia, to outline a set of international principles relating to sexual orientation and gender identity. The result was The Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity: a universal guide to human rights which affirm binding international legal standards with which all States must comply <https://www.icj.org/yogyakarta-principles/>.

⁴⁰⁰ The Yogyakarta Principles plus 10: available here: https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

⁴⁰¹ G Albuquerque et al, Access to health services by lesbian, gay, bisexual, and transgender persons: systematic literature review, (2016) BMC Int Health Hum Rights 16: 2.

⁴⁰² Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, States must include LGBT community in COVID-19 response: The how and why from a UN expert (14 May 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25889&LangID=E>

⁴⁰³ Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness - For International Day against Homophobia, Transphobia and Biphobia (17 May 2016), available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>

In this context, the UN Independent Expert on SOGI in his report to the Human Rights Council in May 2020 specifically highlighted the continued prevalence of “so-called conversion therapy” practices.⁴⁰⁴ “Conversion therapy” is an umbrella term that encompasses a wide range of actions, practices and methods that are carried out with the “specific aim of interfering [with individuals’] personal integrity and autonomy because their sexual orientation or gender identity do not fall under what is perceived by certain persons as a desirable norm”.⁴⁰⁵

Such practices target LGBT persons and violate States’ international human rights law obligations in terms of the rights to bodily autonomy and health and impinge on LGBT persons’ rights to free expression of their sexual orientation and gender identity. They may also constitute a “breach to the prohibition of torture and ill-treatment”.⁴⁰⁶ These practices find no support in scientific evidence, have been “consistently debunked”, and have been shown to cause long-term, irreparable harm to the physical and mental health of LGBT persons.⁴⁰⁷

Finally, there are also “historic barriers”⁴⁰⁸ to access to healthcare services for LGBT persons. It is common that LGBT individuals encounter stigma, discrimination, and violence while seeking access to and the provision of healthcare, goods and services.⁴⁰⁹ Transgender people, for example, face problems in receiving “gender-affirming surgeries and hormone interventions, especially in low-income and middle-income countries”.⁴¹⁰ In addition, “LGBT persons are more likely than their peers to lack health coverage or the monetary resources to visit a doctor, even when medically necessary”.⁴¹¹

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has highlighted that criminalization of sexual orientation, gender identity and expression renders LGBT persons “much more likely to be unable to gain access to effective health services, and preventive health measures that should be tailored to these communities are suppressed”.⁴¹² Such criminalization also increases the risk of violence, abuse and social stigmatization of LGBT persons.⁴¹³

⁴⁰⁴ A/HRC/44/53 ‘Practices of so-called “conversion therapy” Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: <https://undocs.org/A/HRC/44/53>

⁴⁰⁵ Ibid

⁴⁰⁶ UN Expert calls for global ban on practices of so-called “conversion therapy” (8 July 2020), (18 June 2020), available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26051&LangID=E>

⁴⁰⁷ Ibid

⁴⁰⁸ The World Bank, Stigma is not quarantined: The impact of COVID-19 on the LGBTI community (15 May 2020), available at: <https://www.worldbank.org/en/news/feature/2020/05/15/estigma-cuarentena-covid-lgbti>

⁴⁰⁹ See for example: Centers for Disease Control and Prevention, Stigma and Discrimination, available at: <https://www.cdc.gov/msmhealth/stigma-and-discrimination.htm>; A Müller, Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Health Care in South Africa, in Health and human rights vol. 18,2 (2016), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5395001/>

⁴¹⁰ Wang Y, Pan B, Liu Y, Wilson A, Ou J, Chen R. Health care and mental health challenges for transgender individuals during the COVID-19 pandemic, in *Lancet Diabetes Endocrinol* (20 May 2020), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7239622/>

⁴¹¹ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, ASPIRE Guidelines on COVID-19 response and recovery free from violence and discrimination based on sexual orientation and gender identity (18 June 2020), guideline IV: Indirect discrimination is a real and significant risk (and exacerbates stigmatization against LGBT persons).

⁴¹² Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, report, A/HRC/14/20 (27 April 2010), para 18.

⁴¹³ Id, paras 6 and 17-21.

1. COVID-19 and its impact on LGBT persons

In the context of the COVID-19 pandemic there is a generally an increased risk of persecution of LGBT people.⁴¹⁴ Indeed, some States have even “enacted measures which intentionally target LGBTQ persons and communities under the guise of public health”.⁴¹⁵

There is also a risk that healthcare services, goods and facilities needed by LGBT persons, in particular, may be “interrupted or deprioritized”.⁴¹⁶ This includes HIV treatment, testing and hormonal treatment and gender affirming treatments for transgender persons.⁴¹⁷ Discriminatory legal systems criminalizing LGBT identities,⁴¹⁸ as well as social stigma and targeted hatred, have created more barriers to LGBT persons seeking COVID-19 specific related healthcare facilities, services and goods.

The OHCHR has therefore identified LGBT people as particularly “vulnerable”⁴¹⁹ during the pandemic. In particular, LGBT people who are living with “compromised immune systems, including some persons living with HIV/AIDS” face “a greater risk from COVID-19” itself.⁴²⁰ Disproportionate levels of homelessness and economic precarity among LGBT people further expose them to disproportionate risk of contracting COVID-19.⁴²¹

Existing criminalization, stigma and discrimination against LGBT people, which in some places have increased during COVID-19, may also exacerbate risks and reduce the probability of LGBT persons seeking and receiving healthcare goods and services on an equal basis.⁴²²

a) Stigma and criminalization as barriers to healthcare

The COVID-19 pandemic has exacerbated the barriers LGBT people face in accessing healthcare, goods and services which States are required to provide under international human rights law and standards related to the right to health. This is particularly true in countries where same-sex relations and/or diverse sexual orientations and gender identities are criminalized.

In **Malaysia**, for example, where mental health guidelines have homophobic and transphobic content, LGBT people might be discouraged “in accessing affordable

⁴¹⁴ Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity, States must include LGBT community in COVID-19 response: The how and why from a UN expert (17 May 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25889&LangID=E>.

⁴¹⁵ Id.

⁴¹⁶ Office of the United Nations High Commissioner for Human Rights, Covid-19 and the human rights of LGBTI people (17 April 2020), available at: <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>

⁴¹⁷ Id.

⁴¹⁸ The International Commission of Jurists in its following reports document and analyze the experiences of queer people in India and Myanmar, “Unnatural Offences”: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity (February 2017), <https://www.icj.org/wpcontent/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf>, , “Living with Dignity”: Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Spaces in India (June 2019), <https://www.icj.org/india-lgbtq-persons-face-discrimination-in-housing-work-and-public-spaces-despite-increased-legal-recognition-new-icj-report/>, “In the shadows”: Systemic Injustice Based on Sexual Orientation and Gender Identity/Expression in Myanmar (November 2019) <https://www.icj.org/myanmars-criminal-law-and-justice-system-perpetuates-stigmatization-discrimination-and-human-rights-violations-against-its-lgbtq-people-new-report-finds/>

⁴¹⁹ Office of the United Nations High Commissioner for Human Rights, Covid-19 and the human rights of LGBTI people (17 April 2020), available at: <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>.

⁴²⁰ Id.

⁴²¹ Id.

⁴²² Id.

public mental health services”.⁴²³ Being transgender, gay, lesbian and bisexual in Malaysia are crimes under both Syariah state legislation and the Penal Code, which criminalizes “unnatural offences”.⁴²⁴ More generally, as has been noted recently by the UN Special Rapporteur on Extreme Poverty, “transgender people face considerable challenges in accessing basic services such as health care”.⁴²⁵

In July 2020, the situation was aggravated by inflammatory statements by Malaysia’s Minister in charge of religious affairs, who called on religious state authorities to carry out “enforcement actions” against transgender persons that go beyond arrests and detentions, including forms of “religious education”, exposing them to conversion therapy to ensure they “return to the right path”.⁴²⁶

Similarly, Malaysia’s Health Ministry’s National Strategic Plan on Ending AIDS 2019-2030 specify key activities requiring “behavior change”, to minimize risk of acquiring HIV and STI infections through “spiritual support and guidance”.⁴²⁷ Such behaviour change is intended to “guide” Muslim men who have sex with men to “abandon the practice of unnatural sex”.⁴²⁸

In **Indonesia**, although currently there is no national law that expressly criminalizes LGBT identity or expression, there are local, provincial ordinances as seen in the provinces of South Sumatra and Aceh. Articles 63 and 64 of the Provincial Ordinance on criminal offences in Aceh, for example, allow for the implementation of Syariah law which criminalizes same-sex sexual relationships with the penalty of 100 lashes or a maximum of eight years imprisonment.⁴²⁹ Discriminatory enforcement of vague and overly broad “public indecency” offences under the national Penal Code cause significant harm to transgender persons.⁴³⁰

Negative social stigma towards LGBT persons is widespread and heavily influenced by certain interpretations of religion, customs and culture in the country.⁴³¹ The current parliamentary discussions regarding the Draft Penal Code Revision⁴³² and the Family Resilience Bill have the potential to result in the eventual adoption of and enforcement of legal provisions that criminalize LGBT people and force them to undergo a conversion therapy.⁴³³

⁴²³ Galen Centre for Health and Social Policy, What It Means To Suffer in Silence Challenges to Mental Health Access Among LGBT People (April 2020), p. 8, available at: https://galencentre.org/wp-content/uploads/2019/04/PFA02_2019_Challenges-to-Mental-Health-Access-Among-LGBT-People.pdf

⁴²⁴ Human Rights Watch, This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism (2008), available at: https://www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf.

⁴²⁵ Report of the Special Rapporteur on extreme poverty and human rights, Visit to Malaysia A/HRC/44/40/Add.1 (6 April 2020); Human Rights Commission of Malaysia (Suhakam), Study On Discrimination Against Transgender Persons Based In Kuala Lumpur And Selangor (2019), available at: <https://www.ohchr.org/Documents/Issues/SexualOrientation/SocioCultural/NHRI/Malaysia%20Human%20Rights%20Commission.pdf>.

⁴²⁶ International Commission of Jurists, Malaysia: Minister’s order to take action against the transgender community must be revoked (15 July 2020), available at: <https://www.icj.org/malaysia-ministers-order-to-take-action-against-the-transgender-community-must-be-revoked/>.

⁴²⁷ National Strategic Plan: Ending AIDS 2019-2030, Malaysia’s Ministry of Health: http://vlhb.moh.gov.my/cms/content.jsp?id=com.tms.cms.document.Document_f4ad1ba5-a0188549-d7eb9d00-8579b30f

⁴²⁸ Ibid, page 75

⁴²⁹ Human Rights Watch, There Political Games Ruin Our Lives, Indonesia’s LGBT Community Under Threat (10 August 2016), available at: <https://www.hrw.org/report/2016/08/10/these-political-games-ruin-our-lives/indonesias-lgbt-community-under-threat>

⁴³⁰ Human Dignity Trust, Indonesia, : <https://www.humandignitytrust.org/country-profile/indonesia/>

⁴³¹ Ibid

⁴³² Human Rights Watch, Indonesia: Draft Criminal Code Disastrous for Rights (18 September 2019), available at: <https://www.hrw.org/news/2019/09/18/indonesia-draft-criminal-code-disastrous-rights>

⁴³³ The Jakarta Post, Forced exorcisms touted as ‘cure’ for LGBT Indonesians (7 May 2020), available at: <https://www.thejakartapost.com/news/2020/05/07/forced-exorcisms-touted-as-cure-for-lgbt-indonesians.html>

In this context, the COVID-19 pandemic has deepened cultural and social stigma, which have been perpetuated in the media, through which LGBT persons have sometimes been cast as “being responsible for the coronavirus epidemic”.⁴³⁴ The social stigma of being LGBT, living with HIV, and fear of criminalization have played connected, interlinked roles in disrupting access to HIV and antiretroviral therapy during the COVID-19 pandemic. The implementation of movement-restriction measures taken to respond to the pandemic has led to a reduction in access to and availability of HIV-testing, clean needles and condoms.⁴³⁵

In Bogotá, **Colombia**, although domestic legislation does not criminalize sexual orientation or gender identity expressions, LGBT persons are still victims of discrimination and violence, even in the context of the internal conflict.⁴³⁶ In the case of transgender persons, they face serious obstacles to access health services.⁴³⁷ In late May, a transgender woman who had COVID-19 symptoms did not receive medical attention after the paramedics were informed she was a person living with HIV. The paramedics decided not to take her to a hospital stating that she probably was suffering an overdose. She died 40 minutes after the paramedics left her house.⁴³⁸ More generally, local civil society organizations have denounced the lack of access to health care for transgender women living with HIV in other cities of the country.⁴³⁹

In **the Republic of Korea**, social stigma against LGBT persons hindered the effort of the authorities to trace thousands of people who visited Itaewon nightlife district, a zone where there was an outbreak of COVID-19 in May. Since the person who was purportedly responsible for the outbreak had visited two places popular with gay men, LGBT persons feared they would suffer discrimination as a result.⁴⁴⁰

b) Domestic legal framework changes as barriers to healthcare

During the pandemic, LGBT people have faced new problems accessing healthcare services due to modifications introduced in the COVID-19 context to previous legal regulations that guaranteed their rights.

In the **United States**, in June 2020, the federal protection against discrimination for transgender people in access to healthcare, goods and services was eliminated.⁴⁴¹ The US Department of Health and Human Services justified this

⁴³⁴ Sejuk.org, Pandemic and religion against LGBT Phobia (31 May 2020), available at: <https://sejuk.org/2020/05/31/pandemic-and-religion-against-lgbt-phobia/>

⁴³⁵ Why HIV care services must continue during pandemic (10 July 2020), Jakarta Post, Elly Burhaini Faizal, available here: <https://www.thejakartapost.com/academia/2020/07/10/why-hiv-care-services-must-continue-during-pandemic.html>

⁴³⁶ See: Colombia Diversa, Orders of Prejudice: Systematic Crimes against LGBT People in the Colombian Armed Conflict (July 2020), available at: <https://colombiadiversa.org/colombiadiversa2016/wp-content/uploads/2020/07/english-version-Orders-Of-Prejudice.pdf>

⁴³⁷ Ministerio del interior & Programa de Acción por la Igualdad y la Inclusión Social (PAIIS) de la Facultad de Derecho de la Universidad de los Andes, Recomendaciones para la garantía del derecho a la salud de las personas trans: un primer paso hacia la construcción de lineamientos diferenciales para la atención humanizada de personas trans en Colombia (2018), available at: <http://ligadesaludtrans.org/recomendamos/>

⁴³⁸ O Steadman, A Black Trans Sex Worker Died After Paramedics Failed to Take Her to The Hospital, (25 July 2020), BuzzFeed News, available at: https://www.buzzfeednews.com/article/otillisteadman/alejandra-monocuco-colombia-trans-sex-worker-hiv?bftwnews&utm_term=4ldqpgc#4ldqpgc

⁴³⁹ See: Caribe Afirmativo, ¿Cuánto más en espera de una ambulancia? (12 June 2020), available at: <https://caribeafirmativo.lgbt/cuanto-mas-espera-una-ambulancia/>; Caribe Afirmativo, El abandono y prejuicios del Estado hacia mujeres trans continúan evidenciándose en Cartagena (15 June 2020), available at: <https://caribeafirmativo.lgbt/abandono-prejuicios-del-estado-hacia-mujeres-trans-continuan-evidenciandose-cartagena/>

⁴⁴⁰ J Ryall, Is South Korea's LGBT+ community being scapegoated for COVID-19 spread?, DW (13 May 2020), available at: <https://www.dw.com/en/is-south-koreas-lgbt-community-being-scapegoated-for-covid-19-spread/a-53423958>

⁴⁴¹ Department of Health and Human Services, HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs (12 June 2020), available at: <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html>

decision arguing that that sexual orientation is not a protected category under the Affordable Care Act.⁴⁴² As a result of this decision, in the middle of the COVID-19 pandemic, transgender people might be denied care for a check-up at a doctor's office, treatments or procedures, including cancer treatments or procedures related to gender transition.⁴⁴³

In April 2020, in **Poland**, the Criminal Code was amended to include harsher penalties for HIV exposure, a move that was introduced along with other measures put in place to combat the pandemic. The amendment sought to increase existing penalties for HIV exposure, from a three-year maximum prison sentence, to eight-year maximum.⁴⁴⁴ The law also levies a harsh, disproportionate penalty for exposure to other sexually transmitted infections and/or infectious diseases, from a fine or one-year prison sentence to imprisonment for a maximum of six years.

In May 2020, **Hungary's** Parliament, passed a law barring transgender, intersex and gender variant people from legally changing their gender. The law required individual's sex assigned at birth to be registered in the national registry of birth, marriages and deaths and prohibits any changes to these records.⁴⁴⁵ It was passed by the Hungarian Parliament utilizing its extraordinary emergency powers that came into effect during the COVID-19 pandemic.

c) Deprioritization of healthcare services

Another prevalent concern compromising LGBT persons' right to health is the lack of access to HIV treatments due to lockdowns and other COVID-19 measures.⁴⁴⁶ The UN Independent Expert on SOGI has stressed that, since gay men and trans women represent "a significant proportion of those living with HIV-induced compromised immune systems", they are at higher risk "of developing severe symptoms of COVID-19".⁴⁴⁷

LGBT people have been reported to face challenges in accessing HIV medication due to for example, depleted stocks, reduction of working hours of health service providers or complete closure of health centres in accordance with lockdown requirements. For example:

- In **Pakistan**, where there were reports of depletion of ARVs and unavailability of HIV services even before the pandemic, there are fears that the pandemic will only exacerbate these problems and further reduce the number of LGBT people who can access treatment.⁴⁴⁸

⁴⁴² Id.

⁴⁴³ S Simmons-Duffin, Transgender Health Protections Reversed By Trump Administration, NPR, 12 June 2020, available at:

⁴⁴⁴ HIV Justice Network, Poland: Country's Criminal Code amended to increase sentencing in cases of HIV exposure (6 April 2020), available at: <https://www.hivjustice.net/news-from-other-sources/poland-countrys-criminal-code-amended-to-increase-sentencing-in-cases-of-hiv-exposure/>

⁴⁴⁵ Amnesty International, Hungary: Government must revoke prohibition of gender legal recognition, available at: <https://www.amnesty.org/en/documents/eur27/2085/2020/en/>

⁴⁴⁶ N Bhalla & O Lopez, No medicine, no food: Coronavirus restrictions amplify health risks to LGBT+ people with HIV, Reuters (20 May 2020) available at: <https://www.reuters.com/article/us-health-coronavirus-lgbt-aids/no-medicine-no-food-coronavirus-restrictions-amplify-health-risks-to-lgbt-people-with-hiv-idUSKBN22W28G>

⁴⁴⁷ Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity, States must include LGBT community in COVID-19 response: The how and why from a UN expert (17 May 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25889&LangID=E>

⁴⁴⁸ Apcom, Covid-19 and its effect on diverse SOGIESC communities, HIV services and Key Populations, available at: <https://www.apcom.org/the-covid-19-effect-series-part-1/>

- In **Mongolia**, there have been reports of health service providers reducing operating hours resulting in a decrease in people able to access treatment.⁴⁴⁹
- In **Sri Lanka**, there are reports of clinics being completely closed down due to curfews and lockdown and people are afraid to access treatment in public clinics due to stigma and discrimination.⁴⁵⁰

Another challenge in accessing HIV treatment is the lack of transportation to reach healthcare facilities due to lockdown measures. For example:

- In **Thailand**, it has been reported that government measures, such as limiting public transportation across the country, have had significant negative impact on the HIV service delivery in the country.⁴⁵¹ Many community-based organizations providing healthcare services have had to scale back their operations and working hours, which, in turn, have negatively impacted HIV testing and treatment services for LGBT people.⁴⁵²
- In **Uganda**, there have been reports of LGBT persons being unable to access their HIV medicines due to lockdown restrictions that have resulted in the unavailability of transport.⁴⁵³

In some cases, movement is difficult and special permits may be required for any travel, including for collection of medication: For example:

- In **China** there were also reports of people struggling to access HIV drugs as the lockdown “made it impossible for them to leave their homes without special permission to go to hospitals for their medication.”⁴⁵⁴ In addition, some LGBT persons “preferred taking the risk of not getting their medication over being outed to their family or community”.⁴⁵⁵
- In **Uganda, Kenya, Mozambique, Lebanon, Kyrgyzstan, Trinidad and Tobago** there have been reports of sexual minorities “being forced off treatment due to stay at home orders.”⁴⁵⁶ In some cases, people are not able to access their medicines because they are being persecuted or stopped by police when they attempt to collect their medication.⁴⁵⁷

An additional problem is that transgender people face increased barriers accessing gender-affirming surgeries as result of COVID-19. For instance:

⁴⁴⁹ Id.

⁴⁵⁰ Id.

⁴⁵¹ The COVID-19 Effect Series: Community clinics in Thailand strive to provide HIV Services amid COVID19, available at: <https://www.apcom.org/apcoms-the-covid-effect-series-thailand-based-community-clinics-continues-to-provide-hiv-services-amid-covid19/>

⁴⁵² Id.

⁴⁵³ N Bhalla & O Lopez, No medicine, no food: Coronavirus restrictions amplify health risks to LGBT+ people with HIV, Reuters (20 May 2020) available at: <https://www.reuters.com/article/us-health-coronavirus-lgbt-aids/no-medicine-no-food-coronavirus-restrictions-amplify-health-risks-to-lgbt-people-with-hiv-idUSKBN22W28G>

⁴⁵⁴ L Lee & B Westcott, People living with HIV in Wuhan struggle to find medicine during coronavirus outbreak (14 March 2020), CNN Health, available at: <https://edition.cnn.com/2020/03/13/health/coronavirus-china-hiv-wuhan-intl-hnk/index.html&sa=D&ust=1585581292859000>

⁴⁵⁵ J Chong, How Covid-19 affects LGBTIQ people in Asia, Asia Times (27 May 2020), available at: <https://asiatimes.com/2020/05/how-covid-19-affects-lgbtqi-people-in-asia/>

⁴⁵⁶ L Lee & B Westcott, People living with HIV in Wuhan struggle to find medicine during coronavirus outbreak (14 March 2020), CNN Health, available at: <https://edition.cnn.com/2020/03/13/health/coronavirus-china-hiv-wuhan-intl-hnk/index.html&sa=D&ust=1585581292859000>

⁴⁵⁷ Id.

- In the **United States**⁴⁵⁸ and **India**⁴⁵⁹, hospitals have cancelled or postponed the procedures to save resources and “prevent the potential overload of health-care systems by COVID-19 cases”.⁴⁶⁰
- In April, facial feminization surgeries and orchiectomies were considered as “elective procedures” by some governors in the **United States** and were therefore either cancelled or postponed indefinitely.⁴⁶¹ Delays in such surgeries, as evidence from **China** suggests, can trigger mental health problems, such as “high levels of anxiety and depression due to uncertainty about the availability of future treatments and struggles with maintaining unwanted gender identities during the COVID-19 pandemic”.⁴⁶²

d) Violence Against LGBT persons

The Office of the United Nations High Commissioner for Human Rights has highlighted the heightened risk of violence faced by LGBT people in the context of COVID-19.⁴⁶³

For example, as many LGBT persons work in the informal economy, without job security, many have lost their jobs due to COVID-19 response measures implemented by States that restrict informal economic activity.⁴⁶⁴ Consequently, many LGBT persons “have been forced to return to unsupportive family homes”,⁴⁶⁵ which increases the risk of domestic violence and mental health problems. In-depth interviews conducted by OutRight Action International found that LGBT persons felt “at increased risk themselves or knowing others at increased risk of violence and abuse within their homes due to forced cohabitation with unsupportive family or abusive partners.”⁴⁶⁶

Similarly, lockdown and “stay-at-home restrictions” imposed with the aim of combatting COVID-19 have confined young LGBT persons to “hostile environments with unsupportive family members or co-habitants”, which “can increase their exposure to violence, as well as their anxiety and depression.”⁴⁶⁷

⁴⁵⁸ C López, Transgender people are having to indefinitely postpone gender-affirming surgeries due to the coronavirus pandemic, Insider (31 March 2020), available at: <https://www.insider.com/trans-people-cancelling-gender-affirming-surgeries-because-of-covid-19-2020-3>

⁴⁵⁹ R Savage & A Banerji, Anxieties mount for trans people as coronavirus delays surgeries, Reuters (9 April 2020), available at: <https://www.reuters.com/article/uk-health-coronavirus-lgbt-trfn/anxieties-mount-for-trans-people-as-coronavirus-delays-surgeries-idUSKCN21R3N>

⁴⁶⁰ Y Wang, B Pan, Y Liu, A Wilson, J Ou, R Chen, Health care and mental health challenges for transgender individuals during the COVID-19 pandemic, in *Lancet Diabetes Endocrinol* (20 May 2020), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7239622/>

⁴⁶¹ L Cohen, Coronavirus pandemic highlights barriers to health care for transgender community (10 April 2020), available at: <https://www.cbsnews.com/news/coronavirus-transgender-lgbtq-health-care-in-covid-19-pandemic/>; K Burns, The Trump administration will now allow doctors to discriminate against LGBTQ people, (12 June 2020): <https://www.vox.com/identities/2020/4/24/21234532/trump-administration-health-care-discriminate-lgbtq>.

⁴⁶² Y Wang, B Pan, Y Liu, A Wilson, J Ou, R Chen, Health care and mental health challenges for transgender individuals during the COVID-19 pandemic, in *Lancet Diabetes Endocrinol* (20 May 2020), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7239622/>

⁴⁶³ Office of the United Nations High Commissioner for Human Rights, *COVID-19 and The Human Rights of LGBTI People* (17 April 2020), available at: <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>

⁴⁶⁴ OutRight Action International, *Vulnerability Amplified: The Impact of the COVID-19 Pandemic on LGBTIQ People* (6 May 2020), p. 23 ff, available at: https://outrightinternational.org/sites/default/files/COVIDsReportDesign_FINAL_LR_0.pdf

⁴⁶⁵ J Chong, How Covid-19 affects LGBTIQ people in Asia, Asia Times (27 May 2020), available at: <https://asiatimes.com/2020/05/how-covid-19-affects-lgbtqi-people-in-asia/>

⁴⁶⁶ OutRight Action International, *Vulnerability Amplified: The Impact of the COVID-19 Pandemic on LGBTIQ People* (6 May 2020), p. 6, available at: https://outrightinternational.org/sites/default/files/COVIDsReportDesign_FINAL_LR_0.pdf

⁴⁶⁷ Office of the United Nations High Commissioner for Human Rights, *COVID-19 and The Human Rights of LGBTI People* (17 April 2020), available at: <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>

In the **United Kingdom**, a considerable number of LGBT persons “are coming forward to seek help from gay and trans-friendly support services”.⁴⁶⁸ For instance, with the implementation of social isolation measures, the LGBT Foundation experienced “a 30% increase in domestic abuse/violence calls”⁴⁶⁹ to its helpline. At the same time, LGBT persons are reluctant to go to domestic violence shelters since they believe they can be rejected, stigmatized, or discriminated against.⁴⁷⁰

Men and women were required by government regulations to leave their homes on alternate days during lockdowns in **Panama** and **Bogotá, Colombia**.⁴⁷¹ While these measures have ended, at the time of writing in August 2020, these policies have had the consequence of “fuelling violence towards the transgender community by the police and the public” and had far-reaching consequences on the mental health and physical well-being of LGBT persons.

Such policies also put transgender and non-binary people at risk of violence by “reinforcing prejudices” against them.⁴⁷² In **Panama**, for example, transgender women who left their homes for medical treatment on days designated for “women” experienced violence from both State and non-State actors. In one example in the West Panama province, a transgender woman who was on the way to a medical appointment was arrested, detained and subjected to humiliating treatment by police, despite providing papers for her medical appointment.⁴⁷³ In July 2020, the government of Panama, including five government ministries and the Ombud’s Office issued a statement recognizing and denouncing transphobic attacks.⁴⁷⁴

In **Uganda** 13 gay men, two bisexual men and four transgender women were arrested in a police raid at an LGBT+ shelter for “violating social distancing rules banning gatherings of more than 10 people.”⁴⁷⁵ This was “a targeted arrest with trumped up charges” where the authorities used COVID-19 restrictions to target sexual minorities. The victims in this case “looked weak and some reported symptoms of malaria and typhoid. Some are HIV positive and did not have their medication.”⁴⁷⁶ The baseless charges against them were subsequently dropped.

⁴⁶⁸ J P McAulay, Covid-19 and L.G.B.T.+ Victims of Domestic Abuse: Suffering in Silence (6 July 2020), available at: <https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2020/07/covid-19-and-lgbt-victims-domestic-abuse>

⁴⁶⁹ LGBT Foundation, Why LGBT People are Disproportionately Impacted by Coronavirus (29 May 2020), available at: <https://lgbt.foundation/coronavirus/impact>

⁴⁷⁰ J P McAulay, Covid-19 and L.G.B.T.+ Victims of Domestic Abuse: Suffering in Silence (6 July 2020), available at: <https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2020/07/covid-19-and-lgbt-victims-domestic-abuse>

⁴⁷¹ Jo Griffin and Daniela Rivera Antara, ‘Separation by sex’: gendered lockdown fuelling hate crime on streets of Bogotá (8 May 2020), available at: <https://www.theguardian.com/global-development/2020/may/08/separation-by-sex-gendered-lockdown-fuelling-hate-on-streets-of-bogota>

⁴⁷² Jo Griffin and Daniela Rivera Antara, ‘Separation by sex’: gendered lockdown fuelling hate crime on streets of Bogotá (8 May 2020), available at: <https://www.theguardian.com/global-development/2020/may/08/separation-by-sex-gendered-lockdown-fuelling-hate-on-streets-of-bogota>

⁴⁷³ Panama: New Trans Discrimination Cases Under Covid-19 Measures (13 July 2020), Human Rights Watch: <https://www.hrw.org/news/2020/07/13/panama-new-trans-discrimination-cases-under-covid-19-measures>

⁴⁷⁴ Panama took positive steps on transgender people’s rights (16 June 2020, with an update from 16 July 2020): <https://www.hrw.org/news/2020/06/16/panama-took-positive-step-transgender-peoples-rights>

⁴⁷⁵ Alice McCool, Court orders release of LGBT+ Ugandans arrested for ‘risking spreading coronavirus’ (18 May 2020), available at: <https://www.iol.co.za/news/africa/court-orders-release-of-lgbt-ugandans-arrested-for-risking-spreading-coronavirus-48093016>

⁴⁷⁶ Alice McCool, Court orders release of LGBT+ Ugandans arrested for ‘risking spreading coronavirus’ (18 May 2020), available at: <https://www.iol.co.za/news/africa/court-orders-release-of-lgbt-ugandans-arrested-for-risking-spreading-coronavirus-48093016>

2. Recommendations for States on protecting the right to health of LGBT persons

In order to advance the realization of the right to health, States should take at least the following measures to guarantee the right to health of LGBT persons:

- Ensure that LGBT persons can access all healthcare facilities, services and goods without discrimination.⁴⁷⁷
- Ensure that all healthcare facilities, services and goods that are particularly relevant to LGBT persons, such as HIV treatment and hormone replacement therapy and gender reaffirming surgeries are available during the pandemic.⁴⁷⁸ These treatments should not be deprioritized except in accordance with the requirements of international human rights law.⁴⁷⁹
- Take proactive measures to remove all barriers, either in law and/or in practice that prevent LGBT persons from accessing healthcare services, goods, and facilities relating to COVID-19. States should take proactive measures to ensure that LGBT persons are able to access all COVID-19 healthcare, services, goods and facilities without discrimination.
- Ensure that the health rights of LGBT persons are considered in “the design, implementation and evaluation of the measures of pandemic response and recovery”.⁴⁸⁰
- Ensure the participation of LGBT persons in the development of all COVID-19 related responses.⁴⁸¹
- Ensure that COVID-19 lockdown measures are not discriminatory and that their enforcement does not cause or lead to discrimination of any kind against LGBT persons.
- Decriminalize same-sex consensual conduct and abolish all laws that criminalize sexual orientation and gender diverse identities as these laws threaten the safety and security of LGBT people and impede access to healthcare.⁴⁸²
- Refrain from the enactment of laws that disproportionately impact on LGBT persons’ access to healthcare and other services purporting to be COVID-19 response measures.
- Refrain from expressing or endorsing hateful sentiments that either expressly or impliedly target or discriminate against LGBT persons.
- Take active measures to combat hatred and discrimination by individuals and groups. This may include coordinating engagements between LGBT people with religious and customary leaders.⁴⁸³
- Prohibit by law coercive medical practices, including purported “conversion therapies”, that target LGBT persons and take measures to prevent,

⁴⁷⁷ Office of the United Nations High Commissioner for Human Rights, Covid-19 and the human rights of LGBTI people (17 April 2020), available at: <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>

⁴⁷⁸ Y Wang, B Pan, Y Liu, A Wilson, J Ou, R Chen, Health care and mental health challenges for transgender individuals during the COVID-19 pandemic, in *Lancet Diabetes Endocrinol* (20 May 2020), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7239622/>

⁴⁷⁹ Office of the United Nations High Commissioner for Human Rights, Covid-19 and the human rights of LGBTI people (17 April 2020), available at: <https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf>

⁴⁸⁰ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, ASPIRE Guidelines on COVID-19 response and recovery free from violence and discrimination based on sexual orientation and gender identity, 18 June 2020, guideline I: Acknowledge that LGBT persons are everywhere (and that they are hard-hit by the pandemic).

