

Covid-19, Law and Human Rights : **ESSEX DIALOGUES**

A Project of the School of Law and Human Rights Centre

Edited by: Carla Ferstman and Andrew Fagan
1 July 2020



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Covid-19, Law and Human Rights: Essex Dialogues

Introduction	1
Some Conceptual Framings	3
Some Conceptual Framings: A Discussion	3
The Reach of Rights in the Crisis.....	5
Rights and Responsibilities: Protecting and Fulfilling Economic and Social Rights in Times of Public Health Emergency	11
Rethinking Minimum Guarantees after the Pandemic: The Invisible Violence of Neoliberal Rationality	19
Global, Regional and Comparative Perspectives	29
Global, Regional and Comparative Perspectives: A Discussion	29
Moving Towards Global Solidarity for Global Health through Multilateral Governance in the Covid-19 Response	31
African Union and Public Health Crises in a Regional Legal Order.....	41
Crisis, Opportunism, and Opportunity: How the Pandemic has Exacerbated Pre-existing Constitutional Tensions in the European Union	51
A “New Normal”: Legality in Times of Necessity: French Administrative Law under the Health Emergency	63
Victims’ Participation in Times of Covid-19 in Transitional Justice Accountability Mechanisms: What is Needed for Virtual Hearings to Fulfil this Right? The case of Colombia and the Special Jurisdiction for Peace	73
The Right to Health	83
The Right to Health: A Discussion	83
Covid-19: An Inconvenient Truth? Re-evaluating Progress and Confronting Challenges for the Right to Health	85
The Use of Age as a Triage Criterion.....	93
The Effects of the Covid-19 Pandemic on the Regulation of the Economy	103
The Effects of the Covid-19 Pandemic on the Regulation of the Economy	103
Covid-19, Export Restrictions, and the WTO: Magnifying Global Divisions in a Time of Crisis	107
Regulating International Contracts in a Pandemic: Application of the <i>Lex Mercatoria</i> and Transnational Commercial Law.....	117
Changes to UK Insolvency Rules in the Wake of Covid-19: A Much-Needed Help for Businesses or an Unjustified Harm to the Rule of Law?	127
The Right to Work and Rights in Work during the Coronavirus Pandemic: The Response of the United Kingdom	137
The Impact on Vulnerable Populations	147
Vulnerability: A Discussion.....	147
The Politics of Identity in the UK: Before, During and After Covid-19	149

Covid-19 and Social Inequalities in Health in the UK	159
Forced Displacement in a Time of a Global Pandemic	167
Detention and Pandemic Exceptionality.....	177
Imperfect Models of the World: Gender Stereotypes and Assumptions in Covid-19 Responses.....	187
The Human Rights of Older People during Covid-19: Social Wellbeing and Access to Care and Support for Older People in the United Kingdom	197
Access to Justice.....	205
Access to Justice: A Discussion.....	205
Covid-19 and Criminal Justice: Temporary Fixes or Long Term Reform?	207
Effective Mobilisation of Social Welfare Law Advice in Response to the Covid-19 Pandemic.....	217
Legal Advice in the Covid-19 Lockdown: Making Do or Brave New World?	229
Domestic Abuse and Covid-19: The Legal Challenges.....	237
Love of Video Mediation in the Time of Covid-19: An Initial Insight into Benefits and Challenges.....	247
Open Justice, Participation and Materiality: Virtual Hearings and the Court of Protection	257
Big Data and Technology	267
Big Data and Technology: A Discussion	267
Our Digital Footprint under Covid-19: Should We Fear the UK Digital Contact Tracing App?	269
With Great Reliance Comes Great Responsibility: The Role of Technology Companies during Covid-19.....	277
An ‘Infodemic’ in the Pandemic: Human Rights and Covid-19 Misinformation.....	287
Cyber Due Diligence in Public Health Crises	297
Accountability	309
Accountability: A Discussion	309
Failure to Act in Times of Pandemic: Is There a Role for the International Criminal Law Doctrine of Superior Responsibility?	311
The Law of State Responsibility and the Covid-19 Pandemic.....	321

Introduction

Covid-19 presents one of the gravest, acute challenges our world has faced for many years. The pandemic impacts a vast array of areas of life across the globe. It also raises a multitude of very urgent questions for law and human rights. This volume provides a series of scholarly responses to many of the questions Covid-19 raises for the theory and practice of law and human rights. The assembled papers in this volume collectively seek to engage with academic and practitioner communities alike and the volume aims to positively contribute to our collective attempts to “build back better” once a globally available vaccine for Covid-19 has been produced and distributed.

The volume emerged from a hastily convened Zoom meeting of over thirty colleagues based within the Human Rights Centre and the School of Law at the University of Essex. The purpose of the meeting was to gauge ongoing research related to Covid-19 and the breadth and array of responses led to this project. It quickly became apparent that many academic colleagues were extremely interested in contributing their expertise on a very broad range of multidisciplinary Covid-19 related topics and issues. The combination of contributors’ enthusiasm for the project and our editorial efforts has enabled us to produce this volume in a very timely manner. A mere three months has elapsed from the first meeting to the final publication!

The contents of this volume span a very comprehensive range of topics, questions and expertise. The volume is purposefully multidisciplinary. It is also intended to be accessible to a relatively broad readership who, one imagines, is nevertheless united by an interest in the role which expertise has to play in confronting and overcoming the very many legal, social, philosophical and political challenges which Covid-19 entails.

The editors



Some Conceptual Framings

Some Conceptual Framings

Some Conceptual Framings: A Discussion

Eliana Cusato, Koldo Casla, Andrew Fagan Emily Jones and Ozan Kamiloğlu, University of Essex School of Law and Human Rights Centre [DOI: 10.5526/xgeg-xs42_001]

Several colleagues came together to discuss some of the themes arising in the papers for this section of the publication.

A first theme that colleagues explored is whether existing theories of human rights are sufficient to explain and provide a basis for the response to Covid-19, or, whether the theoretical tools that we tend to resort to, need to be re-conceptualised or considered afresh. There is a temptation to seek to re-conceptualise the existing normative resources we have at our disposal, or even to go further by looking for new approaches, and sometimes this will be vital, even essential. However, there was debate about whether the act of re-conceptualising is actually required, or whether it would simply serve as a distraction from the “real” problems. Also, if it is required, what would or could a re-conceptualisation look like?

Some expressed caution about the risks of re-conceptualising, indeed whether by doing so, one might fall victim to the trap of conceiving of the pandemic as an “unprecedented” event somehow requiring or justifying a complete break with the values and approaches we adopt for the “normal”. This “common enemy of humanity” approach, which privileges the need to defend the world from extraordinary shocks, is something we have often seen before, and does not work for all persons within societies. It is also somewhat patronising and ironic; while on the one hand we are progressively losing our societal bonds, on the other hand our leaders are claiming that the approaches they are taking which are responsible for these ruptures are in the name of defending humanity. For example, the feminist critiques of the use of the peace and security language and architecture to respond to Covid-19 underscores why securitisation and militarisation of health and welfare issues end up protecting the economic and neo-liberal status quo.

Instead, perhaps what is required is a “re-balancing”, as well as a greater focus on positive obligations; seeking out a new equilibrium for how rights can be understood and implemented. The critique of mainstream human rights discourse is vital to this task, including its failure to engage effectively with the social ills caused by austerity. One can see very clearly during this pandemic the inadequacy of the liberal tradition of negative liberty – “so long as each person can be left alone, that is good enough.” Indeed, more equal societies have proven themselves to be much more resilient to the pandemic.

Instead of securitised or militarised logic, there is a need to place greater attention on the “violence of the everyday”, and to understand how Covid-19 and many states’ neo-liberal responses to it feed into this violence, perpetually. The pandemic is an important wake-up call by bringing to the fore an array of pre-existing challenges that remain unaddressed. It puts into stark focus the intersectional ways in which different groups are being disproportionately affected, not only by the pandemic but by the unequal societies in which they live. Our political and economic systems have contributed significantly to these societal failings.

Another important theme is the relationship between different theories or conceptions of rights – those which privilege the individual and others which adopt more communitarian or collective perspectives. Both Casla and Kamiloglu, in their papers, for instance call for a much greater attention to be placed on collective rights, and indeed, both share a more communitarian or communal vision of how rights ought to be articulated and respected. Indeed, Casla’s focus on individuals’ civic responsibilities – what defines an individual’s relationship with others and the wider community -, highlights the sense that all individuals are members of a political community. He sees the need to place greater emphasis on the needs of the community, and particularly, those most vulnerable within it. This was seen as particularly important, given the unequal and intersecting impacts of the virus. However, the notion of “vulnerability” is not neutral. There is also a tendency to see vulnerability as a common denominator of resistance; and using it in this way requires us to think about resistance to those in power. In contrast, notions of “care” are slightly different as they can be indifferent to power.

The Reach of Rights in the Crisis

Sheldon Leader, Professor, University of Essex School of Law and Human Rights Centre, Member, Essex Human Rights Centre and Essex Business and Human Rights Project [DOI: 10.5526/xgeg-xs42_002]

I. Introduction

This chapter explores some central challenges to bringing domestic and international human rights principles to bear on the provision of health care in this pandemic. It looks at the ways in which policy aims to balance a variety of competing rights and demands. Some involve competition for access to scarce resources in hospitals, where the competition might be between possessors of the same right to enjoy the highest attainable standard of health:¹ a gain for one might require a loss for another.² Other situations involve a competition between a human right that might conflict with institutional demands that do not themselves rank as implementing human rights, but are nevertheless demands that are sometimes considered legitimate and which can exercise considerable downward pressure on the ability to give full effect to the human rights in question. This happens in the present pandemic, for example, when orders, backed by the threat of dismissal, are given by some enterprises to their workforces to return to work despite evidence that this return can jeopardise their health. While the enterprise cannot usually claim to be making a human rights-based demand in an order to return to work, there is here a recognisable competition between the right to health and the demand to stimulate the economy.

Downward pressure from a demand that is itself not based on a human right, but is sometimes found to prevail over the claim of right to health, can also arise within the network of a state's international relations. For example, this could happen when a member state of the WTO wants to ban an import on grounds of jeopardy to public health, and the WTO resists the import ban on the grounds that a reasonably available alternative exists that would have a less limiting effect on trade and would also protect health.³

II. Configuring a Human Right When it is Up Against Competition

How can one navigate here? There are several principles that aim to flesh out what it means to “balance” rights against competing claims in these situations. These are the requirement that the purpose behind these limitations not be itself independently

¹ cf. *International Covenant on Economic, Social and Cultural Rights*, Art. 12(1).

² cf. Shaheen Azmi, Lorne Foster and Lesley A Jacobs (eds), *Balancing Competing Human Rights in a Diverse Society: Institutions, Policy, Principles* (in cooperation with the Ontario Human Rights Commission) (Irwin Law: 2012). See also, Sheldon Leader, 'Integration, Federation, and the Ethics of Rights', in Monique Costillo (ed), *Morale et politique des Droits de l'homme* (Georg Olms Verlag: 2003) p. 63.

³ Albeit to a possibly lesser extent than would a full ban. Contrast on this issue, Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, GATT decision - November 7, 1990, and Brazil – Measures Affecting imports of re-treaded tyres AB-2007-4. The latter gives greater latitude to a state to fix the level at which it aims to protect public health from the pressures of trade than does the former.

identifiable as illegal,⁴ proportionality,⁵ necessity,⁶ and what is here labelled “reversibility”. The focus here is on the last two: necessity and reversibility. They are particularly relevant to the task of configuring the dimensions of a human right in the circumstances of this health crisis.

a) Necessity

A limitation on the enjoyment of a human right may be imposed if it is established that it is necessary for the purposes of the institution or practice imposing it, and that institution or practice is not otherwise illegal. While there are several interpretations of this requirement, they converge on the need to adjust the limitation on the right against the virtues of allowing that limitation by following a “least negative impact” principle. Courts have asked whether a proposed limitation of a human right arising from a cross-cutting limiting objective is the least damaging to that right from among reasonably available alternatives.

The direction of adjustment is important to note here: it runs from the impact on the right as its benchmark, against which the merits of a proposed adjustment are assessed. So, as in the example of the call to return to work, one should ask if there are reasonably available alternative ways of conducting the return that would have less of an impact on the health of those returning. Via this route, human rights would be applicable in both hiring and firing. The legitimacy of both in this crisis should be anchored in the need to do least damage to the basic rights of those in work, to those wanting work, and to those losing it.

For our purposes, it is important to note that this “least damage” requirement, informing the adjustment between human rights and their legitimate limitation, can actually run in two different directions: it can insist on showing least damage to the human right, or it can insist on showing least damage to the resources and efficacy of the institution aiming to limit that right. Both approaches aim at establishing what they consider to be appropriate space for the human right and appropriate space for the competing objective. But the outcomes of taking one or the other route can be very different. The first will allow the right to be overridden in a narrower range of circumstances than does the second. The first allows a limitation only if it can be shown that the competing objective cannot be reached in any way other than one that places a yet greater limitation on the right. The second does the opposite. It is more open to finding justified limitation on the right and correspondingly greater room for other, competing objectives to prevail.⁷

These competing directions of adjustment are particularly noticeable when institutions with narrower mandates than the state possesses are concerned. When a body such as the

⁴ As would happen, for example, if a hospital intentionally excludes on grounds of their religion, race, etc those who would otherwise receive help .

⁵ This requirement has several components, which include but are wider than necessity. The relevant elements are: i): that the means chosen for achieving an objective that competes with the requirement that one respect the fundamental right in question, be suitable; ii): that the objective be a legitimate one, and; iii): if (i) and (ii) are satisfied, that the means chosen, and/or the objective as interpreted, impinge on the exercise of a fundamental right no more than is necessary. See Sheldon Leader, *Proportionality and the Justification of Discrimination* in Janet Dine and Robert Watt (eds) *Discrimination: Concepts, Limitations and Justifications* (London: Longmans, 1996) 11, and Aharon Barak, *Proportionality* (CUP: 2012).

⁶ See, Aharon Barak, *Proportionality* (CUP: 2012) Ch 11.

⁷ See, Sheldon Leader, ‘Inflating Consent, Inflating Function, and Inserting Human Rights’ in Janet Dine and Andrew Fagan (eds), *Human Rights and Capitalism: A Multidisciplinary Perspective on Globalisation* (Edward Elgar, 2006).

WTO gives priority to facilitating world trade, or a commercial enterprise considers its central mission to engage in profitable production of goods and services, both take measures that can also put pressure on the human rights of those affected, including the right to health, but they are often said to be acting within their mandates in doing so. These mandates, it is often argued, necessarily lead these bodies to reject adjustment in the direction of least negative impact on the human right, even though they may have formally added respect for such rights to their agendas.

b) Hidden priorities

We need to distinguish between *ultimate* priority accorded to a basic right when it faces competition, and priorities in the *adjustment* of that right against the demands of those competitors. Ultimate priority is what one sees when it is clear that the values promoted by, say, the right to health will win over right to trade if one has to choose between them. The right to life is more important than is the right to trade, and more important than the right of investors to their share of corporate profit – more important in the sense that ultimately, if one had to be totally sacrificed to the other, the right to health would win.

However, this ultimate priority is different from the priority that can emerge when the space for the enjoyment of that same right is reduced by asking how it can be adjusted against the requirements of the least negative impact test. A private provider of badly needed medical equipment, for example, might be subject to a government order that it produce this equipment for public use is likely to have several pricing options. One will be to choose a price that puts least burden on the purchasing options of those needing to use the equipment, allowing a larger number to benefit from it, while also making room for the provider to avoid a total loss from the production. An alternative would be for the provider to charge a higher price, making the equipment available to fewer users, but still available to some. The first option looks for the least negative impact on the human right, while the second looks for the least negative impact on commercial returns. Both take some account of the priorities of the other party, but each considers the other to be wrongly focused.

A fully consistent commitment to priority for human rights in this example will line them up in the same direction: it could assign them both ultimate priority *and* priority-in-adjustment. However, these priorities can sometimes be split. A human right might then look as if it has ultimate priority when in fact that status is undermined by a protocol for adjustment that asks: how can we allow a human right to health to be protected in a way that least perturbs, least reduces financial return to investors, or the flow of trade. The right to health, despite appearances, is then marginalised.

c) Reversibility

When two or more human rights compete, there is another issue that arises in public debate about priorities: there is a quality of reversibility about directions of adjustment made between such rights. To illustrate this feature from a domain apart from but relevant to health, consider the right to life as it competes with the right to freedom of movement. Preservation of life is ultimately more important than is the interest in freedom of movement along the highway. But it does not follow that each and every level of risk of death is more important to prevent than is any given level of freedom of movement.⁸

⁸ See, Jeremy Waldron, 'Rights in Conflict' (1989) 99 *Ethics* 503, esp. 509-512, 516-18.

For example, evidence might show that the death rate on highways is reduced by a significant but decreasing number for every mile per hour of reduction in permitted speed. Assume that the annual reduction is 2,000 deaths in a given population for a reduction of permitted speed from 100 and 90 mph; a reduction of 1000 deaths if the speed limit drops from 90 to 50 mph; a saving of 100 lives if it falls from 50 to 40, and 10 lives would probably be saved if the speed limit falls from 20 to 5 mph. Even though the preservation of life is ultimately more important than is freedom of movement along the highway, it does not follow that the right to freedom of movement must always be adjusted downwards so as to have the least impact on the death rate. At a certain point a polity may reverse the direction of compromise. In this example, it will at a certain point adjust the attention paid to the risk of death in favour of greater concern for the right to freedom of movement, even though clearly a certain number of reduced deaths will result from a further reduction in speed limit to 5 mph.

This does not mean that the right to life falls out of the picture at all: it still functions to constrain and channel society's obligations to its members. What does happen is that when human rights compete with one another, as does the right to life with the right to freedom of movement, priorities might at some point legitimately shift. The point at which that shift should happen is a potential matter for legislatures, with appropriate coordination from the executive and judiciary. This should help us to further pin down what is involved in moving a human right towards being a central rather than marginal concern for adequate health provision. There may well be points at which a marginal gain in health care is outweighed by a severe loss of resource in other domains of human rights concern. But this throws into relief the situations on the other side of the line, in which the right to health should win out over competing rights.

III. Providers

These points can also indicate a particular challenge in working out the legitimate role for private providers of health care when they are called on to help meet the demands of human rights in this crisis. It is increasingly accepted that human rights principles should be deployed to shape the role of all private commercial enterprises.⁹ This can include acceptance by these enterprises that human rights have what we have called ultimate priority when they compete with other demands on that enterprise.

However, that status can once again be undermined when priorities-in-adjustment come up for consideration. At that point it is quite possible that the private provider sets as a condition for the provision of its service which the government has asked it to provide, that it be able to work with a guideline that makes the least possible negative impact on the right of its shareholders to a return on their investment.

IV. Conclusion

The present crisis brings into focus some longstanding issues. A sharp division between public and private provision of goods and services is increasingly blurred. All are called on, and all are rightly accountable to human rights requirements. At the same time, as these

⁹ UN *Guiding Principles on Business and Human Rights* (Geneva 2011) *passim*.

See, Sheldon Leader, 'Integration, Federation, and the Ethics of Rights', in Monique Costillo (ed), *Morale et politique des Droits de l'homme* (Georg Olms Verlag: 2003) p. 63.

rights extend their reach, their potential can transform into frustration. This is as true of the human right to an adequate standard of health provision as it is true in many other areas of social justice. The questions generated throw into relief the need to appreciate what can be delivered by a full recognition of the central role that human rights can play in this area, rather than a marginal role that they might acquire by default.

Rights and Responsibilities: Protecting and Fulfilling Economic and Social Rights in Times of Public Health Emergency

Koldo Casla, Lecturer, School of Law and Human Rights Centre [DOI: 10.5526/xgeg-xs42_003]

Abstract

This chapter introduces human rights and civic responsibilities as mutually reinforcing ideas in times of public health emergency. Based on rights and responsibilities, and taking the human rights principle of non-retrogression as a starting point, it is necessary to define positive obligations to protect and fulfil economic and social rights when responding to a serious public health crisis. Among other things, I argue that societies should be able to use privately owned resources and facilities, as it is sometimes not only legitimate but necessary to interfere with private property.

Keywords

Economic and Social Rights; Emergency; Human Rights; Private Actors; Responsibility; Vulnerability.

I. Rights and Responsibilities in Times of Public Health Emergency

We are all interconnected, for better and for worse.¹ If the nodes were not so densely linked in multiple ways, the virus would not have gone global so quickly. At the same time, if the connections between us are not sufficiently strong, we will not be well equipped to deal with it successfully.

We, society and the human rights community, need a holistic response where individuals take responsibility as members of a collective that resembles a beehive more than a massive rack of billiard balls.

The pandemic is testing our resilience individually and socially. We have been asked to act together to flatten the infection curve, preserve the public healthcare system and save lives. We need to wash our hands and we have kept a safe physical distance from each other, not to protect ourselves, but to protect others, not even relatives and neighbours, but people we don't even know.

The Covid-19 pandemic is teaching us a lesson about the role of human rights in the “broadband network” that is society.² Isolated shipwreck survivors have rights, but we are not isolated shipwreck survivors. We are interconnected and interdependent. As individuals and members of a community, ‘in which alone the free and full development of (our) personality is possible’,³ we hold responsibilities vis-à-vis each other.

I am not using the word “responsibility” as a *legal* duty, but as a *civic* duty to do what we can so others in the political community we are part of can enjoy their rights. The breadth of that political community will differ depending on context, personality, politics and other

¹ An earlier version of this chapter was presented at online meetings organised by ESRAN-UKI (April 2020), the Health Law Cluster of the School of Law of the University of Essex (April 2020), and the Northern UK Human Rights Academic Network (May 2020). I am indebted to Andrew Fagan, Carla Ferstman, Eliana Cusato, Emily Jones and Ozan Kamiloğlu for their detailed comments.

² William Davies, ‘Society as a Broadband Network,’ (April 2020) 42(7) *London Review of Books* 11.

³ Universal Declaration of Human Rights, 10 December 1948, Article 29(1).

factors. For some, it might be humanity as a whole, irrespective of borders. For many, the community will have some national dimension they identify with. Possibly for everyone, the community will at least partly be local, close to home, 'where universal human rights begin', said Eleanor Roosevelt.⁴

Hannah Arendt observed that a political community is a precondition to make rights concrete, real and meaningful.⁵ Civic responsibility derives from our membership to that political community as well. Responsibility complements rights and both notions reinforce each other in society. Responsibility does not need to be at odds with international human rights law. As shown by Berdi3n del Valle and Sikkink, even though UN and European human rights systems evolved in a different direction, 19th century Latin American constitutionalism and 20th century Inter-American and African regional human rights systems reflected the idea that individuals are members of communities and have both rights *and* responsibilities.⁶

The 1998 UN Declaration on Rights and Responsibilities of Individuals loosely talks about an individual responsibility to safeguard and promote democracy, human rights and a social and international order where human rights can be materialised.⁷ The wording of the UN declaration echoes the way many human rights defenders take injustice personally. Their commitment is commendable, particularly when they work in very difficult circumstances putting their lives at risk. But my idea of responsibility is slightly different. I am not saying we should all become human rights activists, as desirable as that would be. I am arguing that we should become *citizens* (members of a political community irrespective of nationality, migration status or any other personal circumstances) and accept and embrace the rights and responsibilities that come with it.

This broad idea of citizenship is helpful to make sense of the difference between a legal duty and the civic duty presented here. As individuals, we are legally entitled to certain rights and obliged to respect the rule of law, also when the law limits our rights because it is necessary and proportionate to do so. We are not legally obliged to be virtuous citizens, neither should we be in exchange for human rights. The risks of a totalitarian turn if this requirement existed would be unendurable.⁸ However, above and beyond the realm of individual legal responsibility and duties, there is room to make for civic duty, interpreted as a meaningful contribution so other members of the political community can see their rights fulfilled.

Reason and freedom from the yoke of religion and tradition were significant advances in history, but modernity's liberal orthodoxy is not enough to ensure human rights for

⁴ Eleanor Roosevelt, 'Where do Human Rights Begin?', in Allida M. Black (ed), *Courage in a Dangerous World*(NY: Columbia University Press, 1999), 190.

⁵ Hannah Arendt, *The Origins of Totalitarianism* (Cleveland and NY: World Publishing Company, 2nd Edition, 1958), 290-302.

⁶ Fernando Berdi3n del Valle and Kathryn Sikkink, '(Re)discovering Duties: Individual Responsibility in the Age of Rights', (2017) 26(1) *Minnesota Journal of International Law*.

⁷ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly resolution 53/144 of 9 December 1998, Article 18.

⁸ Isaiah Berlin, 'Two concepts of liberty', in *Four Essays On Liberty* (Oxford: Oxford University Press, 1969), 118-172.

everyone: We need the State.⁹ One of the civic duties must be to sustain and defend resourceful and universal public services that prioritise the attention of most vulnerable individuals in a more equal and caring society. Our personal and economic fortune depends on others. This proposition is anchored in the tradition of civic republicanism. It can be found in Rousseau: ‘No citizen be so very rich that he can buy another, and none so poor that he is compelled to sell himself’.¹⁰ Within this tradition, Thomas Paine pointed out,

personal property is the effect of society; and it is as impossible for an individual to acquire personal property without the aid of society, as it is for him to make land originally... All accumulation, therefore, of personal property, beyond what a man’s own hands produce, is derived to him by living in society; and he owes on every principle of justice, of gratitude, and of civilization, a part of that accumulation back to society from whence the whole came.¹¹

Civic republicanism is looking for a non-individualistic version of rights, in line with T. H. Marshall’s notion of “social citizenship”.¹² Marshall understood social rights as essential ingredients of citizenship and advocated an egalitarian form of welfare that required reciprocal responsibilities between members of society in a precise historical and cultural context.¹³

As a matter of responsibility and social citizenship, I think those of us who believe in human rights can do more to advance meaningfully towards a society where justice is distributed in such way that there is *real* freedom for all. And with the adjective *real* I mean a democratic commitment to non-domination, beyond negative liberty,¹⁴ and I mean in particular the material conditions to be free, for which socio-economic rights are essential. When the International Covenant on Economic, Social and Cultural Rights (ICESCR) was drafted in the 1960s, the promotion of “general welfare in a democratic society” was presented as a potential “limitation” to these rights.¹⁵ I would argue, however, that embracing both rights and responsibilities would not see “general welfare”, as such, as a limitation of rights, but rather as one of the goals of enhancing socio-economic rights in law and policy. This does not mean that there would no longer be conflicts between individual rights and collective interests. It would be foolish to believe that social citizenship would simply overcome a 200-year tension between individual liberalism and utilitarianism. But it can help us to identify a holistic response that takes rights *and* responsibilities as the two sides of a single coin, as opposed to rights *versus* responsibility, or *individual* interests *versus* *collective* needs.

⁹ Samuel Moyn, ‘Reclaiming the language of duty in an age of human rights’, *ABC Religion & Ethics* (August 2019).

¹⁰ Jean-Jacques Rousseau, *The Social Contract: Or Principles of Political Right* (Translated by G. D. H. Cole, Constitution Society, 1762), Book II.11.

¹¹ Thomas Paine, ‘Agrarian Justice (1797)’, in J. Cunliffe and G. Erreygers (eds) *The Origins of Universal Grants: An Anthology of Historical Writings on Basic Capital and Basic Income* (London: Palgrave, 2004), 13.

¹² T. H. Marshall and Tom Bottomore, ‘Citizenship and Social Class’, in *Citizenship and Social Class* (London: Pluto Press, 1992), 1-52.

¹³ Julia Moses, ‘Social citizenship and social rights in an age of extremes: T. H. Marshall’s social philosophy in the longue durée’, (2019) 16(1) *Modern Intellectual History* 158.

¹⁴ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999).

¹⁵ International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, Article 4.

II. Protecting and Fulfilling Economic and Social Rights in Times of Public Health Emergency

Both rights and responsibilities are necessary to respond to the Covid-19 pandemic effectively and fairly.¹⁶ The virus and the lockdown brought challenges to everybody's daily lives, but many of us could and should accept the limitation of some of our rights as a matter of responsibility while the healthcare system was struggling to cope. The lockdown and many of the emergency measures that came with it were not simply limitations of our rights. They were also essential steps to protect and fulfil human rights.

We are all vulnerable to Covid-19, but not equally so. While this pandemic has happened to all of us at the same time, it has not affected all of us the same way. Older persons and those with pre-existing health conditions and compromised immune systems are at greater risk. At the same time, the disease has a disproportionate socio-economic impact on low-income families, children in poverty, rough sleepers, refugees and asylum seekers, among others. Evidence from the UK shows that historically embedded regional, social class and ethnic inequalities are strong indicators of vulnerability to this disease.¹⁷

This crisis begs for a bailout for the most vulnerable, a sort of people's quantitative easing. Developed during the global economic crisis beginning in 2008, the human rights principle of non-retrogression establishes that, in times of economic and financial crisis, assuming the adoption of regressive measures becomes unavoidable, States must 'ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected'.¹⁸ Taking the principle of non-retrogression as a starting point, I believe we need to move from the mere formulation of (negative) limits of what governments are allowed to do to the identification of (positive) requirements to prioritise the preservation of rights of the most vulnerable.

When people are required to stay away from each other, geographically and socially isolated, some individuals struggle more than others. Together with transport for essentials, healthcare and social services, public broadcasters have proved indispensable. Equally, social media and the online world are vital to keep people connected. Narrowing the digital gap becomes an even more urgent priority when we have no alternative but to communicate through webcam. Universal broadband and the right to internet access are now more important than ever.¹⁹

In those countries with sufficiently advanced economies, public authorities should ensure, among other things, an adequate income for those who lose their jobs, which may include an emergency basic income, and guaranteeing that people will return to work if they are temporarily laid off. Conditionality in social benefit payments must be lifted and delays shortened drastically. In this regard, in their Covid-19 statement, the UN Committee on

¹⁶ Sections II and III are partly based on Koldo Casla, 'Coronavirus: beyond human rights', *Open Democracy*, 19 March 2020, and 'New policies for a new crisis', *Open Global Rights*, 14 April 2020.

¹⁷ Rowland Atkinson, 'UK coexists with coronavirus', (June 2020) 2006 *Le Monde Diplomatique – English Edition*, 16. See papers by Caroline Bald and Sharon Walker, and by Andrew Fagan, in this publication.

¹⁸ Chairperson of the UN Committee on Economic, Social and Cultural Rights, 'Letter to States parties to ICESCR,' 16 May 2012.

¹⁹ Lorna McGregor and Ahmed Shaheed, 'The Covid-19 pandemic: Five urgent principles for leaving no one behind through technology', *Universal Rights Group blog*, 19 May 2020.

Economic, Social and Cultural Rights (CESCR) recommended 'subsidizing the costs of essential foodstuffs and hygiene products to ensure that they are affordable to the poor'.²⁰

Gas and electricity supply ought to be secured unconditionally to safeguard the minimum core of an adequate standard of living. In line with States' general obligations in the context of business activities, providers of public services, regardless of their public or private nature, must be required to guarantee universal coverage, quality control and continuity of the service.²¹

The roles and responsibilities of private actors are, I believe, one of the central issues that should be considered as part of a discussion on positive obligations to protect and fulfil economic and social rights in times of global public health emergency. No country has enough public resources to face a crisis of the scale of Covid-19. As an indicator, the weight of public expenditure within the OECD ranges from 25.2% of the GDP in Chile to 56.8% in France.²² In accordance with international human rights law, governments are required to make use of the "maximum of available resources" to satisfy economic, social and cultural rights.²³ Responding to a crisis of this magnitude requires the use of privately owned resources and facilities. It is sometimes not only legitimate but necessary to interfere with private property. In his 'urgent appeal for a human rights response to the economic recession' that is following Covid-19, the UN Independent Expert on Foreign Debt and Human Rights rightly observed that 'property rights are not absolute and, if duly justified, States should be able to take the necessary economic and legal measures to more effectively face the current health crisis'.²⁴

Private hospitals should serve the general interest in a public health emergency. As expressed by the UN CESCR in their Covid-19 statement, both public and private health resources should be 'mobilised and shared among the whole population to ensure a comprehensive, coordinated healthcare response to the crisis'.²⁵ Private providers would be entitled to a just compensation from the State, but measures should be taken to prevent profiteering from the crisis. The avoidance of net losses and furloughs would be a benchmark of appropriateness.

Private labs and tools should also serve the collective goal of finding a cure and relief to the disease. For example, without medical reason, when there is a shortage, it is hard to understand how anyone could be tested privately before any rough sleeper, healthcare professional, home-delivery rider, supermarket cashier, porter, bus driver, person over 70, professional cleaner, scientist or political leader dealing with the pandemic and showing the symptoms.

²⁰ UN CESCR, 'Statement on the Covid-19 pandemic and economic, social and cultural rights', UN Doc. E/C.12/2020/1, 17 April 2020, para. 17.

²¹ UN CESCR, 'General Comment No. 24: State obligations under ICESCR in the context of business activities', UN Doc. E/C.12/GC/24, 10 August 2017, para. 21.

²² OECD Dataset on general government spending: <https://data.oecd.org/gga/general-government-spending.htm> (data from 2015).

²³ ICESCR, Article 2(1).

²⁴ UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, 'Covid-19: Urgent appeal for a human rights response to the economic recession', 15 April 2020, 10.

²⁵ UN CESCR, 'Statement on Covid-19,' (n. 20) para. 13.

Privately owned resources can serve a very necessary purpose to protect particularly vulnerable individuals. Empty hotels can be mobilised to host rough sleepers and healthcare personnel, as necessary. And both hotels and unused buildings can be converted into safe spaces for victims of domestic violence.

Considering the socio-economic impact of the pandemic, evictions should be suspended, and rent and mortgage payment deferment options introduced, with extra requirements for corporate landlords. This recommendation is consistent with some of the most progressive interpretations of international human rights principles. In relation to non-emergency situations, the CESCR has declared that the assessment of proportionality of an eviction in the private sector requires ‘making a distinction between properties belonging to individuals who need them as a home or to provide vital income and properties belonging to financial institutions’,²⁶ and presumably other corporate landlords as well.

Many countries have taken unprecedented measures to support households, preserve employment and help businesses.²⁷ As early as March 2020, governments pledged a collective investment of no less than \$4.5 trillion,²⁸ equivalent to the whole of Japan’s economy, or the combined GDPs of France and Italy. On top of that, in March the UN Conference on Trade and Development called for a \$2.5 trillion package for the Global South.²⁹ Since the early 1980s, governments in advanced economies have increasingly relied on public debt at the expense of taxation, lowering the pressure on the wealthiest strata while diminishing the size of the welfare state.³⁰ With historically low interest rates, governments are undoubtedly going to get into debt to pay for emergency and palliative measures during this crisis and in its aftermath. This approach has a number of risks, not only for finance but also for democracy and human rights. Governments are accountable to those they rely on for revenue. That’s why it is essential for a healthy democracy that people sustain their government through a fair tax system. The payment of the bill should not be deferred in its entirety to future generations. Progressive taxes will be needed to make sure that the wealthy pay their fair share and that income and wealth inequalities do not rise even further as a result of the pandemic.

III. Concluding Remarks

Life is changing quickly, and it is incumbent upon us to find the place of human rights in this exceptional era.

It is important to be epistemically humble. Human rights researchers and activists may have some ideas, but we don’t have all the answers, possibly we don’t even have the answers to the most important questions. Human rights policy analysis was not invented for policies that change radically in a matter of days or even hours.

²⁶ UN CESCR, *López-Albán v. Spain*, UN Doc. E/C.12/66.D/37/2018, 11 October 2019, para. 11.5.

²⁷ OECD, ‘Tax and Fiscal Policy in Response to the Coronavirus Crisis: Strengthening Confidence and Resilience,’ 15 April 2020.

²⁸ Jonathan Guthrie, ‘Get ready for the \$4.5tn takeover’, *Financial Times*, 25 March 2020.

²⁹ UNCTAD, ‘The Covid-19 Shock to Developing Countries: Towards a “whatever it takes” programme for the two-thirds of the world’s population being left behind,’ UNCTAD/GDS/INF/2020/2, March 2020.

³⁰ Wolfgang Streeck, ‘How Will Capitalism End?’, (2014) 84 *New Left Review* 35.

As well as humble, we should be self-critical. Most of us outside China only started to take this threat seriously in March. Let's remember that when we assess what governments should be doing or should have done to anticipate the pandemic.

With epistemic humility and a self-critical spirit, in this chapter I have argued that society and the human rights community need both rights and responsibilities to tackle this and future public health emergencies with effectiveness and fairness. The Covid-19 pandemic and its aftermath must be a time to focus our attention on the rights of people in poverty and at greater risk of harm, disadvantage and discrimination. The human rights principle of non-retrogression sets limits to what States are allowed to do when they intend to implement measures that could result in lesser enjoyment of socio-economic rights. Taking this principle as a starting point, I have argued in favour of moving from the mere formulation of (negative) limits of what governments *are allowed to do* towards the identification of (positive) requirements of what they *should do* to protect and fulfil economic and social rights of most vulnerable individuals in public health emergencies. Since private property is not an absolute right, protecting and fulfilling economic and social rights in a health crisis must include, when necessary, making use of privately owned resources and facilities to respond with a collective and synchronised effort of society as a whole.

We cannot return to business as usual when we go back to normal, whatever normal means after this epoch-defining experience. There will be other crises and more equal societies will be better equipped to weather them. This pandemic is also a wake-up call for us in the international human rights community. What can we do with our policy and advocacy tools to contribute to the reversal of 40 years of regressive taxation, privatisation of public services and diminishing protection of workers' rights?

Let future us remember the coronavirus pandemic as the time when we hunkered down, rediscovered kindness and responsibility, preserved what we valued the most, and became bolder about what needed to change.

Rethinking Minimum Guarantees after the Pandemic: The Invisible Violence of Neoliberal Rationality

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Abstract

This essay suggests that the pandemic brings unprecedented economic and social challenges while simultaneously opening the door for the renegotiation of minimum guarantees that human rights discourses conceptualise. The particular conditions of the pandemic have the potential to crystallise slow and structured forms of violence, and widen our imagination of the possibilities for human rights discourses. This is especially the case because neoliberal rationality doesn't have the hegemony over social movements and human rights imagination, as it may have done in the 90s.

I. Introduction

During the pandemic, states have effectively closed their borders and declared various kinds of emergency measures and derogations from treaties. They have put in place lockdowns and other exceptional measures impacting upon the rights to life, liberty and security, health, education, food, shelter and work as well as freedoms of movement and association. The world is experiencing one of the harshest economic crises to date, leading to spikes in unemployment rates and global poverty. Simultaneously, the pandemic has signalled a time of “returning to the state” with emergency powers given to governments. In many countries, governments have responded with power which human rights frameworks have been incapable of tempering. In the UK, the Coronavirus Act 2020 in addition to changes to the Public Health (Control of Disease) Act 1984, has introduced provisions which will have a severe impact on vulnerable individuals.¹

What is striking is how utilitarianism and the technocracy of experts seem to have become the dominant policy making principle, which inevitably brings disproportionate consequences for those who are already vulnerable, including people with mental health challenges, women in gendered spaces, as well as poor and racially marginalised communities. Utilitarianism for the “common good” against individual rights, invites “herd management.” This kind of management might be necessary in some emergency situations, however, in such a complex global crisis of unknown duration, it is difficult to stop the momentum it creates, which reverberates far beyond the immediate challenges brought on by the pandemic. This pushes us away from simple crisis management, towards a situation in which we are being forced to negotiate new norms in the new normal of an emergency state together with what Andrew Ross calls ‘planetary management’.² Consequently, for human rights practitioners and activists there is an ongoing reconsideration and negotiation on “minimum guarantees” of social and individual protection and arguments over proportionality.

This paper aims to return to debates over what is not visible to the “minimum guarantees” of liberal human rights discourses while focusing on historical construction of the terms

¹ Alex Ruck Keene, ‘Capacity in the Time of Coronavirus’, (2020) 70 *International Journal of Law and Psychiatry*.

² Andrew Ross, *Strange Weather: Culture, Science and Technology in the Age of Limits* (New York: Verso, 1991), 207–212.

parallel to that of neoliberalism. I will argue that, the current crisis makes what used to be invisible, visible, and allows us to reconsider historical negotiation over what minimum guarantees human rights can provide. This debate has been traditionally between economic and social rights on one side and political rights on the other, however there are also other forms of violence and violations at play, that used to be invisible and which are now apparent. The historical debate over austerity and the global administration of debt is where my focus lies, in order to make the claim for the need for a wider debate about the purpose of human rights.

II. The Minimal Utopia of Human Rights

In order to develop a discourse that can claim to be globally valid and legally instrumental, agreeing on a certain set of minimal rights has always been necessary. On its way to becoming a part of the dominant language of global governance, actors keep negotiating over the limits of that minimum content and measure of rights. Samuel Moyn argues that, when it comes to social and economic rights, human rights oscillate between an understanding of rights that offer minimum guarantees for formal equality and substantive equality aiming at social welfare. Similarly, Goldman demonstrates that the 1970s marks the basic (human) needs approach with an egalitarian concept of economic, social and cultural rights, and during these years human rights 'lent themselves as a comprehensive framework for contesting austerity in the name of redistributive equality.'³ In the following decade, the 1980s, after the debt crisis in the Global South, austerity measures demanded structural adjustments from states by the International Monetary Fund, and rarely have been contested with rights discourses. Towards the end of the 1990s, the 'IFIs [International Finance Institutions] avoided the issue of human rights, but reacted by adding "social" components to austerity that aligned with their focus on efficiency and growth and further entrenched sufficiency.'⁴ Finally following the crisis of 2008, some progress has been made in regards to mitigating the effects of austerity with human rights standards.

These oscillations regarding the relationship between social and economic rights and the minimum standards of human rights discourses, brings us back to much wider political questions. As Wendy Brown referring to human rights, reminds us, 'all such projects are situated in political, historical, social, and economic contexts with which they dynamically engage.'⁵ The genealogy of human rights discourses discloses this situatedness of minimal rights, which has, depending on the wider context, validity and leverage over financial institutions. Nonetheless, this is not only a question of "what kind of rights" but also how do we quantify and monitor the violations and suffering caused by state actions. Methodologically, human rights measurement requires some kind of quantification, and during these debates economic and social rights are considered indeterminate.⁶ Moreover, other forms of violence are entirely invisible to current methods applied by states and human rights organisations. Thus, the genealogy of what are the minimum guarantees the

³ Matthias Goldmann, 'Contesting Austerity: Genealogies of Human Rights Discourse', (2020) Max Planck Institute for Comparative Public Law and International Law Research Paper Series No. 2020-09.

⁴ Ibid.

⁵ Wendy Brown, 'The Most We Can Hope For...': Human Rights and the Politics of Fatalism', *Wronging Rights?* (Routledge 2012), 452.

⁶ Rosga and Satterthwaite highlight that 'ESC [economic, social and cultural] rights have been perceived to be more indeterminate than civil and political rights.' See, AnnJanette Rosga and Margaret L. Satterthwaite, 'The Trust in Indicators: Measuring Human Rights', (2009) 27 Berkeley J Int'l Law 253.

human rights paradigm can offer at a particular conjunction is also that of, whose voice is heard, whose death is “grievable” or who is visible from the point of view of “planetary management”. A telling example is John Rawls’ liberal concept of human rights that he defines as ‘a special class of urgent rights’ while trying to theorise the limits of liberal pluralism, however there is no explanation as to why freedom from torture is a part of the minimum standards of liberal societies, but in contrast, a minimum basic income is not.⁷ Talal Asad, highlights that ‘financial pressures can have effects that are more far-reaching than many military adventures’ which are rarely on the radar of human rights organisations, and usually not the subject of obligations set out in any international treaty.⁸

If there is one lesson to be taken from the state response to the pandemic, it is how it exposes a system of structural violence over citizens, emphasising the structural hierarchies of race, class and gender in both spatial and temporal registers. Simultaneously, the pandemic also exposes the limits of human rights discourses that were developed predominantly to tackle immediate and personal forms of violence, while historically not able or less able to articulate on or respond to other forms of violence such as “slow violence”. Rob Nixon, referring particularly to environmental crisis, defines “slow violence” as ‘a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all.’ It is different from violence ‘as an event or action that is immediate in time, explosive and spectacular in space, and as erupting into instant sensational visibility’, but instead ‘incremental and accretive, its calamitous repercussions playing out across a range of temporal scales.’⁹ It is not spectacular, often invisible, ‘not just attritional but also exponential, operating as a major threat multiplier’. Violence that is invisible to language of “victory and defeat” and “victims and saviours” and degrades the lives of those who have no voice, the dispossessed classes and races, while unfolding over years.

As the pandemic continues it loses its event value, and simultaneously, how to organise daily life and economy during the pandemic becomes the territory of struggle. This exposes how structural violence couples with slow violence such as prisons with insufficient health and architectural capacities; refugees who are trapped at the external borders of the EU, subjected to deliberately insufficient public health conditions; the urban poor living in insufficient and crowded dwellings that costs them their health and even their lives; the workers of the gig economy and other precarious work contracts who cannot refuse to work even if they fall within the identified risk groups; women facing different forms of domestic violence systemically over years; air pollution that deteriorates human life gradually, and so on. The minimum guarantees offered by the current human rights framework are able to respond some of these challenges, however when coupled with and viewed from the intersecting lenses of class, race and gender, some of these forms of violence are perhaps, maybe for the first time, strikingly visible.

My claim is that the “ethicisation” of the violence during the 1980s and 90s shaped and severely limited the forms of violence that human rights instruments are able to address under neoliberal governmentality, and consequently, which forms of violence are out of

⁷ John Rawls, *The Law of Peoples: with "The Idea of Public Reason Revisited"* (Harvard University Press 2001).

⁸ Talal Asad, 'What do Human Rights Do? An Anthropological Enquiry' (2000) 4 *Theory & Event*. See also, Jessica Whyte, 'Human rights and the Collateral Damage of Neoliberalism' (2017) 20 *Theory & Event* 137.

⁹ Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2011).

reach. The Covid-19 crisis demonstrates the limits and potential of rights discourses to protect vulnerable people when the underlying structures of violence behind the neoliberal governmentality are exposed so clearly. I will briefly set out a short history of neoliberal governance and austerity programmes, to be able to make the argument that during the pandemic era, human rights movements and their scope are extremely important.

III. Human Rights and the Empire

The transformations in the structures of capitalist accumulation that began in the 1970s after the infamous “Washington Consensus” had different names. Fredrick Jameson calls it “multinational capitalism”, whereas others termed it “late capitalism”, and in the contemporary literature it is described as neoliberalism.¹⁰ One of the most well-developed theses in critical human rights studies is to show how current human rights discourses not only lack the tools to resist capitalism and its various permutations but instead, manage to contribute and reinforce capitalism.¹¹ Most of such accounts focus on how human rights serves to “civilise” the projects of Western states in order to permit them to pursue their economic interests and global domination. Many claim that human rights discourses are instruments of Western capitalism to justify its structures of exploitation and intervention.¹² Mutua, for example, describes human rights as ‘the moral guardians of global capitalism’ which is indebted to certain forms of market democracy.¹³ Others, like Samuel Moyn, suggest that human rights and neoliberalism have shared a ‘kindred trajectory’ and reject the claim that human rights have played a causal role in ‘abetting the free market victory of the neoliberal age.’ In Moyn’s view, human rights are actually a ‘powerless companion’ that has proved inadequate to the task of ‘civilising’ neoliberalism; they are ‘an empty vessel’.¹⁴ The link between the economic model being followed and the discourse of human rights is ‘chronological simultaneity, negative conditions, and vague descriptive affinity.’¹⁵ A third line of thought finds a gradual “marketisation” in the human rights field that appropriates methods and structures of the market in classical liberalism and neo-liberalism. Thus, the logic of the market changes the human rights discourses accordingly and the way human rights activism is being developed. According to Baxi, this is the conversion of the human rights movements into human rights ‘markets’ and according to Joseph Slaughter, ‘human rights of individuals arguably are, in their essence and effects

¹⁰ For a detailed discussion see, Immanuel Maurice Wallerstein, *World-systems Analysis: An Introduction* (Duke University Press 2004).

¹¹ For some of these critical works, see, Pheng Cheah, *Inhuman Conditions: On Cosmopolitanism and Human Rights* (Harvard University Press 2006); Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*; Uendra Baxi, *Human rights in a Posthuman World: Critical Essays* (Oxford University Press 2009); Mark Goodale, *Human Rights at the Crossroads* (Oxford University Press 2012); Jose-Manuel Barreto, *Human Rights from a Third World Perspective: Critique, History and International law* (Cambridge Scholars Publishing 2013); Makau Mutua, *Human rights: A Political and Cultural Critique* (University of Pennsylvania Press 2008).

¹² See, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006); Emilie M. Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110 *American Journal of Sociology* 1373; Zachary Manfredi, 'Recent Histories and Uncertain Futures: Contemporary Critiques of International Human Rights and Humanitarianism' (2013) 22 *Qui Parle: Critical Humanities and Social Sciences* 3.

¹³ For a detailed account of these critical approaches see: Ben Golder, 'Beyond redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought' (2014) 2 *London Review of International Law* 77.

¹⁴ Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 *Law & Contemp Probs* 147; Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap 2010), 51.

¹⁵ Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism', (2015) 77 *Law and Contemporary Problems* 147-169.

(for better and worse), neoliberalized human rights.¹⁶ Similarly, for Orford, human rights law replicates the World Trade Organization and its process of dispute resolution, through which collective rights and interests are being subordinated to the logic of the market, which itself structures the 'responsible subject of capitalist economics.'¹⁷

At this point it is important to turn back to some old questions. In Ben Golder's words, perhaps the correct question to ask is '[w]hy is it that the supposed openness of human rights discourse [...] can so comfortably subsist with a very predictable and quite rigid outcome: the prioritised protection of a familiar set of rights functional to the operation of market exchange?'¹⁸ As I have tried to show, the 'familiar set of rights' reflects wider transformations of the society and at the end of the day the market and human rights discourses operate together, and the conditions and structure of this 'work together' reflects wider transformations of the society. What these minimum rights, their scope, definition and measurement, reveal is the politics of rights struggles. Consequently, the relationship between human rights discourses and neoliberal rationality can only be conceptualised by looking at particular periods of history in a wider picture of events, with methods that go beyond any causal relationship.

To define what neoliberalism is, I follow Wendy Brown, who talks about a 'neoliberal reason' that is 'ubiquitous today in statecraft and the workplace, in jurisprudence, education, culture, and a vast range of quotidian activity is converting the distinctly political character, meaning, and operation of democracy's constituent elements into economic ones.'¹⁹ This follows arguments of an early neoliberal and law professor, Franz Böhm, who stresses that '[w]e wish to bring scientific reasoning, as displayed in jurisprudence and political economy, into effect for the purpose of constructing and reorganizing the economic system.'²⁰ I will later claim that from the period starting with the crises of 2008, the pandemic marks the collapse of various tenets of neoliberal reasoning, and opens space for progress in the protection of economic and social rights and also other less visible forms of perpetual violence. Here I will briefly address the period during which economic and social rights struggles have lost ground following the 70s. This will allow me to further expound on the disappearance of various form of protections from the purview of human rights discourses, and the potential for their re-emergence.

IV. Human Rights at the End of the Bipolar World

The second half of 1989 represented an earthquake or shattering for world politics. The Cold War represented a constitutive divide of the world between two forms of governmentality. The discourse in the USA during the Cold War focused on imagining the Soviets as an aggressive, expansionist enemy. With Reagan and the neoliberalisation of the economy following the 'crisis of capital accumulation' during the 1970s, the belief that

¹⁶ Joseph Slaughter, 'Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World' (2018) 40 *Human Rights Quarterly* 735.

¹⁷ Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2003) 210.

¹⁸ Ben Golder, 'Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought' (2014) 2 *London Review of International Law* 77.

¹⁹ Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution*, (MIT Press 2015) 17.

²⁰ Franz Böhm, Walter Eucken and Hans Grossmann-Doerth, *The Ordo Manifesto of 1936, Germany's Social Market Economy: Origins and Evolution* (Springer 1989).

marketisation and democracy are 'one and the same' become dominant.²¹ Following the fall of the Soviet Union, the USA military complex had to quickly rearrange its enemies, and construct new national threats and evils to protect its society from. Meanwhile, the dogmas of neo-liberal economy and marketisation became further entrenched. While neoliberal rationality was taking over, the discourse of American governance turned to the protection of humanity as a whole against the evil that is this time unexpected, catastrophic and shocking.²² This change from the ideological warfare of the bipolar world to the monopolar construction of the bio-political – and later surveillance regime,²³ had the effect of instrumentalising the discourse of human rights for the purposes of humanitarian intervention.²⁴ Here again, human rights instruments have been prodded to develop around a language and practice of the war against evil, with its ever innocent victims, unforgivable perpetrators, and bystanders.²⁵

The years during which the utopias of the 60s and 70s are lost and human rights struggles takes a particular ethical form, are also the years when economic and social rights struggles lost most of their ground. Following bold claims for a New International Economic Order during the 70s, the year 1985 marks the start of the large debt programmes of the IMF and the adoption of the Baker Plan 'the creed that debtor states should outgrow their debt crises in a grit-your-teeth-and-get-to-it mode.'²⁶ Following Wendy Brown, "neoliberal rationality" corresponds to the entanglement of loss of the political into a particular ethics with the global administration of economy.

Chantal Mouffe once observed that:

What we are witnessing with the current infatuation with humanitarian crusades and ethically correct good causes is the triumph of a sort of moralizing liberalism' and this is because ethics and morality are 'filling the void left by the collapse of any project of real political transformation.'²⁷

Likewise Judith Butler refers to a return to ethics during the 1990s and worries that this return 'constituted an escape from politics', and 'it has meant a certain heightening of moralism.'²⁸ Alain Badiou, describes this turn as an 'ethical ideology', the endemic tendency of the Western world to conceive humanity as powerless and in need of protection from evil.²⁹ In Jacques Rancière's words, it is judgment that is humbled by the law, and it is law that leaves no place for any alternative consideration of justice.

The "us against them" rhetoric inherited from the Cold War era, posits a homogenised community that needs to be protected, along with an incontestable meaning of justice in the post-Soviet era.³⁰ Consequently, there needs to be evils, to "fight against", and each

²¹ Andre Gunder Frank. 'No End to History! History to No End?'; 'No End to History! History to No End?' (1990) *Social Justice* 17, no. 4 (42) 7.

²² Naomi Klein, *The Shock Doctrine* (London: Penguin, 2008).

²³ Michael Hardt and Antonio Negri, *Empire* (Harvard University Press 2000).

²⁴ Nico Krisch, 'Legality, Morality and the Dilemma of Humanitarian Interventions After Kosovo', (2002) 13(1) *European Journal of International Law* 323–35.

²⁵ Rober Meister, *After Evil: A Politics of Human Rights* (Columbia University Press 2010).

²⁶ Matthias Goldmann, 'Contesting Austerity: Genealogies Of Human Rights Discourse', (2020) Max Planck Institute for Comparative Public Law and International Law Research Paper Series No. 2020-09.

²⁷ Chantal Mouffe, "Which Ethics for Democracy?", *The Turn to Ethics* (Routledge 2013) 85.

²⁸ Judith Butler, 'Ethical Ambivalence', in Marjorie Garber, Beatrice Hanssen, and Rebecca L Walkovitz (eds), *The Turn to Ethics* (Routledge 2001) 15-28.

²⁹ Alain Badiou, *Ethics: An Essay on the Understanding of Evil* (Verso 2002) 13.

³⁰ Jacques Rancière, 'The Ethical Turn of Aesthetics and Politics' (2006) 7 *Critical Horizons* 1.

fight becomes a means to advance and reproduce the neoliberal agenda in different ways and in different forms. This includes, privatisation of public resources and public health and reductions in social protections, deregulation of finance and “flexibilisation” of labour, in addition to the expansion of the neoliberal model to previously uncharted territories from Eastern Europe to the Amazon. Neoliberal governmentality produces subjectivities in complex ways that include “ethicisation” of interventions, wars, extraction and accumulation. In the notorious words of Margaret Thatcher to defend neoliberal economic policies, ‘There is no alternative’³¹ when the threat is constructed as targeting the society as a whole, and policies as inevitable utilitarian answers to that evil.

Those years presents us with probably the most stark example of how neoliberal rationality and its technocratic solutionism was uncontested by human rights discourses. Following the financial crisis of 2008 and following the cruel effects of austerity programmes, neoliberal rationality is not unchallenged anymore and together with social movements also human rights movements are energised. Nevertheless, international financial institutions presents us with another story, as has been seen with the grave human suffering caused by austerity measures put in place by the troika and IMF in Greece.³² The IMF and its adjustment programmes are still indifferent to the suffering they impose, and human rights instruments have not been successful in their challenges. The IMF’s own report on Greece concluded that ‘the burden of adjustment was not shared evenly across society.’³³ In the case of *Koufaki and Adedy v. Greece*, the European Court of Human Rights left a very large margin of appreciation to the government regarding austerity induced wage cuts, although it was not the government but external actors imposing the austerity.

V. Conclusions

During the first months of the pandemic, borders and states regained their hegemony over the imagination of societies that look for protection, as something all of a sudden remembered or imagined from the past. Again ironically, the neoliberal state didn’t hesitate to nationalise key industries, and redistribute the wealth in different ways such as through furlough schemes to save the economy. Nevertheless, the millions of new unemployed throughout the world are on the way to reaching record highs. Ruling elites don’t seem to be able to produce consent to lead the vulnerable to their deaths to save the economy, although not without trying. The negotiation to find the highest degree of ‘affordable harm’ continues as the burden of the crisis falls on the care workers and various other working classes and minorities. The imagination of the neoliberal state seems to be limited with finding ways to turn back to the pre-pandemic market economy, while society at large is faced with both the unequal consequences of the current capitalist arrangement and the need for a change in what has been presented for a long time as the only way, primacy of economy over the social.

Recently announced, the Pandemic Emergency Purchase Programme (PEPP) of the European Central Bank (ECB), seems to be aimed at a similar problem of who will take on

³¹ Speech at Conservative Women's Conference, 21 May 1980.

³² Margot E. Salomon, ‘Of Austerity, Human Rights and International Institutions’, (2015) *European Law Journal*, 21: 521-545.

³³ *Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement*, IMF Country Report No. 13/156, May 2013, para 47.

the burden of the crisis at the European level.³⁴ Exceptionally, PEPP allows for the purchase of Member States' debts without any limit (the usual 33% limit does not apply). This means that soon countries in the North of Europe, particularly Germany, will be sending funds to the South through debt purchases. PEPP aims to protect the European Monetary Union that is under stress from the crisis. It seems that a European level redistribution and homogenisation of the economy can only result with the implementation of fiscal union.

This is not a Chinese or European pandemic however, but a global one, and it is not only Southern Europe but the Global South that lacks instruments to buffer the effects of the crisis and also lacks policy autonomy. Thus, the crisis demands the redistribution of wealth globally. The Organisation for Economic Co-operation and Development (OECD) Secretary-General Angel Gurría recommended a 'global effort akin to the last century's Marshall Plan and New Deal – combined' aimed at those who were already in physical, economic and social precarity.³⁵ However, as it is even in doubt whether the public and institutions of Northern Europe will be convinced to share the burden of the crisis with Southern European countries, how can we expect a redistribution plan to support developing countries and the Global South, in general? A recent decision of the German Constitutional Court upheld complaints against the Public Sector Purchase Programme (PSPP), and found the European Central Bank programme ultra vires.³⁶ Consequently, decision puts PEPP at risk.³⁷ It is not difficult to foresee, during the global economic crisis a new wave of IMF programmes will hit the Global South, to "save their economies". However, the ethical turn or loss of the political of the 80s and 90s isn't the valid currency of exchange anymore. Austerity regimes imposed by neoliberal states and international financial institutions but without its depoliticising discourses, allows human rights discourses to renegotiate the minimum guarantees with the hegemonic powers. In addition to the crisis in public health, the World Trade Organization³⁸ reports that developing countries face distinct and unprecedented challenges and the International Labour Organization,³⁹ anticipates devastating job contraction following the pandemic. This will inevitably lead to social movements of various sorts, unbound by an ethical construction of neoliberalism. This unprecedented crisis will therefore bring onto the table both economic and social rights and also other previously invisible forms of violence. We must seize the opportunities that this confluence of factors presents.

³⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020D0440&from=EN>

³⁵ <https://www.oecd.org/newsroom/oecd-secretary-general-coronavirus-war-demands-joint-action.htm>

³⁶ See, paper by Tom Flynn in this publication.

³⁷ Theodore Konstadinides, 'The German Constitutional Court's decision on PSPP: Between Mental Gymnastics and Common Sense', UK Const L Blog, 14 May 2020, <https://ukconstitutionallaw.org/>.

³⁸ WTO, 'Trade set to plunge as COVID-19 pandemic upends global economy', 8 April 2020, https://www.wto.org/english/news_e/pres20_e/pr855_e.htm.

³⁹ ILO, 'ILO Monitor: COVID-19 and the World of Work', 2nd ed., 7 April 2020.

A photograph of a metal fence with numerous padlocks attached. The padlocks are of various colors and designs, some with the word 'Capitol' visible. The entire image is overlaid with a semi-transparent red filter. The text 'Global, Regional and Comparative Perspectives' is centered in white, bold font.

Global, Regional and Comparative Perspectives

Global, Regional and Comparative Perspectives

Global, Regional and Comparative Perspectives: A Discussion

Tom Flynn, Lecturer, School of Law; Sanae Fujita, Fellow, Human Rights Centre; Yseult Marique, Senior Lecturer, School of Law; Onyeka Osuji, Reader, School of Law; Clara Sandoval Villalba, Professor, School of Law and Human Rights Centre [DOI: 10.5526/xgeg-xs42_005]

The pandemic raises a variety of governance issues which can be considered from global, regional and comparative perspectives. Several of the authors in this section and some other colleagues had the opportunity to discuss these different perspectives. This space for dialogue provided an opportunity to reflect upon commonalities (and differences) between regional systems and the similar challenges faced by citizens when seeking to engage with their governments about the adequacy of responses to Covid-19.

The pandemic brings to the fore the importance of global health governance, global solidarity and collaboration but these objectives have been largely thwarted by the wider trends of declining multilateralism, to which the global health sector has not been immune. The capacity for the WHO to respond effectively to the pandemic by, for example, promoting cross border efforts to tackle the spread of the virus and working to find a vaccine, have been made difficult by the organization's dependence on State collaboration under the International Health Regulations and by its restricted budget. But in other respects, international organizations have shown a greater willingness to think outside of their usual toolboxes (they tend to focus on delineating state obligations). Whilst increasingly providing a space for a multilateralist response, they have also shown unusual creativity in identifying the variety of roles that actors additional to states can play to address health and related needs, and in recognising the importance of transboundary collaboration.

Authoritarian and populist tendencies have fed off of the decreased interest in engagement with multilateral organizations. Many states have responded introspectively, some even nationalistically, to the virus, preferring to see Covid-19 as something which has come from outside, developing or fostering a narrative of "us versus them." This focus on stopping the virus from coming in, as a foreign "invader," is exemplified by the rush to close borders. The focus was in many ways a false narrative, given that the virus was already spreading within countries. All it managed to do was to deflect political attention away from what countries were doing (or failing to do) internally to prevent the spread of the disease and to afford essential health care.

But the narrative is slightly more complex, than a simple picture of waning support for multilateral institutions. Some countries like China have stepped up their bilateral support to African states as well as to the WHO, and there are many examples around the world of *ad hoc* bilateral support (sending medical teams; hospital equipment and protective gear).

The anti-multilateralist tendencies, as well as other unrelated, unresolved debates about the relationship between the European Union legal order and that of Member States, have

complicated and arguably weakened the capacity of the EU to adopt and implement successfully, European-wide pandemic responses, and at the same time to address the authoritarian tendencies of several Member States. This problem was less apparent in Africa, where the recent experiences with Ebola underscored for states the need to work collectively to address effectively global health challenges. At the same time, weak internal governance, a culture of coloniality and dependence as well as the failings of the international economic system to help countries to emerge from poverty, have impeded the effectiveness of responses to Covid-19 in many African countries.

The Inter-American human rights institutions have played an important role in framing states' responses to Covid-19 in human rights terms, not only giving meaning to the right to health but also articulating states' due diligence obligations to protect particularly vulnerable sectors of society. This is mirrored to an extent in Europe by both EU and Council of Europe human rights machinery, though less so, perhaps in Africa, where responses to Covid-19 have been framed (almost exclusively) by the African Union's African Centre on Disease Control.

Both Sandoval and Fujita explored another set of governance concerns, linked to the relationship of the state with its citizens, access to justice, truth and equality. Sandoval, focused on the special measures the Colombian Special Jurisdiction for Peace should put in place to enable conflict victims to participate in transitional justice proceedings in the context of Covid-19. Even before the pandemic, access to justice for conflict victims – some of the most marginalised in Colombian society – was a difficult prospect. While there are huge technical challenges to use virtual hearings during the pandemic, Sandoval note that technology also provides important opportunities for victims to participate if key measures, explored in the paper, are put in place.

Fujita explored citizens' challenges to access information in Japan, exacerbated by Covid-19. Part of the challenge relates to the lack of independence of the media, which has been made worse by the emergency situation, coupled with the failings of the Japanese government to provide clear, accessible and transparent information. Not only does this lead to confusion, it also can contribute to deaths if individuals do not know when they should go to the hospital or how to get tested. Part of the worry is that the Government's efforts to safeguard the possibility to host the Olympic Games in 2021 and to address the International Olympic Committee's concerns, overtook its commitment to supply transparent public health information to Japanese citizens. The concerns about media independence foreshadow wider worries about the government's tendency towards the securitisation of public health in its approach to states of emergency, a problem also made very apparent in Marique's paper.

Moving Towards Global Solidarity for Global Health through Multilateral Governance in the Covid-19 Response

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I. Introduction

The rapid spread of, and devastation caused by, Covid-19 worldwide reflects not only its viral properties, but the dichotomy between a globalised world profoundly connected by trade and travel and the absence of global solidarity and coordination in the response to the pandemic. Challenging a rising disengagement from multilateral governance, the UN Secretary General, the World Health Organisation (WHO), and the UN Committee on Economic, Social and Cultural Rights (CESCR) have all called for global solidarity and international assistance and cooperation to be at the heart of the Covid-19 response.¹ In this paper, we explore what this means for global health, giving particular attention to two core components of global health law that provide legally binding obligations regarding Covid-19: the commitments to global governance under the International Health Regulations (IHR) and obligations of international assistance and cooperation towards the realisation of economic, social and cultural rights, including the right to health, under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Situating the global pandemic response in the context of the contemporaneous decline of multilateralism, our article takes a critical look at the international institutions and frameworks and their role during pandemic responses, and the imperative of a more cosmopolitan approach to global governance, embracing solidarity and international cooperation in a way that serves low-income countries and rights holders everywhere.

II. The Rise and Fall of Multilateralism in Global Health

Institutions of global health and human rights have brought the world together in unprecedented cooperation since the end of World War II. The rise of multilateralism in global health reflects the broader cosmopolitan worldview that gave birth to global governance in the aftermath of World War II, embedding global solidarity and cooperation within an increasingly interconnected world. Beginning in the nineteenth century, the spread of infectious disease began to unify states in shared vulnerability, with international cooperation recognised as necessary to prevent disease transmission through regulatory coordination, with early efforts to control specific infectious disease outbreaks evolving to become a standing international public health bureaucracy through WHO.² The WHO Constitution (1946), proclaiming for the first time a human right to ‘the enjoyment of the highest attainable standard of health,’ encompassed the normative aspirations of WHO’s mandate for international health governance to realise the right to health, developing ‘the broadest and most liberal concept of international responsibility for health ever officially promulgated.’³ Despite increasing multilateral integration in the decades that followed, the

¹ Committee on Economic, Social and Cultural Rights (CESCR), ‘Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural rights’, UN Doc. E/C.12/2020/1, 9 April 2020; World Health Organisation, *Addressing Human rights as Key to the COVID-19 Response*, 21 April 2020, <https://www.who.int/publications-detail/addressing-human-rights-as-key-to-the-COVID-19-response>.

² David P. Fidler, *International Law and Infectious Diseases* (New York: Oxford University Press, 1999).

³ Charles E. Allen, ‘World Health and World Politics,’ (1950) 27(4) *International Organization* 27-43.

global vision for the WHO has been undermined by the rising reluctance of States to adequately support global health governance, a reluctance driven by the resurrection of nationalism.

In a direct attack on the shared goals of a globalising world, nationalism has spurred isolationism and has sought to retrench nations inwards. Right-wing populists have directly challenged multilateral institutions, including those in the area of global health and human rights. Some nations have retrenched and withdrawn from multilateral partnerships and international organisations. For example, nationalist governments have withdrawn from the Rome Statute of the International Criminal Court in recent years,⁴ and the USA government, seeing health and human rights as oppositional to traditional nationalist values, has slashed funding to the United Nations Population Fund and other institutions of global governance.⁵ These right-wing nationalist governments have further attacked human rights, undermining the global work of the UN Office of the High Commissioner for Human Rights (OHCHR) whilst turning increasingly autocratic through attacks on minority populations, independent media outlets, and civil society organizations.⁶ Such counter-cosmopolitan retrenchment is leading to a rejection in some quarters of global governance and human rights as a basis for global health, threatening progress that has been made, jeopardising the health and human rights of vulnerable populations worldwide and raising obstacles to future institutional progress.⁷ This new global order, detached from the science of public health and the obligations of human rights, is the context into which Covid-19 emerged. The response to the pandemic is illustrative of the nationalist tenor, undermining global health and human rights through a rejection of multilateralism.

III. The Emergence of Covid-19 into a Nationalist World

The rapidity and scale of transmission of Covid-19 is testimony to the enduring nature of our shared global vulnerability in an increasingly interconnected and globalised world. However, many State responses have shunned transboundary cooperation. While still in the early stages of this devastating pandemic, such actions not only exert negative repercussions on global public health and well-being; in impeding (and at times undermining) multilateralism, they also risk rebounding on nations by inhibiting coordinated strategies to address a virus that has no respect for national borders. For example, in responding to this emergency, States have adopted widespread unilateral travel restrictions in an attempt to interrupt transmission. Amounting to a violation of the IHR, the WHO has cautioned that they also have a perverse public health effect by diverting action away from health system and surveillance preparation. Undercutting the foundations of a human rights-based world, these nationalist actions have broader consequences on health and livelihoods worldwide by undercutting a collective response through compromising the global movement of essential medical supplies and personnel to fight the pandemic, as well as undermining humanitarian assistance more broadly and causing economic disruptions.⁸ With an unmet burden of need for medical equipment, as well as protective

⁴ Jina Moore, 'Burundi Quits International Criminal Court,' *The New York Times*, 27 October 2017.

⁵ 'U.S. withdraws funding for U.N. Population Fund,' *Reuters*, 3 April 2017, <https://www.reuters.com/article/us-usa-un-populationfund-idUSKBN17600T>.

⁶ Alison Brysk, *The Future of Human Rights* (Cambridge: Polity Press, 2019).

⁷ Lawrence O. Gostin, Andrés Constantín, and Benjamin Mason Meier, 'Global Health and Human Rights in the Age of Populism,' in Lawrence O. Gostin and Benjamin Mason Meier (eds) *Foundations of Global Health and Human Rights* (New York: Oxford University Press, 2020) 439-458.

⁸ Sharmilla Devi, 'Travel Restrictions Hampering COVID-19 Response,' (2020) 395 *The Lancet* 1331.

clothing for frontline staff, and with spiralling costs, countries have turned to an agenda of self-reliance and protectionist curbs on exports. Even as states recognize that the pandemic will not come to an end without an effective and universally-shared vaccine, some states have continued to take nationalist approaches to vaccine development and distribution.⁹ Such approaches create particular anxieties in terms of the equitable distribution of a future vaccine, leading to calls for a “People’s Vaccine” that would be available to all.¹⁰

At the same time, multilateralism has been undermined by the failure of some States, particularly the most powerful, to engage with those institutions best-placed to mount a multilateral and coordinated response. The Government of China received widespread condemnation for suppressing information about Covid-19 in the weeks after its emergence, where Chinese efforts to conceal a disease outbreak from WHO (to limit domestic economic damage) harmed the ability of the world to prepare for a pandemic under the International Health Regulations.¹¹ The US Government’s unprecedented and unjustified withdrawal of funding from the WHO,¹² driven by domestic political considerations, is denying the organisation vital resources when they are most needed to coordinate a global response, as well as to maintain its other vital programmes across the world. This US action has emboldened other countries to neglect global solidarity in the face of the pandemic, with Brazil now also threatening to withhold funding from WHO,¹³ as the European Union (EU) and UK squabble over the British financial contribution to the EU’s coronavirus emergency fund.¹⁴ Such financial wrangling is undermining cooperative health efforts: as the pandemic took hold, the EU mounted an initially weak public health response as its member states, overwhelmed by the quickly escalating crisis, focused on domestic responses.¹⁵ Perhaps most disturbingly, the US has continued to block the passage of a Security Council resolution calling for a global ceasefire to support delivery of aid in the context of Covid-19 to conflict regions which are particularly vulnerable.¹⁶

With nationalist responses predominating, their practical ramifications for the well-being not only of those beyond States’ own borders, but those within them too, presents a paradox in that they have undermined not only global health governance, but also national self-interest – linking national security with global solidarity. These linkages are a stark reminder of the original goals, and continued relevance, of global health law as a foundation of multilateral governance in the Covid-19 response.

⁹ Michael Peel, Leila Abboud, and Hannah Kuchler, ‘EU to Spend Billions to Secure Coronavirus Vaccine,’ *Financial Times*, 12 June 2020.

¹⁰ The People’s Vaccine: Available to All, in all Countries, Free of Charge, Open Letter. See 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.

¹¹ Lawrence O. Gostin, Roojin Habibi, and Benjamin Mason Meier, ‘Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats’, *Journal of Law, Medicine & Ethics* (Forthcoming, 2020).

¹² Madhukar Pai, ‘U.S. Withdrawal from WHO is Sad for Global Health and Bad for America,’ *Forbes*, 3 June 2020.

¹³ Lisandra Paraguassu and Ricardo Brito, ‘Bolsonaro threatens WHO exit as COVID-19 kills “a Brazilian per minute”,’ *Reuters*, 5 June 2020.

¹⁴ Charlie Cooper, ‘UK and EU clash over British share of Covid fund,’ *Politico*, 4 June 2020.

¹⁵ Jacint Jordana and Juan Carlos Triviño-Salazar, ‘Where are the ECDC and EU-Wide Responses in the COVID-19 Pandemic?’ (2020) 395 *The Lancet* 1611.

¹⁶ J. Borger, ‘US blocks Vote on UN’s Bid for Global Ceasefire over Reference to WHO’, *The Guardian*, 8 May 2020.

IV. Global Health Law

As globalisation has presented challenges to national disease prevention and health promotion efforts, global health law, offering the promise of addressing transboundary health challenges and promoting global health with justice,¹⁷ describes evolving multilateral efforts to address:

- New health threats – including non-communicable disease, injuries, mental health, dangerous products, and other globalised health threats,
- New health actors – including transnational corporations, private philanthropists, civil society, and other non-state actors, and
- New health norms – including “soft law” instruments, human rights obligations, global justice, and other normative standards of global health policy.¹⁸

Global health law instruments codify public health obligations across the global health landscape, seeking to realise both global health and human rights within and among nations through a multilateral response. Yet, global health law has been challenged by the Covid-19, with State responses falling short of global health law obligations. The scale and nature of the crisis has led for calls for strengthening and reform of the multilateral laws and institutions of global health.

d) Global Health Governance: The International Health Regulations

Drawing from the long history of international health law, the 1946 WHO Constitution provided WHO with the multilateral authority to propose conventions, regulations, and recommendations on any public health matter – with regulations, once adopted by the World Health Assembly, automatically binding on all WHO member states unless explicitly rejected. With this broad international legal authority to regulate public health, WHO assumed governance over the International Sanitary Regulations (1951); yet, with their revision and consolidation into the International Health Regulations (IHR) in 1969, the scope of these provisions was limited to only three select diseases (cholera, plague, and yellow fever). As the world faced a continuous stream of emerging and re-emerging diseases, the principal international legal instrument for preventing, detecting, and responding to infectious disease outbreaks was increasingly seen as inadequate.¹⁹

The 2005 revision of the IHR sought to codify a contemporary global health governance system under WHO – to prevent, protect against, control, and respond to the international spread of infectious disease through public health measures that avoid unnecessary interference with international traffic and trade.²⁰ States bear an obligation under the IHR to notify the WHO within 24 hours of all detected events within their territory which may constitute a Public Health Emergency of International Concern (PHEIC), which is any extraordinary event which is determined to:

¹⁷ Lawrence O. Gostin & Benjamin Mason Meier, ‘Introducing Global Health Law’ (2019) *Journal of Law, Medicine & Ethics*.

¹⁸ Lawrence O. Gostin, *Global Health Law* (Harvard University Press, 2014).

¹⁹ David P. Fidler, ‘Germs, Governance, and Global Public Health in the Wake of SARS,’ (2004) 113 *J Clin Invest* 799.

²⁰ Lawrence O. Gostin and Ana S. Ayala, ‘Global Health Security in an Era of Explosive Pandemic Potential,’ (2017) 9 *J. Nat'l Sec. L. & Pol'y* 53.

- 1) constitute a public health risk to other states and
- 2) potentially require a coordinated international response.

Based upon information received from both state and non-state sources (e.g., media, civil society, and other states), the WHO Director-General has the authority to determine whether an event constitutes a PHEIC.²¹ This PHEIC declaration has since been employed by WHO six times to control the international spread of infectious disease – most recently in the ongoing global struggle against Covid-19.²²

However, the Covid-19 pandemic has brought into sharp focus the limitations of the IHR in (1) reporting public health risks to WHO; (2) declaring a PHEIC where necessary to the international response; (3) coordinating national responses commensurate with public health risks; and (4) supporting national capacity for infectious disease control.

From the initial outbreak in China, delayed reporting hampered WHO's ability to understand the scope of the threat and coordinate the public health response. Legitimate questions remain as to what Chinese authorities knew, when they learned it, and whether they reported this knowledge to WHO in a "timely, accurate and sufficiently detailed" manner in accordance with the IHR.²³ Since the IHR does not give WHO unilateral authority to investigate events independently, it must continue to rely on states' "request for assistance," leaving WHO with insufficient information to declare a PHEIC without state support.

China notified WHO of this potential threat on 31 December 2019, but even with this notification, the IHR did not facilitate the timely declaration of a PHEIC. With inadequate reporting and a split in expert opinion, WHO Director-General Tedros Adhanom Ghebreyesus convened an Expert Committee on three occasions in late January 2020 to advise on the declaration of a PHEIC.²⁴ A PHEIC was finally declared on 30 January 2020, by which point the coronavirus was well on its way to becoming a pandemic. Global health scholars have often questioned WHO's tentative approach to declaring a PHEIC;²⁵ however, WHO has remained hesitant to exercise its authority to declare a PHEIC, apprehensive of a declaration that could devastate the economies of powerful states, and this reticence has delayed global preparations for a pandemic.