⁴⁸¹ Id, guideline V: Representation of LGBT persons in the process of design, implementation and evaluation of COVID-19 specific measures is key (and reflect their voices).

⁴⁸² Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, report, A/HRC/14/20 (27 April 2010), para 26

⁴⁸³ International Commission of Jurists, ICJ hosts consultation on gender and freedom of religion or belief (3 November 2019), available at: <https://www.icj.org/thailand-icj-hosts-consultation-on-gender-and-freedom-of-religion-or-belief/>

investigate and prosecute all forms of forced, coercive and otherwise involuntary treatments and procedures on LGBT persons.⁴⁸⁴

- Ensure that all healthcare services are provided to LGBT persons only with their informed consent, free from stigma, pathologization, discrimination and coercive practices.⁴⁸⁵
- Encourage, empower, support and coordinate with non-State actors to ensure LGBT persons access all healthcare services without discrimination. Ensure that all healthcare services necessary for LGBT persons to have equal access to health continue to operate despite lockdown or quarantine measures implemented.

E. Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities (CRPD), defines disability as an “evolving concept” resulting from “the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.⁴⁸⁶ More than one billion people worldwide are living with disabilities.⁴⁸⁷

Though having a disability does often increase vulnerability to sickness, it “does not equate to being unhealthy”.⁴⁸⁸ Because disability is a “social construct” resulting from the interaction between “actual or perceived impairments” and “attitudinal and environmental barriers”,⁴⁸⁹ official responses to disability, including the types of healthcare services made easily available, contribute to the experience of disability.

The UN Special Rapporteur on the Rights of Persons With Disabilities, in a report on the right to health of persons with disabilities, describes the acute vulnerability of persons with disability in the absence of the provision of adequate and accessible health goods, services and facilities:⁴⁹⁰

“Persons with disabilities have the same health needs as everybody else, including the need for health promotion, preventive care, diagnosis, treatment and rehabilitation. They may also have additional specific health needs resulting from their impairments and other underlying determinants of health, such as poverty, discrimination, violence and social exclusion. While some impairments inevitably progress over time, poor physical and social environments can aggravate primary conditions or exacerbate secondary consequences of primary conditions.

Owing to high levels of poverty, discrimination, violence and social exclusion, as well as significant barriers in access to health-care

⁴⁸⁴ Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness - For International Day against Homophobia, Transphobia and Biphobia (17 May 2016), available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>

⁴⁸⁵ Id.

⁴⁸⁶ Convention on the Rights of Persons with Disabilities, Preamble.

⁴⁸⁷ World Health Organization and World Bank, World Report on Disability (2011), Available at: https://www.who.int/disabilities/world_report/2011/report.pdf

⁴⁸⁸ Special Rapporteur on the rights of persons with disabilities, Rights of persons with disabilities, A/73/161 (16 July 2018), para 6.

⁴⁸⁹ Id, para 7.

⁴⁹⁰ Id.

services, persons with disabilities are at higher risk of developing ill-health than the general population and, therefore, more likely to require and use health-care services.⁴⁹¹

Persons with disabilities enjoy an equal right to access to health services, goods and facilities without discrimination under the ICESCR. As the CESCR has pointed out, persons with disabilities must be provided with the “same level of medical care within the same system as other members of society”. The fulfilment of this right requires provision of health services to allow independent living and access to rehabilitation services.⁴⁹² This applies to both public and “private providers of health services and facilities”.⁴⁹³ Prohibited discrimination against persons with disabilities includes a “denial of reasonable accommodation”⁴⁹⁴ and States must address discrimination in both “public health facilities” and “private places”.⁴⁹⁵

In addition to the protections afforded by ICESCR, Article 25 of Convention on the Rights of Persons with Disabilities provides for the right to health “without discrimination on basis of disability”. States parties must require “health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent” and the must “prevent discriminatory denial of health care or health services or food and fluids on the basis of disability”.⁴⁹⁶

Article 25 of the Convention on the Rights of Persons with Disabilities should be read in the full context of the Convention, including, as examples, the following provisions:

- Article 5 prohibits all forms of disability-based discrimination requires equal protection and “equal benefit” of the law for persons with disabilities;
- Article 9 requires states to take measures to “identif[y] and eliminat[e] obstacles and barriers to accessibility” including for “medical facilities”; and
- Article 26 requires States Parties to implement “comprehensive habilitation and rehabilitation services and programs”, including in the area of “health”, to enable persons with disabilities to “attain and maintain maximum independence, full physical, mental, social and vocational ability”.

Furthermore, the CRPD Committee has emphasized the importance of physical access to healthcare facilities (including accessible transport and buildings), as well as the provision of health information in accessible formats (including through sign language, Braille, accessible electronic formats, alternative script, and augmentative and alternative modes, means and formats of communication).⁴⁹⁷

⁴⁹¹ Id, paras 4-5.

⁴⁹² UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 5: Persons with Disabilities, E/1995/22 (9 December 1994), para 34.

⁴⁹³ General Comment 14, para 26.

⁴⁹⁴ This definition is reaffirmed in the CRPD which defines discrimination in Article 2 as: “Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”

⁴⁹⁵ General Comment 20, para 28. This obligation been further clarified in significant detail by the CRPD Committee, see: General comment No. 6 on equality and nondiscrimination, CRPD/C/GC/6 (26 April 2018).

⁴⁹⁶ Convention on the Rights of Persons with Disabilities, Article 25(2) (d) and (f). See also: Report of the Special Rapporteur on the rights of persons with disabilities on the Right to Health, A/73/161 (16 July 2018), paras 14-16, 39-41.

⁴⁹⁷ Committee on the Rights of Persons with Disabilities, General comment No. 2: Article 9 Accessibility, CRPD/C/GC/2, (22 May 2014), para 40.

The right to health of persons with disabilities is also provided for other international and regional human rights instruments.⁴⁹⁸

1. COVID-19 and disability discrimination in access to healthcare

The COVID-19 pandemic has compounded the vulnerability of persons with disabilities in accessing healthcare. In a Joint Statement on COVID-19, the Chairperson of the CPRD Committee and the Special Envoy of the UN Secretary General on Disability and Accessibility stressed that States must take “all possible measures to ensure the protection and safety of persons with disabilities”. In the direct context of healthcare, they emphasized that States should provide the “same range, quality and standard of health care as provided to other persons” and also “continue providing to persons with disabilities the health services required by persons with disabilities specifically because of their disabilities.”⁴⁹⁹

Therefore, “States have a heightened responsibility towards this population due to the structural discrimination they experience”.⁵⁰⁰

a) Heightened risk of COVID-19 transmission

The UN Special Rapporteur on the rights of persons with disabilities points out in her statement on COVID-19 that even simple containment measures, such as social distancing and self-isolation “may be impossible for those who rely on the support of others to eat, dress and bathe.”⁵⁰¹ This by itself exposes many persons with disabilities to higher risks of COVID-19 transmission.

The General Secretariat of the Organization of American States has produced a Practical Guide in which it emphasized this vulnerability to COVID-19 transmission noting that, depending the specific disability a person is living with:

“There are persons whose disability prevents them from washing their hands by themselves or accessing the tap or sanitizer; there are people who need to touch surfaces to gather information about their environment in order to function, and persons who use their hands to move around; all of whom are therefore at high risk of being infected and unable to precisely follow World Health Organization (WHO) guidelines. Even instructions on how to wash hands properly may also be inaccessible, in many cases, to persons with visual disabilities. These are only a few examples.”⁵⁰²

⁴⁹⁸ See: Universal Declaration on Human Rights (art. 25.1); International Covenant on Economic, Social and Cultural Rights (art. 12); International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (e) (iv)); Convention on the Elimination of All Forms of Discrimination against Women (arts. 11.1 (f) and 12); Convention on the Rights of the Child (art. 24); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (arts. 28, 43.1 (e), and 45.1 (c)); Convention on the Rights of Persons with Disabilities (art. 25); European Social Charter (Revised) (art. 11); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 10); and African Charter on Human and Peoples’ Rights (art. 16).

⁴⁹⁹ United Nations, Joint Statement: Persons with Disabilities and COVID-19 by the Chair of the United Nations Committee on the Rights of Persons with Disabilities, on behalf of the Committee on the Rights of Persons with Disabilities and the Special Envoy of the United Nations Secretary-General on Disability and Accessibility, para 7, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25765&LangID=E>

⁵⁰⁰ UN Rights Experts: COVID-19: Who is protecting the people with disabilities? (17 March 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25725>

⁵⁰¹ Id.

⁵⁰² General Secretariat of the Organization of American States, Practical Guide to Inclusive Right-Based Responses to COVID-19 In the Americas (2020), p. 28, available at: http://www.oas.org/es/sadye/publicaciones/GUIDE_ENG.pdf

The dependence of many persons with disabilities on personal assistants and the high proportion of persons with disabilities who are institutionalized in psychiatric or other institutions, which are often overcrowded increases vulnerability to COVID-19 transmission.⁵⁰³ It is therefore imperative that both persons with disabilities and personal assistants, support workers and interpreters are proactively prioritized for COVID-19 testing to minimize COVID-19 transmission.⁵⁰⁴

In **Argentina, Colombia, Peru** and **Spain** such support workers were exempted from restrictions of movement and physical distancing to provide support to persons with disabilities.⁵⁰⁵ These measures are crucial because, as the Organization of American States has noted, “for many persons with disabilities, support and assistance personnel are as vital as the air they breathe”.⁵⁰⁶

b) Heightened risk of death or serious illness from COVID-19

Speaking before the onset of the COVID-19 pandemic, the UN Special Rapporteur on the rights of persons with disabilities acknowledged that, generally, “secondary and co-morbid” health conditions are “common among persons with disabilities and include chronic health conditions such as high blood pressure, cardiovascular diseases and diabetes”.⁵⁰⁷ Persons with disabilities are also “significantly more likely to need health-care services” and less likely to receive them, with studies finding that persons with disabilities may be up to three times more likely to have unmet healthcare needs.⁵⁰⁸ However, very often persons with disabilities “are not targeted by strategies for health promotion and disease prevention”.⁵⁰⁹

The same circumstances exist and increase the vulnerability of persons with disabilities to serious illness and death from COVID-19.⁵¹⁰ Persons with disabilities, who contract COVID-19, have died at a significantly higher rate than others:

- In **United States**, residents of the state of Pennsylvania with intellectual disabilities and autism who tested positive for COVID-19 are reported to have died at a rate “about twice as high as other Pennsylvania residents”, while in New York persons with “developmental disabilities” have died at a rate 2.5 times higher than others.⁵¹¹

⁵⁰³ Id, p. 29.

⁵⁰⁴ Id, p. 33.

⁵⁰⁵ Argentina, Decree 297/2020, Article 6.5.; Spain, Real Decree 463/2020, article 7.1 (e); Peru, Supreme Decree No 044-2020-PM, article 4.1. (f); and Colombia, Decree 1076 of 2020, Article 3.3.

⁵⁰⁶ General Secretariat of the Organization of American States, Practical Guide to Inclusive Right-Based Responses to COVID-19 In the Americas (2020), p. 29: available at: http://www.oas.org/es/sadve/publicaciones/GUIDE_ENG.pdf

⁵⁰⁷ Special Rapporteur on the rights of persons with disabilities, Rights of persons with disabilities, A/73/161 (16 July 2018), para 6.

⁵⁰⁸ Id, para 23.

⁵⁰⁹ Id, para 26.

⁵¹⁰ Office of the United Nations High Commissioner for Human Rights, Covid-19 and the Rights Of Persons With Disabilities: Guidance (29 April 2020), available at: https://www.ohchr.org/Documents/Issues/Disability/COVID-19_and_The_Rights_of_Persons_with_Disabilities.pdf; The Conversation, People with a disability are more likely to die from coronavirus – but we can reduce this risk (26 March 2020), available at: <https://theconversation.com/people-with-a-disability-are-more-likely-to-die-from-coronavirus-but-we-can-reduce-this-risk-134383>

⁵¹¹ J Shapiro, COVID-19 Infections And Deaths Are Higher Among Those With Intellectual Disabilities, NPR, (9 June 2020), available at: <https://www.npr.org/2020/06/09/872401607/covid-19-infections-and-deaths-are-higher-among-those-with-intellectual-disabili>; M Turk et al, Intellectual and developmental disability and COVID-19 case-fatality trends: TriNetX analysis, in *Disability and Health Journal*, Volume 13, Issue 3 (July 2020), available at: <https://www.sciencedirect.com/science/article/pii/S1936657420300674>

- In the **United Kingdom**, women with disabilities in **England** and **Wales** have been shown to be 2.4 times more likely to die of COVID-19 than other women, while men with disabilities have been shown die at a rate 1.9 times higher than other men.⁵¹² Reports in early July estimated that two thirds of COVID-19 deaths in between 2 March and 15 May were persons with disabilities, leading disability rights activists to call for an official inquiry,⁵¹³ which Parliament conducted in late July.⁵¹⁴

c) Extreme Vulnerability for persons with disabilities living in institutions

Even in the early stages of the global COVID-19 pandemic the UN High Commission for Human Rights acknowledged that institutions, including “residential care homes and psychiatric hospitals” in which “extremely vulnerable populations” live, were at risk of COVID-19 “rampaging” through them.⁵¹⁵

Persons with disabilities are often compelled to live in inappropriate institutions, including psychiatric hospitals, which in many instances contravenes the obligation concerning the right to “independent living” under Article 19 of the Convention on the Rights of Persons with Disabilities .⁵¹⁶ Some of these institutional settings have become COVID-19 hotspots across the world thus highlighting systemic challenges faced by persons with disabilities resulting from institutionalization.⁵¹⁷ In these settings, people with disabilities face heightened risks COVID-19 transmission and heightened chance of death if infected. Their situation is compounded generally poor conditions in many such institutions and disproportionate targeting for abuse, restraint, isolation and violence.⁵¹⁸

The situation in the **Republic of Korea** is illustrative of the vulnerability of persons with disabilities in institutionalized settings. When the virus hit the Republic of Korea, it overtook hospitals and nursing homes for the elderly and persons with disabilities in Cheongdo County. When the infection cases were reported in the Cheongdo Daenam Psychiatric Hospital, health officials put the psychiatric ward on lockdown in an attempt to contain transmission.⁵¹⁹

Subsequently, seven patients with mental illness who lived in the ward died within days, becoming the first COVID-19 deaths in the country. Out of 102 patients in the ward, 100 ultimately got infected with COVID-19 after the cohort isolation lockdown measure was imposed. Yet even after the patients at the hospital had

⁵¹² Office for National Statistics, Coronavirus (COVID-19) related deaths by disability status, England and Wales: 2 March to 15 May 2020 (19 June 2020): available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/articles/coronaviruscovid19relateddeathsbydisabilitystatusenglandandwales/2marchto15may2020>

⁵¹³ L Webster, Coronavirus: Why disabled people are calling for a Covid-19 inquiry (4 July), available at: <https://www.bbc.com/news/uk-53221435>.

⁵¹⁴ UK Impact, Unequal impact? Coronavirus, disability and access to services, available at: <https://committees.parliament.uk/work/320/unequal-impact-coronavirus-disability-and-access-to-services/publications/>.

⁵¹⁵ Office of the United Nations High Commissioner for Human Rights, Urgent action needed to prevent COVID-19 ‘rampaging’ through places of detention’ – Bachelet (25 March 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>

⁵¹⁶ Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 5 on living independently and being included in the community CRPD/C/GC/5 (27 October 2017).

⁵¹⁷ P Chan-kyong, Coronavirus: nursing homes emerge as South Korea’s new battleground for infections, South China Morning Post, (19 March, 2020), available at: <https://www.scmp.com/week-asia/health-environment/article/3075937/coronavirus-nursing-homes-emerge-south-koreas-new>; See also: “Section B. Older persons”, Section V of this document.

⁵¹⁸ United Nations, Policy Brief: A Disability-inclusive response to COVID-19 (May 2020), available at: https://www.un.org/sites/un2.un.org/files/sq_policy_brief_on_persons_with_disabilities_final.pdf

⁵¹⁹ M Joo Kim, How a South Korean psychiatric ward became a ‘medical disaster’ when coronavirus hit, The Washington Post (29 February 2020), available at: https://www.washingtonpost.com/world/asia_pacific/how-a-south-korean-psychiatric-ward-became-a-medical-disaster-when-coronavirus-hit/2020/02/29/fe8f6e40-5897-11ea-8efd-0f904bdd8057_story.html

shown symptoms of COVID-19, no COVID-19 tests were conducted. The blanket cohort isolation measures of nursing homes and psychiatric hospitals in the County were the source of serious concern among a number of human rights groups in the Republic Korea.⁵²⁰

d) Discrimination in access to healthcare and life-saving treatment

In their joint statement on COVID-19, a broad section of Special Procedures mandate holders of the UN Human Rights Council stressed that “everyone, without exception, has the right to life-saving interventions” including persons with disabilities.⁵²¹ However, as the General Secretariat of the Organization of American States noted, “around the world already face discrimination and negligence from health care personnel who consider disability a variable to justify not prioritizing health care for them in a context of scarce resources and personnel”. It describes this as “an act of serious discrimination”.⁵²² A United Nations Policy brief similarly acknowledges that persons with disabilities are “at greater risk of discrimination in accessing healthcare and life-saving procedures during the COVID19 outbreak” noting measures such as “health care rationing decisions” and “triage protocols” being based on discriminatory criteria.⁵²³

In the **United States**, for example, the state of Alabama initially implemented but has since withdrawn standards of care that “allowed for denying ventilator services to individuals based on the presence of intellectual disabilities, including ‘profound mental retardation’ and ‘moderate to severe dementia’”.⁵²⁴ The state of Tennessee “lists ‘people with spinal muscular atrophy who need assistance with activities of daily living’ as among those who will not receive critical care in a situation of scarcity”.⁵²⁵

In **Italy**, the professional organization that sets guidelines for intensive care has stated health resources should prioritize those with the highest chance of “therapeutic success”.⁵²⁶ If persons with disabilities have pre-existing health conditions, or if their particular impairment means their chance of recovery is diminished, they may therefore be de-prioritized for intensive care.

⁵²⁰ Korean Disability Forum, Death Knocked on the Door of Institutions First; The History of Segregation Should be Stopped (6 May 2020), available at:

https://www.internationaldisabilityalliance.org/sites/default/files/kdf_statement_covid19andinstitutions_eng.pdf; National Human Rights Commission of Korea, NHRCK Chairperson’s Statement on Emergency Relief Measures for Closed Psychiatric Ward of Daenam Hospital in Cheongdo and Group Home for Persons with Disabilities (3 March 2020), available at: <https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=002002001&pagesize=10&boardtypeid=7003&boardid=7605365>. See more generally M Woo Jo et al, The Burden of Disease due to COVID-19 in Korea Using Disability-Adjusted Life Years (26 May 2020) J Korean Med Sci. 2020 Jun 1; 35(21): e199, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7261698/>.

⁵²¹ No exceptions with COVID-19: “Everyone has the right to life-saving interventions – UN experts say (26 March 2020), available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=E&fbclid=IwAR1vFZDTrmlWSQXRq5BMJF3144OrKv9HRQevSO_SH1mqOEJXcXDM4KqUHM4

⁵²² General Secretariat of the Organization of American States, Practical Guide to Inclusive Right-Based Responses to COVID-19 in the Americas (2020), available at: http://www.oas.org/es/sadye/publicaciones/GUIDE_ENG.pdf

⁵²³ United Nations, Policy Brief: A Disability-inclusive response to COVID-19 (May 2020), available at: https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_persons_with_disabilities_final.pdf

⁵²⁴ U.S Department of Health and Human Services, OCR Reaches Early Case Resolution With Alabama After It Removes Discriminatory Ventilator Triage Guidelines (8 April 2020), available at: <https://www.hhs.gov/about/news/2020/04/08/ocr-reaches-early-case-resolution-alabama-after-it-removes-discriminatory-ventilator-triaging.html>

⁵²⁵ S Bagenstos, Who Gets the Ventilator? Disability Discrimination in COVID-19 Medical-Rationing Protocols, The Yale Law Journal (27 May 2020), available at: <https://www.yalelawjournal.org/forum/who-gets-the-ventilator>
Alabama’s policy has subsequently been withdrawn.

⁵²⁶ Y Mounk, The Extraordinary Decisions Facing Italian Doctors, The Atlantic (11 March 2020), available at: <https://www.theatlantic.com/ideas/archive/2020/03/who-gets-hospital-bed/607807/>

The Bioethics Committee of the **San Marino Republic** produced COVID-19 guidance on triage, which, in compliance with international human rights law, explicitly prohibits discrimination on the basis of disability by providing that:

“the only parameter of choice ... the correct application of triage, respecting every human life, based on the criteria of clinical appropriateness and proportionality of the treatments. Any other selection criteria, such as age, gender, social or ethnic affiliation, disability, is unacceptable, as it would implement a ranking of lives only apparently more or less worthy of being lived, constituting an unacceptable violation of human rights.”⁵²⁷

e) Access to information

Persons with disabilities, like all other people, have the right to health information.⁵²⁸ Proactive measures should be taken to ensure the accessibility of health information for persons with disabilities about COVID-19.⁵²⁹ This requires the “availability and dissemination of health information and communications in accessible modes, means and formats”, such as sign language, Braille, accessible electronic formats, alternative script, and augmentative and alternative modes, means and formats of communication.

Some examples of such measures taken by States to this effect include:

- **Paraguay** has developed systems to ensure that relevant information is provided in accessible formats. Disability Focal Point launched its use of social media to provide information in sign language.⁵³⁰
- In **New Zealand**, the Ministry of Health has a section of its website⁵³¹ dedicated to providing information in accessible formats, including sign language and easy-to-read versions. The Council of Europe has commended similar efforts by **Germany, Italy, Romania** and **France**, while simultaneously acknowledging the efforts of NGOs to produce such materials.⁵³²
- In **Canada**, a COVID-19 Disability Advisory Group⁵³³ was formed with the participation of persons with disabilities. On the advice of this group, a relief package to improve the circumstances of persons with disabilities was announced on 5 June 2020 by the Prime Minister.⁵³⁴

⁵²⁷ Republic of San Marino, Answers to the requested urgent opinion on ethical issues regarding to the use of invasive assisted ventilation in patients all age with serious disabilities in relation to COVID-19 pandemic (16 March 2020), available at: <http://www.sanita.sm/on-line/home/bioetica/comitato-sammarinese-di-bioetica/documents-in-english/documento2116023.html>

⁵²⁸ See Section VI of this Report.

⁵²⁹ United Nations Human Rights Office of the High Commissioner, COVID-19 and the rights of the persons with disabilities: Guidance (29 April 2020), available at: https://www.ohchr.org/Documents/Issues/Disability/COVID-19_and_The_Rights_of_Persons_with_Disabilities.pdf

⁵³⁰ See: National Secretary for the Human Rights of Persons with Disabilities Social Media page: https://www.facebook.com/pg/senadispy/about/?ref=page_internal

⁵³¹ See: New Zealand Ministry of Health Website: <http://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-novel-coronavirus-resources/covid19-novel-coronavirus-new-zealand-sign-language>

⁵³² Council of Europe, Persons with disabilities must not be left behind in the response to the COVID-19 pandemic (2 April 2020), available at: <https://www.coe.int/en/web/commissioner/-/persons-with-disabilities-must-not-be-left-behind-in-the-response-to-the-covid-19-pandemic>; Inclusion Europe, Easy-to-read information about Coronavirus available in many languages (12 March 2020), available at: <https://www.inclusion-europe.eu/easy-to-read-information-about-coronavirus/>

⁵³³ Government of Canada, Background: COVID-19 Disability Advisory Group, available at: <https://www.canada.ca/en/employment-social-development/news/2020/04/backgrounder--covid-19-disability-advisory-group.html>

⁵³⁴ Office of the Prime Minister, Prime Minister announces supports for Canadians with disabilities to address challenges from COVID-19 (5 June 2020), available at: <https://pm.gc.ca/en/news/news-releases/2020/06/05/prime-minister-announces->

2. Recommendations on disability and health during COVID-19

To ensure that their COVID-19 responses are appropriately tailored to the realization of the right to health of persons with disabilities States should ensure the “mainstreaming” of disability in all response measures. To this effect, ensuring meaningful consultation with and participation of persons with disabilities in developing COVID-19 responses, is of fundamental importance.⁵³⁵

More specifically, States should proactively take measures to ensure the protection of the right to health of persons with disabilities, by, among other things:⁵³⁶

- Ensure priority COVID-19 testing for persons with disabilities, those with whom they live, and their care and support workers.
- Exempt care and support workers from certain lockdown restrictions to allow them to continue to support persons with disabilities.
- Identify and remove barriers to equal access to COVID-19 testing and treatment at all health and quarantine facilities.
- Ensure that in all institutionalized settings in which persons with disabilities live:
 - Wherever possible, safe and practicable persons with disabilities may be eligible for discharge, and that there is access to home and community-based services to assist in this process;
 - COVID-19 testing is prioritized and effective measures to prevent transmission are implemented; and
 - Financial, human and other resources are sufficient to implement effective preventative measures.
- Prohibit the denial of COVID-19 testing and treatment, including in particular, lifesaving treatment, on the basis of disability regardless of resource scarcity; and ensure the training of health workers and sufficiently clear guidance to prevent this and other forms of disability discrimination.
- Provide public and accessible health information that caters for a full range of disabilities (including sign language, Braille, accessible electronic formats, alternative script, and augmentative and alternative modes, means and formats of communication).

F. Persons Deprived of their Liberty

The question of protection of persons deprived of their liberty during the COVID-19 pandemic involves the intersection of a number of civil, political, economic, social and cultural rights. These include:

[supports-canadians-disabilities-address](https://www.nationalobserver.com/2020/06/13/news/trudeau-and-scheer-blame-one-another-blocking-emergency-disability-benefit); Canada’s National Observer, Trudeau and Scheer blame one another for blocking emergency disability benefit (13 June 2020), available at: <https://www.nationalobserver.com/2020/06/13/news/trudeau-and-scheer-blame-one-another-blocking-emergency-disability-benefit>

⁵³⁵ United Nations, Policy Brief: A Disability-inclusive response to COVID-19 (May 2020), p. 2-3, available at: https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_persons_with_disabilities_final.pdf. See also International Disability Alliance, Toward a Disability-Inclusive COVID19 Response: 10 recommendations from the International Disability Alliance (19 March 2020): https://www.internationaldisabilityalliance.org/sites/default/files/ida_recommendations_for_disability-inclusive_covid19_response_final.pdf.

⁵³⁶ Office of the United Nations High Commissioner for Human Rights, Covid-19 and the Rights Of Persons With Disabilities: Guidance (29 April 2020), available at: https://www.ohchr.org/Documents/Issues/Disability/COVID-19_and_The_Rights_of_Persons_with_Disabilities.pdf

- The right to liberty and the prohibition of arbitrary detention, whether for criminal law enforcement or various administrative or other purposes (article 9 of ICCPR);
- The right to be free from torture or other cruel, inhuman or degrading treatment or punishment (article 7 of ICCPR; articles 1, 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT));
- The right to “be treated with humanity and with respect for the inherent dignity of the human person” (article 10 of ICCPR; article 5(2) of American Convention on Human Rights; article 5 of African Charter on Human and Peoples' Rights; article 20(1) of the Arab Charter on Human Rights).

The rights connected with detention during the COVID-19 pandemic also encompass the range of ESCR, including the right to health as protected under international human rights law, including article 12 of ICESCR.⁵³⁷ States must refrain from “denying or limiting equal access for all persons, including prisoners or detainees ... to preventive, curative and palliative health services”.⁵³⁸

Every person has the right to personal liberty and security, including freedom from unlawful or arbitrary arrest or detention.⁵³⁹ At the moment of arrest or commencement of detention, every person has the right to “an impartial and confidential medical or psychological examination” in order to: “verify their state of physical or mental health and the existence of any mental or physical injury or damage”; to “ensure the diagnosis and treatment of any relevant health problem”; and to “investigate complaints of possible ill-treatment or torture”.⁵⁴⁰ It is a duty of law enforcement officers to “ensure the full protection of the health of persons in their custody”, and to “take immediate action to secure medical attention whenever required.”⁵⁴¹

The standards of healthcare provided to persons deprived of their liberty should be equivalent to those enjoyed by the general public and be guaranteed free of charge and without discrimination. Healthcare provision should be organized in close coordination with public health services to ensure continuity of treatment and care,⁵⁴² including of infectious diseases such as COVID-19.⁵⁴³ The revised Standard Minimum Rule for the Treatment of Prisoners (The Mandela Rules), adopted by the UN General Assembly on 17 December 2015, set out the bare minimum to safeguard the state of health of persons deprived of their liberty.

⁵³⁷ General Comment 14, para 34.

See, also: European Prison Rules, rule 39; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle X; Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), guideline 31.

⁵³⁸ General Comment 14, para 34.