Following the PHEIC declaration, states have responded—in contravention of WHO guidance²⁶—with overwhelming restrictions on international traffic, individual rights, and global commerce. Whereas responses are generally expected to adhere to WHO's temporary recommendations and other IHR parameters, states are permitted to deviate from WHO guidance in only limited circumstances: where the different measures achieve

²¹ International Health Regulations (IHR) (Geneva: World Health Organization, 2005).

²² WHO, Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV), 30 January 2020, [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

²³ Matthew M. Kavanagh, 'Authoritarianism, Outbreaks, and Information Politics,' (2020) 5(3) *The Lancet Public Health*, E135.

²⁴ Mark Eccleston-Turner, 'COVID-19 Symposium: The Declaration of a Public Health Emergency of International Concern in International Law,' *Opinio Juris Blog*, 31 March 2020.

²⁵ Richard Horton, 'The Politics of PHEIC', (2019) 393 *The Lancet* 2470.

²⁶ World Health Organisation, 'Updated WHO advice for international traffic in relation to COVID-19 outbreak', 29 February 2020.

equal or greater health protection than the IHR and WHO's recommendations and where they are based on scientific principles, and are not more invasive to persons nor more restrictive of international traffic than reasonably available alternatives, and implemented with full respect for human rights.²⁷ However, a number of countries rapidly implemented violative health measures—including traveller restrictions, flight suspensions, visa restrictions, and border closures—bringing the world to a standstill.²⁸

Further undermining the IHR through these nationalistic measures, states are actively undercutting global solidarity by sidelining their common and shared responsibility to 'collaborate...to the extent possible' in ensuring that every state achieves minimum core public health capacities to detect and respond to outbreaks.²⁹ Neglecting the IHR duty of international assistance, states have taken advantage of these ambiguities to limit, at their own peril, their field of vision to national frontiers and neglect their international responsibilities. This nationalistic short-sightedness amidst the Covid-19 pandemic is exposing the majority of the world to the threat of staggering humanitarian upheaval, economic instability, and health insecurity.

e) Human Rights Governance: The ICESCR

In addressing a global pandemic, international human rights law is uniquely placed in that it comprises a legally binding set of universally applicable norms to guide an equitable and effective response by States to Covid-19. The central place of human rights for pandemic responses is duly reflected in the IHR, which embed human rights at the heart of its approach to infectious disease prevention, control and treatment. International human rights law supports multilateralism for global health because it provides a shared and legally binding framework for action among States as well as recognising duties for other actors, and because it gives rise to multilateral and global obligations, as well as individual and domestic obligations, for the right to health.

Like global health governance, international human rights governance emerged at the conclusion of World War II, and is equally infused with ambitions of global solidarity and a cosmopolitan outlook. The Charter of the United Nations includes a commitment by member states to take joint and separate action for the protection of human rights and fundamental freedom on the basis of non-discrimination and equality.³⁰ The Universal Declaration on Human Rights, which recognises that 'all individuals are born free and equal in dignity and rights', recognised the right to an 'international order in which the rights and freedoms set forth in this Declaration can be fully realized' and a right *through* international cooperation to economic, social and cultural rights.³¹ Translating this vision into internationally binding obligations on States, the ICESCR (and subsequent international human rights treaties) have given rise to an obligation of international assistance and cooperation on States to realise economic, social and cultural rights, which include the rights to health, to an adequate standard of living and to the enjoyment of the benefits of

²⁷ World Health Organisation, International Health Regulations, (2005) Art. 43, para. 1(b).

²⁸ Roojin Habibi et al., 'Do Not Violate the International Health Regulations During the COVID-19 Outbreak,' (2020) 395 *Lancet* 664.

²⁹ WHO, International Health Regulations, (2005) Art. 44, para. 1(a).

³⁰ United Nations, Charter of the United Nations, 1945, 1 UNTS XVI, articles 55 and 56.

³¹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

science.³² These rights give rise to obligations on States parties to take steps not only at the domestic level but also through international assistance and cooperation for, amongst other things, the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases' and to assure 'medical service and medical attention in the event of sickness.'³³

Because persistent poverty and global inequity (reinforced by the actions and arrangements of globalised institutions) hinder low-income State governments from fully realising the right to health of their people without foreign resources, international obligations of assistance and cooperation provide a means to call on the international community for cooperation and assistance in realising the right to health. The international community thus becomes a duty-bearer under the right to health, responsible for respecting, protecting, and fulfilling all the economic, social, and cultural rights that underlie health through coordinated, legally accountable responses.³⁴ As clarified by the CESCR, this international assistance and cooperation requires a range of actions from States in the context of Covid-19, including: 'sharing of research, medical equipment and supplies, and best practices in combating the virus; coordinated action to reduce the economic and social impacts of the crisis; and joint endeavours by all States to ensure an effective, equitable economic recovery.'³⁵ It also means that States should refrain from 'imposing limits on the export of medical equipment, that result in obstructing access to vital equipment for the world's poorest victims of the pandemic'³⁶ and refraining from unilateral border measures that 'hinder the flow of necessary and essential goods, particular staple foods and health equipment',³⁷ as well as lifting sanctions that interfere with medical equipment procurement, debt relief and the use of flexibilities under international trade law to allow universal access to diagnostics, medicines and vaccines.³⁸

Whilst not naming all specific international institutions and initiatives, the CESCR Statement is indicative of the variety of global health governance institutions and laws that provide pathways for global cooperation and solidarity, grounded in human rights, to effectively and equitably address Covid-19. The central role of the WHO is recognised in global health governance; yet, looking across the global governance landscape, States should 'use their voting powers in International Financial Institutions to alleviate the financial burden of developing countries in combating the pandemic,'³⁹ and promote flexibilities in the World Trade Organisation intellectual property regimes 'to allow universal access to the benefits of scientific advancements relating to Covid-19 such as diagnostics, medicines and vaccines.'⁴⁰

³² International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A (XXI) (1966), Art. 2.1.

³³ *Ibid.*, Art. 12.

³⁴ Ashley Fox and Benjamin M. Meier, 'International obligations through collective rights: Moving from foreign health assistance to global health governance,' (2010) 12(1) *Health and Human Rights* 61.

³⁵ Committee on Economic, Social and Cultural Rights (CESCR), 'Statement on the coronavirus diseases (COVID-19) pandemic and economic, social and cultural rights'. UN Doc. E/C.12/2020/1, 17 April 2020, para. 19.

³⁶ *Ibid.*, para. 20.

³⁷ *Ibid.*

³⁸ *Ibid.*, paras. 19-23.

³⁹ *Ibid.*, para. 21.

⁴⁰ *Ibid.* See also Chuang-Feng Wu and Chien-Huei Wu, 'International Trade, Public Health, and Human Rights,' in Lawrence O. Gostin & Benjamin Mason Meier (eds), *Foundations of Global Health & Human Rights* (New York: Oxford University Press, 2020) 351-372.

Further, the UN has established a range of global initiatives that are intended to facilitate global solidarity for health in responses, providing new pathways for multilateral cooperation, most notably: a Strategic Preparedness and Response Plan, led by the WHO;⁴¹ a Global Humanitarian Response Plan, led by the Office for the Coordination of Humanitarian Affairs, particularly focused in the 63 countries facing a humanitarian or refugee crisis;⁴² and the UN Socio-economic Framework, led by the UN Development Program to mitigate the social and economic impact of Covid-19.⁴³ Yet beyond these important, forward looking examples of multilateral governance for global health, as shown by examples highlighted above, including actions to protect and preserve vaccines for domestic populations,⁴⁴ the withholding of scientific knowledge and funds from the WHO,⁴⁵ and travel restrictions,⁴⁶ States responses appear to conflict with their obligations under the ICESCR.

These failures of compliance are indicative of a broader disconnect between the valuable normative framework of international human rights law for more equitable global health responses through international assistance and cooperation, and a range of shortcomings that militate against the realisation of this vision.⁴⁷ The obligation on States of international assistance and cooperation is contested, with high income countries approaching it as a moral, rather than a legally binding obligation.⁴⁸ Further, while exerting binding legal obligations on States, international human rights law does not directly bind other important global health actors, including the private sector and philanthropic organisations, which have important roles to play in the context of Covid-19. The CESCR and other human rights actors support legally binding obligations on international organisations such as the International Financial Institutions, but this position is strongly contested by those organisations.⁴⁹ Further, despite a range of global accountability procedures, State compliance with international human rights law is often weak.⁵⁰ The challenges of Covid-19 for human rights across borders illustrate why scholars have called for a rethinking of international human rights, as well as other global health governance institutions, including the IHR,⁵¹ to render them fit for purpose to effectively address global challenges,

⁴¹ World Health Organisation, 2019 Novel Coronavirus (2019-nCoV): Strategic Preparedness and Response Plan, Draft of 3 February 2020.

⁴² United Nations Office for the Coordination of Humanitarian Affairs, 'Global Humanitarian Response Plan: COVID-19', 28 March 2020.

⁴³ United Nations, 'A UN Framework for the Immediate Socio-Economic Response to COVID-19', April 2020.

⁴⁴ Jon Cohen, 'Unveiling "Warp Speed," the White House's America-first push for a coronavirus vaccine', *Sciencemag*, 12 May 2020.

⁴⁵ Pien Huang, 'Trump and WHO: How Much Does The U.S. Give? What's The Impact Of A Halt In Funding?' *NPR*, 15 April 2020.

⁴⁶ Benjamin Mason Meier, Roojin Habibi and Y. Tony Yang, 'Travel restrictions violate international law', (2020) 367(1485) *Science* 1436.

⁴⁷ See, for example, Elena Pribytkova, 'What Global Human Rights Obligations Do We Have?' (2020) 20(2) *Chicago Journal of International Law* 664.

⁴⁸ UN Commission on Human Rights, 'Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Second Session', UN Doc. E/CN.4/2005/52, 10 February 2005, para. 76.

⁴⁹ Committee on Economic, Social and Cultural Rights (CESCR), 'Statement on Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights', UN Doc. E/C.12/2016/1, 22 July 2016, para. 8.

⁵⁰ See, for example, Valentina Carraro, 'Promoting Compliance with Human Rights: the Performance of the United Nations' Universal Periodic Review and Treaty Bodies,' (2019) 63(4) *International Studies Quarterly* 1079-1093.

⁵¹ Allyn Taylor, Roojin Habibi, Gian Luca Burci et al., 'Solidarity in the Wake of COVID-19: Reimagining the International Health Regulations', *The Lancet*, 19 June 2020.

stakeholders and relationships that determine the enjoyment of economic, social and cultural rights worldwide.⁵²

V. Conclusion

Covid-19 is a global public health crisis that calls for global solidarity and coordinated action, yet many States have responded with nationalist approaches that ignore the need for collective action in facing this common threat. With infectious diseases providing the original impetus for the global cooperation in health, Covid-19 is a reminder of why global solidarity must be preserved and enhanced, including through strengthening global institutions to oversee a robust response. Following this unprecedented pandemic response, global health law will need to be revised to reflect the weaknesses highlighted by the Covid-19 pandemic and the need for global solidarity in facing future threats – bringing together human rights law with global health governance.

Over time, however, we are witnessing some movements towards cooperation and solidarity. With UN-led initiatives being established, countries including the UK and China enhanced contributions to the WHO, whilst € 7.4 billion was raised at an EU-hosted virtual pledging conference to fund the development of Covid-19 vaccines. Further, the African Union and African Centres for Disease Control and Prevention have been praised for collaborative efforts.⁵³ However, much more is needed, particularly more financing, for vaccine development, the global distribution of treatment and diagnostics for Covid-19, and to support both national and global responses to and preparedness for the pandemic.⁵⁴

Multilateral efforts remain a crucial health and human rights imperative, and States must continue to build up their international assistance and cooperation obligations under international human rights law, as well as their obligations under the International Health Regulations. As policymakers increasingly recognise that this pandemic will only truly end with the development of an effective vaccine, human rights obligations—at the intersection of the right to health and the right to benefit from scientific progress—international assistance and cooperation will be crucial in progressively realising universal access to the necessary benefits of this scientific breakthrough, bringing the world together to assure the highest attainable standard of health for all.

⁵² Pribytkova (n. 47).

⁵³ Matthew Kavanagh, Ngozi A. Erondu, Oyewale Tomori et al, 'Access to Lifesaving Medical Resources for African countries: COVID-19 Testing and Response, Ethics, and Politics,' (2020) 395(10238) *The Lancet* 1735-1738.

⁵⁴ Marco Schäferhoff and Gavin Yamey, 'Ending The COVID-19 Pandemic Requires Effective Multilateralism', Health Affairs Blog, 27 May 2020, <https://www.healthaffairs.org/doi/10.1377/hblog20200522.123995/full/>.

African Union and Public Health Crises in a Regional Legal Order

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Abstract

In the context of responses to the Covid-19 pandemic, the paper examines the African regional regime for public health crises and disasters. Using the combined analytic lenses of Capability Approach, Institutional Theory, Constructivism, New Regionalism Approach and Actor Network Theory, it focuses on the opportunities offered by, and limitations of, the African Union legal order.

Keywords: Africa CDC; African Union; Covid-19; Crisis Management; Public Health

I. African Union, Public Health and Covid-19

Article 16(1) of the African Charter on Human and Peoples' Rights 1981 recognised a human right to 'the best attainable state of physical and mental health' well before the right entered the mainstream of the current global discourse, as exemplified by resolutions 2002/31 and 2005/24 of the Commission on Human Rights and resolutions 6/29, 15/22 and 24/6 of the Human Rights Council. An African Union (AU) coordinated approach to public health crises, however, emerged only recently in the regional order. It took some time for the AU to concretise the wish in the preamble to its Constitutive Act for addressing 'multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world.' The AU's potential role in public health is further buttressed by references in Article 3(n) and other objectives enumerated in Article 3(k),(j),(m) of the Constitutive Act.

Nonetheless, just like any other public institution,¹ the AU's legitimacy and acceptability may be inter-linked with its ability to undertake effective crisis management, particularly the ongoing Covid-19 pandemic that presents unprecedented challenges. Although the incidence of infections and deaths are relatively low in Africa compared to trajectories in some parts of the world, Covid-19 potentially disproportionately affects African countries due to peculiar circumstances such as inadequate public health infrastructure and weak economies. In addition to health impacts, the World Bank reported that Covid-19 could potentially cause 'economic and social devastation' to African countries through considerable reductions in commodity trade and export prices, foreign investments and remittances, tourism and travel disruptions, and constraints on economic activities from lockdowns and restrictions.² Covid-19 also constrains the debt repayment and servicing ability of African countries many of which are already part of the Highly Indebted Poor Countries debt relief programme of the International Monetary Fund (IMF). The IMF offered 19 African countries debt relief in the sense of freezing interest payments for six months.³

¹ Arjen Boin, Paul 't Hart, Eric Stern and Bengt Sundelius, *The Politics of Crisis Management: Public Leadership under Pressure* (Cambridge: CUP, 2005); OECD, *The Changing Face of Strategic Crisis Management* (Paris: OECD, 2015).

² Ceasar Calderon, Gerard Kambou, Calvin Z. Djiofack, Megumi Kubota, V. Korman and Catalina Cantu Canales, 'Assessing the Economic Impact of Covid-19 and Policy Responses in Sub-Saharan Africa', *Africa's Pulse*, No. 21 (April), (Washington, DC: World Bank, 2020).

³ Matthew Davies, 'Coronavirus in Africa: "No time for half measures in helping the economy"', 16 April 2020.

Against the backdrop of Covid-19, this paper therefore examines the African regional regime for public health crises on the basis that ‘better’⁴ responses relate to ‘issues of authority, legitimacy and power that are inextricably connected to the way in which crises are defined and handled’.⁵ Using the combined analytic lenses of Capability Approach, Institutional Theory, Constructivism, New Regionalism Approach and Actor Network Theory, the paper focuses on the opportunities offered by, and limitations of, the AU legal order to enable in the assessment of the “ideological-institutional complex”⁶ of its existence.

The key pan-African body for tackling Covid-19 is the Africa Centres for Diseases Control and Prevention (ACDC). Following the 2014-2016 Ebola epidemic in West African countries, the 26th Ordinary Assembly of AU Heads of State in January 2016 agreed to establish the ACDC as a specialised technical institution permitted by Article 9(1)(d) and Article 14 of its Constitutive Act. Launched on 3 January 2017, the ACDC aims to enhance the capacity and capability of AU member states’ public health institutions and to undertake evidence-based collaborative interventions and programmes for rapid and effective disease detection and response.⁷ In addition to working with AU member states, the ACDC operates five regional collaborating centres for Central, Eastern, Northern, Southern and Western Africa which appear to reflect existing sub-regional political and economic groupings.

The ACDC produced a continental Covid-19 strategy document on 5 March 2020⁸ prioritising the limitation of transmission and minimisation of harm from social and economic disruptions. As such, ACDC outlined twin objectives of coordination with partners within and outside Africa and promotion of evidence-based practices which are implemented mainly through the operational units of the Africa Task Force for Coronavirus (AFTCOR) and ACDC’s Incident Management System. ACDC collaborations underlined by Article 3(n) of the AU Constitutive Act include Partnership for Evidence Based Response to COVID-19 (PERC) and Institute Pasteur Dakar, Senegal. The Institute, which studies viral pathogens, is the co-lead of AFTCOR’s laboratory and subtyping working group.⁹ Furthermore, in collaboration private organisations, the AU and ACDC launched the Africa Covid-19 Response Fund to raise US\$150 million for transmission limitation measures and US\$400 million for procuring equipment and supplies, deploying rapid responders and supporting Africa’s vulnerable populations.¹⁰

⁴ Christopher Ansell and Martin Bartenberger, *Pragmatism and Political Crisis Management: Principle and Practical Rationality during the Financial Crisis* (Cheltenham: Edward Elgar, 2019), 4.

⁵ Paul ‘t Hart, ‘Symbols, Rituals and Power: The Lost Dimensions of Crisis Management,’ in Arjen Boin (ed), *Crisis Management*. Volume III, (London: Sage, 2008), 84–104, 100.

⁶ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: CUP, 2011).

⁷ ‘About Us,’ ACDC, accessed 7 May 2020, <https://africacdc.org/about-us/>; ‘Our Work,’ ACDC, accessed 7 May 2020, <https://africacdc.org/our-work/>.

⁸ ACDC, ‘Africa Joint Continental Strategy for Covid-19 Outbreak,’ last modified 5 March 2020, https://au.int/sites/default/files/documents/38264-doc-africa_joint_continental_strategy_for_covid-19_outbreak.pdf.

⁹ ‘Wellcome and DFID Support Africa COVID-19 Continental Response with €2.26 million’, ACDC, accessed 7 May 2020, <https://africacdc.org/news-item/wellcome-and-dfid-support-africa-covid-19-continental-response-with-e-2-26-million/>.

¹⁰ Aloysius Uche Ordu, ‘The Coming of Age of the Africa Centres for Disease Control,’ last modified 15 April 2020, <https://www.brookings.edu/blog/africa-in-focus/2020/04/15/the-coming-of-age-of-the-africa-centers-for-disease-control/>.

To facilitate the implementation of the continental strategy, the ACDC in conjunction with the AU Commission launched the Partnership to Accelerate COVID-19 Testing (PACT): Trace, Test & Track (CDC-T3)¹¹ for strengthening testing capacities with a view to testing 10 million Africans by October 2020. PACT is complemented by a surveillance protocol¹² issued by the ACDC to inform Covid-19 detection by AU member states and a detailed stepwise guidance.¹³ Differentiated in Phase 0 (no Covid-19 case) and Epidemic Phases 1 (early stage outbreak), 2 (expanding outbreak), 3 (advancing outbreak) and 4 (outbreak with nationwide transmission), the stepwise guidance also contains helpful definitions of key terminologies such as contact tracing, social distancing, isolation and quarantine. The ACDC regularly provides outbreak briefs, fact sheets, brochures and policy updates¹⁴ and provides manuals, guidelines and framework documents on assessment, monitoring and movement restrictions,¹⁵ community social distancing¹⁶ and contact tracing,¹⁷ and recommendations on meetings and travel.¹⁸

The ACDC's coordinated response has largely influenced AU member states' Covid-19 policy directions. PERC reported that most African governments swiftly imposed public health and social measures.¹⁹ Tanzania is, however, a notable exception. Tanzania's president rejected social distancing and other ACDC guidelines and even encouraged economic and religious activities involving large gatherings of people.²⁰ President Magufuli questioned the credibility of testing while asserting that the country's Covid-19 cases were exaggerated and supporting an unproven Madagascan herbal remedy. A few other African countries have placed orders for the product. The AU sought the technical data of the

¹¹ 'AU and Africa CDC Launch Partnership to Accelerate COVID-19 Testing: Trace, Test and Track,' ACDC, last modified 21 April 2020, <https://africacdc.org/news-item/african-union-and-africa-centres-for-disease-control-and-prevention-launch-partnership-to-accelerate-covid-19-testing-trace-test-and-track/>.

¹² ACDC, 'Protocol for Enhanced Severe Acute Respiratory Illness and Influenza-Like Illness Surveillance for COVID-19 in Africa,' accessed 7 May 2020, file:///F:/38350-doc%20protocol%20for_enhanced_sari_and_ili_surveillance_for%20covid-19%20in%20africa_eng.pdf.

¹³ ACDC, 'Recommendations for Stepwise Response to Covid-19 by African Union Member States,' accessed 7 May 2020, <https://africacdc.org/download/recommendations-for-stepwise-response-to-covid-19/>.

¹⁴ 'Resources: Documents and publications from Africa CDC,' ACDC, accessed 7 May 2020, <https://africacdc.org/our-work/>.

¹⁵ ACDC, 'Guidance for Assessment, Monitoring, and Movement Restrictions of People at Risk for COVID-19 in Africa,' 5 March 2020, <http://www.africacdc.org/covid-19-and-resources/guidelines-policies/covid-19-and-resources/guidelines-policies/africa-cdc-guidance-for-assessment-monitoringand-movement-restrictions-of-people-at-risk-for-covid-19-in-africa-pdf/detail>.

¹⁶ ACDC, 'Guidance on Community Social Distancing During COVID-19 Outbreak,' 17 March 2020, <http://www.africacdc.org/covid-19-and-resources/guidelines-policies/covid-19-and-resources/guidelines-policies/africa-cdcguidance-on-community-social-distancing-during-covid-19-outbreak-pdf/detail>.

¹⁷ ACDC, 'Guidance for Contact Tracing for the COVID-19 Pandemic,' 24 March 2020, <http://www.africacdc.org/covid-19-and-resources/guidelines-policies/covid-19-and-resources/guidelines-policies/detail>.

¹⁸ ACDC, 'Policy Recommendation for African Union Meetings and Travel During COVID-19 Outbreak,' 15 March 2020 <http://www.africacdc.org/covid-19-and-resources/guidelines-policies/covid-19-and-resources/guidelines-policies/africa-cdc-policy-recommendation-for-african-union-meetings-and-travel-during-covid-19-outbreak-pdf/detail>.

¹⁹ PERC, 'Responding to Covid-19 in Africa: Using Data to find Balance,' 5 May 2020, <https://preventepidemics.org/wp-content/uploads/2020/05/PERCRegional5-6-2020.pdf>, 6.

²⁰ 'Coronavirus: Tanzanian President Promises To Import Madagascar's "Cure",' BBC, 4 May 2020.

unproven²¹ herbal remedy from Madagascar for efficacy and safety review by the ACDC²² but until the date of writing, the country's government and the Malagasy Institute of Applied Research that produced the remedy have not addressed the request nor shared the data with anyone else.²³ Evidence of the product's efficacy, if provided, will no doubt demonstrate the need for considering African traditional remedies within the framework of public health capacity and capability in addition to enhancing the self-confidence of public and private research organisations and promoting regional collaboration and coordination.

The public health visibility and coordinated approach of the AU acting through the ACDC contrasts sharply with its predecessor, the Organisation of African Unity. While the OAU coordinated efforts against colonialism and apartheid, at best it recorded 'terse'²⁴ achievement in areas such as good governance and development. Nonetheless, this emergent interest in continental public health coordination appears to mask deep structural and institutional limitations impeding African countries and the regional order to overcome public health challenges and resultant socioeconomic consequences. The following observation in the ACDC's continental strategy document raises fundamental capacity and capability questions:

Since 2003, the volume, velocity, and variety of travel between the rest of the world and Africa has increased dramatically, which will result in initial and continuous introductions of infected persons from areas with COVID-19 transmission. Africa's baseline vulnerability is also high, given its relatively fragile health systems, concurrent epidemics of vaccine-preventable and other infectious diseases, inadequate water, sanitation, and hygiene infrastructure, population mobility, and susceptibility for social and political unrest during times of crisis.²⁵

II. Situating Capacity and Capability

To understand the drivers of public health capacity and capability, the Actor-Network Theory may be useful as it suggests that society is a complex and fluid diversified collection of relationships and alliances.²⁶ Society is shaped not by predetermined and fixed systems but by contingent and potentially transformative interaction of actors and events. One lesson from the Actor-Network Theory is consideration of dynamic social relations and events to gain understanding of society which suggests the need for investigating wider political and socioeconomic dimensions of crisis management in the AU regional order and their intersection with public health. Accordingly, the following structural and institutional factors may be relevant in determining African countries' public health capacity and capability.

²¹ 'Coronavirus: Caution urged over Madagascar's "Herbal Cure",' BBC, 22 April 2020.

²² 'COVID-19: African Union in discussions with Madagascar over herbal remedy,' AU, last modified 4 May 2020, <https://au.int/en/pressreleases/20200504/covid19-african-union-discussions-madagascar-over-herbal-remedy>.

²³ 'AU Silence Greets Madagascar President's Claim of COVID-19 "cure",' Medical Brief, 13 May 2020, <https://www.medicalbrief.co.za/archives/au-silence-greets-madagascar-presidents-claims-of-covid-19-cure/>; Aryn Baker, "'Could It Work as a Cure? Maybe." A Herbal Remedy for Coronavirus is a Hit in Africa, But Experts Have their Doubts', Time, 22 May 2020, <https://time.com/5840148/coronavirus-cure-covid-organic-madagascar/>.

²⁴ Olufemi Babarinde 'The EU as a Model for the African Union: The Limits of Imitation,' (2007) 7(2) *Jean Monnet/Robert Schuman Paper Series* 1-12, 3.

²⁵ ACDC, 'Africa Joint Continental Strategy,' (n. 8), 2.

²⁶ Bruno Latour, *Re-Assembling the Social: An Introduction to Actor-Network Theory* (Oxford: OUP, 2005).

a) Funding

While it has made some progress, the ACDC requires more funding and resources in addition to the need to establish its autonomous operational and execution capacity to promote public health.²⁷ The ACDC's precarious funding mirrors the position in many African states where political and economic institutions have persistently failed to develop public health capacity through improved funding. This is reflected in the varied picture of Covid-19 responses by AU member states. Countries like South Africa²⁸ responded relatively quickly and instituted public health and social measures but some others have been impeded in their responses by minimal capacity.²⁹

Instructively, the AU 2001 Abuja Declaration required 15 percent of annual national budgets to be ringfenced for health, however only one country met the target in 2011 and many others remained a long way behind.³⁰ The average per capital health budget of 34 of Africa's 45 countries is below US\$200 with many hovering around US\$50.³¹ These levels of health spending make it almost impossible to procure and maintain public health facilities and equipment and employ healthcare professionals. No wonder Africans constitute a significant proportion of health professionals in the West,³² a brain drain on the continent's public health capacity and capability.

b) Good governance

Lack of good governance is another self-induced debilitating factor. The role of corruption, for instance, as being "often a symptom of overall institutional weakness"³³ with adverse impacts on public health³⁴ and other development indicators in African states is widely acknowledged. Initiatives like the AU Convention on Preventing and Combating Corruption 2003, New Partnership for Africa's Development and African Peer Review Mechanism have had modest success in changing the governance profiles. While Article 3(g) of AU Constitutive Act refers to good governance, efforts should be undertaken by the AU to more than symbolic.

A new approach is necessary to curtail prebendalism,³⁵ patrimonialism,³⁶ corruption and other impediments to good governance in African countries. To this end, the AU may

²⁷ Ordu, 'Coming of Age' (n. 10).

²⁸ Andrew Harding, 'South Africa's Ruthlessly Efficient Fight Against Coronavirus,' BBC, 3 April 2020..

²⁹ ACDC, 'Partnership to Accelerate' (n. 11).

³⁰ "Abuja Declaration: Ten Years On," WHO, accessed 7 May 2020, https://www.who.int/healthsystems/publications/abuja_report_aug_2011.pdf?ua=1.

³¹ Abiy Ahmed, 'A Pledge for Africa,' 1 May 2020, <https://www.project-syndicate.org/commentary/pledging-conference-to-help-africa-fight-covid19-by-abiy-ahmed-2020-05>.

³² Oleosi Ntshebe. 'Sub-Saharan Africa's Brain Drain of Medical Doctors to the United States: An Exploratory Study,' (2010) 2(2) *Insight on Africa* 103-111; Kingsley Ighobor, 'Diagnosing Africa's Medical Brain Drain,' accessed 7 May 2020, <https://www.un.org/africarenewal/magazine/december-2016-march-2017/diagnosing-africa%E2%80%99s-medical-brain-drain>.

³³ Melaku Geboye Desta and Moshe Hirsch, 'African Countries in the World Trade System: International Trade, Domestic Institutions and the Role of International Law,' (2012) 61(1) *Intl & Comp L Q* 127, 161.

³⁴ 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,' UN Doc. A/72/137, 14 July 2017.

³⁵ Richard A. Joseph, *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic* (New York: Cambridge University Press, 1987).

³⁶ Anne Pitcher, Mary Moran and Michael Johnston, 'Rethinking Patrimonialism and Neopatrimonialism in Africa,' (2009) 52(1) *African Studies Review* 125.

formulate a good governance code enjoying equal status as the nascent continental aversion to unconstitutional takeover of government expressed in Article 4(p) of its Constitutive Act. A public health good governance code may include matters such as minimum health spending as a percentage of GDP, tax transparency, promotion of public-private partnerships, prohibition of health tourism by public officials and genuine distaste for corruption and illicit financial flows. The existence of such a code can provide a benchmark for African people to assess and compare the performance of governments. Public officials or governments violating the code may be penalised, for example, through sanctions.

c) Dependence

While the Ebola experience attests to the potential ability and initiative of African countries to tackle public health crises, the region intriguingly appears to lack the necessary self-confidence resulting in a habit of dependence on others. This dependence is epitomised by the call by Ethiopia's Prime Minister Abiy Ahmed for developed countries to come to the continent's aid, including through debt relief and financial assistance.³⁷ He also sought assistance for African countries in the Global Health Pledging Conference starting on 4 May 2020.³⁸ The Africa Covid-19 Response Fund launched by the AU and the ACDC similarly relies on external donations.

The ACDC does not seem different in approach notwithstanding that the Institute Pasteur Dakar, Senegal pioneered the isolation of the yellow fever causing arbovirus.³⁹ For example, PERC, which to support evidence-based Covid-19 responses, is a partnership between the ACDC and a private initiative (Resolve to Save Lives), multilateral agencies (World Health Organisation and World Economic Forum), external public health agency (UK Public Health Rapid Support Team) and private market research and data analysis companies (Ipsos and Novetta Mission Analytics). The lack of involvement of African organisations in PERC suggests the need for a more confident regional approach towards developing capacity and capability.

To move away from dependence, it is important to recall that Constructivism asserts "that the structures of human association are determined primarily by shared ideas rather than material forces, and that the identities and interests of purposive actors are constructed by these shared ideas rather than given by nature."⁴⁰ Likewise, the New Regionalism Approach underscores the need for "more spontaneous processes, that often emerge from below and from within the region itself, and more in accordance with its peculiarities and problems."⁴¹ An attitudinal change is therefore imperative. The AU can, for instance, step up in facilitating funding of inter-institutional collaboration between African and foreign researchers.

³⁷ Ahmed, 'Pledge' (n. 31).

³⁸ 'Coronavirus Global Response: International Pledging Event,' European Commission, 4 May 2020, https://ec.europa.eu/regional_policy/en/newsroom/news/2020/05/05-04-2020-coronavirus-global-response-international-pledging-event.

³⁹ ACDC, 'Wellcome' (n. 9).

⁴⁰ Alexander Wendt, *Social Theory of International Politics* (Cambridge: CUP, 1999), 1.

⁴¹ Björn Hettne and Fredrik Söderbaum, 'The New Regionalism Approach,' (1998) 17(3) *Politeia* 6-21, 7.

d) Coloniality and neoliberalism

While colonialism has been implicated in the continent's weak governance and development profiles,⁴² the Covid-19 pandemic confirms a long-standing attitude of African states to look up to former colonial powers for solutions to socioeconomic problems despite years of political independence. Apart from Ethiopia, African countries were colonised by Western European countries (and the United States in Liberia's case). Even the establishment of the ACDC was facilitated by external institutions, notably the governments of USA and China, despite African states' acknowledgment of the need for a regional health body by 2013.⁴³ The ACDC is loosely modelled after the European Centre for Disease Prevention and Control, an agency of the European Union which, in turn, provided the template⁴⁴ for the AU.

Africa's Covid-19 containment measures seem to mirror that of Western European countries. Lockdowns imposed by African governments, for example, did not quite consider unique socioeconomic circumstances like the dominant informal economy, non-existent social welfare and inadequate power and internet infrastructures. Concerns include the impact of social distancing measures on the informal sectors and urban poor⁴⁵ and exacerbation of gender, education and social inequalities.⁴⁶ The reality is highlighted in a PERC survey of residents of 28 cities in 20 African countries which reported significant food shortages and financial difficulties if lockdowns were imposed for 14 days or more.⁴⁷

Related to coloniality is the adoption of neoliberal orientations by African states which resulted in social welfare and infrastructural deficits. The IMF-devised Structural Adjustment Programme imposed on African countries is a particularly harmful neoliberal experiment with 'devastating and debilitating effects'⁴⁸ including significant funding healthcare gaps. Neoliberal developmentalism⁴⁹ has clearly not improved the fortunes of African economies.

⁴² Walter Rodney, *How Europe Underdeveloped Africa* (London: Bogle L-Ouverture, 1972); Peter E. Ekeh, 'Colonialism and the Two Publics in Africa: A Theoretical Statement,' (1975) 17(1) *Comparative Studies in Society and History*, 91-112.

⁴³ Callie Aboaf, 'U.S.-China Collaboration in Creating and Supporting the Africa Centres for Disease Control and Prevention,' accessed 7 May 2020,

<https://www.cartercenter.org/resources/pdfs/peace/china/trs-04-us-china-collaboration-africacdc.pdf>.

⁴⁴ Babarinde, 'The EU as a Model,' 8-9, 11 (n. 24).

⁴⁵ Addisu Lashitew, 'Social Distancing Unlikely to hold up in Africa without a Safety Net for Microentrepreneurs,' 9 April 2020, <https://www.brookings.edu/blog/africa-in-focus/2020/04/09/social-distancing-unlikely-to-hold-up-in-africa-without-a-safety-net-for-microentrepreneurs/>; Zachary Barnett-Howell and Ahmed Mushfiq Mobarak, 'Should Low-Income Countries Impose the Same Social Distancing Guidelines as Europe and North America to Halt the Spread of COVID-19?', 2 April 2020, <https://som.yale.edu/sites/default/files/mushfiq-howell-v2.pdf>.

⁴⁶ 'Joint Solidarity Letter to the African Union: The Impact of COVID-19 on Girls' Education and Child Marriage,' Global Partnership for Education, 30 April 2020, <https://www.globalpartnership.org/news/joint-solidarity-letter-african-union-impact-covid-19-girls-education-and-child-marriage>.

⁴⁷ PERC, 'Responding,' 6 (n. 19).

⁴⁸ Simon Springer, 'Fuck Neoliberalism,' (2016) 15(2) *ACME: An International Journal for Critical Geographies* 285-292, 285.

⁴⁹ Sam Adelman, 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism,' in *Sustainable Development Goals: Law, Theory and Implementation*, ed. Duncan French and Louis J. Kotzé (Cheltenham: Edward Elgar, 2018), 15-40, 18.

Contrary to coloniality and neoliberalism in the African context, the institutional theory suggests that the pronounced socioeconomic disparities between African and Western countries⁵⁰ highlight the need for an African perspective wherever possible. PERC similarly noted growing peaceful resistance and protests against public health and social measures in African countries and stressed the need for adaptation to “local needs” with context-specific mitigation of adverse effects to enhance compliance levels and even prevent unrests and violence.⁵¹ Just like some researchers are increasingly rejecting the conflation of Western ideas as universal benchmarks,⁵² there is therefore the need for decolonisation of the African approach to public health and its political and socioeconomic dimensions.

e) International economic system

While the impediments discussed above are largely self-inflicted, the contemporary international economic system is an external determinant of public health capacity and capability. Noteworthy are neoliberal ideas like free trade and liberalisation championed by the World Trade Organisation, the IMF and the World Bank.⁵³ While conventional neoliberal wisdom suggests that Africa can pursue foreign investments and trade its way out of socioeconomic problems, the unequal international economic system obstructs fair competition between developing African countries and developed economies. Existing objections to the international economic system’s neoliberal foundations and domination by developed economies⁵⁴ include the UN General Assembly Resolution 3171,⁵⁵ New International Economic Order,⁵⁶ Charter of Economic Rights and Duties of States⁵⁷ and Declaration on the Right to Development⁵⁸ and Third World Approaches to International Law.⁵⁹

An illustrative segment is international trade and investment law which establishes a system of “winners and losers” by having ‘rules [that] determine who will benefit, who will lose and, perhaps more importantly, who will adapt to whom so as to render the policy

⁵⁰ ‘Africa Progress Report: Power, People, Planet: Seizing Africa’s Energy and Climate Opportunities,’ Africa Progress Panel, accessed 7 May 2020, https://reliefweb.int/sites/reliefweb.int/files/resources/APP_REPORT_2015_FINAL_low1.pdf.

⁵¹ PERC, ‘Responding,’ 3, 6 (n. 19).

⁵² Pahuja, ‘Decolonising’ (n. 6); Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* 2nd Ed (London: Zed, 2012); Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches*. (Cambridge: CUP, 2013).

⁵³ Sarah Babb and Alexander Kentikelenis, ‘International Financial Institutions as Agents of Neoliberalism,’ in Damien Cahill, Melinda Cooper, Martijn Konings and David Primrose (eds), *The SAGE Handbook of Neoliberalism* (Thousand Oaks: Sage, 2018), 16-27.

⁵⁴ B.S. Chimni, ‘Capitalism, Imperialism and International Law in the Twenty-First Century,’ (2012) 14(1) *Oregon Rev Intl L* 17-45; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, (Cambridge: CUP, 2013); John Linarelli, Margot E. Salomon, and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Global Injustice in the Global Economy*, (Oxford: OUP, 2018).

⁵⁵ *Permanent Sovereignty over Natural Resources* (17 December 1973) UNGA Res 3171 (XXVIII).

⁵⁶ *Declaration for the Establishment of a New International Economic Order* (1 May 1974) UNGA A/RES/S-6/3201.

⁵⁷ *Charter of Economic Rights and Duties of States* (12 December 1974) UNGA Res 3281 (XXIX).

⁵⁸ *Declaration on the Right to Development* (4 December 1986) UNGA Res 41/128.

⁵⁹ Usha Natarajan, John Reynolds, Amar Bhatia and Sujith Xavier, ‘Introduction: TWAIL- on Praxis and the Intellectual,’ (2016) 37(11) *Third World Quarterly* 1946-1956.

goals of trade and investment rules most efficacious'.⁶⁰ Critical international political economy⁶¹ therefore spotlights the role of international trade and investment law in sustaining disparities and inequalities between states and regions, for instance between the Global North and the Global South. Hickel, for example, suggested the need for “real justice” in the global economy to tackle global poverty and growing inequality between countries.⁶²

The adverse effects of the international economic order on African countries' capacity and capability⁶³ are manifest in different ways. Corruption and poor governance in African countries are often endorsed by multinational enterprises and other actors from developed economies⁶⁴ that are equally the recipients of the proceeds of corruption. African countries are unable to invest on healthcare, which is partly a legacy of Structural Adjustment Programmes,⁶⁵ the Washington Consensus on neoliberalism, heavy debt burden and unfavourable international trade. Richer countries have access to cheaper loans that are handy for Covid-19 stimulus packages, but African countries⁶⁶ are charged considerably more interest plus other stringent conditions.

The unbalanced international economic system contrasts starkly with the Capability Approach and its emphasis on access to opportunities and resources and ability to make informed choices and achieve valued objectives.⁶⁷ Fundamental changes are needed in the international economic order to promote fair and accessible opportunities that will enable African economies to develop and sustain public health capacity and capability.

III. Conclusion: Reinvigorating Capacity and Capability

Against the backdrop of the current Covid-19 pandemic and with insights from the Capability Approach, Institutional Theory, Constructivism, New Regionalism Approach and Actor Network Theory, this paper demonstrates the need for appropriate investment and fostering an institutional climate for public health in the African continent and indeed globally. A refocused AU for public health is evident in the ACDC-led regional response to Covid-19. While the ACDC represents a marked departure from fragmented approaches to tackling infectious diseases and demonstrates a viable pan-African approach, the

⁶⁰ Nicolás M. Perrone and David Schneiderman, 'International Economic Law's Wreckage: Depoliticization, Inequality, Precarity,' in Emiliios Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Cheltenham: Edward Elgar, 2019), 446-472, 446.

⁶¹ Ibid.

⁶² Jason Hickel, *The Divide: Global Inequality from Conquest to Free Market*, (London: Heinemann, 2017).

⁶³ Julio Faundez and Celine Tan, *International Economic Law, Globalization and Developing Countries*, (Cheltenham: Edward Elgar, 2010).

⁶⁴ Onyeka K. Osuji, 'Fluidity of Regulation-CSR Nexus: The Multinational Corporate Corruption Example,' (2011) 103(1) *Journal of Business Ethics* 31–57.

⁶⁵ Alexander E. Kentikelenis, Thomas H. Stubbs and Lawrence P. King, 'Structural Adjustment and Public Spending on Health: Evidence from IMF Programs in Low-Income Countries,' (2015) 126 *Social Science and Medicine* 169–176; Alexander E. Kentikelenis, 'Structural Adjustment and Health: A Conceptual Framework and Evidence on Pathways,' (2017) 187 *Social Science and Medicine* 296–305.

⁶⁶ Thomas Stubbs, Alexander Kentikelenis, David Stuckler, Martin McKee and Lawrence King, 'The Impact of IMF Conditionality on Government Health Expenditure: A Cross-National Analysis of 16 West African Nations,' (2017) 174 *Social Science and Medicine* 220–227; Thomas Stubbs and Alexander Kentikelenis, 'Targeted Social Safeguards in the Age of Universal Social Protection: The IMF and Health Systems of Low-Income Countries,' (2018) 28(2) *Critical Public Health* 132–139.

⁶⁷ Amartya Sen, *Development as Freedom*, (Oxford: OUP, 1999); Amartya Sen, 'Elements of a Theory of Human Rights,' (2004) 32(4) *Philosophy and Public Affairs* 315-356.

fragility of public health institutions and socioeconomic environments seriously question African countries' capacity and capability. Self-induced obstacles include inadequate health funding, poor governance and a culture of dependence that includes coloniality and neoliberalism.

The AU can play vital roles in developing workable African public health perspectives and strengthening the capacities of regional, sub-regional and national authorities. The preamble to the AU Constitutive Act similarly calls for 'necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them discharge their respective mandates.' The consideration of institutions serves a wider purpose since these are critical to economic development even in the case of public health.⁶⁸ It has been shown that disease burdens impede development in African countries. Improvements in public health capacity and capability can therefore assist in reducing poverty and promoting development in African countries.

On the other hand, the neoliberal international economic system is an external trigger for the region's public health vulnerability. The global community needs to address underlying structural issues in the international economic system affecting African countries' public health capacity and capability. Covid-19 has demonstrated that ineffective health infrastructure in a country or region potentially exposes the rest of the world to crises of disastrous proportions.

⁶⁸ John Gallup and Jeffrey Sachs, 'The Economic Burden of Malaria,' (2001) 64(1-2) *The American Journal of Tropical Medicine and Hygiene* 85-96; Jeffrey Sachs and Pia Malaney, 'The Economic and Social Burden of Malaria,' (2002) 415(6872) *Nature* 680-685.

Crisis, Opportunism, and Opportunity: How the Pandemic has Exacerbated Pre-existing Constitutional Tensions in the European Union

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I. Introduction

The global Covid-19 pandemic arrived at a time of pre-existing and overlapping constitutional crises in the European Union, and exacerbated them. Two are the particular subjects of this contribution. First, several Member States had been sliding into authoritarianism long before the pandemic hit.¹ The rise of 'post-fascism'² in Hungary in particular was already a matter of serious concern, as was the EU's failure to respond to it. Covid-19 has made this crisis worse, as Hungary has responded with a law suspending its Constitution and allowing the government to rule by decree, while the EU has continued to merely wag its finger. This calls into question the Union's commitment to its claimed foundational values, amongst which are democracy and the rule of law.³

Secondly, tensions between 'northern' and 'southern'⁴ Member States over fiscal discipline and economic solidarity have remained unresolved since the last Eurozone crisis. The EU's response to the crisis beginning in 2008 revealed the deep conflicts between the debtor and creditor states of Europe, and raised complex legal and political questions as to how the Union could and should assist Member States in financial distress. These questions have now resurfaced in the context of Covid-19, with ill-tempered arguments between the so-called 'frugal four' (Austria, Denmark, the Netherlands, and Sweden) and hard-hit states such as Italy and Spain as to how the Union should respond to the pandemic in monetary, financial, and economic terms.

Just as the pandemic (or at least its first wave) looked to have peaked in Europe, the German *Bundesverfassungsgericht* (Federal Constitutional Court, BVerfG) delivered a significant judgment⁵ that ties these two threads together. The BVerfG found in *Weiss* that the European Central Bank (ECB) had exceeded its authority by embarking, since 2015,

¹ See, generally, Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019); András L Pap, *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy* (Routledge 2018); Nor is such backsliding confined to Central Europe, as demonstrated by the recent electoral success of the far-right in France and Italy.

² Gáspár Miklós Tamás, 'On Post-Fascism' (*Boston Review*, 1 June 2000) <<https://bostonreview.net/world/g-m-tamas-post-fascism>>. This is a term I altogether prefer to the more common, more reductive, and less helpful 'populism', and to the 'illiberalism' preferred by Viktor Orbán himself.

³ Art 2 TEU.

⁴ This is itself a problematic binary, with undercurrents of stereotyping and sectarianism. For an example of such bigotry, see the sentiments expressed by Jelte Wiersma, 'Geen Stuiver Extra naar Zuid-Europa' ['Not Another Penny for Southern Europe'] *Elsevier Weekblad* (Amsterdam, 28 May 2020) <www.elsevierweekblad.nl/economie/achtergrond/2020/05/geen-stuiver-extra-naar-zuid-europa-207225w/>, and the accompanying illustration, which was also the front cover of that week's edition.

⁵ German Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, available in English at <www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2020/05/rs20200505_2bvr085915en.pdf?__blob=publicationFile&v=5>. In this paper, the judgment is referred to as *Weiss*, or *Weiss (BVerfG)* where necessary to distinguish it from the CJEU's earlier ruling in the same proceedings, which will be referred to as *Weiss (CJEU)*.

on a programme of purchasing Member State assets in an attempt to tackle low inflation rates; and that the Court of Justice of the European Union (CJEU) had not properly supervised the ECB's design and implementation of this programme. *Weiss* goes against the CJEU's conception of the doctrine of the primacy of EU law: that EU law trumps national law—including national constitutional law—in cases of conflict between them in the areas of the Union's competence; and that national courts cannot tell EU institutions what to do. The decision also complicates the EU's two ongoing constitutional and institutional crises, outlined above. First, critics allege—I think wrongly—that the judgment provides cover for democratic backsliding in Member States such as Hungary and Poland: if the BVerfG can challenge the primacy of EU law, then why can't the courts of other Member States do the same? Secondly, it calls into question the legal and political viability of attempts by the Union—and in particular by the ECB—to provide assistance to states badly economically hit by the pandemic. In this way, Covid-19 has provided yet more evidence of the unsuitability and unsustainability of the current legal, institutional, and constitutional architecture of the Eurozone.

This contribution therefore seeks to place the Covid-19 crisis in the context of a Union well-used to crisis, and already dealing with at least two when the pandemic hit. Will the Union muddle through as it has historically done, or do the structural tensions at work mean that a more radical rethink is needed? It begins by outlining the Hungarian government's response to the crisis: an 'Enabling Act', allowing for rule by decree. This approach, and in particular the cowardly European response, is here portrayed as a significant threat to democracy and the rule of law throughout the Union. Next, it deals with the effect of the BVerfG's judgment holding the Public Sector Purchase Programme (PSPP) of the ECB ultra vires.⁶ The judgment would have been a bombshell at the best of times, but its arrival during the pandemic threw things into even sharper relief: if the PSPP was ultra vires, there is no way that the ECB's new Pandemic Emergency Purchase Programme (PEPP) is within the Union's powers, and this raises serious questions about the ability of the Union and its Member States to mitigate the economic chaos wrought by the pandemic. The judgment is in many respects theoretically coherent and compelling (which is why those who accuse the BVerfG of giving succour to autocrats are mistaken), but its worrying political background raises serious questions about the ability of the Union to provide and co-ordinate the kind of action needed to stave off or alleviate post-Covid economic crisis. Finally, a way forward is sketched, involving the Union finally having the honesty properly to grapple with the inherent structural flaws of the Union in general, and the Eurozone in particular. In short, the Treaties⁷ must be amended, and it should not have taken a deadly pandemic to prove it.

II. On the Hungarian Enabling Act and the Democratic Crisis in the Union

The Hungarian Fundamental Law of 2011⁸ regularly contemplates its own negation: Articles 48–54 establish a total of six 'special legal orders' through which 'normal' constitutional rules can be set aside. These are the 'state of national crisis', the 'state of

⁶ Or, more accurately but less directly, holding *the CJEU's decision to classify the PSPP as lawful* ultra vires.

⁷ Two treaties form the legal and constitutional basis of the EU: the Treaty on European Union (TEU, originally the Treaty of Maastricht) and the Treaty on the Functioning of the European Union (TFEU, originally the Treaty of Rome).

⁸ A document of highly questionable democratic credentials: see Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press 2012).

emergency', the 'state of preventative defence', the 'terror-threat situation', 'unexpected attacks', and the 'state of danger'. It is through this last provision, defined as 'a natural disaster or industrial accident endangering life and property' that Viktor Orbán's Fidesz⁹ party initially channelled its legal response to the Covid-19 pandemic. However, chafing under Article 53 (3)'s imposition of a 15-day limit on decrees under the 'state of danger', at the end of March Orbán used his two-thirds parliamentary majority to pass what we can rightly call an Enabling Act,¹⁰ allowing him to rule by decree for an indefinite period. Others have written cogently of the Act as a 'constitutional moment';¹¹ of how it fits perfectly with Orbán's long-established patterns of behaviour;¹² and of the dim prospects of EU law being any use against it, at least in the short- to medium-term.¹³ What is important for present purposes is to contrast the brilliant opportunism of Orbán's move with the lumpen foolishness of the European response.

On 31 March, Commission President Ursula von der Leyen tweeted that:

[i]t's of utmost importance that emergency measures are not at the expense of our fundamental principles and values. Democracy cannot work without free and independent media. Respect of freedom of expression and legal certainty are essential in these uncertain times.¹⁴

She added that the Commission:

will closely monitor, in a spirit of cooperation, the application of emergency measures in all Member States. We all need to work together to master this crisis. On this path, we'll uphold our European values & human rights. This is who we are & what we stand for.¹⁵

Such dishwater platitudes are to be expected from a President who owes her position to the votes of MEPs from Fidesz and from Poland's ideologically-related ruling PiS¹⁶ party, and who thought it a clever idea to try to appoint a Commissioner for 'Protecting Our European Way of Life',¹⁷ a post later made no less nonsensical and insulting by being changed to one of 'promoting' this alleged 'way of life'.

Only very slightly less disappointing was the following day's joint statement from 17 Member States expressing 'deep concern' about 'the risk of violations of the principles of

⁹ *Fiatal Demokraták Szövetsége*, 'Alliance of Young Democrats'. Founded as a liberal student activist movement in the late 1980s, the party has shifted dramatically to the right.

¹⁰ Krista Kovács, 'Hungary's Orbánistan: A Complete Arsenal of Emergency Powers', *Verfassungsblog*, 6 April 2020, <<https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>>.

¹¹ Renáta Uitz, 'Pandemic as Constitutional Moment', *Verfassungsblog*, 24 March 2020, <<https://verfassungsblog.de/pandemic-as-constitutional-moment/>>.

¹² Kim Lane Scheppele, 'Orbán's Emergency', *Verfassungsblog*, 29 March 2020, <<https://verfassungsblog.de/orbans-emergency/>>.

¹³ Niels Kirst, 'How a Public Health Crisis Became an Aggravation of the Rule of Law Crisis in the European Union', *DCU Brexit Institute Blog*, 2 April 2020, <<http://dcubrexitinstitute.eu/2020/04/how-a-public-health-crisis-became-an-aggravation-of-the-rule-of-law-crisis-in-the-european-union/>>.

¹⁴ Ursula von der Leyen, Twitter, 31 March 2020, <<https://twitter.com/vonderleyen/status/1244960501085491202?s=20>>.

¹⁵ Ursula von der Leyen, Twitter, 31 March 2020, <<https://twitter.com/vonderleyen/status/1244960502385688576?s=20>>.

¹⁶ *Prawo i Sprawiedliwość*, 'Law and Justice'.

¹⁷ Tom Flynn, 'Undermining Our European Way of Life: The von der Leyen Commission Takes the Low Road', *DCU Brexit Institute Blog*, 19 September 2019, <<http://dcubrexitinstitute.eu/2019/09/undermining-our-european-way-of-life-the-von-der-leyen-commission-takes-the-low-road/>>.

rule of law, democracy and fundamental rights arising from the adoption of certain emergency measures'.¹⁸

A striking aspect of both these responses was their unwillingness—their seeming inability—to *name* Hungary, and to specifically state that Orbán's power grab would be resisted and challenged. The consequences of this diplomatic squeamishness soon became clear: just a day later, on 2 April, in an act of the purest, most distilled chutzpah, the Hungarian government had the gall to *join* in adopting the statement issued by the 'deeply concerned' 17 Member States.¹⁹ Whatever his other flaws, we can credit Viktor Orbán with being a master of comic timing.

Subsequently, the decrees came in thick and fast.²⁰ The plan to build a 'museum quarter' in Budapest's City Park, held up by the unexpected victory of the opposition in last year's mayoral elections, will go ahead. A person's legal sex will now be fixed at birth, and cannot be legally altered. Municipal theatres—rare islands of intellectual independence and the possibility of artistic and political dissent—will be brought under central government control. Quite what these measures have to do with stopping the spread of the coronavirus and managing the crisis is not clear. What *is* clear is the Enabling Act is mere opportunism, seizing on a deadly threat to permit the government to go about its agenda with the very minimum of political, legal, and press scrutiny.

The idea of 'naming and shaming' as an enforcement method only works if you *actually name* offenders, and if the offenders are *actually capable of feeling shame*. The refusal of the Commission and the Member States to name Hungary and to specifically condemn Orbán's behaviour illustrates the extent to which senior figures in Europe are beholden to a kind of comity of idiots, where each is afraid of being undiplomatic to the other, just in case the other might one day be undiplomatic to them.

This apparent reluctance of European heads of state and government to 'interfere' in one another's 'domestic' affairs is a relic of a bygone age, a time when we really could draw such bright lines between the 'national' and the 'European'.²¹ The Enabling Act adopted in response to the Covid-19 crisis does not just endanger Hungary and Hungarians, but Europe and Europeans: the rot can spread from the Member States to the Union, from the Union to the Member States, and from one Member State to another. Orbán's pollution of the Hungarian body politic; PiS's degradation of Poland; and the murders of Daphne

¹⁸ Government of the Netherlands 'Statement by Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden', 1 April 2020, <<https://www.government.nl/documents/diplomatic-statements/2020/04/01/statement-by-belgium-denmark-finland-france-germany-greece-ireland-italy-luxembourg-the-netherlands-portugal-spain-sweden>>.

¹⁹ Government of Hungary, 'Statement by Hungary', 2 April 2020), <<https://www.kormany.hu/en/ministry-of-justice/news/statement-of-hungary-02042020>>.

²⁰ 'Decrees That Have Nothing to Do with the Coronavirus Pandemic', *Hungarian Spectrum*, 1 April 2020, <<https://hungarianspectrum.org/2020/04/01/decrees-that-have-nothing-to-do-with-the-coronavirus-pandemic/>>.

²¹ Tom Flynn, 'Triangular Constitutionalism: Some Consequences of Constitutional Pluralism for Domestic Constitutional Thought' in Gareth Davies and Matej Avbelj (eds), *Handbook on Legal Pluralism in the EU* (Edward Elgar 2018).

Caruana Galizia in Malta²² and Ján Kuciak in Slovakia²³ are not directly related, but taken together they are all indicative of a Union sliding ever further into the mire, where the *appearance* of unity is more important than any actual substantive commonality of democratic standards, or those beloved ‘values’ of which we hear so much.

There has recently been at least some movement in terms of legal sanction for Orbán and those like him. In March, Advocate-General Kokott advised²⁴ the CJEU to find Orbán’s ‘lex CEU’, by which the Central European University was hounded out of Budapest, in breach of EU and WTO law. In April, the CJEU held that Poland, Hungary, and Czechia had failed in their obligations under Union law to join in the EU’s relocation programme for the distribution of asylum-seekers across the Union.²⁵ But these victories are partial, reactive, and belated, and have met with scorn from Fidesz.²⁶ Union law in general, and the EU Treaties in particular, are simply not geared towards the rectification of the kind of authoritarian opportunism of which Orbán is the standard-bearer.

In the present state of Union law, the solution must be, and can only be, political. The Hungarian Enabling Act exposes the idea that European conservatives can curb the excesses of their most obviously authoritarian bedfellows as the delusion it has always been. Nor are the EPP alone in sheltering undesirables: the Social Democrats and the Liberals are both happy to rely on the votes of members with questionable records and intentions.²⁷ Remedying the authoritarian drift in the Union requires concerted political action, both within and between Member States.

The Hungarian reaction to the Covid-19 crisis—and the European response—exposes the EU’s historical baggage about what it is, what it does, and what it is meant to be. From bailouts to borders to non-interference in ‘domestic’ politics, we must stop pretending that the EU can exist as a kind of rarefied space of apolitical technocracy. In this sense, we can learn a valuable lesson from Orbán: opportunities ought not be wasted.

It is to another instance of Covid-19 revealing politicians hiding behind technocracy, rather than engaging in difficult negotiations and attempting to gain electoral approval for the results, that we now turn.

²² Jean Claude Cachia and André P DeBattista, ‘The Malaise of Malta: Social Divisions, Weak Institutions, and Political Partisanship’, Political Studies Association 68th Annual International Conference, Cardiff, March 2018, available at <www.psa.ac.uk/sites/default/files/conference/papers/2018/20180328%20-%20Conference%20Paper.pdf>.

²³ Zora Bútorová and Martin Bútor, ‘The Pendulum Swing of Slovakia’s Democracy’ (2019) 86 Social Research 83.

²⁴ Case C–66/18 *Commission v Hungary* (AG’s Opinion) ECLI:EU:C:2020:172.

²⁵ Joined Cases C–715/17, C–718/17 and C–719/17 *Commission v Poland and Others* ECLI:EU:C:2020:257.

²⁶ See the comment of Orbán’s Justice Minister, Judit Varga: ‘#EU compulsory relocation system of migrants is dead and today’s #CJEU judgement won’t change that. It must be lonesome in the saddle since the horse died,’ Twitter, 2 April 2020, <https://twitter.com/JuditVarga_EU/status/1245653581262286848?s=20>.

²⁷ Jean Morijn and Israel Butler, ‘EPP More Likely to Expel Fidesz if Rival Groups Also Ditch Troublemakers’, *Euractiv*, 12 March 2019, <<https://www.euractiv.com/section/future-eu/opinion/epp-more-likely-to-expel-fidesz-if-rival-groups-also-ditch-troublemakers/>>.

III. PEPP talk: the BVerfG's judgment in *Weiss*

In March 2015, the ECB launched the Public Sector Asset Purchase Programme (PSPP),²⁸ under which it would purchase government and other public bonds of Eurozone Member States under certain circumstances and subject to certain conditions, in an attempt to get inflation rates—then very low—back to the ECB's target of being below, but close to, 2%. Five years later, on 18 March 2020, the ECB announced a Pandemic Emergency Purchase Programme (PEPP), whereby €750bn would be spent on purchasing public sector securities to shore up European economies during the Covid-19 pandemic.²⁹ The ECB was clear that the PEPP's architecture is based on that of the PSPP, but with fewer restrictions and conditions in order to enhance its effectiveness. The ECB must have been confident that it had the legal power to launch the PEPP: after all, the CJEU had held in 2018 that the PSPP complied with EU law, and was within the powers of the ECB.³⁰ However, just a few weeks after the launch of the PEPP, the BVerfG handed down its judgment in *Weiss*, responding to the CJEU's greenlighting of the earlier PSPP. The German court's judgment would have triggered a constitutional crisis—or something close to one—at the best of times. However, coming as it did while the pandemic raged across Europe, it raised serious questions not only about the ability of the EU to respond to the pandemic in monetary, financial, and economic terms, but about the very makeup and architecture of the Union in general and the Eurozone in particular: questions of long standing, surely, but ones thrown into new relief by the urgency and seriousness of the pandemic.

The question of the legality of the PSPP arose in 2017, when the programme was subject to a constitutional challenge in Germany. The applicants argued that the PSPP contravenes the Treaties' prohibition of lending to or otherwise financing the Member States,³¹ and the principle of conferral³² (under which the Union is not a body of unlimited competence, but has only the competences specifically bestowed upon it by the Member States in the Treaties). As such, the German state and its institutions would be prohibited from taking part in the PSPP, it being an illegal exercise of power by the Union. Under EU law, if any national court from which there is no appeal finds that the legality of an action of a Union institution is called into question in a case before it, the national court must refer the question to the CJEU for decision. Only the CJEU is competent, under the Treaties, to determine whether a Union institution has acted illegally.³³ This being such a case, the BVerfG referred the issue to the CJEU.

²⁸ Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), as amended by Decision (EU) 2015/2101 of 5 November 2015 (ECB/2015/33), Decision (EU) 2015/2464 of 16 December 2015 (ECB/2015/48), Decision (EU) 2016/702 of 18 April 2016 (ECB/2016/8), Decision (EU) 2016/1041 of 22 June 2016 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic and repealing Decision (EU) 2015/300 (ECB/2016/18), and Decision (EU) 2017/ 100 of 11 January 2017 (ECB/2017/1).

²⁹ European Central Bank, 'ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP),' 18 March 2020,

<https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html>.

³⁰ Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:815 (hereinafter *Weiss (CJEU)*).

³¹ Art 123 (1) TEU.

³² Art 5 (1) TEU, read in conjunction with Arts 119 and 127–133 TFEU.

³³ Art 267 TFEU, known as the preliminary ruling procedure.

In December 2018, the CJEU delivered its judgment,³⁴ holding that the PSPP is within the competences of the Union. This was perhaps to be expected: the CJEU is famous for the expansive approach it takes to determining Union competence. The Court held that the PSPP does not involve the ECB straying from the realm of monetary policy (which is an exclusive Union competence for those Member States in the Eurozone³⁵) to that of economic policy (which is an area primarily for the Member States, in which the ECB has only a supporting role³⁶). The CJEU held that in dividing competences between the Union and the Member States in this way, ‘the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies.’³⁷ Here is the root of the problem: though the separation may not be *absolute*, it is clear: monetary policy is for the Union, economic policy is mainly for the Member States. However, such a division is plainly impossible, monetary and economic policy being so utterly intertwined and inextricable.³⁸ The presence of such an unworkable distinction at the very heart of the Eurozone’s legal constitution is the result of political cowardice by those who wanted a shared currency but not a shared budget and shared liabilities—the very definition of having one’s cake and eating it.

Nevertheless, on the CJEU’s conception of the principle of the primacy of Union law, its judgment ought to have been the end of the matter: the BVerfG, as a court of a Member State and thus as a court of the Union, would have to accept this decision loyally, and dismiss the complaints in the domestic proceedings.

However, the CJEU’s conception of the primacy of EU law is not shared by the Constitutional and Supreme courts of numerous Member States, including Germany. In a long line of case law, the BVerfG has held that as the Union is a body of limited competences, and as the CJEU is a Union institution, both the Union as a whole and the CJEU in particular lack *Kompetenz-Kompetenz*: the ability to determine the limits of their own powers.³⁹ It cannot be left to the Union and its institutions to mark their own homework, and there remains a role, even if only a residual one, for the Member States and their courts to determine in a given case whether the Union has overstepped the bounds of the authority granted it in the Treaties.

It was mere coincidence that the BVerfG’s reaction to the CJEU’s judgment in *Weiss* came as the pandemic was at its peak in Europe, but the coincidence is a revealing one, and illustrates the precarity of the constitutional and institutional architecture of the Eurozone. The single currency may well be able to plod along when times are good, but as soon as things go bad (as they have now done twice, and very suddenly, first with the onset of the Eurozone crisis and then with the pandemic), the inability of the Union to react to events with the necessary speed and firepower is revealed.

For the BVerfG, the ECB had acted *ultra vires* by embarking on the PSPP without having conducted a proportionality review, in order to determine whether the programme was

³⁴ *Weiss (CJEU)* (n 30).

³⁵ Art 3 (1) (c) TEU.

³⁶ Art 127 (1) TFEU.

³⁷ *Weiss (CJEU)* (n 30) [60].

³⁸ Benjamin Braun, Daniela Gabor, and Benjamin Lemoine, ‘Enlarging the ECB Mandate for the Common Good and the Planet’, *Social Europe*, 8 June 2020, <<https://www.socialeurope.eu/enlarging-the-ecb-mandate-for-the-common-good-and-the-planet>>.

³⁹ See Tom Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU, and the ECHR* (Hart 2019) 2–4.

suitable, necessary, and appropriate for achieving aims that are within the ECB's competence, and whether a different programme, with fewer effects on economic and fiscal policy, could achieve the same monetary aims.⁴⁰ More than this, the failure (as the BVerfG sees it) of the CJEU properly to conduct such a proportionality review in the exercise of its judicial review functions rendered the CJEU's purported review 'meaningless',⁴¹ and its judgment '[in]comprehensible'.⁴² Accordingly, on the BVerfG's conception of the relationship between EU law and German law (which, let us remember, does not mirror that of the CJEU), the CJEU's judgment has no binding force in Germany. Therefore, the BVerfG, in the absence of effective judicial control of a Union institution by the CJEU, declared the PSPP ultra vires. The *Bundesbank* was ordered not to take part in the programme, though the BVerfG stayed this last order for three months, in order to give the ECB time to conduct the proportionality review it had failed to engage in. It is possible that, if it (or, more likely, the Bundesbank on its behalf) does so to the satisfaction of the BVerfG, the German court will revisit its verdict.

This was a momentous decision. In term of its theoretical fundamentals, though not the specific methods employed, I agree with it entirely: the kind of unqualified 'supremacy' (rather than the more circumspect 'primacy')⁴³ of EU law, and of the CJEU as its interpreter, for which some scholars advocate⁴⁴ has no basis in the Treaties or in constitutional theory, and fails to respect both the specific nature of the Union as a sui generis non-state legal order and the constitutions of the Member States. The more contingent, relational conception of the school of thought known as constitutional pluralism, where the Member States and the Union inhabit a legal heterarchy rather than a hierarchy,⁴⁵ is both more descriptively accurate and more normatively desirable.

However, though grounded in the best interpretation of the relationship between EU law and that of the Member States, the judgment should still give us pause in other respects: the case was brought by an array of academics, industrialists, and politicians with close links to right-wing political parties: not merely Angela Merkel's CDU and its Bavarian sister party, the CSU, but also the crypto-(and sometimes not very crypto-)fascist *Alternative für Deutschland*. Undergirding the applicants' case is a deeply unsavoury logic whereby the Union in general, and the Euro in particular, are a kind of German charity project, whereby Germany (and other 'frugal', 'thrifty', 'industrious', generally 'northern' states) graciously lets less 'responsible' ('lazy', 'dishonest', 'southern') Member States come along for the ride. Widespread across the German right, this worldview bears no relation to economic or social reality, and fails to acknowledge that the current setup of the Eurozone and the internal market is one from which Germany profits nicely.

Of course, politically distasteful applicants can still have a good legal case, as was the case here. The trouble is that in several passages, the BVerfG repeats ordoliberal

⁴⁰ Though note that here the BVerfG is engaging in the same pretence as the CJEU and the Eurozone's architects: that such aims are in fact severable.

⁴¹ *Weiss (BVerfG)* (n 5) [127].

⁴² *Ibid* [133].

⁴³ 'Supremacy' implies and requires an *erga omnes* hierarchy between norms or institutions within a single, integrated system or order. 'Primacy' is concerned with the *in casu* preference given to one norm or institution over another in the context of interacting but distinct systems or orders: see Matej Avbelj, 'Supremacy or Primacy of EU Law—(Why) Does it Matter?' (2011) 17 *European Law Journal* 744.

⁴⁴ See R Daniel Kelemen, 'The Dangers of Constitutional Pluralism' in Gareth Davies & Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Elgar 2018) 403.

⁴⁵ See generally Flynn (n 39) and references therein.

bromides about the risk of the PSPP reducing the incentive for ‘certain’ (ha!) Member States⁴⁶ to pursue ‘sound’ budgetary policies,⁴⁷ as if the question of budgetary ‘soundness’ were an objective standard capable of guiding legal action, rather than an entirely contingent concept, which varies according to the particular politics and economic approach of the person doing the sums.

The BVerfG’s judgment concerns matters that long predate the pandemic, and would have ruffled feathers in any circumstances. However, its publication during the pandemic has had two consequences.

First, it has consequences to the rule of law crisis discussed in the previous section of this chapter: it has been used by those who criticise constitutional pluralism—and argue for the untrammelled hierarchical superiority of EU law—as further evidence that whatever its theoretical rigour, and regardless of the good intentions behind those who developed it, constitutional pluralism is now a useful tool of autocrats, whereby they can justify their deviation from European norms of democracy, rights, and the rule of law.⁴⁸ After all, if the BVerfG (or the Italian *Corte Costituzionale*⁴⁹ or the Danish *Højesteret*⁵⁰) can contradict the CJEU, then any national court can, and there is nothing to stop Hungary or Poland from simply declaring ultra vires any CJEU judgment with which they disagree. The problem with this objection is that it regards all national courts—and all questioning of CJEU orthodoxy—as being essentially the same. Neither is the case. The German, Italian, and Danish courts, whatever one may think of their decisions, are legitimate, independent judicial bodies operating in functioning *Rechtsstaaten*. The same is absolutely not true of, say, the Hungarian *Kúria* or the post-‘reform’ courts of Poland. The opportunistic misuse of legitimate jurisprudence by government hirelings acting as judges in courts ‘captured’ by the executive does not discredit that jurisprudence. Besides, one may agree or disagree with the reasoning of the German, Italian, or Danish courts, but the reasoning is at least defensible: this is in contrast to some of the CJEU verdicts which have triggered Member State rejection, and similarly in contrast to the abusive jurisprudence and threadbare reasoning of, for example, the *Kúria*.⁵¹

Secondly, the BVerfG judgment raises significant questions about the viability of the PEPP, a key element of the EU’s economic and financial (not monetary: let us be honest) response to the pandemic. It is true that a programme such as the PEPP may satisfy the CJEU,⁵² but it is also true that it does not take much to satisfy the CJEU where the question of the Union acting within its competences is concerned. The PEPP being subject to even fewer and looser safeguards, conditions, and restrictions than the PSPP, it cannot satisfy

⁴⁶ *Weiss (BVerfG)* (n 5) [137].

⁴⁷ *Ibid* [171].

⁴⁸ See R Daniel Kelemen, Piet Eeckhout, Federico Fabbrini, Laurent Pech, Renáta Uitz, ‘National Courts Cannot Override CJEU Judgments’, *Verfassungsblog*, 26 May 2020, <verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>.

⁴⁹ Judgment 115/2018 (*Taricco II*) (available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf).

⁵⁰ Case 15/2014 of 6 Dec 2016, *Dansk Industri (Ajos)*, available in English at <http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>.

⁵¹ Hungarian Constitutional Court Decision 22/2016, available in English at <https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf>.

⁵² Sebastian Grund, ‘The Legality of the ECB’s Pandemic Emergency Purchase Programme’, Delors Institute Policy Brief (draft), March 2020, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3558677>.

the BVerfG in the light of its decision regarding the PSPP. This does not mean that the PEPP, or something like it, is impossible, but it does mean that the ECB will need to take a rather different approach if it is to satisfy the BVerfG that it is acting within the terms of its mandate and not infringing on areas rightly or wrongly (I think wrongly) hived off from Union competence. One might say that as a Union institution, subject only to the CJEU, the ECB should simply not concern itself with what the BVerfG has to say, and on the CJEU's reading of Union law and its relationship with national constitutional law, one would be right. However, the reality of European integration is more complex, and, one way or another, the contradiction will have to be resolved.

IV. The Way Forward

The Covid-19 crisis, aside from its own terrible toll, has exposed pre-existing tensions in the EU like never before.

It has given the EU's most authoritarian national government the perfect opportunity to pursue its agenda with the barest minimum of scrutiny, and the response from the Union and the other Member States is exactly the kind of dispiriting shrug to which we have become accustomed.

It coincided with a German court judgment of Union-wide importance, which brings to the very fore political, legal, and economic tensions within the Union—a judgment which came at perhaps the most inopportune time possible, just as the ECB was embarking on another round of asset purchases in an attempt to assist the Member States, particularly those doubly affected both by the Eurozone crisis and by the pandemic.

The solution, in both instances, should not—perhaps cannot—be legal (or, rather, judicial). It must be political.

As regards the rule of law crisis, the non-authoritarian Member States must finally live up to their responsibilities, and stop pretending that the abuse of democracy and constitutionalism in Hungary, Poland, and elsewhere is a merely 'national' problem. This may include Art 7 TEU's procedure in defence of the rule of law being deployed to its full extent, but cannot be limited to this alone: heavy political pressure must be brought to bear.

As regards the ECB's actions, those of us who are not beholden to 1950s ordoliberal fantasy visions of political economy must recognise two contradictory truths. It is true that the PEPP, like the PSPP before it, is an important and necessary step (but only a step) in correcting the foundational and fundamental flaw in the Eurozone: that is a monetary union, but not a fiscal one. It is also true that the PEPP is arguably illegal under the Treaties as they currently stand. On this question, the CJEU is simply wrong, and the BVerfG is right, no matter how much we may disagree with those who took the case, or with the German court's underlying political-economic assumptions. The only way to deal with this contradiction and reconcile these two truths with legal integrity and intellectual honesty is by Treaty amendment. This does not have to mean full-scale economic or fiscal integration. But it does mean some undoing of the unworkably bright line drawn between monetary policy on the one hand and fiscal and economic policy on the other. The Franco-German

proposal for a €500bn ‘recovery fund’ as part of the current EU budget negotiations⁵³—announced not long after the BVerfG judgment, but not in response to it—is a very small step in the right direction, but further demonstrates the limits of what can be achieved within the framework of the Treaties as they currently stand.

Both of these solutions require the Member States to stop covering behind the CJEU (in the context of democratic values and the rule of law) and the ECB (in the monetary and fiscal context), and to live up to their responsibilities as ‘Masters of the Treaties’. With 27 Member States, each with their own treaty ratification procedures and particular national sensitivities, no doubt this will be difficult. That is not an excuse not to try: Covid-19 has shown us that crises will not wait for us to get our act together.

⁵³ ‘Initiative franco-allemande pour le relance européenne face à la crise du coronavirus’, French Presidency, 18 May 2020, <<https://www.elysee.fr/emmanuel-macron/2020/05/18/initiative-franco-allemande-pour-la-relance-europeenne-face-a-la-crise-du-coronavirus>>; ‘Deutsch-französische Initiative zur wirtschaftlichen Erholung Europas nach der Coronakrise’, German Federal Government, 18 May 2020, <<https://www.bundesregierung.de/breg-de/aktuelles/deutsch-franzoesische-initiative-zur-wirtschaftlichen-erholung-europas-nach-der-coronakrise-1753760>>.

A “New Normal”: Legality in Times of Necessity: French Administrative Law under the Health Emergency

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Abstract

States of emergency test the limits of constitutionalism and our commitment to the rule of law (Dyzenhaus 2012). They tell us something about the ultimate power in a society and the very nature of state powers. French constitutions have a long history of arising from crises, revolutions and overthrows. The current political regime was born in 1958 at the time of the Algerian war of independence. More recently, the French have lived under a sustained period of emergency regulations following the terrorist attacks in Paris in November 2015. Now that a state of health emergency has been declared and extended it is possible to reflect on how key principles relating to the rule of law, such as legality and judicial control, are being re-shaped. This helps us to reflect on how the state seeks to command compliance from its citizens and how a balance is struck between necessity and legality. Key stages can be identified: a first stage when (judicial) control is muted and a second stage when judges re-assert their role once the risks linked to the pandemic have been curbed. This differentiation both confirms the risk of normalising an executive state of emergency (at the time of the peak) and the possibility of a judicial state of emergency emerging (once the first wave is over) (Ginsburg and Versteeg 2020). This brings into question how the next steps in the health emergency can be made subject to robust scrutiny and accountability mechanisms as necessity evolves.

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Key words

Emergency, executive powers, legality, enforcement, compliance

I. Introduction

Is the health emergency state confirming the “banalisation”,¹ “normalisation”² or “experimentation”³ of the exceptional trend that academics denounced regarding the state of emergency during the period 2015-2017 (triggered by the Paris attacks at the Bataclan and the Stadium of France on 13 November 2015)? The UN special rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism highlighted this risk in times of emergency across the world.⁴ In shifting the attention from a community’s potential for long-term well-being to its physical survival in the short term, states of emergency do not leave time and space for rational collective argumentation based on careful weighting between quantitative evidence and qualitative factors in an iterative and/or incremental manner. This leads to

¹ Jean-Louis Halpérin, Stéphanie Henneute Vauchez and Eric Millard (eds), *L'état d'urgence, de l'exception à la banalisation* (Presses Universitaires de Nanterre 2017).

² Stéphanie Henneute Vauchez, 'Introduction', in *Ce qui reste(ra) toujours de l'urgence*, 2018, 6-7.

³ Véronique Champeil-Desplats 'Aspects théoriques: Ce que l'état d'urgence fait à l'état de droit', in *Ce qui reste(ra) toujours de l'urgence*, 2018, 33.

⁴ Report to the UN Secretary General, UN Doc. A/72/43280, 27 September 2017, paragraph 16.

probes into whether the executive is all-powerful or whether courts and similar mechanisms provide for a form of judicial accountability, as Ginsburg and Versteeg have asserted.⁵ In answering this question for the French health emergency this paper highlights that states of emergency need to be looked at as processes with differentiated stages and constellations of actors, not as monoliths.