⁵³⁹ See: Universal Declaration of Human Rights, article 3; International Covenant on Civil and Political Rights, article 9; Convention on the Rights of the Child, article 37(b); African Charter on Human and Peoples' Rights, article 6; American Convention on Human Rights, article 7; European Convention on Human Rights, article 5; Arab Charter on Human Rights, article 14.

For analysis of the scope and content of the right to personal liberty and security, see: Human Rights Committee (CCPR), General Comment No. 35 on Article 9 (Liberty and Security of Person) (“General Comment 35”), UN Doc. CCPR/C/GC/35 (16 December 2014).

⁵⁴⁰ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle IX(3).

See also: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 24-26;; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle M(5)(b); Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, guidelines 4(g), 9(a)(3), 16(d).

⁵⁴¹ Code of Conduct for Law Enforcement Officials, article 6.

⁵⁴² Inter-American Court of Human Rights, *Tibi v. Ecuador*, Judgment, Series C No. 114, 7 September 2004, para 156; Inter-American Court of Human Rights, *Vélez Loor v. Panamá*, Judgment, Series C No. 218, 23 November 2010, paras 216, 220.

⁵⁴³ Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), rules 24-27; European Prison Rules, rule 40.

In this respect, States should provide, as a minimum, appropriate accommodation, with due regard having been paid to:⁵⁴⁴

- **Climatic conditions:** including air, minimum floor space, lighting, heating and ventilation;
- **Personal Hygiene:** Suitable items to ensure personal hygiene;
- **Clothing:** Adequate clothing;
- **Food:** Food of nutritional value adequate for health and strength;
- **Water:** Drinking water;
- **Recreation:** The possibility of participating in recreational and cultural activities "for the benefit of the mental and physical health."⁵⁴⁵

It is noteworthy that conformity with all of these requirements have a bearing on detainees' health and should therefore be secured to ensure the protection of the right to health.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Statement: COVID-19 and Persons Deprived of Liberty

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) issued a statement on the principles States should follow in relation to the treatment of persons deprived of their liberty in the context of the COVID-19 pandemic.⁵⁴⁶ The statement provides the following guidance:

- States should take all possible action to **protect the health and safety** of all persons deprived of their liberty;
- International and domestic **guidelines designed** to tackle the pandemic, consistently with international standards, should be **respected and implemented** fully in all places of deprivation of liberty;
- **Staff** in detention facilities should be **adequately supported** and provided with health and safety protection to continue fulfilling their tasks;
- **Restrictive measures** towards persons deprived of their liberty, aimed to prevent the spread of COVID-19, **should have a legal basis and be necessary**, proportionate, respectful of human dignity, restricted in time, and communicated in a comprehensive and understandable manner;
- States should resort, as far as possible, to **alternatives to deprivation of liberty**, including commutation of sentences, early release and probation, and should refrain, to the maximum extent possible, from detaining migrants;
- States should **pay special attention to the needs of vulnerable and at-risk groups**, such as older persons and persons with pre-existing medical conditions, including screening and intensive care as required, and additional psychological support should be provided to all detainees;
- State authorities should provide detainees with **adequate personal hygiene** (including access to hot water and soap), **daily access to the open air** (of at least one hour), and **means of communications with the outside world** when visits are suspended;

⁵⁴⁴ Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), rules 13, 18-19, 22, 42, 105; Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, guideline 25(g).

⁵⁴⁵ Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), rule 78.

⁵⁴⁶ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic* (20 March 2020), available at: <https://rm.coe.int/16809cfa4b>

- Detained persons, **who are isolated or quarantined** due to COVID-19 infection, should be provided with **meaningful human contact** every day;
- **Safeguards against abuses of detainees' rights** (e.g. access to legal counsel) or torture and other ill-treatment must be in place at all times; and
- States should ensure that **independent monitoring bodies have access to all places of detention**, including quarantine facilities.

Women prisoners should be provided gender-specific healthcare services, which should be equivalent to those available to the general public.⁵⁴⁷ Comprehensive screenings to determine primary healthcare needs should also be conducted in order to, amongst other things, detect sexually transmitted diseases and mental healthcare needs, as well as determine whether a woman has been the victim of sexual abuse or other type of violence prior to detention.⁵⁴⁸

Non-citizen prisoners should have access to healthcare on an equal footing with all other prisoners.⁵⁴⁹ Medical and healthcare staff need to take account of specific problems and diseases which non-citizen prisoners may have, as well as any cultural sensitivities necessary to ensure their equal access to health services. If necessary, interpreters should be made available for communication purposes. The continuity of treatment should be guaranteed during transport whenever a non-citizen prisoner is transferred, extradited or expelled.⁵⁵⁰

Migrants may be detained during immigration control proceedings only to the extent this is "reasonable, necessary and proportionate in the light of the circumstances"; to this end, "[d]ecisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health".⁵⁵¹

1. Detention, COVID-19 and Healthcare

The UN High Commissioner for Human Rights issued an early warning about the threat of COVID-19 to detained persons, urging States "not to forget those behind bars".⁵⁵² She warned that in many States "detention facilities are overcrowded" and "people are often held in unhygienic conditions and health services are inadequate or even non-existent". This makes key measures advised by the WHO such as physical distancing and self-isolation "practically impossible", thus rendering detained persons extremely vulnerable to violations of their right to health and life.

⁵⁴⁷ See: "Section C. Gendered impacts of COVID-19" of Section V of this document.

⁵⁴⁸ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), rules 6-18. See also: Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle M(7)(c); Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, guideline 32(b)(v).

⁵⁴⁹ See: "Section A. Migrants, Refugees, and Stateless persons" of Section V of this document.

⁵⁵⁰ Committee of Ministers, Recommendation CM/Rec(2012)12 of the COE Committee of Ministers to Member States concerning Foreign Prisoners (10 October 2012), recommendations 31.1-31.9.

⁵⁵¹ General Comment No. 35 on Article 9 (Liberty and security of person), CCPR/C/GC/35 (16 December 2014), para 18; Human Rights Committee (CCPR), *Shafiq v. Australia*, Communication No. 1324/2004, CCPR/C/88/D/1324/2004 (13 November 2006), para. 7.3; Human Rights Committee (CCPR), *C. v. Australia*, Communication No. 900/1999, CCPR/C/76/D/900/1999 (28 October 2002), paras. 8.2, 8.4.

⁵⁵² Office of the United Nations High Commissioner for Human Rights, *Urgent action needed to prevent COVID-19 "rampaging through places of detention" – Bachelet* (25 March 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>

Persons deprived of their liberty are among the categories of people at greater risk of infection in relation to COVID-19,⁵⁵³ given “the spread of the virus can expand rapidly due to the usually high concentration of persons deprived of their liberty in confined spaces and to the restricted access to hygiene and health care in some contexts”.⁵⁵⁴ Such a reality has led to prison uprisings across several countries, including **Italy**,⁵⁵⁵ **Colombia**⁵⁵⁶ and **Indonesia**,⁵⁵⁷ where detainees protested the lack of adequate measures to tackle the COVID-19 pandemic.

To safeguard the right to health of persons deprived of their liberty, States should follow the WHO’s “Interim Guidelines on the Preparation, Prevention and Control of COVID-19.”⁵⁵⁸ Persons deprived of their liberty should have access to information concerning the prevention and treatment of the disease, as well as appropriate items, such as soap, hot water and disinfectants, to ensure adequate hygiene standards that prevent infection. Physical distancing should be ensured as much as possible, yet the right of daily access to open air of at least one hour should be maintained. Any necessary restrictions on family visits should be counterbalanced by increased access to alternative means of communication.⁵⁵⁹

a) Detention under unhygienic and unhealthy conditions

Any preventive or protective measures adopted by State authorities to tackle COVID-19 should not result in ill-treatment of persons deprived of their liberty.⁵⁶⁰ Quarantine facilities should meet necessary hygiene and health facilities standards.

In **India**, people required to stay in quarantine facilities in Kashmir and Jammu have allegedly been housed under poor hygiene conditions, including non-sanitized floors, bathrooms and beds, and overcrowded rooms.⁵⁶¹ It has further been reported that migrant workers housed in quarantine facilities in Jammu have not been provided with adequate food, and that authorities have failed to carry out COVID-19 testing.⁵⁶²

In **Nepal**, Nepalese migrant workers were reported to have been stranded at the India-Nepal border for up to two months and faced various issues including lack

⁵⁵³ CESCR COVID-19 Statement, para. 5; Human Rights Council, Human rights implications of the COVID-19 pandemic, A/HRC/PRST/43/1 (2 June 2020), preambular para. 7.

⁵⁵⁴ Office of the United Nations High Commissioner for Human Rights and World Health Organization, Interim Guidance on COVID-19: Focus on Persons Deprived of Their Liberty (March 2020), p. 2, available at: <https://interagencystandingcommittee.org/system/files/2020-03/IASC%20Interim%20Guidance%20on%20COVID-19%20-%20Focus%20on%20Persons%20Deprived%20of%20Their%20Liberty.pdf>

⁵⁵⁵ Z Tidman, Italy prison riots: Six die amid protests over coronavirus restrictions, The Independent (9 March 2020), available at: <https://www.independent.co.uk/news/world/europe/italy-prison-riots-modena-coronavirus-death-toll-jail-inmates-a9387711.html>

⁵⁵⁶ The Guardian, Colombian prison riot over coronavirus fears kills 23 (22 March 2020), available at: <https://www.theguardian.com/world/2020/mar/22/colombian-prison-riot-over-coronavirus-fears-kills-23>

⁵⁵⁷ Al Jazeera, Riot highlights coronavirus risk in Indonesia’s prisons (12 April 2020), available at: <https://www.aljazeera.com/news/2020/04/riot-highlights-coronavirus-risk-indonesia-prisons-200412043823093.html>

⁵⁵⁸ World Health Organization, Interim Guidelines on the Preparation, Prevention and Control of COVID-19 (March 2020), available at: https://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf

⁵⁵⁹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic.

⁵⁶⁰ Id.

⁵⁶¹ K Yousuf, COVID-19: Kashmiris Complain of Crowded, Unhygienic Quarantine Facilities, NewsClick (1 April 2020), available at: <https://www.newsclick.in/COVID-19-Kashmiris-Complain-Crowded-Unhygienic-Quarantine-Facilities>

⁵⁶² P Sareen, Jammu: Poor Facilities at Quarantine Centre Force People to Slip Away, The Wire (12 July 2020), available at: <https://thewire.in/rights/jammu-poor-facilities-at-quarantine-centre-force-people-to-slip-away>

of proper food, water and housing.⁵⁶³ Some entering Nepal were “stuck on buses without any provisions of food, water, toilets, or beddings” before being taken to quarantine facilities.⁵⁶⁴ Nepal required all persons entering the country including migrant workers entering from India to be quarantined for 14-17 days.⁵⁶⁵ Quarantine facilities were often overcrowded, congested, unhygienic and unsafe.⁵⁶⁶ Although the government set standards for such facilities which on paper aimed to comply with WHO guidelines,⁵⁶⁷ many people in quarantine did not receive adequate food,⁵⁶⁸ and as a result, their family members risked increasing COVID-19 transmission when coming into contact while bringing food to their relatives.⁵⁶⁹ After public criticism over quarantine facilities’ conditions, the government started allowing migrant workers to spend the quarantine period at home.⁵⁷⁰

In **Israel**, the Supreme Court rejected a petition asking Israeli Prison Authorities to ensure social distancing for the 450 detainees held in the overcrowded Gilboa prison, where those classified by the authorities as “security prisoners” – mainly Palestinians – are held.⁵⁷¹ The Supreme Court accepted the State’s claim that detainees are to be equated to “family members or flatmates living in the same home”, for whom specific measures of social distancing are not required. The NGO Adalah reported that detainees in the Gilboa prison are “unable to adhere to Israeli Health Ministry’s social distancing guidelines for preventing the spread of COVID-19, thus endangering their safety and lives”.⁵⁷²

In **Thailand**, in the early stages of the COVID-19 pandemic, returnees traveling from “high-risk” countries were required to stay in a quarantine facilities. In Sattahip district of Chonburi province, those who stayed in such facilities were randomly divided into groups of three and were forced to share small rooms that may heighten their risk of infection.⁵⁷³

Failure to ensure hygienic conditions to persons subjected to mandatory quarantine, which might even increase the likelihood of being infected, will inevitably lead to violations of the right to health.

⁵⁶³ P Manandhar, COVID-19 and Nepalese Migrant Workers at Nepal-India Border, Spotlight Nepal (13 April 2020), available at: <https://www.spotlightnepal.com/2020/04/13/covid-19-and-nepalese-migrant-workers-nepal-india-border/>

⁵⁶⁴ A Aryal, Thousands of Nepalis without food or shelter await entrance at the Karnali border, The Kathmandu Post, (26 May 2020), available at: <https://kathmandupost.com/national/2020/05/26/thousands-of-nepalis-without-food-or-shelter-await-entrance-at-the-karnali-border>

⁵⁶⁵ Embassy of Nepal in India, Notice for Nepali in India (3 June 2020), available at: <https://in.nepalembassy.gov.np/wp-content/uploads/2020/06/Notice-for-Nepali-Nationals.pdf>; Ministry of Health and Population, COVID-19 Related Materials, available at: <https://covid19.mohp.gov.np/#/>

⁵⁶⁶ A Poudel, Poor quarantine facilities could themselves become outbreak hotspots, doctors warn, The Kathmandu Post (6 April 2020): <https://kathmandupost.com/national/2020/04/06/poor-quarantine-facilities-could-themselves-become-outbreak-hotspots-doctors-warn>

⁵⁶⁷ Nepal Government, Standards for establishment and management of quarantine facility related to COVID-19 (2020), available at: <https://mohp.gov.np/attachments/article/584/क्वाराण्टाइन%20संचालन%20तथा%20व्यवस्थापन%20मापदण्ड%20202076.pdf>; <http://www.opmcm.gov.np/download/२०७६-साल-चैत्र-महिनाको-मन/?wpdmdl=6394>.

⁵⁶⁸ K Sejuwal & A Tiwari, Thousands of returnees from India run out of food and water, The Kathmandu Post (28 May 2020), available at: <https://kathmandupost.com/national/2020/05/28/thousands-of-returnees-from-india-run-out-of-food-and-water>

⁵⁶⁹ M Paudel, Quarantine facilities in Province 5 crowded and mismanaged, The Kathmandu Post (19 May 2020), available at: <https://kathmandupost.com/province-no-5/2020/05/19/quarantine-facilities-in-province-5-crowded-and-mismanaged>

⁵⁷⁰ P Gill & J Sapkota, COVID-19: Nepal in Crisis, The Diplomat (29 June 2020), available at: <https://thediplomat.com/2020/06/covid-19-nepal-in-crisis/>

⁵⁷¹ Adalah, Israeli Supreme Court rules: Palestinian prisoners have no right to social distancing protection against COVID-19 (23 July 2020), available at: <https://www.adalah.org/en/content/view/10063>

⁵⁷² Ibid.

⁵⁷³ Matichon, 3 persons per 1 room (4 April 2020) available at: https://www.matichon.co.th/politics/news_2122232 (in Thai).

b) Releasing prisoners to reduce overcrowding and prevent COVID-19 transmission

The endemic problem of overcrowding, which is prevalent in many countries, exacerbates the risk of the spread of COVID-19 in prisons and other detention facilities. States should therefore consider prioritizing the release of persons in pre-trial detention, those with low risk profiles who were convicted of minor and non-violent offences, persons with imminent release dates, and at-risk categories such as the elderly and people with chronic diseases. States could consider employing alternative measures such as probation and house arrest. Recommendations towards this have been made by regional human rights bodies, including the Inter-American Commission on Human Rights,⁵⁷⁴ the Inter-American Court of Human Rights,⁵⁷⁵ the Commissioner for Human Rights of the Council of Europe,⁵⁷⁶ and the African Commission on Human and Peoples' Rights.⁵⁷⁷

Releases of detainees in relation to COVID-19 have taken place across Africa (including in **Algeria, Burkina Faso, Cameroon, Ethiopia, Kenya, Mozambique, Niger, Nigeria, Senegal, South Africa, Sudan, Tunisia and Uganda**)⁵⁷⁸ and in the Americas (including in the **United States, Brazil, Argentina, Honduras, Mexico and Peru**).⁵⁷⁹ However, in **Libya**, where thousands of people are arbitrarily detained in conditions under which they have been exposed to heightened risks of contracting COVID-19, there have been no such releases from prison.⁵⁸⁰

Persons arbitrarily detained in violation of international human rights law, including human rights defenders, activists and journalists, should be released irrespective of COVID-19; however, the risk of COVID-19 infections engenders a further compound violation by the fact of their detention.⁵⁸¹ The UN High Commissioner for Human Rights has emphasized that "every person detained without sufficient legal basis, including political prisoners, and those detained for critical, dissenting views" should be released.⁵⁸² However, some States have specifically excluded these categories of people from release:

⁵⁷⁴ Inter-American Commission on Human Rights, The IACHR urges States to guarantee the health and integrity of persons deprived of liberty and their families in the face of the COVID-19 pandemic (31 March 2020), available at: http://www.oas.org/en/iachr/media_center/PReleases/2020/066.asp

⁵⁷⁵ Inter-American Court of Human Rights, COVID-19 and Human Rights (9 April 2020), available at: https://www.corteidh.or.cr/docs/comunicados/cp_27_2020_eng.pdf

⁵⁷⁶ Commissioner for Human Rights of the Council of Europe, COVID-19 pandemic: urgent steps are needed to protect the rights of prisoners in Europe (6 April 2020), available at: https://www.coe.int/en/web/commissioner/thematic-work/covid-19/-/asset_publisher/5cdZW0AJBMLI/content/covid-19-pandemic-urgent-steps-are-needed-to-protect-the-rights-of-prisoners-in-europe

⁵⁷⁷ Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, Press Release of the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa on the Release of Prisoners during the COVID-19 Pandemic (17 April 2020), available at: <https://www.achpr.org/pressrelease/detail?id=492>

⁵⁷⁸ African Commission on Human and Peoples' Rights, Press Release of the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa on the Release of Prisoners during the COVID-19 Pandemic.

⁵⁷⁹ BBC, US jails begin releasing prisoners to stem Covid-19 infections (19 March 2020), available at: <https://www.bbc.com/news/world-us-canada-51947802>; Human Rights Watch, How to Prevent Covid-19 Outbreaks in Latin America's Prisons (21 May 2020), available at: <https://www.hrw.org/news/2020/05/21/how-prevent-covid-19-outbreaks-latin-america-prisons>

⁵⁸⁰ Cairo Institute for Human Rights Studies, Libya: After the first reported death from Covid-19, failure to release detainees amounts to a death sentence (24 April 2020), available at: <https://cihrs.org/libya-after-the-first-reported-death-from-covid-19-failure-to-release-detainees-amounts-to-a-death-sentence/?lang=en>

⁵⁸¹ (6 April 2020), available at: https://www.coe.int/en/web/commissioner/thematic-work/covid-19/-/asset_publisher/5cdZW0AJBMLI/content/covid-19-pandemic-urgent-steps-are-needed-to-protect-the-rights-of-prisoners-in-europe

⁵⁸² Office of the United Nations High Commissioner for Human Rights, Press briefing note on COVID-19 (3 April 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25770&LangID=E>

- In **Turkey**, the Parliament has enacted a law to allow for the release of thousands of detainees to avoid the spread of COVID-19 in prisons. However, this law excludes persons convicted of “terrorism” offences and “offences against the State”, which are typically used to incarcerate human rights defenders, lawyers, judges and political opponents.⁵⁸³
- In **Myanmar**, a presidential amnesty was adopted which, while freeing 24,896 detainees, did not extend to human rights defenders and civil society activists, who continue to be arbitrarily detained.⁵⁸⁴
- In **Iran**, thousands of “low-level” prisoners have been released while excluding the release of many people detained for political reasons.⁵⁸⁵

The detention and prosecution of persons solely for the exercise of rights protected under international law, such as freedom of expression or peaceful assembly, amount to a violation of a State’s obligations under international human rights law. It may also constitute unfair discrimination based on political views and, in the context of COVID-19, a violation of access to healthcare without discrimination.

On the other hand, measures aimed at reducing prison overcrowding in the context of the COVID-19 pandemic must not lead to *de jure* or *de facto* impunity with regard to crimes under international law. As a rule, persons sentenced for these crimes should not be released. To preserve their health, as necessary, States should consider alternative measures such as relocation in facilities where safe detention conditions can be enjoyed or, if this is not possible, placement under temporary house arrest, subject to appropriate controls and to return to prison once the emergency situation is over. Only in case of a “terminal illness of imminent resolution”, a “humanitarian pardon” may be granted to such individuals and the gravity of the offences committed should also be considered.⁵⁸⁶

In **Chile**, a law has been adopted allowing for detention to be commuted to house arrest to tackle prison overcrowding; persons sentenced for serious crimes are excluded from the benefit.⁵⁸⁷ At the same time, the Senate started discussing a bill originally introduced in 2018, which would grant house arrest to persons deprived of their liberty “aged 75 or older”, or who have been “diagnosed with a terminal illness or a grave and incurable physical harm causing a serious dependency,” without excluding persons convicted of crimes under international

⁵⁸³ International Commission of Jurists, Turkey: ICJ urges extension of alternatives to detention for prison population amid COVID-19 crisis (30 March 2020), available at: <https://www.icj.org/turkey-icj-urges-extension-of-alternatives-to-detention-for-prison-population-amid-covid-19-crisis/>; Amnesty International, Turkey: Prison release law leaves innocent and vulnerable prisoners at risk of COVID-19 (13 April 2020), available at: <https://www.amnesty.org/en/latest/news/2020/04/prison-release-law-leaves-prisoners-at-risk-of-covid/>

⁵⁸⁴ Amnesty International, Myanmar: Rights activists excluded from largest prisoner release in years (18 April 2020), available at: <https://www.amnesty.org/en/latest/news/2020/04/myanmar-rights-activists-excluded-largest-prisoner-release-years/>; Amnesty International, Myanmar: “I will not surrender”: The criminalization of human rights defenders and activists in Myanmar (13 April 2020), available at: <https://www.amnesty.org/en/documents/asa16/2041/2020/en/>

⁵⁸⁵ International Federation for Human Rights, Free female prisoners of conscience as coronavirus overtakes prisons (22 April 2020), available at: <https://www.fidh.org/en/about-us/What-is-FIDH/>

⁵⁸⁶ Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, COVID-19, prison overcrowding, and serving sentences for serious human rights violations, available at: <https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/infonotecovid.aspx>; Inter-American Commission on Human Rights, Pandemia y Derechos Humanos en las Américas, Resolución 1/2020 (10 April 2020), para 46, available at: <https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-20-es.pdf>

⁵⁸⁷ Inter-American Commission on Human Rights, CIDH expresa preocupación por iniciativa legislativa en Chile que autorizaría la prisión domiciliaria a determinados condenados por graves violaciones a los derechos humanos cometidas durante la dictadura cívico militar (22 April 2020), available at: <http://www.oas.org/es/cidh/prensa/comunicados/2020/087.asp>

law.⁵⁸⁸ However, it has been reported that the bill lacks political support in the parliament and will likely not be approved.⁵⁸⁹

c) The detention of non-citizens including migrants and asylum seekers

The detention of migrants and asylum seekers should be reasonable, necessary, proportionate and temporary.⁵⁹⁰ For instance, an individual may be detained while awaiting their forced removal from a State's territory, provided the latter complies with international law and standards. However, if such removal cannot take place, as is the case in several countries due to travel restrictions initiated as a result of the COVID-19 pandemic, the continued detention of an individual violates international law.⁵⁹¹

The detention of migrants and asylum seekers in the context of the COVID-19 pandemic, including for mandatory quarantine upon entry into a State's territory, should be applied in a non-discriminatory manner. Systemic immigration detention based on public health concerns cannot be justified under international law. The imposition of blanket measures denying asylum seekers access to a State's territory is in breach of international human rights law and international refugee law.⁵⁹²

As a rule, migrants and asylum seekers should not be subject to detention in the context of COVID-19,⁵⁹³ and detainees have been released in **Belgium, Spain, the Netherlands** and the **United Kingdom**.⁵⁹⁴

However, the rights of non-citizens to health without discrimination have been impaired,⁵⁹⁵ in the context of COVID-19, in a number of countries:

- In **Canada**, 34 out of the 98 migrants and refugees detained in three immigration centres across the country have been freed,⁵⁹⁶ yet authorities have continued to hold hundreds of migrants in maximum-security jails on the sole ground that they might not appear for their immigration status hearings.⁵⁹⁷

⁵⁸⁸ Id.

⁵⁸⁹ M Cisternas, Diario U Chile, Ley Humanitaria: un proyecto inviable que le guiña el ojo a la impunidad (18 April 2020), available at: <https://radio.uchile.cl/2020/04/18/ley-humanitaria-un-proyecto-inviable-que-le-guiña-el-ojo-a-la-impunidad/>

⁵⁹⁰ Working Group on Arbitrary Detention, Revised deliberation No. 5 on deprivation of liberty of migrants (2 July 2018), para 14.

⁵⁹¹ Commissioner for Human Rights of the Council of Europe, Commissioner calls for release of immigration detainees while Covid-19 crisis continues (26 March 2020), available at: https://www.coe.int/en/web/commissioner/thematic-work/covid-19/-/asset_publisher/5cdZW0AJBMLI/content/commissioner-calls-for-release-of-immigration-detainees-while-covid-19-crisis-continues

⁵⁹² United Nations High Commissioner for Refugees, Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response (16 March 2020), paras 5-7, available at: <https://www.refworld.org/docid/5e7132834.html>

⁵⁹³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic (20 March 2020), available at: <https://rm.coe.int/16809cfa4b>

⁵⁹⁴ Commissioner for Human Rights of the Council of Europe, Commissioner calls for release of immigration detainees while Covid-19 crisis continues (26 March 2020), available at: https://www.coe.int/en/web/commissioner/thematic-work/covid-19/-/asset_publisher/5cdZW0AJBMLI/content/commissioner-calls-for-release-of-immigration-detainees-while-covid-19-crisis-continues

⁵⁹⁵ See: "Section A. Migrants, Refugees, and Stateless persons", Section V of this document.

⁵⁹⁶ R Browne, The number of detainees held in Canada's immigration holding centres is declining amid COVID-19 fears, Global News (3 April 2020), available at: <https://globalnews.ca/news/6774564/coronavirus-immigration-detainees/>

⁵⁹⁷ B Kennedy, Hundreds of nonviolent immigration detainees sent to max-security jails as part of 'abhorrent' government program, The Star (24 January 2019), available at: <https://www.thestar.com/news/investigations/2019/01/24/hundreds-of-nonviolent-immigration-detainees-sent-to-max-security-jails-as-part-of-abhorrent-government-program.html>

- In **Malaysia**, “raids” undertaken in early May, which were condemned by the Malaysian Human Rights Commission,⁵⁹⁸ led to the arrest of nearly 2,000 undocumented migrants, some of whom were held in detention centres with notoriously “inhumane” conditions.⁵⁹⁹ These measures reportedly resulted in COVID-19 cases in these facilities surging to 410 by the end of May.⁶⁰⁰ Fear of deportation and poor conditions at detention centres discourages undocumented migrants from seeking COVID-19 treatment, thus further increasing their vulnerability to the disease.⁶⁰¹
- The Inter-American Court of Human Rights (IACtHR) issued urgent provisional measures ordering **Panama** to protect the rights to health, life and personal integrity of individuals held in migrant detention centres. More specifically, the IACtHR affirmed that persons detained in “*La Peñita*” and “*Laja Blanca*” centers must have access to healthcare services, including testing and treatment of COVID-19, especially in light of the risks to their health raised by overcrowding conditions and by the lack of primary health services and measures to prevent infection.⁶⁰²
- In **Kuwait**, some 20,000 migrant workers awaiting repatriation due to the lockdown imposed by State authorities were reportedly being held in detention camps in the desert, with poor hygiene conditions, overcrowding, lack of running water and overflowing sewage.⁶⁰³
- In **Thailand**, between late April and early May 2020, 65 out of 115 detainees in an Immigration Detention Centre in Thailand’s Songkhla province tested positive for COVID-19. Among those were at least 18 were refugees who had been detained since 2015. The UN High Commissioner for Human Rights has described immigration detention facilities in Thailand as “often overcrowded and lack of adequate healthcare, food, water, sanitation and hygiene”.⁶⁰⁴

2. Recommendations for States on the right to health of persons deprived of their liberty during the COVID-19 pandemic

To prevent the spread of COVID-19 in all detention centres, including prisons and quarantine sites, and to ensure the realization of the right to health, States should take adequate measures, including the following:

- Minimize as far as possible the number of detained persons by releasing at-risk categories, such as the elderly and people with chronic diseases, as well as persons in pre-trial detention, those convicted of minor and non-violent offences and persons with imminent release dates.

⁵⁹⁸ Human Rights Commission of Malaysia (SUHAKAM), Press Statement No. 15 of 2020, Suhakam Urges Authorities to Cease Arrest of Undocumented Migrants during Covid-19 Crisis (3 May 2020), available at: <https://www.suhakam.org.my/press-statement-no-15-of-2020-suhakam-urges-authorities-to-cease-arrest-of-undocumented-migrants-during-covid-19-crisis/>

⁵⁹⁹ Amnesty International, COVID-19 is not an excuse to crackdown on undocumented migrants (30 April 2020), available at: <https://www.amnesty.org/2020/04/30/covid-19-is-not-an-excuse-to-crackdown-on-undocumented-migrants/>

⁶⁰⁰ E Fishbein & J T Hkawng, Immigration detention centres become Malaysia coronavirus hotspot, Al Jazeera (2 June 2020), available at: <https://www.aljazeera.com/news/2020/06/immigration-detention-centres-malaysia-coronavirus-hotspot-200602004727890.html>

⁶⁰¹ Human Rights Watch, Malaysia: Migrants, Stateless at Extra Risk from Virus (24 March 2020), available at: <https://www.hrw.org/news/2020/03/24/malaysia-migrants-stateless-extra-risk-virus>

⁶⁰² Inter-American Court of Human Rights, *Vélez Loor v. Panama (Provisional Measures)*, Order of the President of the Inter-American Court of Human Rights (26 May 2020).

⁶⁰³ A Ullah, Middle East Eye, “Like sardines”: Migrant workers suffering in Kuwait’s desert detention camps (15 May 2020), available at: <https://www.middleeasteye.net/news/coronavirus-kuwait-migrant-workers-bangladesh-detention-camps>

⁶⁰⁴ Bangkok Post, Abuse of migrants, refugees counterproductive (28 May 2020), available at: <https://www.bangkokpost.com/opinion/opinion/1925572/abuse-of-migrants-refugees-counterproductive>

- Ensure that any exclusion from early release of persons arbitrarily detained, including human rights defenders, activists and journalists, does not result in a violation of prohibitions on discrimination and other internationally protected human rights.
- Protect the health of persons convicted of crimes under international law, where necessary, by considering alternative to detention such as relocation in facilities where safe detention conditions can be enjoyed. If this is not possible, placement under temporary house arrest, subject to appropriate controls and to return to prison once the emergency situation is over.
- Ensure the protection of the right to health of all persons deprived of their liberty, including by:
 - Preventing overcrowding;
 - Ensuring access to legal representatives for detained persons and protecting their right to challenge the lawfulness of detention;
 - Ensuring access to COVID-19 testing and treatment on an equal basis with the general population;
 - Ensuring access to adequate water, sanitation, soap, sanitizer and PPE materials to prevent COVID-19 transmission; and
 - Ensuring overall conditions complying with international human rights standards, particularly ESCR, including:
 - Adequate climatic conditions such as air, minimum floor space, lighting, heating and ventilation;
 - Suitable items to ensure personal hygiene;
 - Adequate clothing;
 - Food of nutritional value adequate for health and strength;
 - Drinking water; and
 - Recreational activities for the benefit of mental and physical health.
- Refrain, as far as possible, from detaining migrants, stateless persons and asylum seekers, and ensure non-discriminatory access to hygienic conditions and healthcare when they are so detained.

F. Healthcare Workers

Article 7 of ICESCR protects the rights of all workers to “just and favourable conditions to work” including, in particular “safe and healthy working conditions”. Article 12(2)(b) of the ICESCR requires States to ensure “the improvement of all aspects of environmental and industrial hygiene”. The CESCR has clarified that this right requires States to enact “preventive measures in respect of occupational accidents and disease” and more generally ensure “hygienic working conditions”.⁶⁰⁵

Similar protections are provided under regional human rights treaties. For instance:

- Articles 15 and 16 of the African Charter on Human and Peoples' Rights oblige States Parties to protect “the right to work under equitable and satisfactory conditions”;
- Article 7 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San

⁶⁰⁵ CESCR, General Comment 14, para 15.

Salvador) guarantees the right to just, equitable and satisfactory conditions of work. States are obliged to guarantee through legislation: “safety and hygiene at work”; “the prohibition of night work or unhealthy or dangerous working conditions” and, in general, all work which “jeopardizes health, safety, or morals, for persons under 18 years of age”; and

- Articles 3 and 11 of the European Social Charter call on State Parties to effectively exercise the right to safe and healthy working conditions, and “formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.”

Protective obligations are also contained in a number of ILO Conventions including the ILO Conventions on the Occupational Safety and Health Convention 1981 (No. 155),⁶⁰⁶ the Promotional Framework for Occupational Safety and Health Convention 2006 (No. 187),⁶⁰⁷ and Nursing Personnel Convention 1977 (No. 149).⁶⁰⁸

While States should take all necessary efforts to secure the rights to work and health of all workers, certain categories of workers are, because of the precarious nature their work, more vulnerable to COVID-19 transmission in the workplace. The CESCR has noted this, emphasizing that:

“many health-care workers, who are performing heroic work in the front lines of responding to the pandemic, are being infected due to inadequacies or shortages of personal protective equipment and clothing.”⁶⁰⁹

The CESCR therefore indicates that States should ensure health workers are “provided proper protective clothing and equipment against contagion”, that they are “consulted by decision-makers, and that due regard is paid to their advice.”⁶¹⁰

1. COVID-19, the Right to Health and Health Workers

Unsafe working conditions for health workers can lead to work-related illness both impacting on themselves and users of such facilities. Put simply, increased risk of COVID-19 transmission for health workers increases the risk of transmission throughout the general population and reduces vital availability of health workers themselves to perform their critical health care functions in respect of the COVID-19 pandemic. Yet, because their job is to care for the sick and injured, as the WHO recognized, health workers are sometimes wrongly viewed as “immune” to injury or illness.⁶¹¹

On 10 April 2020 in a media briefing to update the public on the COVID-19 outbreak, the WHO explained that healthcare workers were at risk due to a range of factors including the following:

⁶⁰⁶ ILO, C155-Occupational Safety and Health Convention, 1981 (No.155), available at:

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C155

⁶⁰⁷ ILO, C187- Promotional Framework For Occupational Safety and Health Convention, 2006 (No.187), available at:

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C187

⁶⁰⁸ ILO, C149-Nursing Personnel Convention, 1977 (No.149), available at:

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C149

⁶⁰⁹ CESCR COVID-19 Statement, paras 5, 16-17.

⁶¹⁰ Id, para 13.

⁶¹¹ WHO, Health Workers : Heath Worker Occupational Health, available at:

https://www.who.int/occupational_health/topics/hcworkers/en/

- Delayed recognition of COVID-19 symptoms and lack of experience in dealing with respiratory pathogens;
- Exposure to large numbers of patients in long shifts with inadequate rest periods;
- Lack of Personal Protective Equipment; and
- Lack of measures to prevent the spread in hospitals.

The WHO's recommendations to the States included: training healthcare workers to recognize respiratory diseases; increasing access to PPE; supporting exhausted and stressed healthcare workers; putting strong hospital surveillance systems in place; and recognizing that every healthcare system has gaps and looking into how the system be improved for the future.⁶¹² Yet, despite this early warning and direction, health workers from around the world describe in detail how they are put in harm's way, overworked and ill-equipped.⁶¹³

Some States have developed innovative ways to address these problems and ensure occupational health and safety of all healthcare workers. For example, in **Thailand**, the government introduced locally made recycled plastic PPE for their healthcare workers. Considering that imported isolation gowns cannot be reused, in order to quickly solve the shortage, the Thai government introduced the locally made reusable isolation gowns made of recycled plastic drinking water bottles, which proved to be more cost-effective. These gowns, said to be produced by local manufacturers at a reasonable cost to meet internationally acceptable standards, can be reused 20 times. The first batch of these reusable isolation gowns were handed to medical workers in mid-June 2020.⁶¹⁴

a) Shortages of Personal Protective Equipment

A major problem faced by health workers in most of the world during the COVID-19 outbreak has been a shortage of PPE necessary to protect both health workers and their patients from the risk of COVID-19 transmission.

In the early days of the outbreak, regular healthcare workers and local healthcare volunteers⁶¹⁵ in a number of States, including **Italy**,⁶¹⁶ **Japan**,⁶¹⁷ the **Russian Federation**,⁶¹⁸ **Thailand**, the **United Kingdom**, the **United States**⁶¹⁹ and

⁶¹² L Lacina, What's needed now to protect health workers: WHO COVID-19 briefing, World Economic Forum (10 April 2020), available at: <https://www.weforum.org/agenda/2020/04/10-april-who-briefing-health-workers-covid-19-ppe-training/>

⁶¹³ New York Times, In Harms Way (24 June 2020), available at:

<https://www.nytimes.com/interactive/2020/world/coronavirus-health-care-workers.html>.

⁶¹⁴ A Wipatayotin, Anutin Trumpets locally made recycled plastic PPE for medics, Bangkok Post (10 May 2020), available at: <https://www.bangkokpost.com/thailand/general/1915444/anutin-trumpets-locally-made-recycled-plastic-ppe-for-medics>; Thai PBS, Medicine Association distributed 41,950 PPEs which can be Reused 20 times (15 June 2020), available at: <https://news.thaipbs.or.th/content/293638> (in Thai)

⁶¹⁵ Manager Online, Lacking of Masks and PPE Suits for Local Health Volunteers in Phayao Province, Thailand (30 March 2020), available at <https://mgronline.com/local/detail/9630000032498> (in Thai). Notably, much of Thailand's ability to deal successfully with COVID-19 in rural areas is due to its system of village health volunteers. More than 900,000 village health volunteers provide Thailand's first line of defense against illness. They were trained as health communicators and health mobilizers who work as an extension of the professional staff of the Ministry of Public Health.

⁶¹⁶ International Council of Nurses, High proportion of healthcare workers with COVID-19 in Italy is a stark warning to the world: protecting nurses and their colleagues must be the number one priority (20 March 2020), available at: <https://www.icn.ch/news/high-proportion-healthcare-workers-covid-19-italy-stark-warning-world-protecting-nurses-and>

⁶¹⁷ E Lies, Lacking protective gear, Japan's Osaka pleads for plastic raincoats, Reuters (15 April 2020), available at: <https://www.reuters.com/article/us-health-coronavirus-japan-raincoats/lacking-protective-gear-japans-osaka-pleads-for-plastic-raincoats-idUSKCN21X0RO>

⁶¹⁸ AFP, Short on protective gear, Russian medics fear infecting patients (22 April 2020), available at:

<https://www.france24.com/en/20200422-short-on-protective-gear-russian-medics-fear-infecting-patients>

⁶¹⁹ WION, Coronavirus crisis without PPE: Nurses in US, UK forced to wear trash bags (10 April 2020), available at: <https://www.wionews.com/world/coronavirus-crisis-without-ppe-nurses-in-us-uk-forced-to-wear-trash-bags-291863>

Zimbabwe,⁶²⁰ faced severe shortages in access to even basic PPE. Failure to provide PPE is a clear violation of the rights to health and conditions of work of health workers themselves and also may constitute a broader threat to the rights to health of all people.

In Lesotho, a judgment of the High Court handed down on 24 June found the government's failure to provide PPE to doctors to be unconstitutional and in violation of the right life and ordered that it remedy this dereliction by provided the necessary safety equipment.⁶²¹ Rejecting the government's argument that it lacked the resources to provide such equipment, the Court held:

"It should be noted that the threat posed to the doctors' lives is continuing and ever omnipresent. Given the nature of the doctors' work, potential loss of life looms ever so largely and waits for non-one. Procrastination' and apparent lack of political will on the part of Government in addressing these grave concerns is disturbing to say the least."⁶²²

Even where PPE was initially available in some countries, healthcare workers worldwide reported that most of their protective supplies were in short supply. The need for PPE including N95 masks, surgical masks, PPE suits, boots, gloves and gowns and even soap, water and sanitizer were widely reported.⁶²³ At the end of March 2020, WHO acknowledged that "the chronic global shortage of personal protective equipment is now one of the most urgent threats to our collective ability to save lives."⁶²⁴

When healthcare workers were not sufficiently protected and/or were infected, they were often quarantined for around 14 days, depleting the already exhausted workforce and exposing whole populations to further COVID-19 transmission:

- In the Victoria State of **Australia**, it was reported on 16 July 2020 that more than 150 hospital staff members were in precautionary quarantine following three potential sources of exposure;⁶²⁵
- In countries across Asia and Pacific region, as of 3 April 2020, more than 4,200 healthcare workers were reported to be self-isolating.⁶²⁶ This also sent some local hospitals into partial lockdown, suspending most services for up to 14 days, such as in a local hospital in **Thailand**.⁶²⁷

As healthcare workers struggled with a shortage of personal protective gear, many workers in countries such as **Indonesia, Malaysia, the United Kingdom** and

⁶²⁰ N Chingono, Zimbabwe doctors and nurses down tools over lack of protective coronavirus gear, CNN (25 March 2020), available at: <https://edition.cnn.com/2020/03/25/africa/zimbabwe-doctors-nurses-ppe-strike/index.html>

⁶²¹ C Rickard, Supply Doctors, Health Workers With Protection, Court Tells Lesotho Government (25 June 2020), available at: <https://africanlii.org/article/20200625/supply-doctors%2C-health-workers-protection%2C-court-tells-lesotho-government>.

⁶²² *Lesotho Medical Association and Another v Minister of Health and Others* (CONST. CC NO: 19/2019) [2020] LSHC 1 (24 June 2020), available at: <https://lesotholii.org/ls/judgment/high-court/2020/1-0>.

⁶²³ Asian Development Bank, Global Shortage of Personal Protective Equipment amid COVID-19: Supply Chains, Bottlenecks, and Policy Implications (April 2020), available at: <https://www.adb.org/publications/shortage-ppe-covid-19-supply-chains-bottlenecks-policy>; A Jacobs, Grave Shortages of Protective Gear Flare Again as Covid Cases Surge, New York Times (8 July 2020), available at: <https://www.nytimes.com/2020/07/08/health/coronavirus-masks-ppe-doc.html>.

⁶²⁴ Al Jazeera, 'Chronic' Global Shortage of Coronavirus Protective Gear: WHO (28 March 2020), available at <https://www.aljazeera.com/news/2020/03/global-shortage-coronavirus-protective-gear-200327182042806.html>

⁶²⁵ M Davey, More than 150 hospital staff in isolation but Victoria refuses to reveal details about Covid-19 in health institutions, The Guardian (16 July 2020), available at: <https://www.theguardian.com/australia-news/2020/jul/16/victoria-refuses-health-workers-have-covid-19-hospital-staff-looming-crisis-coronavirus>

⁶²⁶ K Butt, Asia-Pacific health workers risk all to fight COVID-19, AA News (3 April 2020), available at: <https://www.aa.com.tr/en/asia-pacific/asia-pacific-health-workers-risk-all-to-fight-covid-19/1791014>

⁶²⁷ Thairath, Reopening Rueso Hospital after healthcare workers were put into quarantine for 14 days (29 April 2020), available at <https://www.thairath.co.th/news/local/south/1833243> (in Thai)

the **United States**, resorted to working with handmade equipment such as plastic garbage bags for gowns and plastic water bottles for eye protection to make up for shortages in PPE.⁶²⁸

b) Increased risk of COVID-19 infection, illness and death

Predictably, insufficient PPE and increased exposure to persons with COVID-19 have resulted in substantial incidents of infection, illness and death for health workers across the world.

As of 12 August, the International Council of Nurses (ICN) estimated that health workers had suffered eight percent of all COVID-19 infections worldwide, noting that the WHO estimated the proportion of total infections could be as high as 10 percent.⁶²⁹ The ICN has called on States to collect "data on healthcare worker infections and deaths to be systematically collected by national governments and held centrally at the WHO."⁶³⁰ Reports from various countries and regions support the conclusion that throughout the COVID-19 pandemic health workers have been disproportionately exposed to infection. For example:

- In **South Africa** the government indicated that as of 13 August 2020, 27,360 health workers had tested positive for COVID-19, while 240 had died as a result;⁶³¹
- By August 2020, an estimated 72,980 of medical staff in **Mexico** had been infected with COVID 19. This is approximately 19 percent of the overall COVID-19 infections.⁶³² Some 978 health workers had died.
- In the **United States** it is estimated that as of 17 August 2020 there had been 135,298 health workers have been infected with COVID-19 and 629 have died,⁶³³ but both the number of deaths and cases are likely higher;⁶³⁴
- By June 2020, according to data compiled by Anadolu Agency, a total of 12,454 health workers across the **Asia-Pacific region** had tested positive for the COVID-19 while 171 had died;⁶³⁵

⁶²⁸ For example, E Bowden, Carl Campanile and Bruce Golding, Worker at NYC hospital where nurses wear trash bags as protection dies from coronavirus, New York Post (25 March 2020), available at: <https://nypost.com/2020/03/25/worker-at-nyc-hospital-where-nurses-wear-trash-bags-as-protection-dies-from-coronavirus/>; C Press, Coronavirus: The NHS workers wearing bin bags as protection, BBC (5 April 2020), available at: <https://www.bbc.com/news/health-52145140>; Athira Nortajuddin, Medical supplies shortage in ASEAN, The ASEAN Post (25 March 2020), available at: <https://theaseanpost.com/article/medical-supplies-shortage-asean>

⁶²⁹ International Council of Nurses, International Council of Nurses calls on public to support nurses: stopping the spread of COVID-19 is in your hands (12 August 2020): https://www.icn.ch/sites/default/files/inline-files/PR_42_AK_Call_for_support_nurses_FINAL_1.pdf; DW, Coronavirus latest: WHO says health workers account for 10% of global infections (17 July 2020): <https://www.dw.com/en/coronavirus-latest-who-says-health-workers-account-for-10-of-global-infections/a-54208221>.

⁶³⁰ International Council of Nurses, International Council of Nurses calls for data on healthcare worker infection rates and deaths (6 May 2020), available at: https://www.icn.ch/sites/default/files/inline-files/PR_20_Infections%20and%20deaths%20from%20COVID-19%20among%20nurses.pdf

⁶³¹ Department of Health, Statement on Health Care Workers that have Acquired COVID-19 (13 August 2020): <https://storage.googleapis.com/stateless-bhekisisa-website/wordpress-uploads/2020/08/fda38e56-hcw-13-august-2020.pdf>. On the conditions faced by health workers in South Africa more generally see: Oxfam, The Right To Dignified Healthcare Work Is A Right To Dignified Health Care For All (30 June 2020), available here: https://www.oxfam.org.za/wp-content/uploads/2020/08/oxfam_care4carers-report_final_20200720.pdf.

⁶³² D Ore, Why the coronavirus is killing so many of Mexico's healthcare workers (6 August 2020), available at: <https://www.reuters.com/article/us-health-coronavirus-mexico-healthcare/why-the-coronavirus-is-killing-so-many-of-mexicos-healthcare-workers-idUSKCN2521PF>.

⁶³³ CDC, Cases and Deaths Among Healthcare Personnel: <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>, accessed 17 August 2020.

⁶³⁴ A Macknamara, The CDC says over 600 health care workers have died from the coronavirus. This doctor has counted hundreds more (14 August 2020), available at: <https://www.cbsnews.com/news/dr-claire-rezba-tracks-healthcare-workers-coronavirus-deaths/>.

⁶³⁵ K Butt, Asia-Pacific health workers hit hard by COVID-19, AA News (11 June 2020), available at: <https://www.aa.com.tr/en/asia-pacific/asia-pacific-health-workers-hit-hard-by-covid-19/1873247>

- In **Nigeria**, by June 2020, more than 800 health workers had reportedly been infected with COVID-19 because of what the National Association of Resident Doctors of Nigeria called “grossly inadequate” provisions of PPE. The Nigerian Doctors’ Association therefore announced an “indefinite strike” to protest their poor treatment.⁶³⁶ In neighboring Niger, estimates in June indicated that 19 percent of all COVID-19 infections had afflicted health workers.⁶³⁷
- In the **United Kingdom**, it is estimated that “patient facing” health and social workers accounted for 10 percent of all COVID-19 cases between 26 April 2020 and 7 June 2020.⁶³⁸
- In **Italy**, figures in April 2020 showed nearly 17,000 healthcare workers had been infected, amounting to 10 percent of Italy’s COVID-19 cases at the time.⁶³⁹

c) Retaliation against health workers speaking out about poor conditions

Given these dire conditions, health workers around the world began speaking out about the poor conditions faced in their workplaces and heightened risks of COVID-19 transmission. As a result, there have been reports of employers retaliating against healthcare workers for raising concerns:

- On 9 March 2020, in **the United States** the American Nurses Association (ANA) issued a statement that it was “disturbed about reports of employers retaliating against nurses and other healthcare workers for raising legitimate concerns about their personal safety while caring for patients with COVID-19”, including reports of “intimidation, firing, ostracizing and more.”⁶⁴⁰
- In **the United Kingdom**, NHS staff were reportedly warned not to make any comments about shortages of protective equipment on social media.⁶⁴¹
- In **China**, Dr Li Wenliang, who attempted to raise an alarm among his colleagues about COVID-19 in a Wuhan hospital, was summoned by the Public Security Bureau and instructed to sign a letter accusing him of “making false comments” that had “severely disturbed the social order” and officially threatened to desist from “illegal activity” or he would be “brought to justice”.⁶⁴²

⁶³⁶ Sahara Reporters, BREAKING: Nigerian Doctors To Begin Nationwide Strike June 15 Amid COVID-19 (8 June 2020), available at: <http://saharareporters.com/2020/06/08/breaking-nigerian-doctors-begin-nationwide-strike-june-15-amid-covid-19>

⁶³⁷ P Mwai et al, Coronavirus: How vulnerable are health workers in Nigeria? (17 June 2020), available at: <https://www.bbc.com/news/world-africa-53013413>.

⁶³⁸ Royal Society Delve Initiative, Scoping Report on Hospital and Health Care Acquisition of COVID-19 and its Control, (6 June 2020) <https://rs-delve.github.io/reports/2020/07/06/nosocomial-scoping-report.html>.

⁶³⁹ Business Day, About 17,000 Italian healthcare workers have Covid-19 (17 April 2020), available at:

<https://www.businesslive.co.za/bd/world/europe/2020-04-17-about-17000-italian-healthcare-workers-have-covid-19/>

⁶⁴⁰ American Nurses Association, ANA Disturbed by Reports of Retaliation Against Nurses for Raising Concerns About COVID-19 Safety (9 April 2020), available at: <https://www.nursingworld.org/news/news-releases/2020/ana-disturbed-by-reports-of-retaliation-against-nurses-for-raising-concerns-about-covid-19-safety/>

⁶⁴¹ S Lintern, Coronavirus: NHS doctors ‘gagged’ over protective equipment shortage, Independent (30 March 2020), available at: <https://www.independent.co.uk/news/health/coronavirus-nhs-uk-doctors-gagged-england-a9433171.html>

⁶⁴² S Hegarty, The Chinese doctor who tried to warn others about coronavirus (6 February 2020):

<https://www.bbc.com/news/world-asia-china-51364382>; Y Tan, Li Wenliang: ‘Wailing Wall’ for China’s virus whistleblowing doctor (23 June 2020): <https://www.bbc.com/news/world-asia-china-53077072>.

d) Discrimination and Violence against health workers

Because of COVID-19 related stigma and their increased exposure to COVID-19 transmission, health workers have also increasingly been subjected to a variety of forms of discrimination. The CESCR has noted that States parties should ensure that “a person’s actual or perceived health status is not a barrier to realizing the rights under the Covenant” and should “adopt measures to address widespread stigmatization of persons on the basis of their health status”.⁶⁴³

Nevertheless, the CESCR further noted that differential treatment will be viewed as discriminatory unless “the justification for differentiation is reasonable and objective”. This includes an assessment as to “whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society”. The Committee further stated that there must be “a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects”.⁶⁴⁴

Despite this, healthcare workers around the world have experienced a range of conduct constituting an impairment to human rights:

- In **Malawi**, healthcare workers were reportedly refused access to public transport, and threatened to be evicted from rented homes or even killed.⁶⁴⁵
- In **Mexico**, a number of inhabitants from a town in Mexico reportedly protested outside a public hospital and said they did not want the hospital to treat COVID-19 patients and threatened to burn down the hospital.⁶⁴⁶ A nurse was reportedly attacked and taunted by children who shouted “It’s Covid! Stay away from us”. The attack resulted in two broken fingers suffered by the nurse.⁶⁴⁷
- In **Japan**, multiple cases of healthcare workers’ children being forced to leave public daycare centers were reported – forcing some workers to stay at home or even to leave the profession.⁶⁴⁸
- In the **Philippines**, an ambulance driver was reportedly shot for parking his vehicle in a residential area after transporting medical personnel as he was accused of transferring COVID-19 patients and endangering the lives of people in the community. A nurse who contracted COVID-19 reportedly could not go back to his hometown after his neighbors had petitioned against his return. There were also reports about health workers who were being evicted from their dormitories by landlords or being refused service

⁶⁴³ CESCR, General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the ICESCR), UN Doc. No. E/C.12/GC/20 (2 July 2009), para 33.

⁶⁴⁴ Id, para 13.

⁶⁴⁵ L Masina, Malawi Health Workers Face Stigma, Discrimination Over COVID-19, VOA (23 April 2020), available at: <https://www.voanews.com/covid-19-pandemic/malawi-health-workers-face-stigma-discrimination-over-covid-19>

⁶⁴⁶ J Miranda, J C Martinez, R Torres, A de Dios Palma, Y Rodriguez, COVID-19: Healthcare workers experience discrimination and violence in Mexico, El Universal (31 May 2020), available at: <https://www.eluniversal.com.mx/english/covid-19-healthcare-workers-experience-discrimination-and-violence-mexico>

⁶⁴⁷ D Ore, ‘It’s Covid! Stay away!’ Latin America’s health workers face rising hostility” (15 April 2020):

<https://www.reuters.com/article/us-health-coronavirus-latinamerica-medic/its-covid-stay-away-latin-americas-health-workers-face-rising-hostility-idUSKCN21X2WL>.

⁶⁴⁸ L Craft, Japan’s beleaguered nurses battling widespread abuse along with COVID-19, CBS News (28 April 2020), available at: <https://www.cbsnews.com/news/japans-overstretched-doctors-and-nurses-battling-widespread-abuse-along-with-covid-19/>

in eateries and prevented from using laundromats and public transport services.⁶⁴⁹

- In **India**, cases have been reported of healthcare workers facing various forms of discrimination, including with respect to access to housing.⁶⁵⁰ Videos of healthcare workers being pelted with stones as they are chased away from a locality in India went viral in April 2020.⁶⁵¹
- In **South Africa**, healthcare workers, and in particular community health workers tasked with community testing for COVID-19, have reported increased stigma against them reminiscent of the HIV pandemic.⁶⁵² They have called for increased public education on COVID-19 which has been hampered by lockdown measures. To support health workers, including with respect to strains on their mental health, a targeted hotline for health workers has been set up.⁶⁵³ In July, police used tear gas and stun grenades to disperse health workers who congregated at a government building to protest poor working conditions and lack of access to PPE.⁶⁵⁴

In several States, assaults and discrimination against health workers were appropriately met with clear denunciations by governments. For example:

- In the **Philippines**, the health department has denounced reports of assaults and discriminatory acts against healthcare workers.⁶⁵⁵ Local governments in the cities of Manila and Cebu have passed ordinances that prohibit discrimination of and denial of service to people infected with COVID-19, people suspected of having contracted the disease, and healthcare workers. Penalties include fines and imprisonment of up to six months.⁶⁵⁶
- In **India**, the Union Health Ministry issued an advisory asking people not to discriminate against COVID-19 patients, healthcare workers, sanitary workers and the police who are the front-line responders to this crisis. People have also been advised against spreading fear and panic or targeting health workers and to avoid discriminatively labelling any community or area for the spread of the virus.⁶⁵⁷
- In **Mexico**, President Andres Manuel Lopez Obrador urged people to “to take care of health workers, to respect them, to love them” and indicated “we couldn’t do anything without health workers”.⁶⁵⁸

⁶⁴⁹ J G U. Rubrico, Covid-19 and the Discrimination of Medical Personnel in the Philippines, Italian Institute for International Political Studies (8 April 2020) (“Rubrico, Italian IIPS, April 2020”) available at:

<https://www.ispionline.it/en/pubblicazione/covid-19-and-discrimination-medical-personnel-philippines-25725>

⁶⁵⁰ D K Pandey, Coronavirus | Don’t discriminate against COVID-19 patients, health workers: Health Ministry, The Hindu (8 April 2020) (“Pandey, The Hindu, April 2020”) available at: <https://www.thehindu.com/news/national/coronavirus-dont-discriminate-against-covid-19-patients-health-workers-health-ministry/article31291391.ece>

⁶⁵¹ C Kapoor, COVID-19: India’s frontline heroes decry harassment, AA News (3 April 2020), available at:

<https://www.aa.com.tr/en/asia-pacific/covid-19-indias-frontline-heroes-decry-harassment/1791396>

⁶⁵² S P Jonas, Eastern Cape nurses face Covid-19 stigma, New Frame (19 June 2020), available at:

<https://www.newframe.com/eastern-cape-nurses-face-covid-19-stigma/>

⁶⁵³ M Lindeque, Healthcare Workers Speak Out On Stigma Attached To Contracting Covid-19, MSN News (3 June 2020), available at: <https://ewn.co.za/2020/06/03/healthcare-workers-speak-out-on-stigma-attached-to-contracting-covid-19>.

⁶⁵⁴ E Ellis, Eastern Cape health workers chased away by police in riot gear after long wait to see health department head (17 July 2020), available at: <https://www.dailymaverick.co.za/article/2020-07-17-eastern-cape-health-workers-chased-away-by-police-in-riot-gear-after-long-wait-to-see-health-department-head/>.

⁶⁵⁵ Rubrico, Italian IIPS, April 2020.

⁶⁵⁶ Rubrico, Italian IIPS, April 2020.

⁶⁵⁷ Pandey, The Hindu, April 2020.

⁶⁵⁸ D Ore, Why the coronavirus is killing so many of Mexico’s healthcare workers (6 August 2020), available at:

<https://www.reuters.com/article/us-health-coronavirus-mexico-healthcare/why-the-coronavirus-is-killing-so-many-of-mexicos-healthcare-workers-idUSKCN2521PF>.

⁶⁵⁸ CDC, Cases and Deaths Among Healthcare

2. Recommendations on the healthcare workers' rights in the context of COVID-19

To ensure protections of the rights to work and health of health workers, States should take measures to:

- Ensure access to all necessary PPE for all health workers without discrimination, including those doing community-based testing.
- Adopt and implement appropriate regulatory measures to require public and private health facilities to minimize the risks of COVID-19 transmission according to evidence-based public health standards.
- Provide public education on COVID-19 to reduce stigma relating to the virus, including against health workers.
- Provide support for healthcare workers to ensure the protection of their physical and mental health throughout the COVID-19 pandemic.
- Ensure the protection of health workers right to just and favourable conditions of work during the COVID-19 pandemic, including by regulating and monitoring working hours, conditions and the level of remuneration received by health workers.
- Ensure that health workers who act as whistleblowers relating to healthcare services during the COVID-19 pandemic are not subjected to retaliation, threats, persecution or sanction.
- Protect health workers against discrimination and violence and differential treatment that is not in compliance with the ICESCR and CESCR's General Comment 20.
- Publicly and clearly condemn and strongly discourage stigma, discrimination and violence against health workers.

G. Sex Workers

All persons, without discrimination, have the right to health and the right to work. The CESCR has explained that, "the right [to work] applies to all workers in all settings", including informal workers.⁶⁵⁹ Therefore, even though most sex workers are informal workers, they too are entitled to exercise their right to work. However, since sex work remains unlawful in the vast majority of countries worldwide, albeit to different degrees, sex workers often face great difficulties in enjoying the full human rights protections to which they are entitled, including with respect to the right to health. Indeed, as the CESCR has indicated:

"States parties should take measures to fully protect persons working in the sex industry against all forms of violence, coercion and discrimination. They should ensure that such persons have access to the full range of sexual and reproductive healthcare services."⁶⁶⁰

⁶⁵⁹ CESCR, General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. No. E/C.12/GC/23 (7 April 2016), para. 5, available at: <https://www.refworld.org/docid/5550a0b14.html>. States parties have immediate obligations in relation to the right to work, such as the obligation to "guarantee" that it will be exercised "without discrimination of any kind" (ICESCR art. 2, para. 2) and the obligation "to take steps" (art. 2, para. 1) towards the full realization of article 6", CESCR, General Comment 18, para 19.

⁶⁶⁰ CESCR General Comment 22, para 32.

1. COVID-19, the Right to Health and Sex Workers

In its Guidance Note on COVID-19, the OHCHR has noted that the criminalization of sex work can act as a barrier to access health services in the context of COVID-19.⁶⁶¹ UNAIDS has stressed that “as sex workers and their clients self-isolate, sex workers are left unprotected, increasingly vulnerable and unable to provide for themselves and their families”.⁶⁶² In a joint statement with the Global Network of Sex Work Projects, UNAIDS has called on States to ensure “equal protection under the law and access to income support and to health care” for sex workers.⁶⁶³

a) Loss of income and work opportunities

As a result of the COVID-19 pandemic and lockdown or quarantine measures imposed by State authorities around the world, many sex workers have been forced to forfeit their main or exclusive source of income and livelihood.