A long tradition in legal scholarship discusses emergencies in terms of law versus facts (politics or morality): do we need to find solutions to emergencies in the law or outside of it?⁶ Revolving around the boundary between legality and extra-legality, this question is especially relevant when it comes to enforcement and mechanisms to ensure citizens' compliance, maybe against their consent. The legitimacy of this enforcement is related to a conservative function of the state of emergency: the state of emergency is supposed to ensure that public bodies and social life are safeguarded against a great evil so that "normal" life can resume with the usual freedoms and liberties. States of emergency test the commitment of a legal order to the principle of legality and the rule of law.⁷

Among all the states of emergency established across the world to respond to the Covid-19 pandemic, analysing one case in depth, such as the French health emergency, helps with developing a more analytical approach. Three features of French administrative law – true any time, anyway – magnify the bluntness of the decision-making available to French public bodies during the Covid-19 pandemic. First is the centralisation of power in the national government, in tandem with an endemic reluctance to decentralise decision-making. Second is the limited space for dissenting voices in decision-making. Third is a narrow understanding of "legality" and compliance, based on a binary dogmatism with little room for pragmatism and flexibility. Yet, the Covid-19 pandemic highlights how these features are in need of adaptation when it comes to addressing new challenges.

After a brief contextualisation of the state of emergency in France the different phases in the health emergency will be analysed, namely its adoption, its enforcement, its extension and the resistance against it. The signs of wear and tear that ordinary French administrative law faces given the Covid-19 pandemic lead to a call for reimagining French administrative law – making it fit for the challenges of the 2020s.

II. A History of Crises

France has a long constitutional history of crises, with a regime dealing with state emergencies (then in the form of *état de siège*) going back to the 19th century.⁸ At the end of the First World War the French High Administrative Court developed the doctrine of "exceptional circumstances", according to which legality could be set aside when circumstances made it impossible for the administration to comply with the law, provided some conditions were met.⁹ This led to the inclusion in the 1958 Constitution of an article granting extensive powers to the French president in cases of serious and immediate

⁵ Tom Ginsburg and Mila Versteeg, 'Binding the Unbound Executive: Checks and Balances in Times of Pandemic,' 25 May 2020, available at SSRN: <https://ssrn.com/abstract=3608974>.

⁶ Kim Lane Scheppele, 'Legal and Extralegal Emergencies', in Gregory Caldeira, Daniel Kelemen and Keith Whittington (eds), *Oxford Handbook of Law and Politics* (OUP 2008) 165-184.

⁷ David Dyzenhaus, 'States of emergency', in Michel Rosenfeld and Andras Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 442-462.

⁸ Sébastien Platon, 'From One State of Emergency to Another – Emergency Powers in France', *Verfassungsblog*, 9 April 2020.

⁹ C.E., 28 June 1918, *Heyriès* and C.E., 28 February 1919, *Dol et Laurent*.

threats to the institutions of the Republic and of interruption to the proper functioning of the constitutional public authorities. This was meant as an answer both to the peculiar circumstances of the French surrender in 1940 and to the Algerian war of independence. This last event also caused a statute¹⁰ – still in force today – to be adopted in 1955 to regulate “states of emergency”. This statute was amended to provide the legislative framework for dealing with the terrorist attacks in Paris in 2015. Many of the specific powers introduced to address the threats of new attacks were then enshrined in the ordinary criminal procedure, in effect enacting permanent changes in the normal legal framework.

III. The Health Emergency as Adopted in the Law: Procedures vs. Circumstances

When Covid-19 struck France social distancing was first introduced on 14 March.¹¹ As the population did not comply with these first instructions the prime minister took more restrictive measures on 16 March based on “*the exceptional circumstances resulting from the Covid-19 pandemic*”. On 23 March the statute on the health emergency was adopted to introduce new provisions in four areas: public health, economic life, elections,¹² and parliamentary processes. In particular, the statute lists ten areas where individual freedoms can be curtailed, including a ban on free circulation except for essential travel, a ban on gatherings and restrictions on the freedom to trade. In cases of repeated breaches of the ban on circulation a criminal sanction of up to six months jail and 3,750 EUR fine was provided for. Three comments can be made about this system concerning the efficiency of governmental action, time malleability, and the limited parliamentary and judicial control over the state of emergency.

First, this state of health emergency has led to centralising power around the prime minister and the Home Office (in charge of public security), with the support of the *préfets* (*i.e.*, representatives of the state at the departmental level) in order to maintain public order and public health.¹³ In addition, as from 24 March, a scientific advisory body was set up to advise the French president in tandem with the “Comité analyse, recherche et expertise”.¹⁴ On 24 March the French president declared, “*We will overcome the virus thanks to science and medicine*”.¹⁵ French scholarship has expressed doubts as to whether covid-19 necessitated this totally new system as the previous 1955 emergency system was already available for cases of “*events presenting, by their nature and seriousness, the character of a public calamity*”. Tweaks to the existing system may have been possible.¹⁶ Indeed, it

¹⁰ Loi n°55-385 du 3 avril 1955 *relative à l'état d'urgence*.

¹¹ Arrêté du 14 mars 2020 *portant diverses mesures relatives à la lutte contre la propagation du virus covid-19*. For a starting point into the many implementing measures and most important political speeches, see: <https://www.vie-publique.fr/dossier/273938-dossier-coronavirus-mesures-pour-endiguer-lepidemie-discours-publics>.

¹² Olivier Béaud, ‘La surprenante invocation de l’article 16 dans le débat sur le report du second tour des élections municipales’, *JP Blog*, 23 March 2020.

¹³ Senate, *Deuxième rapport d'étape sur la mise en œuvre de l'état d'urgence sanitaire*, 29 April 2020, Mission de suivi de la loi d'urgence pour faire face à l'épidémie de Covid-19 (hereafter Senate, *Second report*), 91-93.

¹⁴ <https://www.enseignementsup-recherche.gouv.fr/cid151204/le-comite-analyse-recherche-et-expertise-care-covid-19.html>.

¹⁵ <https://www.elysee.fr/emmanuel-macron/2020/03/24/medecins-chercheurs-et-scientifiques-mobilises-contre-le-covid-19>.

¹⁶ Olivier Beaud, ‘L'état d'urgence sanitaire: était-il judicieux de créer un nouveau régime d'exception?’, (2020) *Recueil Dalloz* 891; Jean-Eric Gicquel, ‘Covid-19: crise sanitaire et crise des normes’, (2020) *Recueil Dalloz* 719; J. Petit, ‘L'état d'urgence sanitaire’, (2020) *AJDA* 833.

has been argued that most of the measures to fight Covid-19 had already been taken the day before the statute was adopted.

Second, the health emergency has impacted the time taken over the law-making process. For instance, time was especially squeezed for the adoption of the statute on 23 March. Adopted in less than three days (from 20-22 March), the bill was discussed without any real opportunity for amendments:¹⁷ there were repeated calls during the discussions to shorten discussions and press ahead, and for comments to be limited to essential matters.¹⁸

Third, the health emergency has been subject to little parliamentary or judicial control over executive decision-making.¹⁹ By way of parliamentary control, two missions, one of information (Lower Chamber) and one of monitoring (Upper Chamber),²⁰ are provided for. The former is chaired by a person close to the president, Richard Ferrand. For the 2015 emergency MPs could ask for investigations on the spot or hearings, an option that was not made available to MPs in the 23 March statute.

Control by constitutional, administrative and ordinary judges is also limited. In addition to the 23 March statute, an “organic” statute had been adopted to suspend time limits in preliminary references to the Constitutional Council: preliminary references pertaining to the constitutionality of the health emergency could hence be delayed until at least September 2020, thus escaping scrutiny when it would be most needed. The adoption of this statute had to comply with time requirements in accordance with the French Constitution: normally such a bill needs to wait for fourteen days between being tabled and being discussed. Covid-19 did not allow for such a delay.²¹ However, in its ruling on this organic statute the Constitutional Council confirmed its constitutionality despite the obvious breach of the constitution, due to the “*peculiar circumstances of the case*”.²²

IV. The Health Emergency as Enforced:²³ Legality, Prevention and Repression

The health emergency caused many practical questions to arise regarding its implementation and enforcement. This provides food for thought regarding a better understanding of how “legality” is conceived under French administrative law. “Legality” is highly specific, heavily reliant on sanctions by police and directed towards the efficiency of governmental action (*i.e.* central vs. local level) with little leeway for differentiation.

First, the legality principle in administrative action may refer to the fact that a statutory basis is needed to justify administrative decisions, especially when they limit individual

¹⁷ Paul Cassia, ‘L’état d’urgence sanitaire: remède, placebo ou venin juridique?’, *Mediapart*, 23 March 2020.

¹⁸ Pierre Januel, ‘Le Sénat en état d’urgence sanitaire’, *Dalloz Actualité*, 20 March 2020.

¹⁹ Manon Altwegg-Boussac, ‘La fin des apparences’, *Revue des droits de l’homme, Actualités Droits-Libertés*, (<http://journals.openedition.org/revdh/9022>).

²⁰ Senate, Commission des lois, *10 premiers jours d’état d’urgence sanitaire : premiers constats - Analyse des décrets et ordonnances (justice, intérieur, collectivités territoriales, fonction publique)*, 2 April 2020; Senate, *Second report* (n. 13).

²¹ <https://actu.dalloz-etudiant.fr/le-billet/article/un-nouveau-repli-du-conseil-constitutionnel-dans-son-role-de-contrepois/h/a1247a77d164c980639f8913ab0be8bf.html>.

²² CC, Décision n°2020-799 DC, 26 March 2020, *Loi organique d’urgence pour faire face à l’épidémie de covid-19*, §3 (available at <https://www.conseil-constitutionnel.fr/decision/2020/2020799DC.htm>).

²³ For an overview of the enforcement measures (staff, technologies etc), see Senate, *Second report*, (n. 13) 32 ff.

freedoms. In the case of Covid-19 the case law-based justification of “exceptional circumstances” was first relied upon, then dismissed in favour of a formal statutory-based exception, although it came back through the window in the constitutional case law in the form of “peculiar circumstances”. In addition, the French High Administrative Court has a particular understanding of the legality principle. As of 1 May the French High Administrative Court had decided eighty cases based on a specific procedure called “*référé-liberté*”, a procedure allowing a quick process when public bodies have harmed individual freedoms in a serious and obviously illegal way. In most cases the French High Administrative Court dismissed the challenges (often at the admissibility stage). In the very few cases where it did not, it asked the government to specify some aspects of its regulations, although with some oddities. One of the cases, decided the day before the health emergency was adopted, asked the government to clarify the exemptions to the lockdown for health grounds, to reassess the possibility of short trips near the home and to assess the risks caused by open-air markets.²⁴ Another decision led to the curious result that the government had to adapt its soft law guidance on the use of bikes during the lockdown but not to amend its hard law regulation in any way.²⁵ In both cases, the contribution of the French High Administrative Court to what counts as legality for protecting individual freedoms was minimal during the peak of the health emergency.

Second, respect for the legality principle is paramount when it comes to implementing the law and exercising coercive powers. Normally, “administrative policing”, a well-developed concept relying on the key idea that “freedom is the principle and restrictions the exception”, is used to balance individual freedom with public order (and matters such as public health), with an emphasis on prevention using administrative tools instead of repression through (criminal) sanctions. However, the health emergency reshapes this classic understanding: it organises repression and criminal sanctions up to incarceration in cases of infringement of the measures limiting freedom of circulation.²⁶ The government wanted to send a strong signal to the population with heavy criminal sanctions (up to six months in jail in cases of four violations). The enforcement by the police of these provisions has implications for individual freedoms and the risks of abuse have been real. For instance, problems of interpretation by the police force have been flagged up due to the sloppy formulation of the offences.²⁷ Very little guidance was provided to the police regarding which travel was allowed. In other cases, the police resorted to extensive surveillance techniques in order to ensure compliance. In Paris it rolled out drones, which led to concerns over privacy.²⁸ All in all, “legality” seems to be underpinned by the need to force citizens to comply with legal requirements at any cost.

Third, the uneasy balance between (central) legality designed in Paris and its implementation to address local circumstances is also a key element of French administrative law. Centralisation reaches very far. Many mayors tried to take measures to address the Covid-19 pandemic in their local government, some introducing curfews,

²⁴ C.E., 22.03.2020 (ord), n°439.674, *Syndicat Jeunes Médecins*.

²⁵ C.E., 30.04.2020 (ord), n°440.179, *Fédération française des usagers de la bicyclette*; <https://www.interieur.gouv.fr/Actualites/Communiques/Situation-relative-aux-autorisations-de-deplacement-a-velo-dans-le-cadre-du-confinement>.

²⁶ Jean-Claude Planque, ‘Le droit pénal bousculé par le covid-19’, *The Conversation*, 11 May 2020.

²⁷ Senate, *Second report*, (n. 13) 40.

²⁸ Jean-Michel Normand, ‘Confinement: la surveillance policière par drones dénoncée par deux associations’, *Le Monde*, 4 May 2020. After the complete lockdown ended, the *Conseil d’Etat* forbade this (C.E., 18 May 2020, n°440.442 and 440.445 (ord.), *Association La Quadrature du Net and Ligue des droits de l’homme*).

some forbidding access to open spaces or closing down hotels. In many cases they had to backtrack as the central government found these measures inappropriate.²⁹

One case sheds interesting light on this “central legality”, that of the *Ville de Sceaux*.³⁰ The *Ligue des droits de l’homme* challenged the decision of this local government to require masks for people circulating on the streets. The Home Office joined the challenge: it considered that the local by-law was implying that citizens could move freely on the streets at a time when people were not supposed to do so according to the national statutory framework. The French High Administrative Court quashed the local by-law: local provisions based on general administrative policing (*i.e.*, to protect security, salubrity and tranquillity) cannot derogate to a case of special policing (here: health protection) as a matter of principle. Only if two conditions were met could the mayor derogate from the national measures: firstly, when local specificities required the derogation; secondly, provided that the consistency and efficiency of the national provisions were not put in jeopardy. The principle and the first exception are in line with previous case law. However, the second condition is a striking innovation: the French High Administrative Court is not supposed to innovate but to follow case law closely when a decision is taken in speedy proceedings.³¹ As a consequence, mayors have seen curtailing of their ability to take measures differing from the national policy. This situation causes one to wonder: what matters most with legality in France? Uniformity across the country or efficient compliance despite differing needs in concrete local circumstances? In other words: legality for the sake of legality or legality for the sake of citizens’ well-being?

V. The Health Emergency Extended: Exiting the Lockdown Incrementally

Exiting the lockdown is challenging for most countries: governments face competing demands to relaunch the economy and re-establish individual freedoms on the one hand and to prevent the virus from reappearing on the other hand. On 11 May a statute extended the health emergency until 10 July. Once the emergency was extended critical voices became more insistent among the French population³² and legal scholarship.³³ The political discussions behind the extension of the health emergency have revolved around two key matters: first, mandatory isolation; secondly, tracing people in contact with sick people.

Regarding mandatory isolation, a loosening of the governmental approach can be noticed. In the first announcements mandatory isolation was widely conceived of to include vulnerable people and any person reported sick with Covid-19 on the French territory. However, the opposition to such a broad limitation to the freedom of circulation led the government to clarify that isolation would be voluntary in principle and that mandatory isolation would be limited to people travelling from abroad. Further exceptions were added for travellers coming from the EU, the Schengen space and the UK. Isolation for sick and vulnerable people would be purely voluntary. Asked to scrutinise the constitutionality of

²⁹ Senate, *Second report*, (n. 13) p. 28.

³⁰ C.E., 17.04.2020, n°440.057 (ord.): ‘Le maire presque privé de pouvoirs de police pour lutter contre le coronavirus’, (2020) *AJDA* 815.

³¹ Paul Cassia, ‘Le Conseil d’Etat démasque Sceaux, et vice-versa’, *Mediapart*, 19 April 2020.

³² Matthieu Goar, ‘Gestion du coronavirus: l’exécutif français jugé plus durement que ses homologues européens’, *Le Monde*, 2 May 2020.

³³ Paul Cassia, ‘Le confinement: 67 millions de privations arbitraires de la liberté de circuler’, *Mediapart*, 13 May 2020.

this extension, the Constitutional Council accepted these measures as constitutional provided that they were so interpreted that any measures forbidding a person to leave his/her home for longer periods than twelve hours a day would be authorized by a judge.³⁴

Regarding tracing people who had been in contact with sick people, two different strategies have been devised. The first one relies on human intervention, namely the training of small teams visiting the homes of people at risks, taking samples and educating them on protective behaviour. 20,000 to 30,000 people are needed to “break” the transmission of the virus among the population in this way. This means a highly resource-intensive system for tracing the virus. The second strategy relies on new technologies, namely an app called *StopCovid*. Problems have surfaced, with a risk of habituation to being monitored by technologies among the population,³⁵ complex technical implementation and a lack of guaranteed success. The app has been delayed. The Constitutional Council interpreted the statute extending the health emergency in such a way that the data for scientific research had to be anonymised; it also considered some provisions to be non-constitutional. These included, first, the requirement for assent to the implementation decrees from the French data protection authority; secondly, the obligation for public bodies to transfer their decisions pertaining to tracing to the Senate and the National Assembly.³⁶ This leaves a black hole when it comes to the monitoring of data processing in the coming weeks and months. The legality of this app is being shaped incrementally in an arm-wrestling match between public authorities and private technological firms³⁷ as much as between the executive and the legislative.

VI. The Health Emergency as Resisted: Discussion, Contestation, Monitoring

Polls showed a broad consensus regarding the French health emergency at first. Protests emerged only marginally, a striking feat for a country where the situation was rather different only a few weeks before. The “yellow vests” had been challenging Macron’s reforms for months in 2018-19 and painful reforms to the retirement system triggered demonstrations until the start of Covid-19. However, as the lockdown began getting longer, increasing opposition arose. Seventy criminal complaints were logged against the prime minister and the ministers of health, justice and/or the Home Office for their management of the crisis, for instance. At least three different levels of resistance to the health emergency can be identified, which could shape the exit from the lockdown, administrative law and life beyond it.

First, scientific, civic and scholarly discussions have flourished during Covid-19. If the French president has relied on science to address the pandemic, scientific controversies have quickly emerged, most famously in relation to hydroxychloroquine.³⁸ Civil society and MPs have started an open consultation on how society could look after Covid-19.³⁹ In scholarly circles Covid-19 has sparked discussions in traditional and modern media to an

³⁴ CC, Décision n°2020-800 DC, 11 May 2020, *Loi prorogant l'état d'urgence sanitaire et complétant ses dispositions*, paragraph 43.

³⁵ Senate, *Second report*, (n. 13) 77-85.

³⁶ CC, Décision n°2020-800 DC, (n. 34), paragraphs 67, 70, 77-78, 82.

³⁷ Damien Leloup, ‘Application StopCovid: La France isolée dans son bras de fer avec Apple et Google’, *Le Monde*, 28 April 2020.

³⁸ Emmanuel Drouet, ‘Chloroquine et infections virales: Ce qu’il faut savoir’, *The Conversation*, 6 April 2020.

³⁹ <https://lejourdapres.parlement-ouvert.fr/>.

extent never witnessed before. One academic has drafted a petition for the “return to ordinary legality”.⁴⁰

Second, civil society has been organising its activity in various ways, including a “réseau de vigilance sur l'état d'urgence sanitaire”,⁴¹ which monitors administrative action and its possible abuses. The *Commission nationale consultative des droits de l'homme* has set up a monitoring centre dedicated to the lockdown situation.⁴² Civil society is also actively involved in challenging administrative measures. The “référés-libertés” in front of the administrative judge mentioned above are most-often initiated by professional organisations and not-for-profits, representing sectorial, professional and social interests. Even though they did not succeed in clearly curbing the course of the health emergency in the first phase of the health emergency, their indirect impact cannot be understated. This willingness to call public bodies to account has led mayors to withdraw their by-laws once judicial challenges have been initiated.

Third, a wave of criticism has arisen against the French High Administrative Court, perceived as the protector of the executive during this crisis.⁴³ One specific issue pertains to its dual role of being both an advisor to the government and an administrative judge.⁴⁴ In the 2000s a discussion emerged around the application of article 6 Eur Conv H R to this institution, with Strasbourg eventually accepting this dual role and some of its associated features. At the time French academics strongly defended these specificities.⁴⁵ Today, this willingness has faded away: academics and practitioners denounce the lack of independence of the administrative judge.⁴⁶ They pinpoint that most challenges against administrative measures have been rejected, and the ones which have not been rejected are more symbolic than substantive.⁴⁷ The head of the French High Administrative Court, Bruno Laserre, and the head of the litigation section, Jean-Denis Combrexelle,⁴⁸ have tried to defend their institution – but to no avail.

The awkward position held by the *Conseil d'Etat*, between the executive and citizens, between responsiveness to necessity and protection of individual freedoms, has come very much to light with Covid-19. From the moment easing out from the lockdown came

⁴⁰ Olivier Pluen, ‘Réflexion sur la diffusion de la doctrine pendant l'état d'urgence sanitaire, suivie d'une proposition de loi ou pétition visant à favoriser le retour à la «légalité ordinaire»’, *RDLF* 2020 chron. n°39.

⁴¹ <https://www.voxpublic.org/Verbalisations-abusives-le-Reseau-de-veille-sur-l-etat-d-urgence-sanitaire.html?lang=fr>.

⁴² <https://www.cncdh.fr/fr/travaux-en-cours/observatoire-de-letat-durgence-sanitaire-et-du-confinement>.

⁴³ See above section IV.

⁴⁴ John Bell, ‘What is the function of the Conseil d'Etat in the preparation of legislation?’ (2000) 49(3) *ICLQ* 661.

⁴⁵ John Bell, ‘From ‘Government Commissioner’ to ‘Public Reporter’: A Transformation in French Administrative Court Procedure?’ (2010) 16(4) *European Public Law* 533–538; Axel Barbelin, ‘Rapporteur public: chronique d'une controverse annoncée’, (2010) *AJDA* 1574.

⁴⁶ Mathieu Touzeil-Divina, ‘Quand le Conseil d'Etat n'avance plus masqué pour réaffirmer qu'il est, même en juridiction, le Conseil «d'Etat» et non «des collectivités» - Observations sur C.E., Ord., 17 April 2020, *Commune de Sceaux* (n°440.057) à propos de l'obligation du port du masque dans l'espace public (municipal)’, *Journal de droit administratif* 18 April 2020. William Bourdon and Vincent Brengarth, ‘Le Conseil d'Etat se dévitalise alors qu'il devrait être l'ultime bastion des libertés’, *Le Monde*, 12 April 2020.

⁴⁷ Some criticisms are strong (e.g. Paul Cassia, ‘Etat d'urgence sanitaire: Le Conseil d'Etat (ne) change (que) sa méthode’, *Mediapart*, 2 May 2020); some more nuanced (e.g. Claire Saunier, ‘La position délicate du juge des référés face à la crise sanitaire: entre interventionisme ambigu et déférence nécessaire’, *JP Blog*, 11 April 2020).

⁴⁸ Jean-Denis Combrexelle, ‘Les juges administratifs du Conseil d'Etat se situent loin des polémiques’, *Le Monde*, 12 April 2020.

closer it started taking a different stance towards the legality of the administrative decisions. While no administrative decisions pertaining to the health emergency were quashed from March 23 onwards, the French High Administrative Court ordered the administration to provide masks in prisons on 8 May.⁴⁹ The approaching easing out of the lockdown as from 11 May features clearly in the judgment.⁵⁰ This judgment was then followed by two decisions, one enjoining public authorities to stop using drones in public spaces in Paris⁵¹ and the other enjoining changes to the regulation of religious celebrations.⁵² It has been noted that these judicial decisions, although technically taken in the form of speedy proceedings and thus temporary, have become final: the very compliance by the executive with these decisions makes any further proceedings redundant.⁵³

VII. The Health Emergency and a “New Normal” Legality: Reimagining Administrative Law?

The health emergency sheds light on the need to reimagine the conceptual, instrumental and functional components of French administrative law, to reconcile individual autonomy and collective concern for the common good. In more general terms, the very notion of “legality” may have to be re-visited to move beyond a positivist and black-letter approach to what it means beyond the legality/illegality dichotomy and why legality is a key feature of the rule of law. Factors such as time, quantitative and qualitative evidence for administrative decision-making, balancing individual privacy with collective health and spatial decentralisation and differentiation, impartial review of administrative action, exercising coercive powers in the light of social cohesion, and improved flows of better-explained information (inside the administration, between administrations and public bodies, across society) would all need to be given some place in the next administrative covenant in France. A new articulation between legality and extra-legality is needed. French administrative law could help provide conceptual frames and a practical toolkit to articulate the social and the political spheres for living together. Such a renewal of French administrative law scholarship is much needed to address the social and economic consequences resulting from Covid-19 – in France and beyond.

⁴⁹ C.E., 7.05.2020 (ord.), n°440.151, *Garde des Sceaux*.

⁵⁰ Paragraphs 21, 25-26, 29, 33.

⁵¹ C.E., 18 May 2020, n°440.442 and 440.445 (ord.), *Association La Quadrature du Net and Ligue des droits de l’homme*. Olivia Tambou, ‘Que faire face au développement des drones? Libres propos autour de l’ordonnance du Conseil d’État’, *Dalloz Actualité*, 25 May 2020.

⁵² C.E., 18 May 2020, n°440.366, 440.380, 440.410, 440.531, 440.550, 440.562, 440.563 and 440.590 (ord.), *W*.

⁵³ John Bell, ‘The importance of urgent interim orders in contesting French government rules on covid-19’, *British Association of Comparative Law Blog*, 3 June 2020.

Victims' Participation in Times of Covid-19 in Transitional Justice Accountability Mechanisms: What is Needed for Virtual Hearings to Fulfil this Right? The Case of Colombia and the Special Jurisdiction for Peace

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I. Introduction

The lockdown restrictions brought on by the Covid-19 pandemic have also impacted the administration of justice around the world. Faced with the impossibility of human contact, judges and prosecutors have had to postpone investigations and suspend hearings and other justice-related activities during the pandemic. Taking note of these delays, international bodies have called on States to ensure that justice remains possible. Indeed, as stressed by the UN Special Rapporteur on the Independence of Judges and Lawyers, today 'a functioning judiciary is more essential than ever.'²

Covid-19 has not only impacted justice systems in working democracies and peaceful States. It has also affected States undergoing conflict situations and engaged in transitional justice processes like Colombia. In such contexts, Covid-19 becomes one more factor to be considered when trying to fight impunity and stop human rights and humanitarian law violations. In such contexts, the question is not only about how to ensure justice but also, equally important: how to ensure that accountability mechanisms, like the Special Jurisdiction for Peace (SJP) in Colombia, are able to fulfil victims' right to justice, while at the same time providing them with meaningful participation throughout the process. This question appears crucial given that victims' participation is arguably not only a right but also, a key element of the healing and reparation process that both victims and society need, to come to terms with the legacy of mass atrocities. Victims not only need justice to be done, they also need to experience that justice is done. This can be achieved through their active participation in judicial proceedings.

This paper explores some of the challenges faced by victims to ensure that their right to participate in transitional justice accountability mechanisms remains a reality in times of Covid-19. In particular, it considers victims' participation through the use of Information and Communication Technologies (ICTs), particularly virtual hearings.³ The paper looks at these issues in the context of the work of the Special Jurisdiction for Peace in Colombia, an accountability mechanism established by the Peace Agreement signed between the Colombian government and the Revolutionary Armed Forces of Colombia (*Fuerzas*

¹ This article has been written as part of the AHRC funded project 'Legitimacy, Accountability, Victims' Participation and Reparation in Transitional Justice Settings – Lessons from and for Colombia'.

² Special Rapporteur on the Independence of Judges and Lawyers, 'Coronavirus Emergency: Challenges for the Justice System;', April 2020, available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25816&LangID=E>.

³ The use of ICTs in Colombia to facilitate the work of transitional justice mechanisms is not new. For example, ICTs have been used both as part of the implementation of the Justice and Peace Law, the transitional justice framework set up by Law 975/2005 in Colombia to deal primarily with the accountability of demobilised members of the paramilitary, and by civil society organisations.

Armadas Revolucionarias de Colombia or FARC) in 2016.⁴ It is divided into two sections. The first one considers the possibility to ensure victims' participation in contexts of inequality, insecurity, and lack of access to ICTs in times of Covid-19. The second considers the use of virtual hearings, to identify the requirements such hearings must fulfil to ensure victims' right to participate in such mechanisms. The article concludes with some final reflections on how to ensure victims' participation at the SJP during the pandemic.

II. Is it Possible to Ensure Victims' Participation in Transitional Justice Mechanisms in Times of Covid-19?

Impunity for mass atrocities is the rule in States undergoing transitional justice processes. It is possible because often those in power do not want the truth to be known or those guilty to be punished, as has been the case in Guatemala, Sri Lanka and El Salvador, but also because it is difficult to investigate and prosecute those responsible for serious crimes. Most States, undergoing processes of transition are still facing violence where many continue to be killed, disappeared, or displaced, and many others are under threat. Such conditions are serious impediments to justice. How can it be possible to recover and secure evidence in the middle of an armed conflict? How can it be possible to guarantee that a witness can appear in court to give her or his testimony without being killed? In addition, in countries that have been and continue to be devastated by war, the means to carry out investigations and prosecutions with due diligence are almost non-existent. For example, investigating the Rwandan genocide was a massive challenge, 'it started with the basic realities of life in a society in which both lives and institutions were shattered by genocide.'⁵

This means that in places devastated by conflict and with millions of victims, including Colombia, fulfilling victims' right to justice remains a major challenge, and this challenge grows exponentially with Covid-19. Indeed, Covid-19 is affecting conflict zones, where many victims are located, and where armed groups and illegal economies are at work. In those areas, as stated by the *Fundación Ideas para la Paz* (FIP), 'the institutions of the State are limited, infrastructure is reduced, access to goods and services is minimal, and people are exposed to the control of different criminal factions.'⁶

It is in these types of contexts where transitional justice processes and mechanisms try to do their best to ensure accountability for those responsible for crimes. But today, in contrast to what happened during the Nuremberg trials,⁷ where victims did not participate whatsoever, victims are meant to play central stage in the fight for justice and accountability through the recognition of their right to participate in criminal proceedings both domestically and internationally. That they are allowed to participate, to exercise this right, is crucial in transitional societies as that gives recognition to victims,⁸ to their harms and the violations suffered by them. It also helps them to rebuild trust in society and the

⁴ Peace Agreement between the Colombian Government and the FARC, 2016, p. 9.

⁵ Human Rights Watch, 'Law and Reality: Progress in Judicial Reform in Rwanda', 2008, section V.

⁶ FIP, '*Impactos y Riesgos del Covid-19 en la Paz y las Dinámicas del Conflicto*', 2020, p. 4, available at: http://ideaspaz.org/media/website/FIP_COVID19_web_FINAL_V3.pdf.

⁷ Susanne Karstedt, 'For Absence to Presence, From Silence to Voice: Victims in International and Transitional Justice Since the Nuremberg Trials', (2010) 17 Intl Rev Victimology 9.

⁸ Hannah Arendt, *The Origins of Totalitarianism* (1951).

State's institutions and may trigger an important reparatory experience.⁹ Today, justice without victims is simply not justice.

While this right of victims to participate in criminal proceedings has been upheld by courts and international bodies, the scope of this right remains contentious given that it clashes and is often in tension with various rights of an accused person, particularly their right to fair trial, and may also clash with the goals of the justice mechanism.¹⁰ However, we would argue that at the very least, the right of victims to participate in proceedings requires that victims are able to access justice mechanisms in a voluntary manner, based on adequate and timely information about how the justice proceedings work and what they offer.¹¹ Also, their participation must be effective (and not merely symbolic) as they should be provided with a real opportunity to influence the outcomes of the justice process by, for example, being heard,¹² and being able to present evidence or to object to evidence.¹³ For victims to participate, they also need *enablers* such as adequate legal representation,¹⁴ security measures¹⁵ and access to psychosocial support. For this participation to be truly reparatory and restorative, victims must be treated with dignity, with equality and non-discrimination, and new harm should be avoided.¹⁶ Victims' participation in justice mechanisms should be the result of permanent and meaningful consultation with them.

Based on these minimum principles that give meaning to a holistic right to participation, we can determine whether in countries emerging from conflict and undergoing a transitional justice process, like Colombia, it is possible to give effect to this right. In the case of Colombia, it should be noted that this right has been recognised in various legal instruments and judicial decisions, including in the normative documents that establish the mandate of transitional accountability mechanisms like the Justice and Peace Law as well as the ones establishing the SJP.¹⁷ Certainly, Covid-19 generates a new challenge for an already fragile accountability mechanism as is the SJP. According to the SJP prosecutor unit (UIA in Spanish), armed groups have been taking advantage of quarantine measures during Covid-19, to violate victims' rights.¹⁸ Likewise social leaders have been murdered at a rate of one person every 64 hours.¹⁹ Equally, during Covid-19, the possibility to reach out to victims is even more limited given that social distancing becomes necessary and

⁹ Pablo de Greiff, 'Theorizing Transitional Justice' in (2012) 51 *Nomos* 44.

¹⁰ Salvatore Zappalà, 'The Rights of Victims v. The Rights of the Accused', (2010) 8(1) *J Intl Crim J* 137.

¹¹ Corte Constitucional, Sentencia C-454/2006, magistrate Jaime Córdoba Triviño.

¹² Corte Constitucional, Sentencia C-209/2007, magistrate Manuel José Cepeda Espinosa and C-616/2014, magistrate Jorge Ignacio Pretelt Chaljub.

¹³ Claire Garbett, 'From Passive Objects to Active Agents: Changing Conceptions of Victim Identities at the ICTY and ICC', (2016) 15(1) *J Hum Rts* 40. Corte Constitucional, Sentencia C-516/2007, magistrate Jaime Córdoba Triviño.

¹⁴ Luc Walley, 'Victims' Participation in ICC Proceedings: Challenges Ahead' (2016) 16 *Intl Crim L Rev* 995.

¹⁵ Corte Constitucional, Sentencia C-782/2012, magistrate Luis Ernesto Vargas Silva.

¹⁶ Lorenn Walker and Katherine Wormer, *Restorative Justice Today: Practical Applications* (London, Sage, 2013).

¹⁷ Ley 975 de 2005, Article 37, Decreto 3391, 29 September 2006, Article 8, Decreto 315, 7 September 2007, Article 2, JEP, Appeals Section, Interpretation Decision TP-SA-SENIT 1, 3 April 2019, par. 64-71.

¹⁸ Unidad de investigación y Acusación de la JEP, *Dinámicas de Violencia, Afectación a Civiles y Control Social Durante la Cuarentena en Colombia: Un Análisis de los Factores de Riesgo en los Territorios y las Poblaciones de Interés para la jurisdicción Especial para la Paz*, 2020, p. 20, available at: <https://www.jep.gov.co/JEP/SiteAssets/Paginas/uia/Sala-de-prensa/Un%20an%C3%A1lisis%20de%20los%20factores%20de%20riesgo%20en%20los%20territorios%20y%20las%20poblaciones%20de%20inter%C3%A9s%20para%20la%20UIA-JEP.pdf>.

¹⁹ *Ibid*, p. 17.

many victims lack adequate ICTs facilities. Yet, 'technology provides new avenues for participation, enabling people to engage with the world and seek change in new ways'.²⁰ We argue in this article that ICTs offer important windows of opportunity for victims in Colombia to exercise their right to participation before the SJP even if challenges remain in place. We consider that these challenges can be surmounted through the use of specific measures that would permit the realisation of all principles that have been mentioned.

We acknowledge that victims in Colombia have expressed their concerns about using ICTs to permit their participation in the SJP proceedings. For example, the president of the *Asociación de Reclamantes de Tierra y Paz* has indicated that 'many persons in rural areas are victims, and we do not have the tools to communicate with others, we lack these resources and we would not have how to participate actively.' Another victim has also indicated that 'some could have the technology, but they do not know how to use it for a videoconference'.²¹ In Colombia, more than half of the population has access to the internet, and the expansion of internet networks has increased significantly in recent years.²² However, the digital divide remains big for the poor and those living in rural areas, many of which are victims of the conflict.²³

Despite the challenges, in Colombia there are various factors that could enable the use of ICTs to fulfil the right of victims to participate in judicial proceedings. First, the SJP has taken significant steps to deliver justice for victims,²⁴ and it knows that failure to deliver will only affect its legitimacy. From early March 2020, the SJP took measures to prevent and avoid risks of contagion of staff and victims, such as suspending time limits in proceedings, changing work schedules and implementing telecommunication work, among others.²⁵ The SJP shifted its work through virtual and electronic means, to respond to information requests, habeas corpus petitions, receiving reports from victims and victims' organizations and adjudicating on issues related to the release from custody of the accused.²⁶ But, transitional justice services must not postpone their activities indefinitely taking into account victims' urgent claims and needs. Transitional justice work should continue even in the hardest of circumstances, as a tool and as a hope to victims. If necessary, justice should proceed outside the courtroom.²⁷

²⁰ Helena Puig Larrauri, 'The Use of New Technologies: Expanding Opportunities for Peacebuilding?' (2013) Critical Reflection, Centre for Peacebuilding KOFF, swisspeace.

²¹ Valentina Parada Lugo, 'Las Preocupaciones de las Víctimas durante la Pandemia', *El Espectador*, 28 April 2020.

²² Robert Muggah and Gustavo Diniz, 'Using Information and Communication Technologies for Violence Prevention in Latin America' in New Technology and Prevention of Violence and Conflict' *in* Francesco Mancini (ed), *New Technology and the Prevention of Violence and Conflict* (New York: International Peace Institute, April 2013).

²³ OECD, 'Colombia Must Boost Digital Transformation and Take Further Steps to Ensure Benefits are Shared by All', 25 October 2019, available at: <https://www.oecd.org/newsroom/colombia-must-boost-digital-transformation-and-take-further-steps-to-ensure-benefits-are-shared-by-all.htm>.

²⁴ Laura Dulce Romero, 'Cómo se debe preparar la JEP para las diligencias virtuales en medio de la pandemia?', *El Espectador*, 10 May 2020.

²⁵ All of the SJP and National government measures regarding Covid-19 are available at: <https://www.jep.gov.co/Paginas/covid-19.aspx>.

²⁶ See SJP, AOG 014 2020, available at: <https://www.jep.gov.co/organosgobierno/Acuerdo%20AOG%20No%20014%20de%202020.pdf>.

²⁷ As the President of the Caribbean Court of Justice, Justice Adrian Saunders, said: 'A court is not a place; it is a service.' Adrian Saunders, 'The Court as a service not a place', 2020, available at: <https://www.unodc.org/dohadeclaration/en/news/2020/05/the-court-as-a-service-and-not-a-place.html>.

Second, in Colombia there are important and solid networks in place, both State institution networks as well as civil society networks. Both of these could facilitate participation. Indeed, the SJP is part of a 'system' where various mechanisms are present to achieve the goals of transitional justice including the Truth Commission, the Commission for Missing Persons and the integral system for victims. All of them working together, and in conjunction with other State institutions, such as the Prosecutor's Office, the Ombudsman's Office, the Office of the Attorney General and others, could provide an important platform for victims to come forward and make their voices heard in judicial proceedings. These networks of State institutions are not alone. Indeed, Colombia has very strong civil society organisations that reach victims across the country, regardless of race, sex, gender, ethnicity or political ideology. And while access to ICTs might be missing in some parts of the country, good coordination among State and non-State authorities could help victims to gain timely, effective, safe and secure access to ICTs if some key conditions are met.²⁸

Third, not all the victims of the armed conflict are in the same situation and/or in the same locations, when considering access to ICTs, and responding to Covid-19 challenges.²⁹ The SJP has so far prioritised seven macro-cases to fulfil its mission, each involving different perpetrators, violations, territories and victims. For example, case 001 considers the illegal retention of people by the FARC (kidnappings); case 003 deals with deaths illegitimately presented as casualties in hostilities by State agents (false positives); case 006 concerns the crimes committed against the Patriotic Union (a political party that claims to have been exterminated by State agents and paramilitary groups working under their acquiescence); and case 007 deals with recruitment and conscription of child soldiers by the FARC. Some of the victims associated with these cases find themselves in particularly vulnerable situations like those involved in case 006 (given their age) or indigenous groups or former child soldiers. Others have better access to ICTs and other resources such as the victims of kidnappings. Therefore, victims' participation is also context and victim dependant, even in times of Covid-19.

III. What is Needed to Ensure that Virtual Hearings Fulfil the Right to Participation of Victims in Times of Covid-19?

We argue that in the context of the Covid-19 pandemic, virtual proceedings offer an opportunity to bring justice outside the courtroom to deal with the legacy of mass atrocities that has taken place in Colombia. This is so, even if they are limited in their ability to ensure meaningful participation to victims.³⁰ To put it simply, justice cannot wait any longer to help the society to come to terms with the crimes of the past and must continue along its course. The crimes that have been committed and over which the SJP has jurisdiction amount to serious international crimes. Virtual hearings at the SJP could offer an opportunity for justice if they take adequate account of the necessary conditions for justice, including those related to connectivity and security, in order to enable victims' participation.

²⁸ See for example, Jean-Marie Chenou, Lina P. Chaparro-Martínez and Ana María Mora Rubio, 'Broadening Conceptualizations of Transitional Justice through Using Technology: ICTs in the Context of Justicia y Paz in Colombia', (2019) 13(1) Intl J Transitional J 92.

²⁹ See some the public claims of civil society organizations in this regard available on the website of the Colombian Commission of Jurists, at: https://www.coljuristas.org/sala_de_prensa/articulo.php?id=296.

³⁰ International Commission of Jurists, 'Judiciaries during COVID-19: South American experience', 29 April 2020, available at: <https://www.icj.org/judiciaries-during-covid-19-south-american-experience/>.

Certainly, the experience of attending a judicial proceeding, such as a hearing, and of physically interacting with magistrates, justice officials, lawyers, the accused and other actors, can hardly be replaced by a virtual hearing.³¹ Given the limitations virtual hearings present, the SJP will have to decide on a case-to-case basis³² whether it is possible and pertinent to conduct a virtual hearing. Virtual hearings should be considered only in relation to those cases where holding them is of utmost importance for the administration of justice and where there is no other way to secure such objectives, while at the same time fulfilling the right of victims to participate in such proceedings. The SJP decisions so far are in line with this principle.³³ However, questions remain as to how best to fulfil the rights of victims to participate through virtual hearings.

The SJP is currently working towards the adoption of guidelines to be applied in such situations. As part of our work under the AHRC funded grant 'Legitimacy, accountability, victims' participation and reparation in transitional justice settings – lessons from and for Colombia' we have suggested to the Victims' Participation Commission of the SJP, the inclusion of key measures to ensure the right of victims to participate in an effective manner in virtual hearings and other proceedings. Some of these key measures identify the conditions that are necessary to enable participation in such contexts such as access to ICTs as well as knowledge on how to work with them. Other measures aim to address how to compensate for what is lost when administering justice in times of the pandemic using ICTs such as providing additional opportunities for filings, or other means to present views before the SJP.

To contextualise any consideration of conducting virtual hearings before the SJP, it is important to note that the SJP can conduct more than 17 different types of hearings. Simply put, one case includes various hearings. Some are private and others are public. However, among the hearings that the SJP can conduct, there are a few that are of particular importance to victims such as the hearing on recognition of responsibility of the accused. No such hearing has taken place so far at the SJP. This hearing is crucial in terms of legitimacy of the SJP but also for the fulfilment of various rights of victims, including their right to truth, justice and reparation. Given that what is at stake for victims depends on the nature of each hearing, we believe that the more important the hearing is for the fulfilment of victims' rights, the more measures that would be required to ensure their rights and their participation. And, in relation to hearings like the one on recognition of responsibility, great creativity would also be necessary to ensure that the symbolisms and rituals victims would have had in a hearing, in person, would somehow be present, even if in a different manner and format.

While Covid-19 is causing abrupt changes in the administration of justice, ICTs were already used by the SJP to facilitate victims' participation in hearing given that not all victims of the cases under their jurisdiction have been in a position to attend them (given the amount of victims in each case, their location, their degree of vulnerability, etc), so *blended options* of participation have already been necessary and will continue to be required, even in times of Covid-19, where some victims will be able to attend in person or virtually, and others would be involved remotely or would gain access to it through other

³¹ Michael Reed-Hurtado, 'Covid-19 fevers: justice stalled, justice displaced, justice lost?', justiceinfo.net, 12 May 2020, available at: <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/44252-covid-19-fevers-justice-stalled-justice-displaced-justice-lost.html>.

³² ICJ (n. 30) p. 65.

³³ Jurisdicción Especial para La Paz, Comunicado 037.

means (Youtube videos, CDs, etc). Bearing this in mind, we suggest that the various hearings of the SJP could happen virtually if the following elements are present:

Victims should consent to be part of virtual hearings

Any decision to hold a virtual hearing by the SJP shall be taken by engaging in dialogue with victims giving due weight to their views on security, biosecurity and their goals to hear and be heard in the administration of justice. This guideline is a clear manifestation of the need to obtain consent of and consult victims.³⁴ Also, it helps to understand what sort of additional measures in terms of security; bio-security and connectivity could be needed by victims in order to ensure meaningful participation.

Addressing ICTs gaps and enabling victims to use ICTs

Given the lack of access to ICTs and the digital divide that exists for victims in Colombia, it is crucial to ensure that victims have access to ICTs of the right quality to be able to consider virtual participation as an option.³⁵ In considering the question of access to ICTs, the SJP should include an age, gender, ethnic, territorial and disabilities dimension to ensure equality and non-discrimination, which are key principles underpinning the right to participation.³⁶

If access to ICTs does not exist, and it is not an option to facilitate victims' access to computers and enough data, then *blended options* should be considered, for example to host virtual hearings in a State building or communal room in the community with the help of SJP personnel and with all necessary biosecurity measures. Mobile phones should not be used to connect to ICTs as it does not provide the best experience for victims and it was not designed to facilitate engagement that can last for several hours.³⁷

In those cases in which virtual hearings are a viable alternative, justice officials will still need to design a connectivity strategy to address the knowledge gap that victims may have about how to use ICTs. This is crucial for victims to have access to timely and adequate information about proceedings. The strategy would need to provide victims with access to adequate training in the use of communication technologies to maximise the quality of their online participation. Officials will also need to ensure that victims know how the hearing itself will be conducted and the modalities of their virtual participation. Educational materials can be developed to this end (both printed and online). Some of these could take the form of tutorials on the use of the software and hardware, online rehearsals and webinar sessions, and guidelines on the modalities of the virtual hearing itself.

In addition to training, a connectivity strategy might also need to consider the hiring of IT personnel to ensure the smooth running of virtual hearings and their security. Some of their functions might include the testing of the software before the start of the hearing so that

³⁴ UN General Assembly, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on the participation of victims in transitional justice measures', UN Doc. A/HRC/34/62, 26 December 2011, para. 31.

³⁵ Richard Susskind, 'Digital exclusion; in *Online Courts and the Future of Justice* (Oxford University Press, 2019).

³⁶ Impunity Watch. "Restricted Access" Promises and Pitfalls of Victim Participation in Transitional Justice Mechanisms', July 2017, p. 47.

³⁷ BBC News, 'Remote Hearings for Family Court "Horribly Cruel"', 3 May 2020.

victims can see that the system is working, the creation of private and secure chat rooms for confidential communication between lawyers and victims, or to access psychosocial support, solving technical issues that might arise throughout the hearing itself, and the safe voice and video recording of the proceedings. Notably, IT personnel could play a key role in supporting victims during their online participation by enabling a communication channel through which they can ask technical questions.

Security and bio-security measures are essential

The SJP should also consider security measures for victims. As already noted, Covid-19 has exacerbated the power that illegal groups have in certain parts of the country and this has generated increased risks for victims who might be unable to contribute to justice proceedings. In this regard, the SPJ should consider not only bio-security measures for the victims but also for any person and staff involved in the delivery of justice to prevent and avoid risks of contagion. Likewise, it is also crucial that systems used to hold virtual hearings are not capable of being hacked, and that the identity of victims and the information and evidence they provide can be trusted as well as the one provided by witnesses, and that what victims or witnesses say could remain confidential (if the hearing is confidential), so as to ensure that their security is not endangered by the proceedings before the SJP.³⁸ Failure to do this might also jeopardise the legitimacy of the SJP.

Psychosocial support

Victims who participate through ICTs continue to require psychosocial support, even more so during the pandemic, given its mental health consequences, which can be exacerbated by insecurity in their places of residence.³⁹ Special measures must be put in place for victims to have adequate access to psychosocial support before, during and after virtual hearings. Such access to psychosocial support should take into account all required biosecurity measures so that it does not endanger the health of the victim or of those providing the service.⁴⁰ Appropriate means for psychosocial support could be provided through ICTs but the nature, and particular situation of the victim should be taken into account when deciding what is the best way to provide such services.

Compensatory measures

Virtual hearings permit an essential public service - the administration of justice, to continue its course. However, as already stated they are far from desirable in States undergoing transitional justice processes. Therefore, it becomes significantly important to consider the use and identification of adequate compensatory measures. Such measures should be considered in tandem with the planning of virtual hearings. The more that a virtual hearing could hamper the right of victims to participate, and the more that such hearing could affect their right to know the truth or to reparation, the more compensatory measures would be required. They should be identified bearing in mind the characteristics

³⁸ Corte Constitucional. "ACUERDO 01 DE 2020. Marzo 19." p. 1. See also, Carolina Villadiego-Burbano, 'Judiciaries during COVID-19: South American experience', ICJ, 29 April 2020.

³⁹ See World Health Organization, 'Mental health and psychosocial considerations during COVID-19 outbreak,' 18 March 2020.

⁴⁰ UN News, 'UN leads call to protect most vulnerable from mental health crisis during and after COVID-19: Huge needs in conflict-hit communities', 14 May 2020, available at: <https://news.un.org/en/story/2020/05/1063882>.

and situation of the victims (for example, age, disabilities, linguistic and cultural differences, gender, location, etc), the potential impact of the hearing in the justice process, and whether there are (or not) other similar opportunities for victims in the justice process to convey their views or object to evidence. For instance, justice officials could invite victims to submit virtual or written opinions or create a digital platform for victims to share video testimonies before the hearing. The receipt of virtual or written submissions could also take place after the virtual hearing through email or other means. Such compensatory measures depend on the type of hearing, whether it is adversarial or not, and must be adopted taking due account of the need to balance the rights of the victims and those of the accused.

IV. Conclusions

Covid-19 has impacted the administration of justice for institutions like the SJP in Colombia. Yet, the SJP is trying to respond and adapt quickly to the new context to ensure justice is done. A key opportunity is to provide victims with participation in the work of the SJP through virtual hearings and proceedings, but we argue that if virtual hearings are organised, they need to reflect certain minimum conditions and standards. If they do not, victims will not be able to be part of and experience the justice process.

Some jurisdictions, particularly those in countries undergoing conflict and in which access to the internet is not universal, might be resistant towards the idea of virtual hearings. The Colombian case demonstrates that even in restrictive contexts, the use of virtual hearings might be possible, and even desirable, as they could provide an alternative to victims who cannot physically attend a courtroom due to their location and/or imminent security risks.

The SJP cannot resolve the problem of access to ICTs affecting victims in Colombia but one of its assets, to conduct virtual hearings, are the State and non-State networks available across the country. Courts might take advantage of existing networks to ensure that victims, particularly those without internet access, can still participate in virtual hearings. However, we recommend that such experiences are properly assessed and monitored so that the way they are carried out improves over time.

Finally, the conversation on virtual proceedings has gained new relevance in the context of the Covid-19 pandemic, the use of this type of technology will outlive the pandemic. Technological developments will continue to provide better virtual experiences of justice in the future. What is crucial in this process is to ensure that the right measures are taken, such as compensatory or enabling ones, to facilitate access to justice and to fulfil the rights of victims to truth, justice and reparation.



The Right to Health

The Right to Health

The Right to Health: A Discussion

Judith Bueno de Mesquita, Lecturer and Sabina Michalowski, Professor, School of Law and Human Rights Centre [DOI: 10.5526/xgeg-xs42_011]

The two authors in this section took a few moments to discuss the broader themes related to their research.

One recurring theme is the content of the right to health and its relationship to notions of public health. There can be synergies or tensions between the approaches taken in these different areas, depending on how public health is approached.

Another issue is how to understand the relationship between policy makers and scientists, and the evidential basis for decision-making. It arises, for instance, in discussions about triage and prioritisation of access to treatment. It is important to consider who is involved in devising responses to the pandemic. It is interesting, for instance to consider who has been involved in developing the different triage guidelines and what their role is vis-à-vis the state; typically this has been professional associations or government bodies with public health professional participation. In most instances there has been little input from communities of interest such as disability groups; groups representing the elderly or minority groups with a higher susceptibility to the disease and mortality rate. Despite the importance of inclusivity and participation, so far, the global human rights community has not engaged with these issues very closely.

Science was understood, at least in principle, as a more effective, rational and more neutral, and less political or contentious, basis for decision-making. However, given the limited scientific knowledge about Covid-19, particularly in the first weeks and month after its emergence, the advice which is based on the 'evidence' has been evolving, whilst there has also been difference of opinion among scientists and social scientists about some aspects of the most appropriate responses. Policy or decision-making needs to continually respond to emerging research and take account of different findings and views. The triage guidelines tend to focus on the 'scientific' basis for their decisions, but if the science is not yet conclusive or sufficiently probative, what are the guidelines actually based on? Also, scientific criteria can be used to hide ethically contentious decision-making.

In terms of decisions about access to treatment or other interventions, there are difficult decisions that may arise where demand outstrips supply. There are certain approaches which are clearly unjustifiable, because of their discriminatory nature. For instance, though the evidence points to the fact that certain minority groups, because of the social determinants of health, are more susceptible to contract the disease and less likely to survive it, "clearly" it would be wrong to deny those groups access to treatment because they have a lesser likelihood to survive it. Yet, one could easily make the opposite argument that those groups should benefit from even greater access to treatment, a form of "affirmative action" to positively address structural inequalities. On the other hand, for some, it has been less problematic to deny treatment to persons over a certain age or with certain health conditions or disabilities, even though these denials would constitute other forms of discrimination. These differences in what societies find "clearly" problematic or

not, perhaps underscores our own limitations and limited capacity to be guided simply by instinct; involving communities of interest tends to be important in its own sake but also to serve as a counterbalance to the unconscious biases of those usually tasked with making policy and taking decisions.

From a human rights perspective, one can be uncomfortable with some of the triage criteria (e.g., age; health prospects) – partly because of the problem of the limited participation of affected groups in the development of the policy. Indeed, why should doctors and ethicists be allowed to take these fundamental decisions about who will live or die? Clearly, communities of interest should have a right to be involved in decisions on public resource allocation. By involving communities of interest, there is a lesser likelihood to arrive at blanket, and probably unintended positions or decisions; it reduces the danger of unreasonable or inflexible policies.

In conflict zones, the human rights community has not challenged prioritisations based on likely health outcomes for soldiers in need of treatment, and seems to defer to the medical or scientific community to determine who should receive treatment. Most soldiers will have similar health backgrounds (relatively young and healthy), which means triage decisions tend to focus exclusively or mainly on the likelihood that soldiers would survive treatment for battlefield injuries. Though even in this example, the decision will not necessarily be neutral, if for example decisions are also taken on the basis of the rank of the soldier.

Beyond the procedural rights associated with access to decision-making, are there additional substantive components of the right to health which may assist us with our approach to prioritization of access to treatment? There has been limited articulation by scholars and advocates of how precisely the right to health applies during pandemics; despite the knowledge about the significant risk of a global pandemic. The Committee on Economic, Social and Cultural Rights' General Comment 14 on the right to health, provides a useful focus on positive health outcomes. Similarly, the right to health is relevant to articulations of what might be meant by "maximum available resources," and the need for states to actively and positively invest in health systems. Beyond the right to health, these thorny questions raise other human rights issues such as the right to non-discrimination and the right to life.

It was obvious to the discussants that there are limitations associated with looking at issues from a single perspective; there are so many angles and complexities involved with these issues, many of them interlinked. And, maybe one of the most important lessons from the current pandemic is that discussion of these issues needs to continue in quieter times that make it possible to consider the many difficult issues with time for wide consultations.

Covid-19: An Inconvenient Truth? Re-evaluating Progress and Confronting Challenges for the Right to Health

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I. Introduction

As the global crisis of Covid-19 has unfurled, a grating dissonance can be observed between many States' responses and their right to health obligations under international human rights law. This began with the initial cover-up of the Covid-19 outbreak in China, conflicting with the right to access health information and the principle of transparency. Following on, the "keep calm and carry on" approach of governments of the UK, USA and Brazil, influenced by perceived economic imperatives and a belief that the cure would be worse than the disease,¹ failed to put in place timely protective measures for the right to health, contrary to advice and warnings from the World Health Organization (WHO). There have been particularly high rates of infection and deaths in these three countries. There is anxiety about limited capacity of health systems in low and middle income (and indeed high income) countries to mount an effective response to Covid-19, on the back of long-standing austerity and structural adjustment policies that have eaten away at the very core of structures required for an effective rights-based public health response,² whilst many States have adopted protectionist measures in conflict with right to health obligations of international assistance and cooperation. This is not to mention the use by some countries of the public health emergency of Covid-19 as a smokescreen for erosions of human rights, including restrictions on reproductive freedoms and civil society space. Even as public health imperatives have become increasingly central to Governments' actions worldwide, a shared global experience has been the disproportionate risks faced by vulnerable and marginalised populations, who are exposed to the double jeopardy of a significantly higher risk of catching and dying from Covid-19, and shouldering the burden of deprivations arising from social distancing measures which fail to protect their livelihoods and health and expose them to hunger and domestic violence, with significant implications in terms of equality and non-discrimination. A lack of accountability thus far for these shortcomings is also highly problematic.

Infringing on almost all of its attributes, Covid-19, is a perfect storm for the right to health, a fundamental human right protected under international human rights law. The United Nations (UN), the WHO and UN human rights procedures have clearly articulated that the right to health should be at the frontline of responses.³ This makes the comparative absence of the right to health from States' responses even more striking. States have largely embraced public health whilst eschewing the right to health. At the same time, predominantly, human rights scrutiny has honed in on derogations and legitimacy of

¹ Juan Pablo Bohoslavsky, 'COVID-19 Economy v Human Rights: a Misleading Dichotomy,' *Health and Human Rights Journal Blog*, 29 April 2020.

² Lisa Forman, 'The Evolution of the Right to Health in the Shadow of COVID-19,' *Health and Human Rights Journal Blog*, 1 April 2020.

³ UN, *We are All in this Together: COVID-19 and Human Rights* (United Nations: April 2020); WHO, 'Addressing Human Rights as Key to the COVID-19 Response', 21 April 2020; Committee on Economic, Social and Cultural Rights (CESCR), 'Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural rights', UN Doc. E/C.12/2020/1, 9 April 2020.

limitations on civil liberties, rather than considering socio-economic rights impacts, including the right to health.

Why has the right to health received so little attention beyond the UN system and what are the lessons to be learned by the human rights community? In this paper, I argue that this dearth of attention is firstly symptomatic of continued marginalisation of the right to health, particularly in the policy making context. Whilst the health and human rights community has celebrated progress of the right to health in recent years, particularly in terms of improving legal protections and the production of rights-based guidance for policy makers, there has been a conflicting and simultaneous erosion of a supportive policy environment. Health and other social support systems have been weakened by structural adjustment and austerity, which have also entrenched and exacerbated inequalities in the social and economic determinants of health. Weak health systems and inequalities are exposed by the catastrophic impact of Covid-19, highlighting the need for the health and human rights community to rethink how to measure and bring about progress. Secondly, it is also reflective of the limited attention of human rights oversight bodies and the broader health and human rights community to unpacking the right to health in contexts of pandemics, which raise unique and often complex questions for human rights. These are questions which the human rights community has scrambled to grapple with but without always producing a clearly articulated positions and guidance. Human rights oversight bodies, and the health and human rights community more broadly, will need to clarify more specifically how the right to health, and other human rights, apply in the context of pandemics, if they are to have a meaningful impact on responses. Thirdly, whilst the pandemic has, at least in most quarters, refocused acceptance of the importance of science and evidence-based approaches, which have been challenged particularly by populist right-wing politicians in recent years, it has not only revealed their importance in many respects, but also their limits when it comes to securing the rights and well-being of all people everywhere. The human rights community can learn from the science and must take it on board; at the same time it can contribute important analysis and tools to support policy makers to promote and protect the well-being of all people. The health and human rights community must put efforts into ensuring its insights meaningfully shape government responses, including from the outset of crises.

II. The Effects of Neoliberalism and Health Inequalities Call for a Re-evaluation of Progress in, and New Strategies for, Vindicating the Right to Health

The right to health is centrally protected in international law by the International Covenant on Economic, Social and Cultural Rights (ICESCR), which obligates States parties to, amongst others, take steps for the ‘prevention, treatment and control of epidemic, endemic, occupational and other diseases’ and create conditions to assure ‘medical service and medical attention in the event of sickness.’⁴ This requires health services and goods, such as medicines, to be available in adequate numbers; financially and physically accessible, and accessible on the basis of non-discrimination; acceptable including respectful of medical ethics; and good quality.⁵ Extending beyond health care, the right to health also embraces social determinants of health such as safe and healthy working conditions, food and nutrition, housing, and water, sanitation and hygiene. With obligations to respect

⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A (XXI) (1966), article 12.

⁵ CESCR, ‘General Comment No. 14, The Right to the Highest Attainable Standard of Health’, UN Doc. No. E/C.12/2000/4, 11 August 2000, para. 12.

(refrain from harm), protect (from third parties), and fulfill (promote) the right to health, States must adopt legislative, administrative, judicial, promotional and other measures and devote maximum available resources to progressively realise the right to health. Further, the right to health must be realized on the basis of cross-cutting human rights principles, including non-discrimination and equality, participation and accountability.⁶ These obligations have a central relevance in Covid-19 responses, to minimise mortality and morbidity and prevent retrogression in the enjoyment of a swathe of other human rights.⁷

Historically marginalised, there has been much progress in terms of increasingly extensive legal recognition of the right to health, and greater oversight provided by the international human rights system. With 170 State ratifications of the ICESCR, as well as even more widespread ratification of other international human rights treaties protecting the right to health, all States have assumed internationally binding legal obligations towards the right to health. Constitutional protections of the right to health are now found in the majority of countries worldwide, some of which are generating a flourishing jurisprudence.⁸ Legal positivists, including within the human rights community, have celebrated these legal gains as significant milestones for the right to health, yet it is acknowledged that in practice the transformative potential of international law, constitutional protections and litigation has varied significantly between countries.⁹

Whilst, on the one hand, States have been prepared to ratify international treaties and adopt constitutional protections recognising the right to health, on the other hand, many States have simultaneously adopted austerity and structural adjustment policies, resulting in the reduction or suppression of spending for healthcare and the erosion of social determinants of health, thus undermining the right to health in practice.¹⁰ With entrenched and widening inequalities in social determinants of health, the right to health situation has been particularly precarious for marginalised and vulnerable groups, including people living in poverty. Covid-19 has shone a torch on the underlying fragility of health systems in the face of sudden, widespread and acute need, with many systems experiencing shortages of equipment including ventilators, oxygen, protective clothing and testing capacity, denials of treatment by some private institutions, and interruptions to other essential healthcare, including cancer treatment, sexual and reproductive health care and immunisations.¹¹ In the earliest weeks of the pandemic, there was strong messaging from governments, and the UN, that Covid-19 does not discriminate.¹² Yet, with the passage of time, it has become clear that marginalised and vulnerable groups are at significantly higher risk of catching Covid-19, are more likely to die from it, and are more likely to suffer adverse consequences to their well-being and human rights from social distancing policies.

⁶ Ibid.

⁷ Dainius Pūras, Judith Bueno De Mesquita, Luisa Cabal, Allan Maleche, and Benjamin Mason Meier, 'The Right to Health Must Guide Responses to COVID-19', *The Lancet*, 29 May 2020.

⁸ Alicia Ely Yamin and Siri Gloppen, *Litigating Health Rights: Can Courts bring more Justice to Health?* (Cambridge, Massachusetts: Harvard University Press, 2011).

⁹ Audrey Chapman, *Global Health, Human Rights and the Challenge of Neoliberal Policies* (Cambridge: Cambridge University Press, 2016); Matthias Goldman, *Contesting Austerity: Genealogies of Human Rights Discourse* (Berlin: Max Planck Institute, 2020).

¹⁰ Timon Forster, Alexander E. Kentikelenis, Thomas Stubbs, and Lawrence P. King, 'Globalization and Health Equity: The Impact of Structural Adjustment Programs on Developing Countries', (2019) 80(5) *Social Science & Medicine* 83-113.

¹¹ See, for example, UNICEF, 'As COVID-19 Devastates Already Fragile Health Systems, over 6,000 Additional Children Could Die a Day, Without Urgent Action', 13 May 2020.

¹² See, for example, UN Network on Migration, 'COVID-19 Does Not Discriminate; Nor Should Our Response', 20 March 2020.

As well as older persons, racial and ethnic minorities and people with underlying health conditions, people living in poverty (a category which has disproportionate representation of groups marginalised on other grounds, e.g. racial and ethnic minorities and older persons) are at particular risks of infection where they live in overcrowded conditions, lack access to sanitation and lack access to protective measures in the workplace, whilst they are also particularly affected by social distancing policies which threaten their livelihood. Further, the World Bank has estimated that Covid-19 will push 71 million more people into poverty worldwide.¹³

Neoliberalism, which promotes a small role for the State, reliance on the market, and privatisation in health and other sectors, has provided the ideological underpinning of austerity and structural adjustment. The strain this approach has placed on the right to health is increasingly recognised.¹⁴ Yet, despite overwhelming evidence of harm, international human rights law, as currently interpreted, does not prescribe any particular type of economic system.¹⁵ Whilst some academics, NGOs and UN Special Procedures have taken an anti-neoliberal stance, other UN human rights bodies, such as the UN Committee on Economic, Social and Cultural Rights (CESCR), which oversees the ICESCR, have refrained from adopting a principled position against neoliberalism, preferring to consider the provision of care and services on a case-by-case basis.¹⁶ Further, the vast economic inequalities that are, at least in part, a product of neoliberalism (which has failed to redistribute economic gains),¹⁷ and which raise questions in terms of the obligation of States to devote maximum available resources to the right to health, have also not been robustly addressed by human rights bodies as questions of equality and non-discrimination. Interpretations of equality and non-discrimination under international human rights law have, to date, precluded the concept of economic inequalities, a position challenged by MacNaughton who describes income, wealth and social inequalities as the ‘greatest human rights challenge of our time.’¹⁸ The impact of Covid-19 on low income groups suggests very clearly that these groups are experiencing inequality and discrimination. A further apposite criticism comes from Moyn, who has also lamented the failure of the human rights community to fully engage with economic inequalities, and who is particularly critical of the contentment of human rights bodies to elaborate and hold States accountable for minimum entitlements, often called “core obligations”, at the expense of the more challenging and redistributive goal, within and between countries, of economic equality.¹⁹ Covid-19 illustrates how economic inequality matters, not only intrinsically, but also for securing core obligations that are vital for dignity and well-being and which the human rights community purports to uphold.

In recent years, the health and human rights community has increasingly engaged with the policy making context as well as with constitutionalism and litigation, particularly through elaborating human rights-based approaches to a range of different health issues and

¹³ Daniel Gerszon Mahler, Christoph Lakner, R. Andres Castaneda Aguilar, and Haoyu Wu, ‘Updated Estimates on the Impact of COVID-19 on Global Poverty,’ *World Bank Data Blog*, 8 June 2020.

¹⁴ Chapman (n. 9).

¹⁵ *Ibid.*

¹⁶ Paul O’Connell, ‘On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights,’ (2007) 7(3) *Human Rights Law Review* 483–509.

¹⁷ Thomas Piketty, *Capital in the Twenty First Century* (Cambridge, Mass: Harvard University Press, 2014).

¹⁸ Gillian MacNaughton, ‘Vertical inequalities: are the SDGs and human rights up to the challenges?’, (2017) 21(8) *International Journal of Human Rights* 1-23.

¹⁹ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, Mass: Belknap, 2018).

issuing many sets of guidelines for policy makers.²⁰ Whilst this clarification is important and welcome, Covid-19 raises questions about the scale of the mainstream impact of this enterprise. This sends an unequivocal message to the human rights community that, despite litigation and guidelines – both of which are playing an important role in Covid-19 responses²¹ but have not have a widespread impact for all - bolder approach are needed to secure the right to health for the most marginalised, including challenging the institutions, and economic models that underpin weak health systems and global inequalities.²²

III. The Human Rights Community Must Clarify Right to Health Obligations in the Context of Pandemics

The devastating effects of pandemic diseases have been recorded across centuries. Plague was one of the first documented pandemics, with two major outbreaks during the middle ages, the Plague of St Justinian, which struck in 542 AD, and the Black Death which resulted in an estimated 100 million deaths between the 14th and 17th centuries in Eurasia, and which led to some of the earliest approaches at international health control, including quarantine and the *cordon sanitaire*.²³ The 1918-19 influenza (Spanish Flu) epidemic led to an estimated 50-100 million deaths worldwide. More recent pandemic influenza outbreaks occurred in 1957, 1968 and 2009 (H1N1/Swine Flu), whilst outbreaks and spread of other novel infectious diseases, notably the HIV pandemic, and the SARS (2002-3), MERS (2016) and Ebola epidemics (2014-16) have continued to remind us of a continuing global threat.

Nascent international health collaborative engagements emerging in the nineteenth and early twentieth centuries were, indeed, spawned by fears of the spread of infectious disease, including cholera, yellow fever (in the Americas) and plague. Whilst the field of international, and more recently global, health has long since expanded to new areas, the remaining commitment to infectious disease control is reflected in the WHO's Constitution, which sets out a long list of duties, amongst which is stimulating and advancing work to 'eradicate epidemic, endemic and other diseases'.²⁴ In the context of this work, the WHO has not lost sight of this vitally important mandate. Whilst its response to infectious diseases has not been without fault,²⁵ it has consistently warned of the threat posed by epidemics and pandemics, and spearheaded a number of relevant initiatives, most notably the legally binding International Health Regulations (IHR).²⁶ As discussed in the chapter by Bueno de Mesquita and Meier in this publication, the International Health Regulations, which are grounded in human rights, require States to, amongst others: notify the WHO of

²⁰ Paul Hunt, Judith Bueno De Mesquita, Joo-Young Lee, and Sally-Anne Way, 'Implementation of Economic, Social and Cultural Rights', in Nigel Rodley, and Scott Sheeran (eds), *Routledge Handbook of International Human Rights Law* (London: Routledge, 2013).

²¹ WHO, 'Addressing Human Rights as Key to the COVID-19 Response' (n. 3); Aoife Nolan, 'Symposium: Constitutional Social Rights Litigation and Adjudication in a Time of COVID-19', *International Association of Constitutional Law Blog*, 28 May 2020.

²² Forman (n. 2).

²³ Anne-Emanuelle Birn, Yogan Pillay, and Timothy H. Holtz, *Textbook of International Health: Global Health in a Dynamic World* (New York: Oxford University Press, 2017), 4.

²⁴ Constitution of the WHO, International Health Conference (1946).

²⁵ Sarah Boseley, 'Experts Criticise WHO Delay in Sounding Alarm Over Ebola Outbreak', *The Guardian*, 22 November 2015.

²⁶ WHO, Fifty-eighth World Health Assembly Resolution WHA58.3: 'Revisions of the International Health Regulations', 23 May 2005.

events that may constitute a public health emergency of international concern; and develop the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern.

Whilst States have been criticised for failures to notify of, and prepare for pandemics, it is also the case that human rights bodies have been neglectful in attending to the delineation of right to health obligations in the context of pandemics, or addressing States compliance with the right to health, in terms of their preparedness for pandemics. The ICESCR clearly sets out that '[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases' is a central right to health obligation.²⁷ More recent international human rights standards do not include such specific language on epidemics, although this is not to say that their provisions cannot be interpreted as requiring State actions in this area. General Comment 14 on the right to health of the CESCR sets out, in prescient albeit sketchy terms, that States must put in place a system of urgent medical care in the event of epidemics or, more generally, for infectious disease control; they should: make available relevant technologies; improve epidemiological surveillance and data collection on a disaggregated basis; and enhance and implement immunization programmes and other strategies.²⁸ However, beyond this, little interpretive guidance had been promulgated by human rights procedures.

Moreover, a search of the Universal Human Rights Index database revealed just 17 recommendations made to States by treaty bodies or the Universal Periodic Review making explicit reference to pandemics and 22 to epidemics: these were reactive and almost all responding to the HIV pandemic, with a small number focused on Ebola (west Africa) and cholera (Haiti), rather than focused on pandemic preparedness.

In the aftermath of the outbreak, almost all international human rights bodies and experts have rapidly elucidated concerns about the impact of the crisis on human rights, yet many recommendations remain quite broad and generic,²⁹ phrased in terms of overarching principles, leaving some of the most challenging textual aspects of addressing Covid-19 unclear. For example, what positive obligations for the right to health apply in the context of pandemics?³⁰ What is the specific relationship of restrictions of other human rights and the protection of the right to health in the context of a pandemic?³¹ In times of acute need and scarce resources, for example for ventilators, personal protective equipment and vaccinations (when available), who should receive treatment as a priority?³² What is the relationship between restrictions of rights under the Convention on the Rights of the Child with the core principles of this treaty, including non-discrimination, the right to survival and development and the right of children to express their views in all matters affecting them?³³ These are all conceptual questions that require clarification by the CESCR, the Committee

²⁷ ICESCR, article 12.

²⁸ CESCR, 'General Comment No. 14' (n. 5).

²⁹ CESCR, 'Statement on the Coronavirus Disease', (n. 3); Commissioner for Human Rights of the Council of Europe, 'Learning from the Pandemic to Better Fulfil the Right to Health', 23 April 2020; WHO, 'Addressing Human Rights as Key to the COVID-19 Response' (n. 3).

³⁰ See, the paper by Koldo Casla in this publication.

³¹ Nina Sun, 'Applying Siracusa: A Call for a General Comment on Public Health Emergencies,' *Health and Human Rights Journal Blog*, 23 April 2020.

³² See, the paper by Sabine Michalowski in this publication.

³³ Aoife Nolan and Judith Bueno de Mesquita, 'Of Limitations and Retrogression: Assessing COVID-19's Impact on Children's ESC Rights,' *Global Initiative for Economic, Social and Cultural Rights Blog*, 26 May 2020.

on the Rights of the Child and other UN human rights bodies charged with overseeing and interpreting core international human rights treaties, to support States to make decisions on complex issues which are compatible with their international human rights obligations. With this in mind, there have been calls for treaty bodies to update guidance, including through adopting new General Comments to flesh out some of these concerns.³⁴

IV. Science, Human Rights and Evidence

Having worked on human rights in the field of public health for almost twenty years, one of the most frequent questions I have been asked by experts within that community, and which I have been rarely asked about by human rights lawyers, is what evidence is there that human rights can improve public health? This preoccupation is indicative of the overriding concern with evidence in public health (not to mention scepticism in some quarters about human rights).³⁵ In recent years there has been an increasing focus on the evidence of impact of a human rights-based approach for health. Whilst methodological challenges of measurement persist, research does suggest positive correlations, including in terms of promoting a more equitable approach to the right to health that secures inclusion for vulnerable and marginalised groups.³⁶ With impacts of Covid-19 disproportionately borne by marginalised and vulnerable groups, and with policy makers engaging particularly with scientists in formulating responses, the emerging evidence of impact of human rights suggests that more should be done to persuade policy makers to adopt human rights-based approaches, including for effective pandemic responses. Conveying the evidence of impact of human rights through more research and awareness raising will be an important part of strategies of political engagement by the human rights community, and will complement efforts to implement human rights in Covid-19 responses through constitutional social rights litigation to remedy and review policies or other measures that have harmed human rights.³⁷

Turning to the field of international human rights law, interpretation of the law is principally guided by normative considerations, yet that evidence also has a role to play is also clearly acknowledged. For example, the adoption and implementation of a 'national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population,' is considered a core obligation of the right to health.³⁸ Thus, strategies must be guided by both norms and evidence of how to achieve them.

The emergence and rapid global spread of Covid-19, a novel strain of coronavirus not previously identified in humans, has posed a series of urgent evidentiary questions surrounding transmission, severity of symptoms, the effectiveness and appropriateness of control measures in different settings, treatment and vaccines. Findings which suggest answers to some of these questions are emerging in an increasingly extensive, though not always coherent, patchwork of research. Whilst it is important that the public health community considers the evidence of impact of human rights, it is equally important that in interpreting international human rights law, the human rights community closely scrutinises

³⁴ See, for example, Sun (n. 31).

³⁵ Birn, Pillay and Holtz (n. 23).

³⁶ Paul Hunt, Alicia Ely Yamin, and Flavia Bustreo, 'Making the Case: What is the Evidence of Impact of Applying Human Rights-based Approaches to Health?' (2015) 17(2) *Health and Human Rights Journal*.

³⁷ Nolan (n. 21).

³⁸ CESCR, 'General Comment No. 14,' (n. 5), para. 43(f).

the public health evidence, taking into account the reliability of evidence, as well as what is still unknown.

The Covid-19 outbreak provides a range of insights about questions of evidence. Firstly, it highlights the range of fields from which evidence can be drawn. As well as the already acknowledged importance of epidemiological evidence, Covid-19 has illustrated that research from a much broader raft of disciplines should also be drawn on. Like human rights, public health is an inter-disciplinary endeavour, and - in addition to epidemiology - economics, statistics, medicines, anthropology, political science, sociology, law and behavioural science are key disciplines generating research that contributes valuable evidence to shape pandemic, and other public health responses. Secondly, Covid-19 has highlighted the great importance of international scientific collaboration, which is reflected by the ICESCR which obligates States parties to recognise the benefits 'derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields'.³⁹ A lack of scientific collaboration of China with the WHO hindered the pandemic responses at the outset, whilst countries, including the UK, have been reluctant to learn from experiences, including the evidence of impact of good practices, from other countries such as Taiwan or South Korea,⁴⁰ such as their successful approaches to testing and contact tracing. Thirdly, transparency surrounding public health strategies and the evidence informing them is another critical consideration illustrated by Covid-19. Where a lack of transparency surrounds the scientific evidence shaping public health policies, this obstructs preparedness, and stymies participation and accountability.⁴¹

In conclusion, the Covid-19 outbreak reveals that the development of an evidence-based public health policy demands critical engagement from human rights oversight bodies in terms of which fields of evidence are used to inform public health policy, political processes surrounding the development of policy, and whether policies engage with international as well as domestic public health guidance, whilst the evidence of impact of human rights must also guide responses to Covid-19.

V. Conclusion

Covid-19 has created a situation of global and national disorder for the right to health. Touching on all of its attributes, and raising many seemingly intractable problems, the pandemic casts light on obstacles to realising the right to health and provides an opportunity to evaluate the past work of, and think about new directions for, the health and human rights community. Now is the moment for the community to refine interpretations of the right to health and think strategically about how to effectively address challenges embedded in society and the global order to achieve health justice and well-being for populations worldwide.

³⁹ ICESCR, Article 15.4.

⁴⁰ Toby Helm, Emma Graham-Harrison, and Robin Mackie, 'How Did Britain Get its Coronavirus Response So Wrong?' *The Guardian*, 19 April 2020.

⁴¹ Richard Coker, 'Coronavirus can only be Beaten if Groups such as Sage are Transparent and Accountable,' *The Guardian*, 27 April 2020.