Many have also largely been excluded from social relief or support packages implemented by States to compensate for economic hardships resulting from COVID-19.⁶⁶⁴ As sex workers do not have access to the formal employment sector in most States given the criminalization of sex work, they are also typically excluded from ordinary existing non-COVID-specific social protection schemes.⁶⁶⁵

- In **Thailand**, it was reported that up to 200,000 sex workers suddenly lost their jobs when the government ordered the closure of nightlife venues in late March 2020.⁶⁶⁶ As UNAIDS reported, most citizen and non-citizen sex workers in Thailand “are not eligible for social protection measures” or for the government’s stimulus package provided to informal workers.⁶⁶⁷
- In **South Africa**, because sex work is unlawful, sex workers are not eligible to benefit from the Unemployment Insurance Fund. Many of the estimated 158,000 sex workers in the country have therefore reported being unable to earn any money to support themselves and their families.⁶⁶⁸

Even in countries where sex work is decriminalized to some degree or even legalized, many sex workers have found that they are not entitled to social relief packages or unemployment benefits, or they are afraid to apply for such benefits,

⁶⁶¹ OHCHR, Covid-19 And Women’s Human Rights: Guidance (15 April 2020), available at: https://www.ohchr.org/Documents/Issues/Women/COVID-19_and_Womens_Human_Rights.pdf

⁶⁶² UNAIDS, Sex workers must not be left behind in the response to COVID-19 (8 April 2020) (“UNAIDS, 8 April 2020”), available at: https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2020/april/20200408_sex-workers-covid-19

⁶⁶³ UNAIDS, COVID-19 responses must uphold and protect the human rights of sex workers (24 April 2020) (“UNAIDS, 24 April 2020”), available at: https://www.unaids.org/en/resources/presscentre/featurestories/2020/april/20200424_sex-work.

⁶⁶⁴ UNAIDS, 8 April 2020.

⁶⁶⁵ See, for example, AFP, Covid-19: France sex workers seek 'emergency' fund for lost income (7 April 2020), available at: <https://www.nst.com.my/world/world/2020/04/582040/covid-19-france-sex-workers-look-for-emergency-fund-lost-income>; D Lumb, Coronavirus: Sex workers 'should have access to support fund, BBC (15 May 2020), available at: <https://www.bbc.com/news/uk-england-nottinghamshire-52579634>.

⁶⁶⁶ T Boonlert, Sex workers left in cold by outbreak, Bangkok Post (23 May 2020), available at: <https://www.bangkokpost.com/thailand/general/1922736/sex-workers-left-in-cold-by-outbreak>

⁶⁶⁷ UNAIDS, Supporting sex workers during the COVID-19 pandemic in Thailand (7 May 2020), available at: https://www.unaids.org/en/20200507_Thai_sex_workers. However, sex workers in Thailand who work in formal business sectors such as bars and other adult entertainment venues are entitled to the government benefit and, at times, social security benefits - but they often have to conceal their occupation to receive such support.

⁶⁶⁸ The Centre for Human Rights, University of Pretoria, the Sex Workers Education & Advocacy Taskforce (SWEAT) and Sisonke, Press Statement: Human Rights Organisations Call on South African Government to Address the Plight of Sex Workers during Covid-19 Crisis in the Interest of All South Africans (6 May 2020), available at: https://www.chr.up.ac.za/images/centrenews/2020/Human_rights_organisations_call_on_South_African_government_to_address_the_plight_of_sex_workers_during_COVID-19_crisis_in_the_interest_of_all_South_Africans.pdf

or unemployment benefits made available to them are insufficient for them to be able to make ends meet. For example:

- In **Canada**, many sex workers have been afraid to apply for unemployment benefits because they would have had to register as sex workers for their benefit eligibility to be considered, and they do not believe that it is safe for them register.⁶⁶⁹
- In **Japan**, sex workers were eligible to apply for aid under certain conditions, but such support ultimately remains insufficient for them to get by.⁶⁷⁰

As a result of insufficient support measures made available for them, sex workers are increasingly faced with the difficult choice of isolation with no support or working at a risk to their own health, as well as exposing themselves to State sanctions for breaching lockdown measures. While some have been able to move their work online, others are unable to stop in-person services.⁶⁷¹

b) Increased risk of contracting COVID-19 and other health risks

Sex workers who continue to work in-person are at heightened risk of contracting COVID-19 and sexually transmitted infections. On the one hand, their risk of COVID-19 exposure and contagion is heightened for many sex workers because of their limited access to proper information and knowledge about COVID-19, while, on the other hand, the risk of sexually transmitted infections is greater as a result of their more limited access to essential sexual and reproductive healthcare, goods and services, including condom supplies.⁶⁷² There have been many reports of interruptions to condom supplies as a result of the COVID-19 pandemic.⁶⁷³ A lack of such supplies is likely to significantly increase sex workers' vulnerability to HIV and other sexually transmitted diseases, as well as COVID-19 virus.⁶⁷⁴

In addition, in **France**, for example, community health groups have reported that during the pandemic, some sex workers have had to adopt increasingly unsafe working practices in order to eke out a living, including having to acquiesce to risky demands such as unprotected sex.⁶⁷⁵

A number of civil society groups are also in the process of developing guidelines to protect sex workers from contracting COVID-19 from their clients. In **Thailand**,

⁶⁶⁹ T Wright, Sex Workers at risk and left out COVID-19 help, National Observer (20 April 2020), available at: <https://www.nationalobserver.com/2020/04/20/news/sex-workers-risk-and-left-out-covid-19-help>

⁶⁷⁰ J Yeung, J Ogura and W Ripley, Japan is offering sex workers financial aid. But they say it's not enough to survive the coronavirus pandemic, CNN (20 April 2020), available at: <https://edition.cnn.com/2020/04/19/asia/japan-sex-workers-coronavirus-intl-hnk/index.html>

⁶⁷¹ A Laing, Chile's sex workers embracing online world amid Covid-19, Business Day (6 May 2020), available at: <https://www.businesslive.co.za/bd/world/americas/2020-05-06-chiles-sex-workers-embracing-online-world-amid-covid-19/>; G Dunstan, Coronavirus: How do sex workers keep safe during pandemic?, BBC (19 May 2020), available at: <https://www.bbc.com/news/uk-wales-52706165>; "The sex work network we have been building is saving us during COVID-19" (29 June 2020): M Fassi, The sex work network we have been building is saving us during COVID-19, Open Democracy (29 June 2020), available at: <https://www.opendemocracy.net/en/5050/sex-work-network-we-have-been-building-saving-us-during-covid-19/>; K Mafolo, Covid-19: Some sex workers move online as SA heads into lockdown, Ground Up (27 March 2020), available at: <https://www.groundup.org.za/article/some-sex-workers-move-online-sa-heads-lockdown/>

⁶⁷² UNAIDS, 8 April 2020.

⁶⁷³ AFP, Virus may spark 'devastating' global condom shortage', Bangkok Post (8 April 2020), available at <https://www.bangkokpost.com/world/1895665/virus-may-spark-devastating-global-condom-shortage>

⁶⁷⁴ Reuters, Global condom shortage looms as coronavirus shuts down production, The Guardian (27 March 2020), available at: <https://www.theguardian.com/world/2020/mar/27/global-condom-shortage-coronavirus-shuts-down-production>

⁶⁷⁵ E St Denny, Coronavirus: why French sex workers seeking support from government are unlikely to receive funding, The Conversation (18 April 2020), available at: <https://theconversation.com/coronavirus-why-french-sex-workers-seeking-support-from-government-are-unlikely-to-receive-funding-136589>

sex worker advocacy NGOs are trying to develop “Safe Sex Guidelines from COVID-19”. However, these Guidelines are difficult to develop as it remains difficult to strike a balance between sex workers’ need to work and the need for social distancing and other effective hygiene measures.⁶⁷⁶

c) Decreased access to sexual and reproductive healthcare, goods and services

Some sex workers living with HIV have had their access to essential HIV medication cut as health systems are overwhelmed by COVID-19 patients and have deprioritized these medicines and essential sexual and reproductive healthcare, goods and services.⁶⁷⁷ The WHO has reported that 73 countries are at risk of stock-outs of life-saving antiretroviral treatments as a result of the COVID-19 pandemic.⁶⁷⁸ This has directly impacted on sex workers’ access to necessary health services and treatment.

In **Eswatini**, for example, a sex worker organization reported that, “for those who are on HIV treatment, it is hard to meet their visit days as there is no transport. For prevention commodities, it is hard to reach them.”⁶⁷⁹ Sex workers have therefore struggled to access HIV treatment and services as well as necessary preventative health services to limit transmission of HIV.

Sexual and reproductive healthcare, goods and services, including family planning, contraception and safe abortions, have also been disrupted by COVID-19. In **Thailand**, for example, during the pandemic, half of the healthcare centers that had been providing safe and legal abortion services were either closed or overwhelmed with COVID-related patients. Out of 142 clinics, only 71 were operating during the pandemic and only four provided abortion services for women who were more than 12 weeks into their pregnancies.⁶⁸⁰

d) Homelessness and irregular housing for sex workers

As a result of financial hardships caused by COVID-19, sex workers in some countries have been rendered homeless, further compounding their risk of COVID-19 contraction:

- In **Mexico**, after the government reportedly shut the hotels where many sex workers lived and worked, they were forced to live on the streets.⁶⁸¹

⁶⁷⁶ ICJ Telephone Interview, Representatives from Empower Foundation Thailand (24 May 2020).

⁶⁷⁷ The Lancet, Sex workers must not be forgotten in the COVID-19 response (15 May 2020), available at: [https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(20\)31033-3.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(20)31033-3.pdf); S Jerving, How COVID-19 could complicate treatment for HIV patients, Devex (2 April 2020), available at: <https://www.devex.com/news/how-covid-19-could-complicate-treatment-for-hiv-patients-96884>

⁶⁷⁸ WHO, WHO: access to HIV medicines severely impacted by COVID-19 as AIDS response stalls (6 July 2020), available at: <https://www.who.int/news-room/detail/06-07-2020-who-access-to-hiv-medicines-severely-impacted-by-covid-19-as-aids-response-stalls>

⁶⁷⁹ UNAIDS, 24 April 2020.

⁶⁸⁰ Prachatai, Revealed that COVID 19 pandemic risks to access to safe abortion (18 May 2020), available at: <https://prachatai.com/journal/2020/05/87708> (in Thai)

⁶⁸¹ A Esposito, Mexico’s prostitutes end up homeless as coronavirus keeps clients at home, shuts hotels, Reuters (9 April 2020), available at: <https://www.reuters.com/article/us-health-coronavirus-mexico-sex-workers/mexicos-prostitutes-end-up-homeless-as-coronavirus-keeps-clients-at-home-shuts-hotels-idUSKCN21R26C>

- In **Germany**, after the authorities shut brothels and nightclubs in March 2020, thousands of non-citizen sex workers working in Germany were rendered homeless and could not return home as the borders shut.⁶⁸²
 - In **Thailand**, given their financial constraints during the pandemic, some sex workers were forced to stay in shared accommodation arrangements⁶⁸³ and faced greater challenges in maintaining social distancing as it is nearly impossible for them to do so in such shared settings.⁶⁸⁴
- e) Disproportionate impact of lockdown measures

In addition, sex workers have been disproportionately affected by lockdown and quarantine regulations in many countries.⁶⁸⁵ The increased criminalization of activities necessary for many sex workers to undertake their work heightens the risk of harassment by authorities, arrests and detention:

- In **Thailand**, for example, many sex workers were reportedly arrested for violating night-time COVID-related curfews because of their hours of trade.⁶⁸⁶
- In **South Africa**, in April 2020, a homeless sex worker was found dead in a police cell in Cape Town, after she was detained for four days without being afforded the opportunity of bail, apparently in contravention of South African law and lockdown regulations. Though the police alleged the case was suicide, sex worker advocacy groups have called for a full investigation and some have expressed doubt about whether her death was a suicide.⁶⁸⁷ In general, sex workers have received “intensified abuse” from police officers during lockdown periods resulting from COVID-19.⁶⁸⁸

2. Recommendations on sex workers’ rights in the context of COVID-19

To ensure the protections of the rights to work and health of sex workers, States should take at least the following measures, many of which UNAIDS has described as “immediate” and “critical”:⁶⁸⁹

- Engage sex workers and sex work advocacy organizations in developing COVID-19 responses.

⁶⁸² J Nasr, Sex workers stranded in Germany as coronavirus shuts brothels, Reuters (3 April 2020), available at: <https://www.reuters.com/article/us-health-coronavirus-germany-brothels/sex-workers-stranded-in-germany-as-coronavirus-shuts-brothels-idUSKBN21L0ZY>

⁶⁸³ ICJ Telephone Interview, Representatives from Empower Foundation Thailand (24 May 2020)

⁶⁸⁴ V Davila, Coronavirus hot spots in Texas homeless shelters highlight challenges unsheltered residents face social distancing, staying clean, Texas Tribune (24 May 2020), available at: <https://www.texastribune.org/2020/05/24/texas-homeless-shelters-coronavirus-houston-austin-dallas/>

⁶⁸⁵ See, for example, R K J Tan et al, Impact of the Coronavirus Disease (COVID-19) on the sex work industry in Singapore: Recommendations for policymakers (May 2020), available at:

https://www.researchgate.net/publication/341068662_Impact_of_the_Coronavirus_Disease_COVID-19_on_the_sex_work_industry_in_Singapore_Recommendations_for_policymakers.

⁶⁸⁶ ICJ Telephone Interview, Representatives from SWING Foundation (24 May 2020)

⁶⁸⁷ Sex Workers Education and Advocacy Taskforce (SWEAT), Sisonke, the National Movement of Sex Workers and Triangle Project, How did Robyn Montsumi die in the custody of Mowbray Police Station (29 May 2020), available at: http://www.sweat.org.za/2020/05/29/press-statement-how-did-robyn-montsumi-die-in-the-custody-of-mowbray-police-station/?utm_source=rss&utm_medium=rss&utm_campaign=press-statement-how-did-robyn-montsumi-die-in-the-custody-of-mowbray-police-station.

⁶⁸⁸ S Smit, Police treat sex workers like they are “nothing”, Mail & Guardian (10 June 2020), available at: <https://mg.co.za/news/2020-06-10-police-treat-sex-workers-like-they-are-nothing/>; J Rangasami, T Konstant, S Manoeke, Police abuse of sex workers: Data from cases reported to the Women’s Legal Centre between 2011 and 2015, Women’s Legal Centre (April 2016), available at: <http://wlce.co.za/wp-content/uploads/2017/02/Police-abuse-of-sex-workers.pdf>.

⁶⁸⁹ UNAIDS, 8 April 2020.

- Ensure that sex workers are included within existing national social protection schemes and COVID-19 relief measures, including income support schemes.
- Provide emergency financial support for sex workers facing destitution, including non-citizens who are unable to access residency-based financial support.
- Immediately end evictions of sex workers and provide access to adequate emergency housing for homeless sex workers.
- Immediately order State authorities, including the police, to refrain from harassing, arresting and detaining sex workers for violations of laws criminalizing sex work, public nuisance and lockdown measures.
- Ensure sex workers consistent access to sexual and reproductive healthcare, goods and services, including contraceptives, abortion services and HIV treatment.
- Ensure that sex workers have ease of access to accurate and regular COVID-19 related health information as well as COVID-19 testing and treatment without any form of discrimination.

VI. ACCESS TO HEALTH INFORMATION

Access to health information is an element of the right to health under the ICESCR. Article 19 (2) of the ICCPR also guarantees the “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 other media of one’s choice.”⁶⁹⁰

The protection of these rights applies both to online and offline information and expression. The UN Human Rights Council has affirmed that “the same rights that people have offline must also be protected online, in particular freedom of expression which is applicable regardless of frontiers and through any media of one’s choice.”⁶⁹¹ The UN Special Rapporteur and regional rapporteurs with mandates on freedom of expression have further clarified that the right to free expression applies to the internet, and that restrictions are “only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognized under international law.”⁶⁹²

In addition, it is often necessary for individuals and groups to have internet access to ensure the protection of other rights including the rights to freedom of association, peaceful assembly, and political participation.⁶⁹³ The imposition of internet shutdowns may also infringe upon other rights,⁶⁹⁴ including the rights to work, education, livelihood and security.⁶⁹⁵

The right to health requires “information accessibility” to all without discrimination of any kind. This information accessibility requirement obliges States to ensure access to health-related education and information and entitles all people to seek, receive and share information and ideas concerning health issues.⁶⁹⁶ It also includes abstaining from the enforcement of discriminatory information practices as State policy as well as from “censoring, withholding or intentionally misrepresenting health-related information” and “preventing people’s participation in health-related matters.”⁶⁹⁷

⁶⁹⁰ The rights to freedom of expression and information is also protected under customary international law, and reflected in numerous human rights instruments. See Vienna Declaration and Programme of Action (25 June 1993): <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>; ICJ, Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia (December 2019) (“ICJ Dictating the Internet report”), available at: <https://www.icj.org/wp-content/uploads/2019/12/Southeast-Asia-Dictating-the-Internet-Publications-Reports-Thematic-reports-2019-ENG.pdf>, pp. 17-19.

⁶⁹¹ UN Human Rights Council, The promotion, protection and enjoyment of human rights on the Internet, UN Doc. No. A/HRC/38/L.10/Rev.1 (4 July 2018), p3.

⁶⁹² United Nations (Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and the Internet (1 June 2011) (“Joint Declaration on Freedom of Expression and the Internet”), para 1a, available at: <https://www.osce.org/fom/78309?download=true>.

⁶⁹³ ICCPR, Articles 21, 22 & 25. See also: Draft of UN Human Rights Committee, General Comment No. 37 on Article 21: the right to peaceful assembly, para 38, Available at: <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx>

⁶⁹⁴ In 2016, stakeholders from the policy, human rights and ICT sectors in a RightsCon conference defined an internet shutdown as an “intentional disruption of internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information... (which) include blocks of social media platforms, and are also referred to as ‘blackouts’, ‘kill switches’, or ‘network disruptions’.” See Access Now, The State of Internet Shutdowns around the World: The 2018 #Keepitopen Report, p 2, available at: <https://www.accessnow.org/cms/assets/uploads/2019/06/KIO-Report-final.pdf>

⁶⁹⁵ Id.

⁶⁹⁶ General Comment 14, para. 12(b).

⁶⁹⁷ General Comment 14, para. 12(b).

Access to health information is of even greater importance in the context of a public health emergency such as the COVID-19 pandemic. The CESCR has indicated that information about COVID-19 must be provided by State authorities on a “regular basis, in an accessible format and in all local and indigenous languages.” This is because “accurate and accessible information” is crucial to “reduce the risk of transmission of the virus” and to counter COVID-19-related false information. Affordable internet services and necessary technology allowing for effective information dissemination must also be made available.⁶⁹⁸

In a report released in April 2020, within the context of COVID-19, the UN Special Rapporteur on Freedom of Expression highlighted guidance by the WHO on the rights principles underpinning the need to proactively publish “early, transparent and understandable” information towards protecting the right to health.⁶⁹⁹

States have increasingly resorted to contact tracing to inform people about COVID-19 risks in their immediate vicinity. In this regard, the protections afforded by the right to health must be interpreted consistently with other human rights, including the right to privacy under Article 17 of the ICCPR. The UN Human Rights Committee has made clear that the “gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law.”⁷⁰⁰ In this regard, personal data includes “health-related data”.⁷⁰¹

A. Limiting access to information during COVID-19

Article 19 of the ICCPR provides expressly for conditions under which freedom of expression and information may be limited. The test for limitations is narrow as freedom of expression is an “indispensable condition” for the advancement of society, facilitating the evolution and exchange of information and opinions which enable “principles of transparency and accountability” for the promotion and protection of human rights.⁷⁰²

These rights are related to the enjoyment of other human rights, including the “rights to freedom of assembly and association, and the exercise of the right to vote”.⁷⁰³ Article 19 thus specifically provides for the protection of the right and

⁶⁹⁸ CESCR COVID-19 Statement, para. 18

⁶⁹⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Disease pandemics and the freedom of opinion and expression, UN Doc. No. A/HRC/44/49 (23 April 2020) (“UNSR FoE report, April 2020”) para 18.

⁷⁰⁰ UN Human Rights Committee, CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (8 April 1988), para 10, available at: <https://www.refworld.org/docid/453883f922.html>

⁷⁰¹ Defined in “Draft Recommendation on the Protection and Use of Health-Related Data” produced on behalf of the UN Special Rapporteur on Privacy as:

“all personal data concerning the physical or mental health of an individual, including the provision of healthcare services, which reveals information about this individual’s past, current or future health. Genetic data is health related data in the understanding of this recommendation. Health-related data concerning but not limited to data resulting from testing, such as a prenatal diagnosis, pre-implantation diagnostics, or from the identification of genetic characteristics, whether or not regarded as the health-related data of the mother, must be protected to the same level as other health-related data.”

United Nations Special Rapporteur on the Right to Privacy – Task Force on

Privacy and the protection of Health Data, Draft Recommendation on the Protection and Use of Health-Related Data (2 February 2019), available at:

https://www.ohchr.org/Documents/Issues/Privacy/SR_Privacy/2019_HRC_Annex3_HealthData.pdf

⁷⁰² UN Human Rights Committee, General Comment No. 34, UN Doc. No. CCPR/C/GC/34 (12 September 2011) (“General Comment 34”), paras 2, 3.

⁷⁰³ General Comment 34, para 4.

permits restrictions only if they are provided by law and are necessary for limited legitimate state objectives:

- “1. Everyone shall have the right to hold opinions without interference.
2. 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 other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are **provided by law** and are **necessary**:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.”

Article 19(3) therefore provides that limitations must conform strictly to the general principles of legality, necessity and proportionality. The UN Human Rights Committee has provided guidance that legality is established when laws:

- Give **sufficient clarity and precision** to facilitate individuals adjusting their conduct accordingly;
- Provide **relevant guidance for persons in charge of enforcement** to clearly determine which kinds of expression can be limited and do not grant them “unfettered discretion”; and
- Are **not contravention international human rights law** or standards.⁷⁰⁴

The test of necessity provides that limitations cannot be justified where other measures which do not infringe upon fundamental freedoms are available to achieve a legitimate aim, while the test of proportionality guides that limitations should be proportionate to their function, not be excessive and be the “least intrusive instrument amongst others to achieve their protective function.”⁷⁰⁵

Comprehensive internet shutdowns are inherently incompatible with international human rights law, as the shutdown of all flows of information can never meet the principles of necessity and proportionality. The UN Human Rights Council has “unequivocally condemned measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law” and urged all States “to refrain from and cease such measures”.⁷⁰⁶

States have a positive obligation to ensure universal access to the internet, which is derived from their obligation to promote and protect the right to freedom of expression.⁷⁰⁷ The denial of an individual’s access to the internet is therefore “a

⁷⁰⁴ General Comment 34, paras 25, 26.

⁷⁰⁵ General Comment 34, paras 33 to 35.

⁷⁰⁶ UN Human Rights Council, The promotion, protection and enjoyment of human rights on the Internet, UN Doc No. A/HRC/38/L.10/Rev.1 (4 July 2018), p5.

⁷⁰⁷ Joint Declaration on Freedom of Expression and the Internet, paras 6a, 6e.

punishment (of) extreme measure, which could be justified only where less restrictive measures are not available and where ordered by a court.”⁷⁰⁸

1. Limiting information access during COVID-19

In the specific context of COVID-19, in a recent report, the UN Special Rapporteur for freedom of expression clarified that:

“Internet shutdowns during a pandemic risk the health and life of everyone denied such access – and that of others with whom they come in contact. They are an affront to the right of everyone, especially health-care workers, to access health information. There is no room for limitation of Internet access at the time of a health emergency that affects everyone from the most local to the global level.”⁷⁰⁹

The UN High Commissioner for Human Rights has thus called for “an end to any blanket internet and telecommunication shutdowns and denials of service.”⁷¹⁰ Similarly, the UN Secretary-General highlighted that “leaving no one behind” in the pandemic “means leaving no one offline”, adding that in the COVID-19 context, “connections with loved ones, schools, workplaces, healthcare professionals and essential supplies” enabled by digital technologies are “more important than ever.”⁷¹¹ An internet shutdown may prevent individuals from accessing medical or other emergency services, contacting their friends or family, and receiving up-to-date and accurate information on necessary health and safety measures. This includes information on COVID-19 itself and government measures responding to COVID-19. In many States, these include lockdown restrictions and social distancing norms which, if transgressed, may carry criminal or other serious sanctions.

Despite these recommendations, the onset of the COVID-19 pandemic has not led to the lifting of government-imposed internet shutdowns in certain parts of the world. In Indian-administered **Jammu and Kashmir**, an ongoing internet shutdown which began in August 2019 has disrupted crucial communications between doctors, patients, healthcare providers and patients.⁷¹² This shutdown is reported to have led to preventable deaths, drug shortages and a reduced number of surgeries, with pediatric care and maternity services “among the hardest hit”.⁷¹³ Women unable to communicate with health professionals experienced miscarriages and stillborn births. People were also denied life-saving treatment such as chemotherapy and dialysis.⁷¹⁴ In January 2020, the shutdown was partially lifted, and internet access expanded in March 2020.⁷¹⁵ However, ongoing internet restrictions in the region have resulted in low internet speeds, preventing health

⁷⁰⁸ Joint Declaration on Freedom of Expression and the Internet, paras 6a, 6c.

⁷⁰⁹ UNSR FoE report, April 2020, para 28.

⁷¹⁰ UN High Commissioner for Human Rights, COVID is ‘a colossal test of leadership’ requiring coordinated action, High Commissioner tells Human Rights Council (9 April 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25785&LangID=E>.

⁷¹¹ A Guterres, Information Technology Acts as Beacon of Hope during COVID-19 Crisis, Secretary-General Says in Video Message to Mark Global Day (17 May 2020), available at: <https://www.un.org/press/en/2020/sgsm20083.doc.htm>

⁷¹² Software Freedom Law Centre, Longest Shutdowns’, Internet Shutdowns in India (“SFLC, Longest Shutdowns”), available at: <https://internetshutdowns.in/>

⁷¹³ See S Yasir and J Gettleman, In Kashmir, a Race Against Death, With No Way to Call a Doctor, New York Times (7 October 2019), available at: https://www.nytimes.com/2019/10/07/world/asia/kashmir-doctors-phone.html?te=1&nl=morning-briefing&emc=edit_%20MBAE_p_20191007§ion=longRead?campaign_id=7&instance_id=12908&segment.

⁷¹⁴ Human Rights Watch, Kashmir Shutdown Raises Healthcare Concerns (30 August 2019), available at: <https://www.hrw.org/news/2019/08/30/kashmir-shutdown-raises-healthcare-concerns>.

⁷¹⁵ SFLC, Longest Shutdowns.

workers from quickly and effectively accessing health guidelines and updated information and research on COVID-19.⁷¹⁶

In **Myanmar**, ongoing internet restrictions are in place in several townships in Rakhine and Chin states amid continuing conflict between the Myanmar military and the Arakan Army, despite the onset of COVID-19.⁷¹⁷ The shutdown was lifted in Maungdaw township in Rakhine state in early May,⁷¹⁸ but continues in eight other townships. In April 2020, the International Commission of Jurists analyzed the impact of the internet shutdown in Rakhine and Chin states on Myanmar's obligation to uphold the right to health under the ICESCR and concluded that violations of the right to health had been engendered as a consequence of:⁷¹⁹

- Denial of access to critical information necessary to prevent infection;
- Hindering of humanitarian agencies to respond effectively;
- Disruption of coordination between humanitarian agencies and health workers;
- Adverse impacts on the distribution of medical goods, food, potable water and sanitation; and
- Limitations on the operation of medical facilities.

Rohingya persons in refugee camps in **Bangladesh** have suffered similar difficulties since the Bangladesh Telecommunication Regulatory Commission imposed an internet shutdown in September 2019.⁷²⁰

Some States have restricted or altogether or shut down access to news media outlets. This has resulted in large numbers of people being deprived of critical news sources at a time when accurate and independent news coverage is critical to combatting COVID-19 and realizing the right to health.

In March 2020, **Myanmar's** government ordered major telecommunications service providers to block access to 2,147 websites,⁷²¹ justifying this action as an effort to take down websites spreading "fake news", adult content, and child sexual abuse content".⁷²² News media outlets, including *Voice of Myanmar*, *Development Media Group*, *Narinjara News*, *Karen News*, *Mekong News* and several Rohingya news sites were among the websites to which access was

⁷¹⁶ A Radhakrishnan, COVID-19: Restricted Internet Impacts on Health in Kashmir, *Health and Human Rights Journal* (15 April 2020), available at: <https://www.hhrjournal.org/2020/04/covid-19-restricted-internet-impacts-on-health-in-kashmir/>.

⁷¹⁷ 7Day TV (26 March 2020), available at:

<https://www.facebook.com/1018416014896767/posts/3654408471297495/?v=e&d=n>; The Ministry of Transport and Communications (MoTC) first ordered Internet restrictions on 21 June 2019 in Rakhine state's Buthidaung, Kyauktaw, Maungdaw, Minbya, Mrauk-U, Myebon, Ponnagyun, and Rathedaung townships and Chin state's Paletwa township. The MoTC lifted the restriction in Buthidaung, Maungdaw, Myebon, Paletwa, and Rathedaung townships on 1 September 2019 but reinstated it again on 3 February 2020. See Joint Statement, Myanmar: Lift Internet Restrictions in Rakhine and Chin States (13 February 2020), available at: <https://www.hrw.org/news/2020/02/13/myanmar-lift-internet-restrictions-rakhine-and-chin-states>

⁷¹⁸ Aung Nyein Chan, Internet ban lifted in Maungdaw township, *Myanmar Now* (5 May 2020), available at: <https://myanmar-now.org/en/news/internet-ban-lifted-in-maungdaw-township>

⁷¹⁹ ICJ, COVID-19 and Human Rights: Upholding the Right to Health in Myanmar's Conflict Areas (30 April 2020), available at: <https://www.icj.org/myanmars-ongoing-internet-shutdown-and-hostilities-threaten-right-to-health/>.

⁷²⁰ Human Rights Watch, Bangladesh: Internet Ban Risks Rohingya Lives (26 March 2020), available at:

<https://www.hrw.org/news/2020/03/26/bangladesh-internet-ban-risks-rohingya-lives>; M Sullivan, Leaders Want Internet Ban lifted in Rohingya Area As COVID-19 Misinformation Spreads, *Wbur News* (24 June 2020), available at:

<https://www.wbur.org/npr/882678469/leaders-want-internet-ban-lifted-in-rohingya-area-as-covid-19-misinformation-spr>

⁷²¹ ICJ, Myanmar: Government must lift online restrictions in conflict-affected areas to ensure access to information during COVID-19 pandemic (10 April 2020) ("ICJ April 2020 statement"), available at: <https://www.icj.org/myanmar-government-must-lift-online-restrictions-in-conflict-affected-areas-to-ensure-access-to-information-during-covid-19-pandemic/>

⁷²² Telenor, Press Release: Blocking of 230 websites in Myanmar based on directive from authorities (30 March 2020), available at: <https://www.telenor.com.mm/en/article/blocking-230-websites-myanmar-based-directive-authorities>; Frontier Myanmar, Operators split as Telenor rejects govt order to block 'fake news' sites (27 March 2020), available at: <https://frontiermyanmar.net/en/operators-split-as-telenor-rejects-govt-order-to-block-fake-news-sites>.

blocked, depriving particular communities of their trusted news sources in the midst of a health crisis.⁷²³

In the **Philippines**, the largest news media outlet, ABS-CBN, was forced off-air after the Philippine Congress failed to renew the network's legislative franchise, which expired on 4 May 2020. In complete disregard of established practice, the Philippines' National Telecommunications Commission issued an order on 5 May 2020 to ABS-CBN to immediately cease its on-air operations.⁷²⁴ The shutdown of the largest news outlet in what appears to be an act of harassment undermines access to health information at a time where trusted news providers remain crucial to combat COVID-19 and ensure the realization of the right to health.⁷²⁵

2. Recommendation on access to information during COVID-19

In order to ensure the protection of the rights to expression, opinion and information, States should take the following measures:

- Ensure the frequent and periodic dissemination of reliable, evidence-based information on COVID-19 and measures relating to combatting exposure to and transmission of the virus.⁷²⁶
- Ensure that all information provided on COVID-19 is accessible to all individuals in languages and formats they can comprehend.
- Ensure that internet services and necessary technology for effective access to information and dissemination are available and affordable to all individuals.
- Refrain from denying access to internet through blanket shutdowns and ensure that any restrictions on access to the internet, are necessary, proportionate and in full compliance with international law.⁷²⁷
- Refrain from censoring, withholding, intentionally misrepresenting COVID-19 related health information and information on measures related to combatting COVID-19.
- Refrain from harassing, persecuting or subjecting individuals to criminal or administrative sanction for exercising their protected rights to free expression, opinion and information including online.
- Refrain from interferences with the media that are non-compliant with article 19 of the ICCPR.⁷²⁸

B. Containing the spread of false information relating to COVID-19

Dissemination of information pertaining to COVID-19 is essential to mitigate its spread. The obligation to promote the right to health requires States to facilitate

⁷²³ ICJ April 2020 statement; Karen Human Rights Group, Statement on COVID-19 and Blocking of Ethnic News Websites (9 April 2020), available at: <https://reliefweb.int/report/myanmar/karen-human-rights-group-s-statement-covid-19-and-blocking-ethnic-news-websites-enmy>; Joint Civil Society Statement on Myanmar government's orders to block over 200 websites (April 2020), available at: <https://www.apc.org/en/pubs/joint-civil-society-statement-myanmar-governments-orders-block-over-200-websites>

⁷²⁴ X Gregorio, SolGen warns NTC of graft charges if it issues ABS-CBN provisional permit, CNN Philippines (3 May 2020), available at: <https://www.cnnphilippines.com/news/2020/5/3/ABS-CBN-franchise-Solicitor-General-NTC-graft.html>; M Cepeda, Lawmaker seeks probe vs Calida, NTC for 'conspiracy' to shut down ABS-CBN, Rappler (8 May 2020), available at: <https://www.rappler.com/nation/260306-lawmaker-seeks-probe-calida-ntc-conspiracy-shut-down-abs-cbn>

⁷²⁵ ICJ, Philippines: order to major media outlet to stop airing violates freedom of expression and access to information (8 May 2020) available at: <https://www.icj.org/philippines-order-to-major-media-outlet-to-stop-airing-violates-freedom-of-expression-and-access-to-information/>

⁷²⁶ See also UNSR FoE report, April 2020, para 44.

⁷²⁷ Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35 (6 April 2018), paras 65 to 69. See also ICJ Dictating the Internet report, pp. 246 to 249.

⁷²⁸ See also UNSR FoE report, April 2020, para 62.

educational and informational measures about the right to health and healthcare more generally. Accurate and accessible information can limit transmission of the virus, “protect the population against dangerous disinformation” and combat the “risk of stigmatizing, harmful conduct against vulnerable groups, including those infected by COVID-19.”⁷²⁹

1. Laws and measures that are not human rights compliant

States have, in response to the COVID-19 pandemic, attempted to regulate what they deem to be false information online relating to COVID-19 either by introducing laws punishing the spread of such information or by fortifying existing content-based laws and regulations enacted prior to COVID-19. Research conducted by the ICJ shows that such measures often criminalize excessively broad categories of expression and constitute blunt and ineffective tools to combat the spread of false information.⁷³⁰ Common shortcomings in such laws violate the rights to freedom of expression and, where applicable, health. These include:

- Vague and overbroad provisions;
- Severe and disproportionate penalties;
- Inadequate oversight mechanisms; and
- Insufficient remedy or accountability mechanisms.⁷³¹

In Southern Africa,⁷³² such shortcomings have been evident in laws promulgated by governments in response to the spread of false information online regarding COVID-19.⁷³³

In **South Africa**, the government included within lockdown regulations provisions to criminalize publication of any statement made “with the intention to deceive any other person” about COVID-19 or about the infection status of any person or any measure taken by the government “to address COVID-19”. The offence carries a sentence of up to six months’ imprisonment. The law contains vague standards and raises evidentiary and other practical challenges.⁷³⁴ Within a month of the implementation of these regulations, at least eight people had been arrested in terms of this provision.⁷³⁵

⁷²⁹ CESCR COVID-19 Statement, para. 18; United Nations (Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and “Fake News”, Disinformation And Propaganda (3 March 2017), available at: <https://www.osce.org/fom/302796?download=true>

⁷³⁰ ICJ, Dictating the Internet report.

⁷³¹ ICJ, Dictating the Internet report.

⁷³² In addition, other countries in Southern Africa have enacted or enforced similarly harsh regulations. As examples: **Namibia**: Proclamation 9 of 2020 (28 March 2020), s 16(1)(e), available at: <https://namiblii.org/akn/na/act/p/2020/9/>; **Botswana**: J Konopo, Censorship, the unexpected side-effect of Covid-19, Mail & Guardian (11 May 2020), available at: <https://mg.co.za/africa/2020-05-11-censorship-the-unexpected-side-effect-of-covid-19/>; **Kenya**: VON, Kenya arrests coronavirus fake news peddler (16 March 2020), available at: <https://www.von.gov.ng/kenya-arrests-coronavirus-fake-news-peddler/>; **Lesotho**: Public Health (COVID-19) Regulations, 2020 Legal Notice 38 of 2020 (22 April 2020), available at: <https://africanlii.org/akn/ls/act/ln/2020/38>

⁷³³ T Hodgson, K Farise & J Mavedzenge, Southern Africa has cracked down on fake news, but may have gone too far, Mail & Guardian (5 April 2020): <https://mg.co.za/analysis/2020-04-05-southern-africa-has-cracked-down-on-fake-news-but-may-have-gone-too-far/>; A Budoo, Controls to manage fake news in Africa are affecting freedom of expression, The Conversation (11 May 2020), available at: <https://theconversation.com/controls-to-manage-fake-news-in-africa-are-affecting-freedom-of-expression-137808>.

⁷³⁴ Id.

⁷³⁵ Id; A Nyathi, R Thaw and K Palm, Cele: 8 People Arrested for Spreading Fake News on Covid-19, EWN (7 April) available at: <https://ewn.co.za/2020/04/07/cele-8-people-arrested-for-spreading-fake-news-on-covid-19>

In **Eswatini**, overbroad regulations ban “spreading rumours or unauthenticated information about COVID-19” or using “print or electronic media” for information on the virus “without the prior permission of the Minister of Health” with a potential penalty of up to five years’ imprisonment.⁷³⁶ These regulations are unclear as to what “authenticated information” entails and serious concerns about requiring ministerial permission to publish information on COVID-19.

In **Zimbabwe**, government regulations criminalize the publication or communication of “false news” that is “about any public officer, official or enforcement officer involved with enforcing or implementing the national lockdown in his or her capacity as such, or about any private individual that has the effect of prejudicing the state’s enforcement of the national lockdown” with a potential penalty amounting to 20 years’ imprisonment.⁷³⁷ This provision does not even appear to target disinformation on COVID-19, but rather information about a public official or individual, raising serious concerns that the law can and will be wielded by officials to clamp down on criticism of their governance measures to combat COVID-19 transmission.⁷³⁸ The President of Zimbabwe called for a person being prosecuted under this law to be jailed for “at least ... 20 years”⁷³⁹ and he was subsequently remanded in police custody,⁷⁴⁰ before being granted bail on 30 April after initially being denied bail on 20 April.⁷⁴¹

2. Enforcement of laws that are not human rights compliant

Laws purporting to regulate false information online enacted prior to COVID-19 have been reinforced by some governments as a pretext to suppress protected criticism of governments’ COVID-19 response.

In the **Philippines**, at least two journalists⁷⁴² who had reported on COVID-19 and a town mayor and an individual Facebook user who criticized the government’s handling of the health crisis were all subjected to legal action in accordance with a COVID-19-related law enacted in March. The law penalizes the dissemination of “false information” with up to two months’ imprisonment and a fine of up to one million pesos (approximately USD 19,600).⁷⁴³ Local authorities have used the law in combination with the Revised Penal Code, which penalizes anyone who publishes as news “any false news which may endanger the public order, or cause damage to the interest or credit of the State”, to summon at least 12 individuals for social media posts deemed to violate the law.⁷⁴⁴

⁷³⁶ Id.

⁷³⁷ Id.

⁷³⁸ Id.

⁷³⁹ L Ndebele, Man who peddled ‘fake news’ about Zim lockdown faces 20 years in jail, Times Live (20 April 2020), available at: <https://www.timeslive.co.za/news/africa/2020-04-20-man-who-peddled-fake-news-about-zim-lockdown-faces-20-years-in-jail/>

⁷⁴⁰ T Moyo, Censorship in Zimbabwe: When fake news is true and ‘official’ news is fake, Daily Maverick (28 April 2020), available at: <https://www.dailymaverick.co.za/article/2020-04-28-censorship-in-zimbabwe-when-fake-news-is-true-and-official-news-is-fake/#gsc.tab=0>

⁷⁴¹ Zimbabwe Lawyers for Human Rights, High Court Sets Free Man Imprisoned Over “Fake” Mnangagwa Covid-19 National Lockdown Extension Statement (30 April 2020), available at: <https://www.zlhr.org.zw/?p=2022>.

⁷⁴² Reporters Without Borders, Two Philippine journalists face two months in prison for coronavirus reporting (2 April 2020), available at: <https://rsf.org/en/news/two-philippine-journalists-face-two-months-prison-coronavirus-reporting>.

⁷⁴³ Human Rights Watch, Philippine Authorities Go After Media, Online Critics (6 April 2020), available at: <https://www.hrw.org/news/2020/04/06/philippine-authorities-go-after-media-online-critics>; M Dañguilan Vitug, Duterte crushes free expression amid pandemic, Rappler (4 May 2020), available at: <https://www.rappler.com/thought-leaders/259453-duterte-crushes-free-expression-coronavirus-pandemic>.

⁷⁴⁴ Lian Buan, NBI summons ‘more than a dozen’ for coronavirus posts, Rappler (3 April 2020), available at: <https://www.rappler.com/nation/256746-nbi-summons-more-than-dozen-people-social-media-coronavirus-posts>; Marites

In **Thailand**, laws enacted prior to COVID-19 to combat false information online have been used against individuals who express criticism of government measures to curtail the virus. In May, for example, an artist from Phuket province was indicted for alleged violation of article 14(2) of the Computer-related Crimes Act for commenting online about the lack of COVID-19 screening measures at an airport. He has been released on bail but his charge remains active and he is expected to face trial next year.⁷⁴⁵

Journalists and bloggers across the world have also been targeted by States for carrying out their professional reporting functions amidst the pandemic:

- In **Cambodia**, Sovann Rithy, the director of an online news site was charged with “incitement to commit a felony” under the Criminal Code for quoting an excerpt from Prime Minister Hun Sen’s speech on his personal Facebook profile.⁷⁴⁶
- In **Tunisia**, bloggers Anis Mabrouki and Hajer Awadi were detained following charges of defamation, “insult of state officials” and “causing disturbances to the public” under the Penal Code brought against them for videos they posted on their Facebook accounts. The videos highlighted government corruption and State failures to provide sufficient financial compensation or address food shortages.⁷⁴⁷
- In **Rwanda**, bloggers Valentin Muhirwa and David Byiringiro who worked for an online news channel were arrested following their YouTube reporting of allegations of rape against soldiers enforcing government lockdown measures.⁷⁴⁸ They were accused of alleged violation of COVID-19 regulations on food distribution after they had requested authorities for permission to distribute food supplies.⁷⁴⁹
- In **Thailand**, the owner of an anonymous investigative Facebook page called “Queen of Spades” was reportedly threatened by the police to be charged with violating the Computer-related Crimes Act, and to have her identity publicly exposed. This threat occurred after she allegedly posted photos showing persons closely linked to a high-profile politician to be involved with illegal exporting of facial masks to buyers in China amid severe domestic shortage of PPE.⁷⁵⁰

Individuals exercising their right to freedom of expression, opinion and information online have also increasingly been targeted for alleged violation of laws by States:

- In **Vietnam**, a Facebook user faced charges of alleged “abuse of democratic freedoms” or “anti-State propaganda” under the Penal Code with a maximum of between seven and twelve years in prison for disseminating

Vitug [ANALYSIS] Duterte crushes free expression amid pandemic, Rappler (4 May 2020), available at: <https://www.rappler.com/thought-leaders/259453-duterte-crushes-free-expression-coronavirus-pandemic>; See also: ICJ, Philippines: upholding human rights during a state of public health emergency (27 April 2020), available at: <https://www.icj.org/philippines-upholding-human-rights-during-a-state-of-public-health-emergency/>

⁷⁴⁵ ICJ communications with partners.

⁷⁴⁶ Committee to Protect Journalists, Cambodian journalist Sovann Rithy detained for quoting prime minister on COVID-19 (9 April 2020), available at: <https://cpi.org/2020/04/cambodian-journalist-sovann-rithy-detained-for-quo.php>.

⁷⁴⁷ Amnesty International, Tunisia: End prosecution of bloggers for criticizing government's response to COVID-19 (21 April 2020), available at: <https://www.amnesty.org/en/latest/news/2020/04/tunisia-end-prosecution-of-bloggers-for-criticizing-governments-response-to-covid19/>

⁷⁴⁸ Human Rights Watch, Rwanda: Lockdown Arrests, Abuses Surge (24 April 2020), available at: <https://www.hrw.org/news/2020/04/24/rwanda-lockdown-arrests-abuses-surge>.

⁷⁴⁹ Id.; Theoneste Nsengimana and Cyuma Hassan, owners of other online news channels, and Fidèle Komezusenge, Hassan's driver, were also arrested for alleged violations of COVID-related lockdown regulations and alleged fraud.

⁷⁵⁰ Khaosod English, Investigators seeking mask hoarding ring whistleblower (10 April 2020), available at: <https://www.khaosodenglish.com/politics/2020/04/10/investigators-seeking-mask-hoarding-ring-whistleblower/>

more than 200 articles on Facebook on the outbreak, which had not been made available in State media.⁷⁵¹

- In **Cambodia**, in March, a 14-year-old girl was arrested and questioned for allegedly posting false information online on the virus. She had written about her anxieties relating to COVID-19 cases in her province and school on her social media account.⁷⁵²
- In **Bangladesh**, in May, cartoonist Ahmed Kabir Kishore and writer Mushtaq Ahmed were jailed under the Digital Security Act for being administrators of a Facebook page where news reports, political cartoons and Facebook statuses relating to COVID-19 were shared.⁷⁵³

The application of laws enacted purportedly to combat false information about COVID-19 has often resulted in increased risks of violation of the rights to free expression and health. These laws often contravene international law, deter necessary information flows and meaningful debate and legitimate criticism of government policy. They also risk instilling fear and self-censorship amongst individuals, including amongst healthcare professionals, policy makers and the media. Experiences from countries in which COVID-19 transmission has been slowed show that government transparency and accessibility of accurate, consistent and abundant information about COVID-19 is a more effective means of protecting the right to health and combatting the pandemic.

3. State actors as purveyors of COVID-19 disinformation

Even as States purport to regulate “fake news” concerning COVID-19, some State officials have peddled COVID-19 disinformation themselves, exacerbating health and security risks and compromising realization of the right to health.

In early June, **Brazil**’s Health Ministry removed from a government webpage detailed data that showed the evolution of the COVID-19 pandemic in Brazil.⁷⁵⁴ It decided to only release data on the number of daily deaths instead.⁷⁵⁵ The decision was reported to have caused substantial public opposition and prompted a legal challenge.⁷⁵⁶ The Supreme Court of Brazil subsequently ordered the Health Ministry to resume releasing consolidated data on COVID-19 confirmed cases and deaths.

⁷⁵¹ Defend the Defenders, Vietnamese Well-known Facebooker Threatened with Heavy Punishment For Disseminating News on Covid-19 (28 March 2020), available at: <https://www.vietnamhumanrightsdefenders.net/2020/03/28/vietnamese-well-known-facebooker-threatened-with-heavy-punishment-for-posting-on-covid-19/>; ICJ, Southeast Asia: States must respect and protect rights in combating misinformation online relating to COVID-19 (1 April 2020), available at: <https://www.icj.org/wp-content/uploads/2020/04/SEAsia-COVID-and-Rights-Online-Press-Statement-2020-ENG.pdf>.

⁷⁵² Id.; Human Rights Watch, Cambodia: COVID-19 Clampdown on Free Speech (24 March 2020), available at: <https://www.hrw.org/news/2020/03/24/cambodia-covid-19-clampdown-free-speech>.

⁷⁵³ Z Islam and M Saad, Digital Security Act: 11 sued, two sent to jail, Daily Star (7 May 2020), available at: <https://www.thedailystar.net/frontpage/news/digital-security-act-11-sued-two-sent-jail-1900228>.

⁷⁵⁴ La República, Bolsonaro defiende la entrega parcial y mas tardía de los datos de covid-19 en Brasil (6 June 2020), available at: <https://www.larepublica.co/globoeconomia/bolsonaro-defiende-la-entrega-parcial-y-mas-tardia-de-los-datos-de-covid-19-en-brasil-3015547> (in Spanish)

⁷⁵⁵ Agencia Brasil, La Corte Suprema ordena al Gobierno publicar datos totales de la COVID (9 June 2020), available at: <https://agenciabrasil.ebc.com.br/es/justicia/noticia/2020-06/la-corte-suprema-ordena-al-gobierno-publicar-datos-totales-de-la-covid> (in Spanish)

⁷⁵⁶ L Paraguassu and J McGeever, Brazil restores detailed COVID-19 data after Supreme Court ruling, Reuters (10 June 2020), available at: https://news.abc-cbn.com/overseas/06/10/20/brazil-restores-detailed-covid-19-data-after-supreme-court-ruling?fbclid=IwAR22V1NQflb1AZQYx82HI54MbQIQM553ZPdXejBQ_ncn1j-Hu9s94c4HQ; Paula Ramon, Brazil accused of manipulating coronavirus toll, Agence France-Presse (9 June 2020), available at: <https://news.abc-cbn.com/spotlight/06/09/20/brazil-accused-of-manipulating-coronavirus-toll>.

In **Nicaragua**, the government also appears to have downplayed the spread of the virus in-country.⁷⁵⁷ Similarly, in **Turkmenistan** and the **Democratic People's Republic of Korea**, countries with long histories of censorship, the absence of confirmed cases of COVID-19 have triggered speculation of underreporting or data manipulation.⁷⁵⁸

Some officials, including Heads of State, have used social media and other platforms to convey false and risky rhetoric about COVID-19:

- In **Brazil**, President Jair Bolsonaro openly questioned the necessity of quarantine measures during COVID-19. He tweeted a video of himself defying the quarantine measures advised by Brazil's health ministry and the World Health Organization. In another tweet, he insisted on the effectiveness of chloroquine against COVID-19, despite lack of scientific evidence to support the claim.⁷⁵⁹ Twitter later removed the two tweets and replaced them with a notice explaining why the posts were taken down.⁷⁶⁰
- In **Venezuela**, Twitter removed a tweet from President Nicolas Maduro recommending a homemade concoction to purportedly fend off COVID-19. The post contradicts the WHO's finding that no proven drug had yet been found to prevent or cure the virus.⁷⁶¹
- In **Belarus**, President Alexander Lukashenko stated in a media interview in late March that vodka, hockey and a traditional sauna could cure COVID-19.⁷⁶²
- In **Nepal**, Prime Minister Oli has repeatedly claimed in Parliament that Nepali's "better immunity" against COVID-19, because they breathe fresh air and have ginger, garlic and turmeric as integral parts of their daily diet.⁷⁶³

4. Recommendations on disinformation and COVID-19

In order to ensure the protection of the rights to expression, opinion and information, States should take the following measures:

⁷⁵⁷ W Miranda, Sandinista leaders fall victim to coronavirus outbreak they downplayed, The Guardian (8 June 2020), available at: <https://www.theguardian.com/world/2020/jun/08/nicaragua-coronavirus-sandinista-leaders-fall-victim>.

⁷⁵⁸ Al Jazeera, Which countries have not reported any coronavirus cases? (18 June 2020), available at: <https://www.aljazeera.com/news/2020/04/countries-reported-coronavirus-cases-200412093314762.html>; The Conversation, How Central Asia's authoritarian regimes have used coronavirus to their advantage (21 May 2020), available at: <https://theconversation.com/how-central-asias-authoritarian-regimes-have-used-coronavirus-to-their-advantage-138498>; P Leonard, Turkmenistan has not banned "coronavirus", Eurasianet (1 April 2020), available at: <https://eurasianet.org/perspectives-turkmenistan-has-not-banned-coronavirus>.

⁷⁵⁹ A C Fabio, True to form Bolsonaro backs Chloroquine despite lack of scientific evidence, The Brazilian Report (9 April 2020), available at: <https://brazilian.report/power/2020/04/09/why-is-bolsonaro-so-keen-on-chloroquine-treat-covid-19/>.

⁷⁶⁰ Agence France-Presse, Twitter removes two Bolsonaro tweets questioning virus quarantine, Jakarta Post (30 March 2020), available at: <https://www.thejakartapost.com/news/2020/03/30/twitter-removes-two-bolsonaro-tweets-questioning-virus-quarantine.html>.

⁷⁶¹ BBC, Coronavirus: World leaders' posts deleted over fake news (31 March 2020), available at: <https://www.bbc.com/news/technology-52106321>; K Lyons, Twitter removes tweets by Brazil, Venezuela presidents for violating COVID-19 content rules, The Verge (30 March 2020), available at: <https://www.theverge.com/2020/3/30/21199845/twitter-tweets-brazil-venezuela-presidents-covid-19-coronavirus-jair-bolsonaro-maduro>. Twitter's COVID-19 content policy includes the removal of posts that contradict "guidance from authoritative sources of global and local public health information," such as the World Health Organization. See Twitter, Coronavirus: Staying safe and informed on Twitter (3 April 2020), available at: https://blog.twitter.com/en_us/topics/company/2020/covid-19.html; Twitter, An update on our continuity strategy during COVID-19 (16 March 2020), available at: https://blog.twitter.com/en_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19.html.

⁷⁶² M Ilyushina and N Hodge, Post-Soviet strongmen prescribe vodka, hockey and folk medicine against coronavirus, CNN (31 March 2020), available at: <https://edition.cnn.com/2020/03/30/europe/soviet-strongmen-coronavirus-intl/index.html>.

⁷⁶³ B Ghimire, Oli peddles in mistruths and sidesteps criticism before Parliament (10 June 2020): <https://kathmandupost.com/national/2020/06/10/oli-peddles-in-mistruths-and-sidesteps-criticism-before-parliament>.

- Ensure meaningful participation of the public – including civil society representatives, academics, lawyers, technology experts and other independent policy advisers or experts – in the development of any law, regulation or legal framework relating to limitations on the rights to expression and information online.
- Refrain from making, sponsoring, encouraging or disseminating statements which State actors, officials or agencies know or reasonably should know to be false or which demonstrate a reckless disregard for verifiable information.⁷⁶⁴
- Bring into force regulatory mechanisms and standards to oversee, guide and control the use of online and offline mass media platforms by individual State officials disseminating information on COVID-19, including by designating specific, trusted State officials or agencies to disseminate accurate information on COVID-19, and introducing non-criminal penalty measures for violation of these standards.
- Repeal or amend any law, regulation or legal framework that criminalizes or unduly restricts the rights to expression, opinion and information in compliance with international human rights law.⁷⁶⁵
- Ensure that any restrictions on online content are narrowly tailored and comply with international human rights law and standards, including due process requirements, legality, necessity and legitimacy.⁷⁶⁶
- Release all individuals held in detention on criminal charges of alleged violation of laws not in compliance with international human rights law.

C. COVID-19-related surveillance, privacy and health

In an effort to control community transmission of COVID-19 many States⁷⁶⁷ have used “contact tracing” to track and identify people who have been in contact with a person with COVID-19, a measure which the WHO has indicated may be effective if “systematically applied”.⁷⁶⁸ Effective contract tracing may strengthen access to health information and protect the right to health. However, contact tracing measures may also raise privacy concerns if they are developed and implemented without:

- Specifying their scope and purpose;
- Providing adequate notice to the persons being traced; and
- Ensuring adequate regulation of the use of information collected.

Failure to ensure rights of individuals with the public health interest in collecting information may violate the right to be free from “non-consensual medical

⁷⁶⁴ UNSR FoE report, April 2020, para 44.

⁷⁶⁵ Id.

⁷⁶⁶ UNSR FoE report, April 2020, para 44.

⁷⁶⁷ AFP, Contact tracing apps: Which countries are doing what (29 April 2020), available at:

<https://health.economictimes.indiatimes.com/news/diagnostics/contact-tracing-apps-which-countries-are-doing-what/75440095>; Y Huang , M Sun and Y Sui, How Digital Contact Tracing Slowed Covid-19 in East Asia, Harvard Business Review (15 April 2020) (“HBR, April 2020”), available at: <https://hbr.org/2020/04/how-digital-contact-tracing-slowed-covid-19-in-east-asia>.

⁷⁶⁸ P Howell O’Neill, T Ryan-Mosley, B Johnson, A flood of coronavirus apps are tracking us. Now it’s time to keep track of them., MIT Technology Review (7 May 2020), available at: <https://www.technologyreview.com/2020/05/07/1000961/launching-mittr-covid-tracing-tracker/>; WHO, Contact tracing in the context of COVID-19 (10 May 2020), available at: <https://www.who.int/publications/i/item/contact-tracing-in-the-context-of-covid-19>; WHO, Contact tracing (9 May 2020), available at: <https://www.who.int/news-room/q-a-detail/contact-tracing>; WHO, Contact tracing during an outbreak of Ebola virus disease (2014), available at: <https://www.who.int/csr/resources/publications/ebola/contact-tracing-guidelines/en/>.

“the process of identifying, assessing, and managing people who have been exposed to a disease to prevent onward transmission. When systematically applied, contact tracing will break the chains of transmission of an infectious disease and is thus an essential public health tool for controlling infectious disease outbreaks. Contact tracing for COVID-19 requires identifying persons who may have been exposed to COVID-19 and following them up daily for 14 days from the last point of exposure.”

treatment” protected in terms of ICESCR.⁷⁶⁹ There is also a serious risk that data gathered and stored to combat COVID-19 may be used by governments for issues unrelated to curbing COVID-19.

Governments have therefore been urged to develop contact tracing measures that comply with international human rights law and standards.⁷⁷⁰ Such measures should be lawful, non-discriminatory, necessary and proportionate to achieving the legitimate aim of realizing the right to health.

1. Contacting tracing and surveillance in the context of COVID-19

China, Hong Kong SAR, Taiwan, the Republic of Korea, Singapore, Indonesia, Vietnam, Philippines and South Africa are among countries which have adopted contact tracing in a bid to decrease COVID-19 transmission.⁷⁷¹ Contact tracing among these and other countries suffer from data privacy challenges in varying levels, for example:

- **Indonesia and Vietnam**, despite adopting measures that gather and store user data, nonetheless do not have data privacy laws to protect individuals from potential violations of their rights to privacy and security.
- In the **Philippines**, the contact tracing application “StaySafe” poses significant human rights concerns. StaySafe was not vetted by the National Privacy Commission before its launch⁷⁷² and includes functionalities which reach beyond what is necessary to identify COVID-19 carriers. The privacy notice provided, for example, is “confusing” for the majority of users;⁷⁷³ StaySafe’s website allows various government units and agencies, companies, and other organizations that are not tasked with contact tracing to request access to the system and see political constituents and employees’ data; and personal data may be retained for “as long as necessary”.⁷⁷⁴ This raises significant risks about how data gleaned from the contact tracing app may be used, retained and shared by State or non-State actors in violation of individuals’ privacy and security.
- In **South Africa**, the Tracing Database created and implemented has “built-in privacy protections” including the appointment of “Designated Judge” to receive weekly reports on the location and movements information.⁷⁷⁵ This judge is empowered “to give directions as to any further steps to be taken to protect the right to privacy of those persons whose data has been collected, which directions must be complied with”.⁷⁷⁶ Information on the

⁷⁶⁹ General Comment 14, para 8.

⁷⁷⁰ ICJ, COVID-19: Use of digital surveillance technologies must be human rights compliant (2 April 2020), available at: <https://www.icj.org/covid-19-use-of-digital-surveillance-technologies-must-be-human-rights-compliant/>

⁷⁷¹ HBR, April 2020; M Meisenzahl, People arriving in Hong Kong must wear tracking bracelets for 2 weeks or face jail time.

Here’s how they work, Business Insider (4 May 2020) (“Meisenzahl, Business Insider, May 2020”), available at: <https://www.businessinsider.com/hong-kong-has-tracking-bracelets-to-enforce-coronavirus-quarantine-2020-4>; DPEX, Comparative Review of Contact Tracing Apps in ASEAN countries (28 May 2020) (“Contact Tracing Apps in ASEAN, May 2020”) available at: <https://www.dpexnetwork.org/research/webinar-comparative-review-contact-tracing-apps-asean-countries/>

⁷⁷² P Ranada, Borderline spyware: IT experts raise alarm over Duterte admin contact-tracing app, Rappler (8 June 2020), available at: <https://www.rappler.com/newsbreak/in-depth/263090-borderline-spyware-information-technology-experts-alarm-stay-safe-app>

⁷⁷³ Contact Tracing Apps in ASEAN, Slide 77.

⁷⁷⁴ See StaySafe website, available at: <https://www.staysafe.ph/>

⁷⁷⁵ J Klaaren, K Breckenridge, F Cachalia, S Fonn, M Veller, South Africa’s COVID-19 Tracing Database: Risks and rewards of which doctors should be aware, South African Medical Journal (4 June 2020), available at: <http://www.samj.org.za/index.php/samj/article/view/12983/9291>

⁷⁷⁶ Department of Co-operative Governance and Traditional Affairs. Disaster Management Act, 2002: Amendment of regulations issued in terms of section 27(2). Government Gazette No. 43199, 2 April 2020. (Published under Government Notice No. R. 446.), s 11H(18), available at: https://www.gov.za/sites/default/files/gcis_document/202004/43199rg11078-gon446.pdf

Tracking Database may be shared with enforcement officers to assist in enforcing legal regulations criminalizing failure to accept treatment and quarantine, in potential violation of not only the right to privacy of individuals, but their rights to security and bodily integrity. Concern has also been raised that the safeguards provided do not involve civil society or medical professional structures.⁷⁷⁷

Some States have imposed criminal penalties for failure to comply with COVID-19-related surveillance measures, which raise risks of violation of the rights to security and bodily integrity, especially where such surveillance measures are not implemented in a human rights-compliant manner, subject to independent and effective oversight or provide effective remedial or accountability mechanisms in cases of alleged violation.