The Use of Age as a Triage Criterion

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I. Introduction

There is nothing new about age being relevant for access to certain types of health interventions. For example, some routine health checks are only offered from a certain age, some fertility treatment might not be made available after a certain age. This is usually justified on the basis of clinical benefits or risks associated with a person's age. Different questions arise where decisions on access to health care are being made with the objective of managing a shortage in available resources, that is in situations where more persons need a particular form of treatment than can be treated, for example with regard to organ transplants where demand tends to outweigh supply by far. In that scenario, it is controversial whether age should have a role to play when deciding how to allocate organs.

The current coronavirus pandemic has brought this question to the forefront. In some countries, demand for critical care beds and access to ventilators has by far exceeded supply, which meant that difficult triage decisions on how to regulate access had to be made. In other countries, such as Germany, Switzerland and the UK, similar discussions have been taking place in order to prepare for the possibility of this scenario arising. While clinical guidelines in some countries, e.g., Spain and Italy, regard age to be an acceptable criterion to exclude patients from access to ventilators, other countries, such as Germany, reject such an approach vehemently. But even where age itself is rejected as an access criterion, it might indirectly become relevant, for example where age influences the prognosis of recovery, especially if the prognosis is linked to the likely length of survival.

This contribution will address some of the ethical and human rights considerations that should inform the discussion of whether age can be regarded as a valid criterion to decide who receives life-saving treatment at a time of acute scarcity of medical resources, using the Covid-19 pandemic as a case study.¹

II. Different Countries' Reactions to Covid-19 Triage²

In some countries, such as Italy and Spain, at the peak of the pandemic not enough critical care beds were available to treat all patients who needed intubation. Difficult decisions on who to include or exclude from access to this particular form of life-saving treatment thus had to be made. Ethical guidelines were hastily drawn up, while hospitals were trying to cope as best as possible with an unmanageable situation.

¹ This contribution draws on Sabine Michalowski, Beatrice Han-Pile, Beatrice Carniato, Fabio Serôdio Mendes and Wayne, 'Triage in the COVID-19 Pandemic: Bioethical and Human Rights Considerations'; Joint Technical Report of the Essex Autonomy Project and the Ethics of Powerlessness Project. 6 April 2020; <http://autonomy.essex.ac.uk/covid-19>.

² The guidelines referred to in this part of the paper might not be reflective of the official approach adopted in each of the countries, but rather serve as examples to tease out some of the issues around the relevance of age for access to Intensive Care Unit (ICU) beds.

On 6 March 2020, the Italian Society for Anaesthesia, Analgesia, Resuscitation and Intensive Care issued recommendations,³ with the purpose of relieving individual physicians from the emotional burden of having to make such difficult decisions and contributing to the transparency of the decision-making process. With regard to age, the document indicated:

It may be necessary to establish an age limit for admission to the ICU [Intensive Care Unit]. It is not a question of making choices merely according to worth, but to reserve resources that could become extremely scarce to those who, in the first instance, have a greater likelihood of surviving and who, secondarily, will have more years of life saved, with a view to maximizing the benefits for the greatest number of people. ...

While age was thus regarded as a legitimate exclusion criterion, no specific age limit was suggested. The justification behind using age as a triage criterion was clearly based on the understanding that health care should be guided by the utilitarian principle of maximising benefits for the greatest number of people and that this was interpreted to mean to maximise not just the number of lives saved, but instead the number of life years saved, based on a prognosis of how many years of life each patient has left. Another consideration referred to in the guidelines was the potential resource intensity when saving those who, because of their age or pre-existing health conditions, would need longer treatment and assistance than younger and healthier persons.

The Spanish Society of Intensive and Critical Medicine and Coronary Units also issued ethical recommendations.⁴ Stressing the importance of the principles of maximising the greatest good and of distributive justice, the recommendations suggest that, faced with two patients in similar circumstances, the person with more life years ahead of them, adjusted by the quality of that life be prioritised. According to the guidelines, for older patients this requires taking into account the chances of survival free from disability, not simply survival as such. Nevertheless, the Spanish guidelines suggested a case-by-case approach for decisions about access to mechanical ventilation, even for patients above 80 years of age with relevant co-morbidities, though non-invasive forms of ventilation were recommended as the default for those patients. The recommendations also excluded all patients with cognitive deterioration from access to mechanical ventilation because of dementia or other degenerative diseases.

While both the Italian and Spanish recommendations were issued when a health care emergency was already underway, other countries considered ethical guidelines in preparation for similar crises, as was the case in Germany and Switzerland. Based on the predominance of the principle of human dignity, both the German and the Swiss constitutions attach equal value to each life, whatever its projected duration and its quality. Prioritising access to life-sustaining medical treatment based on age, life years and quality adjusted life years is therefore prohibited and ethical guidelines tend to reject age as a freestanding triage criterion, because of discrimination concerns. While prioritisation criteria that are regarded as permissible in these countries are seemingly based on clinical

³ Clinical Ethics Recommendations for Admission to Intensive Care and for Withdrawing Treatment in Exceptional Conditions of Imbalance between Needs and Available Resources, available at: <http://www.siaarti.it/SiteAssets/News/COVID19%20-%20documenti%20SIAARTI/SIAARTI%20-%20Covid-19%20-%20Clinical%20Ethics%20Reccomendations.pdf> (accessed 27 March 2020).

⁴ *Recomendaciones éticas para la toma de decisiones en la situación excepcional de crisis por pandemia COVID-19 en las unidades de cuidados intensivos*, available at: https://semicyuc.org/wp-content/uploads/2020/03/%C3%89tica_SEMICYUC-COVID-19.pdf (accessed 2 April 2020).

criteria and therefore supposedly age and disability neutral, age often comes into the equation as part of clinical assessments.

The guidelines issued by the Swiss Academy of Medical Sciences⁵ explain with regard to age:

Age in itself is not to be applied as a criterion, as this would be to accord less value to older than to younger people, thus infringing the constitutional prohibition on discrimination. Age is, however, indirectly taken into account under the main criterion «short-term prognosis», since older people more frequently suffer from comorbidity. In connection with COVID-19, age is a risk factor for mortality and must therefore be taken into account.

This more general, introductory statement thus already suggests that it is not only acceptable, but instead inevitable, that age is an important factor that needs to be taken into account as part of the clinical prognosis. The guidelines go on to set out different criteria according to which to determine the main triage criterion, a person's short-term prognosis. Surprisingly, short-term prognosis is defined differently depending on the level of capacity to provide treatment to all who are in need of it. In the situation where ICU beds are still available, but capacity is limited, patients are excluded from ICU treatment if their predicted survival span is less than 12 months, or where they suffer from a list of pre-existing health conditions, including severe dementia. Where no ICU beds are available and capacity therefore needs to be managed either through decisions not to admit or through discontinuation of treatment to free up beds, the list of pre-existing illnesses that would automatically exclude the patient from treatment is broadened considerably. For example, patients are already excluded from treatment if they suffer from moderate dementia, or if their predicted life span post treatment is less than 24 months. In addition, patients older than 85 years are automatically excluded and those who are older than 75 are excluded if they suffer from liver cirrhosis, stage III chronic kidney disease or a particular form of heart failure. It can thus be seen that clinical criteria are adapted to the availability of resources. Age itself, as well as age related co-morbidities take a more prominent role as scarcity of resources increases.

In Germany, meanwhile, it is maintained more consistently that age is not an acceptable criterion for exclusion from treatment. The German Ethics Council issued a statement in which it insisted that it would be unconstitutional to make triage decisions that do not give equal value to all lives.⁶ Regarding the difficulties this could pose for medical professionals having to make frontline decisions in a situation of scarcity, the statement limits itself to suggesting that the responsibility to make such decisions in line with constitutional principles and based entirely on clinical considerations lies with professional bodies and individual health professionals. In making the decision entirely clinical, age nevertheless becomes an indirect factor. This can be seen when looking at the professional guidelines issued by the German Interdisciplinary Association of Intensive and Emergency Medicine,⁷

⁵ 'COVID-19 pandemic: triage for intensive-care treatment under resource scarcity', 24 March 2020, available at: www.sams.ch/en/Ethics/Topics-A-to-Z/Intensive-care-medicine.html, (accessed 15 May 2020).

⁶ Deutscher Ethikrat. 2020. Solidarität und Verantwortung in der Corona-Krise. Available at: <https://www.ethikrat.org/fileadmin/Publikationen/Ad-hoc-Empfehlungen/deutsch/ad-hoc-empfehlung-corona-krise.pdf> (accessed 2 April 2020).

⁷ Entscheidungen über die Zuteilung von Ressourcen in der Notfall und der Intensivmedizin im Kontext der COVID-19-Pandemie, 25 March 2020, <https://www.divi.de/aktuelle-meldungen-intensivmedizin/covid-19-klinisch-ethische-empfehlungen-zur-entscheidung-ueber-die-zuteilung-von-ressourcen-veroeffentlicht>, (accessed 15 May 2020).

which list prioritisation criteria such as the clinical condition of the patient, co-morbidities, score on the clinical frailty scale (a scale that scores patients based on criteria such as general physical fitness, underlying diseases, dependency on others in their daily affairs) and the SOFA (Sequential Organ Failure Assessment) score. This overall evaluation will then be compared with that of other persons competing for the scarce resources, with priority being given to those with the best predicted clinical outcome.⁸ Age thus comes in as a criterion that indirectly influences a person's chances to obtain access to a ventilator.

The approaches to age as a triage criterion set out above differ substantially. In some, age is directly referred to as a criterion for triage ethics (Italy and Spain), suggesting age limits or a focus on life years saved which disadvantages older persons over younger persons. Others explicitly reject such an approach as discriminatory (Germany and Switzerland, with the Swiss guidelines making age an exclusion criterion in times of particularly limited resources, despite assurances to the contrary). Nevertheless, in all approaches age plays some role, to the extent that they rely on clinical assessments, given that co-morbidities, frailty etc. are more likely to be present in older than in younger persons.

III. Reflections on Age as a Triage Criterion

Triage decisions raise difficult ethical issues, because they require a decision on what is the best and fairest way to allocate scarce resources and, as a consequence, whose lives should or should not be saved. These are existential questions that touch upon deeply held ethical values that differ from country to country. Even within most countries, the criteria that should guide such decisions are controversial, as is how they should be reached and who should make them. The ethical debate on triage decisions seems to agree at least on one goal: the maximisation of lives saved.⁹ However, as the guidelines introduced in Part II demonstrate, fundamental disagreements exist as to whether this means that all lives need to be given equal value, no matter the person's age, expected life span and quality of life.

a) Age cut off point for treatment

Only the Swiss guidelines fixed a clear age limit, above 85 years, as of which patients are automatically excluded from access to a ventilator in times of extreme scarcity, regardless of the individual health and other situation of the person. The Italian guidelines, without actually identifying a particular age limit, considered that '[i]t may be necessary to establish an age limit for admission to the ICU.'¹⁰ A slightly different approach is that of applying age not as a freestanding triage criterion, but to consider age limits for treatment where certain co-morbidities exist, as can be observed in the Swiss guidelines which, in addition to stipulating an absolute age limit of above 85 years, also exclude patients of above 75 years if they have particular health conditions.

⁸ Guidelines in the UK adopt a comparable approach, see National Institute for Health and Care Excellence (NICE). 2020. COVID-19 rapid guideline: critical care. Available at: <https://www.nice.org.uk/guidance/ng159/resources/covid19-rapidguideline-critical-care-in-adults-pdf-66141848681413> (accessed 6 April 2020) and British Medical Association (BMA), 'Covid-19 – ethical issues: A guidance note,' available at: <https://www.bma.org.uk/media/2226/bma-covid-19-ethics-guidance.pdf> (accessed 1 April 2020).

⁹ For a discussion see, for example, WHO, 'Addressing ethical issues in pandemic influenza planning', WHO/HSE/EPR/GIP/2008.2, WHO/IER/ETH/2008.1, p.8.

¹⁰ See supra note 3.

The main advantage of a blanket cut off point for treatment eligibility in a triage context is clarity and making individual evaluations unnecessary at a moment when decisions need to be made quickly. However, a blanket rule is problematic for various reasons. Whatever age limit is set will necessarily be arbitrary, given how much the health condition of persons in the same age group can differ. There does not seem to be any particular age as of which mechanical ventilation is either futile or too burdensome, so that exclusion based on age can also not be justified in the interests of the patient him/herself. If this was the case, arguably these groups should be excluded from mechanical ventilation, whether or not there is a context of particular scarcity; however, this argument does not seem to have been made by anyone. Indeed, even those who promote a distributive justice argument according to which younger persons should receive priority over older persons when competing for ventilators,¹¹ do not seem to advocate for a cut-off point based on age. Age thus only comes into the decision-making process where choices need to be made about which of two patients should be given access to a ventilator in priority over the other. The same seems to apply where triage guidelines use the criterion of age combined with particular pre-existing health conditions as an exclusion criterion, as the suggestion is not that the patient would not benefit from the treatment, but rather that other persons would benefit more because of they are younger.

b) Maximising life years

Another issue often discussed in the context of triage ethics is that of aiming to maximise not just the net number of lives, but the number of life-years. This approach could be seen in the Italian guidelines which justified excluding older patients partly because the limited life span they have left would result in fewer life years being saved if an older person were to be prioritised over a younger. While often linked to age, in the sense that where a choice between a younger and an older patient who compete for a ventilator needs to be made, the argument is that the younger person should be prioritised in order to achieve a maximisation of life years. This criterion can also potentially apply where a choice needs to be made between two patients of the same age, one of whom has a better prognosis to live longer than the other, but where both have a chance to benefit from the treatment. Even though this approach might sound attractive at first sight, it needs to be considered that such prognoses are uncertain. The approach also raises concerns about discrimination, not just based on age, but also based on pre-existing health conditions and disabilities that might shorten the life prognosis. Indeed, one could, on this basis, potentially discriminate against persons from minorities or deprived backgrounds, given the data according to which they have poorer health outcomes, including with regard to Covid-19, raising serious concerns about race and other forms of discrimination.

Some suggest that age discrimination concerns could to some extent be alleviated by a particular distributive justice approach to triage ethics which focuses not just or even primarily on the life years to be saved, but on the years already lived. This approach which is sometimes also referred to as lifetime justice approach considers that those who have lived a shorter life have a greater entitlement to scarce resources than those who have already lived longer.¹² Such an approach would, of course, run into problems where the

¹¹ E.g., Govind Persad, 'Evaluating the Legality of Age-Based Criteria in Health Care: From Nondiscrimination and Discretion to Distributive Justice', (2019) 60 B.C.L. Rev. 889, <https://lawdigitalcommons.bc.edu/bclr/vol60/iss3/4>.

¹² Ibid.

younger person has much lower chances of surviving the treatment, or a shorter life span prognosis than the older person.

In addition to these more pragmatic considerations, the New York State Task Force on Life and the Law made an interesting point in its ventilator guidelines¹³ that were developed to prepare for future pandemics, based on wide interdisciplinary and public consultations. The guidelines highlight that 'age already factors indirectly into any criteria that assess the overall health of an individual (because the likelihood of having chronic medical conditions increases with age)'. There is therefore a risk that age becomes 'double-weighted' in triage decisions if age is considered as an additional factor to clinical considerations.

Just like the approach that uses a specific age as a cut off point for exclusion from mechanical ventilation in times of pandemics, the life years approach, including in its lifetime justice manifestation, would violate the principle stressed by the German and Swiss guidelines, that all lives are of equal value and that a choice between different lives cannot be made based on any inherent characteristics of the person, be they related to age, health, social worth etc. According to this view, choices of who to treat can only be justified based on clinical criteria related to the treatment itself.

c) The relevance of age in clinical triage criteria

Most guidelines on triage in times of pandemics recommend using clinical considerations focusing on the treatment prognosis as the main criterion. Such an approach is seemingly neutral with regard to characteristics of the individual other than those that are directly related to the treatment itself, including those that influence risks, benefits, futility and overall prognosis. Nevertheless, age and also disability might play a role that needs to be considered in order to determine the acceptability of such approaches. In a recent interview in *The Guardian*, the chair of the BMA Ethics Committee pointed out that, even though age and disability will only be criteria where they have an impact on a patient's ability to benefit from treatment ' [a]n approach based solely on clinically relevant factors may, statistically, prioritise the younger and, where clinically relevant, it may discriminate against those with underlying health conditions. We need to be alert to this.'¹⁴

A particularly concerning aspect of clinical decision-making in this context is the widespread reliance on clinical frailty scores that are applied, in particular, to elderly dementia patients. The Clinical Frailty Scale (CFS) assesses the overall level of fitness or frailty, ranging from 1 ('Very Fit') to 9 ('Terminally Ill'). Scores are predicated on an assessment of cognition and mood, mobility, function, social health, co-morbidities, medications and health attitude and differentiate on the basis of a person's need for assistance with day to day activities.¹⁵

In their Covid-19 Guidelines, the National Institute for Clinical Excellence in the UK, NICE differentiates between patients of a frailty score of below 5 and who are on that basis

¹³ Ventilator allocation guidelines, 2015, available at:

https://www.health.ny.gov/regulations/task_force/reports_publications/docs/ventilator_guidelines.pdf.

¹⁴ John Chisholm, 'Doctors will have to choose who gets life-saving treatment. Here's how we'll do it', *The Guardian*. 1 April 2020.

¹⁵ Kenneth Rockwood, Xiaowei Song, Chris MacKnight, Howard Bergman, David B. Hogan, Ian McDowell, and Arnold Mitnitski. 'A global clinical measure of fitness and frailty in elderly people', (2005) 173(5) *Cdn Medical Assoc J* 489.

regarded as more likely to benefit from critical care and those who have a score of 5 (moderate frailty) and above, where the benefit of critical care is more uncertain and where a discussion of a do not resuscitate order with the patient is recommended.¹⁶ Originally, the guidelines suggested the use of CFS scores irrespective of the person's age. This provoked significant opposition from civil society organisations which regarded it as potentially discriminating against persons with learning disabilities. In the words of the chair of "Embracing Complexity", a coalition of leading neurodevelopmental and mental health charities: 'There is a risk that the scale does not distinguish clearly enough between those who need support with daily living as they near the end of their lives and those who need support because of neuro-developmental conditions but may otherwise be healthy.'¹⁷ NICE reacted by changing the recommendation that clinicians use CFS scores 'as part of a holistic assessment where appropriate,' also acknowledging that '[t]he CFS should not be used in younger people, people with stable long-term disabilities (for example, cerebral palsy), learning disabilities or autism.' While this addresses discrimination concerns of a particular group of disabled persons, it does not alleviate concerns that a group of persons are likely to be denied treatment based on their age combined with their need for assistance.

To the extent that the CFS score has a bearing on the clinical indication for and success of mechanical ventilation in a patient, this might be an acceptable justification for it to be part of the triage decision-making process. However, where the score, such as that of moderately frail, primarily relates to a person's need for assistance with their daily affairs, the relevance of this for clinical decision-making cannot automatically be assumed, and it is important to distinguish between those factors that influence the outcome and prognosis of treatment and those that mean that the person might need more resources during and after recovery.

IV. Conclusions

As this short paper has tried to show, differences exist as to whether age is an acceptable triage criterion, either in the form of a general age limit for treatment eligibility, in the form of setting age limits where certain co-morbidities are present, or hidden behind clinical considerations. With regard to the open use of age as a triage criterion, it needs to be borne in mind that this would amount to direct discrimination based on age resulting in the likely death of the older person. Such an approach would require an ethically and legally sound justification. Its acceptability seems to depend on whether one adheres to consequentialist views that define the greatest good and terms of direct consequences of decisions, in this case in the form of maximisation of life years, or whether one adheres to dignity based ethics that require protecting each life equally, no matter how short its projected duration.

What seems almost more worrying than direct age based discrimination which is out in the open, is indirect discrimination under the guise of clinical criteria, where, as in the Swiss guidelines, lip service is paid to equal dignity and value of all lives, while including age

¹⁶ National Institute for Health and Care Excellence (NICE), 'COVID-19 rapid guideline: critical care', 2020, available at: <https://www.nice.org.uk/guidance/ng159/resources/covid19-rapidguideline-critical-care-in-adults-pdf-66141848681413> (accessed 11 June 2020).

¹⁷ Jo Stephenson, 'Avoid frailty score in Covid-19 guidance when assessing LD patients,' *Nursing Times*, 24 March 2020 <https://www.nursingtimes.net/news/policies-and-guidance/avoid-frailty-score-in-covid-19-guidance-when-assessing-ld-patients-24-03-2020> (accessed 6 April 2020).

based exclusion criteria without acknowledging that this violates the basic values upon which the guidelines supposedly rest. Awareness is needed that clinical criteria will often not be as neutral as they might seem, particularly when they are not applied in order to determine, based on each person's individual circumstances, whether or not he or she would benefit from being put on a ventilator, but rather for making choices between different patients in times of acute scarcity. It is all too easy to regard the elderly, if not as less deserving, nevertheless as less able to benefit from treatment.

There are no clear and easy answer to the dilemmas posed by extreme shortages of vital medical treatment during pandemics, but it is important that a transparent and fair decision-making process is in place and that the criteria are not random, discriminatory or based on intuitions and assumptions that are not openly admitted and thoroughly justified. At a minimum, this means that the criteria used are subjected to ethical discussion and scrutiny which ideally should take place outside of emergency situations, when there is time and space for such debate, and with wide consultation with all potentially affected groups.



**The Effects
of Covid-19
on the
Regulation
of the
Economy**

The Effects of the Covid-19 Pandemic on the Regulation of the Economy

The Effects of the Covid-19 Pandemic on the Regulation of the Economy: A Discussion

Johanna Hoekstra, Jessica Lawrence, Niall O'Connor and Eugenio Vaccari [DOI: 10.5526/xgeg-xs42_014]

The sweeping nature of the Covid-19 pandemic is having devastating effects on all sectors of the economy. This new development has not just caused consumers to restrict their usual spending. It has caused governments all over the world to limit travel, free movement as well as social and economic activity.

All of these governmental and social responses directly and indirectly affect companies and their operations. As a result, countries and international organisations are implementing a variety of fiscal and legislative measures to minimise the economic impact of this crisis. These measures ensure the performance of—or allow for reasonable changes to—ongoing contracts; protect the free movement of goods around the globe; safeguard employees' rights; and establish financial relief packages and rescue policies to keep companies afloat.

The papers in this section analyse the implications of the crisis and the measures announced or discussed by national governments and international organisations to minimise its effects from a variety of perspectives. These papers emphasise key issues that should feature prominently in short as well as long-term regulatory reforms. Overall, they advocate for more inclusive and just approaches to regulatory reforms than those implemented so far, in the immediate aftermath of the crisis.

Dr. Johanna Hoekstra investigates the judicial approach to the enforceability of obligations arising from international commercial contracts when one of the parties cannot perform their obligations due to the Covid-19 pandemic if the contract is regulated by transnational commercial law. In her paper, Johanna suggests that courts would use the existing legal instruments—the Convention for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contract, and the principles of the *lex mercatoria*—to promote a pragmatic interpretation of existing contracts. This pragmatic approach of the judiciary is likely to result in predictable rulings and, therefore, encourage parties to be cooperative and flexible in their dealings.

The pragmatic approach of the judiciary is not restricted to the international level or cross-border disputes. It is one of the main attributes of the judicial approach adopted by English courts in domestic insolvency cases. In his paper, Dr. Eugenio Vaccari focuses on some specific emergency measures enacted in the area of the insolvency law by the UK government. Particularly with reference to the suspension of wrongful trading, Eugenio warns of the risk that measures branded to save companies and, ultimately, jobs can have unwanted side-effects. These include delaying the inevitable (i.e. winding-up of unprofitable businesses) and unduly restricting legal rights (i.e. the creditors' rights to hold

directors accountable for improper use of company's assets), thus raising social and justice issues.

This “justice perspective” is further explored and expanded in the remaining two papers of this section. Dr. Jessica Lawrence writes on trade policies, support measures and equivalent barriers to trade subject to World Trade Organisation (WTO) law. In her paper, Jessica challenges not simply the legality and permissibility, but also and more importantly the desirability of these measures in light of their potential crippling effect on some less developed economies. Jessica concludes that it is reductive and, ultimately, inadequate to articulate international rules solely designed to promote the neo-liberal purpose of facilitating global trade.

Dr. Niall O'Connor follows a similar approach in presenting an overarching analysis of the virus' intrusion into working conditions through the lens of the “right to work”. Niall highlights the components of the right to work and its fundamental, social nature. He observes that its key features (right to a decent work, to freely enter into a profession/job, to fair working conditions and to be shielded against dangerous working environments) may critically counteract the employers' right to conduct a business, especially in the immediate aftermath of the crisis. In his paper, Niall observes that reliance on the “right to work” can ensure a robust employee-protective response to the pandemic for a variety of employees. These include: (i) frontline workers who had to continue going to their workplaces for the whole period of the crisis; (ii) home workers; and (iii) furloughed workers.

The economic effects of the Covid-19 pandemic will be felt for years to come. The devastating effects on companies and trade may be prolonged by the approach of public health officials, who are attempting to minimise the impact of the Covid-19 virus on the population. More importantly, the Covid-19 pandemic will have extensive and long-lasting (perhaps, permanent) effects on the way we conduct our lives. Where 9/11 resulted in permanent changes for the aviation and travel industries, it is safe to assume that no sector of the economy will be unaffected by the exogenous shock caused by the current crisis.

These societal and economic developments will impact the law regulating the economy, particularly in the long term. Speculating on how extensive the impact on regulations will be is premature and inappropriate at this stage, as no-one can reasonably predict the magnitude of changes caused by the Covid-19 pandemic on people's lives. The papers included in this section suggest that, at least in the immediate aftermath of the crisis, states will resort to domestic, un-coordinated solutions. In line with patterns observed in other recent crisis—such as the Great Financial Crisis and the 2001 recession—co-ordinated approaches are likely to be developed after the emergency phase. The papers reported in this section are designed to inform the discussion on these co-ordinated approaches and provide arguments for a more inclusive and just approach to regulatory reforms.

To conclude, the papers in this section do not aim at offering a comprehensive or exhaustive investigation of the effects of the Covid-19 pandemic on economic regulations. However, they suggest that similar legal and non-legal issues arise in a variety of sectors of the economy, at a domestic and international level. They also suggest the need for a more inclusive regulatory debate, as the interests of less sophisticated and “vocal” players—such as emerging economies, employees, small businesses and suppliers—have been frequently overlooked in the emergency measures adopted by governments in the aftermath of the crisis. As a result, these papers offer a tool to analyse the adequacy

of immediate responses and highlight issues that should be considered in any informed discussion on co-ordinated responses to the challenges raised by the Covid-19 pandemic.

Covid-19, Export Restrictions, and the WTO: Magnifying Global Divisions in a Time of Crisis

Jessica Lawrence, Senior Lecturer, School of Law [DOI: 10.5526/xgeg-xs42_015]

Abstract

Trade policy has been an important part of the global response to Covid-19. In order to boost production and increase the supply of critical goods, countries have lowered tariff barriers, put export restrictions in place, and smoothed the path to issue compulsory licenses for patented medicines and medical devices. All of these measures touch on trade policy, and fall under the ambit of the World Trade Organisation (WTO). This raises the question: do the flexibilities built into WTO law give countries the policy space they need to take emergency measures during this health crisis? This short paper explains the WTO rules and their application to national trade measures in response to Covid-19 using the example of export restrictions. It finds that from a legal perspective, WTO rules are flexible enough to permit countries to deviate from their normal obligations during this time of crisis. However, from a justice perspective, these flexibilities will be far more useful for wealthy developed states than for those with less purchasing power and production capacity. Indeed, the flexibility built into WTO law may prove ineffectual—and even detrimental—for poorer states, as it permits the wealthy the policy space to take measures in their own interest while leaving the less powerful without access to critical goods. The paper concludes that here, as elsewhere, the negative economic effects of Covid-19 will fall disproportionately on the poor and the vulnerable.

I. Introduction

In response to the Covid-19 crisis, countries across the globe have implemented policies to spur production of critical goods, support the development of vaccines and anti-viral treatments, and safeguard domestic supplies of medicines, protective equipment, and diagnostic devices. Trade policy has played an important part in this global response, as countries lower entry barriers for medical products, put up export restrictions to keep scarce supplies at home, and look for ways to increase the production of medicines and medical devices and ensure affordable access for their populations.

These measures fall within the scope of World Trade Organisation (WTO) law, under which countries have agreed to certain limits on their freedom to implement trade-related policies. These limits generally require countries to remove unnecessary barriers to trade, not to discriminate against products and services from other WTO members, to fairly administer their technical rules, to do away with certain types of subsidies, and to ensure a minimum level of protection for intellectual property, among other things.

Some of the trade measures that countries have taken to combat Covid-19 are permissible—even desirable—under WTO rules. For example, many countries have lowered barriers to trade in critical goods, seeking to increase supplies and protect supply chains by making it cheaper and easier for products to cross international borders. To this end, governments have suspended or even eliminated tariffs on medicines and other critical supplies, suspended the application of anti-dumping duties on medical goods, and streamlined customs procedures, creating “green lanes” for the rapid inspection and

approval of products necessary for the fight against Covid-19.¹ WTO members are certainly permitted to decrease trade barriers by lowering tariffs and simplifying entry procedures, so long as they do so in a non-discriminatory fashion, and observers have widely applauded these moves. Indeed, some have argued that they should be made a permanent part of WTO law after the crisis ends, as cheaper access to medical goods will be of long-term benefit to all.²

Other responses, however, are less clearly compliant with WTO rules. Measures like export restrictions and limitations on patent protections are WTO-compatible only if they fall under the exceptions and flexibilities available under the current regime. This raises the important question of whether the flexibilities built into WTO law give countries the policy space they need to take emergency measures during this health crisis, and whether in doing so WTO law promotes positive global outcomes.

This short paper addresses this question in two ways. First, it asks from a *legal* perspective whether or not WTO law permits the measures that countries have imposed thus far, and are considering imposing in the future. By way of illustration, it examines the rules that govern export restrictions on goods, explaining the requirements under the General Agreement on Tariffs and Trade (GATT)³ and the carve-outs and exceptions that countries can make use of in order to justify actions that would normally fall afoul of the WTO rulebook. It concludes that the WTO Agreements do contain flexibilities for at least some types of emergency measures, and permit governments to act in ways that would normally contravene their obligations in order to respond to a public health crisis.

Second, it asks from a *justice* perspective whether the legal flexibilities contained in the WTO rulebook are sufficient to protect the interests of all countries in ensuring access to critical medicines and supplies. Here, it discusses the ways in which WTO law's flexibilities, while facially neutral, will be far more useful for wealthy developed states than for the developing world. Indeed, the flexibility built into WTO rules may prove ineffectual—and even detrimental—for poorer states, as it gives the wealthy the policy space to take measures in their own interest while leaving the less powerful without access to critical goods. As a result, WTO flexibilities may magnify, rather than diminish, the underlying divisions between countries in terms of purchasing power and production capacity.

II. Are Export Restrictions on Goods Permissible under WTO Law?

Among other measures put into place in the context of the Covid-19 crisis, a growing number of countries have enacted various types of export restrictions on goods, including medicines, medical devices, protective supplies, and food.⁴ These measures have come

¹ For example, Argentina has suspended anti-dumping duties on the import of syringes from China; Costa Rica granted a moratorium on import tariffs from April – June 2020; and the European Union implemented “green lanes” to facilitate the movement of essential goods and services. See, WTO, ‘COVID-19: Trade and Trade-Related Measures’, 29 May 2020, <https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm> accessed 10 June 2020.

² See, e.g., Jennifer A Hillman, ‘Six Proactive Steps in a Smart Trade Approach to Fighting COVID-19,’ *Think Global Health*, 20 March 2020, available at <<https://www.thinkglobalhealth.org/article/six-proactive-steps-smart-trade-approach-fighting-covid-19>> accessed 10 June 2020.

³ General Agreement on Tariffs and Trade, LT/UR/A-1A/1, 14 April 1994(GATT) <<http://docs.wto.org>>.

⁴ The WTO maintains a regularly updated list of such measures: ‘Trade and Trade-Related Measures’ (n 1).

in the form of outright bans or restrictions on export as well as the introduction of new or strengthened export licensing and approval procedures. Such restrictions seek to safeguard national supplies of critical products, ensure food security, and prevent domestic shortages by keeping goods inside a country's borders.

The GATT generally prohibits quantitative restrictions (that is, measures such as bans and quotas) on exports of goods.⁵ The ban on quantitative restrictions is quite broad, covering both *de jure* and *de facto* measures imposed by WTO members. Any prohibition or limitation of exports in order to combat Covid-19 would clearly be caught by this rule, and is thus in principle incompatible with the GATT.

The prohibition of quantitative restrictions is, however, subject to four important sets of exceptions that significantly soften the impact of this ban.

First, the GATT includes a carve-out for '[e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.'⁶ In the context of Covid-19 this means that a country can impose temporary export restrictions or prohibitions in order to prevent critical shortages of medical or other supplies. 'Temporary' means that the restrictions should last only so long as necessary,⁷ and 'critical shortage' means 'those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point.'⁸ Thus, countries must be careful to restrict exports only of essential products, and only for a limited period (though this period may extend as long as necessary). Such restrictions should also be non-discriminatory, applying to all third countries equally and maintain insofar as possible a proportional distribution of trade.⁹ Where a country's measures do meet these criteria, they will not be considered violations of the GATT, and may thus be freely imposed. This carve-out is one of the two flexibilities cited most by the countries that have adopted export restrictions thus far, along with the general exception for health measures discussed below.¹⁰

When it comes to restrictions on the export of agricultural products a few additional rules apply. Export restrictions on food are permitted where necessary to protect food security. Such restrictions were used extensively during the 2007–2008 global food crisis, for example. The WTO's Agreement on Agriculture specifies that when a government puts in place restrictions on food exports, it should take into account the potential effects of the measure on the food security of other countries, notify the WTO's Committee on Agriculture about the nature and extent of the rules, and, if requested, consult with other countries and provide them with information regarding the export restrictions.¹¹ There is

⁵ GATT, art XI(1). The Agreement on Agriculture provides further specific rules on export restrictions in the context of agricultural products (Agreement on Agriculture, LT/UR/A-1A/2, 15 April 1994, (AoA) art 12 <<http://docs.wto.org>>). For an academic overview of the WTO's rules on export restrictions, see Gabrielle Marceau, 'WTO and Export Restrictions', (2016) 50 *Journal of World Trade* 563.

⁶ GATT, art XI(2)(a).

⁷ *China—Measures Related to the Exportation of Certain Raw Materials*, WT/DS394/AB/R, 30 January 2012, [323]–[331].

⁸ *Ibid* [324].

⁹ GATT, art XIII.

¹⁰ WTO, 'Export Prohibitions and Restrictions: Information Note', 23 April 2020, 5 <https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf> accessed 10 June 2020.

¹¹ AoA, art 12.

some debate, however, as to whether this provision in fact imposes any hard substantive obligations, or whether it simply amounts to ‘soft law’ that is unlikely to constrain agricultural export restrictions.¹²

Second, the prohibition of quantitative restrictions exempts ‘duties, taxes and other charges’ from its coverage, meaning that export tariffs or duties are generally permitted by WTO law so long as they continue to respect non-discrimination rules and continue to treat other countries equally.¹³ This means that countries could impose taxes on the export of medicines, devices, protective equipment, or other critical supplies in order to generate revenue or discourage exports.¹⁴

Some countries have made special additional commitments to minimise, transform, or eliminate export taxes as part of their terms of accession to the WTO, and a few of these may be relevant in the context of measures taken to combat Covid-19.¹⁵ Montenegro, for example, agreed that it ‘would not apply or reintroduce any export duty,’¹⁶ which would include any new charge imposed on critical goods. Domestic policy space may in such cases face additional constraints.

Third, even in the event that a country’s export restrictions cannot rely on the previous flexibilities, they may still fall under the general exceptions to WTO law. Three of these exceptions are potentially relevant here.

First, countries may put in place measures otherwise incompatible with their GATT obligations if ‘necessary to protect human, animal or plant life or health,’ provided they do so in a way that does not arbitrarily or unjustifiably discriminate among countries, and does not amount to a disguised restriction on trade.¹⁷ Such measures must be ‘necessary’ to addressing the Covid-19 situation, which may bar rules that are deemed to be more restrictive than is reasonable. Siddharth Aatreya has argued that this would exclude, for example, measures that hoard essential goods beyond the level that a country could reasonably need.¹⁸ But given that public health is such an important goal, the ‘necessity test’ is likely not to be read strictly.¹⁹ This general exception for health measures is the second flexibility commonly cited by the countries that have adopted export restrictions thus far, alongside the carve-out explained above.²⁰

¹² For the argument that the provisions of the Agreement on Agriculture should be read more strictly, see Robert Howse and Tim Josling, ‘Agricultural Export Restrictions and International Trade Law: A Way Forward’ (2012) International Food and Agriculture Trade Policy Council, 15–16.

¹³ See further *China—Raw Materials* (n 7) [321].

¹⁴ But see Howse and Josling (n 12) 17–18 (arguing that the exemption of export taxes should be read in light of the object and purpose of GATT Article XI, and thus restricted to measures with a primarily fiscal, rather than trade-restrictive, objective).

¹⁵ These countries include Bulgaria, Mongolia, Latvia, Estonia, Georgia, Croatia, China, Saudi Arabia, Viet Nam, Ukraine, Montenegro, Russia, Lao People’s Democratic Republic, Tajikistan, Kazakhstan, and Afghanistan (Marceau (n 5) 576–581).

¹⁶ WTO, ‘Report of the Working Party on the Accession of Montenegro to the World Trade Organization’, WT/ACC/CGR/38, 5 December 2011 [132].

¹⁷ GATT, art XX(b).

¹⁸ Siddharth S Aatreya, ‘Are COVID-19 Related Trade Restrictions WTO-Consistent?’, *EJIL:Talk!*, 25 April 2020, <<https://www.ejiltalk.org/are-covid-19-related-trade-restrictions-wto-consistent/>> accessed 10 June 2020.

¹⁹ WTO, ‘European Communities—Measures Affecting Asbestos and Asbestos-Containing Products’, WT/DS135/AB/R, 12 March 2001 [172].

²⁰ WTO, ‘Export Prohibitions and Restrictions’ (n 10) 5.

Second, countries may make use of the general exception for ‘restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry’ if they do so ‘during periods when the domestic price of such materials is held below the world price.’²¹ Here, too, such measures would need to be put in place in a way that does not arbitrarily or unjustifiably discriminate among countries, and does not amount to a disguised restriction on trade. This exception could cover, for example, situations in which a country placed price caps on materials necessary for the production of critical supplies, and coupled these price controls with export restrictions in order to keep the supplies from being sold on world markets at higher prices.

Third, countries may also make use of the general exception for measures ‘essential to the acquisition or distribution of products in general or local short supply,’ again provided they do so in a way that does not arbitrarily or unjustifiably discriminate among countries, and does not amount to a disguised restriction on trade.²² Such measures must be ‘essential’ to acquiring or distributing the products in question, which would (as with the ‘human health’ exception) bar measures that are more trade restrictive than is necessary to achieve this goal.²³ The products in question must also be in ‘general or local short supply,’ meaning that they are not available on the market – a simple lack of domestic production capacity will not be sufficient.²⁴ This exception includes the further caveats that such measures must be ‘consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products’ and that they be ‘discontinued as soon as the conditions giving rise to them have ceased to exist.’ In the context of Covid-19 export restrictions, this would seem to permit, for example, restrictions on trade in protective equipment, so long as that equipment is in short supply, the restrictions do not direct all exports to one country (violating the principle of equity), and are limited to the duration of the shortage.

Finally, countries could also attempt to justify their export restrictions on the basis of national security concerns. The GATT contains a broad national security exception that permits a WTO Member to take ‘any action which it considers necessary for the protection of its essential security interests [...] taken in time of war or other emergency in international relations.’²⁵ The national security exception has so far been referenced primarily to justify boycotts and restrictions on trade and transit during times of conflict, and this seems to have been the understanding of the original drafters of the GATT.²⁶ However, the outer limits of what qualifies as an ‘emergency in international relations’ are not entirely clear,²⁷ and it is possible that Covid-19, which has been declared a global pandemic by

²¹ GATT, art XX(i).

²² GATT, art XX(j).

²³ The AB in *India—Solar Cells* found that the same weighing and balancing process would apply to assessing whether measures are ‘essential’ as is typically used to determine whether measures are ‘necessary’ (*India—Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS/456/AB/R, 16 September 2016 [5.63]).

²⁴ *Ibid* [5.75]–[5.77].

²⁵ GATT, art XXI(b)(iii).

²⁶ ECOSOC ‘Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment’ E/PC/T/A/PV/33, 24 July 1947.

²⁷ A WTO Panel in 2019 provided a first interpretation of this provision in *Russia—Traffic in Transit*, in which it found that a series of Russian measures preventing the movement of goods from Ukraine during the 2014 conflict could be justified under the national security exception (*Russia—Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019).

the World Health Organization, could pass the test, permitting countries to take whatever measures they consider ‘necessary’ to protect their public health sectors.

Provided that they apply their measures in a non-discriminatory way and respect the other limited requirements imposed by the various carve-outs and exceptions discussed in this section, it is likely that many national export restrictions on critical goods will be permissible under WTO rules.²⁸ As was seen during the 2007–2008 food crisis, GATT flexibilities do seem broadly sufficient to permit countries to put in place extraordinary export measures in order to deal with a national crisis. However, the question of whether and to what extent this flexibility will actually serve to ensure that WTO Members are able to access the medicines, devices, protective equipment, food, and other supplies they need to combat the global pandemic is another matter. Indeed – these very flexibilities may prove detrimental to countries that need to import goods from abroad and the lack domestic production capacity or financial resources to make up for the loss of global supply.

III. Are the WTO Flexibilities Sufficient to Ensure Medical and Food Security?

While it is understandable that countries concerned with supply would wish to put export restrictions in place, such restrictions also pose significant dangers, particularly to smaller economies and those lacking in domestic production capacity.

To begin with, export restrictions disrupt supply chains, causing delays in production and transport and impeding access to essential goods. Pharmaceuticals, medical devices, and other high-priority items are frequently the products of multiple jurisdictions, with manufacturers, intellectual property holders, and shipping lines stretching across national borders. In such cases, self-sufficiency is simply not a viable option. The interruption of global supply chains negatively impacts production, approval, and distribution processes, reducing supply and increasing prices for all.

Second, export restrictions can be self-defeating, leading to a ‘multiplier effect’²⁹ as countries put their own limitations in place in response to previously imposed rules. Research has found that during the global food crisis of 2008, export restrictions led to a 13% increase in world food prices in general, and a 45% increase for rice, one of the hardest-hit products.³⁰ In the case of medical devices, almost all economies are importers as well as exporters, making everyone vulnerable to price increases, but affecting those with less purchasing power the most. Countries with greater financial resources will be better placed to withstand price surges, while states with weaker fiscal positions and higher public debt will see the real value of their budgets fall, and will be far less able to borrow to support government policies.³¹

Retaliation is also a matter of concern. For example, when US President Donald Trump decided to impose export restrictions on N95 protective masks, Canadian Prime Minister

²⁸ Countries are also responsible for notifying any new quantitative restrictions to the WTO ‘as soon as possible, but not later than six months from their entry into force’ (Decision on Notification Procedures for Quantitative Restrictions, G/L/59/Rev.1, 22 June 2012 <<https://docs.wto.org>> accessed 10 June 2020).

²⁹ Paolo E. Giordani, Nadia Rocha, and Michele Ruta, ‘Food Prices and the Multiplier Effects of Trade Policy’ (2016) 101 *Journal of International Economics* 102.

³⁰ *Ibid.*

³¹ See, eg, Cesar Calderon et al, *Africa's Pulse, No 21, Spring 2020: An Analysis of Issues Shaping Africa's Economic Future*, World Bank, 2020.

Justin Trudeau swiftly threatened countermeasures, noting that ‘the United States also receives essential supplies and products’ from Canada.³² Retaliation is a concern with Covid-related food export restrictions as well, to the degree that the Directors-General of the Food and Agriculture Organization and the World Health Organization joined the WTO Director-General in issuing a joint statement cautioning that ‘[u]ncertainty about food availability can spark a wave of export restrictions, creating a shortage on the global market.’³³

Finally, export restrictions have a differential impact on countries with smaller or non-existent domestic production capacity for critical goods.³⁴ For example, World Bank economists Aaditya Mattoo and Michele Ruta have found that only seven countries account for 70% of world exports of ventilators.³⁵ Export restrictions put in place by any of these states would endanger access to medical supplies throughout the world, and the hardest hit states would, again, be those without the resources to buy or build their own. In some areas, this has already come to pass. Despite calls for solidarity,³⁶ the EU put in place restrictions on face shields, mouth-nose protection equipment, protective spectacles and visors, protective garments, and gloves beginning in March, and continued to restrict the export of masks, spectacles, and protective garments through the end of May.³⁷ Chad Bown of the Peterson Institute for International Economics warned of the severe consequences of this move for countries that have historically imported these products from the EU, such as Cape Verde (89% of protective spectacles and visors), Niger (71%), and Angola (62%).³⁸

States and international organisations have recognised the damage that may be caused by export restrictions, and in response have proposed some guiding principles that countries should follow when enacting emergency trade measures. The G20, for example, has recommended that export restrictions should be ‘targeted, proportionate, transparent, temporary, [and] reflect our interest in protecting the most vulnerable.’³⁹ And the WTO and World Customs Organisation (WCO) have stressed the importance of export measures

³² Richard Hall, ‘Trudeau Threatens Retaliation after Trump Keeps Shipment of Masks Intended for Canadian Doctors’, *Independent*, 3 April 2020.

³³ WTO, ‘Agency Chiefs Issue Joint Call to Keep Food Trade Flowing in Response to COVID-19’ (WTO, 31 March 2020) <https://www.wto.org/english/news_e/news20_e/igo_26mar20_e.htm> accessed 27 April 2020.

³⁴ See, e.g., Alvaro Espitia, Nadia Rocha, and Michelle Ruta, ‘Trade and the COVID-19 Crisis in Developing Countries’, *VoxEU*, 9 April 2020 <<https://voxeu.org/article/trade-and-covid-19-crisis-developing-countries>> accessed 15 April 2020.

³⁵ Aaditya Mattoo and Michele Ruta, ‘Viral Protectionism in the Time of Coronavirus’, *World Bank Blogs*, 27 March 2020, <<https://blogs.worldbank.org/voices/viral-protectionism-time-coronavirus>> accessed 27 April 2020.

³⁶ Dr Tedros Adhanom Ghebreyesus, ‘WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19’, 3 March 2020, <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---3-march-2020>> accessed 14 April 2020.

³⁷ Commission Implementing Regulation (EU) 2020/568 of 23 April 2020 making the exportation of certain products subject to the production of an export authorisation [2020] OJ L 129/7.

³⁸ Chad P Bown, ‘COVID-19: Demand Spikes, Export Restrictions, and Quality Concerns Imperil Poor Country Access to Medical Supplies’ in Richard Baldwin & Simon J Evenett (eds), *COVID-19 and Trade Policy: Why Turning Inward Won’t Work* (Vox / CEPR Press 2020), 35.

³⁹ ‘G20 Trade and Investment Ministerial Meeting: Ministerial Statement’, 14 May 2020, Annex art 1.1.1 <https://g20.org/en/media/Documents/G20SS_Statement_G20%20Second%20Trade%20&%20Investment%20Ministerial%20Meeting_EN.pdf> accessed 10 June 2020.

being temporary and designed in a non-discriminatory way.⁴⁰ These guidelines do not impose any hard limits on national behaviour, but seek to prompt countries to think more carefully about the design of their export restrictions while preserving their freedom to act as they believe necessary.

Fearing that these moves do not go far enough to prevent or remedy the negative impacts of export restrictions, some scholars have called on the international community to take bolder and more legally binding action. Wendy Cutler, for example, has argued that the G7 and G20 should call for a standstill on tariff hikes, export bans, and export limitations, and that the WTO should call an emergency session to act on the surge in export restrictions.⁴¹ Mona Pinchis-Paulsen has argued for a revision of the WTO rules to add an ‘inverse-exception’ whereby countries would be asked to *drop* their trade barriers, rather than being permitted to *raise* them, during times of global emergency.⁴² The likelihood of any legal development of this type is, however, vanishingly small—particularly given the WTO’s pre-existing struggles over the collapse of the Doha round trade negotiations, the turn to bilateralism and regionalism as the primary forums for economic liberalisation, and the breakdown of the dispute settlement process that has resulted from the US’s refusal to appoint new members to the Appellate Body.⁴³

Covid-19-related export restrictions—even those that are WTO-compliant—are likely to increase prices, decrease supply, and disrupt supply chains, especially when put in place by important industrial centres. And in the absence of more extensive international cooperation and commitment to ensure that the interests of developing countries are protected, it can only be the case that the poorest and most vulnerable will disproportionately suffer the negative impacts of any trade measures enacted in response to the crisis.

IV. Conclusion

Times of crisis prompt us to reconsider law and policy by exposing stress points and weaknesses in the existing system. In the world of WTO law, the Covid-19 crisis, like the food crisis of 2007–2008, has brought attention to, among other issues, the tricky question of export restrictions.

As explained in Section II, the GATT provides numerous flexibilities that allow countries to enact emergency measures that would otherwise be incompatible with their WTO obligations. So long as export restrictions are non-discriminatory, temporary, and do not go beyond what is needed to protect domestic supply, they are likely permissible under

⁴⁰ ‘WCO-WTO Joint Statement on COVID-19 Related Trade Measures’, 6 April 2020, <https://www.wto.org/english/news_e/news20_e/igo_06apr20_e.htm>.

⁴¹ Wendy Cutler, ‘Coronavirus: The Need to Adjust and Reshape Our Trade Agenda’, *Asia Society Policy Institute*, 17 March 2020, <<https://asiasociety.org/policy-institute/coronavirus-need-adjust-and-reshape-our-trade-agenda>> accessed 10 June 2020.

⁴² Mona Pinchis-Paulsen, ‘COVID-19 Symposium: Thinking Creatively and Learning from COVID-19—How the WTO can Maintain Open Trade on Critical Supplies’, *Opinio Juris*, 2 April 2020, <<https://opiniojuris.org/2020/04/02/covid-19-symposium-thinking-creatively-and-learning-from-covid-19-how-the-wto-can-maintain-open-trade-on-critical-supplies/>> accessed 28 April 2020.

⁴³ See, e.g., Imogen Saunders, ‘Populism, Backlash and the Ongoing Use of the World Trade Organization Dispute Settlement System: State Responses to the Appellate Body Crisis’ (2020) 35 *Maryland Journal of International Law* (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3611539> accessed 10 June 2020.

WTO rules. This means that the many nations that have put such rules in place—from Colombia to India to the UK—will not face multilateral restrictions on their freedom to act.

But is this flexibility really a good thing? As discussed in Section III, export restrictions come with many negative side effects, including increases in prices and disruptions in production and distribution networks. These effects are problematic for everyone, but especially for those countries without the money or industrial capacity to buy or make their own substitutes. As with other aspects of the Covid-19 crisis, the impact of export restrictions will disproportionately fall on the poor and vulnerable.

While the WTO's flexibilities are sufficient in terms of providing policy space to member states who wish to enact export restrictions, they do not help to ensure equitable global access to critical supplies. Indeed, they exacerbate inequality in distribution by failing to control the use of export restrictions by countries that seek to protect their own citizens at the expense of their neighbours. We may well wish for a global trade regime that pays more attention to issues of justice and equity, but that it is not the one we have.

Regulating International Contracts in a Pandemic: Application of the *Lex Mercatoria* and Transnational Commercial Law

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Abstract

The Covid-19 pandemic is a significant disruption for the performance of contractual obligations. Contracts often contain a force majeure clause that lays out the circumstances under which a contract can be terminated or suspended. However, not all contracts contain such a clause, or the clause might not cover the current situation. In the absence of a force majeure or similar type clause the applicable law fills that gap.

This paper concentrates on international commercial law contracts and transnational commercial law; it specifically focuses on the Convention for the International Sale of Goods,¹ the UNIDROIT Principles of International Commercial Contracts,² and the principles of the *lex mercatoria*. This paper analyses how these instruments could be applied if the contractual parties do not meet their obligations because of the Covid-19 pandemic.

I. Transnational Commercial Contracts in Times of Corona

a) Introduction

The Covid-19 pandemic significantly disrupts the performance of a large number of contracts. This can be because the performance of the contract is now impossible, illegal, no longer necessary, onerous, or simply inconvenient for the contracting parties. The key question is how the law deals with non-performance caused by the pandemic. In most cases hopefully the parties will come to an amicable agreement about the termination or modification of the contract. In other cases, however, that might not be possible; one of the parties may not wish to terminate/modify or the parties cannot reach agreement on how consequences of any changes should be attributed.

This paper analyses contractual disruption due to Covid-19 focussing on international commercial law contracts and transnational commercial regulations. This entails contracts where both parties operate in a commercial capacity and concerns sales, services, hire-purchase, and agency agreements among others. International commercial law contracts regularly include non-state rules such as transnational commercial law instruments or the *lex mercatoria* in the choice of law clause, either as the applicable law or by reference as contractual rules. Even in the absence of any reference in the contract, arbitrators and courts apply non-state rules with some regularity.

The Convention for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (UPICC) are two of the most prominent examples of transnational commercial instruments. This paper analyses how these instruments could be applied if the contractual parties do not meet their obligations because of the pandemic.

¹ United Nations Convention for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988).

² UNIDROIT Principles of International Commercial Contracts (2016 edition).

It furthermore examines how a court or tribunal would decide on issues related to the pandemic if the *lex mercatoria* is applied. The next section discusses the relationship between the force majeure clause and the applicable law. The following part introduces the CISG and the UPICC and discusses how these instruments approach force majeure. The final part examines how, when applying the *lex mercatoria*, the court/tribunal could deal with breach of contract resulting from Covid-19 and concludes with some reflections on the likely effect of Covid-19 in relation to contractual modification or termination under transnational commercial law.

b) Force Majeure and the Applicable Law

The court/tribunal firstly looks at the contractual provisions, given that the contract is said to be the first source of contract law.³ Contracts often contain a force majeure and/or hardship clause (or similar) that will lay out the circumstances under which a contract can be cancelled, modified, or suspended. Such a clause typically includes a description of the type of situations that are covered by it, for instance war, strikes, acts of God, and eventually pandemics. However, not all contracts contain such a clause and even when they do, the clause might not cover pandemics (or it may be formulated in such a way that it is unclear whether it does). In the absence of a force majeure or similar type clause, the applicable law fills in the contractual gaps to resolve the dispute.

For instance, if English law is the applicable law, then the doctrine of frustration is applicable. The threshold for frustration is high; the contract needs to be either impossible to perform,⁴ illegal,⁵ or the main purpose of the contract must have been thwarted.⁶ This could cover difficulties caused by a pandemic but would not cover all contracts that are disrupted because of the pandemic. For instance, it would not cover the situation where the contract can still be performed, although performance might now be significantly more onerous for one of the parties. Therefore, if the contract does not contain an adequate force majeure clause it could very well be that the contract cannot be terminated without one of the parties being in breach and thus liable to pay damages. Other jurisdictions have similar doctrines, such as force majeure in France and *Unmöglichkeit der Leistung* in Germany, although these each operate somewhat differently and will have a different threshold as to when a contract can be terminated without incurring liability.

The parties to an international commercial contract can insert a choice of law clause in their contract for the application of non-state rules. With non-state rules is meant the body of transnational commercial law that is either developed by international organisations and trade associations (such as restatements of laws and standard terms and conditions) or emerges spontaneously from usage by merchants (trade usages) and is refined through application by courts/tribunals (creating general principles of transnational commercial law). Non-state rules are thus created by other entities than the state and aim to facilitate international commerce through legal unification. Whilst a choice for non-state rules is not permitted in most jurisdictions in litigation, it is usually permitted for arbitration.⁷ This choice could be formulated in a precise manner by referring to a transnational commercial law

³ Jacques Ghestin, 'La notion de contrat' (1990) 12 Periodicals Archive Online 7, 10.

⁴ *Taylor v Caldwell* [1863] EWHC QB J1.

⁵ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] UKHL 4.

⁶ *Krell v Henry* [1903] 2 KB 740.

⁷ See for instance, UNCITRAL Model Law on International Commercial Arbitration (1985) Art. 28. Legislation based on this model law has been adopted by 83 states.

instrument by name (such as the UNIDROIT Principles) or could employ a formula such as general principles of commercial law, accepted transnational commercial practices, or the *lex mercatoria*. It is then up to the tribunal to find and decide the general principles and concrete rules of the *lex mercatoria*. There is no agreement on what the substance of the *lex mercatoria* is, as the intense debate on the subject shows.⁸ Tribunals often refer to transnational commercial law instruments as an expression or reflection of the *lex mercatoria*;⁹ that is to say as a source of the *lex mercatoria* or as the written evidence of the *lex mercatoria*. The instrument that is used most often for this purpose is the UNIDROIT Principles (others include the Principles of European Contract Law (PECL) and the Principles of Latin America Contract Law (PLACL) as well as the Incoterms¹⁰).

II. Transnational Commercial Law Instruments

a) *The Convention for the International Sale of Goods*

The CISG is also regularly used by courts/tribunals as a reflection of the *lex mercatoria*. It is debatable whether conventional law should be included in the *lex mercatoria* (or indeed whether codified non-state rules should be included at all) but regardless of whether it is desirable it is often applied in this way. Aside from being used as *lex mercatoria*, the CISG is a leading convention that is ratified by 93 states as of 2020.

The underlying principles of the CISG are characterised by internationality, good faith, uniformity in interpretation, pragmatism, and freedom of contract. The CISG has a strong *favor contractus* approach: preserving the contractual relationship is key. It offers limited possibilities to rely on force majeure. There is *no rebus sic stantibus* type provision which allows the contract to be modified or terminated if there is a significant change in circumstances.

Art. 79 discusses non-liability for performance:

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.¹¹

Non-liability is only valid for the duration of the event.¹² Whilst the party in breach will not be liable for any damages, the other party can still avoid the contract if the breach is considered fundamental: 'Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.'¹³ The contract is only terminated when it is avoided and not retroactively upon occurrence of the impeding event.¹⁴

⁸ See for instance, Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International 1999); Gilles Cuniberti, 'Three Theories of Lex Mercatoria' (2013) 52 Columbia Journal of Transnational Commercial Law.

⁹ See the UNILEX database for examples: <http://www.unilex.info/instrument/principles>.

¹⁰ The International Commercial Terms created by the International Chamber of Commerce to facilitate the international sale of goods, available at: <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020/>.

¹¹ CISG Art. 79 (1).

¹² CISG Art. 79 (3).

¹³ CISG Art. 79 (5).

¹⁴ Jacob Ziegler, 'Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods', July 1981, available at <http://cisgw3.law.pace.edu/cisg/text/ziegel79.html>.

Understanding how impediments should be interpreted is key to understanding the scope of the article. The definition of impediment is not immediately clear from the article, which has been criticised for its generality and lack of detail.¹⁵

The CISG Advisory Council is a private initiative from a group of scholars and publishes opinions on the interpretation of the CISG. Whilst these opinions are not canon, they have persuasive value as they are based on caselaw and the legislative history of the CISG. Opinion 7 discusses the interpretation of Article 79 and includes an analysis of existing caselaw. It explains that overall, courts and tribunals take a strict interpretation of Article 79. Courts do not rely excessively on domestic law interpretations of hardship and force majeure which might have a broader approach, and they maintain high standards for exemption of liability.¹⁶

Clearly Covid-19 can lead to economic hardship. Would such a situation fall within the scope of Article 79? The legislative history clarifies that impediment should not only cover situations where it is physically impossible to perform the contract but also, under limited circumstances, those situations in which it is economically problematic to do so.¹⁷ Overall, however, the courts have taken a reticent approach to accepting economic hardship as an excuse for non-performance.¹⁸ It could be that Covid-19 represents such a sufficiently exceptional situation that courts would take a more flexible approach, however it could also be said that certainty in deciding contractual disputes is needed now more than ever and therefore the standards for exemption are likely to remain high.

If Article 79 is rather general, how should the courts, then interpret any request for relief? According to Article 7, any matters covered by the CISG but not explicitly discussed should be settled by relying upon the principles underlying the CISG, If such principles are not found, the courts should turn to the applicable law to settle the issue (and not the *lex fori* as some courts have the tendency to do).¹⁹ Turning to the applicable law creates uncertainty for the parties and should therefore be the last resort. It is not recommended that the applicable law should be used to further define what an impediment is or whether hardship should be covered, given the diverse approaches taken by different jurisdictions. This would lead to unpredictable results for the parties because they cannot anticipate the outcome of the dispute that well. Rather, courts should rely upon the extensive CISG caselaw to interpret the Convention and extend the scope of impediment to include exceptional economic hardship. It would be especially appropriate to grant such relief if the equilibrium of the contract is destroyed and where one of the parties stands to profit whilst the other party suffers extensive losses because of the unforeseen event.²⁰

¹⁵ Ibid. See also, Harry Flechtner, 'Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods' (2007) 19 Pace International Law Review 29.

¹⁶ CISG Advisory Council Opinion No. 7: 'Exemption of Liability for Damages Under Article 79 of the CISG,' 2007, <http://www.cisgac.com/cisgac-opinion-no7/>.

¹⁷ Peter Schlechtriem, 'Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods', 1986, <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem-79.html>.

¹⁸ CISG Advisory Council, Opinion No. 7: 'Exemption of Liability for Damages Under Article 79 of the CISG,' 2007, <http://www.cisgac.com/cisgac-opinion-no7/>.

¹⁹ Franco Ferrari, 'Homeward Trend and Lex Forism in International Sales Law' (2009) International Business Law Journal 333.

²⁰ Joseph M. Perillo, 'Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts,' (1997) 5 Tulane Journal of International and Comparative Law 5-28, 14.

The approach of the CISG favours certainty in contractual relationships rather than allowing for flexibility should the situation change. At the same time the pragmatism that is reflected in the CISG through, for instance, the requirement to mitigate damages (Article 77) and allow for a period of grace/*nachfrist* (Article 49), suggests that the parties should maintain if possible, a certain flexibility towards each other if situations change. The CISG does not include an explicit duty to renegotiate in cases of hardship but there is caselaw suggesting that such a duty is implied in the principles underlying the CISG.²¹ This suggests that exempting a party from liability in exceptional circumstances such as Covid-19 for reasons of economic hardship is permitted under the CISG.

b) The UNIDROIT Principles of International Commercial Contracts

The UNIDROIT Principles of International Commercial Contracts (first published in 1994) are a restatement of international commercial law. They are the result of a comparative study between the commercial laws of different states and the common practices between international merchants and they seek to provide the best possible legal solutions for facilitating international trade.²² They can be applied if the parties choose them as the governing law, if the parties have chosen the *lex mercatoria* as the governing law, and to interpret the contract, the law, and international conventions (such as the CISG).²³

Article 6.2 covers questions of hardship. Article 6.2.1 provides ‘Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.’ The official commentary reinforces that even if the contract is now significantly more costly or no longer beneficial for one of the parties, they still need to perform, unless there are exceptional circumstances.²⁴ Whilst economic risks can undoubtedly cause a significant imbalance in the contract and provide difficulties, hardship should only be applied if the economic difficulties go significantly beyond normal market developments.²⁵ The consequences of Covid-19 would qualify as such a development, given that the scale of disruptiveness clearly goes beyond any expected economic disruption.

Article 6.2.2 provides that the principle is not ‘absolute’ and that it applies ‘when supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract.’ The event must be outside of the control of the disadvantaged party and the party must not have assumed the risk for such an event. This means that if the contract contains a clause where the party has assumed the risk for a pandemic occurring, they could not rely on the provisions of hardship. This could either be explicitly (if the contract refers to a pandemic/epidemy) or implicitly (if the party assumes all risks no matter outside events occurring for instance). To qualify, the event must have become known or occurred after the conclusion of the contract. Therefore, it is unlikely contracts concluded after March 2020 could rely upon this article to be exempted from liability.

²¹ Julie Dewez et al, ‘The Duty to Renegotiate an International Sales Contract under CISG in Case of Hardship and the Use of the Unidroit Principles’ (2011) 19(1) *European Review of Private Law* 101.

²² Michael Joachim Bonell, ‘Unidroit Principles of International Commercial Contracts: Why What How,’ (1994-95) 69(5) *Tulane Law Review* 1121-1148, 1129.

²³ Preamble (Purpose of the Principles).

²⁴ UNIDROIT Principles of International Commercial Contracts 2016, 217.

²⁵ Dietrich Maskow, ‘Hardship and Force Majeure’, (1992) 40 *The American Journal of Comparative Law* 657-669, 662.

The effects of hardship (Article 6.2.3) are that the disadvantaged party is first entitled to request renegotiations, but such a request does not of itself entitle the party to withhold performance. If these negotiations are unsuccessful, they can turn to the court who, if it finds hardship may terminate the agreement or adapt the contract to reach an equilibrium between the parties which could according to the official comments on the article entail a price recalibration. Equilibrium should not be interpreted as contractual fairness but should be based on 'the intended effect of the contract on risk and reward,' and thus concerns the effect on the purpose of the contract.²⁶ For instance, if an electronics company cannot source specific goods because of a lockdown caused by Covid-19 they will have no need of transportation. The carriage contract that they have with a truck company can still be performed given the trucks can still ride between A and B. However, there is no purpose to the contract anymore for the electronics company if they have no goods that need to be transported.

Article 7.1.7 discusses force majeure. Force majeure is a container concept that means different things depending on the jurisdiction. The official comments on the Article discuss that the term was chosen because it is well-known in international trade and covers the same ground as the common law concept of frustration and the civil law concept of force majeure but it should not be seen as identical to these domestic law concepts.²⁷ The official comments on Article 7.1.7 state that a party's non-performance is excused if this was 'due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.'²⁸

Article 7.17 furthermore states that if the impediment is only temporary than it has effect for that period and that 'nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.' Therefore, like the CISG, it excuses liability for damages, but it does not waive other rights. Whilst under the CISG, impediment is interpreted to include economic hardship, this is not the case for the UPICC. As the UPICC has a separate article on hardship, impediment should be interpreted in a strict manner and refers to an event that makes the contract impossible to perform.²⁹ Whilst Covid-19 does make some contracts impossible to perform and this provision can therefore be relied upon by the disadvantaged party, for other contracts there will thus be a need to rely on the hardship provisions to escape liability rather than on the force majeure provisions.

The UPICC offer a more comprehensive approach to hardship and non-performance than the CISG. It even confers (controversially) the power on courts/tribunals to adapt the contract to restore the equilibrium (which the CISG does not do). At the same time the UPICC also emphasise the exceptionality of the event, again safeguarding the contractual obligations. The official comments stress that these articles would mainly be applied to long term contracts, therefore for shorter and single transactions the approach would be more stringent.³⁰

²⁶ Donald Robertson, 'Symposium Paper: Long-Term Relational Contracts and the UNIDROIT Principles of International Commercial Contracts,' (2008) Australian International Law Journal 185, 188.

²⁷ UNIDROIT Principles of International Commercial Contracts 2016, 240.

²⁸ Ibid, 241.

²⁹ Joseph M. Perillo, 'Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts,' (1997) 5 Tulane Journal of International and Comparative Law 5-28, 15.

³⁰ UNIDROIT Principles of International Commercial Contracts 2016, 242.

Good contractual relationships are at the centre of the UPICC. Parties should first negotiate if there is hardship. The UPICC emphasise the general principles of good faith and fair dealing (Article 1.7) and incorporate a specific duty of cooperation (Article 5.1.3). Parties should be flexible and cooperative towards one another, and whether they demonstrate this cooperation can play a part in the deliberations of the court/tribunal.

Both the CISG and the UPICC refer to the temporality of the event, which means performance could be merely suspended. Whilst one hopes that Covid-19 is a temporary event, the duration of it is likely to be long-term, certainly months and perhaps years. The courts should take into account that it is unforeseeable how long the pandemic will continue and therefore this might favour termination over suspension.

III. Principles of the *Lex Mercatoria*

a) Applying the *Lex Mercatoria*

If a tribunal/court is applying the *lex mercatoria* they might choose to use transnational instruments such as the UPICC or the CISG (or both). The court might also come to a reasoned conclusion of what the general principles of transnational commercial law and trade usages are that should be applied.

Trade usages are considered implied terms of the contract under Article 9 of the CISG and Articles 1.8 and 4.3 of the UPICC. They form the cornerstone of the *lex mercatoria*. Usages clarify how force majeure and hardship should be interpreted in different trades (which could mean a broader or stricter interpretation depending on the trade) and need to be applied by the court/tribunal, immediately after the express contractual provisions.

A key principle of the *lex mercatoria* is a strong *favor contractus*; that is to say the need to interpret the legal provisions in a way that as far as possible upholds the contract. Termination is a last option. This combined with the principle of *pacta sunt servanda* means that under the *lex mercatoria*, terminating a contract should only be done as the last resort. Legal uncertainty is one of the key detriments for trading abroad and therefore predictability and security are important for the contracting parties.³¹ The barrier to non-liability for non-performance is thus high. This means that in principle even in times of Covid-19 the court should uphold the contract and the obligations of the parties as far as possible. Clearly this situation affects a myriad of contracts and certainty is thus even more important.

Good faith is a key principle of the *lex mercatoria* and the UPICC. Good faith is also one of the principles underlying the CISG although from the wording it seems that it is the Convention rather than the contract that needs to be interpreted in good faith. The wording of the good faith principle is vague because the CISG is trying to bridge common law and civil law.³² English common law does not recognise an overall good faith obligation, differently from civil law. Good faith is recognised as a principle of the *lex mercatoria*, probably partly because the origins of the *lex mercatoria* are in Roman law and much of its development took place in Italy and France. Furthermore, the revival of the *lex*

³¹ Clive M Schmitthoff, 'American and European Commercial Law' (1979) 6 Journal of Legislation 44, 44.

³² For an analysis see for instance, Ulrich Magnus, 'The Vienna Sales Convention (CISG) between Civil And Common Law - Best of All Worlds,' (2010) 3(1) Journal of Civil Law Studies 67-98.

mercatoria started with the work of French scholars.³³ Good faith would imply that the parties deal with each other in a transparent and honest manner. The *lex mercatoria* emphasises equity and fairness.³⁴ This should especially be taken into account if unexpected outside events such as Covid-19 cause significant hardship for one of the parties.

The principle of *Clausula Rebus Sic Stantibus* allows the parties to modify or terminate an agreement because of serious disruptions and is considered part of the *lex mercatoria*. In combination with the good faith requirement it means that parties should be willing to renegotiate. If an event happens that would not have been in the contemplation of the parties (like Covid-19) then the fundamental changes to their obligations would not have been intended by the parties and this vitiates their consent.³⁵ Therefore, there is a strong case for saying that despite the key principle of contractual certainty, extreme economic hardship caused by Covid-19 is a cause for renegotiation.

b) Conclusion

The WHO declared Covid-19 a pandemic on 11 March 2020. The effects of the pandemic were already felt before that and certainly will continue to be felt for the foreseeable future. Both the CISG and the UPICC emphasise that for the terms of the contract to be vitiated, the event should not be foreseeable. The question of foreseeability is complicated, however. Can it be foreseen that a pandemic might occur at some point? Yes, of course, it has happened in the past and will happen again. Can it be foreseen in what manner it will occur or when? No, of course not. Caselaw shows that courts struggle with the notion of foreseeability, especially in long-term contracts, that might have decades of running time. Within that time all sorts of events including wars and natural disasters can be expected to happen, even if we do not know the precise shape they will take. A pandemic can be expected to occur at some point given that in human history we see a pattern of disease outbreaks, but how likely it is to happen, and would the parties have contemplated this at the time of contracting? There is a grey area with a margin of appreciation. The next years will undoubtedly bring contradictory caselaw on the foreseeability of Covid-19.

For any contract concluded after 11 March 2020 it would be difficult to rely upon the pandemic as an excuse for non-performance. It could even be argued that before 11 March, the outbreak was already so prominent that it was foreseeable that this would create hardship.³⁶ It is also clear that the exact consequences of the pandemic could not be foreseen on 11 March and there are still more questions than answers with regards to the immediate future. But clearly the pandemic itself is now a reality and relying on it as an excuse for non-performance will be more difficult. This is not to say that it can never be relied upon but the party in breach will face a higher threshold to prove that the effects were unforeseen. This makes the inclusion of a force majeure/hardship clause even more

³³ See for instance, Harold J Berman, 'The Law of International Commercial Transactions (Lex Mercatoria),' (1987) 2 Emory Journal of International Dispute Resolution 235. For the renewal of the *lex mercatoria* see, Klaus Peter Berger, 'Berthold Goldman and the Dijon School: The rebirth of the Lex Mercatoria' (undated), <http://www.trans-lex.org/000001>.

³⁴ William Mitchell, *An Essay on the Early History of the Law Merchant* (Cambridge University Press 1904) 13.

³⁵ Joseph M. Perillo, 'Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts,' (1997) 5 Tulane Journal of International and Comparative Law 5-28, 13.

³⁶ On 30 January 2020, the WHO already declared Covid-19 a public health emergency of international concern.

important. This force majeure clause should cover pandemics explicitly to maximise the security of the parties.³⁷

In conclusion it can be said that under the rules discussed, the approach is to favour certainty first. Therefore, the threshold to excuse non-performance is high. Whilst Covid-19 is an exceptional situation and clearly could not have been expected by either party the importance of certainty for international commercial contracts is paramount and courts/tribunals will likely continue with a strict interpretation of these rules. At the same time, the principles of good faith and fair dealing combined with the pragmatism of international trade also call for the parties to be cooperative and flexible towards one another in order to come as far as possible to an amicable settlement.

³⁷ See for example, ICC Force Majeure and Hardship Clauses, available at <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/>.

Changes to UK Insolvency Rules in the Wake of Covid-19: A Much-Needed Help for Businesses or an Unjustified Harm to the Rule of Law?

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Abstract

The economic impact of the Covid-19 outbreak has triggered calls for emergency fiscal and legislative measures to address liquidity and legal problems in several areas of law. Some of these measures address specifically companies in financial distress and insolvency statutes. Among the proposed changes to the insolvency framework, the UK Government announced a suspension of wrongful trading provision as outlined in section 214 of the Insolvency Act 1986 ('the Act'). This announcement was later implemented (with significant amendments) in section 10 of the Corporate Insolvency and Governance Bill ('the Bill'). This measure applies retrospectively from 1 March 2020 for a 3-month period or one month after the coming into force of the Bill, whichever is later.

To assess the need for such a measure, this paper investigates the requirements to establish a successful claim for wrongful trading and the interpretation of those requirements, stemming from the case law. It also discusses the announced suspension as implemented by the Government in the Bill. This analysis strongly suggests that the suspension of (liability for) wrongful trading does nothing to achieve the purpose for which it was introduced, i.e. to facilitate business rescue and/or to help viable companies to survive the crisis created by the Covid-19 pandemic.

To the contrary, the suspension of personal liability actions against the directors is likely to curb the rule of law in the UK. Laws are deferred and the exercise of civil liability remedies restricted without any apparent justification and with no proof that this measure is relevant to address the crisis created by the Covid-19 pandemic.

I. Introduction

The economic measures announced and implemented by the Government in the past few weeks to deal with the immediate and long-term consequences of the Covid-19 outbreak are broad-ranging.¹ Some aim at keeping companies afloat by furloughing employees under the Coronavirus Job Retention Scheme,² granting emergency loans, deferring VAT

* This article covers statutes, literature and case law published before 1 June 2020. The usual disclaimer applies. The author is greatly indebted to *Yseult Marique* for her insightful comments on earlier drafts of this paper, as well as to *Panagiota Kotzamani* and *Lee Hansen* for their constructive criticism of the manuscript.

¹ For an updated outline, see the report prepared by Sonya Van de Graaff (Morrison & Foerster (U.K.) LLP) for the World Bank and INSOL International, available here: <<http://insol-techlibrary.s3.amazonaws.com/c17d98a5-bb2a-4713-80d9-54f43ebcecd1.pdf?AWSAccessKeyId=AKIAJA2C2IGD2CIW7KIA&Expires=1587279308&Signature=8%2BEvPI5l5NrY3gYIM1mTdXZmWdg%3D>> accessed 25 April 2020.

² Under the Coronavirus Job Retention Scheme, companies can put their employees on furlough because of the restrictions on trade arising from the Covid-19 pandemic. In that case, the Government will pay 80 per cent of the employee's wages plus any employer National Insurance and pension contribution up to £2,500/month: <<https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme>> accessed 25 April 2020. Unfortunately, despite the detrimental effect that this may cause for the possibility of rescuing the company in administration, the courts have held that if the employees remained

payments and stopping the requirement to pay taxes on property leases.³ Others avoid that insolvency procedures are brought against companies that are only temporarily cash-flow insolvent due to the Covid-19 outbreak.⁴

On Saturday 28 March 2020, the Business Secretary, Alok Sharma, announced new insolvency measures to provide businesses with the flexibility and breathing space they need to continue trading during the Covid-19 crisis.⁵ This announcement later resulted in the Corporate Insolvency and Governance Bill ('Bill'),⁶ which is expected to be converted into law by the end of June 2020. The most prominent of the proposed changes to the insolvency framework are:

1. A temporary suspension of liability for wrongful trading;
2. A short automatic stay for companies giving them a breathing space from creditor action, whilst they seek rescue or restructure;
3. Allowing companies continued access to their supplies; and
4. A new restructuring plan which would be binding on all creditors and include a "cross-class cram down".⁷

This paper focuses on the announced suspension of wrongful trading provision as later implemented in the Bill. To assess the need for such a measure, this paper investigates the requirements to establish a successful claim for wrongful trading, taking into account the interpretation of those requirements established from the case law. This analysis suggests that suspension of (liability for) wrongful trading does nothing to allow directors to protect viable businesses struggling from the Covid-19 pandemic from vulture creditors.

To the contrary, the suspension of personal liability actions against the directors has the effect of promoting abusive exercise of powers by directors, thus reducing the rule of law in the UK and restricting the exercise of civil law remedies by the company's creditors.

furloughed and the administrators took no further action in relation to them, this would amount to adopting the employment contracts of these employees: *Re Debenhams Retail Ltd (in administration)* [2020] EWCA Civ 600, [2020] Bus. L.R. 788, confirming [2020] EWHC 921 (Ch), [2020] 4 WLUK 158 (*Powdrill v Watson* [1995] 2 A.C. 394 followed). As a result, the employees are accorded a priority of entitlement to payment of any sums payable as wages or salary under their contract of employment, and these liabilities take precedence ahead of the administrator's own entitlement to payment: para. 99, Sch. B1 of the Act.

³ See, for instance, the provisions made in the Coronavirus Act 2020 (which received Royal Assent on 25 March 2020), preventing landlords from exercising a right of forfeiture of a relevant business tenancy (under Part 2 of the Landlord and Tenant Act 1954) for non-payment of rent between 25 March and 30 June 2020 (a date which may be extended).

⁴ See, for instance, the provisions in the Temporary Insolvency Practice Direction effective from 6 April 2020, which adjourned all non-urgent insolvency applications and petitions listed for hearing prior to 21 April 2020. Available here: <https://www.trinitychambers.co.uk/media/2654/temporary-ipd-april-2020_.pdf> para. 4, accessed 25 April 2020.