- In **Hong Kong**, new arrivals are ordered to wear a mandatory quarantine wristband as the new arrival undergoes a 14-day quarantine. People who fail to comply face a six-month jail time and a fine.⁷⁷⁸
- In **Singapore**, if people who do not assist in contact tracing, or similar COVID-19 related tracing or tracking measures to contain the virus may face prosecution under Singapore's Infectious Diseases Act.⁷⁷⁹

States should refrain from criminalizing COVID-19 transmission or exposure. Prosecution and attribution of criminal intent or liability for COVID-19 transmission or exposure raises significant human rights concerns and undermines public health by deterring individuals from seeking COVID-19 treatment and services.⁷⁸⁰ States should therefore concentrate efforts on enacting effective, evidence- and rights-based interventions to COVID-19 responses, reverting to more coercive measures only as a last resort, coupled with due process safeguards to ensure compliance with international law.⁷⁸¹

2. Recommendations on surveillance, privacy and health

In order to ensure the protection of the rights to expression, opinion and information and privacy, States should take the following measures:

- Ensure any authorization of surveillance is regulated by precise and publicly accessible legal frameworks.⁷⁸²
- Where contracting tracing systems are implemented, ensure regulatory safeguards to guarantee privacy and data protection in accordance with legal regulations.⁷⁸³ These safeguards should include:
 - Assessing digital tools for contact tracing before they are used to ensure safeguarding of data;⁷⁸⁴

⁷⁷⁷ Id.

⁷⁷⁸ Meisenzahl, Business Insider, May 2020; U Saiidi, Hong Kong is putting electronic wristbands on arriving passengers to enforce coronavirus quarantine, CNBC (18 March 2020), available at:

<https://www.cnbc.com/2020/03/18/hong-kong-uses-electronic-wristbands-to-enforce-coronavirus-quarantine.html>.

⁷⁷⁹ Infectious Diseases Act (Cap. 137), available at: <https://sso.agc.gov.sg/Act/IDA1976>

⁷⁸⁰ N Sun and L Zilli, COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Exposure and Transmission, Part I, *Opinio Juris* (3 April 2020), available at: <http://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-exposure-and-transmission-part-i/>

⁷⁸¹ N Sun and L Zilli, COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Enforcement of Public Health Measures, Part II, *Opinio Juris* (3 April 2020), available at: <http://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-enforcement-of-public-health-measures-part-ii/>

⁷⁸² UNSR FoE report, April 2020, para 57.

⁷⁸³ WHO, Interim Guidance on Contact tracing in the context of COVID-19 (10 May 2020) ("WHO Interim Guidance, May 2020"), available at: file:///C:/Users/User/Downloads/WHO-2019-nCoV-Contact_Tracing-2020.1-eng.pdf

⁷⁸⁴ Id.

- Rigorous documentation detailing utilization of surveillance information and data for legitimate public health purposes;⁷⁸⁵
- Strict privacy protections to protect against disclosure of all personal data to any person not authorized for public health purposes;⁷⁸⁶
- Express exclusions of specific personal data from collection, such as the content of a person's communications;
- Safeguards against any State or non-State actor misusing personal data, including for purposes not related to public health;⁷⁸⁷
- Safeguards to ensure State or non-State actors involved in data collection can clearly demonstrate the anonymization of data collected;⁷⁸⁸
- Regulatory mechanisms which clearly and transparently require all State or non-State actors involved in contact tracing to adhere to the ethical principles of handling personal information, to ensure responsible data management and respect for privacy throughout the process;⁷⁸⁹ and
- Information about how personal data and information collected in surveillance and tracing measures will be handled, stored, disseminated and used by State and non-State authorities should be communicated in a clear, transparent, regular and accessible manner.

⁷⁸⁵ UNSR FoE report, April 2020, para 57.

⁷⁸⁶ *Id.*

⁷⁸⁷ *Id.*

⁷⁸⁸ *Id.*

⁷⁸⁹ WHO Interim Guidance, May 2020.

VII. RIGHT TO HEALTH AND INTERRELATED ESCR: HOUSING, WATER AND FOOD

Article 12(2)(c) of ICESCR guarantees the right to the “prevention, treatment and control of epidemic, endemic, occupational and other diseases”. The CESCR has indicated that the realization of this right requires, amongst other things, “promotion of social determinants of good health”.⁷⁹⁰ Consistently with this approach, and acknowledging the direct connection between the protection of the right to health and the realization other ESCR, States are required to secure access to food, water, housing and sanitation as core obligations in terms of the right to health.⁷⁹¹

In the execution of their duties to respect, protect and fulfil the right to health during COVID-19 states are therefore legally obliged to also make provision for the “social determinants of health” by respecting, protecting and fulfilling other rights, including the rights to adequate housing, food, water and sanitation. These are *both* self-standing rights *and* aspects of the right to health itself.

According to World Health Organization (WHO), the social determinants of health may be defined as:

“the conditions in which people are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life. These forces and systems include economic policies and systems, development agendas, social norms, social policies and political systems.”⁷⁹²

The WHO therefore recognizes that lack of access to the social determinants of health contribute significantly to health inequities within and between countries.

Many of the “social determinants of health”, including, as examples, housing, water, sanitation, education, nutrition and poverty, impact on health outcomes for those vulnerable to COVID-19 transmission. Persons having difficulty accessing and enjoying the benefit of these social determinants of health, will also often be more likely to experience “co-morbidities” which increase the chances of sickness and death from COVID-19.⁷⁹³

For instance, homeless persons and people living in informal settlements are at higher risk of transmission of infectious diseases including COVID-19, as they often lack access to housing, water and sanitation facilities and may well find recommended “physical distancing” or “social distancing” measures difficult or impossible to implement.⁷⁹⁴ Improving protection of the rights to adequate housing, food, water and sanitation facilities therefore reduces the possibility and likelihood of transmission of COVID-19. As such “social determinants of health must be included as part of pandemic research priorities, public health goals, and

⁷⁹⁰ General Comment 14, para 16.

⁷⁹¹ General Comment 14, para 43.

⁷⁹² World Health Organization, Social Determinants of Health, available at: https://www.who.int/social_determinants/en/.

⁷⁹³ One common definition of “co-morbidity” is: “Any distinct additional entity that has existed or may occur during the clinical course of a patient who has the index disease under study.” Cited in J Valderas et al, Defining Comorbidity: Implications for Understanding Health and Health Services, (July 2009) *The Annals of Family Medicine* 7(4):357-63.

⁷⁹⁴ K Poornima Wasdani & A Prasad, The impossibility of social distancing among the urban poor: the case of an Indian slum in the times of COVID-19, (21 April 2020) *Local Environment*, 25:5, 414-418; K Noko, In Africa, social distancing is a privilege few can afford, (22 March 2020), available at <https://www.aljazeera.com/indepth/opinion/africa-social-distancing-privilege-afford-200318151958670.html>; S Ebrahim & TF Hodgson, Abahlali baseMjondolo: You can't stop the virus while living in the mud, (27 March 2020), available at: <https://www.dailymaverick.co.za/article/2020-03-27-abahlali-basemjondolo-you-cant-stop-the-virus-while-living-in-the-mud/#gsc.tab=0>.

policy implementation”.⁷⁹⁵ As UN Special Rapporteur on Health emphasized in a statement on COVID-19:

“Physical distancing and other measures being used to curtail the spread of COVID-19 are inadequate if other crucial elements such as adequate housing, safe drinking water and sanitation, food, social security, and protection from violence are ignored... Binding obligations grounded on the right to health framework oblige States to look at the broader social response in the fight against COVID-19... Looking at the broader social response will not only make COVID-19 measures fairer, but also more efficient, effective and transparent.”⁷⁹⁶

A. Water and Sanitation

The right to water is protected under international human rights law, including ICESCR.⁷⁹⁷ The right to water is a right to access a variety of goods, services, and facilities, including potable water and sanitation.⁷⁹⁸ The former UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation developed guidance for States on their obligations in terms of this right.⁷⁹⁹ The CEDAW,⁸⁰⁰ CRC,⁸⁰¹ CRPD⁸⁰² and CERD⁸⁰³ all recognize the dependence of realization of other rights such as housing and food on the availability of water and sanitation.

1. The Rights to Water and Sanitation in the context of COVID-19

The CESCR has reminded States that persons who lack access to “adequate access to water, soap or sanitizer” are rendered more vulnerable to COVID-19.⁸⁰⁴ It has therefore called on States to dedicate resources to “housing, food, water and sanitation systems” to effectively counter COVID-19.⁸⁰⁵ Giving specific content to the rights to water and health in the COVID-19 context, the CESCR also reminded States that they have an obligation to ensure “provision of water, soap and sanitizer to communities that lack them”⁸⁰⁶ on a continuous basis.

A number of Special Procedures of the UN Human Rights Council have also given additional guidance. Eleven such UN experts have called for policies that ensure continuous access to water and sanitation.⁸⁰⁷ Acknowledging that adequate water is “unavailable to the 2.2 billion persons who have no access to safe water

⁷⁹⁵ E. Abrams, COVID-19 and the impact of social determinants of health, *The Lancet* (May 18 2020), available at: [https://www.thelancet.com/journals/lanres/article/PIIS2213-2600\(20\)30234-4/fulltext.t](https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30234-4/fulltext.t)

⁷⁹⁶ UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, COVID-19 measures must be grounded first and foremost on the right to health, (10 June 2020) available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25945&LangID=E>.

⁷⁹⁷ ICESCR, Articles 11 and 12. UDHR, Article 25; UN General Assembly, *The Human Right to Water and Sanitation*, UN Doc. A/RES/64/292 (2010). See more generally: N Ndeunyema, *Unmuddying the Waters: Evaluating the Legal Basis of the Human Right to Water Under Treaty Law, Customary International Law, and the General Principles of Law*, 41 *MICH. J. INT'L L.* 455 (2020).

⁷⁹⁸ General Comment 14; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: *The Right to Water* (arts. 11 and 12 of the Covenant) E/C.12/2002/11 (20 January 2003) (“General Comment 15”).

⁷⁹⁹ UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Realising The Human Rights to Water and Sanitation: A Handbook* by the UN Special Rapporteur Catarina De Albuquerque, (2014), available at: <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Handbook.aspx>.

⁸⁰⁰ CEDAW, Articles 11(1)(e)-(f), 12, 13(a) and 14(2)(b) & 14(2)(h).

⁸⁰¹ CRC, Article 24.

⁸⁰² CRPD, Article 25.

⁸⁰³ CERD, Article 15.

⁸⁰⁴ CESCR COVID-19 Statement, paras 5 and 9.

⁸⁰⁵ *Id.*, para 24.

⁸⁰⁶ *Id.*, para 15.

⁸⁰⁷ OHCHR, COVID-19 will not be stopped without providing safe water to people living in vulnerability-UN experts, (23 March 2020), available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25738&LangID=E>.

services”, well of over a quarter of the world’s current population, they made the following calls:⁸⁰⁸

1. **Cessation of Water Cuts:** that States “immediately prohibit waters cuts to those who cannot pay water bills”;
2. **Provision of Free Water:** that States “provide water free of cost for the duration of the crisis” to wide range of people including “people in poverty” and those affected by COVID-19 related “economic hardship”;
3. **Public/Private Providers:** that States ensure both public and private providers of water are “enforced to comply” with measures set out in 1 and 2; and
4. **Protection of Persons from Vulnerable groups:** that States take measures to protect those vulnerable to COVID-19 including people “who are homeless, rural populations, women, children, older persons, people with disabilities, migrants, refugees”.

The CESCR’s General Comment 15 on “The Right to Water” clarifies the scope and content of the right to water, including minimum core obligations.⁸⁰⁹ It has explained that the right to water as “one of the most fundamental conditions for survival”,⁸¹⁰ and has clarified that states must prioritize access to water resources for preventing “starvation and disease”.⁸¹¹

With respect to the right to sanitation it has noted, “ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources.”⁸¹² The right to sanitation is therefore at very least a component part of the rights to water, housing and health. The core obligations of States relating to access to water, emanating both from the rights to health and water, are summarized in Graph 2 below.

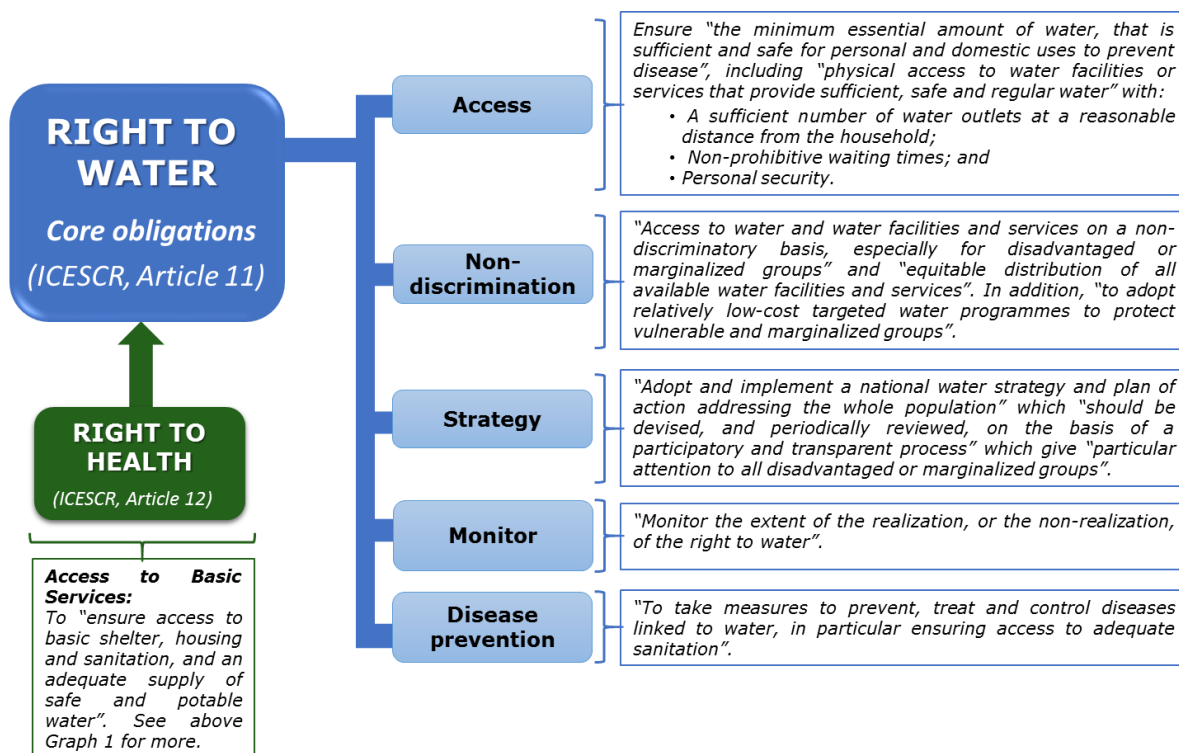
⁸⁰⁸ Id.

⁸⁰⁹ General Comment 15.

⁸¹⁰ Id, para 3.

⁸¹¹ Id, para 6.

⁸¹² Id, para 29.



Graph 2. Source: own elaboration.

It is evident that there is an immediate obligation on States to take any necessary measures to "prevent, treat and control diseases linked to water" by ensuring access to water and sanitation. COVID-19 is undoubtedly a disease "linked to water". In this regard both water and sanitation systems, services and facilities must be available, accessible, affordable, acceptable and of good quality.⁸¹³ This requires physical and economic accessibility without discrimination of any kind and in keeping with privacy and human dignity.⁸¹⁴

At the regional level, Article 20 of the Social Charter of the Americas recognizes that "water is fundamental for life and central to socioeconomic development and environmental sustainability." In addition, States must "ensure access to safe drinking water and sanitation services for present and future generations".⁸¹⁵ The **Inter-American Court** has established that the right to water must be guaranteed as a part of other human rights, such as the right to food, right to a healthy environment, and the right to health.⁸¹⁶ The Court has specifically acknowledged that the lack of water in proper quantity and quality creates a risk for the health of communities.⁸¹⁷

The **African Commission on Human and Peoples' Rights** has also affirmed that the right to water is implicit in rights protected under ACHPR, including the

⁸¹³ Id.

⁸¹⁴ Id, paras. 12(b), 18-19.

⁸¹⁵ Organization of American States, Water, Health, and Human Rights, Resolution AG/RES. 2349/07; Organization of American States, The Human Right to Safe Drinking Water and Sanitation, Resolution AG/RES. 2760. WHO and WASH, Water, sanitation, hygiene, and waste management for SARS-CoV-2, the virus that causes COVID-19 (29 July 2020): <https://www.who.int/publications/i/item/water-sanitation-hygiene-and-waste-management-for-covid-19>.

⁸¹⁶ Corte IDH, *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina*, Fondo, Reparaciones y Costas, Sentencia de 6 de febrero de 2020, Serie C No. 400, paras 222-223.

⁸¹⁷ Corte IDH, *Caso Comunidad Indígena Xákmok Kásek Vs. Paraguay*. Fondo, Reparaciones y Costas. Sentencia de 24 de agosto de 2010. Serie C No. 214, para. 196.

rights to life, dignity and, importantly, health.⁸¹⁸ The Commission acknowledged, in the face of COVID-19, that many individuals and communities “do not have access to water which is essential in maintaining good hygiene as a preventive COVID-19 measure”.⁸¹⁹ It therefore indicated that States must, “as a part of the right health,” ensure “access to preventive cleaning products and protective materials at affordable prices and with free provision for those having no capacity to pay and no access to clean water and sanitation”. It also called on States and private actors alike to take measures to alleviate the impact on human rights of, among other things, “water bills”.⁸²⁰

In **Ethiopia**,⁸²¹ more than 62 million people live without basic access to safe drinking water, meaning that only 42 per cent of the population has access to clean water. In rural areas of the country, these figures are even lower. About 31 per cent of Ethiopian population (32 million) rely on unsafe water for their daily needs, while another 28 per cent have “limited access”. Because many of those who do have access to water use shared standpipes and toilets attempts to access water “can constitute a channel of transmission.”⁸²² More money must be invested in water and sanitation services as well as public health messaging to address these threats during COVID-19 and beyond.⁸²³ Water access has also been adversely affected by other serious health epidemics including cholera, measles, polio, malaria and chikungunya.⁸²⁴

In **India** approximately one billion people live with physical water scarcity and approximately 44 percent of people have access to piped water.⁸²⁵ Access is also more scarce in rural areas and more than one-third of the water consumed by rural populations is contaminated.⁸²⁶ Poorer households in India often depend on public water sources such as public taps and wells at a significant distance from their homes.⁸²⁷ Sanitation facilities are also often shared, and community toilets lack reliable water supply.⁸²⁸

Even where some water is available, it is often accessible infrequently or intermittently, in low quantities and for short durations.⁸²⁹ Given the limited supply of water, the household priority is often cooking food and drinking water, at the

⁸¹⁸ African Commission on Human and Peoples’ Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (2010), available at: <http://www.achpr.org/instruments/economic-social-cultural/>; See also African Commission on Human and Peoples’ Rights “Guidelines on the Right to Water in Africa” (2020), available at: <https://www.achpr.org/legalinstruments/detail?id=71>.

⁸¹⁹ African Commission on Human and Peoples’ Rights, Press release on the impact of the COVID-19 pandemic on economic, social and cultural rights in Africa, (5 June 2020), available at: <https://www.achpr.org/pressrelease/detail?id=510>.

⁸²⁰ African Commission on Human and Peoples’ Rights, Press Statement on human rights based effective response to the novel COVID-19 virus in Africa, (24 March 2020), available at: <https://www.achpr.org/pressrelease/detail?id=483>.

⁸²¹ S Verma, COVID-19: Ethiopia stares at water crisis, (7 May 2020), available at: <https://www.downtoearth.org.in/blog/africa/covid-19-ethiopia-stares-at-water-crisis-70966>.

⁸²² K Baye, COVID-19 prevention measures in Ethiopia Current realities and prospects, (May 2020), available at: <https://ebrary.ifpri.org/utills/getfile/collection/p15738coll2/id/133729/filename/133940.pdf>, p 8.

⁸²³ A Nicol, The Pandemic Is Laying Bare a Global Water Crisis (12 May 2020), available at: <https://foreignpolicy.com/2020/05/12/coronavirus-pandemic-global-water-crisis/>.

⁸²⁴ United Nations Office for the Coordination of Humanitarian Affairs, Humanitarian Needs Overview: Ethiopia (Jan 2020), available at: https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/ethiopia_2020_humanitarian_needs_overview.pdf, p 16.

⁸²⁵ F Callister, Beneath the Surface: The State of the World’s Water 2019, Water Aid (March 2019), available at: <https://washmatters.wateraid.org/sites/g/files/jkxoof256/files/beneath-the-surface-the-state-of-the-worlds-water-2019-0.pdf>, p 6.

⁸²⁶ United Nations Children’s Fund (UNICEF) and World Health Organization, Progress on household drinking water, sanitation and hygiene 2000-2017, (2019), p 95.

⁸²⁷ C Davison, Under coronavirus lockdown, Delhi slum residents struggle to get water (9 April 2020), available at: <https://www.dw.com/en/under-coronavirus-lockdown-delhi-slum-residents-struggle-to-get-water/a-53073487>.

⁸²⁸ S Koppikar, Death-trap toilets: the hidden dangers of Mumbai’s poorest slums (27 February 2017) available at: <https://www.theguardian.com/global-development-professionals-network/2017/feb/27/death-trap-toilets-mumbai-india-slums>.

⁸²⁹ S Dasgupta, Hand washing to stop coronavirus — 78% of toilets in Mumbai slums lack reliable water supply (13 May 2020), available at: <https://theprint.in/opinion/hand-washing-to-stop-coronavirus-78-of-toilets-in-mumbai-slums-lack-reliable-water-supply/402590/>.

expense of hand washing and other hygiene measures essential for halting the transmission of COVID-19.⁸³⁰ The Indian Government has failed to execute national level laws, policies or adequate emergency measures to meet the water requirements of all people in India to mitigate the risk of transmission of COVID-19.⁸³¹

2. Recommendations on the rights to water and sanitation

To ensure that the rights to water and health of are realized in the context of COVID-19 States should take measures including the following:

- Providing emergency water access free of charge to people living in poverty.
- Providing public hand-washing facilities, soap and hand sanitizer on a continuous basis during the COVID-19 pandemic.
- Instituting immediate prohibitions on water disconnections for those who cannot afford to pay water bills whether their water is provided by public or private service providers.
- Developing policies allowing for continuous access to water and sanitation, with particular focus on persons from marginalized or disadvantaged groups without discrimination. Such groups include in particular: people living in informal settlements; homeless persons; people living in rural areas; women; children; older persons; persons with disabilities; non-citizens; and LGBTQI persons.⁸³²
- Urgently enacting and implementing legally enforceable policies and strategies on the provision of emergency water in all water-scarce areas for all people during the COVID-19 pandemic.
- Creating and ensuring the effective operation of water supply helplines for effective and prompt redress of grievances and responses to emergency water needs.
- Establishing independent monitoring mechanisms, with effective participation by community members and civil society organizations, state human rights institutions.
- Providing regular, accurate, evidence-based information on the spread of COVID-19 to the general public (including via public television and radio) on hygiene measures that are effective in curbing the spread of COVID-19.

B. Housing

The right to adequate housing is protected under international human rights law, including under the ICESCR.⁸³³ The CESCR has clarified that the right to adequate housing is not merely a right to basic shelter but a “right to live somewhere in security, peace and dignity”.⁸³⁴ The right to housing includes the following: legal security of tenure; access to services materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.⁸³⁵

⁸³⁰ N Bhowmick, Handwashing helps stop COVID-19. But in India, water is scarce (7 April 2020), available at: <https://www.nationalgeographic.com/science/2020/04/hand-washing-can-combat-coronavirus-but-can-the-rural-poor-afford-frequent-rinses/>.

⁸³¹ General Comment 15, para 44(c).

⁸³² OHCHR, COVID-19 will not be stopped without providing safe water to people living in vulnerability-UN experts (23 March 2020) available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25738&LangID=E>.

⁸³³ ICESCR, Article 11(1).

⁸³⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (art. 11 (1) of the Covenant) E/1992/23 (13 December 1991), paras 8(b) and 8(d), para 7 (“General Comment 4”).

⁸³⁵ Id, para 8.

The right to housing is also interrelated with the right to life, protected under article 6 of the ICCPR. In this connection, the UN Human Rights Committee has affirmed that States must take appropriate measures to address homelessness in order to ensure the conditions necessary for a dignified life.⁸³⁶ The CESCR has indicated “any significant number of individuals is deprived of ... basic shelter and housing... is failing to discharge its obligations under the Covenant”.⁸³⁷ It has clarified the positive obligations of States to prevent and address homelessness. These include an obligation to assess the extent of homelessness and inadequate housing and to prioritize those who are disadvantaged.⁸³⁸ The UN Special Rapporteur on Adequate Housing has set out clear obligations in regard to homelessness.⁸³⁹

CESCR has also more generally set out detailed requirements, which, if not fulfilled will render evictions unlawful.⁸⁴⁰ For an eviction to be lawful, it needs to fulfil certain requirements, which include, at the very minimum:⁸⁴¹ genuine consultation; adequate notice, adequate information; government presence; appropriate conditions; and legal remedies.

1. The right to housing in the context of COVID-19

From early on in the COVID-19 pandemic, the WHO has urged people to “stay at home” to combat the virus. Many States implemented this advice measures such as quarantines, “lockdowns” and curfews which restrict people’s movement outside of their homes. These measures have been taken to prevent COVID-19 transmission and protect public health thereby contributing to the fulfilment of States obligations to realize the right to health.

However, as the UN Special Rapporteur on the Right to Housing has noted: “It’s impossible to stay home when you don’t have one”.⁸⁴² An estimated 150 million people worldwide, some two percent of the global populations, are homeless and approximately 1.6 billion (over 20 percent) are estimated to lack adequate housing.⁸⁴³ The UN Special Rapporteur on the Right to Housing has produced a series of “Guidance Notes” for States relating to the realization of the right to housing during COVID-19.⁸⁴⁴

Describing housing as “the front line defense against the coronavirus”, the Special Rapporteur expressed concern about access to housing for homeless persons and

⁸³⁶ UN Human Rights Committee (HRC), General Comment No. 36: The Right to Life (art.6 of the International Convention on Civil and Political Rights) CCPR/C/GC/35 (3 September 2019), para 26.

⁸³⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), E/1991/23 (14 December 1990), para 10.

⁸³⁸ General Comment 4, paras 8(e) and 13.

⁸³⁹ United Nations Special Rapporteur on Adequate Housing, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/HRC/31/54 (2015), para 49.

⁸⁴⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The Right to Adequate Housing – Forced Evictions (art.11.1) E/1998/22 (20 May 1997).

⁸⁴¹ Id, para 15.

⁸⁴² L Farha, How can billions of people 'stay home' to beat Covid-19 without a safe place to live?, (29 April 2020), available at: <https://www.theguardian.com/society/2020/apr/29/how-can-billions-of-people-stay-home-to-beat-covid-19-without-a-safe-place-to-live>.

⁸⁴³ J Chamie, As Cities Grow, So Do the Numbers of Homeless, (13 July 2017), available at: <https://yaleglobal.yale.edu/content/cities-grow-so-do-numbers-homeless>.

⁸⁴⁴ United Nations Special Rapporteur on Adequate Housing, Protecting the right to housing in the context of the COVID-19 outbreak, available at: <https://www.ohchr.org/EN/Issues/Housing/Pages/COVID19RightToHousing.aspx>.

those living in emergency shelters and informal settlements.⁸⁴⁵ She therefore called on States to “at a minimum”:⁸⁴⁶

- Ensure protection of those living in homelessness or grossly inadequate housing;
- Cease all evictions;
- Provide emergency housing with services for those who must isolate;
- Ensure that “containment measures” such as curfews do no result in “punishment of anyone based on housing status”; and
- Provide access to adequate housing through “extraordinary measures” including by “using vacant and abandoned units and available short-term rentals”.

In a follow up statement in August 2020, the UN Special Rapporteur on the Right to Housing noted “alarm” at a “global increase in forced evictions” during the COVID-19 pandemic. Reiterating the need for a moratorium on evictions, he condemned largescale eviction in **Kenya, Haiti** and **Brazil** in particular, adding that “losing your home during this pandemic could mean losing your life”.⁸⁴⁷

In its statement on COVID-19 and ESCR, CESCR too indicated that States should consider “imposing a moratorium on evictions or mortgage bond foreclosures against people’s homes during the pandemic”.⁸⁴⁸

Importantly for the COVID 19 context, “an adequate house must contain certain facilities essential for health” including water and sanitation. It must also provide inhabitants with “adequate space” and protect against “cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors”.⁸⁴⁹ The core obligations in terms of the right to housing are summarized in Graph 3 below. They include protection and provision of, at very least, “basic shelter and housing”.⁸⁵⁰

⁸⁴⁵ United Nations Special Rapporteur on Adequate Housing, Housing, the front line defence against the COVID-19 outbreak, says UN expert (18 March 2020), available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25727&LangID=E>

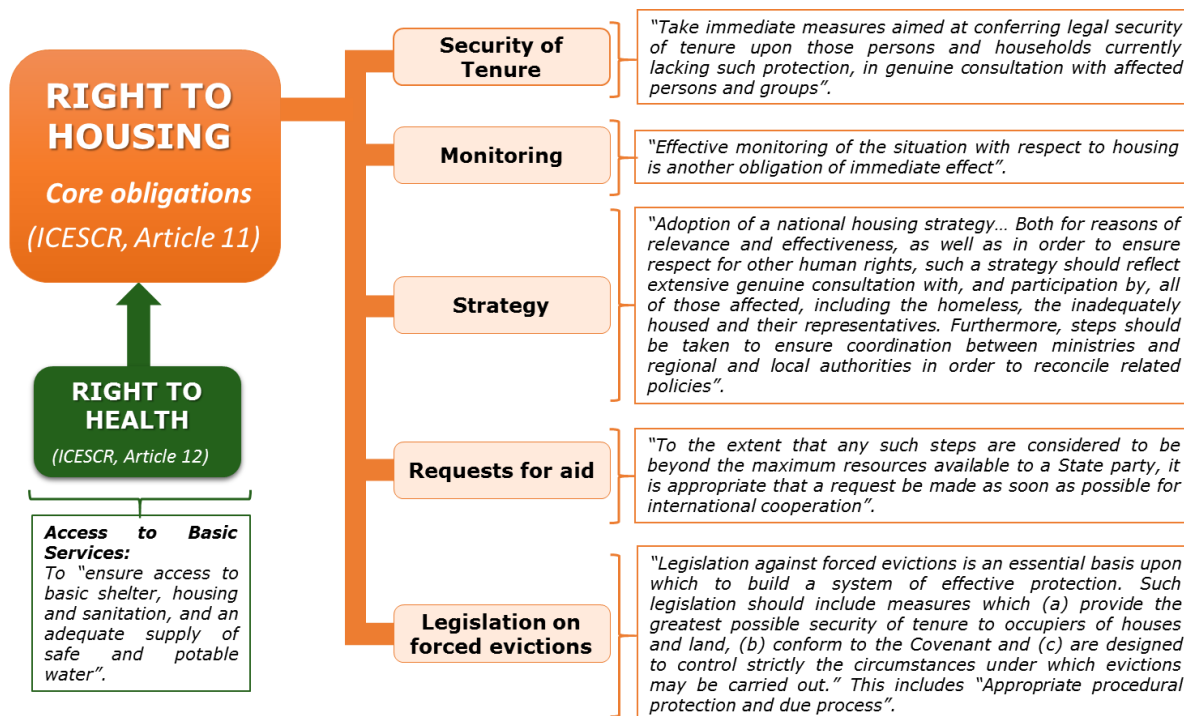
⁸⁴⁶ Id.