⁵ The press release is available here: <<https://www.gov.uk/Government/news/regulations-temporarily-suspended-to-fast-track-supplies-of-ppe-to-nhs-staff-and-protect-companies-hit-by-covid-19>> accessed 25 April 2020.

⁶ Corporate Insolvency and Governance HC Bill (2019-21).

⁷ "Cross-class cram down" is a prominent feature of the US Chapter process. Usually, a restructuring plan can only be approved if the required majority of creditors vote in favour of it.

If creditors are divided in classes, all classes need to reach the required majority but dissenting *creditors* within that class are out-voted by the other creditors within the same class.

If cross-class cram down is allowed, dissenting *classes* of creditors can be out-voted provided that the other classes vote in favour of the restructuring plan. The cross-class cram down needs to be sanctioned by a court so long as it does not unfairly prejudice the dissenting class of creditors.

II. Wrongful Trading under English Law – A Look at the Statutes

The wrongful trading section of the Act applies whenever the company directors did not take appropriate actions and caused damage to the creditors by continuing to operate a company when they knew or ought to have known that the company had no reasonable prospects of avoiding insolvent liquidation or administration.⁸

The introduction of a similar provision was strongly recommended by the Cork Report,⁹ as there was the perception that the burden of proof required to establish fraudulent trading (criminal liability) was too high to prevent the inappropriate behaviour of the directors.

This section is without prejudice to sections 213 and 246ZA of the Act, which deal with fraudulent trading.¹⁰

The petition can be submitted not only by the liquidators, but also by the administrators.¹¹ The consequences for the alleged perpetrator are not only to make a contribution to the assets of the company but also to be subject to disqualification proceedings.¹²

To establish civil liability, the petitioner (administrator or liquidator) needs to demonstrate that:

1. There was a specific moment in time before the director filed for liquidation or administration when the directors realised that a formal insolvency proceeding was inevitable (“point in time”);
2. The director, *de facto* director and shadow director¹³ knew or ought to have known that there was no reasonable prospect of the company avoiding going into insolvent liquidation or administration (“director’s knowledge”); and
3. The wrongful trading caused an increase in the company’s net deficiency (“damage”).

To assess the director’s knowledge, section 214(4) of the Act introduces a test which is both objective and subjective (“moment of truth” test). Accordingly, what is being assessed is whether a director knew or ought to have known that there was no prospect of avoiding insolvent liquidation or administration if such outcome would be reached by:

- (a) Any director with general knowledge, skill and experience; and
- (b) The specific director, with his or her specific knowledge, skill and experience.

If it is proven that the director continued trading after they knew or ought to have known that there was no reasonable prospect of avoiding insolvent administration or liquidation, there is a case of wrongful trading.

⁸ s.214(1) IA 1986.

⁹ RJ Mokal, *Corporate Insolvency Law: Theory and Application* (OUP 2005); I Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017) 835 at [27-034].

¹⁰ s.214(8) IA 1986. For more on this matter, see section III(a) of this paper.

¹¹ s.246ZB IA 1986.

¹² s.215(2) and (4) IA 1986.

¹³ s.214(7) IA 1986.

Directors can only escape liability for wrongful trading if they demonstrate – on the balance of probabilities – that they took every step with a view to minimising the potential loss to the company’s creditors.¹⁴

This preliminary analysis of the statutory requirements to establish a successful claim for wrongful trading suggests that directors would have a hard time in shielding themselves from such claims. The office holder needs only to establish that the debtor was approaching insolvency and the director continued trading, thus causing a financial loss to the creditors.

It appears, therefore, that the Government’s decision to suspend this provision facilitates business rescue and helps viable companies to survive the crisis created by the Covid-19 pandemic. However, one should exercise caution when making such assumption, especially because – as mentioned before in this section – the directors remain liable for a multitude of other offences under the Act.

The next part of the paper considers whether the Government’s decision to suspend this provision stands up to scrutiny, when considered in light of how courts have interpreted this section of the Act and the statutory language in the Bill.

III. Wrongful Trading under English Law – A Look at the Cases and at the Bill

Law in books differs from law in practice. It is, therefore, appropriate to investigate how courts have implemented the statutory provision outlined in the earlier part of this paper and how the suspension of wrongful trading was translated into the Bill.

a) Case Law

In order to establish if a director is liable for breaching the wrongful trading provision, the courts consider the specific circumstances of the case. Particularly, they consider the companies run in the past by the director, the type of business and the profile (executive or non-executive) of the director.¹⁵

Courts do not approach the question of whether a director ought to have concluded that a company had no reasonable prospect of avoiding liquidation with the benefit of hindsight, i.e. on the basis of *ex post* knowledge.¹⁶

One of the most contentious points of the wrongful trading provision has always been the defence provided by section 214(3) of the Act. Directors can invoke this defence if they took every step to minimise the potential loss to the company’s creditors.

Proof that they have met the requisite conditions set out in section 214(3) can be reached if the director demonstrates that the continuation of trading was intended to reduce the net deficiency of the company and minimise the risk of loss to individual creditors.¹⁷

¹⁴ S.214(3) IA 1986.

¹⁵ *Re Produce Marketing Consortium Ltd* (1989) 5 B.C.C. 569; *Re Sherborne Associates Ltd* [1995] B.C.C. 40; *Re Brian D Pierson (Contractors) Ltd* [1999] B.C.C. 26.

¹⁶ *Re Ralls Builders Ltd* [2016] EWHC 243 (Ch), [2016] B.C.C. 293; *Johnson v Beighton* [2019] EWHC 895 (Ch), [2019] 3 W.L.U.K. 380.

¹⁷ *Re Ralls Builders Ltd* [2016] EWHC 243 (Ch), [2016] B.C.C. 293.

In *Continental Assurance*, the directors escaped liability because they reduced trading to minimal and cautious levels and filed for liquidation when they were advised that the company was insolvent.¹⁸ And, vice versa, the directors did not escape liability in *Idessa*, as they did not take appropriate measures to reduce the company's cash flow and minimise the losses for the creditors.¹⁹

While this defence in section 214(3) has been successfully invoked in the past, it is also undeniable that it had been construed strictly,²⁰ in order to avoid making it too easy for directors to escape liability. Additionally, courts have usually adopted a tough stance on directors.²¹

Overall, this may give even more credence to the suggestion that the Government's decision to introduce a suspension to this provision is appropriate to ensure that viable companies continue trading over the Covid-19 crisis. A law tough on directors has been applied strictly by the courts. Law in books and law in practice seem not to differ, at least at first glance.

Nevertheless, it is to be noted that, even if the section 214(3) defence fails, courts have complete discretion as to whether to make an order and if so, on its content. For instance, in *Nicholson* the court declined to make a declaration that the company's directors were liable for the losses caused by wrongful trading despite the fact that the applicant succeeded in proving the misconduct and the defendant failed in their defence. This is because the debtor was operating in challenging market conditions (the period following the Global Financial Crisis of 2007-08), in a sector of the economy significantly affected by the said challenging conditions. Additionally, the directors constantly monitored and discussed the situation with key creditors.²²

The court's discretion may suggest that there is no real need to introduce a suspension of this provision due to the Covid-19 pandemic. Furthermore, there are other factors militating against the need to introduce such a suspension into the law.

First, in any wrongful trading application, the applicants need to prove that the company had "no reasonable prospect" of avoiding insolvency. This represents a challenging and daunting task in the current economic and financial climate. At the time of writing, the Government announced that the lockdown should have remained in place for 3 weeks.²³ Subsequently the Government extended this period for another 3 weeks²⁴ and it only on 23 April acceded to a request to outline an exit strategy from "phase 1" of the Covid-19

¹⁸ *Re Continental Assurance Company of London plc* [2001] B.P.I.R. 733.

¹⁹ *Re Idessa (UK) Ltd* [2011] EWHC 804 (Ch), [2011] B.P.I.R. 957.

²⁰ A Keay and P Walton, *Insolvency Law. Corporate and Personal* (4th edn, LexisNexis 2017) 662.

²¹ See, among others, *Palmer v Tsai* [2017] EWHC 2710 (Ch), [2017] 9 W.L.U.K. 369, where the court refused to grant additional time to directors to file their defences as they had already failed to comply with previous court orders.

²² *Nicholson v Fielding* [2017] 9 W.L.U.K. 260.

²³ On 23 March 2020, the Government announced measures to stem the coronavirus pandemic. These included a 'lockdown': citizens should now stay at home apart from essential travel or risk fines and all non-essential shops were to close: H Stewart and others, 'Boris Johnson orders UK lockdown to be enforced by police' *The Guardian*, 23 March 2020.

²⁴ BBC, 'Coronavirus: UK lockdown extended for 'at least' three weeks', 16 April 2020.

crisis.²⁵ If directors do not know when their companies will be allowed to operate again in the market and under which conditions, they cannot assess if their companies have no reasonable prospect of avoiding insolvent liquidation or administration. Hence, office holders cannot successfully promote a claim for wrongful trading against them. It follows that there is no apparent reason for the Government to suspend the enforceability of this section in the wake of the Covid-19 crisis.

Other reasons militate against the introduction of a suspension of wrongful trading.

Second, this suspension is not a panacea. Directors continue to be liable for the breach of the duties²⁶ they have towards the creditors;²⁷ fraudulent trading²⁸ and transactions defrauding creditors;²⁹ antecedent transactions which put assets beyond the reach of creditors;³⁰ and misfeasance.³¹

As the wrongful trading section is not the only means by which directors may incur personal liability for their actions, suspending this provision alone will not remove the risk of personal liability for directors. This in itself suggests that the announced protection against personal liability granted to directors by means of the suspension of wrongful trading is partial at best.

Third, courts also retain discretion not only with reference to the wrongful trading order but also in determining if the company is cash-flow insolvent. The existence of a condition of insolvency or inability to pay its debts is a key issue for triggering a wrongful trading claim.

On this latter point, in the seminal case of *Cheyne Finance*,³² the court held that they will not adopt a “blinker” review based on a slavish focus on the debts due at the relevant date. In other words, English courts will not declare a company “insolvent” if the inability to pay its debts is due to a temporary lack of liquidity soon to be remedied.³³ This position was approved by the UK Supreme Court in *Eurosail*.³⁴

The *Eurosail* approach is being generally applied by the courts.³⁵ As a result, it is nowadays possible to claim that the words “as they fall due” in section 123(1)(e) of the Act transform the cash-flow test into a flexible and fact sensitive requirement to which balance-sheet insolvency is not irrelevant. The analysis of cash-flow insolvency shall not be carried out mechanistically but in a manner that has regard to commercial reality.³⁶

²⁵ R Merrick, ‘Coronavirus: Government finally reveals lockdown ‘exit strategy’ with plan to recruit 18,000 to trace infected people’ *The Independent*, 23 April 2020.

²⁶ ss. 171-177 Companies Act 2006.

²⁷ It is still uncertain the exact moment in time in which creditors’ interests have to be considered by the company’s directors.

²⁸ s.213 IA 1986.

²⁹ s.423 IA 1986.

³⁰ ss. 238-239 and 244-245 IA 1986.

³¹ s.212 IA 1986.

³² *Re Cheyne Finance plc (No 2)* [2007] EWHC 2402 (Ch), [2008] Bus. L.R. 1562.

³³ *Ibid* [51].

³⁴ *BNY Corporate Trustee Services v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28, [2013] 1 WLR 1408.

³⁵ *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch), [2014] BCC 337 [81]; *Evans v Jones* [2016] EWCA Civ 660, [2017] Ch. 1.

³⁶ *Re Rococo Developments Ltd* [2016] EWCA Civ 660, [2017] Ch. 1, [24].

Fourth and finally, courts have consistently held that “to put a company into administration is a serious matter”³⁷ and should be restricted to cases where rescue is possible³⁸ and the debtor is more likely than not to be insolvent.³⁹

The third and fourth points reassert that – especially during the Covid-19 crisis – office holders will have a hard time to prove that the company had no reasonable prospects of avoiding insolvent liquidation or administration. This suggests, once again, the lack of justification to suspend wrongful trading.

b) The Bill

Despite the sensible approach adopted by courts in interpreting section 214 of the Act and the existence of other instances of personal liability in the Act, the Government thought it appropriate to introduce changes to the wrongful trading regime to avoid unnecessary insolvencies and allow distressed yet viable companies to continue trading during the crisis. Section III(a) demonstrated that this decision does not withstand academic scrutiny. It is yet to be assessed, however, whether the suspension provision affords directors the protection from wrongful trading actions which the Government intended to give. This section carries out this assessment with reference to the wording of the Bill.

A close look at the provision in the Bill suggests that the announced measure presents several issues, particularly with reference to its scope which at times appears too narrow and other times too broad.

The scope is arguably too narrow. Sections 10(3) and (4) of the Bill clarify that the suspension of liability for wrongful trading does not apply to a variety of companies. These include (among others) insurance companies, banks (including investment banks and firms), building societies, friendly societies, credit unions, public-private partnership project companies and overseas companies with corresponding functions. In other words, a lot of medium and large enterprises are excluded from the scope of this provision without any apparent justification.

Additionally, the Government decided to waive the *liability* for wrongful trading, while section 214 of the Act continues to apply. Furthermore, the liability for wrongful trading for *petitions* but only for *debt* (“worsening of the financial condition”) incurred in the relevant period.

This means that a company can be admitted into insolvency proceedings as a result of the Covid-19 pandemic⁴⁰ and directors can still be sued for breach of section 214 of the Act. As a result, petitioners can still hold directors liable for debt incurred *before* 1 March 2020 if the criteria summarised above are met.

³⁷ *Re Colt Telecom Plc (No 2)* [2002] EWHC 2815 (Ch), [2003] BPIR 324 [24]. See also: *Re Gigi Brooks Ltd* [2015] EWHC 961 (Ch), [2015] 2 W.L.U.K. 736, where the court declined to make an administration order because it could not be satisfied that the company was insolvent, either on a balance sheet or cash flow basis, or that the statutory purposes would be achieved.

³⁸ *Re Arrows Ltd No. 3* [1992] BCLC 555, dismissing a petition for administration because the majority of the creditors appeared to be against such an order, thus making it unlikely their approval of the administrator’s plan.

³⁹ *Re Colt Telecom Plc (No 2)* [2002] EWHC 2815 (Ch), [2003] BPIR 324 [25].

⁴⁰ Exceptions and exclusions apply.

Furthermore, the poor drafting quality of the Bill has the effect of further narrowing down the scope of the suspension. As a result, it is argued that directors may be held accountable for breach of wrongful trading provision even for debt incurred *after* 1 March 2020 for the reasons outlined below.

The Explanatory Notes seem to grant adequate protection to directors. They state that courts will not take into account losses incurred during the period in which businesses were suffering from the impact of the pandemic.⁴¹ This is not, however, reflected in the language used in the Bill.

Section 10(1) of the Bill provides that the court is to assume that the person is not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period. From a director's perspective, there would appear to be the risk of an insolvency practitioner being able to rebut that assumption in the course of an action for wrongful trading.

This raises a number of issues. For instance, does the presumption in section 10(1) of the Bill leave it open to an office holder to seek a contribution where they can, through evidence, demonstrate that the person was responsible for the worsening position? On the basis of the current draft of the Bill, the answer is likely going to be in the affirmative.

The narrow scope of the suspension means that it does not apply with reference to some companies and – even with reference to the companies for which it applies – directors can still be held liable for losses incurred before and after 1 March 2020 as a result of wrongful trading.

At the same time, the scope is too broad. First, the provision makes no reference to the pandemic. Other temporary provisions in the Bill refer specifically to coronavirus for the purposes of determining their applicability. For instance, creditors are restricted from serving winding up petitions unless they demonstrated that Covid-19 has not had a financial effect on the debtor.⁴² This might be the case, for instant, of an insolvent grocery shop.

However, there is no such qualification to the application of the suspension of liability for wrongful trading provision. Both the Explanatory Notes and the Bill state that there is no requirement to show that the company's worsening financial position was due to the Covid-19 pandemic. The Bill adopts a blanket approach: liability for losses incurred in the relevant period is waived, irrespective of whether the losses are incurred because of the Covid-19 pandemic.

This blanket approach raises issues of potential abuse of the law if the office holders cannot hold the directors accountable for losses that are not caused by the Covid-19 pandemic.

For instance, the creditor of the above-mentioned insolvent grocery shop may be able to file an insolvency petition against their debtor. This petition is likely to be granted if the

⁴¹ Explanatory Notes to the Corporate Insolvency and Governance Bill 2019-21, para. 28.

⁴² Section 2(2), Part 2, Schedule 10 of the Bill.

debtor is insolvent for the reason mentioned above. Yet, the office holders may not be able to recover any losses caused by wrongful trading incurred in the relevant period because of the blanket approach of the Bill. This is even if the losses were not caused by the Covid-19 pandemic, thus showing that the scope of the suspension is too broad here.

Second, as stated in section III(a) of this paper, suspending liability for wrongful trading alone will not remove the risk of personal liability for directors. However, the other sections of the Act introduce personal liabilities only for “extreme” cases, such as fraudulent or gratuitous transactions to the detriment of creditors. *De facto*, section 10 of the Bill introduces a general, too broad shield to personal liability for directors.

Third, this extension is likely to last far longer than the three months originally envisaged by the Government. The Explanatory Notes state that, in the event that the impact of the pandemic on businesses continues beyond the end of that period, the measure may be extended for up to six months using secondary legislation. This process may be repeated, extending the suspension period further.⁴³

As a result of all these considerations, a measure in theory designed to remove the threat of the Covid-19 pandemic on businesses is likely to lift significant restrictions on the arbitrary exercise of powers by rogue directors, thus significantly affecting creditors’ rights (and the rule of law).

c) Concluding Remarks

Wrongful trading already has a relatively high barrier of proof, with very few cases ever taken forward. It already has safeguards which probably would, for most sensible directors, not leave them exposed to risk of personal liability *in any given circumstance*.

In practice, English courts manage to successfully balance the need to adopt a tough stance on errant directors without unduly compressing their freedom and ability to make rescue attempts on the eve of insolvency. This is especially true whenever directors act under the expert advice of turnaround professionals and accountants.⁴⁴ As a result, there is no need to introduce a suspension of wrongful trading.

Section 10 of the Bill has altered this equilibrium, unless it is significantly amended as the Bill progresses through Parliament. On the one hand, in some instances this section does not offer protection to directors responsible for worsening of the debtor’s financial position, even if this happened after 1 March 2020 and because of the crisis. On the other, it has the potential of being abused by rogue directors because liability is suspended irrespective of whether the losses are *caused* by the pandemic. It is sufficient that these losses are *incurred* during the pandemic (or for a long period of time after 1 March 2020).

As a result, section 10 of the Bill becomes a sort of “Get Out Jail Free” card⁴⁵ for rogue directors who incurred excessive liabilities at the time of Covid-19. When applicable, it shields them from liability for losses caused by wrongful trading and not due to the Covid-19 pandemic.

⁴³ Explanatory Notes to the Corporate Insolvency and Governance Bill 2019-21, para 29.

⁴⁴ *Re Continental Assurance Company of London plc* [2001] B.P.I.R. 733.

⁴⁵ Wrongful trading is a *civil* rather than criminal offence. Readers should not be too alarmed by this choice of phrase.

IV. Conclusion

A person who is not expert in insolvency matters may be excused for thinking that the wrongful trading provision represents an unreasonable burden for directors at times of crisis. The same person might be equally excused for thinking that the Government's decision to suspend the liability rather than enforceability of this provision is "the right one" to save companies and, ultimately, jobs.

But the devil is in the detail. This paper evidences that the Government's decision does not withstand academic scrutiny. This is because the suspension of liability for wrongful trading is poorly drafted and does not properly consider the law and the way in which courts have consistently interpreted section 214 of the Act.

All these elements strongly suggest that the measure fails to achieve the Government's goal to remove a deterrence to continue trading where there is a threat of insolvency. It produces, however, undesired side effects. As a result, the announced suspension of liability for wrongful trading may generate a plethora of abusive practices and raise rule-of-law concerns for restricting creditors' rights without any apparent justification.

The Right to Work and Rights in Work during the Coronavirus Pandemic: The Response of the United Kingdom

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I. Introduction

With many of us now working from home and some commentators even predicting the 'end of the office', we cannot but fail to notice the impact of the Coronavirus outbreak on our terms and conditions of employment.¹ For those essential workers on the frontline, the situation is altogether more serious.² The effects of the Coronavirus on the world of work are beginning to be explored, with the current academic analysis largely focused on discrete areas of employment law, for example the health and safety of workers,³ protection from unfair dismissal, the right to paid annual leave,⁴ and the interaction between the UK Government's furlough scheme and the background rules of domestic employment legislation.⁵

This paper will seek to present an overarching analysis of the virus' intrusion into working conditions through the lens of the 'right to work'. The right to work is a social right identified in a number of international rights instruments, notably the International Covenant on Economic, Social and Cultural Rights (the Covenant), the European Social Charter (the Social Charter) and the European Union Charter of Fundamental Rights (the EU Charter).⁶ This paper will explore the components of the right to work that are particularly relevant in the context of the Coronavirus pandemic, notably the State's obligation to prevent unemployment, the right to decent conditions of work and crucially, the right not to work.

The right to work is also linked intimately to the freedom of employers to pursue their business. The consequences of this connection for workers' rights is a potential cause for concern. Of course, all of these issues clearly transcend the current pandemic, but the Coronavirus provides an important impetus to explore a concept that despite extensive academic analysis, has so far failed to gain much traction as a standalone fundamental social right.

II. What is the Right to Work?

The first hurdle in any consideration of the right to work is that the content and scope of the concept is difficult to define, with various meanings being ascribed to it depending on

¹ Daniel Thomas, Stephen Morris and Andrew Edgecliffe-Johnson, 'The End of the Office? Coronavirus may Change Work Forever', *The Financial Times*, 1 May 2020.

² James Robottom, 'The Legal Rights of Healthcare Workers to Personal Protective Equipment during the COVID-19 Pandemic', UK Labour Law Blog, 13 April 2020.

³ Stuart Brittenden, 'The Coronavirus: Rights to Leave the Workplace and Strikes', UK Labour Law Blog, 27 March 2020.

⁴ Alan Bogg and Michael Ford, 'Furloughing and Fundamental Rights: The Case of Paid Annual Leave', UK Labour Law Blog, 6 April 2020.

⁵ Alan Bogg and Michael Ford, 'Legislating in Times of Crisis: The Coronavirus Job Retention Scheme', UK Labour Law Blog, 23 March 2020; Alan Bogg and Michael Ford, 'Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2', UK Labour Law Blog, 31 March 2020.

⁶ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UN Treaty Series, vol. 993, p. 3; Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163; EU, Charter of Fundamental Rights of the European Union, 26 October 2012, [2012] OJ C26/02.

the context. It could, first of all, be conceived as a legally enforceable right, with a corresponding obligation on the State to provide employment, although this is unlikely to stretch to a right to a particular job.⁷ Second, the right to work might be viewed as encompassing a right to decent work, being tied with the concept of fair and just working conditions, explored below. Going further still, it can be thought of as a right destined to provide for human self-realisation.⁸ More controversially, the right to work has been linked with the correlative *duty* to work.⁹ As argued in this paper, the right to work may also be construed as a right not to work, or at least the right not to work in dangerous conditions.

The scope and content of the right to work is complicated by the fact that it is a right that can potentially be raised against a variety of actors, namely the State, the employer or trade unions. As against the State, the right to work can be viewed as a duty to maintain conditions of full employment, to protect the right of every worker to earn a living freely chosen and to provide employment services and vocational training for all workers.¹⁰ The second actor against whom the right to work could conceivably be raised is the employer. Every worker has the right to be engaged on a non-discriminatory basis, a right to be given work while employed, a right to remain in continuous employment and to be reinstated in cases of unfair dismissal.¹¹ However, the right is probably not broad enough to encompass a guarantee of satisfying or rewarding work from the employer. Finally, the right to work can be invoked against trade unions in closed-shop situations, providing a right for workers who are not members of a union to seek and maintain employment.¹² The latter has led to the right to work being treated with a great deal of suspicion within employment law circles, and overlooks the role that trade unions can play alongside the State and private employers in ensuring the realisation at national level of a meaningful right to work.¹³

III. The Right to Work as a Fundamental Social Right

The right to work is scattered across a number of international rights instruments. To begin with, Article 23(1) of the Universal Declaration of Human Rights provides that '[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'.¹⁴ The content of the right to work is further specified in other UN rights instruments, most notably the Covenant. Article 6 of the Covenant attests to the recognition by the States Parties of the right to work 'which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. Steps to be taken to safeguard this right include technical and vocational guidance and training programmes, policies, and techniques to achieve economic, social, and cultural development and productive employment under conditions that safeguard the

⁷ Bob Hepple, 'The Right to Work' (1981) 10 ILJ 65, 73; Council of Europe, *European Social Charter: A Short Guide*, 2000, 119.

⁸ Hugh Collins, 'Is There a Human Right to Work?' in Virginia Mantouvalou (ed), *The Right to Work* (Hart 2015) 17, 29.

⁹ Guy Mundlak, 'The Right to Work, the Value of Work' in Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2007) 341, 343.

¹⁰ Hepple (n. 7) 69.

¹¹ *ibid* 73.

¹² *ibid* 79.

¹³ Alan Bogg, 'Only Fools and Horses: Some Sceptical Reflections on the Right to Work' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2015) 149; Colm O'Connell, 'The Right to Work in International Human Rights Law' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2015) 99, 109.

¹⁴ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

fundamental freedoms of the individual. The provisions of Article 6 enjoy particular prominence as the first substantive right set out in the Covenant.¹⁵ The UN Committee on Economic, Social and Cultural Rights has sought to flesh out the concept of the right to work, highlighting that '[w]ork as specified in article 6 of the Covenant must be *decent work*. This is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of *work safety* and remuneration'.¹⁶

At the European level, the right to work can be found in both the Social Charter, which is the social rights equivalent of the European Convention on Human Rights and also in the EU Charter. Article 1 of the Social Charter calls on the Parties to undertake:

(1) to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment; (2) to protect effectively the right of the worker to earn his living in an occupation freely entered upon; (3) to establish or maintain free employment services for all workers; (4) to provide or promote appropriate vocational guidance, training and rehabilitation.

The focus of this provision is on the State's obligation to achieve full employment, although it also roots the right to work in the right of every worker to earn their living in an occupation or profession *freely* entered upon. Essentially, this means that every worker has the right to enter the workforce without constraint or coercion, ie it is the 'liberty' component of the right to work.¹⁷

The EU Charter similarly conceives of the right to work as the freedom to choose an occupation, thereby overlooking the other components of Article 1 of the Social Charter, which as we just saw, also ground the right to work in wider issues of access and availability of work.¹⁸ Article 15 provides that '[e]veryone has the right to engage in work and to pursue a freely chosen or accepted occupation'. This provision has a very wide personal scope when compared to other EU Charter rights, applying to "everyone", but the corresponding duty to ensure the right's protection is framed by the EU Charter's horizontal provisions, which specify that it is addressed to the EU's institutions and the Member States when they are implementing EU law. The Explanations attached to the EU Charter note that Article 15 is derived from the Court of Justice of the European Union's pre-existing case law on the freedom to pursue a trade or occupation as a general principle of EU law.¹⁹ The Explanations thereby link Article 15 to the freedom to enter a freely chosen occupation found in Article 1(2) of the Social Charter. Again, this implies a right to access employment (or not to be deprived of employment) in a non-discriminatory manner. The difficulty here is that the terminology used has been inconsistent. For example, the Explanations attached to Article 15 refer to the 'freedom to pursue an economic activity', while the case referred to does not use that formula at all, instead referring to the 'freedom to choose and practice their trade or profession'. As explained further below in the context of the freedom to conduct a business, there are perhaps different connotations to being able to freely enter an occupation and the freedom to choose an economic activity.

¹⁵ O'Cinneide (n. 13) 104.

¹⁶ UN Committee on Economic, Social and Cultural Rights: General Comment No 18, *The Right to Work*, UN Doc. C/C/12/GC/18, 6 February 2006 para. 7.

¹⁷ Guy Mundlak, 'The Right to Work: Linking Human Rights and Employment Policy' (2007) 146 *Int'l Lab Rev* 189, 193.

¹⁸ Diamond Ashiagbor, 'Article 15' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights* (1st edn, Hart 2014) 423, 428.

¹⁹ Case C-4/73 *Nold* ECLI:EU:C:1974:51.

The nebulous nature of the right to work's focus on the 'availability' and 'accessibility' of work is somewhat tempered by its close connection to other more 'substantive' rights which seek to guarantee work that is 'acceptable'.²⁰ As O'Connell remarks in relation to the Covenant and the Social Charter, 'the placing of work at the beginning of the list of substantive rights is no accident, but rather reflects its fundamental importance in the overall scheme of social rights'.²¹ Most obviously, we rely on work as a source of income to fulfil our basic human needs such as food, housing, and health. More widely, work can be seen as an act of human self-expression and socialisation.²² The freedom to pursue a freely chosen trade or profession also has clear links to the concept of self-determination and human dignity. The idea is, that although not all of us want to work, or at least not all of the time, work gives us a sense of purpose, community, and self-respect.²³ The right to work is also linked to protections against unfair dismissal and discrimination in access to employment. Finally, the right to work has a clear relationship with other fundamental employment rights such as the right to fair and just working conditions.²⁴

Having set out the content and scope of the right to work, we are now in a position to assess the implications of the Coronavirus pandemic for that right.

IV. The Implications of Coronavirus for the Right to Work

The Coronavirus poses obvious challenges for the right to work, but at the same time, the right to work can potentially be relied on to ensure a robust employee-protective response to the pandemic. Three situations will be distinguished, with the Coronavirus pandemic creating different right to work implications in each category. namely: (a) the right to work implications for those of us now working from home; (b) the consequences for those who are no longer working either due to having been furloughed or made redundant and finally and (c) the right to work implications of going to work while the pandemic continues.

a) Those who are working from home

At least since the beginning of the UK's initial general lockdown on 23 March, a large proportion of the population have been working from home, with the Coronavirus Regulations permitting travel for the purposes of work only where it is not 'reasonably possible' to do this.²⁵ In certain respects, those of us who are able to work from home are in a privileged category from a right to work perspective, with our continued employment likely to be facilitated for the duration of the pandemic.²⁶ Having said that, the wider right to (decent) work implications of working from home are potentially numerous.

The most obvious consequence of working from home is the further blurring of the home and work distinction, already under strain from the ever-presence of email. The deployment of new workplace technologies to facilitate staff meetings, such as Zoom add to the sense that we never really leave the workplace and that work never really leaves us. The added

²⁰ Collins (n. 8) 120.

²¹ O'Connell (n. 13) 112.

²² Mundlak, 'The Right to Work, the Value of Work' (n. 9) 342.

²³ Ashiagbor (n. 18) 425.

²⁴ For example, Article 31(2) of the EU Charter.

²⁵ The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

²⁶ COVID Inequality Project, <<https://sites.google.com/view/covidinequality/home>> .

pressure to be 'always on' also places strain on employment rights found in domestic legislation, notably the Working Time Regulations 1998, which implement the EU's Working Time Directive 2003/88/EC. The Directive entitles workers to a minimum number of rest periods during the day, a limited working week and a right to paid annual leave. In a long line of case law, the EU Court of Justice has ensured that any such break period must be for the purpose of rest and relaxation from work and any time spent not working, but on-call, at the employer's disposal or even on sick leave, cannot count as time off.²⁷ But, how does one ensure that adequate rests breaks are taken when the office is also the home and when, at least in the early stages of the lockdown, frequently going outside was not an option?

Anyone whose travel plans have recently been disrupted will also know that there are definite consequences of the pandemic for the exercise of the right to annual leave. Is it really possible to switch off and relax when confined to the home which has also been serving as your workplace? Recently adopted legislation recognises these difficulties, providing that where, due to the Coronavirus, it is not reasonably practical for the worker to take leave during a particular leave period, the entitlement to annual leave can transfer to the next period.²⁸ As Bogg and Ford argue, these Regulations should be interpreted as preventing the employer from insisting on workers taking annual leave while the pandemic persists, including for those employees on furlough.²⁹ Such a reading is reinforced by the right to fair and just working conditions found in Article 31(2) of the EU Charter, perhaps in conjunction with the right to work in Article 15. The Court of Justice has already held that, as a fundamental social right, the obligation is on the employer to ensure that the employee is able to exercise the right to annual leave.³⁰ However, the Government's current advice seems to be that the employer can indeed specify when the employee should take leave, an interpretation that does not sit well with the purpose of the underlying right.³¹

In the grand scheme of a global pandemic, these issues might seem insignificant, but there is always the risk that hard-won employment rights will be eroded. Working time protections are already vulnerable to Brexit, with the UK Government having long-demonised the protections granted in the Working Time Directive.³² Indeed, the Charter itself will strictly speaking no longer apply in the UK once the transition period has ended, although its interpretative pull may live on. When the floor of rights currently guaranteed by EU legislation and the EU Charter is removed, it may be a whole lot easier to justify the suspension of working time rights found in domestic legislation. It is here where reliance on wider international standards such as the right to work guaranteed in the Social Charter and the Covenant may prove useful.

A more immediate issue is the particular effect that working from home has for those with childcare responsibilities. Balancing work with childcare has obvious consequences for the accessibility limb of the right to work. There are also clear gender dimensions to this issue, with the burden of childcare and housework continuing to fall disproportionately on female

²⁷ Case C-151/02 *Jaeger* ECLI:EU:C:2003:437; Joined Cases C-350/06 and C-520/06 *Stringer* ECLI:EU:C:2009:18.

²⁸ The Working Time (Coronavirus) (Amendment) Regulations 2020.

²⁹ Bogg and Ford (n. 4).

³⁰ C-214/16 *King* ECLI:EU:C:2017:914.

³¹ UK Government, 'Holiday entitlement and pay during coronavirus (COVID-19)', 13 May 2020.

³² Case C-84/94 *UK v Council* ECLI:EU:C:1996:431.

workers.³³ There have long been calls for greater recognition of the value of work done in the home. If the right to work is to have any real meaning, we need to decide what is meant by 'work'. As a fundamental social right, the concept of work should be defined broadly. If nothing else, the Coronavirus pandemic has shown us that it is those in the most precarious and often low-paid industries who we now depend on the most.

Finally, the increased reliance on home-based technology raises further issues as to access to such technology, for example computer equipment and high speed internet and the consequent rise in energy bills, which are unlikely to be met by increased wages.³⁴ All of these issues clearly engage the non-discriminatory access to employment aspect of the right work, but it is not at all obvious who bears the responsibility for responding to these challenges. The existing legal framework in the employment context, which was not designed to meet the current circumstances, and is already creaking under the weight of new technology and increasingly flexible forms of work, is unlikely to be of much assistance. The contractual model underpinning the employment relationship is very adaptable to permitting non-traditional (and less protective) forms of work, while at the same time, alterations to terms and conditions of employment are not so easily facilitated without falling foul of contractual principles.

b) Those who are no longer working

As already mentioned, those who can work from home are in a relatively secure position. For those who have been made redundant, or who have been furloughed, the situation is more precarious. Particular difficulties have been caused for those employed by shops and restaurants, most of which were forced to close temporarily, meaning that many of these already low-paid workers are likely to have been furloughed.³⁵ Furloughing is provided for in the Coronavirus Job Retention Scheme, which allows employers to apply for an 80% reimbursement of wages (up to £2,500) for employees who have been placed on furlough, for an initial period of three months (now extended until October 2020), the purpose being to prevent redundancies in situations where it is no longer possible for the employee to continue working due to the restrictions on businesses opening.

The Scheme has been criticised from the outset, notably for its initial differentiated approach to the various categories of employment status.³⁶ This is partly because it cannot be divorced from the background of the existing inadequacies in domestic UK employment law, which, as mentioned, do not allow for much flexibility in the variation of terms and conditions of employment. By contrast, the law is much more permissive of dismissals at both common law and under statute, albeit that the latter engages further procedural and substantive protections, thereby incentivising employers to dismiss their workforce and reengage them later on under new terms and conditions.³⁷ The only real protection derives from the Equality Act 2010, which would prevent discriminatory selection for furlough and potentially other contractual mechanisms such as the implied term of mutual trust and confidence.³⁸ If the Scheme, combined with the existing legislative backdrop, were

³³ Donna Ferguson, "I feel like a 1950s housewife": how lockdown has exposed the gender divide', *The Observer*, 3 May 2020; COVID Inequality Project (n. 26).

³⁴ Joanna Partridge, 'UK household energy bills to soar by £32 per month', *The Guardian*, 4 May 2020.

³⁵ Andy Verity, 'Coronavirus: More than 9 million expected to be furloughed', *BBC News*, 8 April 2020.

³⁶ Bogg and Ford (n. 5).

³⁷ *ibid.*

³⁸ *ibid.*

(inadvertently) to lead to widespread redundancies, this would clearly be at odds with the State's obligation under the Covenant and the Social Charter to devise labour market policies that support employment. The same is true of the State's handling of the wider economic impact of the pandemic.

c) Those who are still going to work

As already mentioned, the Regulations stipulate that workers can leave their home to go to work where it is not 'reasonably possible' to work at home. As the lockdown begins to ease, more of us will also return to work. This raises significant health and safety issues for those who are required to go to work, particularly those in essential frontline services such as the NHS, transport, and food supply. The lack of access to Personal Protective Equipment (PPE) has gained much attention in recent weeks. There is a raft of legislation guaranteeing the health and safety at workers at work.³⁹ For example, the EU's Framework Directive 89/391/EEC stipulates that workers should not suffer any detriment for having exercised their right to protect their safety. The UK implementing legislation stipulates that any dismissal resulting from an exercise of these rights will be automatically unfair and incapable of justification by the employer. The right not to suffer a detriment or dismissal covers a situation where an employee refuses to work, leaves the workplace or refuses to enter certain parts of the workplace due to a reasonable belief that there are circumstances of 'serious and imminent danger'.⁴⁰ These provisions have been interpreted widely to cover not only the individual employee themselves, but also other workers and potentially family members.⁴¹ Brittenden suggests that given the seriousness of the pandemic and the Government's own use of the terms 'serious and imminent', it is highly likely that an employee refusing to work out of fear of infecting themselves or others, will be protected. It is suggested that such a reading can be bolstered by reliance on the right to work.

Of course, many of us expect to return to work at some point in the near future. The Government has issued draft guidelines for getting employees to return to work while the pandemic is on-going.⁴² These non-binding guidelines have been criticised by the Trade Union Congress as putting workers' health at risk.⁴³ The guidelines leave it to employers to decide whether it is safe for their business to reopen but provides little detail beyond stating that social distancing and handwashing "should" happen. Given the risks while at work or travelling to work, the question arises as to whether the right to work can also encompass a right not to work.

Most of us, regardless of need, derive a strong sense of identity and value from our chosen trade or profession and value the social connections that work can bring. It would be a stretch, to say the least, to argue that the right to work as a fundamental human right, encompasses the right not to work at all. However, it may be interpreted as including a right to refuse to work under certain circumstances or to perform certain tasks. Such a

³⁹ Framework Directive 89/391/EEC; ss 44 and 100 Employment Rights Act 1996; Directive 89/656; The Personal Protective Equipment at Work Regulations 1992; Workplace (Health, Safety and Welfare) Regulations 1992; Management of Health and Safety Regulations 1999; Health and Safety at Work Act 1974.

⁴⁰ Brittenden (n. 3).

⁴¹ *Masiak v City Restaurants* [1999] IRLR 780.

⁴² UK Government, 'Working safely during coronavirus (COVID-19)', 11 May 2020.

⁴³ Rowena Mason, 'Coronavirus plan for returning to work puts employees at risk, says TUC', *The Guardian*, 4 May 2020.

refusal to work will usually constitute a breach of contract. We have already seen that this rule is to an extent tempered by the fact that the employee has a right not to suffer a detriment for refusing to work in the face of serious and imminent danger. The employer is also required to comply with health and safety legislation. But is this really enough for an employee who genuinely fears the health repercussions of continuing to work during the pandemic? The right to work might help in one respect, namely the idea that work must be “freely” chosen or entered upon. Making the choice between potentially be dismissed for falling on the wrong side of the concept of “serious and imminent danger” and continuing to take the risk of going to work is really no choice at all.

Of course, the right to work, like most rights, is not absolute, but may be limited, provided that any such limitations are necessary, justified, and proportionate. It should be recognised that employers and the Government are reacting to a fast-developing situation, but this is no excuse to overlook fundamental social rights. There is also the danger that some of the rapid changes to working conditions that have taken place in the immediate wake of the crisis will solidify, leading to a semi-detached body of regulation that sits uneasily with existing employment law. If nothing else, the current situation has highlighted flaws within the current regulatory regime, notably the continued exclusion of some of the most vulnerable workers from legislative protections, income inequality and the continued gendering of household work.

Another issue, is that, as mentioned, the employer has competing rights that may undermine any invocation of the right to work. The freedom to conduct a business found in Article 16 of the EU Charter is a clear example. Quite clearly, businesses that have been closed due to the Coronavirus, will want to reopen as soon as possible and it can conceivably be argued the decision to require many businesses to shut their doors infringes their freedom to conduct a business. The invocation of business freedoms to challenge the lockdown has potential implications for the health, safety and working conditions of employees.

Both Articles 15 and 16 of the EU Charter derive from the EU Court’s earliest case law on the freedom to pursue economic activity as a general principle of EU law.⁴⁴ Although both rights are, in theory, also subject to the same limitations, the reality is that the CJEU has granted a wide interpretation of the concept of freedom of contract within Article 16, to the detriment of employee-protective legislative rights.⁴⁵ The CJEU has confirmed that both Articles 15 and 16 are closely related, with both protecting individual autonomy, linked to the performance of economic activity. Where the two provisions differ is that the right to work is connected to the concept of free choice and personal autonomy of the individual, while the freedom to conduct a business protects entrepreneurial values, such as freedom of contract.⁴⁶ The right to work is also infused with (and indeed infuses) other fundamental employment rights, such as the right to fair and just working conditions. This symbiosis can lead to a more worker-friendly reading of employment legislation even in the face of the strains posed by the current pandemic.

⁴⁴ Case C-4/73 *Nold* ECLI:EU:C:1974:51.

⁴⁵ Case C-426/11 *Alemo-Herron* ECLI:EU:C:2013:521.

⁴⁶ Advocate General opinion in Case C-190/16 *Werner Fries* ECLI:EU:C:2017:225.

V. Conclusion

The Coronavirus pandemic has clear implications for the world of work, from both the perspective of the wider shape of the economy and on the basis of our individual terms and conditions of employment. The right to work, while often indeterminate and difficult to enforce, can serve to highlight the fundamental nature of the social rights underlying our everyday experiences at work. It also acts as a unifying force, bringing together what can at times appear a rather disparate medley of individual employment rights, found both in international social rights instruments and domestic law. The right to work, being closely linked with autonomy concepts, can act as a strong counterpoint to the freedom to conduct a business of employers, many of whom are now keen to return to business as usual in the wake of the pandemic.



The Impact on Vulnerable Populations

The Impact on Vulnerable Populations

Vulnerability: A Discussion

Caroline Bald, Laura Carter, Carla Ferstman, Andrew Fagan, Geoff Gilbert and Aaron Wyllie
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The majority of authors in this section came together to discuss synergies between their chapters and common themes arising in their research.

It was agreed that “vulnerability” is not a neutral world. It arises from intersecting structural inequalities and is a cross-cutting issue. The use of this particular term, the context in which it is used and by whom, as well as how it is framed, feeds into its politicisation and, indeed, its weaponisation. Covid-19 has turned populist narrative about who is vulnerable, on its head. It requires us to rethink who is vulnerable, in all sorts of ways. This is further underscored by the killing of George Floyd in Minneapolis on 25 May. This entire area is rapidly evolving.

The discussants also noted that vulnerability is not accidental; it is constructed. It can be about choices, all of which requires structural, political analysis: how are long-standing issues of marginalisation redressed by governments and communities; who obtains access to healthcare; who is released from prison; how are asylum seekers dealt with? Covid-19 has simply amplified every aspect of pre-existing discrimination and disempowerment.

There is power in the designation of “vulnerable”; there is also a power for who is taking or avoiding responsibility for that vulnerability. Older people in care homes have been significantly affected; this must be considered in terms of the extent to which governments had made provision for care, but also how hospitals have navigated and cast to the side vulnerability by pushing persons back into care homes and exposing those locals to further infection risks. The power dynamic is about who is responsible for the vulnerable, and who is responsible for the fatal outcomes.

Another theme which arose during the discussion was the role of knowledge and knowing. There is an urgent need to educate the public about race in response to the recent protests against racism, but what is missing perhaps is a deeper understanding of how inequalities are created, maintained and accentuated, and to consider the tools to dismantle the structures in place which lead to such edifices. What are our responsibilities as educators, social workers, activists or lawyers?

Carter’s paper discusses the importance of “centering” as a conceptual process of bringing vulnerable people back in from the margins in policy discourses, a concept articulated by the theorist and activist bell hooks. This was understood as a crucial framing for understanding power dynamics and to recognise that by incorporating their lived experience and expertise from their situation of vulnerability, it is possible for theory and policy responses to become more complete and appropriate, in order to better reflect the needs of people caught up in vulnerability. The discussants canvassed the ways in which this principle of “centering” could also encompass or take into account the goals of empowerment – access to decision-making from the context of vulnerability, having their own unfiltered voices heard. In many ways, the pandemic has reduced those voices even

further than before. One needs to take care to consider whether the “we” who wish to bring people in situations of vulnerability in from the margins, includes those people themselves: they can still be marginalised in “the middle”.

The notion of positive obligations is another useful lens through which to assess necessary actions to take better account of structural vulnerabilities and seek to address them. There is a question whether Covid-19 requires the state to go beyond what they would normally be doing to address the extra layers of vulnerability and added risks facing affected persons. This may depend on the nature of the particular issues at stake. It may be that the laws work fine, but it is the resources to underpin them which have been lacking.

It is important to understand the role of social movements and other “soft” approaches to advance rights, particularly when the law is being undermined or unenforced. There are important political opportunities that can be used to ensure that the fleeting examples of solidarity are solidified. Just beneath the veneer of “we’re all in it together” is a veneer of populism and racism, that must be addressed systematically. There is a moment of potential transformation on which we must be ready to capitalize, but the transformation must occur through structural changes and activism, as opposed to simply wishful thinking.

The Politics of Identity in the UK: Before, During and After Covid-19

Dr Andrew Fagan (Director, Human Rights Centre) [DOI: 10.5526/xgeg-xs42_020]

I. Introduction

Covid-19 is the most harmful and devastating pandemic the world has faced for over a century, and one hopes that biomedical science will provide the most effective clinical remedy to the virus in due course. When countries began to seriously pay attention to the rapid spread of the virus, it was commonly asserted that Covid-19 was an indiscriminate disease, which everyone was similarly vulnerable to, a claim which appears to be exemplified by the UK Prime Minister, Boris Johnson, contracting the virus in late March 2020.

After several months of the spread of Covid-19 throughout the developed world, we now know that the fate of Boris Johnson revealed little about peoples' vulnerability to the virus. In stark contrast to the claim that the virus did not discriminate, it became quickly apparent that the likelihood of becoming infected is far higher amongst some socio-economic, racial and ethnic groups than others.¹ Identity is an aetiological factor in the spread of the virus. This is not because of the differing physiological or DNA composition of those who have disproportionately been infected by the virus. Biology is not destiny. Rather, those most likely to become infected and thus to die from the virus are also many of the poorest and most socially marginalised within our societies. In addition to its biomedical properties, Covid-19 must also be understood as a profoundly social and political pathogen, that sheds an unrelenting light on the social and political pathologies of affluent, notionally democratic societies such as the United Kingdom.

This paper focuses upon two pandemics and examines the relationship between them. The first is, of course, Covid-19. The second, that I suggest here, consists of a form of identity-fuelled politics which has quickly risen to the status of liberal democracy's most formidable adversary in many affluent societies, including that which I shall focus upon here: the United Kingdom. In a chapter I wrote in December 2019, I referred to this as the "pandemic of discontent".² In this brief chapter, I will analyse three stages of the pandemic of discontent: before, during, and "after" the Covid-19 pandemic. In so doing, I aim to analyse the pathological character of a particular form of identity politics in the UK, whilst also, albeit somewhat speculatively, seeking to show how Covid-19 might provide the basis for the human rights community and the defenders of social justice to begin politically disrupting key identity-based elements of the pandemic of discontent. My hope is that we might be able to derive some longer-term benefits from the terrible devastation which Covid-19 has already caused by reasserting the extent to which respect for fundamental rights is essential for the sustainable well-being of any and all diverse societies.

¹ See the paper by Caroline Bald and Sharon Walker in this volume.

² Andrew Fagan, 'Confronting Uncomfortable Truths: Liberal Democracy, Minority Rights, Identity Politics and Populism,' in Anna Maria Biro, Andrew Fagan and Dwight Newman (eds) *Minority Rights and Unstable Orders* (London: Routledge, forthcoming 2021).

II. Before

Can you still clearly recall the UK as it was before Covid-19? Lest your frustrations with life in the age of Covid-19 have induced a state of nostalgia for what came before, let me remind you: significant parts of the UK had become infected by a wider political phenomenon, which, I have labelled the “pandemic of discontent”. Though not entirely consisting of a politics of identity, a particular form of identity politics was and is integral to this pandemic.

There is a large and growing body of academic literature devoted to the study of identity as a central feature of the political, socio-cultural and economic distribution of rights, resources and opportunities within established liberal democratic societies, such as the USA, the UK, France, and the Netherlands.³ Despite liberalism’s avowed commitment to equality and non-discrimination, which underpin a comprehensive body of equality and anti-discrimination law, many theorists, commentators and activists have repeatedly pointed to the multitude of ways in which formally rights-respecting, liberal democratic societies have failed to recognise and support the interests of groups of people whose avowed identity results in systematically restricting their enjoyment of equal opportunities.⁴ These critiques appear in areas such as, education, employment, housing, health-care, the protection afforded by the law, the criminal justice system, the enjoyment of one’s gender orientation, and the ability to practice key cultural and religious traditions and beliefs. Identity politics belies liberal democracy’s complacent assumption regarding the basically just and fair character of liberal institutions and liberal societies.

While advocates of identity politics are typically associated with positions on the left of the political spectrum, the identity-politicking components of the pandemic of discontent extends to include many groups towards the opposite end of that spectrum. Specifically, those groups that typically espouse nationalist and exclusionary causes and interests. While the underlying causes of right-wing populism are complex, a key element of right-wing populist identity politicking consists of the support it enjoys amongst communities of people who have come to view themselves as the victims of the liberal democratic order and the “elites” who are seen as administering liberal democracy.⁵ Ironically, for many of its supporters, much of the ostensive appeal of right-wing populist identity draws upon an experience of the ontological insecurity and vulnerability which has mobilised various minority communities to fight for their collective rights to exist and thrive since the emergence of the identity politicking age in the 1960s until the present day.⁶ The re-emergence, and several eye-catching political successes, of right-wing populism freshly highlights the extent to which identity politics now includes groups of people who claim that their own identities are increasingly vulnerable to the presumed legal, political, socio-

³ Bhiku Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd edition) (Basingstoke: Palgrave Macmillan, 2006). Iris Marion Young, *Justice and the Politics of Difference* (Princeton N.J.: Princeton University Press, 2011).

⁴ Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge: Cambridge University Press, 2001). Michael Kenny, *The Politics of Identity: Liberal Political Theory and the Dilemmas of Difference*, (Cambridge: Polity Press, 2004).

⁵ Eric Kaufman, *Whiteshift: Populism, Immigration and the Future of White Majorities* (Harmondsworth: Penguin, 2019).

⁶ Ipsos Mori, ‘Populist and Nativist Sentiment in 2019: A 27 Country Survey,’ 2019, https://www.ipsos.com/sites/default/files/ct/news/documents/2019-08/populism-and-nativism-2019_0.pdf; Steven Hahn, ‘The Rage of White Folk: How the silent majority became a loud and angry minority’, *The Nation*, 27 September 2017, <https://www.thenation.com/article/the-rage-of-white-folks/>.

cultural and economic rights gained by particular minority communities within societies such as the UK. Illiberal right-wing populism is, to a large extent, the principal political manifestation, or symptom, of the pandemic of discontent, which itself is seen by many as posing the greatest existential threat to liberal democracy.⁷

In addition to unbridled prejudice, right-wing populism is fuelled by a wide range of concerns and anxieties which have emerged within the UK over the course of many years. The services and “goods” which the vast majority of us depend upon: education, employment, health-care, safe and affordable housing, access to a healthy environment, pensions which support a dignified old age for all, adequate social security, affordable public transport and adequately funded local authorities, have become increasingly precarious and vulnerable to under-funding and reduced accountability over several decades.⁸ Many people are entirely justified in feeling that the prevailing political system has routinely and systematically failed them. Under more democratic circumstances, these conditions might have led to wholesale popular support for a progressive political platform committed to addressing what some identify as the principal cause of this pandemic: an inequitable neoliberal economic order, which has led to the relative impoverishment and destitution of many different groups of people who inhabit the UK. There are demonstrable grounds for forging an electorally powerful, multicultural constituency comprising all of those who the prevailing order has failed, which would include many amongst the white British and BAME communities who share a common exposure to an inequitable economy and society. Against this possibility, right-wing populist identity politicking represents, arguably, the most powerful obstacle to forging a transformative politics committed to securing equal rights and effective opportunities for all communities and individuals within the UK. By weaponizing racism and xenophobia, right-wing populism divides groups of people who, despite their differing identities, are similarly exposed to many of the same social, political and economic ills.

As is the case with the Covid-19 pandemic, the pandemic of discontent has also disproportionately impacted many of the more vulnerable and marginalised communities within the UK.⁹ Racist, xenophobic and intolerant beliefs and attitudes persist within many liberal democracies, despite the existence of a comprehensive array of legal commitments and constitutional provisions designed to protect minorities from such harms. For many legal theorists and political philosophers, the very survival of liberal democracy rests upon robust state support for the rights of minorities, combined with concerted efforts to combat prevailing forms of racism, xenophobia and intolerance which some utterly illiberal sections of the population may cling to.¹⁰ One of the most disturbing features of right-wing populist

⁷ William Galston, *Anti-Pluralism: the Populist Threat to Liberal Democracy* (New Haven: Yale University Press, 2018). Yascha Mounk, *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It* (Cambridge, Mass.: Harvard University Press, 2018). Yascha Mounk and Jordan Kyle, ‘What Populists Do to Democracies’, *The Atlantic*, 26 December 2018; Jan-Werner Muller, *What is Populism?* (Harmondsworth: Penguin, 2017).

⁸ Guy Standing, *The Precariat: The New Dangerous Class* (London: Bloomsbury, 2011).

⁹ The Runnymede Trust, ‘State of the Nation: New comprehensive analysis on race in Britain,’ London, April, 2020, <https://www.runnymedetrust.org/blog/state-of-the-nation-new-comprehensive-analysis-on-race-in-britain>; Equality and Human Rights Commission, ‘Healing a Divided Britain: the need for a comprehensive race strategy,’ London, 2016, <https://www.equalityhumanrights.com/en/race-report-healing-divided-britain>.

¹⁰ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977). Alan Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton, N.J.: Princeton University Press, 2014).

identity politicking is the extent to which persistent tensions and prejudices surrounding race, ethnicity and religion amongst populations, have been mainstreamed into the political discourse and even the policy commitments of some governments within some liberal democracies. The UK provides one such example of this utterly illiberal development.

Thus, evidence from the British Social Attitudes Survey, published in 2019 found that between 1983 and 2018, the proportion of the population who describe themselves as 'very' or a 'little racially prejudiced' persistently remained between one quarter and one third of the UK population.¹¹ The figure has never fallen below 25%, and has actually increased since 1996. In respect of racially motivated hate crimes, UK Home Office figures demonstrate that racially motivated hate crime has risen every year since 2013.¹² In 2018, 71,251 such crimes were reported in England and Wales: the number of hate crimes has more than doubled since 2013. An extensive range of other governmental and civil society surveys reinforce the perception that racism and xenophobia are part of the lived realities of many minorities in the UK.¹³

Of course, one might counter that, within a liberal democracy, the government cannot be held primarily responsible for the persistence of illiberal attitudes amongst some parts of the population. Indeed, the very fact that criminal sanctions exist against those who seek to turn their hateful attitudes into actions testifies to the government's continuing commitment to minority rights protection. However earnestly this objection is made, it belies the extent to which prominent UK politicians and government officials have repeatedly sought to gain political capital by playing the race and ethnicity "card".

The most prominent and far-reaching example of this is, of course, Brexit. While it is entirely reasonable to assume that many people who voted "leave" in the UK's EU referendum were not motivated by racist and xenophobic prejudices, there is reliable evidence pointing to the numerically decisive role which racially and ethnically motivated voters played in ensuring the outcome.¹⁴ This is unsurprising given the fact that many politicians, public figures and several national media outlets repeatedly sought to persuade some voters that supporting the reassertion of a particularly restrictive notion of national identity was precisely what the EU referendum was concerned with. They, at least, should not have been surprised to see significant increases in racially and religiously motivated hate crime immediately prior to and following the referendum, including the terrorist murder of the MP, Jo Cox.

Other examples of state level right-wing populist identity politicking are easy to find. Take, for example, the then Home Secretary Theresa May's 2012 statement that the UK government was committed to creating a "hostile environment" for irregular immigrants in the UK.¹⁵ The hostile environment policy was then quickly underpinned by two highly controversial pieces of legislation in the form of the Immigration Acts 2014 and 2016, which were heavily criticised by impartial bodies such as the UN Committee on the Elimination

¹¹ John Curtice, Elizabeth Clery, Jane Perry, Miranda Phillips and Nilufer Rahim (eds), *British Social Attitudes: The 36th Report* (London: The National Centre for Social Research, 2019).

¹² UK Home Office, *Hate Crime: England and Wales, 2017-2018*, <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2017-to-2018>.

¹³ See Runnymede Trust, 'State of the Nation' (n. 9).

¹⁴ Maria Sobolewska and Robert Ford, 'British Culture Wars? Brexit and the Future Politics of Immigration and Ethnic Diversity', (April 2019) 90(52) *The Political Quarterly*, 142-154.

¹⁵ See the Runnymede Trust, 'The State of the Nation' (n. 9).

of Racial Discrimination and, most recently, by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance in her 2019 report on the situation in the UK.¹⁶ Theresa May's successor as Home Secretary, Amber Rudd, then had to resign in 2018 as a direct result of the shameful Windrush Scandal, which amounted to little more than an instance of state racism, highlighting how a campaign against irregular immigrants could embroil many non-white British citizens. The effective mainstreaming of racist and xenophobic prejudices was also highlighted in the previously mentioned UN Special Rapporteur's damning country report on the UK. Resorting to rather stark language, Tendayi Achiume stated that 'the harsh reality is that race, ethnicity, religion, gender, disability status and related categories all continue to determine the life chances and well-being of people in Britain in ways that are unacceptable and, in many cases, unlawful.' (2019: p. 7) She concluded that 'in the United Kingdom explicit expressions of racial, ethnic and religious intolerance have become more acceptable, in ways that mark a notable shift.' (op cit. p.17)

Immediately prior to the outbreak of the Covid-19 pandemic, it was clear that UK politics and society were significantly infected by profoundly harmful pathogens, which had the most damaging effects upon many of the country's racial, ethnic and religious minority communities.

III. During

To repeat the claim I made towards the beginning of this paper, Covid-19 is not biochemically predisposed to infect certain identity-based groups of people. We are all of us exposed to the same disease. However, there are manifest inequalities in the rates of infection within the UK, which largely overlap existing socio-economic and identity-based inequalities within the wider population. Class and identity are integral aetiological elements of Covid-19.¹⁷

Socio-economic deprivation and marginalisation appears to be the most general category in which the discriminatory effects of Covid-19 are most apparent. Thus, in April 2020, the Office for National Statistics (ONS) revealed that those living in the poorest parts of England and Wales were dying at twice the rate of those living in the richest areas. The most deprived areas of England and Wales recorded 55.1 deaths per 100,000 people, compared with 25.3 in affluent areas.¹⁸ Of course, poverty is, to a certain extent, an intersectional injustice, which impacts many different racial and ethnic groups in the UK. Many poor and deprived white British people have also died from Covid-19. However, the racism and xenophobia which I set out above, serves to disproportionately consign many racial, ethnic and religious minorities to socio-economic vulnerability and marginalisation. This is apparent in the figures which show the disproportionate impact of Covid-19 upon many black, Asian and minority ethnic (BAME) communities in the UK. The same data showed that more than 16 percent of all people who had tested positive for coronavirus when they died were from BAME communities, despite the fact that the 2011 UK census

¹⁶ OHCHR, 'Visit to the United Kingdom of Great Britain and Northern Ireland Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance,' UN Doc. A/HRC/41/54/Add. 2, 27 May 2019.

¹⁷ Helen Pidd, Caelainn Barr and Aamna Mohdin, 'Calls for health funding to be prioritised as poor bear brunt of Covid-19,' *The Guardian*, 1 May 2020.

¹⁸ Chris Giles and William Wallis, 'Deprived areas hit hardest by the pandemic in the UK,' *The Financial Times*, 1 May 2020.

showed that 7.5 per cent of the population were Asian and 3.3 per cent black. More anecdotally, it was also very noteworthy that the first ten doctors and two-thirds of the first 100 health and social care workers who died of Covid-19 were from ethnic minorities.¹⁹ Public Health England has produced a report examining the causes of these disparities.²⁰

There is, no doubt, be a very complex set of factors and conditions which combine to expose many minority communities to significantly greater risk of becoming infected and dying from Covid-19. Some have pointed to cultural factors, such as the relatively larger size of family households amongst some South Asian-descended communities, which make socially isolating all the more difficult. However, it is clear that one of the principal factors is the greater exposure of particular occupational groups to the virus. Many of us, including many university staff, have been able to continue working from home throughout the period of social lockdown. The opportunity to work from home is, one might say, a particular privilege which Covid-19 has underlined. Many others, of course, do not enjoy this privilege. So-called key or essential workers have had to continue exposing themselves to a far higher risk of infection as they have continued to go to work. The most obvious such groups are health care and social care professionals, but the category of key workers extends far beyond these occupational categories. Identity is significant here for the simple reason that racial and ethnic minority communities are disproportionately employed in key-worker positions. For example, more than two in ten black African women of working age are employed in health and social care roles. Indian men are 150% more likely to work in health or social care roles than their white British counterparts. While the Indian ethnic group makes up 3% of the working-age population of England and Wales, they account for 14% of doctors.²¹ Similar figures are also found amongst other key occupational groups, such as public transport and public utilities.

The higher rates of infection and death from the coronavirus pandemic connect directly to the other pandemic I have been analysing in this chapter. Identity politicking based upon racism, xenophobia and intolerance are a manifestation of the social, political and economic marginalisation and vulnerability which many minority communities have been exposed to for a very considerable time and which has intensified in recent years as such prejudices have been mainstreamed into many areas of UK politics and society. The coronavirus pandemic has served to highlight the disturbingly pathological character and effects of the pandemic of discontent. The two pandemics converge to deadly effect.

IV. “After”

These words are being written in early June 2020 and I must acknowledge the speculative nature of contemplating any post-Covid age and the unavoidably tentative nature of any

¹⁹ Haroon Siddique, ‘UK government urged to investigate coronavirus deaths of BAME doctors,’ 10 April 2020.

²⁰ Public Health England, ‘Disparities in the risk and outcomes of Covid-19,’ June 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890258/disparities_review.pdf, although it’s important to note that the findings of the report have been quickly criticised by members of the BAME community. See, Haroon Siddique and Denis Campbell, ‘Censorship row over report on UK BAME Covid-19 deaths,’ *The Guardian*, 4 June 2020.

²¹ Omar Khan, ‘Coronavirus exposes how riddled Britain is with racial inequality,’ *The Guardian*, 20 April 2020; Lucinda Platt and Ross Warwick, ‘Are some ethnic groups more vulnerable to Covid-19 than others?’ Institute for Fiscal Studies, April 2020, <https://www.ifs.org.uk/inequality/chapter/are-some-ethnic-groups-more-vulnerable-to-covid-19-than-others/>.

predictions regarding what changes the post-Covid world will undergo. It does, however, seem reasonable to assume that significant changes will occur. The question is, will the overwhelming evidence of the indispensable contribution BAME communities make in sustaining the UK during (before and after) the Covid-19 pandemic, provide a means for undercutting the toxic identity politicking of the pandemic of discontent within the UK? A change is gonna come. The question is, can those of us who care about the equal rights of all steer this change in the right direction?

Right-wing populist identity politicking seeks to exploit long-standing socio-cultural differences to its own ends. Advocates of a politics which resorts to racism, xenophobia and intolerance seek to convert difference into hostile otherness. Further, the architects of right-wing populism have persistently sought to argue that the always vaguely defined essential interests of those sections of the electorate represented as the “genuine people” are necessarily at odds with liberal commitments to respecting the rights of many minority communities.²² It is possible that this interests-based appeal will be strengthened as societies like the UK face the huge economic challenges which Covid-19 will entail. History is rife with examples of severe crises being accompanied by populations turning against and scapegoating marginalised communities in their midst.

However, such developments are not inevitable. Periods of profound crisis also afford opportunities for developing radically different forms of political imagination and action. It is also possible to develop a very different narrative from our collective experience of Covid-19. While identity is a salient aspect of peoples’ vulnerability to the virus, identity has also been an essential feature of the UK’s social and economic survival over the past few months. The very same racial, ethnic and religious communities who were often targeted as posing an existential threat to the UK’s wider collective identity, have emerged as disproportionately populating the key and essential workers the media have come to depict as national heroes, worthy of being applauded once a week in a national rite of appreciation. This is particularly the case with many “front-line” health care professionals, amongst whom there is a massively disproportionate number of people from BAME communities. Thus, as of March 2019, 20% of the more than 1.2 million staff employed by the health service were BAME, compared with 14% of the general population of England and Wales. This proportion increases to 44% when it comes to medical staff. The latest figures show that 43% of senior NHS doctors and 47% of junior doctors were BAME as of March last year.²³ Indeed, other evidence has unequivocally demonstrated the indispensable role migrants from many of the UK’s former colonial territories played in staffing the then newly established NHS in the late 1940s and early 1950s.²⁴ Broadly similar claims can be made for many of the sectors included within the other key and essential worker occupations, upon whom much of the entire country has depended, not just over the past few months, but, of course, for many decades prior to the Covid-19 pandemic.²⁵ Racial, ethnic and religious minorities have shown themselves to be

²² See Muller (n. 7).

²³ Haroon Siddique, ‘UK doctors’ coronavirus deaths highlight crucial role of BAME medics,’ *The Guardian*, 3 April 2020.

²⁴ Mend, ‘Overlooking the Incredible Contributions of BAME Staff in the NHS’, Muslim Engagement and Development, April 2020, <https://www.mend.org.uk/overlooking-the-incredible-contributions-of-bame-staff-in-the-nhs/>.

²⁵ Who the UK Government identifies as key workers during the coronavirus is provided here: UK Government, ‘Guidance: Critical workers who can access schools or educational settings,’ updated 16 June 2020, <https://www.gov.uk/government/publications/coronavirus-covid-19-maintaining-educational-provision/guidance-for-schools-colleges-and-local-authorities-on-maintaining-educational-provision>.

absolutely essential for the development and survival of British society, despite the racism and xenophobia which they have often had to confront.

Right-wing populism draws support from across the socio-economic demographic sectors of the UK electorate and it is false to assume that its supporters are entirely relatively poorly educated and low-paid white British voters.²⁶ There is no denying, however, that right-wing populist political parties, such as UKIP, the Brexit Party and Boris Johnson's Conservative Party have capitalised on the support of such voters.²⁷ Right-wing populism has successfully depicted socio-cultural differences between white British communities and their BAME neighbours as, in some ill-defined sense, detrimental to the interests of the nation and its people. The experience of Covid-19 provides an opportunity to fundamentally defy and contradict this strategy, by manifestly demonstrating that the most vital interests of us all, staying alive and retaining some degree of socio-economic functioning, have been secured by countless numbers of people whom right-wing populists have sought to characterise as being, in effect, the enemies within. The NHS would collapse without BAME staff. Many of the essential services we all depend upon would grind to a halt without the very many BAME workers continuing to expose themselves and their families to greater risk of infection. BAME communities will play an absolutely essential role in rebuilding the UK's economy and society after a vaccine has been delivered. These irrefutable truths provide the basis for a political project of "building back better" as the world and the UK confronts an altered world social and economic environment.²⁸

The, admittedly rather optimistic, position I am asserting here has, perhaps, been further strengthened by the ongoing response by many people to the death of George Floyd in the US. The death of yet another African American at the hands of US police officers has sparked an astonishing reaction by a wide cross-section of people who are united in their outrage at continuing racism in societies such as ours. Initial attempts by right-wing populists to gain political capital from the killing of George Floyd have been largely overwhelmed by a different form of popular protest, one which stands up for the human rights of all and is demanding radical and transformative change. This political and social phenomenon points to the possibility of mobilising large numbers of people in support of a genuinely rights-based alternative to the hateful politics of the pandemic of discontent. A key aspect of politics consists of how we name the collective problems we are confronted by. Right wing populism has, for several years, sought to name the profoundly serious challenges we all face in ways which conspire to reinforce the pathologies which right-wing populism ultimately depends upon and which cause us so much harm and discontent. We now have an opportunity of renaming and thus effectively confronting the problems we face in ways which support the ongoing struggle to secure genuine justice for all.

²⁶ Catarina Kinnvall, 'The Postcolonial has moved into Europe: bordering, security and ethnocultural belonging', (2016) 54(1) *Journal of Common Market Studies*, 152-168.

²⁷ Nicolas Morieson, 'The Revenge of Farage: Right-Wing Populism at the 2019 UK Elections', Australian Institute for International Affairs, 19 December 2019, <http://www.internationalaffairs.org.au/australianoutlook/the-revenge-of-farage-right-wing-populism-at-the-2019-uk-elections/>.

²⁸ See the UN Secretary-General's statement on "building back better" after Covid-19 – 'We are all in this Together: Human Rights and COVID-19 Response and Recovery,' 23 April 2020, <https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and>.

V. Conclusion

The two pandemics I have briefly analysed in this chapter converge around socio-economic and socio-cultural inequalities and marginalisation. Significant aspects of the pandemic of discontent should be understood as symptoms of a deep and underlying set of structural conditions that have adversely impacted broad cross-sections of British society. The very genuine concerns which have fuelled some aspects of right-wing populist identity politicking were, of course, never going to be remedied by the hateful “medicine” prescribed by the architects of right-wing populism. In contrast, the inequalities which Covid-19 have cast such an uncompromising light upon offer a glimmer of hope of developing a new political narrative, which recognises that we really all ought to be in the struggle to rebuild better together, because our relationships with each other are (or can be) mutually interdependent and supportive. In the final analysis, we all depend upon each other. I fear that the collective memory of our interdependence will not last too long without a sustained and rights-based political project to support it. Call me a naïve optimist, but the lessons we might learn from the Covid-19 pandemic provide the means for fighting back against and perhaps even neutering the right-wing populism pathogen at the heart of the pandemic of discontent.

Covid-19 and Social Inequalities in Health in the UK

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Abstract

Shortly before the UK was struck by the Covid-19 pandemic, research was published which showed that since 2010 'inequalities in life expectancy have widened and life expectancy fell in the most deprived communities'.¹ Such inequalities in health are mainly caused by wider social inequalities. Evidence of the demographics of those who died as a result of the virus, served to highlight how these inequalities disproportionately led to the elderly and BME communities contracting Covid-19 and succumbing to it. This article will discuss how the health and wellbeing of socially disadvantaged people were negatively impacted. It argues that these inequalities are a breach of Article 2 of the Human Rights Act 1988 - the right to life, in that this right cannot be equally accessed by all. Finally, the article explores the current and future practice implications for social workers, who work daily with some of the most vulnerable people in society.

Keywords: Covid-19, health inequalities, social care, social work, social work education

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I. Introduction

The advice from the government to stay home was announced in March 2020. In effect, the country went into "lockdown" with only essential workers able to continue in their role in the workplace. Cabinet Office minister Michael Gove claimed that, '...the fact that both the prime minister and the health secretary have contracted the virus is a reminder that the virus does not discriminate'.² This implied that the virus was a "great leveller" that indiscriminately struck, independently of other factors – except age - not least people's socio-economic circumstances. However, data began to emerge which demonstrated the Covid-19 pandemic has done exactly the opposite and established that being socially advantaged has been a protective factor in the UK and globally.

It is a fallacy that the National Health Service (NHS) is available to all UK citizens that need to access free health care. Professor Donna Kinnair argues that from the point of going to the GP to accessing treatment, BME patients have worse experiences and outcomes compared to those of their white counterparts.³ Saini noted that black women were five times more likely to die in pregnancy than white women.⁴ She argues being poor is a crucial factor in health and wellbeing. The life expectancy for people living in deprived areas in England is seven years lower for women and nine year lower for men. It is a long-established fact that the lower down the social scale you are, the worse your health is likely

¹ 'Taking urgent action on health inequities', Editorial, (2020) 395 *Lancet* 659.

² Angelo *Boccatto*, 'COVID-19: Race, Class and the "Great Equalizer" Myth,' Media Diversity Institute, 17 April 2020, <https://www.media-diversity.org/covid-19-race-class-and-the-great-equalizer-myth/>.

³ Sirin Kale, 'Prof Donna Kinnair on racism in the NHS: "In every community, BAME patients suffer the most",' *The Guardian*, 10 June 2020.

⁴ Angela Saini, 'The data was there - so why did it take coronavirus to wake us up to racial health inequalities?,' *The Guardian*, 11 June 2020.

to be.⁵ People who are socially disadvantaged whether by poverty, “race”, gender, disability or sexual orientation will, on average, have more illness and shorter lives than people who are less disadvantaged, or indeed privileged. Moreover, as Marmot, et al say:

... health inequalities are not confined to poor health for the poor and good health for everyone else: instead, health follows a social gradient. Everyone below the top has greater risk of worse health than those at the top.⁶

One implication of this social gradient is that most people are affected by health inequalities, albeit to varying extents.

In February 2020, a month before the Covid-19 lockdown in the UK, a major review of health inequalities in England since 2010⁷ found that the increase in average life expectancy which had continued for over a century had now stalled. It also found that, ‘... inequalities in health have widened. Among women, particularly, life expectancy declined in the more deprived areas of the country’.⁸

II. Health Inequalities in the UK

Health inequalities are measured across two dimensions of life: illness and death. With death rates, there is a widening gap between rich and poor as measured by life expectancy at birth. In 2016-18 men in the richest tenth of the population could expect to live 9.5 years and women 7.7 years longer than people in the poorest tenth.⁹ A related trend in illness is that on average people experience longer periods in poor health. These contradictory trends present a paradox: people live longer but their old age is blighted by ill health. Marmot, et al, show that, for women, ‘healthy life expectancy has declined since 2009–11 and for both men and women years spent in poor health have increased’.¹⁰ In short, disadvantaged people will, on average, live significantly shorter lives than wealthier people and in their shorter lives will suffer more years of illness.

This raises two questions: what causes these inequalities and why are they getting worse? There are two main concepts that attempt to provide these answers: cultural/behavioural theories and socio-economic ideologies. Behavioural explanations dominate in public discourse about health where the belief is that the cause of inequalities lies with the people who are victims of it. With behaviour for example, poor people are more likely to smoke and less likely to exercise regularly and to eat a healthy diet.¹¹ Hence it seems to follow that if disadvantaged people made better choices, their health would improve and health inequalities would be reduced. Cultural explanations are often used in relation to Black, Asian, and minority ethnic (BAME) groups who tend to have worse health than the white

⁵ See e.g. Peter Townsend and Nick Davidson (eds) *Inequalities in Health: The Black Report*, (Harmondsworth: Penguin, 1982).

⁶ Michael Marmot, Jessica Allen, Tammy Boyce, Peter Goldblatt and Joana Morrison, ‘Health equity in England: The Marmot Review 10 years on,’ Institute of Health Equity, 2020, 7.

⁷ Ibid.

⁸ Ibid, 7.

⁹ Ibid.

¹⁰ Ibid, 21.

¹¹ Public Health England, ‘Health profile for England: 2017,’ 2017.

British majority; as Chouhan and Nazroo say these inequalities, 'are easily understood to be a consequence of supposed biological and cultural differences...'.¹²

The alternative to cultural and behavioural explanations is what is called the social determinants of health. This perspective seeks to understand health inequalities in their socio-economic context. The social determinants of health are, 'the conditions in which people are born, grow, live, work and age and inequities in power, money and resources'.¹³ Unhealthy eating is a good example of how a social determinants approach gives more insight into the problems than cultural or behavioural explanations.

In 2018 it was found that nearly one in four adults were likely to have had a "heart age" older than their actual age.¹⁴ Having a heart which is "older" than your chronological age greatly increases 'the risk of an early grave or ending up very disabled in later life'.¹⁵ Media discussion of how these risks could be averted mostly took the same approach; the answer, we were told, lay in changing our behaviour, making healthier lifestyle choices. This included things like, 'quitting smoking, exercising regularly and cutting back on alcohol'.¹⁶ To help with this the government published an *Eatwell Guide* which showed the types of food, and what amounts, people should eat to have a healthy diet.¹⁷

At much the same time the Food Foundation published research showing that many people could not afford this recommended diet.¹⁸ To follow the government's guidelines the poorest fifth of UK households would have to spend two fifths of their disposable income on food, when they are already spending more than half their income on other essentials. Worse, households in the poorest tenth of the population would have to spend almost three quarters of their disposable income to buy the Eatwell diet.

Human behaviour is complex but it is plainly not helpful to tell people to take more responsibility for their health by eating a healthy diet if they cannot afford to do so. In 2018/19 Trussell Trust foodbanks distributed 1.6 million emergency food parcels, a 76% increase over the five years from 2013/14. As Emma Revie, Trussell's Chief Executive, observed, 'What we are seeing year-upon-year is more and more people struggling to eat because they simply cannot afford food'.¹⁹ Unhealthy eating, like other health related behaviour, is rooted in the social determinants of health. Poor people do not make unhealthy lifestyle choices because they are ignorant or stupid. Rather, in general, they try to make the best of their situation so far as the conditions in which they, 'are born, grow, live, work and age'²⁰ allow.

¹² Karen Chouhan and James Nazroo, 'Health Inequalities', in Bridget Byrne, Claire Alexander, Omar Khan, James Nazroo and William Shankley (eds.) *Ethnicity, Race and Inequality in the UK: State of the Nation*, (Bristol: Policy Press, 2020) 78.

¹³ Marmot and others, (n. 6) 5.

¹⁴ Public Health England, 'Heart Age Test gives early warning of heart attack and stroke,' 4 September 2018.

¹⁵ Professor Jamie Waterall quoted in Denis Campbell, 'UK health crisis: why are so many of us heading for an early grave?,' *The Guardian*, 4 September 2018.

¹⁶ Public Health England, 'Heart Age Test gives early warning of heart attack and stroke,' 2018.

¹⁷ Public Health England, 'From Plate to Guide: What, why and how for the eatwell model,' 2016.

¹⁸ Courtney Scott, Jennifer Sutherland, and Anna Taylor, *Affordability of the UK's Eatwell Guide*, (London: Food Foundation, 2018).