⁸⁴⁷ UN Special Rapporteur on the Right to Housing, Ban evictions during COVID-19 pandemic, UN expert urges (18 August 2020), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26170&LangID=E>.

⁸⁴⁸ CESCR COVID-19 Statement, paras 5 and 9.

⁸⁴⁹ Id, paras 8(b) and 8(d).

⁸⁵⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, available at: <https://www.refworld.org/docid/4538838e10.html> [accessed 23 June 2020], para 10.



Graph 3. Source: own elaboration.

In **Kenya**, despite court orders aimed at restraining authorities from conducting their eviction, 8000 persons were reported to have been forcibly evicted from their homes, with little advanced warning. They were not provided with food, temporary shelter, access to water and sanitation or compensation.⁸⁵¹ This remained the case for some of those evicted weeks after the evictions took place.⁸⁵² The UN Special Rapporteur on adequate housing and the UN Special Rapporteur on human rights defenders condemned these evictions as constituting violations of the right to housing but also as exacerbating the potential impact of COVID-19 "on the rights to health and life of thousands of Kenyans".⁸⁵³

In **China**, the COVID-19 pandemic has allegedly resulted in "xenophobic" and discriminatory treatment of African residents.⁸⁵⁴ Africans in Guangzhou, for example, were reportedly evicted from their apartments by landlords and been repeatedly compelled to take COVID-19 tests.⁸⁵⁵ Landlords and hotels in the province were said to have been instructed to turn away Africans seeking accommodation, resulting in increased homelessness among Africans living in Guangzhou with many "sleeping on the street".⁸⁵⁶ Such conditions increase the

⁸⁵¹ B Rajagopal and M Lawlor, COVID-19 crisis: Kenya urged to stop all evictions and protect housing rights defenders (22 May 2020), available at:

<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25901&LangID=E>.

⁸⁵² J Ashly, Kenyans desperate after mass shack evictions (17 June 2020), available at: <https://www.newframe.com/kenyans-desperate-after-mass-shack-evictions/>.

⁸⁵³ B Rajagopal and M Lawlor, COVID-19 crisis: Kenya urged to stop all evictions and protect housing rights defenders (22 May 2020), available at:

<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25901&LangID=E>.

⁸⁵⁴ Open Letter on the Xenophobic, Racist and Inhuman Treatment of Africans in China (15 April 2020), available at:

<http://www.southernafricadefenders.africa/2020/04/15/open-letter-on-the-xenophobic-racist-and-inhuman-treatment-of-africans-in-china/>.

⁸⁵⁵ Al Jazeera, African nationals 'mistreated, evicted' in China over coronavirus (12 April 2020), available at:

<https://www.aljazeera.com/news/2020/04/african-students-mistreated-evicted-china-coronavirus-200412100315200.html>

⁸⁵⁶ Human Rights Watch, China: Covid-19 Discrimination Against Africans (5 May 2020), available at:

<https://www.hrw.org/news/2020/05/05/china-covid-19-discrimination-against-africans>.

risk of transmission of COVID-19, which is compounded by the reported refusal of entry of some Africans to hospitals.⁸⁵⁷

In the **United States**, some 24 percent of persons were reportedly unable to make their rent payments in April, with this increasing to 31 percent in May and decreasing marginally to 30 percent in June.⁸⁵⁸ Some experts predicted an “avalanche of evictions across the country”⁸⁵⁹ with people being “forced to put themselves at extraordinary health risk only to show up to court and get evicted”.⁸⁶⁰ The federally mandated ban on evictions which applies to roughly 25 percent of renters in the USA expired on July 25 2020, while moratoria on evictions for tenants living in private properties varies from state to state and many expired at the end of June 2020.⁸⁶¹

In **India**, a ban on evictions of “labourers and students” is insufficiently broad, and has apparently not generally been enforceable as 90 percent of rent agreements are without a written contract.⁸⁶² Individuals and groups, particularly healthcare workers, Muslim persons and persons from North East of India, continue to be vulnerable to evictions as a result of religious and ethnicity-based discrimination and other prejudice based on fear of COVID-19 transmission.

Moreover, informal settlements in India commonly lack basic amenities such as water, sanitation and cooking facilities.⁸⁶³ Lockdown measures implemented restricted people from leaving their homes.⁸⁶⁴ Many of those who stayed in their cities of work – by choice or compulsion – continue to live in inadequate housing. Many have lost their existing housing and have been forced into shelter homes. In addition, some 600,000 internal migrant workers who attempted to return to their hometowns, some travelling hundreds of kilometers on foot, were required by a Government Order to abandon their efforts and quarantine in government shelter homes.⁸⁶⁵ Many shelter homes lacked adequate space, sanitation facilities and proper hygiene measures and thus risk increased transmission of COVID-19.⁸⁶⁶

⁸⁵⁷ Time, “This Is Discrimination.” Africans in One of China’s Major Cities Say They Are Targets After a Spike in COVID-19 (16 April 2020), available at: <https://time.com/5820389/africans-guangzhou-china-coronavirus-discrimination/>.

⁸⁵⁸ I Popov et al, Missed Payments Stabilize In June -- At Alarming Levels (9 June 2020), available at: <https://www.apartmentlist.com/research/june-housing-payments>.

⁸⁵⁹ New York Times, An ‘Avalanche of Evictions’ Could Be Bearing Down on America’s Renters (27 May 2020), available at: <https://www.nytimes.com/2020/05/27/us/coronavirus-evictions-renters.html>.

⁸⁶⁰ BBC, Coronavirus: Why US is expecting an ‘avalanche’ of evictions (19 June 2020) available at: <https://www.bbc.com/news/world-us-canada-53088352>.

⁸⁶¹ K Tapales, Here’s when enhanced unemployment insurance, eviction bans and other coronavirus financial protections expire (19 June 2020), available at: <https://www.cnbc.com/2020/06/19/when-extra-unemployment-benefits-and-other-coronavirus-protections-end.html>.

⁸⁶² G Bhan, View: Why the issue of migrant security should be a top priority in India’s covid response (8 April 2020), available at: https://economictimes.indiatimes.com/news/politics-and-nation/view-why-the-issue-of-migrant-security-should-be-a-top-priority-in-indias-covid-response/articleshow/75054748.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

⁸⁶³ Ministry of Housing and Urban Poverty Alleviation, Government of India, Report of the Working Group on Migration, (2017) p 44, available at: <http://mohua.gov.in/upload/uploadfiles/files/1566.pdf>.

⁸⁶⁴ Order No. 40-3/2020-DM-I(A), Ministry of Home Affairs, Government of India (24 March, 2020), available at: https://www.mha.gov.in/sites/default/files/MHAorder%20copy_0.pdf. International Commission of Jurists, COVID-19: Indian authorities must act immediately to protect internal migrant workers stranded under intolerable conditions (16 April 2020), available at: <https://www.icj.org/india-the-authorities-must-act-immediately-to-protect-internal-migrant-workers-stranded-under-intolerable-conditions/>.

⁸⁶⁵ Order No. 40-3/2020-DM-I(A), Ministry of Home Affairs, Government of India (29 March, 2020), available at: https://www.mha.gov.in/sites/default/files/PR_MHAOrderrestrictingmovement_29032020.pdf

⁸⁶⁶ PTI, Hunger, joblessness subsumes Covid-19 threat as thousands throng Delhi shelters for food (28 March 2020), available at:

In **South Africa**, despite lockdown regulations prohibiting the exception of eviction orders in all but the most exceptional circumstances, evictions and demolitions, sometimes using excessive force, continued to be executed across the country.⁸⁶⁷ One in case this led to a judge the Court describing an eviction executed as “inhumane”, “heartless” and done with “scant regard to his safety, security and health particularly in light of the Covid-19 health pandemic”.⁸⁶⁸ In another incident, video footage captured the eviction of a man from his home and its subsequent demolition while he was naked and taking a bath.⁸⁶⁹ Litigation initiated by the South African Human Rights Commission led to the High Court interdicting further evictions without court orders in the City of Cape Town, and requiring compensation to be paid to individuals whose belongings were lost in unlawful evictions.⁸⁷⁰

2. Recommendations on the Right to Housing

To ensure that the rights to housing and health of are realized in the context of COVID-19 States should take measures including the following:

- Declaring a general ban or moratorium on evictions and the execution of eviction orders until the end of the COVID-19 pandemic and for a reasonable period of time thereafter. Failure to make rent or mortgage payments alone cannot justify evictions in context of COVID-19. Any exceptions to such a general ban should clearly detailed in legal regulations, compliant with international human rights law and standards and permitted only by an order of court having considered the full impact on the human rights of those evicted in the specific context of COVID-19.
- Providing necessary resources to monitor and prevent forced evictions executed and initiated by both public and private actors.⁸⁷¹
- Providing for strict compliance with international human rights law and standards prohibiting forced evictions, if and when eviction proceedings resume.
- Ensuring that no eviction leads to homelessness, by making provision for temporary alternative accommodation which comply with the standards on the right to adequate housing.
- Ensuring access to justice for persons who are facing the possibility of eviction, irrespective of their legal status.⁸⁷² No eviction should proceed without a court order by a judge having considered the right to housing of those who are facing evictions and considered all relevant circumstances and all alternative options in specific context of COVID-19.

<https://www.indiatoday.in/india/story/hunger-joblessness-subsumes-covid-19-threat-thousands-throng-delhi-shelters-food-1660780-2020-03-28>; See Housing Land Rights Network, Need for Special Measures to Check Spread of COVID-19 among Homeless and Other Inadequately-housed Persons (13 March 2020), available at: https://www.hlrn.org.in/documents/Press_Release_COVID19.pdf.

⁸⁶⁷ TF Hodgson, The lawlessness of unlawful evictions: South Africa’s home invasion problem (6 August 2020), available at: <https://www.dailymaverick.co.za/article/2020-08-06-the-lawlessness-of-unlawful-evictions-south-africas-home-invasion-problem/>.

⁸⁶⁸ *Community of Hangberg and Another v City of Cape Town* (7837/2020) [2020] ZAWCHC 66 (15 July 2020), available at: <http://www.saflii.org/za/cases/ZAWCHC/2020/66.html>.

⁸⁶⁹ V Lali et al, Bulelani Qolani: What happened before he was dragged naked from his shack? (9 July 2020), available at: <https://www.dailymaverick.co.za/article/2020-07-09-bulelani-qolani-what-happened-before-he-was-dragged-naked-from-his-shack/>.

⁸⁷⁰ *South African Human Rights Commission and Others v City of Cape Town and Others* (8631/2020) [2020] ZAWCHC 84 (25 August 2020), available at: <http://www.saflii.org/za/cases/ZAWCHC/2020/84.html>.

⁸⁷¹ UN Special Rapporteur on the Right to Adequate Housing, COVID-19 Guidance Note - Protecting residents of informal settlements (23 April 2020), available at: https://www.ohchr.org/Documents/Issues/Housing/SR_housing_COVID-19_Guidance_informal_settlements.pdf

⁸⁷² Id.

- Ensuring the provisions of adequate, affordable and proximate supplies of hygienic water and sanitation facilities for all housing including in informal settlements.⁸⁷³
- Ensuring that women, children and others who are forced to leave their homes as a result of domestic violence are provided adequate and safe alternate accommodation with access to water, sanitation, food, social supports, health services and testing for COVID-19.⁸⁷⁴
- Prohibiting, preventing and effectively addressing discrimination against homeless persons based on their housing status and their inability to comply with COVID-19 response measures, including lockdown restrictions.⁸⁷⁵
- Ensuring that existing essential services such as water, electricity, heating, telecommunications and internet are not suspended due to lack of payment of rent or mortgage during the COVID-19 pandemic and for a reasonable time thereafter'.⁸⁷⁶
- Where possible, providing effective support and relief to owners and landlords to compensate for losses endured as a result of State measures prohibiting evictions.

C. Food

The right to food is protected under international human rights law, including Article 11 of ICESCR. It is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights.⁸⁷⁷

The UN Guiding Principles on extreme poverty and human rights, adopted by the UN Human Rights Council, provide that States should “[e]nsure effective distribution mechanisms that recognize market shortcomings to make adequate food physically and economically accessible to persons living in poverty”.⁸⁷⁸

The right to food protects a right to food which covers a person’s dietary and nutritional needs; is free from adverse substances; is culturally acceptable; is available; and is economically and physically accessible without discrimination.⁸⁷⁹ The core obligations in terms of the right to housing are summarized in Table 4 below.

1. The Right to Food in the context of COVID-19

In its statement on COVID-19 and ESCR, the CESCR indicated that under the ICESCR States have an obligation to adopt of various measures to ensure an adequate standard of living for all people, including their ability to access sufficient food. Key recommendations in this regard include that States take measures:

⁸⁷³ Id.

⁸⁷⁴ UN Special Rapporteur on the Right to Adequate Housing, COVID-19 Guidance Note - Protecting those living in homelessness (28 April 2020), available at: https://www.ohchr.org/Documents/Issues/Housing/SR_housing_COVID-19_guidance_homeless.pdf.

⁸⁷⁵ Id.

⁸⁷⁶ Id.

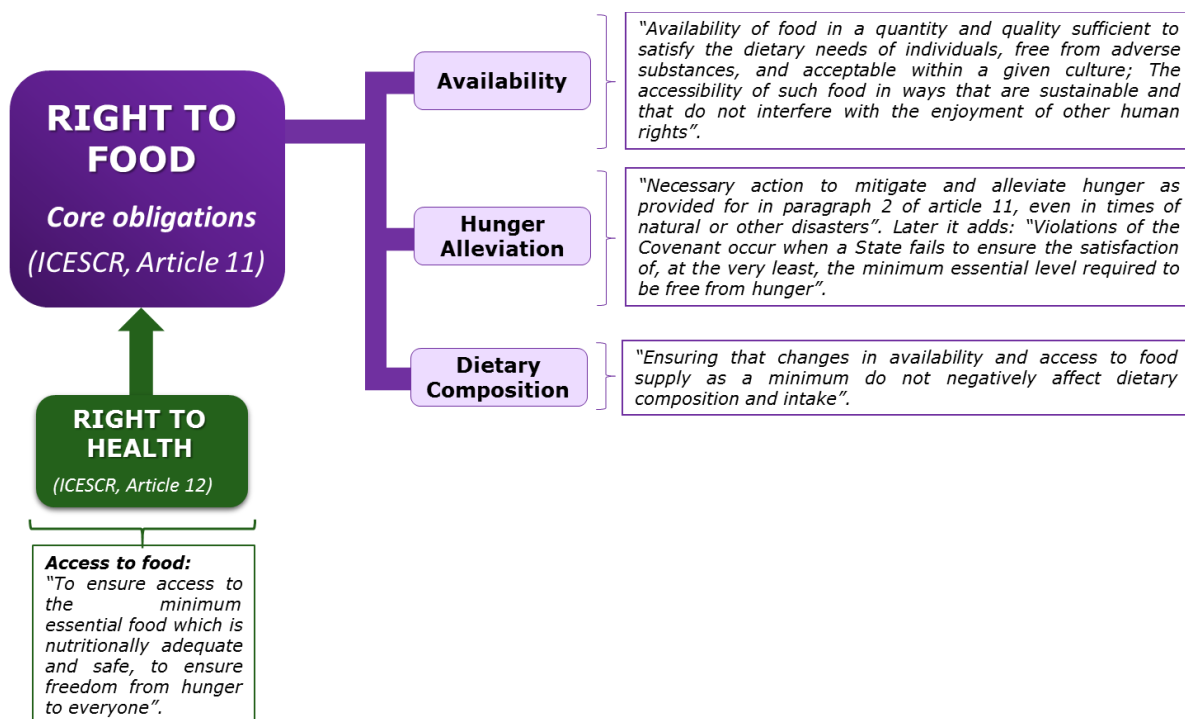
⁸⁷⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (art. 11 of the Covenant) 12 May 1999, para 4.

⁸⁷⁸ UN Special Rapporteur on Extreme Poverty and Human Rights, Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, A/HRC/21/39 (18 July 2012), available at: <https://undocs.org/pdf?symbol=en/A/HRC/21/39>.

⁸⁷⁹ Id, para 8.

- **Provide Social Relief:** Providing social relief and income-support programmes to “ensure food and income security to all those in need”;
- **Prevent Profiteering:** Enacting regulatory measures to “prevent profiteering on foodstuffs, hygiene products and essential medicines and supplies”;
- **Lifting of VAT:** Lifting of “value added tax” on foodstuffs, hygiene products and essential medicines and supplies;
- **Subsidizing essential food:** Subsidizing the costs of “essential foodstuffs and hygiene products to ensure that they are affordable to the poor”;
- **Border Measures:** Ensuring that border measures, including closures, “do not hinder the flow of necessary and essential goods, particular staple foods and health equipment”.

Some of these measures also flow from the obligations of States in terms of the right to social security,⁸⁸⁰ although this right is not treated in this report.



Graph 4. Source: own elaboration.

COVID-19 has generally disrupted global food supply, caused economic destruction and devastated the ability of people across the world to access and afford food. The number of people at risk of going hungry has doubled to at least 265 million in 2020, despite the fact that experts agree there should be enough food to feed the world this year.⁸⁸¹ Even among those who can access food, many will not be able to afford food owing to the economic hardships caused by and

⁸⁸⁰ ICESCR, Articles 9-10; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), E/C.12/GC/19 (4 February 2008). See also: D Sivaprakasam & D Kurolova, The Right to Social Security: Navigating the Narrow Passage Between Virus Suppression and Economy Resuscitation (12 May 2020), available at: <https://opiniojuris.org/2020/05/12/the-right-to-social-security-navigating-the-narrow-passage-between-virus-suppression-and-economy-resuscitation/>.

⁸⁸¹ P Anthem, Risk of hunger pandemic as coronavirus set to almost double acute hunger by end of 2020 (16 April 2020), available at: <https://insight.wfp.org/covid-19-will-almost-double-people-in-acute-hunger-by-end-of-2020-59df0c4a8072>; Global Network Against Food Crises & Food Security Information Network, 2020 Global Report On Food Crises, (20 April 2020) available at: https://docs.wfp.org/api/documents/WFP-0000114546/download/?_ga=2.11649652.1707541732.1592899992-1333429366.1592899992.

government responses to COVID-19 sometimes limiting economic opportunities to people living in poverty.⁸⁸²

Overall, the UN World Food Programme acknowledges “growing evidence that the impacts of the COVID-19 pandemic continues to deepen existing hunger amongst vulnerable populations”. It notes that “constrained access to food is worsening food insecurity” and that COVID-19 is “exacerbating pre-existent regional crises” which may lead to “unprecedented levels of hunger in 2020/2021”.⁸⁸³

In **South Africa**, desperation for food during lockdown reportedly led to protests involving looting.⁸⁸⁴ Thousands of people were been forced to queue for food parcels in the absence of other means to procure food during the lockdown.⁸⁸⁵ Such congested queues increase risks of COVID-19 transmission, and at least one major food distribution centre was forced to close after a staff member tested positive for COVID-19.⁸⁸⁶

In **Honduras** peaceful protests for food, medicine and water were reportedly met with severe repression by security forces.⁸⁸⁷ Human rights defenders in Honduras have particularly come under attack in the context of emergency measures taken to combat COVID-19.⁸⁸⁸ The adverse impact of COVID-19 has been compounded by the dire state of Honduras’ public health system.⁸⁸⁹

In **Malaysia** food aid provided by the government to indigenous persons has been inadequate, requiring significant intervention by NGOs to ensure that households receive adequate food.⁸⁹⁰ Some indigenous persons have reported decided to “flee into forests” both to evade COVID-19 transmission and in search of food in the absence of sufficient income or support.⁸⁹¹ NGOs were initially prohibited from providing food aid, resulting in the closure of soup kitchens across the country, although this prohibition has since been lifted. Despite government-provided food assistance LGBTQ persons have sometimes been denied access to such food.⁸⁹²

⁸⁸² A Gunia, How Coronavirus Is Exposing the World’s Fragile Food Supply Chain – and Could Leave Millions Hungry, (8 May 2020), available at: <https://time.com/5820381/coronavirus-food-shortages-hunger/>.

⁸⁸³ United Nations World Food Programme, External Situation Report #9 (4 June 2020), available at: https://docs.wfp.org/api/documents/edea71639137476fbd600cb051bf0716/download/?_ga=2.188788715.1707541732.159289992-1333429366.1592899992.

⁸⁸⁴ Iol, Covid-19: lockdown: Looting, property damage in Western Cape strongly condemned, (21 April 2020), available at: <https://www.iol.co.za/news/south-africa/western-cape/covid-19-lockdown-looting-property-damage-in-western-cape-strongly-condemned-46992744>.

⁸⁸⁵ BBC, Coronavirus: South Africans in massive queues for food parcels (17 May 2020), available at: <https://www.bbc.com/news/av/world-africa-52701571/coronavirus-south-africans-in-massive-queues-for-food-parcels>; R Hall et al, The lockdown may be unconstitutional – unless school feeding and social grants are fixed (21 April 2020), available at: <https://www.dailymaverick.co.za/article/2020-04-21-the-lockdown-may-be-unconstitutional-unless-school-feeding-and-social-grants-are-fixed/>.

⁸⁸⁶ T Monama, Gauteng indigents dealt a blow as Covid-19 shuts food distribution centre, (23 June 2020), available at: <https://www.iol.co.za/the-star/news/gauteng-indigents-dealt-a-blow-as-covid-19-shuts-food-distribution-centre-49776583>.

⁸⁸⁷ Amnesty International, Authorities must protect people from COVID-19 instead of resorting to repressive measures, (15 May 2020), available at: <https://www.amnesty.org/en/latest/news/2020/05/americas-authorities-must-protect-people-covid19-repressive-measures/>.

⁸⁸⁸ Civicus, Honduras’ Undue Restrictions On Expression And Police Abuse Of Emergency Powers During Covid-19, (22 May 2020), available at: <https://monitor.civicus.org/updates/2020/05/22/honduras-undue-restrictions-expression-and-police-abuse-emergency-powers-during-covid-19/>.

⁸⁸⁹ A Brigida, Coronavirus crisis exposes another pandemic in Honduras: Analysts (27 March 2020), available at: <https://www.aljazeera.com/news/2020/03/coronavirus-crisis-exposes-pandemic-honduras-analysts-200327183808256.html>.

⁸⁹⁰ V Tan, Isolated and short of supplies, Malaysia’s indigenous groups depend on aid to ride out movement control order, (12 April 2020), available at: <https://www.channelnewsasia.com/news/asia/covid19-malaysia-orang-asli-food-shortage-ngos-12647956>.

⁸⁹¹ R Latiff, Malaysia's indigenous people flee into forests to escape coronavirus, (3 April 2020), available at: <https://www.thejakartapost.com/seasia/2020/04/03/malaysias-indigenous-people-flee-into-forests-to-escape-coronavirus.html>.

⁸⁹² V Pillai, The Trans Women at the Frontline, available at: <https://www.queerlapis.com/the-trans-women-at-the-frontline/>.

In **Pakistan** despite some legal protection and public support from some leaders, all LGBTQ persons have experienced significant vulnerability during lockdown periods.⁸⁹³ Transgender persons struggled to access food aid, which was made dependent on verification based on the national identification card, which many do not have.⁸⁹⁴ This problem was compounded by the closing of shrines during lockdown – sometimes a key source of food for transgender persons.⁸⁹⁵ Moreover, transgender persons, many of whom work as informal workers, have faced a severe loss of livelihood as lockdown measures have prevented many informal workers from earning a living.⁸⁹⁶

In **India** informal sector workers and many others who ordinarily survive on meager and unreliable daily wages, reportedly lost access to a regular income because of lockdown measures.⁸⁹⁷ Government authorities announced lockdown measures with only four hours' notice. Significant bottlenecks in the food distribution system have been experienced in the transportation of food which has led to disruptions in the domestic food supply chain.⁸⁹⁸ This has contributed to a proliferation of hunger and even starvation despite the fact that in 2020, the Government held three times the buffer stock of food than it required.⁸⁹⁹ One source records 216 deaths as a result of "starvation and financial distress".⁹⁰⁰

Structural flaws preventing access to food for people living in poverty, including lack of ration cards and lack of inter-state portability of ration cards, persist.⁹⁰¹ Despite relief packages provided by the government more than 100 million low-income persons who should qualify for ration cards but have been unable to obtain them, have been unable to access food grains through the food public distribution system.⁹⁰² Moreover, many that did not qualify for subsidized food in the past are now likely to require food subsidies, as food insecurity has increased substantially in light of COVID-19 leading to massive loss of livelihood.⁹⁰³ A number of people

⁸⁹³ K Hussain, Transgender community fears complete lockdown will add more miseries to life, (22 March 2020), available at: <https://tribune.com.pk/story/2181779/1-transgender-community-fears-complete-lockdown-will-add-miseries-life/>.

⁸⁹⁴ UNAIDS, Keeping HIV treatment available in Pakistan during COVID-19, (15 April 2020), available at: https://www.unaids.org/en/resources/presscentre/featurestories/2020/april/20200415_pakistan

⁸⁹⁵ K Hussain, Transgender community fears complete lockdown will add more miseries to life, (22 March 2020), available at: <https://tribune.com.pk/story/2181779/1-transgender-community-fears-complete-lockdown-will-add-miseries-life/>.

⁸⁹⁶ World Bank, Women and girls must be at the center of Pakistan's COVID-19 recovery, (9 June 2020), available at: <https://blogs.worldbank.org/endpovertyinsouthasia/women-and-girls-must-be-center-pakistans-covid-19-recovery>.

⁸⁹⁷ International Labour Organization, India Wage Report: Wage policies for decent work and inclusive growth, (2018), available at: https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_638305.pdf.

⁸⁹⁸ T Reardon et al, COVID-19's Disruption of India's Transformed Food Supply Chains, (2 May 2020), available at: <https://www.epw.in/journal/2020/18/commentary/covid-19s-disruption-indias-transformed-food.html>.

⁸⁹⁹ S Hussain, COVID-19 Lockdown: How India Can Provide Food Grains to Stranded Migrant Labourers, (18 April 2020), available at: <https://thewire.in/rights/covid-19-lockdown-india-food-grains-stranded-migrants>.

⁹⁰⁰ "Non Virus Deaths" (11 June 2020): <https://thejeshqn.com/projects/covid19-india/non-virus-deaths/>. Source is updated regularly. Figure below correct as of 11 August 2020.

⁹⁰¹ International Commission of Jurists, India on the Brink of Hunger Crisis during COVID-19 Pandemic, (27 April 2020), available at: <https://www.icj.org/wp-content/uploads/2020/04/India-Right-to-Food-COVID19-Briefing-Paper-2020-ENG.pdf>.

⁹⁰² Finance Minister announces short term and long-term measures for supporting the poor, including migrants, farmers, tiny businesses and street vendors (14 May 2020), available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1623862>; The Indian Public Food Distribution System (PDS) is the largest food distribution welfare programme in the world. The Public Distribution System (PDS) facilitates the supply of food grains and distribution of essential commodities to a large number of poor people through a network of Fair Price Shops at a subsidized price on a recurring basis. It has a network of more than 4 lakh Fair Price Shops. See Department of Food and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution: <http://epds.nic.in>.

⁹⁰³ K Agarwal, Six Charts Show That India Needs to (and Can Afford to) Universalise PDS, (18 April 2020), available at: <https://thewire.in/food/covid-19-lockdown-food-pds-india>. Reuters, Mexico's prostitutes end up homeless as coronavirus keeps clients at home, shuts hotels, (9 April 2020), available at: <https://www.reuters.com/article/us-health-coronavirus-mexico-sex-workers/mexicos-prostitutes-end-up-homeless-as-coronavirus-keeps-clients-at-home-shuts-hotels-idUSKCN21R26C>.

trying to access food from community kitchens that have sprung have allegedly been harassed and beaten by the police.⁹⁰⁴

2. Recommendations on the Right to Food

To ensure that the rights to food and health of are realized in the context of COVID-19 States should take measures including the following:

- Provide immediate access to food for all people who cannot afford to meet their daily nutritional needs themselves.
- Ensure that all food banks and distribution centres comply with WHO hygiene and physical distancing recommendations, including by as far as possible ensuring decentralized food delivery including on-site support and home delivery.⁹⁰⁵
- Address the minimum essential nutritional needs of all persons to the maximum of their available resources, including through use of its existing buffer food stock, or other appropriate mechanisms.⁹⁰⁶
- Adopt and implement targeted measures to ensure food and income support particularly to persons from disadvantaged and marginalized groups and ensure non-discrimination in access to food for all persons.⁹⁰⁷
- Adopt regulations to prevent and overpricing of food by supermarkets and other businesses trading in food.
- Ensure that informal food traders are permitted to continue operating as essential services even during the implementation of COVID-19 lockdown measures.
- Lift or reduce by as much as possible Value Added Tax on food essential food items during the COVID-19 pandemic.
- Subsidize the cost of essential food so that it is affordable for all persons regardless of their employment situation.⁹⁰⁸
- Ensure that any border closures do not impact the flow of food and health equipment to other countries and that where such restrictions are strictly necessary for a legitimate purpose, they must be proportionate and take into account the obligation to provide for access to food.⁹⁰⁹
- Act swiftly to remedy supply chain disruptions in provision of food and ensure dissemination of information about the availability of essential services such as community kitchens and fair price shops.⁹¹⁰

⁹⁰⁴ M Sehgal, Coronavirus lockdown in Chandigarh: Daily wage workers are surviving on donated food, (2 April 2020).

⁹⁰⁵ UN Special Rapporteur on the Right to Adequate Housing, "COVID-19 Guidance Note - Protecting those living in homelessness" (28 April 2020), available at: https://www.ohchr.org/Documents/Issues/Housing/SR_housing_COVID-19_guidance_homeless.pdf.

⁹⁰⁶ International Commission of Jurists, India on the Brink of Hunger Crisis during COVID-19 Pandemic, (27 April 2020), available at: <https://www.icj.org/wp-content/uploads/2020/04/India-Right-to-Food-COVID19-Briefing-Paper-2020-ENG.pdf>.

⁹⁰⁷ CESCR COVID-19 Statement, para 15.

⁹⁰⁸ Id, para 17.

⁹⁰⁹ Id, para 20.

⁹¹⁰ International Commission of Jurists, India on the Brink of Hunger Crisis during COVID-19 Pandemic, (27 April 2020), available at: <https://www.icj.org/wp-content/uploads/2020/04/India-Right-to-Food-COVID19-Briefing-Paper-2020-ENG.pdf>.

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