¹⁹ quoted in Patrick Butler, 'Food bank network hands out record 1.6m food parcels in a year,' *The Guardian*, 25 April 2019.

²⁰ Marmot and others, (n. 6) 5.

As health inequalities are socially determined, they are not inevitable but can be reduced by changing social conditions. One way to address food poverty, for example, would be to increase poor people's incomes. Similarly, as Chouhan and Nazroo argue, health inequalities suffered by BAME groups reflect inequalities in areas such as, 'economic activity, employment levels, educational outcomes, housing, geographical location, area deprivation, racism and discrimination, citizenship and claims to citizenship'.²¹ These are complex issues but they are not immutable: they can be changed if there is the political will to do so.

III. The Impact of Austerity

Austerity refers to the programme of public spending cuts made by governments in the decade since 2010. Two areas of cuts most directly impact on the social determinants of health: social security benefits and local government services. With social security women and disadvantaged women in particular are most affected, for example:

- The poorest families have lost the most; with an average drop in living standards of around 17% by 2020;
- Lone mothers will experience a drop in living standards of 18%.²²

These and related changes have led to increasing child poverty, with over four million children in England now growing up in poverty.²³

Cuts to local government services have also hit the worst off hardest, with children and young people's services suffering a 29 percent funding reduction since 2010. As Marmot et al say, 'The growing mismatch between need and funding risks widening inequalities in outcomes for families and children'.²⁴

Austerity has been accompanied by other social and economic changes summarised by Marmot et al thus:

From... the closure of children's centres, to declines in education funding, an increase in precarious work and zero hours contracts, to a housing affordability crisis and a rise in homelessness... to ignored communities with poor conditions and little reason for hope. And these outcomes... are even worse for minority ethnic population groups and people with disabilities.²⁵

Overall, the 2020 Marmot review concludes that, 'austerity has adversely affected the social determinants that impact on health... [and this] will cast a long shadow over the lives of the children born and growing up under its effects'.²⁶

²¹ Chouhan and Nazroo (n. 12), 78.

²² Sarah Hall, Kimberly McIntosh, Eva Neitzert, Laura Pottinger, Kalwinder Sandhu, Mary-Ann Stephenson, Howard Reed, and Leonie Taylor, *Intersecting Inequalities: The Impact of Austerity on Black and Minority Ethnic Women in the UK* (London: Women's Budget Group, 2017) 5.

²³ Marmot and others (n. 6).

²⁴ Ibid, 46.

²⁵ Ibid, 5.

²⁶ Ibid, 5.

IV. Covid-19 in Context

Seen in isolation Covid-19 might appear indiscriminate, as Michael Gove claimed. Yet, like any other disease or health condition, how it affects people, and which people it affects most is greatly influenced by the social determinants of health. Rather than a level playing field, when it reached the UK Covid-19 hit an increasingly unequal society. As Ryan points out doing one big shop per week during the lockdown is a lot easier if you have money in the bank to pay for it.²⁷ Similarly, self-isolation is a different proposition if you can, as the Prime Minister did, retire to a country retreat, rather than living in overcrowded housing with shared facilities and no garden.

The socio-economic factors that were likely to contribute to the increased incidence of BME men being four times more likely to contract Covid-19 than their white counterparts (ONS analysis, April 2020) include living in overcrowded conditions, being on a low income, using public transport. However, BAME NHS staff including nurses and doctors who died, their deaths were disproportionately higher than white staff. Yet, many of these NHS staff worked in densely populated London which was substantially affected. Omar Khan argues race should be seen as a social determinant of health.²⁸ Far from being random, the disproportionately high Covid-19 deaths experienced by BAME groups²⁹ track inequalities in the social determinants of health which BAME groups experience.³⁰

Public Health England's report on "disparities" in Covid outcomes echoes earlier concerns showing people from the BAME community being most likely to be diagnosed and most likely to die as a result of Covid – while deprivation was also seen as an indicator, with twice higher risk of diagnosis, the report stopped short of connecting the two as result of structural racism.³¹ The report has been further criticised by Dr Chaand Nagpaul, the British Medical Association chair, that nearly seventy pages which addressed recommendations were removed from the report.³² Therefore, no recommendations have been offered as a way of resolving the disparities.

Similarly, health inequalities have been marked for the elderly during the Covid-19 pandemic. The Public Health England Report, (2020) found that between 20 March and 7 May 2020 the number of Covid-19 deaths for the elderly in care homes was equivalent to 20,457 (46.4%) and 16,016 in hospitals of the excess number of deaths expected for that period of time. This means that 75% of excess deaths were of people aged 75 and over. With a lack of resources such as ventilators, a report in the Telegraph noted that Imperial College Healthcare NHS Trust stated that very "poorly" people might need to be on

²⁷ Frances Ryan, 'Britain has a hidden coronavirus crisis – and it's shaped by inequality,' *The Guardian*, 15 April 2020.

²⁸ Omar Khan, 'Coronavirus exposes how riddled Britain is with racial inequality,' *The Guardian*. 20 April 2020.

²⁹ Up to 10 April 2020, 34% of critically ill coronavirus patients in England, Wales, and Northern Ireland were from BAME backgrounds, although in the 2011 census they made up only 14% of the UK population (ICNARC report on Covid-19 in critical care, 17 April 2020, available at: <https://www.icnarc.org/Our-Audit/Audits/Cmp/Reports>).

³⁰ For a fuller discussion of this, see Andrew Fagan's paper in this publication.

³¹ Public Health England, 'Disparities in the risk and outcomes of COVID-19,' June 2020.

³² Aamna Mondon, 'BMA demands answers over missing BAME pages of COVID-19 report,' *The Guardian*, 13 June 2020.

ventilators for two weeks, which might not be in their interest.³³ Feinstein et al highlighted that some patients would be excluded from receiving scarce resources, including mechanical ventilation; they could instead be considered for palliative extubation. They noted that ventilator allocation might be prioritised for younger patients, with a higher likelihood of recovery and maximisation of life-years saved.³⁴ Hoskin and Finch argue the use of “do not resuscitate” letters, whereby elderly patients were encouraged to consent to not be resuscitated and the resulting ethics of triage, has served to widen health outcomes for a generation.³⁵ Combined with being most likely to receive private care has created the current situation whereby the elderly have been let down significantly and social care has been marginalised to such a degree it can do little to challenge government policy and health practice. This is evidenced in language with the Minister for Health and Social Care often only referred to as Minister for Health to performative with no social care leaders presenting at UK Government Daily Briefings.

To put into context, marketisation of social care is such that 80% of government funding of social services is now spent on private and voluntary sector provision.³⁶ Three quarters of children’s and 84% of elderly care homes in England are owned by private companies.³⁷ The Association of Directors of Adult Social Services (ADASS), publishing their annual budget summary as a Coronavirus Survey, noted that four-fifths of local authorities had to call private funders to step in to support their work. They underlined that austerity did not work, put business gain before public health and ultimately there needed to be a return to state intervention when exposed by the pandemic.³⁸

The network of contracting, some 18,500 domiciliary care providers alone, hampered relief and built unnecessary risk in care release plans from hospital to community.³⁹

Before the imposition of austerity in 2010 population health was improving.⁴⁰ Had this trend continued, Hochlaf, et al estimate that, between 2012 and 2017, 130,000 deaths could have been averted.⁴¹ They argue that in withdrawing services at that time, public health policy missed opportunities to engage with activity designed to reduce preventable disease, such as reducing schools’ capacity to deliver physical education or underfunding health visiting.⁴² It follows that those 130,000 deaths were both preventable and a breach

³³ Henry Bodkin, ‘Intensive care for coronavirus patients now limited to those “reasonably certain” to survive, NHS Trust admits,’ *The Telegraph*, 29 March 2020.

³⁴ Max Feinstein, Joshua Niforatos, Insoo Hyundai, Thomas Cunningham, Alexandra Reynolds, Daniel Brodie and Adam Levine, ‘Consideration for ventilator triage during the COVID-19 pandemic,’ (2020) 8(6) *Lancet* 1.

³⁵ Janet Hoskin and Jo Finch, ‘COVID-19, disability, and the new eugenics: implications for social work policy and practice,’ *Social Work 2020 under Covid-19 Magazine*, 2 June 2020. See also, John Chisholm, ‘Doctors will have to choose who gets life-saving treatment. Here’s how we do it,’ *The Guardian*, 1 April 2020.

³⁶ John Lister, ‘The History of Privatisation,’ *The Lowdown*, 16 March 2020.

³⁷ Ray Jones, ‘Outsourcing children’s services isn’t just wrong – it’s a waste of money,’ *The Guardian*, 7 August 2019. See also, Denis Campbell, ‘84% of care home beds in England owned by private firms,’ *The Guardian*, 18 September 2019.

³⁸ Association of Directors of Adult Social Services, ‘ASASS Coronavirus Survey’, online, June 2020.

³⁹ *Ibid.* 39.

⁴⁰ Marmot and others (n. 6).

⁴¹ Dean Hochlaf, Harry Quilter-Pinner and Tom Kibasi, *Ending the blame game: The case for a new approach to public health and prevention*, (London: IPPR, 2019).

⁴² Toby Helm, ‘Austerity to blame for 130,000 “preventable” UK deaths – report,’ *The Guardian*, 1 June 2019.

of the victims' right to life. According to the Equality and Human Rights Commission, Article 2 of the HRA applies where: 'policy decisions ... may undermine or threaten someone's life or put their life at risk'.⁴³ This is exactly what austerity has been shown to have done. This is also evidenced in the ethical decisions to prioritise treatment by ventilation to younger people and providing older people with palliative extubation, effectively ending their life.⁴⁴

In the ten years since 2010 social fault lines have widened to the point where 'inequities in power, money and resources'⁴⁵ have rendered poor and disadvantaged people particularly vulnerable to Covid-19. Social workers, with other health and social care professionals, cannot undo the effects of ten years of austerity by themselves but they can use the human right to life as a lever to help protect service users from the twin depredations of austerity and Covid-19.

V. Social Work: Time for Change? – The Case for Critical Social Work Pedagogy

Many will have begun to ask whether Covid has raised public awareness of inequalities. It has certainly served to highlight the impact health inequalities have on the right to life by setting out a call for social work to more clearly situate itself as a human rights profession; from a critical social work pedagogy in education. Such a restructuring of social work education centres human rights and social justice over procedure and preparedness for current methods of practice. Critical social work pedagogy seeks to centre reflexive learning and conceptual knowing. It sets a focus on *voice* to acknowledge and counteract against power and stigma power positioning social work education as critique and instructional.⁴⁶ We posit that to do so would require curriculum and regulatory authority review. It could be argued there is a need cross-helping professions where focus is on health and lifelong wellbeing.

Critical pedagogy is a philosophical approach, drawn ostensibly from the work of Paulo Freire⁴⁷ examining the role of power in the production of knowledge. Situating in social work education speaks to valuing emancipation of oppressed groups.⁴⁸ It has been recognised for some time that the inherent tension in social work as advocate and administrator of social justice lies in its relationship to, in and with the state. Lavelette and Ioakimidis highlight the potential for social work innovation at grassroots level to meet extreme situations.⁴⁹ We advocate Covid-19 is unprecedented and requires a return to radical community-based practice, which Gutierrez and Gant describe as working with the

⁴³ Equality and Human Rights Commission, *Human Rights: Human Lives, a Guide to the Human Rights Act for Public Authorities*, (London: Equality and Human Rights Commission 2014), 11.

⁴⁴ Feinstein et al (n. 34).

⁴⁵ Marmot and others, (n. 6), 5.

⁴⁶ Gemma Corradi Fiumara, *The other side of language: a philosophy of listening*, (London: Routledge, 1999). See also, Henry Giroux, *Pedagogy and the politics of hope: theory, future, and schooling*, (Boulder: Westview Press, 1997); Amy Rossiter, 'Innocence lost and suspicion found: do we educate for or against social work?', (2001) 2(1) *Critical Social Work*.

⁴⁷ Paulo Freire, *Pedagogy of the Oppressed*, reprint, (London: Penguin Random House, 1993).

⁴⁸ Dennis Scanlon and Edward Saleebey, 'Is a critical pedagogy for the profession of social work possible?', (2005) 25 *Journal of Teaching in Social Work*.

⁴⁹ Michael Lavelette and Vasilios Ioakimidis (eds) (2011) *Social work in extremis: lessons for social work* (London: Policy Press, 2011).

community to empower and create change through collective action would allow for social work to re-centre its activist roots.⁵⁰

There is no doubt, as Bywater argues, that health inequalities are ‘a vital social work issue,’⁵¹ both because they are unjust and because ‘almost all social work service users are either already living with poor health or their health is threatened by the conditions in which they live’.⁵² Social work ought to be well placed to help meet fresh demands for parity. However, as shown, austerity has been a pervasive ideology with an uncompromising focus on government withdrawal in favour of free markets. Social care and by extension social work has in many ways had its hands tied by decentralising marketisation policies and regulatory authority undermined by repeated change. This has been evident by social care absence at the Covid daily briefings also, by fast-tracked changes made under various Covid-19 legislation. The Covid-19 Bill made changes to the Care Act 2014, making it permissible to not meet all service user needs and allowing some assessments to be delayed. Similarly, the Coronavirus guidance for Children’s Social Care Service (2020) made amendments to the Care Planning, Placement and Case Review (England) Regulations where statutory visits can be conducted as soon as “reasonably practicable” rather than in the time-frames that have been in set to regularly monitor the wellbeing of children. These changes potentially increase the incidents of safeguarding issues whilst furthering inequalities for those dependent upon statutory services and interventions. In response to this, we argue, to follow on from Peter McLaren’s call⁵³ for rethinking critical pedagogy, that there is a striking need to re-establish and embed criticality and activism in social work education and practice and formally establish a new critical social work pedagogy. This would require a root and branch reclamation of social work values, language, education and space.

While the challenges to come for social care, and social work specifically, are very different to those leading up to Covid-19 with the awareness of these inequalities, navigating the ramifications of remote working and overnight changes in legislation, it must surely be impossible for social work practice and social work education to return to business as usual. The social work rhetoric of social justice and equality would become platitudes unless we concede that a clear voice has at least the potential for activism in reasserting Article 2 of the Human Rights Act as the right to a full life.⁵⁴

⁵⁰ Lorraine Gutierrez and Larry Gant, ‘Community practice in social work: reflection on its first century and directs for the future,’ (2018) 92(4) *Social Service Review* 617.

⁵¹ Paul Bywaters, ‘Tackling inequalities in health: a global challenge for social work,’ (2009) 39(2) *British Journal of Social Work* 353, 355.

⁵² *Ibid*, 355.

⁵³ Peter McLaren, ‘The Future of Critical Pedagogy,’ (2020) 1(1) *Rethinking Critical Pedagogy*.

⁵⁴ The Care Badge, online, ‘thecarebadge.org’.

Forced Displacement in a Time of a Global Pandemic

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Abstract

Covid-19 has limited “access” by refugees and internally displaced persons (IDPs). First, access to protection at the frontiers of states and access to services in a state. Covid-19 was defined in terms of a disease from abroad, so refugees who were always seen as “other” are seen as tainted in yet a new way. Nevertheless, states have a right to control their own borders and in a time of a global pandemic, entry can be restricted. This paper will argue, however, that those controls cannot be arbitrary and must respect international refugee law and international human rights law, as well as the international rule of law. Those seeking asylum from persecution cannot be sent back to the frontiers of a territory where their life or freedom would be threatened, even if they are Covid-19 infectious.

Secondly, those admitted to the state must have the same access to life saving health care as anyone else within the territory of the state; to deny access to health care is not to make the problem go away, but to drive those fearing expulsion underground, placing even more people at risk during a pandemic. Beyond health care, refugees and IDPs must have access to all other rights during any lockdown and there can be no discrimination based on forced displacement status.

I. Introduction

The protection sector's response to this rolling apex needs to be measured by the number of lives saved, not the number of webinars, seminars, guidance and strategies. What will save lives is putting well-resourced local staff capable of communicating with broader communities as close to the problem as possible.¹

Part of that resourcing is putting forward legal analysis to ensure the greatest protection for those forcibly displaced during this pandemic. Part of any crisis is the natural willingness of governments to retreat from anything other than legally binding obligations.

Much has been published lately, but it is not the first time, even in recent years, that forcibly displaced persons have been caught up in health crises.² What is different this time is its global character and the threat to international human rights law (IHRL), international refugee law and the rule of law. These threats may not pass even after the pandemic has subsided. As at 10 June 2020, there had been no serious outbreaks of Covid-19 in any

¹ Paul White, ‘Humanitarians in the Frontline: The protection sector in the COVID-19 humanitarian response’, Kaldor Centre for International Refugee Law, 23 April 2020, 7, <https://www.kaldorcentre.unsw.edu.au/publication/humanitarians-frontline-protection-sector-covid-19-humanitarian-response>.

² See, for the West African Ebola Crisis, 2013-16: UNHCR, ‘Gender-based violence prevention, risk mitigation and response during COVID-19’, 20 March 2020, 1, <https://www.refworld.org/docid/5e84bb2b4.html>. Equally, see IOM, ‘Mobilisation Against COVID-19 Draws on Ebola Response Experience’, 8 May 2020, https://www.iom.int/news/mobilisation-against-covid-19-draws-ebola-response-experience?utm_source=IOM+External+Mailing+List&utm_campaign=a98996c8d1-EMAIL_CAMPAIGN_2020_05_08_05_54&utm_medium=email&utm_term=0_9968056566-a98996c8d1-43575781.

refugee or IDP camp or settlement,³ although that might be because only limited testing is possible. Nevertheless, states have limited refugees' access to protection and have curtailed the rights of displaced persons within their territories, as well as limiting access by humanitarian agencies to persons of concern in some cases.⁴ Access in all those senses is not straightforward for forcibly displaced persons and humanitarian actors in normal times, but Covid-19 has raised this problem to new heights. This paper addresses this attack on protection under international law.

II. Accessing Protection

a) Access to states

States have the right to control their borders, particularly to protect their own populations.⁵ However, that obligation cannot justify ignoring other obligations with respect to IHRL, international refugee law and rule of law, such as respecting the right of individuals to seek and enjoy asylum from persecution and upholding the principle of *non-refoulement*.⁶ Equally under Article 12 of the International Covenant on Civil and Political Rights, states cannot close their borders preventing people, including IDPs, from leaving to seek protection elsewhere.⁷ Nevertheless, during the pandemic, states have closed borders and denied access:⁸ as at 22 May 2020, 161 countries had closed their borders, 99 even to those seeking refugee status.⁹ Closing borders resulting in persons seeking protection

³ There were 25 confirmed cases in Kutupalong camp, Cox's Bazar, Bangladesh, that houses 860,000 refugees. See statistics at www.unhcr.org.

⁴ UNHCR, 'COVID-19 Preparedness and Response', 24 April 2020, <https://www.refworld.org/docid/5e84bb2b4.html>.

⁵ Even human rights treaty bodies recognise this power in states: see UN Human Rights Committee in *Aumeeruddy-Cziffra and nineteen other Mauritian women v Mauritius*, Communication No. 35/1978, UN Doc. CCPR/C/12/D/35/1978, 9 April 1981, para. 9.2b(2)(ii)3; The Committee Against Torture in *Agiza v Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003, 24 May 2005, para. 13.1. See also, UNHCR, '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. 1-3, <https://www.refworld.org/docid/5e7132834.html>.

⁶ See, Art. 14, Universal Declaration of Human Rights 1948, UNGA Res 217(III), 10 December 1948, (hereafter, UDHR); Arts. 1A(2) and 33(1) 1951 Convention relating to the Status of Refugees, 189 UNTS 137. The European Union Commission stated on 16 April that '[registration] and processing of applications should continue', Press Release, 'Coronavirus: Commission presents guidance on implementing EU rules on asylum and return procedures and on resettlement', 16 April 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_666. See also, Columbia, Cornell, Zolberg Institute, 'Human mobility and human rights in the COVID-19 pandemic: Principles of protection for migrants, refugees, and other displaced persons', Principle 6, (hereafter CCZI Principles), <https://zolberginstitute.org/covid-19/>.

⁷ 999 UNTS 171 (ICCPR). See also, Principle 15, 'Guiding Principles on Internal Displacement', UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, on the right of IDPs to be able to seek asylum outside the state. And see, Kate Ogg, 'COVID-19 Travel Bans: The Right to Seek Asylum When You Cannot Leave Your Homeland', Kaldor Centre, 16 April 2020, 1, <https://www.kaldorcentre.unsw.edu.au/publication/covid-19-travel-bans-right-seek-asylum-when-you-cannot-leave-your-homeland>.

⁸ See, on Malaysia blocking Rohingya refugees attempting to arrive by sea, BBC News, 'Rohingya crisis: Hundreds of refugees stranded in boats at sea', 26 April 2020, <https://www.bbc.co.uk/news/av/world-asia-52431222/rohingya-crisis-hundreds-of-refugees-stranded-in-boats-at-sea>.

⁹ See UN Secretary-General, 'Policy Brief: COVID-19 and People on the Move', 19, https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_people_on_the_move.pdf. See also, UNHCR, 'The COVID-19 Crisis: Key Protection Messages', 31 March 2020, <https://www.refworld.org/docid/5e84b9f64.html>. See also, Gillian Triggs, 'We can secure both public health and the rights of refugees to protection', Kaldor Centre, 8 April 2020, 2, <https://www.kaldorcentre.unsw.edu.au/publication/we-can-secure-both-public-health-and-rights-refugees->

being forced back to persecution or conflict zones is a violation of the principle of *non-refoulement*.¹⁰ While states can derogate in time of public emergency that threatens the life of the nation or in exceptional circumstances under Article 4 ICCPR or Article 9 1951 Convention, respectively, the 1951 Convention limits provisional measures to the case of a particular person and derogations under the ICCPR have to be non-discriminatory, proportionate, strictly required and established by law. Blanket bans on all persons arriving from outside the territory, therefore, are prohibited.¹¹

The European Union Qualification Directive, contrary to EU states' commitments in the 1951 Convention, might appear to offer broader scope to prevent entry.¹² Under Article 33(2) of the 1951 Convention, states can *refouler* a refugee where there are reasonable grounds to regard them as a danger to security of the country; however, they must be a recognised refugee for Article 33(2) to apply. Under Article 14 of the EU Qualification Directive, states can decide not to grant refugee status, that is, effectively reject at the border, where 'there are reasonable grounds to regard her or him as a danger to security of the Member State'. It is not difficult to imagine a scenario where an EU member state decides to rely on Article 14(4) and 14(5) to deny protection on the ground that the applicants for refugee status might have Covid-19. However, not only does the EU Commission Coronavirus Press Release suggest that steps can be taken to process where the person is suspected of having Covid-19,¹³ but in *Joined Cases C-715/17, C-718/17 and C-719/17*, the Court of Justice of the European Union (CJEU) held that member states could not apply particular EU laws:

for the sole purposes of general prevention and without establishing any direct relationship with a particular case, in order to justify suspending the implementation of or even a ceasing to implement its obligations¹⁴

Thus, not only ought regional mechanisms be interpreted in conformity with the 1951 Convention, even where individual applicants for refugee status were thought to be Covid-

protection; Lucas Guttentag, 'Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors', *Just Security*, 13 April 2020, <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

¹⁰ Uganda has apparently closed its borders. See also, Rebecca Blumenthal and Catriona Murdoch, 'COVID-19 and Humanitarian Access for Refugees and IDPs: Part 2 – Syria and Bangladesh', *Just Security*, 9 April 2020, <https://www.justsecurity.org/69570/covid-19-and-humanitarian-access-for-refugees-and-idps-part-2-syria-and-bangladesh/>. See also, UNHCR, 'COVID-19 Preparedness and Response' (n. 4), 4, 7. In the light of the reasoning in *Paposhvili v Belgium (GC)*, Application no. 41738/10, 13 December 2016, transposable to other international and regional human rights mechanisms, even if an asylum seeker's claim to refugee status were to be rejected, they should not be removed to any country where the treatment they could expect to receive would place them at risk of inhuman treatment because of the care they could expect in the country of nationality (paras. 186-91). In *Hirsi Jamaa and Others v Italy (GC)*, Application No. 27765/09, 23 February 2012, Italy was found to have collectively expelled 12 Somali and 13 Eritrean asylum seekers who had been intercepted at sea by the Italian navy before reaching Italian waters and returned to Libya contrary to Article 4, Protocol 4 ECHR, so closing borders in such a way as to force return may be treated similarly, there being no way to challenge the closure (*cf. ND and NT v Spain (GC)*, Application Nos. 8675/15 and 8697/15, 13 February 2020).

¹¹ Guttentag (n. 9).

¹² Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9.

¹³ EU Commission (n. 6).

¹⁴ *Joined Cases C-715/17, C-718/17 and C-719/17, EU Commission v Hungary, Poland and Czech Republic* (CJEU Third Chamber, 2 April 2020) para. 160.

19 infectious, there is no justification for blanket bans because states can implement measures to protect their own population without forcing people back contrary to the principle of *non-refoulement*.

b) Accessing services and protection in states

For applicants for refugee status within a state and for IDPs generally, again there are access issues. Those issues are also tied up with access by humanitarian actors to persons of concern.

*i) Humanitarian Access*¹⁵

UNHCR has the unique mandate to provide international protection to refugees and its extended mandate includes conflict driven IDPs and other persons of concern.¹⁶ To fulfil that role, the organization needs access to these populations. States also have a duty to co-operate with UNHCR in the exercise of its functions.¹⁷ Nevertheless, during this pandemic access by humanitarian actors has been restricted, particularly in conflict zones that still face the same Covid-19 threat. To resolve this, regard needs to be had not just to IHRL, but also to the international law of armed conflict and rule of law that complement IHRL, but that have been strangely missing from much of the current analysis.¹⁸ Under the 1949 Geneva Conventions, the ICRC and ‘any other impartial humanitarian organization’ may undertake care for the sick, while parties to the conflict should permit ‘relief actions which are humanitarian and impartial in character and conducted without any adverse distinction’.¹⁹ In 2012, the General Assembly agreed that rule of law was applicable to states and to international organizations:²⁰

¹⁵ For an in-depth discussion, see International Association of Professionals in Humanitarian Assistance and Protection, ‘Access and Humanitarian Protection: Lessons from restricted operational contexts and their application to the COVID-19 operational environment’, Webinar, 22 April 2020, <https://phap.org/PHAP/Events/OEV2020/OEV200422.aspx>.

¹⁶ Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res 428(V), 14 December 1950 (hereinafter, 1950 Statute); the Cluster Approach was established in 2005 under the UN’s Inter-Agency Standing Committee (IASC) and UNHCR has the lead for protection of conflict driven IDPs (<https://www.globalprotectioncluster.org/about-us/who-we-are/>). See also, Volker Türk and Elizabeth Eyster, ‘Strengthening Accountability in UNHCR’, (2010) 22 *International Journal of Refugee Law* 159 .

¹⁷ Article 35, 1951 Convention (n. 6).

¹⁸ E.g., CCZI Principles (n. 6).

¹⁹ See Common Article 3, Articles 9 Geneva Conventions I-III, 10 GC IV, 70 and 71 Additional Protocol 1, and Article 18 Additional Protocol 2. See also, Principle 25, Guiding Principles on Internal Displacement (n. 7), as well as Geoff Gilbert and Anna Magdalena Rüsçh, ‘Creating Safe Zones and Safe Corridors in Conflict Situations: Providing protection at home or preventing the search for asylum?’, Kaldor Centre for International Refugee Law Policy Brief No.5, 2017, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Policy_brief_Creating_safe_zones_and_safe_corridors.pdf?mc_cid=6e9bb775e9&mc_eid=fb55c2c7c4&cn=bWVudGlvbG%3D%3D. Notably, the ICRC has not failed to promote the international law of armed conflict – ICRC Blog, ‘COVID-19 response in conflict zones hinges on respect for international humanitarian law’, 16 April 2020, https://blogs.icrc.org/law-and-policy/2020/04/16/covid-19-respons...n_47_fQ70xw3RYCqH1h79PsBMvHjOG1l_qjxKHw90X_laJZxg&_hsmi=86397599. See also, the humanitarian principles of humanity, impartiality, independence and neutrality [UNGA res 46/182, 19 December 1991].

²⁰ UN General Assembly, ‘Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels’, UNGA Res 67/1, 30 November 2012; Geoff Gilbert and Anna Magdalena Rüsçh, ‘Rule of Law and UN Interoperability’, (2018) 30 *International Journal of Refugee Law* 31.

2. We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.

Thick rule of law demands that all actors operationalize interoperability to uphold the full gamut of IHRL.²¹ Given that 85 percent of persons of concern to UNHCR are in low- or middle-income countries (LMICs), their capacity to respond to the Covid-19 crisis will not be as great as that of states in the global north, so a concerted and co-ordinated response that includes humanitarian actors who are given full access is essential.²² The joint work of the IASC's GPC and Health Cluster,²³ as White explains, placing humanitarian actors on the ground to work with local medics and other relief agencies, will be essential to saving lives.²⁴

Finally with respect to humanitarian access, the General Assembly in 2018 adopted the Global Compact on Refugees.

5. The global compact emanates from fundamental principles of humanity and international solidarity, and seeks to operationalize the principles of burden- and responsibility-sharing to better protect and assist refugees and support host countries and communities.²⁵

It applies to the international community as a whole, including states and international organizations and, if fully operationalised, benefits refugees, host communities and relieves the burden on host states.²⁶ While it does not expressly cover IDPs, host communities will often be mixed populations. During the global pandemic, categorising who benefits from protection should be irrelevant;²⁷ a comprehensive and inclusive approach that operationalizes interoperability can address several aspects of the consequences of Covid-19, upholding at the same time IHRL and the rule of law.

In Niger, UNHCR, in partnership with WFP and UNDP, is providing training on the production of soap, bleach and masks to over 5,000 refugees and hosts, among whom over 90% are women. Apart from improving health conditions and hygiene in the camp, this activity promotes women as economic agents, generates an income for refugee households and stimulates the local economy, mitigating the negative socio-economic impact of COVID.²⁸

²¹ UN General Assembly, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence to the General Assembly', UN Doc A/67/368, 13 September 2012, para. 12. See also, Gilbert and Rüschi, *ibid.*, 45-46, 59-68.

²² See UNHCR, 'COVID-19 Preparedness and Response' (n. 4), 3, 6 and 7, particularly as regards the situation in East and Horn of Africa and the Great Lakes.

²³ See, on the Cluster Approach under the IASC (n. 16).

²⁴ White (n. 1) 2.

²⁵ Global Compact on Refugees (GCR), UNGA Res 73/151, 18 December 2018, para. 5.

²⁶ See donations made to UNHCR by states to respond to COVID-19 Crisis, UNHCR 'COVID-19 Preparedness and Response' (n. 4) 3, 10; Triggs (n. 9) 4. See also, UN Sustainable Development Group, 'Shared Responsibility, Global Solidarity: Responding to the Socio-Economic Impacts of COVID-19', March 2020, <https://unsdg.un.org/resources/shared-responsibility-global-solidarity-responding-socio-economic-impacts-covid-19>.

²⁷ White (n. 1) 2-3. See also, WHO, 'Preparedness, prevention and control of coronavirus disease (COVID-19) for refugees and migrants in non-camp settings: Interim guidance', 17 April 2020, Guiding Principles 5 and 6, [https://www.who.int/publications-detail/preparedness-prevention-and-control-of-coronavirus-disease-\(covid-19\)-for-refugees-and-migrants-in-non-camp-settings](https://www.who.int/publications-detail/preparedness-prevention-and-control-of-coronavirus-disease-(covid-19)-for-refugees-and-migrants-in-non-camp-settings).

²⁸ UNHCR, 'COVID-19 Preparedness and Response' (n. 4), 11.

An awareness of all the available frameworks for protection is essential if refugees, local communities, countries of asylum and the international community as a whole are to meet all their commitments.

ii) Accessing in-state services

Displaced persons need to be able to obtain a variety of services in the hosting state whether they are refugees or IDPs.²⁹ During the pandemic, the most obvious is access to health care. However, this is an area of law where status matters. IDPs, by definition are within their country of nationality or habitual residence and should have access to all such services as normal, taking into account the cause and effects of the displacement – their displacement might have been part of some event that disrupts services for everyone. As for refugees, if they have been recognised as such by the country of asylum, then the 1951 Convention complements normal IHRL, but if they are asylum-seekers then their rights are not so broadly based.³⁰ Regardless, there should be no discrimination based on seeking refugee status for the purposes of IHRL.³¹

Thus, accessing refugee status determination is important during the pandemic. As discussed above, gaining access to the state will be the first hurdle, but that does not mean that refugee status determination will proceed smoothly thereafter. The EU Commission contemplates delays in the process and that accommodations will be needed for social distancing, but clearly provides that status determination will take place.³² Furthermore, the applicant needs to be able to access legal advice as regards the application – if quarantined, as may well happen, there will be additional difficulties.³³

Refugees, asylum-seekers and IDPs must also be able to access health care. Fear that seeking medical advice might lead to detention and removal will only drive those seeking protection to conceal their presence, risking spreading the virus much further if they are infectious. At this time, it makes sense for the state and the host community that displaced persons have as much access as possible to health care. Equally, they need access to information, which includes access to the internet, something equally important for those seeking refugee status, discussed above.³⁴ Access to the internet for information has been recognised as a right by the Human Rights Council,³⁵ but states and international

²⁹ On IDPs, see OHCHR, 'COVID-19: Do not forget internally displaced persons, UN expert urges Governments worldwide', 1 April 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25763&LangID=E>.

³⁰ Articles 3-30, 1951 Convention (n. 6), apply either to all those seeking refugee status, refugees 'lawfully in the territory' or 'lawfully staying in the territory'.

³¹ See, CCZI Principle 1 (n. 6).

³² EU Commission (n. 6).

³³ See Kerry Murphy, 'COVID-19: Some issues for asylum seekers and refugees in Australia - Kaldor Centre', 17 April 2020, 1, <https://www.kaldorcentre.unsw.edu.au/publication/covid-19-some-issues-asylum-seekers-and-refugees-australia>.

³⁴ See UNHCR, 'Key Protection Messages' (n. 9).

³⁵ UN Human Rights Council, 'The promotion, protection and enjoyment of human rights on the Internet', UN Doc. A/HRC/RES/32/13, 18 July 2016. See also, Human Rights Committee, General Comment no. 34, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 15.

organizations must ensure there is no digital divide.³⁶ CCZI Principle 9 on the right to information provides:³⁷

Migrants, refugees, and other displaced persons have a right to information about COVID-19, including information related to symptoms, prevention, control of spread, treatment, and social relief. The internet is an indispensable source of information, and blocking or interfering with access during a pandemic is not justifiable.³⁸

As UNHCR's guidance has made clear, information must be understandable by refugees, asylum-seekers and IDPs, possibly requiring the state and UNHCR to combine their resources.³⁹

Article 12, International Covenant on Economic, Social and Cultural Rights (ICESCR), provides that everyone has the right to the enjoyment of the highest attainable standard of health.⁴⁰ CCZI Principle 2 expands on the right to health, including preventive medicine. WHO Guiding Principle 1 is in similar terms.⁴¹ This right applies just as much to forcibly displaced persons as anyone else. Moreover, more vulnerable displaced persons need to be ensured even greater access to health care.⁴² When it is also remembered that many displaced persons are caught up in conflict zones, where too often the parties do not respect the international law of armed conflict and health services are diminished or destroyed,⁴³ then the risks are even higher and the need for international rule of law is greater than ever.

Likewise, Article 11 ICESCR sets out a right to an adequate standard of living, including housing.⁴⁴ Adequate in the time of a global pandemic that requires social distancing is clearly different from what would be acceptable at other times. It should also be noted that over 60 percent of refugees live in urban settings, not camps, so the ability of international organizations to regulate accommodation in such circumstances is limited. A range of related matters arise in relation to standard of living during this particular pandemic. There is no explicit right to water in the ICESCR,⁴⁵ but, in terms of sanitation, the right to the

³⁶ See, statistics from the International Telecommunication Union, <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>. See also, Matthew Downer, 'Bridging the mobile gender gap for refugees', GSMA, March 2019, <https://www.gsma.com/mobilefordevelopment/africa/sizing-the-mobile-gender-gap-in-refugee-contexts/>; UNHCR, 'Displaced and Disconnected', February 2019, <https://www.gsma.com/mobilefordevelopment/resources/displaced-and-disconnected/>.

³⁷ CCZI (n. 6) – emphasis added.

³⁸ Bangladesh has restricted access to the internet in Cox's Bazar – Blumenthal and Murdoch (n. 10), 10-11, 15-16.

³⁹ UNHCR, 'Risk Communication and Community Engagement (RCCE) – COVID-19', 21 March 2020, 1 <https://data2.unhcr.org/en/documents/download/75289>. On promoting protection and assistance for refugees and host communities see the GCR and rule of law principles (n. 25, 20 respectively). Moreover, if contact tracing is part of controlling the spread of infection, then displaced persons need to be able to access the internet, although with even greater protection of their privacy. See, UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR*, May 2015 <https://www.refworld.org/docid/55643c1d4.html>; White (n. 1), 4, 5-6.

⁴⁰ 999 UNTS 3 (hereafter, ICESCR).

⁴¹ WHO Guiding Principles (n. 27).

⁴² UNHCR, 'Age, Gender and Diversity Considerations – COVID-19', 21 March 2020, <https://www.refworld.org/docid/5e84a9dd4.html>.

⁴³ Article 12 AP1 and Article 11 AP2 (n. 19), as well as Article 56 GC IV. See also, Ngala Killian Chimtom, 'Cameroon's deadly mix of war and coronavirus', BBC News, 10 May 2020.

⁴⁴ See also, Article 21, 1951 Convention (n. 6).

⁴⁵ Cf. CESCR, 'General Comment 15: The Right to Water (Arts. 11 and 12 of the Covenant)', UN Doc. E/C.12/2002/11, 20 January 2003..

highest attainable standard of health during this pandemic demands access to water.⁴⁶ In terms of upholding the right to adequate housing, Article 12 ICCPR establishes the right to choose one's residence.⁴⁷ Principles 5 – 9 Guiding Principles on Internal Displacement provide that all authorities shall prevent displacement from one's home or habitual residence.⁴⁸ Furthermore, parties to a conflict cannot, according to Article 51(7) Additional Protocol 1, constrain the movements of non-fighters 'in order to attempt to shield military objectives from attacks or to shield military operations'; similarly, Article 17(1) Additional Protocol 2 that applies in non-international armed conflicts provides '[the] displacement of the civilian population shall not be ordered for reasons related to the conflict *unless the security of the civilians involved or imperative military reasons so demand*' (emphasis added).⁴⁹

Accessing employment opportunities is always difficult for displaced persons, but when so many places of work are closed, the informal economy is even more restricted.⁵⁰ The consequence is that refugees', asylum-seekers' and IDPs' standards of living are even more threatened. At the same time, cash-based interventions are more difficult to implement due to the requirements of social distancing.⁵¹ One very predictable consequence of lockdowns in inadequate housing with limited resources for families has been an increased risk of sex and gender-based violence in refugee and IDP settlements.⁵² More than ever, states need to uphold rule of law so that victims can seek protection.⁵³

iii) Detention

The flipside of in-state services is detention by the state. Quarantining those who may have the virus is undoubtedly permitted, but it must be provided for by law, proportionate and no longer than is necessary. Article 26 1951 Convention⁵⁴ and Article 12 ICCPR grant freedom of movement and choice of one's place of residence.⁵⁵ Under IHRL, forcibly displaced persons cannot suffer discriminatory treatment because of the situation in which they find themselves. Furthermore, states must ensure that detention would not place displaced persons at greater risk of infection from Covid-19 – social distancing and proper sanitation must be part of any detention regime where that is the proportionate response. The UN Network on Migration has called on states to:⁵⁶

⁴⁶ Blumenthal and Murdoch (n. 10), 14-15.

⁴⁷ ICCPR (n. 7).

⁴⁸ Guiding Principles (n. 7).

⁴⁹ AP 2 (n. 19), and Gilbert and Rüsç (n. 20).

⁵⁰ Cf. CCZI Principle 13 (n. 6).

⁵¹ UNHCR, 'COVID-19 Preparedness and Response' (n. 4), 5.

⁵² UNHCR, 'Gender-based violence' (n. 2), 1; Blumenthal and Murdoch (n. 10), 3-4.

⁵³ Gilbert and Rüsç (n. 20), 50, 58, fn128.

⁵⁴ 1951 Convention (n. 6). Article 31 allows for detention of those who enter the country of asylum unlawfully, but it must be proportionate and only until their situation is regularised.

⁵⁵ See also CCZI Principle 7 (n. 6).

⁵⁶ UN Network on Migration, 'COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?', 29 April 2020, https://migrationnetwork.un.org/sites/default/files/docs/un_network_on_migration_wg_atd_policy_brief_covid-19_and_immigration_detention_0.pdf. While the Network speaks on migration issues, UNHCR has stated that the recommendations are relevant to refugees and asylum seekers in immigration detention. See, p 13.

1. Stop new detentions of migrants for migration- or health-related reasons and introduce a moratorium on the use of immigration detention.
2. Scale up and urgently implement non-custodial, community-based alternatives to immigration detention in accordance with international law.
3. Release all migrants detained into non-custodial, community-based alternatives, following proper safeguards.
4. Improve conditions in places of immigration detention while alternatives are being scaled up and implemented.

Ultimately, quarantine is a temporary measure to protect the health of the host community while the individual is treated: immigration detention is something very different and is wholly inappropriate for those seeking protection from persecution.⁵⁷

III. Conclusion

The lives of forcibly displaced persons are already complicated and challenging and Covid-19 has added a further layer of complexity, if not outright threat. The interaction of various sub-disciplines of international law make it difficult to navigate their situations, without having regard in addition to the domestic laws where they find themselves seeking protection. If, as is often the case, the situation is one of acute crisis resulting from armed conflict or generalized violence, then yet further problems confront the refugee or IDP seeking protection and the humanitarian actors trying to provide it. This paper has sought to address the most pressing issues caused by the pandemic for all the various actors within the already complicated context of forced displacement. Refugees and IDPs have to be resilient to survive displacement, but they are in situations of vulnerability and, when states are threatened, the “outsider” is frequently left unprotected.⁵⁸

⁵⁷ See also, *Joined Cases C-924/19 PPU and C-925/19 PPU FMS, FNZ (C-924/19 PPU) SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, CJEU Grand Chamber.

⁵⁸ Jane McAdam, “The impacts of COVID-19 on the world's displaced people: A watching brief”, Kaldor Centre, 6 April 2020, 2, <https://www.kaldorcentre.unsw.edu.au/publication/impacts-covid-19-world's-displaced-people-watching-brief>.

Detention and Pandemic Exceptionality

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Abstract

This essay considers the circumstances of persons deprived of their liberty in the context of Covid-19. Detention is always intended to be exceptional and the essay explores the extent to which the pandemic impacts upon this exceptional character. First, by increasing the unacceptability of detention, have the rules regarding what may constitute “arbitrary detention” changed? Secondly, for persons serving out prison sentences, to what extent should Covid-19 serve as a justification for early release or commutation of punishment? In this respect, should the goals of retribution and specific and general deterrence be weighed against the rights to health and safety of prisoners and prison staff, and if so, how? Do detaining authorities have absolute discretion to determine which detainees to release or must they ensure that policies of release also, are not arbitrary? To what extent does the arbitrary resort to detention as well as the arbitrary decision to maintain someone in detention during the pandemic, which may heighten certain individuals’ exposure to the disease and thereby produce extreme anxiety, give rise to cruel, inhuman or degrading treatment or punishment, if not torture?

The paper considers how governments, specialist agencies and courts are beginning to grapple with these legal, ethical and public health issues. On the one hand, recognition of the heightened health risks for detainees associated with the pandemic is proving to be an important opportunity to reduce reliance on detention – and thereby to make good on the intention for detention to be recognised as an exceptional measure. Yet on the other hand, as will be shown, the selectivity of approaches and lack of transparency and oversight of decision-making has put some detainees at even greater risk of harm.

I. Introduction: A Brief Roadmap

This essay starts by considering the various contexts of detention. It then reviews the concept of “arbitrariness” as applied to detention. It continues by considering the different ways in which the understanding of “arbitrariness” are impacted by Covid-19. It does so by considering a range of pandemic-related circumstances that can heighten the arbitrariness of detention. It also considers how Covid-19-inspired releases from detention, whether they are temporary releases or permanent commutations of sentences, may also contribute to arbitrariness.

The pandemic also contributes to other rights issues associated with detention. Indeed, the use of quarantines and protective detention have featured regularly in Covid-19 responses. Also, persons who ignore emergency regulations may be prosecuted, and in that context may be detained. The potential over-reach of emergency provisions, discriminatory impacts and/or the ways in which the restrictions put in place have been balanced with other rights, particularly for the most vulnerable in our societies, are all topics worthy of detailed consideration.¹ Notwithstanding their importance, these aspects are not the focus of this essay. The essay focuses on how responses to Covid-19 are impacting

¹ UN Working Group on Arbitrary Detention (WGAD), ‘Deliberation No. 11 on prevention of arbitrary deprivation of liberty in the context of public health emergencies’, 8 May 2020.

persons who are already detained or at risk of detention for reasons unconnected to the pandemic.

II. Places of Confinement: Positive Obligations in a State of Hyper-Engagement

Places of confinement are particularly dangerous for the spread of infectious diseases. This is regardless of whether they are prisons, police stations, hospitals, drug rehabilitation centres, ships, residential care homes, transit zones, refugee and migrant detention or removal centres or closed refugee or displaced persons camps. It is also irrespective of whether the goals of the places of confinement are to care for or protect the inhabitants, to respond to emergencies or to serve as some form of rehabilitation or punishment. The dangers associated with places of confinement stem from the large number of persons forced to live in close proximity to one another and the inability to practice effective social distancing measures and hygiene best practise. Also, the heightened risks stem from the vulnerability of many individuals within some detainee populations on account of their underlying health statuses and/or their experience of different forms of marginalisation, taken together with often poor ventilation, challenging sanitation conditions, limited space and insufficient access to doctors and medical supplies. Consequently, detainees as well as those working in detention settings face a disproportionately high risk of infection as well as a higher mortality rate.

Given the lack of autonomy within detention settings, detainees are reliant on those responsible for their detention to address both proactively and reactively, their health, safety and related needs. This reliance exists at all times but is accentuated in the time of a pandemic given the special health risks. The reliance heightens detainees' vulnerability, which in turn means that any acts or omissions of the authorities are likely to have a greater impact on detainees' psychological well-being on account of the feelings of powerlessness they engender. Arguably, it also means that detaining authorities have a heightened or special duty of care to those they detain,² which because of the greater risks of infection and higher mortality rates associated with the pandemic in detention, goes beyond the general duty of care recognised in the *Mandela Rules* to provide to detainees (irrespective of citizenship, nationality or migration status) the same level of care inside detention as is available outside in the community.³ The special duty of care will be breached if detention conditions and the policies relating to detention do not take adequate account of the specific contexts of detention and the special risks posed by Covid-19, and tailor services and measures to adequately protect against the disease.

This heightened duty of care, or in human rights terms states' obligation to exercise due diligence, is one of means rather than result, however it is context-specific; it is focused on the reasonable steps detaining authorities must take in light of the specific and heightened risks posed by the pandemic in places of confinement, in terms of protective gear for staff; testing for detainees at the time of admission; ventilation and general air quality; hand sanitisers; and measures to improve physical distancing. Because of the nature and

² UN Human Rights Committee, General comment No. 36, UN Doc. CCPR/C/GC/36, 30 October 2018, paras. 6, 25. See also, *Rowson v Department of Justice and Community Safety* [2020] VSC 236, 1 May 2020, discussed in Human Rights Law Centre, 'Supreme Court rules Victorian Government prima facie breached duty of care to person in prison in their response to COVID-19 pandemic' 2 May 2020 (at <https://www.hrlc.org.au/>).

³ UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), GA Res'n 70/175, Principle 24(1).

seriousness of the risks and the vulnerability of detainees, states' positive obligations to protect detainees and staff operating in places of confinement extends beyond the right to liberty and security of the person, to the rights to life, freedom from torture and other cruel, inhuman and degrading treatment or punishment, health, to be treated with humanity and with respect for the inherent dignity of the human person, and an array of other rights. These rights are not simply engaged – the pandemic puts them in a state of “hyper-engagement” given the significant, special risks posed.

III. The Exceptional Nature of Detention

The right to liberty and security of the person is a fundamental principle of human rights law recognised by numerous international and regional treaties, case law and national constitutions.⁴ While there will be circumstances when detention is appropriate, it is always supposed to be exceptional; it cannot be “arbitrary”.

No detention that is arbitrary can ever be regarded as lawful;⁵ though the parameters of what might constitute “arbitrary” detention are not always clear. Detention tends to be arbitrary if it is ordered outside of any law, or if it involves an unfair or improper procedure,⁶ a degree of inappropriateness, injustice or unpredictability.⁷ Examples of arbitrary detention include: indefinite or unduly prolonged administrative detention; automatic pretrial or administrative detention without review; if there is no possibility to review the legality of the detention within a reasonable time from the detention and at regular periodic intervals thereafter; if it results from discrimination against a protected group or from an individual or group seeking to exercise freedom of expression or association.⁸

In order for a detention to be lawful, the detention must be on grounds and in accordance with a procedure prescribed by law.⁹ Potential examples, which would depend on the facts in any given case, include: if a person has been found guilty of a crime and sentenced to a term of imprisonment; to prevent the commission of a crime; when someone presents a risk of absconding from future legal proceedings or administrative processes or presents a danger to their own or public security. Other reasons may relate to the mental health of the person which may make it necessary to detain them for their own protection or protection of others.¹⁰

Beyond this, any decision to detain must be made on the basis of and in accordance with such procedures as are established by law, and the law itself must be appropriate, accessible, sufficiently precise, consistently applied and predictable.¹¹ Equally, the detention must be for a legitimate purpose and must be necessary and proportionate - there must be no lesser means available to achieve the objective justifying

⁴ Art 9 UDHR; Art 9 ICCPR; Art 5 ECHR; Art 6 Banjul Charter; Art 7 ACHR.

⁵ *Winterwerp v. The Netherlands* Appl No. 6301/73, 24 October 1979, para. 39.

⁶ *Ibid*, para. 45. See also, *Kemmache v. France* (No. 3), Appl No. 17621/91, 24 November 1994, para. 37.

⁷ *Mukong v. Cameroon*, Case No. 458/1991, UN Doc. CCPR/C/51/D/458/1991, 21 July 1994, para. 9.8. See also, *Gangaram Panday v. Suriname* (Merits, reparations, and costs), Series C No. 16, 21 January 1994, para. 47.

⁸ WGAD, ‘Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law’, UN Doc. A/HRC/22/44, 24 December 2012.

⁹ Art 9(1) ICCPR.

¹⁰ Art 5(1) ECHR.

¹¹ *Mukong v. Cameroon* (n. 7), para. 9.8; *Khlaifia and Others v. Italy* (Grand Chamber), Appl. No. 16483/12, 15 December 2016, para. 92. See also, WGAD, Deliberation No. 11 (n. 1), para. 10.

detention.¹² Furthermore, detention must be of a limited duration and must be applied in a non-discriminatory manner.

Inadequate conditions of detention may make detention arbitrary. This is because the conditions can impede detainees from exercising crucial rights. The UN Working Group on Arbitrary Detention (WGAD) has explained that pre-trial detainees who endure detention conditions that affect health, safety or well-being, or who have none or insufficient access to counsel or others, will participate in criminal proceedings in less favourable conditions than the prosecution, impairing the prospect for a fair trial. Sometimes, conditions will be so poor so as 'to create an incentive for self-incrimination, or - even worse - to make pre-trial detention a form of advance punishment in violation of the presumption of innocence.'¹³

IV. Does Covid-19 Impact on Exceptionality in Detention?

a) Covid-19 and conditions of detention

It has been recognised that detainees must be held in conditions that are compatible with respect for their human dignity, that they are not subjected to distress or hardship that goes beyond the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured.¹⁴ At times, conditions of detention will be so deficient that they will cause severe pain or suffering that may rise to the level of cruel, inhuman or degrading treatment or punishment, if not torture. Severe overcrowding can amount to prohibited ill-treatment¹⁵ on account of the distress or hardship it engenders, for example by being 'obliged to live, sleep and use the toilet in the same cell with so little personal space'.¹⁶ It is not difficult to extend this logic to detainees who fear the spread of Covid-19 because of inadequate sanitation, poor ventilation, lack of protective gear for staff entering and exiting facilities and inadequate testing and medical care.

Detention authorities have taken measures to reduce the risk of Covid-19 spreading. Some measures have to do with releases, discussed in the next section (b). Other measures have to do with improving sanitation, increasing social distancing within detention facilities (through solitary cell confinement; reducing exercise and other mingling between detainees) and prohibiting or severely restricting access to outside visits. There is a question whether these measures are sufficient or appropriate in the circumstances in light of authorities' heightened due diligence obligations. There is also a question whether the measures taken may increase the risk of arbitrariness. This is because of the arbitrary way in which decisions tend to be taken. For example, the lack of transparency with respect to who may be temporarily released as a social distancing measure and who may be subjected to new/additional restrictions on movement within places of confinement; as well as the failure for detaining authorities to consider adequately the impact on particularly vulnerable detainees of the removal of privileges (which tend to increase isolation within detention settings as well as vulnerability).

¹² *Saadi v. the United Kingdom* (Grand Chamber), Appl. No. 13229/03, 29 January 2008, paras. 68-74.

¹³ WGAD, 'Report of the Working Group on Arbitrary Detention', UN Doc. E/CN.4/2005/6 1 December 2004, paras. 69, 70.

¹⁴ *Ramirez Sanchez v. France* (Grand Chamber), Appl. No. 59450/00, 4 July 2006, para. 119.

¹⁵ *Kalashnikov v. Russia*, Appl. No. 47095/99, 15 July 2002, paras. 96-97.

¹⁶ *Khudoyorov v. Russia*, Appl. No. 6847/02, 8 November 2005, para 107.

Detainees must receive appropriate medical treatment, and where needed, psychological counselling. Detaining authorities have a positive obligation to prevent the spread of contagious disease, and must introduce appropriate measures, such as screening detainees upon admission and prompt and effective treatment programmes.¹⁷ The European Court of Human Rights has recognised that the failure to diagnose and provide adequate medical care to detainees can amount to ill-treatment;¹⁸ lack of treatment resulting in death also violates the right to life.¹⁹ In *Gladkiy v. Russia*, it determined that, ‘for lack of adequate medical treatment, the applicant was exposed to prolonged mental and physical suffering diminishing his human dignity.’²⁰

In an effort to increase social distancing, many institutions have severely restricted or even eliminated outside visits, including from families and lawyers. Similarly, independent detention monitoring and oversight bodies which are crucial to help stop abuse and inadequate prison conditions, have been placed on hold, increasing detainee vulnerability, isolation, fears and anxieties. Reportedly, one woman at HMP Downview prison in Surrey, United Kingdom, has alerted the United Nations to a breach of her human rights, because she has been locked in her cell for 23 hours a day - measure taken by the facility to reduce the likelihood of spread of the disease.²¹ It is important as some policy bodies have recognised, that any limitations ‘must be necessary, time-bound and proportionate. However, the most critical is the combined effect of a series of limitations which together create a dangerous vacuum, disproportionately impacting the legal protection of detainees at a time of heightened anxiety and tension.’²² The WGAD has recognised that the ‘introduction of blanket measures restricting access to courts and legal counsel cannot be justified and could render the deprivation of liberty arbitrary.’²³ It determined that ‘States must ensure the availability of other ways for legal counsel to communicate with their clients, including secured online communication or communication over the telephone, free of charge and in circumstances in which privileged and confidential discussions can take place.’²⁴

b) Covid-19 and Justifications for Early Release

The rules to determine whether a particular detention is arbitrary have not changed because of the pandemic. It is still necessary to consider whether the detention was subject to law, whether the law itself was just and appropriate, and whether the detention was necessary and proportionate to fulfil a legitimate purpose. However, the factors to take into account when determining whether detention was necessary and proportionate have certainly changed and the pandemic may change the outcome of such considerations.

¹⁷ *Poghosyan v. Georgia*, Appl. No. 9870/07, 24 February 2009, para. 69, 70.

¹⁸ *Khudobin v. Russia*, Applic. No. 59696/00, 26 October 2006, paras 94 – 96. See also, *Asyukov v. Russia*, Applic. No. 2974/05, 5 April 2011, para. 76.

¹⁹ *Salakhov and Islyamova v. Ukraine*, Applic. No. 28005/08, 14 March 2013.

²⁰ *Gladkiy v. Russia*, Applic. No. 3242/03, 21 December 2010, para. 96.

²¹ See, Lara Keay, ‘Coronavirus: Woman in Surrey Jail Petitions UN over “Horrorific” Lockdown Treatment’, *Sky News*, 11 June 2020.

²² OMCT, ‘Building Our Response on COVID-19 and Detention: OMCT Guidance brief to the SOS-Torture Network and partner organizations’, April 2020.

²³ WGAD, Deliberation No. 11 (n. 1), para. 21.

²⁴ *Ibid.* See also, Inter-Agency Standing Committee (IASC) of OHCHR and WHO, ‘Interim Guidance COVID-19: Focus on Persons Deprived of Their Liberty’, March 2020; Fair Trials, ‘The Public Health Need to Keep People out of Detention Practical Guidance’, March 2020.

Certain detentions which would otherwise satisfy necessity and proportionality requirements may no longer do so, given the disproportionately high risk of infection in detention and higher mortality rate. Consequently, it is necessary to assess whether, in light of the change in circumstances occasioned by the pandemic, continued detention is still justified in each detained case or class of cases.²⁵ The failure to do so increases the arbitrariness of detention by failing to allow individuals' changed circumstances to be considered as part of a review of the legality of their detention.

Proportionality and necessity requirements may have changed as a result of Covid-19. First, proportionality requires some comparison between the detention and the purpose it is intended to achieve. Purposes will differ depending on the type of detention. The purpose of pre-trial detention is to ensure defendants appear at trial and the safety of accused and/or the public whereas the purpose of sentencing is to ensure the various crime control punishment rationales (e.g., specific and general deterrence; retribution; rehabilitation). In other settings, purposes include to ensure physical or psychological care and protection in hospital and care settings; to ensure attendance at future legal proceedings or administrative processes for migrant and refugee processing or removal centres. These various purposes may change over time,²⁶ and sometimes, Covid-19 may render the purposes no longer justifiable. For instance, it may not be justifiable to detain a failed asylum seeker to await deportation, when deportation to the country of origin is not an option because that country is not expecting to accept entrants within a reasonable time, because of Covid-19.²⁷ But also, the costs associated with detention are augmented by Covid-19, arguably shifting the balance. As an example, pre-trial detention may be harder to justify if trials in a particular country have been put on hold because of the pandemic. As explained by the Howard League for Penal Reform, in the UK, 'remand and sentenced prisoners alike are being held in conditions amounting to solitary confinement, for extended periods as they await trials that have invariably been delayed. Nothing has been done to address this, for adults or children in the system.'²⁸

Secondly, necessity is focussed on whether there are realistic alternatives to detention. Here, the negatives associated with detention during Covid-19 are augmented, but the alternatives to detention will also have been affected; due to lockdowns, there may be fewer available half-way houses or less temporary accommodation; community programmes to help integrate released detainees may not be operational and parole systems may be dysfunctional.²⁹ As OMCT highlights, 'release into confinement with families can also create difficulties and tensions with little time to prepare for release and appropriate post-release monitoring or support. There may also be detainees without clear places to go to, including foreigners, migrants, children or women defenders whose family ties are broken, or street children.'³⁰

Releases, whether permanent or temporary, help underscore that detention should be exceptional, and particularly so in the context of a pandemic. Releases encourage detaining authorities and policymakers to consider alternatives to detention. These could

²⁵ 'Challenging immigration detention in the COVID-19 pandemic', Landmark Chambers, 15 April 2020.

²⁶ *Murray v. the Netherlands* (Grand Chamber), Appl. No. 10511/10, 26 April 2016, para. 100.

²⁷ *Ibid.* See also, *R v Governor of Durham Prison ex parte Hardial Singh*[1984] 1 WLR 704.

²⁸ Howard League for Penal Reform, 'Justice and fairness under Covid-19 restrictions', May 2020.

²⁹ *Ibid.*

³⁰ OMCT (n. 22).

be applied to short-term pandemic needs, but might in the longer term be incorporated as standard alternatives to detention.

Nevertheless, release is another area where an absence of clear rules transparently implemented may result in arbitrariness, particularly if there is no clear procedure for detainees to petition to have their cases considered. The jurisprudence on the reducibility of life sentences is relevant, where the European Court of Human Rights has found a violation of Article 3 when legislation on clemency did not require the President ‘to assess whether continued imprisonment is justified on legitimate penological grounds.’ Nor did it ‘set a time-frame in which the President must decide on the clemency application or to oblige him or the Minister of Justice ... to give reasons for the decision....’³¹ Covid-19 releases which are undertaken without transparency or without a clear framework can also result in those who remain in detention feeling as if they are being doubly punished.

Many oversight bodies have recommended who should be prioritised for release.³² The recommendations tend to focus on factors connected, first, to the rationale for the detention (e.g., persons unlawfully or arbitrarily detained should be released, as should the bulk of pre-trial detainees; persons held for non-penal reasons such as immigration detainees).³³ Regarding migrants, the WGAD noted that ‘detention is only permissible as an exceptional measure of last resort, which is a particularly high threshold to be satisfied in the context of a pandemic or other public health emergency.’³⁴ However, some of the major refugee receiving countries have been slow to implement releases, with dangerous consequences. Arguably migrants are the equivalent in terms of the derision they receive to the human rights defenders and protest movements operating in the most repressive regimes. At the time of writing, the USA’s ICE programme had refused to proceed with releases of vulnerable migrants detained in its wide network of immigration detention centres.³⁵

Other factors taken into account include whether persons pose a danger to society (prisoners serving short prison sentences for non-violent crimes; prisoners who are almost at the end of their prison term).³⁶ States have begun to take on board some of these recommendations, leading to an important number of temporary and permanent releases in many countries. However, there are some important gaps. Many countries that routinely resort to arbitrary detention, particularly against protest movements, opposition groups, human rights defenders and journalists, have failed to proceed with their releases. At times, this is because the individuals concerned have been charged and at times convicted of security-related offences, which have been classified as some of the most serious offences not subject to full or conditional release.³⁷ At other times, it is because the state has introduced arbitrariness into the release process, picking and choosing who should benefit from this solution. For instance, it has been reported that in the context of the pandemic, Turkey introduced legislation to secure the release of up to 100,000 prisoners,

³¹ *T.P. and A.T. v. Hungary*, Apps. 37871/14, 73986/14, 4 October 2016, para. 49. See also, *Matiošaitis and others v. Lithuania*, Apps. No. 22662/13, 51059/13, 58823/13, 23 May 2017, 157-181.

³² UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, ‘COVID-19 and Protection of right to life in places of detention’, COVID-19 Human Rights Dispatch No. 2, 5 May 2020.

³³ IASC (n. 24); see also, WGAD, Deliberation No. 11 (n. 1).

³⁴ WGAD, Deliberation No. 11 (n. 1), para. 23.

³⁵ Sam Levin, ‘He lived in the US for 40 years. Then he became the first to die from Covid-19 in immigration jail’, *The Guardian*, 12 May 2020.

³⁶ See, e.g., the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its COVID-19 Statement of Principles; IASC (n. 24).

³⁷ OMCT (n. 22).

but detained journalists and human rights activists are not included.³⁸ Similarly, Israel has announced the release of thousands of Israeli prisoners, including serious offenders. However, reportedly, it has failed to release Palestinian prisoners, even the minors, women, the elderly and infirm.³⁹ In Egypt, thousands of prisoners have been pardoned but reportedly, none of those pardoned are “political” prisoners.⁴⁰ For those forced to remain in detention it is a double punishment; arbitrarily detained and now condemned to anxiously await infection.

Also, there is an emphasis on different forms of vulnerability, which focuses on categories such as persons over a certain age, pregnant women and women who are breastfeeding, persons with underlying health conditions, and persons with disabilities, as well as children and women with children.⁴¹ Who is considered vulnerable, and relative levels of vulnerability, particularly if connected to disease susceptibility, is highly contested as the disease is not yet fully understood. Also, assessments of vulnerability can ignore or undervalue complex, intersecting vulnerabilities. Invariably, considerations of who should be released on account of their vulnerability will involve both ethics and science, and also some consideration of human rights. It is important that decisions to release are taken on clear and transparent grounds that are non-discriminatory.

In respect of persons serving out sentences of imprisonment for crimes committed, to what extent should Covid-19 serve as a justification for early release or commutation of sentence? In this respect, should the goals of retribution and specific and general deterrence be weighed against the right to health and safety of prisoners and prison staff, and, if so, how? A number of elderly and potentially frail convicted war criminals have been temporarily released from detention, on vulnerability considerations. Penological considerations such as retribution or rehabilitation have not been major considerations for the release, particularly as they are intended to be temporary releases. These include Hissène Habré, who was sentenced to life imprisonment by the Extraordinary African Chambers seated in Senegal, for the torture and crimes against humanity he directly perpetrated and oversaw in Chad, has been given a two month leave from prison (to house arrest) as a consequence of the Covid-19 risks.⁴² Victims of Habré’s crimes have expressed deep concern, given the failure to progress their reparations awards; all the concern over Habré’s health leaves them cold.⁴³ Many convicted war criminals have been seeking release around the world.⁴⁴ The human rights community has struggled with its

³⁸ Emma Sinclair-Webb, ‘Turkey Should Protect All Prisoners from Pandemic’, HRW, 23 March 2020.

Beyond Turkey, Human Rights Watch has reported that key human rights defenders remain in detention despite national release programmes making progress with other detainee groups in Bahrain, Egypt, Iran, Kyrgyzstan, Myanmar, Cambodia, Cameroon, Libya, South Sudan, Syria, Yemen and China. See, HRW, ‘COVID-19: A Human Rights Checklist’, 23 April 2020.

³⁹ Raji Sourani, ‘COVID-19 and Human Rights – 2013 Laureate Raji Sourani: “Governments must put human rights and dignity at the centre”’, The Right Livelihood Foundation, 8 May 2020.

⁴⁰ ‘No political prisoners freed as Egypt pardons thousands on Eid: President el-Sisi grants clemency to 3,157 people, including ex-policeman jailed for murder of singer Suzanne Tamim’, *Al Jazeera*, 24 May 2020.

⁴¹ E.g., WGAD, Deliberation No. 11 (n. 1), para. 15, 16; See also IASC (n. 24).

⁴² ‘Chad: Ex-president temporarily released from jail due to COVID-19’, *Aljazeera*, 7 April 2020.

⁴³ Ephrem Rugiririza, ‘COVID-19: Should we Release Vulnerable Convicts?’, *Justiceinfo.Net*, 16 April 2020.

⁴⁴ See, e.g., Jo-Marie Burt, ‘In Guatemala, COVID-19 Puts Justice on Hold, Emboldening Convicted War Criminals to Seek Their Freedom’, *International Justice Monitor*, 17 April 2020. See also, ‘ADC-ICT Urges President of the UN International Residual Mechanism for Criminal Tribunals to Urgently Grant Early or Provisional Release to Detainees in Light of the COVID-19 Pandemic’, 27 March 2020.

response to such releases. The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has issued guidance on this issue, noting that ‘the legitimate and necessary measures to protect against Covid-19 and overcrowding should not lead, *de jure or de facto*, to impunity for persons convicted in various parts of the world for serious violations of human rights, crimes against humanity, genocide, or war crimes.’ He has underscored that temporary house arrest should only be afforded if it is impossible to relocate such prisoner to a prison facility with safe and healthy conditions.⁴⁵ OMCT has taken a more direct line, recommending to the organizations in its network that ‘we should avoid advocating for the potential release of war criminals, those convicted of crimes against humanity, genocide or the crime of torture, whose prosecutions many of us have supported.’⁴⁶ But this presents an arbitrary exception to the application of vulnerability criteria, which cannot be right.

IV. Conclusions: An Increase or Reduction in Arbitrariness?

We know that there is a prohibition of arbitrary detention. However, as has been described, Covid-19 can accentuate the arbitrariness of detention in several important ways. First, detention may no longer satisfy the tests of proportionality and necessity. Second, inadequate prison conditions, including poor health and sanitation as well as distancing measures which isolate detainees for their own health and safety, but fail to provide reasonable accommodation, can also make the detention arbitrary given the impact such conditions have on the ability of detainees to exercise their rights. Detention in the context of Covid-19 can also heighten the arbitrariness associated with a number of other human rights violations.⁴⁷

Also, arbitrariness can enter into decisions to release detainees as part of distancing measures. Lack of clarity, fairness and transparency in decisions to release contributes to arbitrariness and increases the stress and anxiety of detainees and their families, which constitutes a double punishment which they do not deserve, this time cruel, inhuman or degrading treatment.

⁴⁵ UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings (n. 32).

⁴⁶ OMCT (n. 22), p. 5.

⁴⁷ UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings (n. 32).

Imperfect Models of the World: Gender Stereotypes and Assumptions in Covid-19 Responses

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Abstract

As the Covid-19 pandemic has unfolded, epidemiologists have been working to build and refine models of how the disease is spread through populations: at the same time, policy-makers around the world have been taking measures to try to stem the transmission of disease, which are based on models of how they think the world works. These models may be implicit, or made explicit including through the use of statistics and data science: frequently, though, they are based on stereotypes and assumptions about how individuals and systems operate.

This paper argues that it is crucial to understand to whom models are useful, and who they ignore. This paper looks at the gendered assumptions – and resulting gaps - in policy responses, which betray an understanding of the world that neglects the experiences of women and of trans and non-binary people. It examines how gendered assumptions, gender binaries and stereotypes weaken responses to the pandemic, and how they reinforce imperfect models of the world that have detrimental impacts on the people who are not included.

Keywords

Gender, data, policy, discrimination

This article draws on the work I am carrying out as part of my ESRC-funded PhD studies, as part of the University of Essex's Human Rights, Big Data and Technology Project.

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I. Introduction

Covid-19 is a new disease, caused by a newly discovered virus.¹ We don't know how it will behave or what to expect: but as societies, we have to respond to a disease that has killed more than a third of a million people worldwide in a few months.² In this paper, I articulate how the way that we – individuals, authorities, scientists, or governments – respond to Covid-19 is based on how we model the world, and the assumptions that we make as we do this. I outline how these assumptions may be based on stereotypes, and how the

¹ The virus is called severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2): the disease it causes is called coronavirus disease (Covid-19). For more information, see World Health Organization, 'Naming the Coronavirus Disease (Covid-19) and the Virus That Causes It', accessed 7 May 2020, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it).

² As of 10 June 2020, the WHO had reported 408,025 deaths. World Health Organization, 'Coronavirusdisease (Covid-19) Situation Report–142', 31 May 2020, https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200511-covid-19-sitrep-112.pdf?sfvrsn=813f2669_2.

inaccuracies caused by inaccurate models can lead to discrimination. Finally, I articulate two recommendations that could help alleviate the problems caused by these imperfect models: making the assumptions that underly them explicit; and centering the people who are already marginalised by building policy responses that foreground their experiences and expertise.

II. The Importance of Models

The experts in new diseases are epidemiologists. As with SARS, H1N1, and Ebola, they follow the spread of Covid-19. They look at data on positive tests, on infection rates, on hospitalisation and deaths. This data enables them to build *models* of the disease: expressed as diagrams or in computer programs, these models allow us to better *determine* what is happening now, and to *predict* what will happen next.

a) Models in epidemiology

Models can help us understand what was previously unknown: and to communicate ideas that might not have been previously accepted. In the UK in the 1850s, the prevailing model of cholera, as understood by doctors, was that it was spread by a “miasma”: bad air.³ Dr John Snow disagreed. He recorded the deaths from a cholera outbreak in Soho, London in 1854, marking the residences of those who died on a map: and because he thought that the disease might be spread by water, he also marked the location of neighbourhood pumps.

³ William F Bynum, ‘On the Mode of Communication of Cholera’, *Nature*, 14 March 2013, 169.

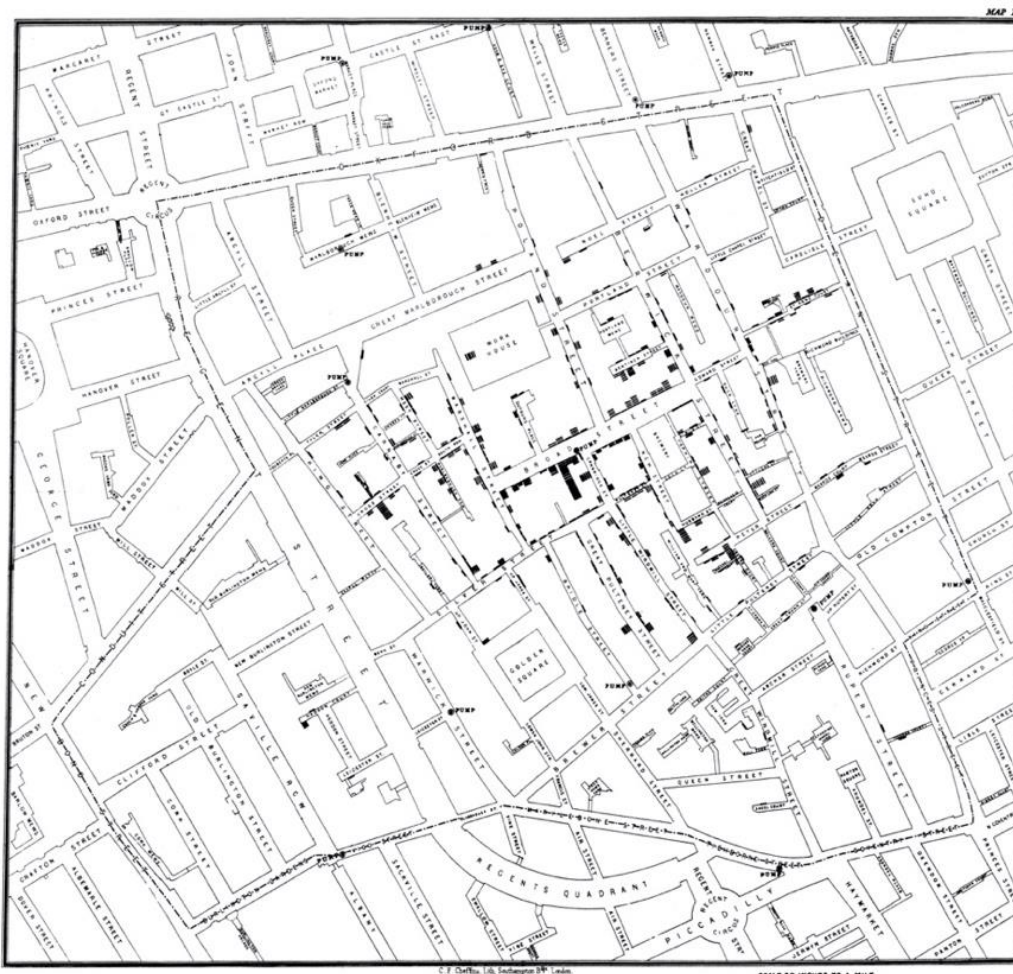


Figure 1: John Snow's map showing cholera cases in Soho in 1854.⁴

Snow's map – now often cited as an early example of data visualisation⁵ – is shown in Figure 1. The largest cluster of deaths was around the pump on Broad Street. Snow demanded that the handle of the pump be removed, and the outbreak stopped.⁶ More than 150 years later, modern-day epidemiologists are engaged in similar projects: understand how a disease spreads, and what actions need to be taken to save lives.

b) Models in the world

Of course, models are not solely the tool of epidemiologists. Models of how the world operates are familiar in all academic disciplines: from microeconomic graphs that plot price against demand, to legal theories that posit humans as rational actors, to sociological theories about the ways that we constitute ideas of 'disability'.

These models may be developed as theories, that are then tested empirically, or they may be developed through a 'grounded' observation of a situation, on top of which a model is

⁴ John Snow, *Map from 'On the Mode of Communication of Cholera'*, 1854, 1854, Originally published in 1854 by C.F. Cheffins, Lith, Southampton Buildings, London, England, <https://commons.wikimedia.org/wiki/File:Snow-cholera-map-1.jpg>.

⁵ See for example Edward R. Tufte, *The Visual Display of Quantitative Information* (Graphics Press, 1983), 24.

⁶ Broad Street is now called Broadwick Street: it now hosts a commemorative replica of the original pump, just outside the (more traditionally British commemoration) John Snow pub.

built; they may make use of qualitative or quantitative research; they may be constructed as single static forms, or constantly updated. Written in academic papers and presented in the form of graphs, computer code or flowcharts, we are familiar with models of the world: and we understand that some models are better than others. We no longer accept the “miasma” theory of cholera transmission as a useful explanation, just as we no longer find geocentric models of the universe useful.⁷

Models are crucial for policy responses as well. In order to have some idea of how a policy will work, we need to have some understanding of how a complex system will respond to changes. This is a model, whether it’s computational, theoretical, or ideological.

III. The Imperfections of Models

Statistician George Box wrote, ‘all models are wrong, but some are useful.’⁸ All models are wrong in the sense that they are inherently reductive. They reduce the complexities of the world down to a finite set of parts.

This reduction may be because not enough is known about all the components: Snow was able to advance the understanding of cholera through his work, but he died before the development of germ theory,⁹ which argued that some diseases are caused by micro-organisms. His model of cholera, therefore, held that it was spread by sewage-contaminated water, but was not specific enough to identify the contamination: the bacterium *Vibrio cholerae*, which can be spread in human faeces.¹⁰

It may also be because assumptions are made that are not spelled out: Newton did not explicitly state that his laws were only valid up to a certain speed. While during his lifetime, he accepted the idea that light travelled at a very fast but finite speed,¹¹ he did not consider that the laws he developed to measure the world around him might not be universally applicable. Newtonian classical mechanics is accurate enough to send humans to the moon, but it fails for objects that are very small, or going very fast.¹²

This is just as true in the humanities as in the sciences. Liberal theories of society explicitly model society as being composed of individuals who are rational, autonomous, and equal before the law,¹³ while international law institutions have rightly been criticised for their

⁷ In a geocentric model of the universe, everything – the Sun, the Moon, planets, and stars – orbits around the Earth. Geocentric models were known to be flawed from the 2nd century BC, and were superseded by heliocentric (orbiting around the Sun) models in the 16th century.

⁸ An oft-quoted aphorism, it appears in print in for example George E P Box and Norman R Draper, *Empirical Model-Building and Response Surface* (USA: John Wiley & Sons, Inc., 1986), 424.

⁹ Bynum, ‘Cholera’ (n. 3).

¹⁰ World Health Organization, ‘Cholera’, 17 January 2019, <https://www.who.int/news-room/fact-sheets/detail/cholera>.

¹¹ Isaac Newton, *Opticks*, 1704, 77, <https://gallica.bnf.fr/ark:/12148/bpt6k3362k>.

¹² How small, or how fast, exactly? Smaller than atoms, or faster than around 10% the speed of light. In practice, the differences between Newton’s predictions, and Einstein’s Theory of General Relativity, were far smaller than the rounding errors in the computer systems used by NASA in the Apollo program. (Much more information about the computer system is available from Ron Burkey, ‘The Apollo Guidance Computer: A Kinder, Gentler Introduction’, Virtual AGC — AGS — LVDC — Gemini, accessed 7 May 2020, <http://www.ibiblio.org/apollo/ForDummies.html>).

¹³ Sandra Fredman, *Women and the Law*, Oxford Monographs on Labour Law (Oxford: Clarendon Press, 1997), 12–17.

‘outmoded but nevertheless deeply entrenched attitudes concerning the roles and status of men and women in society.’¹⁴

Some models are useful: but only to some people. Newton’s model of gravity was useful to NASA scientists, but not to quantum theorists. Snow’s model of cholera was useful to future Londoners, but not to the residents of Soho who had already died – or fled – the outbreak of 1854.

Models of – and about – people may be useful for describing some lives, but less so for others. These include both theoretical models and grounded models, both qualitative and quantitative. Feminist legal scholars have argued, for example, that the assumptions of liberalism are masculine: they do not fit the realities of people’s lives, particularly the lives of women, in their neglect of human bodies, social contexts and relationships.¹⁵

At the international level, the Convention on the Elimination of All Forms of Discrimination Against Women, and the CEDAW Committee which oversees its implementation has begun not only to identify that gender stereotyping is a problem,¹⁶ but to name specific stereotypes and show how their application is harmful in judicial decisions.¹⁷ Imperfect models of the world can lead to unexpected outcomes for people who don’t fit – and sometimes discrimination.

IV. Imperfect Models and Covid-19

In crisis situations, things move fast. The people – whether they are epidemiologists or policy makers – are unlikely to have all the information they need to build accurate models at the best of time. In crises, this is exacerbated, and the model-makers also may not have time to interrogate all their assumptions.

Take, for example, collecting disaggregated data on Covid-19 cases and deaths. This is crucial in order to track potential disparities and inequities in health: it enables health care researchers to see how the virus is impacting different groups of people.¹⁸ The USA has the highest number of Covid-19 cases in the world, but the disease is not hitting everyone equally. In order to understand which communities are being hit hardest, US states have started to collect data that is disaggregated by race. But at the time of writing, this data was available for only 35% of deaths.¹⁹

¹⁴ Elizabeth Evatt, ‘Foreword’, in *The Boundaries of International Law: A Feminist Analysis*, by Hilary Charlesworth and Christine Chinkin, Melland Schill Studies in International Law (Manchester: Manchester University Press, 2000), ix.

¹⁵ Rosemary Hunter, ‘Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism’, in *The Ashgate Research Companion to Feminist Legal Theory*, ed. Margaret Davies and Vanessa Munro, Ashgate Research Companion (Farnham: Ashgate, 2013), 21.

¹⁶ As in for example *AT v Hungary*, UN Doc. CEDAW/C/32/D/2/2003, 26 January 2005.

¹⁷ Simone Cusack, ‘Building Momentum Towards Change: How the UN’s Response to Stereotyping Is Evolving’, in *Stereotypes and Human Rights Law*, ed. Eva Brems and Alexandra Timmer (Cambridge, United Kingdom: Intersentia, 2016), 28.

¹⁸ PolicyLink, ‘Counting a Diverse Nation: Disaggregating Data on Race and Ethnicity to Advance a Culture of Health’, 2018, 5, https://www.policylink.org/sites/default/files/Counting_a_Diverse_Nation_08_15_18.pdf.

¹⁹ Johns Hopkins University of Medicine, ‘State Testing Data by Race’, Johns Hopkins Coronavirus Resource Center, accessed 7 May 2020, <https://coronavirus.jhu.edu/data/racial-data-transparency>.

a) Who is 'other'?

Not all data on infection rates and deaths is disaggregated. In four of the ten states with the highest population of Native Americans, data about the case and fatality numbers for this population is not disaggregated, and is instead counted under 'other.' Without accurate data about Native populations – who are disproportionately likely to be living in poverty, and unable to access healthcare – it will not be possible to design policy responses that take into the account how they have been hit by the virus.

And it is likely that they have been hit hard. Where data has been collected, Native Americans are more likely to have been infected – as in New Mexico, where they are less than 10% of the population but more than a third of the cases – and to die – as in Arizona, where 6% of the population, but 16% of the deaths, are amongst Native populations.²⁰ In per capita cases, the Navajo Nation is third highest in the USA, behind only New York and New Jersey.²¹

b) Exactly two genders?

Policy responses, too, can rely on imperfect models of the world. In Panama, in order to minimise the number of people in public at one time, the government implemented a gendered curfew: women can leave their houses on Monday, Wednesday and Friday, while men can go out on Tuesday, Thursday and Sunday.²² Violations are enforced by the police and quarantine officers. This presents a challenge for trans and non-conforming Panamanians, in a country where changing the gender marker on official documents requires undergoing costly gender confirmation surgery, and where transphobic discrimination is widespread.

For trans people whose gender doesn't match their legal documents, they risk arrest, humiliation and criminalisation: one woman was detained for three hours, despite being outside on a Wednesday, and as a health volunteer, exempt from the quarantine restrictions.²³ It took more than five weeks for the government of Panama to recognise that the enforcement of the quarantine was discriminatory against trans and gender non-conforming people, and to issue a communication to the security forces.²⁴

²⁰ Rebecca Nagle, 'Native Americans Being Left out of US Coronavirus Data and Labelled as "Other"', *The Guardian*, 24 April 2020.

²¹ Delilah Friedler, 'Navajo Nation Is behind Only New York and New Jersey in Rates of COVID-19 Infection. What Happened?', *Mother Jones* (blog), 5 May 2020, <https://www.motherjones.com/politics/2020/05/navajo-nation-covid-outbreak-deaths/>.

²² This was combined with specified hours for leaving the house, based on the last digit of a person's ID card or passport. República de Panamá Gobierno Nacional, 'Nuevas Medidas Para La Cuarentena Absoluta', 30 March 2020.

²³ Cristian González Cabrera, 'Panama's Gender-Based Quarantine Ensnarers Trans Woman', *Human Rights Watch* (blog), 2 April 2020, <https://www.hrw.org/news/2020/04/02/panamas-gender-based-quarantine-ensnarers-trans-woman>.

²⁴ Human Rights Watch, 'Panama: Government Takes Step to End Quarantine Gender Discrimination', Human Rights Watch, 18 May 2020, <https://www.hrw.org/news/2020/05/18/panama-government-takes-step-end-quarantine-gender-discrimination>.

c) Hitting the most marginalised hardest

Both of these outcomes result from a failure to model aspects of the world. In Panama, it is a failure to recognise that legal gender and gender expression are not the same for many people, and that policing the latter to enforce the former leaves an already marginalized group at risk of further oppression. In the USA, it is a failure to recognise in models that there is a population – Native Americans – who experienced consistently poor health outcomes (including lower life expectancy, and higher rates of death from preventable diseases) in general,²⁵ and who would therefore benefit from disaggregated data in order to understand the specific impact of Covid-19.

In both of these countries, this failure to model accurately, disproportionately impacts groups that are already marginalized. This might be the result of models – explicit or implicit models – suffering from what D'Ignazio and Klein call the 'privilege hazard': they are built by people who lack the tools to recognize the oppression that other people experience.²⁶ It might be the result of deliberate discrimination. Or it might be the result of hurried decision-making. Regardless of the motivation, the outcome is the same: inequalities are exacerbated, and marginalised people are pushed further into the margins.

Assumptions are not neutral. They may be made deliberately, in service of faster, more streamlined models. They may be made implicitly, because everyone in the room is working under the same set of assumptions and so no-one thinks to question if a different approach could be taken. But when modelling the world, the assumptions made are choices: about what to spell out in detail, and what to abstract. The choices are political: they determine what is counted, and what is ignored.

V. Building Better Models

Models must be reductive in some way: but the choices that are made in order to reduce the world to a model are political. They hit some people harder than others. In this final section, I offer two methods to mitigate against this disproportionate impact.

a) Make assumptions explicit

When developing a model – whether it is computational, diagrammatic, or theoretical – everyone involved could articulate the assumptions that they are making. The specific actors will be different for every model, but Wieringa's taxonomy of actors involved in computer algorithm development is a helpful illustration: she distinguishes between decision-makers, developers and users.²⁷ In complex systems, it is not always easy – or possible – to know the individual or individuals who fill each of these roles

²⁵ Donald Warne, 'The State of Indigenous America Series: Ten Indian Health Policy Challenges for the New Administration in 2009', *Wicazo Sa Review* 24, no. 1 (10 May 2009): 7–23, <https://doi.org/10.1353/wic.0.0023>.

²⁶ Catherine D'Ignazio and Lauren F. Klein, *Data Feminism*, Ideas Series (Cambridge, Massachusetts: The MIT Press, 2020), 29.

²⁷ Maranke Wieringa, 'What to Account for When Accounting for Algorithms: A Systematic Literature Review on Algorithmic Accountability', in *Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency (FAT* '20: Conference on Fairness, Accountability, and Transparency, Barcelona, Spain: ACM, 2020)*, 3–4, <https://doi.org/10.1145/3351095.3372833>.

‘Decision-makers’ are those who specify parameters for a model. In the example cited above, this could be the state- and federal-level public health bodies in the USA who decided that collecting data about Covid-19 cases and deaths was important, or the individuals or teams within the Government of Panama, who decided that they needed to impose a curfew.

‘Developers’ are those who make decisions about how to implement the model. These could be the civil servants tasked with dividing Panama’s population into discrete groups, for the purposes of limiting the number of people in public. It could also be the representatives of Arizona Department of Health Services which included Native American as a category in their demographic data,²⁸ or those at the Texas Department of State Health Services, which did not.²⁹

Finally, ‘users’ are the operators of a model: the health and social care workers tasked with recording demographic information about COVID-19 patients, or the police and security forces in Panama tasked with enforcing the curfew.

In Covid-19 data collected in Texas, for example, an unspoken assumption is that certain racial groups are worthy of special consideration, and others are not. Collecting data so that disproportionate impact on White people could be identified is deemed worthwhile by the Texas public health authorities: similarly, Black people. But Native Americans – despite a history of health inequities – were not necessarily considered a group worth of scrutiny. Implicitly, it was assumed that the impact on Native American populations was likely to be either small enough to be not worth scrutinising: or (possibly in addition), the virus was expected to hit those populations in the same way as other groups that are not counted separately in data, such as Arab-Americans.³⁰

In the case of the Panama gendered quarantine, the policy makers assumed that gender could be determined by third parties: police and quarantine officers: they also assumed that gender expression and legal gender were the same for everyone. Neither of these assumptions hold, as trans activists and gender scholars have been arguing for many years.³¹

Articulating assumptions is not an easy task: it takes practice! It is easier to do when the people in the room are from diverse backgrounds – when everyone has the same assumptions, they often go unnoticed: and it is easier to do when there is a strong incentive to devote resources to this process. Spelling out assumptions in the Panamanian and USA-ian examples above might have helped identify why – and for whom – they failed: which leads neatly into my second method.

²⁸ Arizona Department of Health Services, ‘COVID-19 Data Dashboard’, Arizona Department of Health Services, accessed 27 May 2020, <http://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/covid-19/dashboards/index.php>.

²⁹ Texas Department of State Health Services, ‘Texas Case Counts: COVID-19’, accessed 27 May 2020, <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83>.

³⁰ For more information about advocacy for including ‘Arab American’ as a separate category in census and other data, see: PolicyLink, ‘Counting a Diverse Nation’.

³¹ See for example TGEU, ‘Legal Gender Recognition’, accessed 27 May 2020, <https://tgeu.org/issues/legal-gender-recognition/>; Amnesty International, ‘The State Decides Who I Am: Lack of Legal Gender Recognition for Transgender People in Europe’, 2014, <https://www.amnesty.org/en/documents/document/?indexNumber=EUR01%2f001%2f2014&language=en>.

b) Centre the impact on the people on the margins

Scholars like Donna Haraway have been arguing for ‘strong objectivity’ as a lens of analysis, which centres the perspectives of groups who are excluded from knowledge-making processes:³² while standpoint theory, a common tool of feminist analysis, recognises that all knowledge is situated, partial and historically specific.³³ Black feminist scholar and activist bell hooks argued that it is not only important to recognise that the people on the margins have a specific perspective: it is crucial to building successful movements that the experiences of marginalised people are “understood, addressed and incorporated.”³⁴

Yet while scholars have been arguing for local knowledge, properly used, for decades: those in power remain, in many situations, prone to discount the impact of their decisions on marginalised people. Marginalised people are less likely to be in the room when decisions are made: and if they are in the room, they are less likely to have their voices heard, let alone have the power to influence the decisions that are made.

In the medium-to-long term, one way to resolve this is to have decision-makers with diverse identities, backgrounds and experiences. But this will take time. In the short-term – and particularly in crisis situations – it is crucial for those who hold power to think about the impact of their decisions – and the assumptions that underly them – on people who are marginalised. Centring marginalised people means, in hooks’ analysis, bringing in their experiences, but also creating – and in some cases, ceding – space for them to participate as both ‘makers of theory and of leaders of action.’³⁵

In the USA, this would have meant including the experiences, perspectives and expertise of communities who are already known to have poorer health outcomes - including Native Americans – in the development of policy responses. It would have meant ensuring that the policy included responses centred on these communities, instead of keeping them at the margins. And to be effective, these policy responses needed data for evaluation. While there are legitimate concerns about collecting data on marginalized groups, ignoring them or subsuming them into ‘other’ was not effective here.

In Panama, this would have meant including trans people, and gender-non-conforming people – and their lived experiences - in the development of the quarantine measures. It would have meant considering how the measures would impact them, including how quarantine violations were to be policed. Trans people are already more likely to be targeted by police: quarantine measures that exacerbated this should not have been put into place.

Both of these responses require a broader view of the world: they require thought and reflection on the part of the designers and implementers, about the models of the world that they are using and the assumptions that underly them. Crisis situations are inherently fast-moving and individuals tasked with decision-making may feel they don’t have time to think about these concerns: this is precisely why these are important. Not just in our current

³² D’Ignazio and Klein, *Data Feminism*, (n. 26) 83.

³³ Joey Sprague, *Feminist Methodologies for Critical Researchers: Bridging Differences*, The Gender Lens Series (Walnut Creek, CA: AltaMira Press, 2005), 41.

³⁴ bell hooks, *Feminist Theory from Margin to Center* (South End Press, 1984), 161.

³⁵ *Ibid.*

pandemic situation, but in every future crisis – and day-to-day – policy response. These two methods: making assumptions explicit, and centering the people who are already marginalized – should be paramount in all the models that we build of the world.

VI. Conclusion: Beyond Covid-19

As I have described, imperfect models of the world have the potential to have a detrimental impact on responses to Covid-19. But the harm of imperfect models does not stop there. The Covid-19 crisis will continue for months and years, but decision-making based on imperfect models did not begin with the virus, and it will not end with it.

Models of the world are in use in almost every sphere of life, but the proliferation of big data analytics and algorithmic decision-making has concretised these models into computer code. Without proper oversight, the decision-makers, developers and user of models risk using models with reductive views of the world based on assumptions and stereotypes. The two methods I have outlined here: spelling out assumptions, and centring the people at the margins, will be necessary – although perhaps a starting point, rather than a complete solution – to ensuring that these models are useful without being harmful.

The Human Rights of Older People during Covid-19: Social Wellbeing and Access to Care and Support for Older People in the United Kingdom

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Abstract

To date, the vast majority of Covid-19 deaths have been those over the age of 65. The vulnerability of older people to the impacts of Covid-19 were recognised early and have featured prominently in policy discussions and decision-making of governments around the world. While the risks posed by Covid-19 to the health and wellbeing of older people are significant, the impact of policies introduced in response to the public health crisis raise several critical human rights issues.

This article addresses two broad areas of concern regarding the rights of older people which have emerged in the United Kingdom as a consequence of Covid-19. Firstly, this article discusses the risks posed by the suspension of several Local Authority duties under the Care Act, and proposes amendments aimed at ensuring the rights of people in need of care and support are maintained during this period. Secondly, the social wellbeing of older people is discussed with reference to Article 8 of the European Convention on Human Rights, which establishes the right to respect for private and family life. For older adults living in the community, it is argued that Article 8 imposes a positive obligation on Local Authorities to identify and support those older adults experiencing significant isolation or loneliness as a consequence of measures introduced in response to Covid-19. In care home environments, Article 8 is considered with reference to the suspension of care home visitation rights, which is argued to be a disproportional and overly restrictive measure which imperils the rights and social wellbeing of older people.

I. Introduction

Older people are at the highest risk of Covid-19, owing to age-related physiological changes which increase infection susceptibility, and a higher incidence of underlying conditions. As a result, older people are more likely to contract Covid-19, and at greater risk of complications and morbidity when they do.¹ Those over the age of 65 have accounted for 93% of all Covid-19 deaths in England and Wales, with a death rate of 286 per 100,000, compared with 8.4 among those aged under 65.² Globally, fatality rates from Covid-19 among those over the age of 80 are five times greater than the population average, with this rate expected to increase further as the virus spreads among older

¹ World Health Organization, Office for Europe, 'Statement: Older people are at highest risk from COVID-19, but all must act to prevent community spread', by Hans Henri P. Kluge, 2 April 2020, <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/statements/statement-older-people-are-at-highest-risk-from-covid-19,-but-all-must-act-to-prevent-community-spread> [accessed 8 May 2020].

² Office of National Statistics (ONS), 'Coronavirus related deaths by occupation, England and Wales: Deaths registered up to and including 20 April 2020', 11 May 2020, <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/causesofdeath/bulletins/coronaviruscovid19relateddeathsbyoccupationenglandandwales/deathsregistereduptoandincluding20april2020> [accessed 10 May 2020].

people living in developing countries.³ While the significant direct health risks posed by Covid-19 for older people demand clear and targeted responses, policies enacted must be proportional, measured and aimed towards the preservation of older person's dignity and fundamental human rights. This article focuses on two areas of concern with regard to the effect of Covid-19 on the rights and dignity of older people in the United Kingdom (UK): social wellbeing, and access to care and support.

II. Access to Care and Support

In recognition of the significant impact of COVID-19 on the social care workforce capacity, the Coronavirus Act 2020⁴ has modified or temporarily suspended a range of local authority duties under the Care Act 2014 (CA). With an expected increase in social care referrals coinciding with a significantly reduced workforce, these changes were justified on the basis of enabling local authorities to 'continue to be able to deliver the best possible care services during the peak and to protect the lives of the most vulnerable members of society'.⁵ Among the most significant changes has been the suspension⁶ of the duty for local authorities to undertake a needs and financial assessment 'where it appears to a local authority that an adult may have needs for care and support,' irrespective of their view of the extent of the adult's needs, or their financial resources.⁷ The duty to provide support to meet eligible unmet needs has also been suspended, with the only requirement being that support be provided where it is necessary to prevent a breach of a person's rights under the European Convention on Human Rights (ECHR), as incorporated by the Human Rights Act.⁸ While this duty applies to potential breaches of any of the ECHR rights, those most relevant to the aforementioned CA duties are Article 2 (right to life), Article 3 (freedom from inhumane and degrading treatment), and Article 8 (the right to private and family life).

Regulations giving effect to the suspension of these duties have not yet been published, with the government advising that local authorities should only exercise these easements 'where this is essential in order to maintain the highest possible level of resources'.⁹ Nonetheless, serious concerns remain as to the impact of these measures during a time when older people's needs for care and support are likely to increase, and informal support and care in the community is likely to be harder to access. First, while the intention of these easements is to enable a more efficient and effective use of resources, the scale of the revised provisions is likely to require local authorities to introduce new procedures and administrative systems that will delay the provision of critical care.¹⁰ Second, the lowering

³ World Health Organization, 'COVID-19 Strategy update', 14 April 2020, https://www.who.int/docs/default-source/coronaviruse/covid-strategy-update-14april2020.pdf?sfvrsn=29da3ba0_19&download=true [accessed 7 May 2020].

⁴ Coronavirus Act, 2020, Schedule 11, Chapter 7.

⁵ Department of Health and Social Care, 'Guidance: What the Coronavirus Bill will do, Easing the burden on frontline staff both within the NHS and beyond,' 26 March 2020, paragraph 5 <https://www.gov.uk/government/publications/coronavirus-bill-what-it-will-do/what-the-coronavirus-bill-will-do> [accessed 6 May 2020].

⁶ Coronavirus Act, 2020, Chapter 7, Part 1 (Main Provisions).

⁷ Care Act, 2014, Section 9 (1-7).

⁸ Human Rights Act, 1998, Section 1.

⁹ Department of Health and Social Care, 'Care Act easements: guidance for local authorities,' Section 4, 1 April 2020, <https://www.gov.uk/government/publications/coronavirus-covid-19-changes-to-the-care-act-2014/care-act-easements-guidance-for-local-authorities> [accessed 2 May 2020].

¹⁰ British Association of Social Work, 'Briefing paper on Coronavirus Bill,' 25 March 2020, <https://www.basw.co.uk/media/news/2020/mar/basw-england-briefing-paper-coronavirus-bill> [accessed 4 May 2020].

of the duty threshold to circumstances of anticipated ECHR breaches assumes a high level of knowledge and expertise on the part of the assessor and gives an unprecedented level of discretion to local authority decision makers. With the vast majority of CA assessments undertaken by social workers, the British Association of Social Worker's (BASW) response to the CA easements cautions against the assumption of the requisite ECHR knowledge and competency:¹¹

...social workers are not experienced in applying human rights law in the specific way that is envisaged and this would involve a steep learning curve. The Care Act 2014 operationalises the principles of human rights into the concept of wellbeing and provides a well understood means of social workers applying professional judgment to assessing and meeting needs.

While recognising the unique circumstances posed by Covid-19, and the speed at which the Coronavirus Act needed to be developed, changes are needed to ensure that older people's needs continue to be met over this period. Reflecting the limitations discussed above, the following amendments proffered by public law experts, and the BASW, are worthy of serious consideration:¹²

- Amending the application of local authority duties under the CA to require that they be implemented “as far as reasonably practicable”, rather than the wholesale suspension of duties to undertake needs and financial assessments. The “reasonably practicable” provision would not apply in circumstances of anticipated ECHR breaches, such as where a failure to undertake an assessment could conceivably lead to the loss of life (ECHR Article 2), or subject a person to neglect, abuse or indignity (ECHR Article 3). In such circumstances, undertaking a needs or financial assessment would remain a duty.
- The introduction of a provision which would require the local authority to be satisfied that compliance with pre-amendment CA duties is incompatible with other statutory duties, or the efficient use of resources, prior to treating the relevant duties as disapplied. In effect, such a provision would require local authorities to justify the suspension of duties by demonstrating a significance change to needs, or available resources. For example, suspending the duty to undertake routine needs re-assessments could be justified on the basis of a demonstrated increase in the number of new assessments needing to be undertaken.
- Amending the Act to include an express requirement that local authorities carry out an assessment in order to verify the risk of an ECHR breach. While local authorities are currently required to be satisfied that there would not be an ECHR breach, the corresponding suspension of the duty to undertake a needs assessment would make such a determination difficult, if not impossible.

¹¹ Ibid.

¹² Jenni Richards, Jonathan Auburn and Steve Broach, ‘The Coronavirus Bill – Schedule 11’, 20 March 2020, <https://www.11kbw.com/knowledge-events/article/the-coronavirus-bill-schedule-11/> [accessed 4 May 2020]; BASW (n. 10).

III. Social Wellbeing

f) a) Older people living in the community

The social and economic wellbeing of older people has been significantly and disproportionately disrupted as countries around the world instruct those vulnerable to Covid-19 to self-isolate within their own homes and arrange for the delivery of groceries, medicines and other essential items. At the time of writing, all people over the age of 70 in the UK have been advised to self-isolate within their own homes for two months, with no clear indication as to when this guidance will be amended.¹³ Changes associated with later life, such as retirement, declines in health or mobility, and the death of spouses and friends, leave many older people vulnerable to social isolation and loneliness.¹⁴ In the UK, approximately 2 million people over the age of 75 live alone,¹⁵ and 17% of people over 65 report less than weekly contact with family, friends and neighbours.¹⁶ With older people more likely to live alone and to rely on social networks within their immediate neighbourhood environment for social interaction,¹⁷ the physical distancing and self-isolation measures introduced in response to COVID-19 have been particularly onerous.

It is important to recognise that many older people with the means and capacity to adapt, have been proactive in using digital social networking technology to communicate and maintain relationships with family and friends. However, it remains the case that older adults are significantly less likely than younger people to have access to an internet enabled device, with 79% of all digital exclusion in the UK among those aged over 65.¹⁸ Considering that the rate of digital exclusion is highest among older people living alone and experiencing financial disadvantage,¹⁹ physical distancing and home isolation are exacerbating existing inequalities experienced by some older people. While the guidance provided to older people is intended to protect their health and wellbeing during this period, it is critical that local authorities are proactive in recognising and responding to the consequences of these measures for older people. As noted by the Equality and Human Rights Commission with respect to the obligations of local authorities under Article 8 of the ECHR:

¹³ Public Health England, 'Guidance on social distancing for everyone in the UK,' 30 March 2020, <https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people/guidance-on-social-distancing-for-everyone-in-the-uk-and-protecting-older-people-and-vulnerable-adults>; Cabinet Office, 'Guidance: Staying alert and safe (social distancing),' 11 May 2020, <https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing> [accessed 4 May 2020].

¹⁴ Susan Davidson and Phil Rossall, 'Evidence review: Loneliness in later life', Report commissioned by Age UK, July 2015, https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/health--wellbeing/rb_june15_loneliness_in_later_life_evidence_review.pdf [accessed 8 May 2020].

¹⁵ Jennifer Thomas, 'Insights into loneliness, older people and wellbeing', Office of National Statistics, October 2015, <https://backup.ons.gov.uk/wp-content/uploads/sites/3/2015/10/Insights-into-Loneliness-Older-People-and-Well-being-2015.pdf> [accessed 8 May 2020].

¹⁶ Christina Victor et al., 'The prevalence of, and risk factors for, loneliness in later life: a survey of older people in Great Britain,' (2005) 25(6) *Ageing & Society* 357.

¹⁷ *Ibid.*

¹⁸ Digital exclusion is defined here as 'not having used the internet in the past 3 months.' [Susan Davidson, 'Digital inclusion evidence review 2018', Report commissioned by Age UK (November 2018), https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/age_uk_digital_inclusion_evidence_review_2018.pdf].

¹⁹ *Ibid.*

In some limited circumstances, this could mean that local authorities have a positive obligation to remedy extreme isolation experienced by individuals who depend on care services to maintain relationships with others by getting out of their homes.²⁰

During this period, such positive obligations should apply to those older adults experiencing the most significant forms of isolation and disadvantage as a consequence of physical distancing and self-isolation measures.

b) Older people in supported accommodation environments

There are 11,300 care homes for older people in the UK,²¹ responsible for the care and support of approximately 418,000 residents.²² As has been demonstrated since the advent of Covid-19, residential environments for older people are particularly susceptible to outbreaks of infectious disease, with management and containment hampered by close living quarters and the vulnerable health status of many residents.²³ In addition, isolating residents and limiting their interaction with staff is difficult to implement in an environment with high-level physical, mental and cognitive care needs.²⁴ The toll of Covid-19 on care homes in the UK and around the world has been undeniably devastating, having claimed the lives of almost 10,000 care home residents in the UK at time of writing.²⁵ In response to shifting government guidance, non-essential visits to care homes by family and friends have been restricted or completely suspended in many care homes across the UK. While alterations to normal practice and procedure are clearly warranted by the unique vulnerabilities of care home environments, these must be carefully balanced against the physical and mental health risks of loneliness and isolation from social support networks. As public authorities, National Health Service (NHS) Funded care homes have a legal obligation under Section 6 of the Human Rights Act to act compatibly with human rights. Article 8 of the ECHR protects the right to private and family life, home and correspondence.²⁶ This includes the right to live with one's family, or, where this is not possible, to right to maintain relationships through regular contact and the facilitation of visits from family and friends.²⁷ The protection against interference with the right to respect

²⁰ Equality and Human Rights Commission, 'Close to home: An inquiry into older people and human rights in home care', 2011, https://www.equalityhumanrights.com/sites/default/files/close_to_home.pdf [accessed 8 May 2020], 39.

²¹ Competition and Markets Authority, 'Care homes market study: summary of final report,' 30 November 2017, <https://www.gov.uk/government/publications/care-homes-market-study-summary-of-final-report/care-homes-market-study-summary-of-final-report#fn:4> [accessed 10 May 2020].

²² Laing Buisson, 'Care of older people: UK market report' (28th ed), May 2017, 12-13.

²³ Evonne Curran, 'Infection outbreaks in care homes: Prevention and management', (2017) 113 (9) *Nursing Times* 18-21. See also, for similar issues affecting prisons and other places of detention, the paper by Carla Ferstman on detention and pandemic exceptionality, in this publication.

²⁴ An estimated 69% of UK care home residents live with dementia. See, Martin Prince et al., 'Dementia UK: Update Second Edition', Report produced for the Alzheimer's Society, 2014, http://eprints.lse.ac.uk/59437/1/Dementia_UK_Second_edition_-_Overview.pdf [accessed 8 May 2020].

²⁵ Office of National Statistics, 'Deaths involving COVID-19 in the care sector, England and Wales: deaths occurring up to 1 May 2020 and registered up to 9 May 2020', 15 May 2020, <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/articles/deathsinvolvingcovid19inthecaresectorenglandandwales/deathsoccurringupto1may2020andregisteredupto9may2020provisional> [accessed 16 May 2020].

²⁶ Health and Social Care Act, 2008, section 145.

²⁷ Eilidh Turnbull, 'Family visits and care home complaints: Getting it right', British Institute of Human Rights, 30 April 2019, <https://www.bihhr.org.uk/blog/family-visits-and-care-home-complaints> [accessed 6 May 2020].

the home under ECHR Article 8 has also been found to extend to contracts for accommodation in care home environments,²⁸ and is reflected in the Care Quality Commission's position that 'we must never forget that care homes are people's homes'.²⁹ Beyond protection against interference, Article 8 imposes positive obligations on government and those working on its behalf to ensure that private and family life, home and correspondence are respected.³⁰ As such, care homes are required to take reasonable steps to enable regular contact between residents and their family and friends, such as providing dedicated spaces for private visits, and facilitating contact through telephone, post or other means.³¹ These duties are reflected in guidance issued by the independent regulator of health and social care providers in England, the Care Quality Commission, who impose the following obligations on social care providers:³²

Regulation 10(2)(a): People's relationships with their visitors, carer, friends, family or relevant other persons should be respected and privacy maintained as far as reasonably practicable during visits.

Regulation 10(2)(b): People must be supported to maintain relationships that are important to them while they are receiving care and treatment.

The rights under Article 8 of the ECHR are qualified rather than absolute, meaning that they can be restricted where it is in pursuit of a legitimate aim set out in the Human Rights Act, and is both necessary and proportionate to the circumstances.³³ In satisfying the test for necessity and proportionality with respect to obligations under Article 8 of the ECHR, it has been argued that the 'care home must show it has considered all other options available and picked the least restrictive option'.³⁴ The risks posed by Covid-19 provide a clear justification under the ECHR Article 8(2) for temporary changes to care home visitation procedures to protect the health and safety of staff and residents. However, it is questionable whether the current balance struck by some care providers between staff and resident safety and residents' need for social connection meets the test of proportionality and the principle of the least-restrictive alternative. Guidance provided by the Department of Health and Social Care initially 'recommended that care homes limit unnecessary visits', while maintaining that 'visits at the end of life are important both for the individual and their loved ones'.³⁵ However, considering the average length of stay in a care home prior to

²⁸ See, *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2001] EWCA Civ 595.

²⁹ Care Home Professional, 'More care homes banning relatives who complain, charity warns', 23 April 2019, paragraph 4, <https://www.carehomeprofessional.com/more-care-homes-banning-relatives-who-complain-charity-warns/> [accessed 9 May 2020].

³⁰ *Marckx v. Belgium*, Appl. no. 6833/74, 13 June 1979, held that Article 8 'does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life', [para. 31].

³¹ Care Quality Commission, 'Information on visiting rights in care homes,' October 2019 https://www.cqc.org.uk/sites/default/files/20191017_visiting_rights_information_2019_update.pdf [accessed 8 May 2020].

³² Health and Social Care Act 2008 (Regulated Activities) Regulations, regulation 10.

³³ ECHR Article 8(2) holds that interference is justified only where it is in accordance with the law; in pursuit of a legitimate aim (national security, public safety, economic wellbeing, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others); and, necessary in a democratic society.

³⁴ Claire Burrows, 'To what extent can a care home restrict visitors' access?', (Dec. 2019) 22(1) *Nursing and Residential Care*, paragraph 11.

³⁵ Department of Health and Social Care, 'COVID-19: Our action plan for adult social care,' Section 3.11, 16 April 2020,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879639/covid-19-adult-social-care-action-plan.pdf [accessed 2 May 2020].

death is approximately 26 months,³⁶ the absence of clear guidance as to what constitutes a ‘necessary’ visit, and who is responsible for determining this, continues to cause understandable concern among some residents and their loved ones.³⁷ In addition the social wellbeing of care home residents, the question of the ‘necessity’ should also be considered within the context of the accountability and oversight provided by external visitors to care home environments.³⁸ With visits suspended, there may be an increased risk, or at least decreased visibility, of inhuman or degrading treatment of older people, potentially in breach of Article 3 of the ECHR.

Differences in interpretation and implementation of the Department of Health and Social Care guidelines have also resulted in a myriad of different policies, ranging from enhanced visitor management, such as supervising handwashing and scheduling visits, through to the suspension of all social visits outside of a palliative context.³⁹ With guidelines for the management of Covid-19 in care homes under review at the time of writing, clear and unambiguous guidance on visitation procedures is needed to ensure that the rights and wellbeing of older people are uniformly protected. With respect to care homes’ obligations under Articles 3 and 8 of the ECHR, the least restrictive approach is surely one which allows for older people to receive visitors, while maintaining the health and safety of care home residents and staff. While the temporary imposition of no-visitor policies is perhaps appropriate during periods of an acute outbreak, it should not be the case that visitation is suspended as a defensive strategy across all care homes in the UK. Instead, reflecting their positive obligations under Articles 3 and 8 of the ECHR, local authorities should be proactive in providing care homes with the resources required to adapt their visiting policies and procedures during this period.

IV. Conclusion

The lives of older people have been significantly and disproportionately impacted by Covid-19. While all older people in the UK are likely to have been impacted in some way with the introduction of physical distancing and isolation measures, this paper has drawn particular attention to the unique vulnerabilities facing socially isolated older people living in the community, those in need of care and support, and those residing in care homes. In each of these settings, the rapid changes seen since Covid-19, whether as a consequence of the illness itself, or policies developed in response, have exacerbated underlying vulnerabilities and raised several human rights concerns. As this public health crisis continues to develop, the rights and wellbeing of older people must remain a visible and critical consideration.

³⁶ Julien Forder and Jose-Luis Fernandez, ‘Length of stay in care homes’, Report commissioned by Bupa Care Services, PSSRU discussion paper 2769 (January 2011), <https://www.pssru.ac.uk/pub/3211.pdf> [accessed 3 May 2020].

³⁷ See Relatives and Residents Association, ‘Coronavirus: Voices from the ground,’ <https://www.relres.org/voices-from-ground/> [accessed 10 May 2020].

³⁸ Alison Rahn, ‘Banning visitors to aged care during coronavirus raises several ethical questions – with no simple answers,’ 15 April 2020, <https://theconversation.com/banning-visitors-to-aged-care-during-coronavirus-raises-several-ethical-questions-with-no-simple-answers-134663> [accessed 10 June 2020].

³⁹ Care Home Professional, ‘Coronavirus: Care home visitor restrictions called into question,’ 16 March 2020, <https://www.carehomeprofessional.com/coronavirus-care-home-visitor-restrictions-called-into-question/> [accessed May 9 2020].



Access to Justice

Access to Justice

Access to Justice: A Discussion

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Some of the authors in this section got together to discuss some of the common themes and challenges arising from the issues they canvassed in their papers.

A very obvious difficulty occurred when all services quickly went online; the 7% of the population who is unable to access the internet was doubly disadvantaged as the agencies normally available to help them access online services (libraries; community centres; advice groups) went fully virtual so the 7% were left without support and further marginalised. With respect to legal advice, telephone advice has been made available in some cases, as has online chat and text services, however it can be quite expensive for individuals to obtain telephone advice unless there are clear call-back arrangements in place. One can query, perhaps, whether legal advice and service providers were overly cautious in their approach to lockdowns. At the height of the lockdowns, one needed a reasonable excuse to go out and meet someone. Perhaps as a sector we need to consider whether we should have been more flexible in accommodating vulnerable individuals who could not access the internet with in-person meetings.

With domestic abuse cases, accessing advice remotely when both victim and perpetrator are in the same household has been very difficult; however, there is very limited data available about what alternatives were put in place and whether they worked effectively. Furthermore, these access to justice gaps must be understood in a wider context in which law firms have been progressively limiting their legal aid agency work in the light of the impact of legal aid reform.

Another area which requires further attention is “litigants in person”. For normal courtroom hearings there is a system of support in place which works relatively effectively in some locations. The Essex Law Clinic had already been planning to develop a student-led support project for “litigants in person”. It appears that these litigants have not been receiving support in virtual hearings.

It is important that virtual hearings reflect the principles of open justice, as well. It is crucial to be able to scrutinise what is happening in the virtual court room, but observations have become more difficult. It is less straight-forward for researchers and members of the public to obtain permission to access; more questions are being asked by officials about why an applicant wants to dial-in to a hearing. It is also unclear whether virtual observations are perceived as more or less intrusive by litigants. Further research is needed on this point.

The structural challenges to access legal aid in England and Wales stem from the strong reliance on the private sector, as well as the progressive cuts to legal aid provision under austerity policies. This differs, for example, from the approach taken in Australia (described in Hansen’s paper), where large public bodies deliver services directly to the public. The access to justice crisis in the UK invites us to look more fundamentally at the way we organize ourselves to deliver legal services, though there is not a natural organization to take the central role, given the fragmentation within legal aid service delivery.

It was recognised that the pandemic constitutes an important learning experience, in which all pre-existing problems with access to justice have been magnified. In the field of mediation, for example, it is not simply access to justice but comfort with the justice environment which contributes to successful justice outcomes. As mediation requires an open exchange addressing human needs and a dialogue in which parties gradually enter a deeper layer of their experience, concerns and wishes, videoconferencing is not the optimal channel for all mediations and for all individuals. A number of factors may negatively impact on parties' experience of video mediation, reducing the likelihood for a successful resolution or achieving the best possible outcome. On the other hand, for those individuals who experience extreme stress from the courtroom experience or in-person face-to-face mediation, they may have a better online experience. Importantly, whilst at present practitioners are working on establishing trust with phone calls or web-based conflict resolution, after the pandemic, it will be essential that they carefully consider all factors in each individual case when advising on the best communication channel for mediation and conflict resolution.

Overall, in all areas of legal advice including ADR, it is important to ensure that advice providers are able to treat the needs of their clients holistically. It is not only the narrow legal problem that deserves attention but the wider impact it is having on the person, and similarly how issues extraneous to law impact on legal problems. Whilst this idea was present in the past, for example as a precursor of the mediation movement, the realisation of the need for a holistic approach has been fortified in the pandemic across various areas of the law, legal casework and conflict resolution. In this regard, advice providers should be prepared to engage with issues related to clients' trauma associated with the pandemic, which may have a delayed impact. Such an approach should be incorporated into our learning and advice methodologies to best serve clients' needs.

Similarly, there is a sense that legal education, unlike medical education for example, has traditionally been less focused on ensuring that future lawyers are trained to respond to legal emergencies where the need for advice may be massive in both size and scope and urgent, such as pandemics. It would be important to integrate this into clinical training and the legal curriculum.

There was a strong sense that detailed evaluation was needed of the virtual and other measures which were instituted to enable access to justice during the lockdown, and their effectiveness. There are advantages and disadvantages to the virtual systems and it would be important to identify what worked well and integrate it into the post-Covid justice systems. There is a need to look deeply at service delivery and to identify how blended approaches could be employed to increase both access to justice and the quality of the justice experience.

Covid-19 and Criminal Justice: Temporary Fixes or Long Term Reform?

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I. Introduction

Countries across the globe have been struggling with the question of how to keep the wheels of justice turning during the Covid-19 pandemic. Accordingly, both the UK and Scottish governments have taken a number of measures to ensure the justice system does not grind to a halt despite rules requiring social isolation and social distancing. Most notably, they have moved court hearings (and even trials) online and the Scottish government has extended the exceptions to the hearsay rule to cover witnesses who cannot be in court because of Covid-19.

Undoubtedly, these moves were motivated¹ at least in part by the idea that “justice delayed is justice denied” which is guaranteed by article 6 of the European Convention on Human Rights (ECHR) which provides a right to a trial within a “reasonable time” as one of its rights to a fair trial. Delays in trials may extend pre-trial custody and exacerbate all the anxieties and other material consequences of having important decisions hanging over one’s head. And it is not, of course, only the defendants who are affected by delays, but also witnesses, alleged victims, and all those with an interest in seeing justice done.

However, the right to speedy justice is by no means the only aspect of the right to a fair trial raised by the coronavirus crisis. In fact, it clashes with various other of the protections accorded to criminal accused as part of the “due process” model of criminal justice² which Herbert Packer defined as prioritising the protection of criminal suspects and accused through a variety of measures, such as the asymmetrical burden of proof, and the rights to silence, legal representation and to challenge prosecution evidence. Thus, recognising the power imbalances between the state and citizen which run throughout all aspects of the criminal justice system and the fact that wrongful decisions have more extreme consequences for convicted accused than acquittals have for the community, it has long been recognised that in Blackstone’s celebrated aphorism ‘it is better to let ten guilty men go free than to convict one innocent.’³ In addition, the law has increasingly come to grant suspects certain civil liberties associated with the right to fair trial and fair treatment which are not simply party of the “overprotection” of suspects and accused but can also be seen as a recognition of the inherent value of human dignity and autonomy and/or the legitimacy and integrity of criminal proceedings.

However, speedy justice is not just a civil liberty. It is also a core element of the competing “crime control” model of criminal justice which favours the quick and efficient processing

* We would like to thank Eamon Keane for his useful comments on this article.

¹ Cf Scottish Government, ‘Covid-19 And Solemn Criminal Trials Scottish Government Discussion Document’, April 2020, 7-8, <https://www.gov.scot/publications/coronavirus-covid-19-options-for-progressing-the-most-serious-criminal-ca>.

² Herbert Packer *The Limits of the Criminal Sanction* (Stanford Univ. Press, 1968).

³ Blackstone, Commentaries (1765-1769) 4.27.

of suspected criminal activity, especially in the lower courts;⁴ an orientation which has seen a re-emergence in recent years not least because of the rise of what has been called ‘penal populism’⁵ and ‘managerialism’.⁶ At the same time, however, changes to the operation of the criminal justice systems in both England and Wales, and Scotland have not just come from government. Lawyers have also had to adapt the way they represent clients including, as we discuss, those who are in police custody.

In this chapter we assess the impact of these changes on the procedural features and principles that have been developed over centuries in the two criminal justice systems, considering in particular whether they are merely a temporary necessary evil in the face of a dangerous pandemic or whether they might become – or even should become – more permanent features of the criminal justice landscape in England and Wales and in Scotland.

II. Early Access to Legal Representation

The right to a lawyer is an essential safeguard in criminal proceedings and is now protected by Article 6 of the ECHR. It ensures vulnerable citizens some semblance of equality of arms with powerful investigating and prosecuting authorities. Given that what happens in police stations can cast a long shadow over subsequent proceedings, potentially representing the difference between conviction and acquittal, the right to representation applies here as well as in court, operating as a safeguard against coercion and ill-treatment, and helping suspects understand their other rights, including the right to remain silent.⁷ At least in principle, suspects in England and Wales had long enjoyed this right – a position which was put beyond doubt by the unambiguous decision of the European Court of Human Rights (ECtHR) in *Salduz v. Turkey*.⁸ However, the same situation only came about in Scotland after the UK Supreme Court in *Cadder v HMA*⁹ found that the Scottish system of police custody permitting suspects to be questioned for six hours without access to a lawyer breached their human rights. In response, the Scottish Government legislated to recognise suspects’ right to privately consult with legal representatives before and at any other time during police questioning, but did not specifically provide a right to have them present during police questioning.¹⁰

After lockdown was imposed in mid-March, the question arose as to whether lawyers should continue to attend police stations to advise arrested clients. In England and Wales, some custody sergeants initially continued to insist that suspects who requested lawyers should be given face-to-face legal advice. However, this created understandable fears about obvious health dangers, particularly in the absence of appropriate PPE and facilities to allow for social

⁴ Cf Doreen McBarnet’s analysis of the “ideology of triviality” in terms of which cases in the lower courts are not regarded as serious enough to merit the full panoply of civil liberties protection: *Conviction* (Palgrave Macmillan, 1981), ch. 7.

⁵ Peter Duff, ‘Scottish Criminal Law Adrift?’ in Peter Duff and Pamela Ferguson (eds) *Current Developments in Scottish Criminal Evidence Law* (Edinburgh Univ. Press, 2017), 227-34.

⁶ Jenny McEwan, ‘From Adversarialism to Managerialism: Criminal Justice in Transition’ (2011) 31 *Legal Studies* 519.

⁷ Cf *Beuze v Belgium*, App no. 71409/10 (Judgment of 9 November 2018), § 125-13.

⁸ App. no. 36391/02 (27 November 2008).

⁹ [2010] UKSC 43, following the decision of the European Court of Human Rights in *Salduz v. Turkey* [GC], App. no. 36391/02, 27 November 2008.

¹⁰ Section 15A(3) Criminal Procedure (Scotland) Act 1995, as inserted by Section 1(4) Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010).

distancing.¹¹ Consequently, in early April a number of stakeholders met to agree guidance on police interviews. This provides that, in the vast majority of cases, if a police interview is required, it should be conducted with lawyers and other specialist support services (such as interpreters) attending remotely, with the disclosure and custody record provided electronically to lawyers in advance.¹² As a result, many lawyers are now conducting pre-interview consultations with their clients remotely (by phone or videolink) and attending the interview itself via videolink.

This arrangement might represent ‘a situation which is as good as we could possibly have hoped to achieve’,¹³ but it may lead in future trials to questions about the fairness of convictions that rely in any substantial way on evidence obtained during police interview (or drawing adverse inferences from silence) when suspects were refused face-to-face legal support in the police station. Whether such evidence (or silence) can be relied on is likely to depend on a number of factors such as whether: (a) the accused is particularly vulnerable, for example by reason of age or mental capacity; (b) the evidence formed an integral or significant part of the probative evidence upon which the conviction was based; and (c) whether other rights were complied with at the time of arrest and in custody.¹⁴ One would expect courts to be sympathetic to the exceptional circumstances of the pandemic and to admit evidence or inferences, where effective remote access to a lawyer was provided. Nevertheless, the police would be advised to take steps to pre-empt exclusion such as by: delaying arrest and interviews wherever possible and proportionate until health can be better protected; assessing the vulnerability of the suspect; ensuring that the technology is working properly; and ensuring social-distancing and PPE for face-to-face consultation and lawyer attendance at interview where the accused requests this or is vulnerable. Also relevant to potential exclusion are allegations by accused that they did not voluntarily waive the right to a lawyer (for example, where police wrongly state that lawyers are not available because of the pandemic).

In Scotland, guidance from the Legal Aid Board published in May merely states: ‘Local Police Station Duty Solicitors will still be called on for any police station attendances in their local police stations.’¹⁵ Even before the pandemic it was rare for solicitors to attend police stations in person in Scotland. As JUSTICE Scotland reported, ‘the majority of requests for advice are concluded with the telephone call to a solicitor’ and ‘just 9% of people in detention received the advice and assistance of a solicitor present in person in the police station.’¹⁶ Guidance by the Law Society of Scotland had encouraged solicitors to consider attending police

¹¹ See Vicky Kemp, ‘Covid-19 and the Dangers of Providing Police Station Legal Advice in England and Wales’, April 2020, <https://www.fairtrials.org/news/commentary-covid-19-and-dangers-providing-police-station-legal-advice-england-and-wales>.

¹² Interview Protocol between the National Police Chiefs Council, Crown Prosecution Service, Law Society, the Criminal Law Solicitors’ Association and the London Criminal Courts Solicitors’ Association, 24 April 2020, <https://www.lawsociety.org.uk/support-services/advice/articles/coronavirus-covid-19-interview-protocol/>.

¹³ Ian Kelcey, ‘Criminal Justice in a Pandemic: The Courts’, Cambridge University Law Faculty, 28 May 2020, <https://www.youtube.com/watch?v=tXMJzCTAVAs&feature=youtu.be>.

¹⁴ *Ibrahim and Others v. the United Kingdom* [GC], Apps. nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, § 274; *Beuze v. Belgium* [GC], App. no. 71409/10, 9 November 2018, § 150; *Sitnevskiy and Chaykovskiy v. Ukraine*, Apps. nos. 48016/06 and 7817/07, 10 February 2017, §§ 78-8.

¹⁵ Scottish Legal Aid Board, ‘Covid-19: Custody courts and duty solicitors’, 26 March 2020, <https://www.slab.org.uk/news/covid-19-custody-courts-and-duty-solicitors/>.

¹⁶ JUSTICE Scotland, ‘Legal assistance in the police station,’ 2018, 4, <https://justice.org.uk/justice-scotland/our-work/legal-assistance-in-the-police-station/>.

stations in person but, except for children or vulnerable adults, this was not binding.¹⁷ Indeed, it seems that, having advised clients by telephone to remain silent in the interview, solicitors frequently discourage them from requesting the lawyer's in-person attendance during those interviews.¹⁸ Therefore, it is possible that Covid-19 has not had as significant an impact on mechanisms for providing legal advice and representation in police stations in Scotland as it has South of the border.

Many pragmatic considerations seem to favour remote access to lawyers in police stations becoming - or in the case of Scotland, remaining - the norm. Lawyers have understandably long complained about the level of legal aid paid for police station attendance (which requires travel and often anti-social hours). It would not be surprising if demotivated and underpaid lawyers wanted to retain the increased efficiency of advising accused remotely from their homes or offices, perhaps even utilising centralised call centres. There may also be rights-based reasons for the long-term retention of suitable remote technologies to help suspects exercise their rights in the police station. Perhaps, in Scotland, videoconferencing might come to replace telephone consultations and encourage more solicitors to participate in interviews. In England and Wales, this could address the worryingly high number of people (around 50%) who were waiving their right to free legal assistance before the pandemic,¹⁹ and concerns about the poor quality of advice provided and reliance on non-lawyer representatives.²⁰

However, if one returns to the underlying rationale of the right to legal representation in the police station, it seems clear that attendance in person is the gold standard. Having a defence lawyer with you in person is far more effective in building some semblance of equality of arms and the physical presence of a lawyer is a more effective safeguard against coercion and ill-treatment.²¹ A lawyer who meets clients in person may also be more effective at explaining their rights and assessing whether they are vulnerable and in need of medical or other forms of specialist support. Beyond this, in-person meetings help to establish effective lawyer-client relationships, including by giving the defendant confidence that conversations are confidential and that the lawyer represents their interests and by creating a safe space within which to gather the information needed to prepare for trial or argue for pre-trial release.

III. Remote Hearings

The public drama of the courtroom dominates representation of criminal justice in film, TV and literature: the austere architecture; the key protagonists brought together (often in costume); the grand oratory and gesturing; the high tension when conflicting versions

¹⁷ The Law Society of Scotland, 'Police Station Interviews: Advice and Information from the Law Society of Scotland', <https://www.lawscot.org.uk/media/8819/police-station-advice-and-information-march-2015-section-f-division-advice.pdf>.

¹⁸ JUSTICE Scotland (n. 16), p.8.

¹⁹ Layla Skinnis, 'The Right to Legal Advice in the Police Station: Past, Present and Future'[2011] Crim LR 19, 22.

²⁰ Cf 'The Good Lawyer', Transform Justice, July 2019, p.17; Vicky Kemp *Effective Police Station Legal Advice - Country Report 2: England and Wales Project Report* (University of Nottingham, 2018), (<http://eprints.nottingham.ac.uk/51145/1/Country%20Report%20England%20and%20Wales%20Final%20.pdf>); Legal Aid Agency, *Improving Your Quality: A Guide to Common Issues Identified through Peer Review* (4th edn) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490047/peer-review-quality.pdf).

²¹ See eg *Hawkins v HMA* [2017] HCJAC 79 where a confession made after only telephone advice not to say anything was excluded as the result of police pressure on the accused to change his story.

confront each other.²² While there is much dramatic license in these portrayals, hearings in open court play a central role in criminal justice. The public (directly or via the press), or those who witnessed or were victims of crime, can observe the serious spectacle of the rule of law in action and hopefully be satisfied that justice is done, thus legitimising the verdict.²³ Public hearings also provide important protections to the accused. Indeed, according to Bentham, without publicity all other guarantees of truth-finding are insufficient. ‘Publicity’ he wrote, ‘is the soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.’²⁴ It is also thought to render witnesses less inclined to falsify,²⁵ especially if they have to face the gaze or questions of those who know the truth.²⁶ Moreover, having the accused physically brought to court soon after arrest, allows judges to see visible signs of mistreatment. Being physically present in court also allows the accused to better exercise their right to be heard by participating in the proceedings - seeing, hearing and responding to what is being said.²⁷ It also makes it easier for the accused to consult their lawyer and receive support from friends and family.

The dangers posed by Covid-19 place obvious obstacles in the way of normal courtroom hearings. Consequently, emergency legislation was passed permitting a wide range of court hearings to take place without the physical attendance of the accused, prosecution, defence or witnesses.²⁸ Much of the work of Crown Courts in England and Wales, for example, has been done remotely including sentencing hearings, urgent applications (such as applications for bail and to extend custody time limits) and pre-trial preparation and case management hearings. In Scotland, one key area in which remote attendance has increased has been hearings to determine whether suspects should be detained or released pending trial.²⁹ More generally in the UK, there has also been a huge increase in the use of video-link and telephone during court hearings. For example, the number of cases heard each day in England and Wales which use remote technology increased from under 1,000 in the last week of March 2020 to approximately 3,000 by mid-April (1/3 using video and 2/3 audio).³⁰

In both England and Wales and Scotland, the question of what to do about jury trials during the pandemic posed particular problems. The large number of people involved in such trials (accused, judges, jurors, lawyers, witnesses, the public and press) make social distancing highly challenging. In Scotland, the Government initially proposed to move to

²² See Donald Nicolson, *Evidence and Proof in Scotland: Context and Critique* (Edinburgh Univ Press, 2019), 165ff.

²³ Cf Anthony Duff, et al. *The Trial on Trial: Volume 3 – Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2007).

²⁴ Quoted by Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 2nd edn, 2006), 88-9.

²⁵ See Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* vol. 6, 435.

²⁶ See eg. *Coy v. Iowa* 487 US 1012, 1019 (1988).

²⁷ *Murtazaliyeva, v. Russia* [GC], Application no. 36658/05, 18 December 2018.

²⁸ Coronavirus Act 2020, Schedules 23 to 26 and Coronavirus (Scotland) Act 2020, Schedule 4, para 2.

²⁹ Cf Scottish Courts and Tribunals Service, ‘Guidance in relation to Remote Hearings – Attendance by Electronic Means for Custody’, 4 June 2020, <https://www.scotcourts.gov.uk/docs/default-source/default-document-library/attendance-by-electronic-meansa5cacia7898069d2b500ff0000d74aa7.pdf?sfvrsn=0>.

³⁰ Her Majesty’s Courts and Tribunals Service, ‘Courts and Tribunals Data on Audio and Video Technology Use During Coronavirus Outbreak’, 14 April 2020, last updated 30 April 2020, <https://www.gov.uk/guidance/courts-and-tribunals-data-on-audio-and-video-technology-use-during-coronavirus-outbreak>).

judge only trials as an emergency measure for up to 18 months,³¹ but the proposal was quickly withdrawn following a backlash by the legal profession and opposition parties.³² Instead, as happened in England and Wales, jury trials were put on hold for several weeks.³³ With the gradual relaxation of lock-down restrictions, jury trials have resumed, but at a much lower volume. To allow for social distancing each trial is spread across several court rooms.³⁴ This has had a significant impact on backlog and delays. In Scotland, for example, the Chief Executive of the Scottish Courts and Tribunals Service has warned that there could be a backlog of 3,000 trials by March 2021.³⁵ In England and Wales, the Criminal Bar Association warn of a backlog of 40,000 cases, which will not be solved even if all Crown Courts are brought into service under physical distancing rules.³⁶ There has been some consideration of the feasibility of moving to online jury trials³⁷ but, while the use of technology in jury trials has increased, the wholesale move online for trials has not happened.

But even though the iconic jury trial has - so far at least³⁸ - been retained, the significant shift to the use of remote technologies is changing the way courts operate. This has succeeded in preventing the criminal justice systems grinding to a halt completely but at the expense of maintaining traditional safeguards for protecting suspects and accused. Research suggests that defendants in remote hearings are more likely to be unrepresented

³¹ Kate Wallace, 'Jury-less trials are an opportunity to put victims at the centre of Scotland's justice system', *Holyrood*, 27 April 2020, https://www.holyrood.com/comment/view,juryless-trials-are-an-opportunity-to-put-victims-at-the-centre-of-scotland_15426.htm.

³² Tom Peterkin, 'Legal profession and opposition vow to fight emergency plans to hold trials without juries in Scotland', *The Press and Journal*, 31 March 2020, <https://www.pressandjournal.co.uk/fp/news/politics/scottish-politics/2114473/as-a-row-erupts-over-non-jury-trials-heres-your-guide-to-the-coronavirus-emergency-legislation-being-rushed-through-holyrood>. Space constraints prevent detailed discussion; suffice to say that based on his recent study of evidence and proof the first named author is not convinced that this proposal should have been dropped so quickly: (See, Nicolson (n. 22), esp. at 172-4, 339-40). Thus, there is no evidence to suggest that juries are superior fact-finders to judges: the benefits of having wider social backgrounds are arguably counterbalanced by the apparent greater tendency of jurors to be swayed by persuasive stories lacking logical coherence. Similarly, the relatively strict control exercised by the courts and law over jurors means that they do not often act as safeguards against state tyranny and corruption, or to democratise and inject "lay acid" into adjudication by bringing an element of common sense, equity, flexibility, popular and community justice, and a human face to the austerity and harshness which may emanate from the strict application of law. Admittedly, from a due process perspective, jurors acquit slightly more frequently than judges. However, this needs to be balanced against the possibility that judges (and lay adjudicators who might be appointed to sit with them) can be better educated than jurors as to the problems with perception, memory and recall of observational witnesses and the unreliability of many forms of scientific evidence.

³³ Severin Carrell, 'Scotland Drops Plans to Suspend Jury Trials during Coronavirus Crisis', *The Guardian*, 1 April 2020.

³⁴ Jemma Slings, 'Socially-distanced Jury Trial Went Like Clockwork, Says Chambers', *Law Society Gazette*, 29 May 2020.

³⁵ Reevel Alderson, 'Coronavirus: Covid-19 Could Lead to Court Backlog of 3,000 Trials', BBC, 19 May 2020.

³⁶ Owen Bowcott, 'England and Wales Face Backlog of 40,000 Criminal Cases Due to Coronavirus', *The Guardian*, 20 May 2020.

³⁷ Linda Mulcahy, Emma Rowden, and Wend Teeder, 'Exploring the Case for Virtual Jury Trials During the COVID-19 crisis: An evaluation of a pilot study conducted by JUSTICE', April 2020, <https://justice.org.uk/wp-content/uploads/2020/04/Mulcahy-Rowden-Virtual-trials-final.pdf>.

³⁸ The Lord Chief Justice in England and Wales has suggested that it may be necessary to move to juryless trials in respect of less serious, "either way" offences or to consider reducing the number of jurors, Owen Bowcott, 'Drop juries for less serious crimes in England and Wales, judges say', *The Guardian*, 16 June 2020.

and to receive a prison sentence or remand.³⁹ The ability of suspects and accused to follow the trial and meaningfully participate though video-link can be significantly impaired due to malfunctioning equipment, isolation, fragmented view of the proceedings, and the absence of a lawyer by their side to help navigate the proceedings. The effects of isolation, increased complexity of the procedure, and risks of not being able to understand the process are increased for unrepresented suspects or accused persons or those with special needs.⁴⁰

Long before the pandemic, authorities in both jurisdictions had been looking to increase the use of technology in the courts to allow for remote attendance.⁴¹ In England and Wales, for example, there had been a gradual move towards defendants participating in hearings via videolink from prisons and police stations, such that between June 2018 and March 2020 over 10,792 first appearance hearings took place remotely.⁴² Despite the many concerns about the impact on fairness, many within the legal professions have celebrated how the move to remote technologies has been accelerated during the pandemic. As with remote attendance at police stations, the question which inevitably arises (or will do so) is whether these changes should remain in place after the pandemic. The Lord Chief Justice of England and Wales has already indicated that '[t]here will be no going back to where we were'.⁴³

As with remote attendance at the police station, there may well be legitimate practical and principled reasons to facilitate more remote participation in hearings. Before doing so, however, it is crucial to fill the significant gaps in knowledge about the impact of remote attendance on outcomes and on procedural fairness. Is an accused person more or less likely to be detained or convicted if they appear in court via videolink? How many potential participants have the necessary technology and ability to use it? What happens when internet connections are slow or unstable? How does one ensure that witnesses giving evidence remotely are not intimidated or coached by those not in view?

IV. Hearsay Evidence in Scotland

By contrast to the situation with remote hearings, there is a much longer history of practice to draw upon in evaluating the justifiability of the Scottish Government's changes to the hearsay rule. This has been defined as '[a]n assertion other than one made by a person while giving evidence in the proceedings is inadmissible as evidence of any fact asserted.'⁴⁴ The common law has long recognised a number of exceptions to this, including those caused by witness unavailability. In 1995, s. 259 (2) of the Criminal Procedure Act (Scotland) codified and slightly

³⁹ For example, Penelope Gibbs, 'Defendants on video – conveyor belt justice or a revolution in access?', Transform Justice, October 2017; Legal Education Foundation 'Briefing: Coronavirus Bill, Courts and the Rule of Law', 18 March 2020; Anne Wallace 'Courts and Coronavirus: Is Videoconferencing a Solution?', 18 March 2020, <https://courtechbulletin.blogspot.com/2020/03/courts-and-coronavirus-is.html>; Advocates Gateway 'Planning to question someone using a remote link', 20 March 2017, <https://www.theadvocatesgateway.org/images/toolkits/9-planning-to-question-someone-using-a-remote-link-2017.pdf>.

⁴⁰ 'Court Hearings Via Video 'Risk Unfairness For Disabled People'', *The Guardian*, 22 April 2020.

⁴¹ See Scottish Courts and Tribunals Digital Strategy 2018-2023, available at <https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/scts-digital-strategy---final.pdf?sfvrsn=4>.

⁴² Monidipa Fouzder, 'Open Justice Campaigner Calls for Video Remand Data to be Published', *Law Society Gazette*, 30 March 2020.

⁴³ Select Committee on the Constitution, Uncorrected oral evidence: Constitutional implications of Covid-19, Wednesday 13 May 2020 (Q6).

⁴⁴ Rupert Cross and Colin Tapper, *Evidence* (Oxford UP, 7th edn, 1990), 42.

extended the latter exceptions to include the situations where witnesses are dead, unfit or unable to give evidence or outside the UK, unidentifiable, have been advised that they might incriminate themselves, or refuse to take the oath or give evidence. This provision has now been amended to include the situation where requiring the witness to attend the court would:

- (a) ...give rise to a particular risk to —
 - (i) to the person's wellbeing attributable to coronavirus, or
 - (ii) of transmitting coronavirus to others, and
- (b) it is not reasonably practicable for the person to give the evidence in any other competent manner.⁴⁵

If these circumstances apply and other conditions are met⁴⁶, the court can admit documents prepared by the witness or allow hearsay testimony from those who had the relevant facts reported to them.

Where such evidence is admitted, many of the traditional safeguards for ensuring the truth and accuracy of testimony are obviated without an alternative reason to trust the evidence, as applies in some of the common law exceptions to the hearsay rule.⁴⁷ But there are no reasons other than expediency to justify removal of the truth-supporting role of the oath, observation of witness demeanour, and dialectic immediacy and the cross-examination of those who observed the facts in question. Of these truth-supporting mechanisms, the first three may only operate to prevent dishonesty which is far less common than witness inaccuracy through problems of perception, memory and recall, and in any event are not uniformly supported by empirical evidence of their effectiveness.⁴⁸ By contrast, cross-examination can be used to challenge both witness honest and accuracy. Admittedly, it can be used to make 'the true look false and the false look true'.⁴⁹ Nevertheless, in the absence of effective lie detectors, better means for evaluating witnesses or the emergence of "smoking gun" evidence which self-evidently reveals true facts (in which cases there are likely to be guilty pleas), it seems that Wigmore was only slightly exaggerating when he said that cross-examination is the 'greatest legal engine ever invented for the discovery of truth'.⁵⁰ Indeed, its value extends beyond its instrumental "truth-certifying" role. By allowing those who face allegations an opportunity to test their veracity, cross-examination upholds principles of natural justice and makes participants more likely to accept adverse outcomes as legitimate.⁵¹ As a result, the failure to allow cross-examination may breach article 6 of the ECHR, at least when the witness was the sole or determinant source of evidence supporting

⁴⁵ Coronavirus (Scotland) Act 2020, Schedule 5, Part 5.

⁴⁶ Out of court statements can only be "first hand" hearsay, their maker must have been competent at the time and that proof of their having been made would not itself require hearsay evidence, whereas notice must be given if they are going to be led.

⁴⁷ For instance, the unlikelihood of people manufacturing evidence in the heat of the moment justifies the *res gestae* exception.

⁴⁸ See Nicolson, (n. 22), 134, 283-6.

⁴⁹ Murray Schwarz, 'On Making the True Look False and the False Look True' (1988) 41 *Southwestern Law Journal* 1135.

⁵⁰ *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol. 5, (1974), para. 13672. For supporting anecdotal and empirical evidence: see, respectively Francis Wellman, *The Art of Cross Examination* (Prentice Hall, 1903); Gwynn Davis, Steven. Cretney, and Jean Collins, *Simple Quarrels* (Clarendon Press, 1994), 246ff.

⁵¹ See e.g., Genevra Richardson and Hazel Genn, 'Tribunals in Transition: Resolution or Adjudication' [2007] *Public Law* 116, 131.

the conviction and only when the authorities have not made all reasonable effort to produce the witness for cross-examination.⁵²

Given this, while it is clearly not in anyone's interest to require witnesses to attend court if they have Covid-19 or are particularly vulnerable to succumbing to its effects, it is less clear why courts cannot always require remote testimony which will then be subject to cross-examination. Recovery times are not unduly long and in the sad cases where witnesses die, there is already an exception to the hearsay rule. There is also a danger that courts will not appropriately interrogate assertions of coronavirus health risks or assertions that remote testimony is not reasonably practicable,⁵³ for instance by requiring positive tests and medical certificates. While, the Scottish Government understandably felt that it needed to act quickly, we are not sure that the hearsay provision was necessary or adequately considered.

VI. Conclusion

There are many ways in which societies have changed in response to Covid-19 and the same is true of criminal justice systems. The three areas of change discussed in this chapter raise questions about whether these changes are, in fact, justifiable and whether, even as temporary fixes, they offer appropriate protections for defence rights. Some of the contemporary impetuses towards a more crime control, rather than due process, orientation towards criminal justice suggest some Covid-19 measures might become permanent. This is especially so given that there will be serious backlogs to clear and even less public money available to invest in due process protections. We would strongly argue that any decisions about long-term changes to criminal justice systems (and, indeed, the safety of convictions imposed during Covid-19, which may have life-long consequences for convicted people) are not based on convenience or cost-savings but on evidence, including on how the criminal justice systems in England and Wales, and in Scotland work in practice.

⁵² *Van Mechelen and Others v Netherlands*, 1997-III; *Artner v Austria* (1992) A 242-A, paras 19-24.

⁵³ See Eamon Keane, 'Alarm Bells Ring Over Hearsay Proposals', *Scottish Legal News*, 1 April 2020, <https://www.scottishlegal.com/article/eamon-keane-alarm-bells-ring-over-hearsay-proposals>.

Effective Mobilisation of Social Welfare Law Advice in Response to the Covid-19 Pandemic

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Abstract

The Covid-19 pandemic has the potential to spell the demise of access to justice for all but a select few. Prior to the crisis, the infrastructure for free and low-cost legal advice had been severely weakened by UK government policy and austerity-era budget cuts. Now, as solicitors are on furlough, law centres are on the brink of collapse and lockdowns have led to widespread service closures and restrictions, the legal needs of many members of society are set to multiply and may remain unmet.

In the face of other crises (9/11, Bushfires, Grenfell), members of the legal support sector (legal aid providers, law centres, pro bono practitioners) worked together. This resulted in much needed help in the form of free legal advice to the affected communities.

This paper surveys the lessons learned from such interventions. It explores the extent to which these experiences may serve as guidance to address the legal needs arising from the current crisis posed by the pandemic. It also highlights the unique features of the Covid-19 crisis. This suggests the need to look beyond ad hoc and technologically based measures (which worked in the past) to assert a more prominent role for the state in the legal advice sector.

Keywords: Legal Advice; Social Welfare Law; Solicitors; Covid-19; Access to Justice

I. Introduction

In England and Wales the term “social welfare law” has been defined as the law concerning ‘asylum, community care, education, employment, debt, housing, immigration and welfare benefits.’¹ It is likely that the Covid-19 pandemic will impact vastly upon individuals in all of these areas of life. Those who advise upon social welfare law (referred to here, collectively, as the ‘legal support sector’ or more simply ‘the sector’), will play a key role in ensuring that individuals experiencing health, economic and others impacts from the pandemic are aware of their legal rights and how they may be enforced.

However, the reality is that following a decade of austerity the sector is in a weakened position to assist. Historically, legal aid played a central role in enabling the provision of social welfare legal advice. However, after the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) came into force, the scope of advice that was able to be funded under the legal aid scheme was dramatically limited.² As a result, many legal aid

* Thank you to Eugenio Vaccari, Lucy Davies and Carla Ferstman for comments on an earlier version of this piece. Any errors remain the responsibility of the author.

¹ The Law Commission, ‘Appendix 2 – Social Welfare Law Contextual Issues’ in *Final Report of the Law Commission*, < <https://www.lag.org.uk/about-us/policy/the-low-commission-200551> > accessed 11 June 2020, 1.

² Those areas of law that remain within scope are set out in Schedule 1 of LASPO. These include community care (para. 6); welfare benefits appeals to the Upper Tribunal, the Court of Appeal or Supreme

providers and law centres closed or had to refocus their business upon more commercially viable areas of law.³

From this weakened position the legal support sector must now mobilise to respond to the Covid-19 crisis. In forming its response, consideration may be given to how the sector has responded to other crises, whilst taking stock of the unique features of this current health and economic crisis.

In this paper, consideration will be given to three crises from the UK and abroad. The three crises considered are the:

- 9/11 terrorist attacks in New York and Washington, USA in 2001 and their aftermath,
- Bushfires in Victoria, Australia in the Summer of 2009 and the more recent Australian bushfires of 2019/20 and their aftermath, and
- The Grenfell Tower fire in Kensington, London, UK in 2017 and its aftermath.

One of the purposes of this comparative study is to investigate how the legal support sector responded to these crises, and to highlight the lessons that may be drawn and applied to the current Covid-19 pandemic.

II. Legal Needs Arising from the Covid-19 Pandemic

There has not yet been time for a systematic study of the legal needs arising from the Covid-19 pandemic in England and Wales.⁴ One report has indicated an initial increase in demand 'particularly around employment / redundancy issues and claiming Universal Credit'.⁵ This was said to be followed by a drop in demand below normal levels presumably as people take time to adjust to a new reality and deal with other more urgent matters.⁶ Requests for assistance are expected to re-emerge at a later point, perhaps when lockdowns are relaxed; this has been predicted to include 'a large new cohort of people with Covid-19 legacy issues.'⁷

It should also be noted that people in need of legal support may already be in a vulnerable position prior to this Covid-19 crisis taking hold. This situation has been exacerbated through benefit cuts and other reductions in public funding in recent years.⁸ This raises a

Court (para. 8); family matters for victims of domestic violence (para. 12); housing where there is a risk of the loss of home (para. 33); homelessness (para. 34) risk of safety in a rented home (para. 35).

³ The closure of Brent Community Law Centre was announced on 6 March 2020: Legal Action Group, 'Brent Community Law Centre closes its doors' *Legal Action* March 2020; Legal Action Group, 'Lambeth Law Centre Closes Down' *Legal Action* July 2019; Owen Bowcott, 'Legal advice centres in England and Wales halved since 2013 – 14,' *The Guardian*, 15 July 2019.

⁴ On 5 June 2020 the Civil Justice Council on the impact of COVID-19 on Civil Court Users recognised a reduction in the ability to access advice and an increase in the general need for legal advice. See, Civil Justice Council, 'The impact of COVID-19 measures on the civil justice system,' May 2020 [4.4 – 4.6], < <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf> > accessed 12 June 2020.

⁵ Lindsey Poole, 'A Quick Appraisal of the Impact of Covid-19 on the Advice Sector', Administrative Justice Council Webinar, 29 April 2020 < <https://ajc-justice.co.uk/wp-content/uploads/2020/04/ASA-Report-COVID-19-.pdf> accessed 11 June 2020.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*, 2.

broader question beyond the scope of this paper of whether the re-emergence of a welfare state may increase society's resilience in the face of such crises in the future.

One can expect employment, debt, housing and welfare benefits issues to emerge from the pandemic together with legal issues connected to the bereavement of family members. There are also reports of increased incidents of domestic violence as families spend more time together in lockdown which give rise to the need for legal interventions.⁹

There are also some available sources of data on the types of issues being queried on the Citizens Advice webpages. Out of 2.8 million webpage views about welfare benefits for the period 16 March – 6 May, 1 million were on universal credit.¹⁰ There were also 2.3 million views on employment issues which included a 77% increase when compared to the same period in 2019.¹¹ Traffic to the website also shows increased concern about reloading of prepayment meters, debt issues and self-employment.¹²

What emerges from this cursory analysis is the need for a rapid assessment of the legal needs arising in the current crisis. This must be done to enable legal advice organisations and governments to allocate resources in an informed matter, to meet the needs of the population.

Lessons can be learnt on how to carry out this assessment. For instance, an analysis of the Australian Government's response to the 2009 bushfires in Victoria, Australia showed that the sector can valuably participate in predicting, to the extent that is possible, legal needs that may arise as effects of a crisis. Such an approach should be factored into emergency management planning both for the current and any future crises.¹³

III. Immediate Impacts of Covid-19 on the Sector in England and Wales

As has been noted above, law centres were already in a vulnerable position as a result of the changes brought about by LASPO. Following those changes several law centres have been forced to close. Recently in 2019 this included Lambeth Law Centre after almost 40 years of providing services to the local community of Lambeth in London. It is to be expected then that as the Covid-19 crisis hit, the Law Centres Network (LCN), which is the peak body for Law Centres in England and Wales, was concerned. The very survival of remaining law centres that had successfully managed to see off LASPO was under threat by this crisis. In response to these circumstances the UK Government has channelled £3 million to law centres with grants being distributed by the LCN.¹⁴ The announcement also

⁹ Carol Storer, 'Editorial – We are Working to Ensure Access to Justice during the Covid-19 Crisis and Beyond' *Legal Action* May 2020 (Legal Action Group). See also, the paper by Jo Harwood in this publication.

¹⁰ Carol Storer, *ibid.*

¹¹ *Ibid.*

¹² Gemma Byrne, Senior Policy Researcher at Citizens Advice tweeted a graph with this data represented on 1 April 2020, < <https://twitter.com/gbyrne03/status/1245421387076042758/photo/1> > accessed 11 June 2020.

¹³ Victoria Legal Aid, 'Legal assistance and Community Recovery after the 2009 Victorian Bushfires,' March 2010. < <https://www.probonocentre.org.au/wp-content/uploads/2015/08/NA2JPBC2010-BushfireLegalHelpReport-36.pdf> > accessed 11 June 2020.

¹⁴ Ministry of Justice, '£5.4 million to support legal advice sector during the COVID-19 pandemic,' 4 May 2020, < <https://www.gov.uk/government/news/5-4-million-to-support-legal-advice-sector-during-the-covid-19-pandemic> > accessed 11 June 2020.

includes new funding in the amount of £2.4 million for other organisations providing specialist social welfare legal advice to be distributed from the Community Justice Fund by the Access to Justice Foundation who is also conducting an ‘Emergency Advice Appeal’ for donations to the fund.¹⁵

A significant proportion of legal aid solicitors have been placed on furlough.¹⁶ The Legal Aid Agency (LAA) has also announced a series of changes to their policies. This includes for example changes to policies on remote working, processing and payments, working with clients and contract management and assurance. The LAA states that its aim ‘is to make it as easy as possible for legal aid firms to continue to provide advice to their clients.’¹⁷

As a result of LASPO a significant amount of expertise in social welfare law has been drained out of the system. Practitioners who had dedicated their working lives to supporting the most marginalised and disadvantaged members of our society to navigate a complex legal system have been made redundant or otherwise redeployed. With this loss of expertise there is a decreased capacity to respond effectively in the current crisis.

In concluding this section, it should be noted that many of the organisations mentioned above play a key role in responding to such crises due to the proximity with the people most badly affected by them. Law centres, for example, are based within and known by their local communities. This suggests the need for a stronger sector backed by increased support from the state.¹⁸

IV. The Sector’s Response to the Australian Bushfires

In the Australian summer of 2019-20 the country experienced a massive uncontrolled bushfire season. On this occasion people affected by these fires were well served by dedicated legal services Disaster Legal Help Victoria and the Disaster Response Legal Service NSW.¹⁹ These services stem from an earlier initiative responding to bushfires which occurred in the Australian summer of 2009 in the state of Victoria. There the local

¹⁵ Ibid; Access to Justice Foundation, ‘Emergency Advice Appeal’ < <https://atjf.org.uk/emergencyappeal> > accessed 12 June 2020.

¹⁶ 13.5% of young legal aid lawyers have reported being furloughed. See, Young Legal Aid Lawyers, ‘Second YLAL Covid-19 Report,’ 25 May 2020, < <http://www.younglegalaidlawyers.org/secondcovid19report> > accessed 12 June 2020.

¹⁷ Legal Aid Agency, ‘Coronavirus (COVID-19): Legal Aid Agency contingency response,’ 18 March 2020, last updated 21 April 2020 < <https://www.gov.uk/guidance/coronavirus-covid-19-legal-aid-agency-contingency-response> > accessed 11 June 2020.

¹⁸ See e.g., the Report of the Bach Commission which recommends the introduction of a legally enforceable right to legal aid modelled on the enforceability mechanisms of the *Human Rights Act* (1998): Fabian Society, ‘The Right to Justice – The Final Report of the Bach Commission,’ September 2017; For a bolder vision of socialised access to justice see Tom Cornford, ‘The Meaning of Access to Justice,’ In Ellie Palmer, Tom Cornford, Audrey Guinchard and Yseult Marique (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford: Hart Publishing, 2016) 27–40.

¹⁹ Disaster Legal Help Victoria, ‘Submission to the Inquiry into the 2019–20 Victorian Fire Season,’ 20 April 2020, < <https://www.disasterlegalhelp.org.au/sites/www.disasterlegalhelp.org.au/files/dlhv-submission-inquiry-into-2019-20-victorian-fire-season.pdf> > accessed 11 June 2020; Disaster Legal Help Victoria, ‘Submission to the Royal Commission into National Natural Disaster Arrangements,’ 8 May 2020, < <https://www.disasterlegalhelp.org.au/sites/www.disasterlegalhelp.org.au/files/dlhv-submission-royal-commission-into-national-natural-disaster-arrangements.pdf> > accessed 11 June 2020.

legal aid authority, Victoria Legal Aid, co-ordinated with pro bono organisations and community legal services to provide a dedicated service to the public.

In 2009 the programme was set up as Bushfire Legal Help (BLH). Partners moved quickly to set up 'The Bushfire Legal Help Hotline'. This operated as a single port of call.²⁰ There was an existing infrastructure that partners were able to tap into - Victoria Legal Aid's telephone advice line.²¹ Having a similar single port of call in the Covid-19 crisis could make it easier for people to find the help they need.

BLH also set up face to face advice clinics at relief centres across bush fire affected areas. By situating themselves at relief centres, lawyers had a 'visible presence at the frontline services alongside other agencies such as Centrelink, health services, and local governments.'²²

An analysis has been conducted of the initial queries received at the centres. These included 'insurance issues, fencing, business, rental property, statutory declarations, family law issues and Wills.'²³ Many of these queries are pertinent to the Covid-19 crisis.

Subsequently, BLH also co-ordinated the development of information and resources including factsheets 'on topics such as insurance, fencing, coronial processes and the 2009 Bushfires Royal Commission'.²⁴ Again, a co-ordinated approach to the development of the public legal information materials related to Covid-19 is warranted and this should be informed by the sector's assessment of the important areas of legal need arising from the crisis.

Following the immediate aftermath of the bushfires, Victoria Legal Aid established a 'Bushfire Insurance Unit' comprised of four lawyers. They assisted clients with insurance and banking issues and were able to undertake ongoing casework and advocacy on behalf of clients.²⁵ There are likely to be ongoing legal issues arising in the aftermath of the Covid-19 pandemic and now is the time to begin to plan for a dedicated casework service such as what was set up by Victoria Legal Aid, who can build up specialist knowledge in the area.

In 2010 Victoria Legal Aid together with project partners undertook a detailed evaluation and report on the initiative which included key recommendations and learnings from the intervention. These included:

1. The need to integrate legal services into emergency disaster strategies and planning;²⁶
2. The need to develop collaborative and multidisciplinary service models in order to best meet the complex and diverse issues that arose.²⁷ Such an approach will make

²⁰ Victoria Legal Aid, 'Legal assistance and Community Recovery after the 2009 Victorian Bushfires,' March 2010, < <https://www.probonocentre.org.au/wp-content/uploads/2015/08/NA2JPBC2010-BushfireLegalHelpReport-36.pdf> > accessed 11 June 2020.

²¹ Ibid, 7.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid, 9.

²⁶ Ibid, 32.

²⁷ Ibid, 33.

it 'easier for clients to navigate their way through the complexities of the problem they are facing';²⁸

3. The need for proactivity in the legal assistance sector in order to recognise legal and social problems stemming from the emergency (including longer term problems) and the need to bring these to the attention of government and planning bodies.²⁹

This analysis also showed that the following factors contributed to the success of the partnership. First the creation of a strong single entity. Second, the quick mobilisation of existing resources. And third, the need for effective and existing resources.³⁰ The similarities in the nature of the bushfire and Covid-19 crises suggest that these elements should be taken in consideration even in England and Wales.

However, there is nothing in England and Wales to compare with the existing infrastructure and considerable size of Victoria Legal Aid, a singular organisation able to achieve economies of scale, with approximately 1500 lawyers employed at various locations around the State. This clearly enabled the organisation to play a key leadership role in establishing a service collaboratively with other stakeholders. This casts doubts on the ability of a fragmented sector in England and Wales to provide the same support as is evidenced in Australia.

It remains to be seen whether the English and Welsh legal support sector can organise itself in response to the Covid-19 crisis in the way that the Australian profession was commendably able to achieve in response to the bushfires of 2009 and 2019/20.

V. The Sector's Response to the 9/11 Terrorist Attacks

The terrorist attacks on the World Trade Centre in New York and the Pentagon in Washington DC on 11 September 2001 gave rise to legal needs in the areas of benefits, landlord and tenant, insurance, consumer law and wills and estates.³¹ Over 4,000 persons affected by this event received pro bono support through a scheme co-ordinated by the New York Bar.³²

As we saw in response to the Australian bushfires, a successful element of the sector's response to the 9/11 fallout is that of collaboration with a number of legal support organisations contributing, including 'bar associations, leading law firms, pro bono, public interest, and legal services organisations, community groups, and other social service providers'.³³

A key measure taken was the 'facilitator project' in which pro bono practitioners (800 took part) were matched with a victim or family to provide legal support across the broad range

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Association of the Bar of the City of New York Fund Inc, The NALP Foundation for Law Career Research and Education and Louis Stein Center for Law and Ethics, Fordham University School of Law, 'Public Service in a Time of Crisis,' 2004, < <https://www.citybarjusticecenter.org/wp-content/uploads/2016/10/public-service-time-crisis.pdf> > accessed 11 June 2020, 12.

³² Ibid.

³³ Deborah Rhode, 'Pro Bono in Times of Crisis: Looking Forward by Looking Back' (2003-4) 31(4) *Fordham Urban Law Journal* 1019.

of legal issues that might have arisen.³⁴ Lawyers as ‘facilitators’ would ‘conduct a legal inventory, prioritize the client/family’s needs, act as a problem solver to represent or refer the client in an exemplary and expeditious manner, and find other experts to assist with special legal needs.’³⁵

As issues would inevitably arise outside of practitioners’ expertise, training was provided by experts co-ordinated by the New York Bar.³⁶

An interesting insight that followed from the pro bono response was the way the crisis acted as a driver for members of the profession to engage in pro bono services.³⁷ These services may represent at least a partial solution to meet the legal needs arising from the Covid-19 epidemic in England and Wales. Whereas public funding may provide long term solutions to deal with future crises, pro bono interventions may at least help to prop up the system in the immediate term.

Consideration may be given to whether there are new volunteers who may be utilised amidst the current Covid-19 crisis. LawWorks, a pro bono charity for solicitors in England & Wales provides training and has advised that solicitors on furlough are still able to engage in pro bono activities.³⁸

One negative point that has been observed was that pro bono practitioners involved in the 9/11 legal assistance projects had a less than fully satisfying experience.³⁹ It would be valuable to explore why this was so, so that pro bono practitioners may be better supported in future. Accordingly, a lesson for the current crisis is to obtain detailed feedback from pro bono volunteers on their experience in providing assistance to people impacted by the Covid-19 crisis and to consider in depth the support and supervision that is provided.

It has been recognised in the context of this post 9/11 work that there was an absence of ‘systematic quality control and evaluation of lawyer assistance.’⁴⁰ Pro bono services often have an ‘inadequacy of evaluation’ as pro bono providers are said to have constrained resources.⁴¹ Again, it is important to integrate evaluation into any Covid-19 response as it will allow for timely improvements to service provision, and for lessons to be learned for ongoing or future interventions.

It is also noted that whilst the 9/11 terrorist attacks provided an opportunity to mobilize the New York Bar it also laid the foundations for broader change, inviting: ‘focus on the strategies necessary to engage greater numbers of lawyers in public service on a sustained basis’.⁴² In addition to this there is emphasis on the need for there to be an

³⁴ ‘Public Service in a Time of Crisis’ (n. 31), 11.

³⁵ Ibid.

³⁶ Ibid, 15.

³⁷ Rhode (n. 33), 1014.

³⁸ LawWorks, ‘COVID-19: Legal pro bono and volunteering while on furlough,’ April 2020, <
<https://www.lawworks.org.uk/solicitors-and-volunteers/resources/covid-19-legal-pro-bono-and-volunteering-while-furlough> > accessed 11 June 2020.

³⁹ Rhode (n. 33), 1016.

⁴⁰ Ibid, 1018.

⁴¹ Ibid.

⁴² Ibid.

existing 'corps of committed volunteers and adequate support structures should already be in place.'⁴³

It is interesting that there may be a greater emphasis in the USA on the need for pro bono services, where commentators may have all but given up hope that such provision will ever be catered for by the government. In contrast, in England and Wales there is clear recognition of a role for pro bono services but the role of pro bono may be more limited in its scope as it is only in recent times that the government has largely withdrawn from legal aid provision and there is considerable pressure for this to be reinstated.⁴⁴

VI. The Sector's Response to the Grenfell Tower Inferno

This paper so far looked at international answers to crises that present significant similarities with the Covid-19 epidemic. This comparative analysis evidenced the value of sectoral collaboration in response to a crisis and to the support that pro bono practitioners may also provide. However, it is also possible to look at the English response to the Grenfell Tower fire to draw important lessons.

On 14 June 2017 the Grenfell Tower Fire occurred resulting in 72 deaths and the destruction of the tower block. In addition to legal concerns connected to bereavement of the deceased and injuries of survivors, all remaining residents numbering over 200 had to be relocated creating housing and homelessness issues.

A collaborative response to the crisis was led by North Kensington Law Centre (NKLC). NKLC is a law centre with a 50-year history of providing social welfare law services to the local community. NKLC collaborated with Shelter, the Housing Law Practitioners Association, Citizens Advice and pro bono members of the Collaborative Plan for Pro Bono. The pro bono response was significant with many commercial and city firms getting involved. In the aftermath of the event they ran daily drop-in sessions at premises neighbouring the Grenfell site.⁴⁵

The NKLC's own response was constrained by the backdrop of austerity – it had to rely on public donations, charitable grants and pro bono volunteering in order to be able to provide a service to those who were affected. Legal aid had largely been taken out of scope in many of the areas of law where legal advice was needed.⁴⁶

The law centre undertook policy advocacy as well, highlighting for example the ongoing problems with rehousing of residents.⁴⁷ This emphasises an important aspect of law centre activity. Drawing on their direct service provision, they are able to provide advice to government on the areas of law that are in need of reform or policies that are being poorly

⁴³ Ibid.

⁴⁴ Ibid, 1021.

⁴⁵ Mondipa Fouzder and John Hyde, 'Grenfell Tower fire: lawyers step up pro bono efforts' *Law Gazette*, 12 June 2020, < <https://www.lawgazette.co.uk/news/grenfell-tower-fire-lawyers-step-up-pro-bono-efforts/5061613.article> > accessed 12 June 2020.

⁴⁶ John Robins, 'Underfunded and overstretched: the lawyers seeking justice for Grenfell' *The Guardian*, 24 July 2017.

⁴⁷ North Kensington Law Centre, 'Rehousing Grenfell Survivors', 2018, < <https://www.nklc.co.uk/wp-content/uploads/sites/130/2018/06/Rehousing-Grenfell-Survivors-One-Year-On.pdf> > accessed 12 June 2020.

implemented. In the Australian context this has been recognised as a unique feature of law centre work and can be contrasted with the weaker or less coordinated contributions made to public policy debates by others such as legal aid providers.⁴⁸ In the UK, Shelter is both a large legal aid provider and campaigning organisation and was able to undertake campaigning work after Grenfell. Such a strength in the public policy sphere should be factored into the sector's response to the current crisis.

The pro bono response by the profession to Grenfell led the Australian Pro Bono Centre to suggest development of a 'pro bono emergency response plan' as a way 'for the legal profession to contribute to our country's resilience and assist in these times of need.'⁴⁹ Again such an approach is also suggested following on from the Australian bushfires experience and is a key lesson that should inform future planning.

A focus of discussion has been on the shortcomings in the law leading up to Grenfell,⁵⁰ and how the residents were poorly served in terms of their access to legal services prior to the fire.⁵¹ There has been more limited discussion of victim's access to legal services after the fire. The first phase of a public inquiry into the Grenfell fire has concluded, with the second phase set to continue in 2020. The second phase of the inquiry is not due to cover issues of access to justice arising before and after the inferno.⁵² When the terms of reference were being proposed NKLC made detailed submissions as to why access to legal aid should be included.⁵³ It would have helped the sector if the post disaster legal response had been considered, this might have provided valuable learning of relevance to the current Covid-19 crisis and for future emergency response planning for the profession.

The co-ordinated response by the NKLC demonstrates the value of having community-based organisations respond to local crises. Even in a world-wide pandemic, community-based legal service organisations are able to understand the needs of their communities and employ effective strategies to reach them. Investment in such organisations will also improve the sector's resilience in the face of future crises.

VII. Conclusion

Social welfare law touches upon the most basic needs of individuals including their rights to safety and decent treatment at work, to a minimum level of income through work or benefits, to education and shelter. The importance of access to advice about such matters is magnified in times of a public health crisis. Until a recent cash injection, the legal support

⁴⁸ Nicole Rich, 'Reclaiming Community Legal Centres: Maximising our potential so we can help our clients realise theirs,' Victoria Law Foundation Community Legal Centre Fellowship 2007-8 Final Report, December 2008, <https://victorialawfoundation.org.au/sites/default/files/attachments/VLF%20-%20CLC-report-08.pdf> accessed 12 June 2020.

⁴⁹ 'Legal Assistance in the UK Supports Grenfell Victims' (August 2017) 120 *Australian Pro Bono News* < <https://www.probonocentre.org.au/apbn/legal-assistance-supports-grenfell-victims/> > accessed 12 June 2020.

⁵⁰ See e.g., Equality and Human Rights Commission, 'Following Grenfell : Access to Justice,' January 2019, < <https://www.equalityhumanrights.com/sites/default/files/following-grenfell-briefing-access-to-justice.pdf> > accessed 12 June 2020.

⁵¹ E.g., Sir Henry Brooke, The LASPO Review: My Recent Talk about the Bach Commission's Report on the Right to Justice (2018) 6 *Birkbeck L. Rev.* 1, 13.

⁵² Chapter 34 of the Phase 1 report of the public inquiry into the Grenfell tower fire, available at: <https://assets.grenfelltowerinquiry.org.uk/GTI%20-%20Phase%201%20full%20report%20-%20volume%204.pdf>.

⁵³ The Housing Law Practitioners Association also made such a submission.

sector had been starved of public funding leading to it being in a weakened position to handle this Covid-19 pandemic.

As this paper has shown, the sector regularly responds to situations of crises.

There are key lessons drawn from each response that are of relevance to the current crisis:

The Australian sector worked in partnership in response to bushfires and demonstrated the value of having a single port call for people affected by crisis. This also highlighted the value of a co-ordinated approach to the development of public legal information materials. The initiative also showed the benefit for the sector and its clients in predicting legal needs in the context of emergency response planning. Finally, the Australian response showed the leadership that a strong legal aid authority with an army of public-facing lawyers was able to provide.

The USA sector's partnership in response to 9/11 showed the role that pro bono can play where the government is unwilling or unable to fulfil its obligation to provide access to legal advice. The USA example also provides a model of assistance ('lawyer as facilitator' role) that is worthy of consideration in the current crisis. Finally, this USA programme poses broader questions of more fundamental change to the profession and its pro bono ethos suggesting the value of readily available corps of volunteers who may be deployed in the face of a crisis.

In the UK following Grenfell we have seen the importance of a community-based service operating in coordination with stakeholders. We have also observed the significant role for the sector in relying on their frontline experience to provide input into policy and law reform debate arising in and out of the crisis.

Looking forward, a further study should examine how other countries have mobilised legal aid in response to the pandemic. It would also be useful to explore how the collaborations highlighted in this piece have led to new and similar initiatives under the current public health crisis. In England and Wales there are early signs of some such collaborations at least on a sectoral basis (that is to say within distinct areas of law).⁵⁴

What has ultimately figured in the background to this current study is the role of the state in providing public funding for social welfare law advice. Across the three jurisdictions considered, the extent of public funding in the legal support sector has varied from low (Australia, England and Wales) to virtually non-existent (USA).

The unique crisis that we face in public health and in our economy warrants a greater emphasis upon the role of the state in the funding and support of public services. The economic assumptions that underpinned the recent neo-liberal agenda of reduced

⁵⁴ For example the Housing Law Practitioners Association (HLPAs) and Shelter have campaigned throughout the current pandemic on housing issues and coordinated with law centres. HLPAs were interveners in the case of *Arkin v Marshall & Anr* [2020] EWCA Civ 620 where the Court of Appeal upheld a practice direction postponing all possession actions during the crisis (PD51Z). The HLPAs used evidence that had been gathered from legal aid practitioners and law centre housing lawyers: < <http://www.hlpa.org.uk/cms/wp-content/uploads/2020/05/Arkin-v-Marshall-HLPA-evidence.pdf> > accessed 12 June 2020.

investment in public services is likely to be proven wrong by the current crisis and its economic aftershocks. A broader debate will shortly follow on the resilience that a reinvigorated welfare state provides in a time of crisis. In that discussion practitioners of social welfare law should be towards the front of the queue in arguing for sustainable public investment in the sector.

Legal Advice in the Covid-19 Lockdown: Making Do or Brave New World?

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I. Introduction

For some time now, university law clinics have played an important role in filling the gap between those who qualify for legal aid and those who can afford to pay for legal services. This is a need which continues to grow as legal aid is inexorably cut back in terms of both those who qualify and those issues it covers.¹ More recently there have been calls for lawyers and more latterly law clinics and other not for profit organisations to use the rapidly evolving capacity of the internet and digital computing facilities to expand the ability of service providers to both assist their clients and to develop ways, through technology, to help clients help themselves.

Indeed, more than thirty years² ago Richard Susskind³ began to argue that the digital revolution, which was only beginning to show itself, would and should also lead to a revolution in legal services, and suggested that such development could even mean, the end of the profession as we know it. While he has had to adjust his prediction about the timescale in which this revolution would take place, there are now visible signs of the legal profession embracing a wide range of digital means to deliver legal services, ranging from the very mundane such as computerised case management systems, digital document storage and search tools to online platforms allowing clients to create their own legal contracts. Equally, courts have also begun to get in on the act, for instance by enabling court documents to be filed online and encouraging online dispute resolution.⁴ Moreover, as the papers in this publication show, the Covid-19 crisis, has caused those responsible for delivering legal and courts services to turn to the internet and digital computing to try as far as possible to maintain “business as usual”.

A similar trajectory describes the role of digital services in the law clinic sphere. Thus, as we show in this paper, law clinics which had slowly begun to embrace new digital technologies, have been forced by Covid-19 to bring this means of delivering services to the fore. However, it is important to examine whether such forms of services are merely a necessary response to the Covid-19 crisis or whether they herald a “brave new world” for law clinics. Do digital services enhance or detract from the values of law clinics in helping to fill the access to justice gap? Before turning to this question, however, it is useful to have an idea of the clinical landscape prior to the Covid-19 crisis (the Pre-Covid or PC world!).

¹ See Paul McKeown and Elaine Hall, ‘If We Could instil Social Justice Values Through Clinical Legal Education, Should We?’, (2018) 5(1) J Intl & Comp L 143, 147.

² Richard Susskind, *Expert Systems in Law - A Jurisprudential Inquiry* (Oxford University Press, 1987).

³ Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Oxford University Press, 1996); *The End of Lawyers?: Rethinking the Nature of Legal Services* (Oxford University Press, 2010); *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013). See also, Daniel Susskind and Richard Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2015).

⁴ See, Emma Jones, Francine Ryan and Hugh Mcfaul, ‘Connectivity, Confidentiality and Confidence: Key Issues in the Provision of Online Pro Bono Activities’ (2018) 25 Intl J Clinical L Ed 48, 54-57.

II. Digital Legal Services in the PC World

There has been considerable interest throughout the world in the potential of the internet and digital computing to enhance access to justice. Thus both worldwide⁵ and in the UK,⁶ conferences and “hackathons” have brought together those in the tech world with those at the access to justice coalface. But, anecdotally it seems that there has been far more interest from the former than the latter, and that many ingenious apps have been imagined but very few if any developed.⁷ This has also been the pattern in the UK law clinic world. Indeed at a recent conference on the use of lawtech in law clinics, the advice of one of the lawtech pioneers was to stop trying to invent the perfect app and instead translate what is currently done in “real time” into simple digital format.⁸

In fact some law clinics have been doing this for some time. Thus, six years ago the University of Strathclyde⁹ used email advice to develop a useful triage system which allowed it to concentrate its energies on the more complex live-client cases. Thus, having the benefit of the services of some very tech-savvy students who first developed a relatively sophisticated website and then an even more sophisticated case management system, Strathclyde developed a system whereby clients who access the website are first directed to a series of questions and answers on their problem. If the Q and A's do not solve their problems, which is likely to be the case, they are invited to send an email explaining their problem. If it is felt that their query can be dealt with by email because it is of general nature not requiring detailed facts or complex law (such as how can I challenge a parking “fine” imposed by a supermarket?), a student produces advice via email within five days which is checked by a supervisor, with the option retained of escalating the case to full representation if felt necessary.

Somewhat differently, Essex Law Clinic (henceforth ELC) has begun work to develop an app to allow the public in England and Wales to create their own will. More relevantly, as far as the Covid-19 situation is concerned, ELC began in January 2020 to offer face to face interviews with clients via Zoom. Admittedly, this was not done with a pandemic in mind but to respond to a serious geographical problem. Like some clinics in the UK, ELC is not situated conveniently for clients. Essex does not have a city and its university is situated a long-ish bus ride from the nearest large town. Consequently, for the last three years ELC has developed outreach clinics in the community so that clients who are unable to travel to campus, whether due to poor or expensive public transport or because campus is seen as an ‘alien world’, can also access advice. However, as some journeys remain too far and too expensive whether for the clients or students or both, the ELC has turned to Skype. This augmentation of services stemmed from an exciting new initiative involving the creation of a “holistic” law clinic involving clients being interviewed on Skype by law students whilst supported by social work students. Given the demographic of likely clients,

⁵ Hague Institute for Innovation of Law (HIIL), ‘Innovating Justice Forum 2019 - From Justice Innovation to Scale’, 10 February 2019, <https://www.impactcity.nl/innovating-justice-forum-2019-from-justice-innovation-to-scale/>.

⁶ See, e.g., <https://www.legalhackathon.london/>.

⁷ Exceptions include an app developed by Compassion in Dying to help people to write their own power of attorney/living will. See, <https://compassionindying.org.uk/services/>.

⁸ Alex Hamilton from Radiant Law, speaking at Legal Tech and Clinics, University of Manchester, 10 January 2019.

⁹ <https://www.lawclinic.org.uk/annual-report-2014-2015>.

who might not have access to computers or the experience of using video conferencing, and the fact that the social work students already have a placement in the Southend community, this meant that law students from the Colchester campus could advise clients, who are supported generally and in relation to tech by social work students, in Southend. This process was piloted with cases in both family and housing law with positive feedback from clients. For example, a family law client at the end of the interview reflected that she had been far less daunted by the interview as she was not sitting across a desk facing an adviser. Unknown to us at the time, this highly successful experiment provided the prototype for our response to the Covid lockdown.

For other university law clinics, geography has played a somewhat different role in motivating the establishment of what many call “virtual law clinics” (VLCs). Thus without an actual campus, the Open University has always operated online,¹⁰ whereas the fact that BPP is spread over various campuses meant that the provision of online services was useful.¹¹ However, for other universities, there have been more direct reasons for establishing a VLC. Thus, the University of Cumbria’s VLC seems to have been motivated by a desire to introduce students to the way that law is likely to be increasingly practised in the future, in this way enhancing their tech skills and employability.¹²

III. The Digital Response to the Covid Crisis

However, in the current situation, using the internet to advise and perhaps also represent clients seems to be, not just a way of enhancing access to justice, but a necessity. Consequently many law clinics have or are planning to set up VLCs.¹³

As is usual with law clinics, different institutions adopt different models, while the competitive nature of the IT market means that there are various platforms to choose from for the “virtual law clinic ” (VLC). Choices about platforms are often determined by the licence held by the university. Thus the ELC uses Zoom, whereas others have responded to concerns about zoom bombing (which should be easily avoided by the use of codes and waiting rooms) or instead have chosen Adobe Connect Microsoft Teams.¹⁴ There are also differences in VLC models as to whether supervisors are present throughout the video interview (VI), come in at the end or only speak to the students afterwards. In addition, some clinics provide advice on the spot – at least as in the case of the ELC by the supervisor but possibly, in appropriate circumstances, also by students in the presence of a supervisor who can make real-time corrections. Where supervisors are not available, some clinics have chosen to record interviews,¹⁵ but this raises data protection issues regarding where and how long recordings are stored and for this and other reasons (such as detracting from students learning the important skill of simultaneous note taking), most clinics do not record interviews. A final important difference relates to the extent of the service offered to the clients – advice only or some form of subsequent assistance – but

¹⁰ See generally, <http://law-school.open.ac.uk/open-justice>.

¹¹ See, <https://probono.bppuniversity.ac.uk/>.

¹² See, Ann Thanaraj and Michael Sales, ‘Lawyering In A Digital Age: A Practice Report Introducing The Virtual Law Clinic At Cumbria’ (2015) 22(3) Intl J Clinical Legal Ed 334.

¹³ All but two of 23 respondents to a question at a recent CLEO workshop (<https://www.cleo-uk.org/>); and one was not sure.

¹⁴ BPP began with Skype but given that clients must have an account or be prepared to set one up, they are now also moving to Microsoft. In any event Skype for Business is being ‘retired’ online in July 2021 and all new customers from September 2019 are automatically set up with Teams.

¹⁵ Swansea.

here, as with many of the above differences, much depends on the particular model used by the clinic generally rather than just in their VLC.

IV. VLCs in the Future

While the implementations of VLCs has not necessarily been smooth and many staff and even students, not to mention clients, have had to negotiate a steep learning curve, the “lawtech turn” in the clinical world appears to have been a success. This leads to the inevitable question of whether this suggests that clinics should retain their VLCs or return to the face to face delivery of legal services which dominated the PC world, and in turn to a discussion of the benefits and drawbacks of VLCs.

Video interviewing (VI) allows students (and staff) to see clients and to respond to what they can see of their facial and body language. While not quite as effective as face to face contact, this goes a long way to establish the emotional connection which is so important for a good working relationship, trust and hence fuller disclosure of facts and client concerns.¹⁶ Certainly, it is better in this regard than contact by phone and much better than email. Also as with a phone, VI allows for immediate response in terms of advice. As such, there are obvious advantages for clients after lockdown – those with mobility issues and other disabilities,¹⁷ those who are put off by hassle, expense and anxiety from travelling especially onto campuses which, as already noted, can be seen as an alien and intimidating domain populated by the social elite. Moving from the “demand” to the “supply-side” of clinic services, there are also huge advantages both for the students involved and for the overall effectiveness of clinic services. If lockdown or social distancing continues into future academic years, students can continue to be involved even if they are not on campus and law clinics can remain open (as some already do) out of term and particularly over the summer. Where law clinics require real-time supervision of interviews, supervisors and students need not be in the same locality and clinics can thus make better use of pro bono lawyers who often struggle to get to campus during office hours or even early evening because of traffic, late meetings, etc. It may even help if those students who suddenly have to cancel have a colleague on hand to take over at short notice.

Thinking more widely, the ability of clinics to extend their services beyond their geographical environs to anyone in or outside the country (or at least jurisdiction) means that clinics as a whole or those within particular regions could begin to specialise in one or two areas, while referring all other cases to their partners. However, while this may work well for clients and clinics in allowing the latter to play to their strengths and for the even greater development of special expertise, it may be less attractive to students who, anecdotally, seem to want to gain a wide range of skills and knowledge and “try out” different areas of law before making a career choice.

One advantage for student learning and indirectly for clinics is that virtual interviews may (with client permission) allow for more students to learn and gain experience through shadowing rather than conducting interviews. Surprisingly, while it is early days, students at ELC reported preferring video interviewing to campus interviews, citing feeling more confident by being in the comfort of their own home with a lesser degree of tension than being in the same room as a client. Likewise clients, as mentioned in our early findings,

¹⁶ Cf Jones, et al (n. 4).

¹⁷ Open University clients report that VI may ensure that “you see the person first not the disability” : Francis Ryan, personal communication (1 June 2020).

have reported that not being in the same physical room as an adviser meant they felt far less anxious about talking about their legal issues.

A final advantage is also more beneficial to clients and clinics as an institution rather than just for students. As the University of Strathclyde has shown, being able to answer more simple queries via email prevents time being wasted setting up and conducting interviews when there is no need to interview (and by extension even more so in case of clients who are served by looking at FAQs) - though there is always the danger that information or nuances are not conveyed by email. Also, of course, students may lose out from their valuable educational experience of practising their interviewing skills. Furthermore, an email service does depend on a client being able to sufficiently articulate their issue as, so often in client interviews, it becomes apparent that what clients think their legal issue is, is in reality very different.

Nevertheless, VLCs clearly offer opportunities for directly enhancing access to justice. At the same time, it cannot be denied that there are downsides to VLCs. Some are minor and relatively easy to overcome. For instance, they pose risks for the leak of confidential information via insecure emails and to a much greater extent via VIs in that conversations might be overheard at the locality of the client, student and/or supervisor. But the sort of advice that can be given by email is far less likely to involve confidential information and if it does then the level of details suggest that clinics should in any event consider using face to face or interviews or video conferencing). As regards the latter, while there will always be risks clinics can take steps to minimise risks of confidential conversations being overheard such as students and advisers using headphones and prohibiting using client's names during the call and indeed the discontinuation of any VI once it is thought that confidentiality might be compromised.

Other problems also have partial solutions at least. Thus, notwithstanding the number of people who do have access to the internet and computing facilities for email and video conferencing there is inevitably a substantial group who do not¹⁸ and there will be a large overlap with this groups and the socio-economic group which clinics serve (or in our view should serve).¹⁹ Less extreme than this problem of "internet poverty" is that of "computer illiteracy"²⁰ whereby those who do have access to the internet and computers do not have the skills to utilise what might seem daunting video-conferencing platforms. Here, one solution for both problems is for clinics to collaborate with community groups or other service providers (as in the case of the ELC's holistic clinic) who can provide clients with access to and help with setting up interviews and dealing with problems if they arise. Computer illiteracy can be also overcome by taking clients through the necessary steps to get connected via phone either just before the interview or some time before hand. Of course there is likely to still a small group of people who cannot access these "workarounds" or who are daunted by anything other than face to face interviews,²¹

¹⁸ 7% of the UK population do not have access to the internet. See, <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics>.

¹⁹ For example, 64% of disabled people have access to a tablet/PC/laptop compared with 85% of non-disabled people. See, https://www.ofcom.org.uk/__data/assets/pdf_file/0018/132912/Access-and-Inclusion-report-2018.pdf.

²⁰ This could be due to age. For example, 100% of 16-24 year olds use the internet daily whereas 55% of over 65 year olds do. Also people with low income are less likely to have used the internet in the last 3 months than those with greater income. See, <https://www.ons.gov.uk> 2018.

²¹ ELC clients reported that they felt anxious about how to connect to Zoom notwithstanding that full information is provided before each interview.

suggesting that whatever the benefits of VLCs for expanding access to justice, clinics need to retain old school forms of service delivery.

Indeed, it is arguable that while VLS may enhance the quantity of clients served, they may also reduce its quality. Arguably, better rapport and hence fact-finding can be achieved in an actual room where subtle changes in atmosphere can be detected²² and demeanour detection is not limited to the face and upper body but extends more widely.²³ Unwarranted interruptions, poor internet connection, technical issues and silences while these problems are sorted may also detract from the atmosphere and unnerve clients.²⁴ It is also far better to show empathy towards angry or upset clients, for instance by handing over a glass of water, offering tea and coffee at the beginning of the interview which may help settle and show care towards clients. Being in different localities, where this occurs, may also detract from the subtle signals and possibly also the passing of written notes between students interviewers, and between them and supervisors if they are present, which may be useful in alerting students to problems, such as unwanted questions, or prompting lines of questions which might otherwise be overlooked.²⁵ For this reason and also to reduce problems of confidentiality leaks, having two way video-conferencing where possible is better than multiple localities. On the other hand, whether follow up work is likely to be affected by virtual contact between students and them and staff is a moot point.

Also moot is whether VLC will have a negative impact on the indirect role clinics may play in enhancing access to justice. Thus, by contrast to the direct enhancement of access to justice through providing the public with legal services, law clinics can indirectly enhance access to justice by inspiring law students to go on to play some role in redressing social injustice after they graduate. Thus a study by the Open University, revealed that students at their virtual clinic 'developed new perspectives on access to justice and the value of pro-bono work'²⁶ This could be via career choice, engaging in pro bono work, making donations, providing training or other forms of assistance to organisations which promote access to justice or social justice more widely.²⁷ If so, given that this may translate into years of pro bono or financial assistance or even a career devoted to helping those most in need, the indirect role of law clinics in promoting social justice may in the long run be even more important than their direct role.²⁸ Thus, drawing on educational theory, many clinicians claim that student exposure to clients may cause 'disorienting moments'²⁹ whereby their pre-existing assumptions about the world clash with their observation of social deprivation, unequal access to justice and substantive legal injustice, especially

²² Cf the comment of one ELC supervisor that it "is obviously not possible to capture all the nuances of behaviour/reactions etc. by video but it is a pretty good approximation."

²³ On the other hand, research does not suggest that even trained interviewers are likely to be good at at least determining lies from demeanour. See, Donald Nicolson, *Evidence and Proof in Scotland: Critique and Context* (Edinburgh University Press, 2019), 282-6.

²⁴ Our thanks to Francine Ryan (personal communication, 1 June 2020) for this insight.

²⁵ Again a factor raised by one ELC supervisor: "The interview was less formal and I slightly felt that the students took it less seriously. There was some insensitivity from one of the students and I found it more difficult to raise this than I would have in a face to face interview."

²⁶ Francine Ryan 'A Virtual Law Clinic: A Realist Evaluation of What Works for Whom, Why, How and in what Circumstances?' (2019) *The Law Teacher* (early access).

²⁷ See Donald Nicolson, 'Our Roots Began in (South) Africa': Modelling Law Clinics To Maximise Social Justice Ends' (2016) 23 *Intl J Clinical Leg Ed* 87.

²⁸ Steven Wizner and Jane Aiken, 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice', (2004) 73 *Fordham L Rev* 997, 1005.

²⁹ Fran Quigley, 'Seizing the Disorientating Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics', (1995) 2 *Clinical L Rev* 37.

when repeated exposure reveals that these problems are endemic rather than exceptional.³⁰ According to adult learning theory,³¹ learning from experience rather than abstract teaching is likely to make these lessons particularly profound. And, when the experience is that of someone in dire need and it is realised that they may have no other source of assistance, knowledge may be transformed into empathetic care. Furthermore, Aristotelian theories of moral development³² teach that satisfaction at helping others (or regret at not being able to do so), particularly if accompanied by guided reflection on experience and the example of positive role models, may convert knowledge about social injustice and empathetic concern for its victims into an ongoing commitment to contribute to social justice.

In this regard, all forms of digital justice, except for VI are far less likely than direct contact with the client to play this indirect role. Thus, if email advice is confined, as it should be, to requests for general information, there is far less likely to be a “disorienting moment” and no learning from experience. As regards students who develop apps and other internet sources as forms of public legal education and capacity building to support other providers or help members of the public to help themselves, any learning about disadvantage and injustice is not likely to be more vivid and impactful than that gained from more traditional forms of education. This suggests that law clinics who want to have a long term impact on access to justice via their graduates should ensure a “blended learning” approach whereby students gain both direct experience of the lives of actual clients at what can be called a “retail level” as well as involvement in “wholesale” methods designed to expand the number of people served but without personal contact³³ - with perhaps the former coming before the latter in terms of the student’s chronological experience. This though might clash with other needs such as to get those with tech skills working on digital wholesale work as soon as possible and the benefits of testing students on and training them while engaged in non-client facing work before letting them loose on members of the public.

By contrast, to the extent that clinics only provide advice to clients, the amount of learning about the client’s lived experience of hardship and injustice is likely to be less than if students try to resolve their problems, whereas there obviously can be no learning from success or failure. At the same time, however, such learning of justice is not likely to be much less in VLCs than advice giving after face to face interviews. So here any marginal loss of an indirect impact of clinic work is more than outweighed by the possible gains in direct enhancement.

³⁰ See, e.g., Jane Harris Aiken, ‘Striving To Teach “Justice, Fairness, And Morality”,’ (1997) 4 *Clinical L Rev* 1; Stephen Wizner, ‘Beyond Skills Training’, (2000-1) 7 *Clinical L Rev* 327, 327-8; Donald Nicolson, ‘Education, Education, Education: Legal, Moral and Clinical’, (2008) 42 *Law Teacher* 145; Juliet M. Brodie, ‘Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics’, (2008-9) 15 *Clinical L Rev* 333, 379-83.

³¹ Quigley (n 29); Frank Bloch, ‘The Andragogical Basis of Clinical Legal Education’, (1982) 35 *Vanderbilt L Rev* 321.

³² See e.g., Richard Stanley Peters, *Moral Development and Moral Education* (London: George Allen & Unwin 1981), ch. 2; Joel Kupperman, *Character* (Oxford Univ Press, 1991); Hubert L. Dreyfus and Stuart E. Dreyfus, ‘What is Morality? A Phenomenological Account of the Development of Ethical Expertise’ in David. Rasmussen (ed), *Universalism Versus Communitarianism: Contemporary Debates in Ethics* (Cambridge, Mass.: MIT Press 1990).

³³ See Nicolson, (n. 27), section 3.2.6.

V. Conclusion

Indeed it is arguable that the biggest question which clinics should face is not whether legal advice should be delivered face to face but how to take the next step to provide clients with the representation they need to put their advice into effect. Using the internet to provide advice via video-conferencing and/or email has as many – and in some cases such as with clinics suffering a geographical deficit more – advantages as disadvantages. Where however what many law clinics – including our own – should be urged to consider is how they develop both digital and non-digital means of enabling clients to put advice into effect. This is not to question the need for such advice, not least as it may help clients realise that they do not have any legal rights or remedies. However, where they do, but are left without the ability to vindicate these right and remedies, clients may in fact feel worse off. In addition, the ongoing engagement with clients through representation and the intimate contact with the workings of the (in)justice system does far more to motivate students to become “justice warriors”³⁴ than the brief encounters in interviews even if face to face rather than video conferencing. Nevertheless the brave new digital world may offer a way to have one’s cake and eat it too. Where it is possible to deliver advice via email or VI, this may speed up the time taken to inform clients of their rights and remedies and this in turn can free up time for clinics to devote to representation or at least capacity building so that clients can be helped to help themselves. In this way, it can be argued that VLCs are on balance far more of a permanent opportunity than a temporary necessity in the Post Covid world of law clinics.

³⁴ Donald Nicolson, ‘Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-Liberal World’ (2015) 22 Intl J Leg Profession 1.

Domestic Abuse and Covid-19: The Legal Challenges

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Abstract

At a time when the home is presented as a place of safety in the face of Covid-19, there are major concerns that forced confinement is exacerbating the risks posed to victims of domestic abuse. Increased isolation, coupled with more limited opportunities to seek support, are presenting unprecedented challenges for victims and for the law in responding to domestic abuse. This paper takes as its focus these legal challenges, focusing particularly on the situation in the UK. It opens by addressing the implications for domestic abuse victims of the restrictions in movement. It then assesses the capacity of the criminal offence of coercive or controlling behaviour to respond to the rise in domestic abuse. It also explores the recent move to remote hearings within the family justice system, and associated access to justice concerns.

Key words

Coercive control – remote hearings – access to justice – participation

I. Introduction

The increase in domestic abuse in response to Covid-19 has been described as the 'shadow pandemic'.¹ In the UK, it has been reported that fourteen women and two children were killed in the first three weeks of the lockdown.² Calls to Refuge's domestic abuse helpline rose by 25%,³ with a 120% increase in calls and contacts in a single day following media coverage of the support available.⁴ Traffic to Refuge's website also increased by 700%.⁵ Despite these statistics, Covid-19 is not the cause of the rise in domestic abuse. Responsibility for domestically abusive behaviour belongs solely to the perpetrator. Nevertheless, the pandemic appears to be aggravating pre-existing domestically abusive behaviours and posing barriers to victims accessing safety.

The home has never been a place of sanctuary for victims of domestic abuse, and domestic abuse has always posed unique challenges for the law. With domestic abuse being both a matter of intense public concern and taking place predominantly in private, the role of the law in responding to domestic abuse is complex. The pandemic has brought

¹ UN Women, 'Press Release: UN Women Raises Awareness of the Shadow Pandemic of Violence Against Women During COVID-19,' 27 May 2020, <https://www.unwomen.org/en/news/stories/2020/5/press-release-the-shadow-pandemic-of-violence-against-women-during-covid-19>.

² 'Domestic Abuse and Risks within the Home,' accessed 12 June 2020, <https://publications.parliament.uk/pa/cm5801/cmselect/cmhaff/321/32105.htm>.

³ Refuge, '25% Increase in Calls to National Domestic Abuse Helpline Since Lockdown Measures Began,' 6 April 2020, <https://www.refuge.org.uk/25-increase-in-calls-to-national-domestic-abuse-helpline-since-lockdown-measures-began/>.

⁴ Refuge, 'Refuge Sees Calls and Contacts to National Domestic Abuse Helpline Rise by 120% Overnight,' 9 April 2020, <https://www.refuge.org.uk/refuge-sees-calls-and-contacts-to-national-domestic-abuse-helpline-rise-by-120-overnight/>.

⁵ Refuge, 'Refuge Sees Online Traffic to its National Domestic Abuse Helpline Rise by 700%,' 9 April 2020, <https://www.refuge.org.uk/refuge-sees-700-increase-in-website-visits/>.

the dangers posed by the home, and the challenges facing the law, into even sharper focus, as well as shedding further light on the cracks within existing legal structures.

This paper explores the challenges in responding to domestic abuse in the light of Covid-19. It starts by addressing the implications of the restrictions on movement brought about by the lockdown for victims of domestic abuse. It moves on to explore the potential for the criminal offence of coercive and controlling behaviour to respond to a rise in the perpetration of abuse. It then turns to access to civil law protection and family proceedings in the light of the court system having moved online at unprecedented speed, and associated access to justice concerns. It highlights the action that needs to be taken urgently in response to the current pandemic and argues for long-term reform of the law's treatment of domestic abuse.

II. Restrictions on Movement

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 introduced extraordinary restrictions on movement. Whilst we are now seeing a relaxation of these restrictions, movement continues to be regulated, social distancing measures look set to be the “new normal” for some time and there remains the possibility of a second wave of the virus, which could cause the re-introduction of the tightest controls. The risks posed by these restrictions for victims experiencing domestic abuse need little articulation. Women's Aid has warned that ‘social distancing and self-isolation will be used as a tool of coercive and controlling behaviour by perpetrators’.⁶ Victims might be unable to work, or have to work from home, losing the face-to-face support that may be provided by employment, as well as having more limited opportunities to leave the home. Access to support networks are likely to be restricted. If victims and perpetrators are living together, perpetrators' physical presence in the home will be intensified if they are unable to work or are working from home. As the lockdown eases, there is also the risk of abuse escalating, as perpetrators resist the loss of control.

Even at the point of the strictest restrictions on movement, victims have always been permitted to leave their homes to seek safety and engage with protective services.⁷ It hardly needs to be said, however, that the opportunity to seek support is by no means the same as actually being able to access that support, and the current pandemic has further exposed the underfunding of the infrastructure needed to support victims of abuse. Refuge and outreach services were facing a funding crisis prior to the pandemic.⁸ Emergency funding is being made available,⁹ but this needs to be sustained. The consequences of the restrictions in access to legally aided representation brought about by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 also continue to cut deep. Whilst legal

⁶ Women's Aid, ‘The Impact of COVID-19 on Women and Children Experiencing Domestic Abuse, and the Life Saving Services that Support Them,’ 17 March 2020, <https://www.womensaid.org.uk/the-impact-of-covid-19-on-women-and-children-experiencing-domestic-abuse-and-the-life-saving-services-that-support-them/>.

⁷ See in particular Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, reg 6(2)(h), (i) and (m) (as originally enacted).

⁸ See for example, Women's Aid, ‘Funding Crisis for Domestic Abuse Sector with 64% of Refuge Referrals Denied,’ 28 January 2020, <https://www.womensaid.org.uk/funding-crisis-for-domestic-abuse-sector-with-64-of-refuge-referrals-declined/>.

⁹ Ministry of Housing, Communities & Local Government and Luke Hall MP, ‘Over 100 Frontline Domestic Abuse Charities Given Government Funding,’ 5 June 2020, <https://www.gov.uk/government/news/over-100-frontline-domestic-abuse-charities-given-government-funding>.

aid was retained for cases involving domestic abuse, the means test and evidence requirements have, in practice, severely restricted access to legally aided representation.¹⁰ The ability of victims to access the evidence required to qualify for legal aid is likely to be further limited during the period of the lockdown, with it being harder to access, for example, physician support. This will impact the availability of legal representation in proceedings such as child arrangements disputes. The Law Society has called for the provision of non-means tested legal aid, as well as relaxations in the evidence gateway to allow solicitors to identify abuse victims.¹¹

It is well-known that victims of domestic abuse very often do not report abuse. Whilst there are reports of an increase in abuse during the period of the pandemic, it is also likely that much abuse is going unreported. For victims who come forward, the importance of a well-funded and comprehensive network of support is abundantly clear. This is particularly so given that separation is often the trigger for the escalation of abuse,¹² and the point at which the victim tries to leave is when they are at heightened risk of serious injury or death.¹³ There is no room for the law to fall short in providing a range of accessible and robust protections. This paper now turns to the protections afforded by the current legal framework.

III. Responding to an Increase in Coercive and Controlling Behaviour – the Serious Crime Act 2015

Section 76 of the Serious Crime Act 2015 criminalised patterns of controlling and coercive behaviour for the first time. The significance of the new offence was that it was intended to move the law away from a focus on the perpetration of specific incidents of violence to recognise the cumulative harm caused by domestic abuse, and in particular of non-physical forms of abuse. As outlined below, the offence is likely to be of particular significance during the current pandemic in the light of the increased opportunities for the perpetrator to exert power and control.

The national picture of the implementation of the offence does not point to a transformational shift in the criminal law's response to domestic abuse. The conviction rate has been consistently low, and average custodial sentences have been significantly below the maximum five year term.¹⁴ Whilst still low, the most recent figures suggest that

¹⁰ See recently, Public Law Project, 'Domestic Violence: Challenge to Legal Aid Means Regulations,' 10 June 2020, https://publiclawproject.org.uk/latest/domestic-violence-challenge-to-legal-aid-means-regulations/?utm_source=rss&utm_medium=rss&utm_campaign=domestic-violence-challenge-to-legal-aid-means-regulations. See also Joanna Harwood, 'We Don't Know What It Is We Don't Know': How Austerity Has Undermined the Courts' Access to Information in Child Arrangements Cases Involving Domestic Abuse,' (2019) 31(4) *Child and Family Law Quarterly* 321.

¹¹ Law Society, 'COVID-19 Lockdown Puts Domestic Abuse Victims at Risk,' 8 April 2020, <https://www.lawsociety.org.uk/news/press-releases/coronavirus-covid-19-lockdown-puts-domestic-abuse-victims-at-risk/>.

¹² See for example, Maddie Coy et al., *Picking Up the Pieces: Domestic Violence and Child Contact* (London: Rights of Women, 2012), 27.

¹³ See for example, Julia Long, Keshia Harper and Heather Harvey, *The Femicide Census 2017 Findings: Annual Report on UK Femicides 2017* (London: Women's Aid 2018), 9.

¹⁴ Office for National Statistics, 'Domestic Abuse in England and Wales: Year Ending March 2018,' 22 November 2018, 12 and 40; Office for National Statistics, 'Domestic Abuse and the Criminal Justice System, England And Wales: November 2019,' 25 November 2019, 26.

prosecutions and convictions are increasing year on year.¹⁵ It is possible, therefore, that we will continue to see higher conviction rates as the offence becomes more embedded into professional practice.

Research pre-dating the pandemic highlighted the potential for the offence to capture a range of behaviours that might not have fallen within the then-existing offences prior to the reform.¹⁶ These behaviours included economic abuse, the use of digital surveillance technologies, isolation tactics and deprivation, including denying access to medication, telephone and internet usage.¹⁷ The current pandemic creates an environment in which these forms of abusive behaviour are likely to intensify, in particular in relation to surveillance and isolation. For example, victims who are shielding may have to rely on the perpetrator for access to medication and food. There are risks that perpetrators will deny access to medical treatment to victims who become unwell. Opportunities for the perpetrator to restrict access to the telephone and internet are likely to be higher if both parties are confined to the home during a period of lockdown. There are also emerging concerns surrounding perpetrators using remote hearings as a weapon, as well as perpetrators being able to isolate further their victims. Indeed, 67% per cent of respondents to Women's Aid's recent Survivor Survey reported that the abuse experienced has worsened since the outbreak of Covid-19 and 72% reported the perpetrator exerting greater control over their lives.¹⁸

The importance of the "coercive control" offence is clear, but much of its effectiveness inevitably rests on the evidence available to support prosecutions, and the lockdown measures are likely to impact the collection of that evidence. Crown Prosecution Service guidance pre-dating the pandemic emphasises the need to focus on the 'wider pattern of behaviour' and its 'cumulative impact', with examples of relevant evidence including text messages, records of interaction with support services, witness testimonies, GPS tracking and victims' diaries.¹⁹ The challenge for the law has always been that non-physical forms of abuse are less visible than physical violence. The current lockdown presents risks that patterns of coercive and controlling behaviour will become even less visible. The restrictions on day-to-day movement could result in abuse becoming more confined to the home, with the perpetrator changing the strategies used to exert power and control. In response, practical measures are emerging to support victims' collection of evidence. The 'Bright Sky' app offers a secure platform on which victims can log diary entries, without these being saved on the device itself.²⁰ Police forces are encouraging neighbours and workers visiting houses to be alert to domestically abusive behaviour.²¹

¹⁵ Office for National Statistics, 'Domestic Abuse and the Criminal Justice System, England And Wales: November 2019,' 25 November 2019, 26.

¹⁶ Charlotte Barlow, Kelly Johnson, Sandra Walklate and Les Humphreys, 'Putting Coercive Control into Practice: Problems and Possibilities,' (2020) 60 *British Journal of Criminology* 160.

¹⁷ *Ibid*, 168.

¹⁸ Women's Aid, 'Survivors Say Domestic Abuse is Escalating Under Lockdown,' 28 April 2020, <https://www.womensaid.org.uk/survivors-say-domestic-abuse-is-escalating-under-lockdown/>.

¹⁹ Crown Prosecution Service, 'Coercive or Controlling Behaviour in an Intimate or Family Relationship,' last modified 30 June 2017, <https://www.cps.gov.uk/legal-guidance/coercive-behaviour-intimate-or-family-relationship>. See also, Home Office, 'Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework,' December 2015.

²⁰ <https://www.hestia.org/brightsky>, accessed 12 June 2020.

²¹ See for example, Cumbria Police, 'Police Appeal to Neighbours and Workers to Help Victims of Domestic Abuse,' 25 March 2020, <https://www.cumbria.police.uk/News/News-Articles/2020/March/Police-appeal-to-neighbours-and-workers-to-help-victims-of-domestic-abuse.aspx>.

The evidential problem is even more acute given that research has highlighted pre-existing problems with police responses to coercive and controlling behaviour. The findings from Barlow et al's study into the use of the coercive control offence by one police force in the North West of England, based on data from 2016-17, highlighted a series of failings.²² In common with the national picture, use of the offence was limited, due in part to 'missed opportunities' to identify and investigate patterns of coercive and controlling behaviour.²³ Police officers were found to focus on specific incidents and place their emphasis on the existence of 'hard' evidence, such as photographic evidence, which in turn impacted case outcomes.²⁴ Victims' accounts were minimised, seen as 'one word against the other', and 'unverifiable' or 'weak' as a result.²⁵ Cases involving physical violence were 'significantly more likely' to be classified as high risk than those without.²⁶

The conclusion from this research conducted prior to the current pandemic was that further funding and training are needed to support the implementation of the offence at 'all points of contact within the criminal justice process – from call handlers, up to and including the Crown Prosecution Service'.²⁷ As awareness grows of the long-term economic impact of the pandemic, the risk now is whether responses to coercive and controlling behaviour are likely to improve during a period of increased budgetary constraints. The challenge, moving forward, is going to be to maintain pressure on the importance of funding and training at a time when resources are likely to be limited. Training and guidance to achieve a shift from the focus on specific incidents to patterns of abusive behaviour must also take into account the impact of the lockdown measures on the evidence available. The criminal offence is one arm of the law's protection against domestic abuse, and we turn now to the accessibility of civil law remedies and family proceedings in the light of the shift to remote hearings.

IV. Access to Civil Law Protection and Family Proceedings – the Shift to Remote Hearings

The Family Law Act 1996 houses two principal remedies: occupation orders and non-molestation orders, both of which are accessed through the family court. Occupation orders can remove the perpetrator from the home and the surrounding area.²⁸ Non-molestation orders prohibit the perpetrator from 'molesting' the victim.²⁹ Prior to the lockdown, remote hearings were not a regular occurrence within family justice proceedings. In response to Covid-19, access to these remedies, along with other family proceedings, moved online at unprecedented speed.

²² The data were collected in two stages between January 2016 and June 2017. See, Barlow, Johnson, Walklate and Humphreys, 'Putting Coercive Control into Practice,' (n. 16) 164.

²³ Ibid, 172. See also, Andy Myhill and Kelly Johnson, 'Police Use of Discretion in Response to Domestic Violence,' (2016) 16(1) *Criminology & Criminal Justice* 16; Amanda L. Robinson, Gillian M. Pinchevsky and Jennifer A. Guthrie, 'A Small Constellation: Risk Factors Informing Police Perceptions of Domestic Abuse,' (2018) 28(2) *Policing & Society* 200.

²⁴ Barlow, Johnson, Walklate and Humphreys, 'Putting Coercive Control into Practice,' (n. 16) 170.

²⁵ Ibid.

²⁶ Ibid, 171. See also: Cassandra Wiener, 'Seeing What is "Invisible in Plain Sight": Policing Coercive Control,' (2017) 56(4) *The Howard Journal of Crime and Justice* 503-504.

²⁷ Barlow, Johnson, Walklate and Humphreys, 'Putting Coercive Control into Practice,' (n. 16) 175. See also, Charlotte Bishop and Vanessa Bettinson, 'Evidencing Domestic Violence, Including Behaviour that Falls Under the New Offence of "Controlling or Coercive Behaviour",' (2018) 22(1) *The International Journal of Evidence & Proof* 23.

²⁸ Family Law Act 1996, ss 33-40.

²⁹ Ibid, s 42.

To cope with this shift, HM Courts & Tribunals Service issued a list of court priorities. The granting of non-molestation and occupation orders remained within the family court's 'work that must be done'.³⁰ The expectation was that hearings would take place primarily via video or telephone. It is now anticipated that it will be the end of 2020 or Spring 2021 before the family justice system will return to anything resembling normality.³¹ As a result, we can expect some expansion of cases heard remotely.³² Whilst remote hearings are likely to remain the most common, all family courts will be open, at significantly reduced capacity, by early July.³³ There will be increased scope, therefore, for cases to be heard fully in person, and others through a 'hybrid' arrangement, in which some parties attend in person and others remotely.³⁴

This is not the roll-out of a new system that has had the benefit of robust prior testing. The family court is having to find its way in intensely challenging circumstances against the backdrop of an already unmanageable pre-Covid caseload.³⁵ Guidance has been issued to support the navigation of these challenges.³⁶ In response to the 'overwhelming view of the judiciary and legal profession', further 'directive or proscriptive' case management guidance will not be issued.³⁷ Instead, we will see 'bespoke case management decisions' being taken on a 'case by case basis'.³⁸

The shift to remote hearings presents opportunities to review the experience of victims within the family justice system, but also significant immediate risks. We are at a stage when the data are only just emerging on the operation of the remote family court. At the request of the President of the Family Division, the Nuffield Family Justice Observatory ('FJO') conducted a rapid review of the use of remote hearings within family justice in response to Covid-19.³⁹ The consultation ran from 14 to 28 April 2020, with over 1,000 responses received.⁴⁰ The vast majority of responses were from professionals working within family justice.⁴¹ Data on the experience of remote hearings from parents' and family members' perspectives are being collected by the Transparency Project through an online

³⁰ HM Courts & Tribunals Service, 'Summary of Family Business Priorities Previously Agreed with the President of the Family Division: 21 April 2020,' last accessed 12 June 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880307/Ops_update_-_family_court_business_priorities_21_April_2020_FINAL.pdf.

³¹ Sir Andrew McFarlane, 'The Family Court and COVID 19: The Road Ahead,' 9 June 2020, <https://www.judiciary.uk/announcements/the-family-court-and-covid-19-the-road-ahead/>, para. 5.

³² *Ibid.*, paras. 11 and 17.

³³ *Ibid.*, para. 19.

³⁴ *Ibid.*, para. 14.

³⁵ *Ibid.*, para. 42.

³⁶ Sir Andrew McFarlane, 'COVID 19: National Guidance for the Family Court 19th March 2020,' 19 March 2020, https://www.judiciary.uk/wp-content/uploads/2020/03/Presidents-Guidance_Covid-19-2.pdf; Mr Justice MacDonald, 'The Remote Access Family Court: Version 4,' 16 April 2020, <https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-4-Final-16.04.20.pdf>.

³⁷ Sir Andrew McFarlane, 'The Family Court and COVID 19,' (n. 31) para. 16.

³⁸ *Ibid.*

³⁹ Nuffield Family Justice Observatory, *Remote Hearings in the Family Justice System: A Rapid Consultation* (London: Nuffield Family Justice Observatory, 2020).

⁴⁰ *Ibid.*, 2 and 5.

⁴¹ Only 3% of respondents were parents: *Ibid.*, 5.

survey.⁴² The sample size is small, with 50 responses received by 28 April.⁴³ Fifty-eight per cent of respondents were parties to proceedings, with the remaining respondents ‘supporters’ of those parties.⁴⁴

The data collected to date have already made an important contribution to understanding the operation of the remote family court, despite their collection under intense time pressure. We do not yet, however, have comprehensive data on victims’ experiences of the new system. Understanding victims’ experiences is further complicated by the lack of a detailed breakdown in the findings to date of the specific hearings to which the findings relate. Work is needed as a matter of urgency to continue to invest in understanding these experiences. The analysis below is based on what is known now, drawing out three access to justice themes that should inform future research: safety; participation; and confidentiality. Current findings, and the attendant access to justice concerns, suggest that best practice guidelines to support the conduct of hearings involving domestic abuse allegations might become necessary, both to ensure consistency and that victims are fully supported to participate within proceedings, even if these are not ‘directive or proscriptive’.

a) Safety

There are severe restrictions on victims’ capacity to access legal proceedings when living in the same house as the perpetrator, and attendant safety risks. As discussed above, controlling access to internet and telephone usage are strategies used by perpetrators to exert power and control. If the hearing goes ahead, some victims will face the prospect of having to conduct that hearing in the same physical space as the perpetrator. It is encouraging that the President of the Family Division has given general guidance that lay parties should be supported to engage with the remote court outside of their homes, such as in solicitors’ offices,⁴⁵ but particular support is needed for the increased number of self-representing litigants, who have to navigate the system without legal assistance.

In the cases in which the perpetrator is not living in the same physical space as the victim, remote hearings might represent some improvement on previous practice. Concerns about the inadequacies of court facilities in protecting victims of domestic abuse in civil and family proceedings long pre-dated the pandemic.⁴⁶ Small trials took place last year to allow victims applying for domestic abuse injunctions to appear by video link, to save having to face the perpetrator in person in court, with positive results.⁴⁷ Some respondents to the FJO’s consultation also reported positive experiences of obtaining non-molestation orders remotely, including accessing ex-parte non-molestation orders by telephone helping to

⁴² Transparency Project, ‘Justice on the Altar,’ 29 April 2020, <http://www.transparencyproject.org.uk/justice-on-the-altar/>.

⁴³ Ibid.

⁴⁴ Ibid. These ‘supporters’ included lawyers, lay advocates, McKenzie friends and family members. Twenty-two cases concerned non-financial remedy private law proceedings and three concerned domestic abuse.

⁴⁵ Sir Andrew McFarlane, ‘The Family Court and COVID 19,’ (n. 31) para. 28.

⁴⁶ For example, Coy et al., *Picking Up the Pieces*, (n. 12) 43-44; Jenny Birchall and Shazia Choudhry, ‘What About My Right Not to be Abused?’ *Domestic Abuse, Human Rights and the Family Courts* (Bristol: Women’s Aid, 2018), 8.

⁴⁷ ‘Press Release: Video Hearings Tested in Domestic Abuse Cases,’ 9 May 2019, <https://www.gov.uk/government/news/video-hearings-tested-in-domestic-abuse-cases>. Six cases were held using the video link. Independent evaluation is ongoing.

avoid the distress of attending court in person and the need to find childcare at the time of the hearing.⁴⁸

Remote hearings, however, also present new opportunities for perpetrators to use the hearings as a means to perpetrate coercive control.⁴⁹ There will, therefore, be new challenges for judges in identifying abusive behaviour when conducting hearings remotely, with no capacity to observe the physical behaviour of the parties when the hearing takes place via telephone and only limited capacity to do so through video. There will also be major challenges for judges in understanding victims' experiences of abuse under intense time pressure. The President of the Family Division has been candid that, in order to respond to caseloads, there will have to be a 'very radical reduction in the amount of time that the court affords to each hearing'.⁵⁰ The challenge here is that coercive and controlling behaviour cannot be condensed into a few select incidents; time is needed to unpick the complex web of abusive behaviour. These challenges are relevant not only to victims' safety but also their capacity to participate within hearings.

b) Participation

To date, most family law hearings appear to be taking place by telephone.⁵¹ Work is ongoing on the use of video platforms.⁵² Some alarming examples were given in the FJO's consultation that suggest that victims are not always being supported to participate fully in proceedings. Examples included victims being left on phonelines with the perpetrator being the only other person on the call,⁵³ and the risk of perpetrators recording proceedings,⁵⁴ despite the prohibition of recording remote hearings.⁵⁵

Broader concerns exist also about victims' capacity to give their best evidence when they are at home on their own during the hearing, with the perpetrator able to see and/or hear them through the telephone/video link.⁵⁶ Inequalities in the location of the parties is also significant and suggests the need for caution before proceeding with 'hybrid' hearings. Examples were given within the FJO's consultation of the victim having to participate in the hearing from home, but the perpetrator being able to be in the same location as his lawyers.⁵⁷ 'Technical workarounds' are developing to keep an open line between lawyer and client during the hearing,⁵⁸ but this does not overcome the differences in what the judge and the parties can see when some are attending in person and others remotely. The challenges for victims navigating remote hearings without a lawyer will be even more acute. Ensuring access to court papers for litigants who are either unrepresented, or who are attending the hearing in a different physical space to their lawyer, is also a significant issue that is likely to shape victims' participation in proceedings.

⁴⁸ Family Justice Observatory, *Remote Hearings in the Family Justice System*, (n. 39) 14 and 47.

⁴⁹ *Ibid*, 16.

⁵⁰ Sir Andrew McFarlane, 'The Family Court and COVID 19,' (n. 31) para. 43.

⁵¹ Within the Transparency Project's survey, 73% of hearings were conducted using this platform: Transparency Project, 'Justice on the Altar' (n. 42).

⁵² Sir Andrew McFarlane, 'The Family Court and COVID 19,' (n. 31) paras. 22-26.

⁵³ Family Justice Observatory, *Remote Hearings in the Family Justice System*, (n. 39) 14.

⁵⁴ *Ibid*, 15-17.

⁵⁵ See further, Mr Justice MacDonald, 'The Remote Access Family Court,' (n. 36) para. 5.20.

⁵⁶ Family Justice Observatory, *Remote Hearings in the Family Justice System*, (n. 39) 16-17.

⁵⁷ *Ibid*.

⁵⁸ Sir Andrew McFarlane, 'The Family Court and COVID 19,' (n. 31) para. 27.

c) Confidentiality

Hearings taking place remotely also raise important questions about confidentiality, and in particular how judges can police who is in the room at the time of the hearing. The majority of respondents to the Transparency Project's survey did not know who else was present during the remote hearing.⁵⁹ In addition, whilst not having to find childcare was identified as a strength of remote hearings by some within the FJO's consultation,⁶⁰ the presence of children in the home at the time the hearing takes place runs the risk that they will hear the proceedings, including accounts of domestic abuse.⁶¹

V. Conclusion

Covid-19 has created a fertile environment for perpetrators to exert power and control, and lockdown measures restrict victims' opportunities to access support. The pandemic is bringing into sharper focus the tensions within the existing legal framework in responding to this challenge. The 'coercive control' offence has been a crucial development in recognising patterns of abusive behaviour, but its effectiveness is undermined by problems with implementation. The shift to remote hearings provides new opportunities to review how victims' experiences of the family justice system can be improved, but also raises new challenges, with serious access to justice concerns. What is urgently needed is further data on victims' experiences of the remote court system, as well as monitoring how domestic abuse can be evidenced in the light of Covid-19. Access to legal advice and support will be more crucial than ever for victims navigating the court system, underlining once more the critical importance of reviewing the legal aid threshold. Best practice guidelines on the conduct of remote hearings in domestic abuse cases might also prove necessary, in particular as understanding develops of how victims can be best supported. Longer term, pressure must be maintained on the importance of funding and training for those on the frontline, if any transformational shift in the treatment of domestic abuse is to be achieved.

⁵⁹ Transparency Project, 'Justice on the Altar' (n. 42).

⁶⁰ Family Justice Observatory, *Remote Hearings in the Family Justice System*, (n. 39) 47.

⁶¹ *Ibid*, 15-16.

Love of Video Mediation in the Time of Covid-19: An Initial Insight into Benefits and Challenges

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Abstract

Mediation's claim to legitimacy is based largely on its promise to integrate responsiveness to personal needs and values into the process of dispute resolution, offering "personalised justice" based on human needs. As face-to-face mediation sessions are not possible during the Covid-19 outbreak, mediation service providers are offering video mediation services. Before the onset of the pandemic, video mediation was used on a much smaller scale. Whilst this article highlights the benefits of video mediation it also identifies challenges that must be faced when seeking to incorporate video mediation as an integral part of service provision post-pandemic. It emphasises that if mediation is to continue to provide high quality personalised justice it is vital that practitioners, when considering the appropriate medium for each mediation, give thorough consideration to a wide range of factors. Such factors include parties' need to maintain or reduce distance (geographical and psychological), and the rise of a new form of vulnerability that hinders less IT literate persons' access to alternative dispute resolution mechanisms. The author includes references to her own personal experience of conducting video mediations in the United Kingdom (UK) and recommends the way forward for optimal integration of videoconferencing into mediation practice.

I. Introduction

In the same way that court hearings have been conducted virtually as a result of the Covid-19 outbreak, mediators have also been offering online mediation sessions, using mainly video platform mediations. This article argues that although this shift was forced and sudden, it offers policy making and mediation practice an exceptional opportunity to reconsider service provision and find ways to integrate videoconferencing into mediation service provision post pandemic. However, the transition to video mediation, can only be capitalised upon if its impact on mediation's promise to provide access to "personalised" justice is explored.

This article examines mediation's ability to respond to a range of personal needs, interests and values which allows the process to extend beyond the examination of legal rights, and it provides initial insights into video mediation's potential to fulfill mediation's promise. It highlights the lack of attention paid to video mediation by policy makers and the need for research into video mediation's potentials to provide access to personalised justice. It also identifies some key benefits of video mediation and underlines the crucial importance for mediation parties to be comfortable in engaging with technology if they are to use videoconferencing for the process. This is because mediation requires parties to progressively deepen their dialogue and open up about personal needs and interests.

The rise of a new form of vulnerability in mediation - digital exclusion, is also highlighted.¹ The article cautions that in order to take advantage of what video mediation has to offer, mediators must carefully weigh a combination of factors for each individual case.

II. Background to Mediation: Personalised Justice as Mediation's Promise

Mediation is a key form of alternative dispute resolution (ADR), the primary form of dispute resolution in the common law world.² Mediation is practiced in various styles, however, mediators are most commonly trained in the facilitative model.³ When facilitative mediation (hereinafter referred to as "mediation") is practiced appropriately, the mediator is an impartial third party who does not make suggestions, give legal advice, or exert pressure to reach a settlement. Rather, the mediator facilitates the parties' negotiation, helping them move beyond their stated financial and/or legal positions, exploring their underlying concerns, needs and interests.

Mediation is often described as an "art".⁴ The artistic aspect of the mediator's practice captures the intangible, intuitive and unpredictable angle of their work.⁵ A key to a successful mediation involves the mediator connecting with the parties on a deep and empathic level and skillfully guiding them through a powerful and challenging process of exploration, which, if successful, leads to parties' better understanding of their conflict. The selection of the right communication channel for mediation is crucial to make the most of what mediation offers.

Mediation's greatest promise is offering personalised or "individualised justice",⁶ i.e. a form of justice that is responsive to the needs of the parties and what is fair to them, as opposed to the strictly regulated, bureaucratic court procedure that offers legalised justice, i.e. "justice according to the law".⁷ Parties' experience of empowerment, self-determination and control over the outcome overarch the process of mediation. These have been found to induce parties' perceptions of procedural justice and better acceptance of the outcome.⁸ This highlights the importance of party control over choice of the type of mediation and of the communication channel used in order to allow for the highest possible quality of personalised justice.

III. Online Mediation and Where We Have Got To

Initially, mediation was conducted in in-person face-to-face sessions. With the development of the internet, however, online forms of mediation and ADR, i.e. online

¹ JUSTICE, 'Preventing Digital Exclusion from Online Justice', April 2018, 4, <https://justice.org.uk/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf>.

² Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and The Internet of Disputes*, (OUP, 2017), 44.

³ Jonathan Dingle and John Septon, *Practical Mediation: A Guide for Mediators, Advisers, Lawyers, and Students* (Law Brief Publishing, 2017), 19.

⁴ For example, Bennett D. Mark and Scott Hughes, *The Art of Mediation 2nd* (NITA: Notre Dame, IN, 2005), 3.

⁵ Donald T. Saposnek, 'The Art of Family Mediation', (1995) 11(5) *Mediation Quarterly* 5.

⁶ Carrie Menkel-Meadow, 'Practicing in the Interests of Justice in the Twenty-First Century: Pursuing Peace as Justice', (2001-2) 70 *Fordham Law Review* 1761, 1769.

⁷ Richard Susskind, *Online Courts and the Future of Justice* (Oxford, UK: Oxford University Press, 2020), 72.

⁸ Nancy A Welsh, 'Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories', (2004) 54(1) *Journal of Legal Education* 52.

dispute resolution (ODR), have developed. At first, ODR systems focused on handling disputes that arose in e-commerce using text-based communication methods online. However, the development of technology and the internet resulted in ODR's growing use to handle conflict in a wide variety of areas, and the use of more developed means, e.g. videoconferencing. Whilst the original idea was to "fit the forum to the fuss"⁹, ODR and online video mediation have been increasingly offered as a convenient "equivalent" to face-to-face mediation sessions. However, this article cautions that attributing disproportionate weight to convenience and/or blurring the distinction between face-to-face and online video services when advertising mediation may jeopardise the quality of personalised justice.

a) Video mediation as access to justice during the pandemic

Understandably, the coronavirus pandemic resulted in a surge of mediations conducted via videoconferencing as face-to-face encounters had become impossible. For example, whilst UK Mediation, a UK-based mediation service provider, generally conducts approximately 10% of their caseload using videoconferencing, due to the social distancing measures and lockdown they reported a threefold increase in their online video mediations.¹⁰ Further, the Family Mediators Association, a membership organisation for family mediators in the UK, at the time of the lockdown transitioned to offering mediation information and assessment meetings (MIAM) and full mediations through videoconferencing.¹¹ This is an important prerequisite to maintaining access to justice for divorcing couples in two ways: (1) as section 10 of the Children and Families Act 2014 makes it compulsory for individuals to attend a MIAM before making an application to the court, MIAMs through videoconferencing maintain disputants' access to justice through the courts; (2) should the disputants be open to mediation they can get access to the process and therefore avoid litigation. In this sense, online video mediation allows mediators to remain "gate-openers"¹² to the justice system in the extraordinary times of the pandemic. However, this article highlights that, when life returns to "normal", it is essential that mediation service providers do not automatically revert to online mediation or simply return to face-to-face sessions but skillfully integrate videoconferencing into their practice.

b) Transitioning from online to face-to-face and back: Why is this important now?

There are at least three reasons why it is particularly timely to consider the transition between the different methods of mediation service provision. Firstly, the only way to benefit from the challenging forced shift to video mediation is if mediators pause, reflect and carefully redesign their service delivery, taking into account their own and their clients' lived experience of face-to-face mediation and its online counterpart. Their decisions need to be monitored and reconsidered in the light of the findings of empirical research that has yet to have been conducted.

⁹ Frank E. A. Sander and Stephen B. Goldberg, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure', (1994) 10 *Negotiation Journal*, 49.

¹⁰ UK Mediation, 'Re:connect: The Online Mediation,' video, <https://ukmediation.net/mediation-services/reconnect-online-mediation-services/>, accessed 10 June 2020.

¹¹ Family Mediators Association, 'COVID-19 Update', <https://thefma.co.uk/>, accessed 29 April 2020.

¹² Lisa Parkinson, 'The Place of Mediation in the Family Justice System', (2013) 25 *Child & Family Law Quarterly*, 205.

Secondly, finding ways to select the best communication channel for each mediation may become more important than ever as the side-effect of the range of preventative practices adopted to protect physical health are predicted to bring about severe economic recession and downturn in business and family relationships. Mediation, if used appropriately, can help repair these relationships. As in China the number of divorce claims rose significantly after over a month of stay-at-home measures,¹³ similar increase can be expected in the Western world, because the combined impact of the isolation, the closure of schools, business uncertainties and layoffs which impose great strain on families. A growing number of commercial disputes seems inevitable, e.g. in the service economy due to cancellation of services to consumers, and in case of commercial contracts due to the unwillingness or inability of one party to fulfil its contractual obligations. Further, a survey that examined the six largest UK property management firms and reported that 25% of rents and 31% of service charges that were due for payment in March 2020 remained outstanding after 49 days,¹⁴ foreshadows a growing number of disputes in the property market. Resolving these disputes will be vital for economic recovery and mediation could play a critical role in reinstating or healing these relationships leading to a greater and speedier economic recovery. This will require the selection of the optimal communication channel for each dispute, maximising mediation's potential to provide good quality justice.

Thirdly, during the pandemic, policy making has so far paid too little attention both to mediation and to whether it is conducted in-person or online. While design thinking based on empirical research is unfeasible in the current circumstances, this will become essential in a few months' time.

The Coronavirus Act (the Act) came into force on 25 March 2020, introducing new laws mainly in order to protect public health. Schedule 25, section 85 of the Act allows for court hearings to take place either using video or solely audio facilities and section 89 (1) of the Act stipulates that the Act will expire in 2 years' time. Whilst the Act does not mention ADR, it has implications for mediation due to mediation's embeddedness in civil procedures¹⁵ as broadly defined.

Importantly, JUSTICE, a law reform and human rights organisation in the UK, in paragraph 27 of its briefing on the Coronavirus Bill argues that non in-person hearings are only appropriate for the emergency situation caused by the pandemic. It notes that at all times 'the presumption should be that hearings will be conducted in person'; videoconferencing should be used only when in-person hearings are unattainable and it is in the interest of justice that the hearing continues. JUSTICE also states that the emergency legislation should not be in place longer than the emergency itself,¹⁶ which is estimated to be considerably shorter than 2 years. This paper posits that the presumption of face-to-face sessions would benefit also the mediation arena. Further, the identification of circumstances that establish the need for the use of video mediations is also necessary and this task should be carried out well before the expiration of the above mentioned 2-

¹³ Cristina Mesa Vieira, Oscar H. Franco, Carlos Gomez Restrepo and Thomas Abel T, 'COVID-19: The forgotten priorities of the pandemic,' (2020) 136 *Maturitas*, 40.

¹⁴ 'COVID-19 Crisis: Minimal Rise in Collection Rates of Quarterly Rent and Service Charge Payments', Remit Consulting, 20 May 2020, <https://www.remitconsulting.com/blog>.

¹⁵ For example, paragraph 8 of the (CPR) Practice Direction- Pre-Action Conduct and Protocols 2015.

¹⁶ JUSTICE, 'Briefing on Coronavirus Bill', March 2020, paras. 6, 8(ii), <https://justice.org.uk/wp-content/uploads/2020/03/JUSTICE-briefing-Coronavirus-Bill.pdf>.

year period, as soon as it is possible. This will facilitate a more consistent approach to mediation service provision and protect disputants' access to quality justice.

Whilst organisations that specialise in mediation service provision have provided their mediators with guidance on conducting video mediations and mediators have been exchanging their experiences using various platforms, in the legal arena mediation has received only brief coverage in protocols and guidelines issued on conducting dispute resolution procedures during the Covid-19 outbreak in the UK. For example, the comprehensive guide issued by Outer Temple Chambers to its members makes some technical recommendations and warns that client communication is more difficult to foster remotely. It goes on to argue that additional separate meetings need to be organised between counsel and the client before and after mediation.¹⁷ However, whilst this is of great importance it is only a starting point to explore the differences between face-to-face and video mediation. Guidance issued by the courts is also limited. For example, the presidential guidance for the Employment Tribunals in England and Scotland makes only a fleeting reference to mediation stating only that judicial mediation may take place via either video or telephone conferencing.¹⁸ The 'FAQ arising from the Covid-19 pandemic' document does not provide further details but makes telephone conferencing the primary tool for mediation.¹⁹ As mediation practice draws on interdisciplinary perspectives including legal, psychological, and organisational considerations the guidance issued should reflect such interdisciplinarity and differences. This paper argues that for each practice area, e.g. family, commercial mediation, interdisciplinary expert panels comprising mediators and mediation specialists from various backgrounds should be involved when creating guidance on the choice of communication channel. A dialogue between experts from different disciplines would help balance various perspectives when considering the advantages and drawbacks of different communication channels for mediation.

IV. Video Mediation: An Initial Consideration of Benefits and Challenges

To date, little research is available that addresses specifically video mediation and its distinction from in-person face-to-face mediation. The literature most commonly addresses ODR as a whole with greater focus on text-based forms of online mediation. However, mediation via videoconferencing shares some of the advantages of other methods of ODR.

a) Why mediate using videoconferencing?

Video mediation has a number of undisputable advantages. Whilst allowing parties to see each other, videoconferencing helps participants:

- ✓ take part in mediation from the safety and comfort of their homes;
- ✓ participate in mediation even if there is significant geographical distance between the parties and/or the mediator, or if parties live in remote areas;
- ✓ save time and money when accessing mediation.

¹⁷ 'The Virtual Conduct of Litigation during COVID-19', Outer Temple Chambers, 9 April 2020, <https://www.outertemple.com/2020/04/the-virtual-conduct-of-litigation-during-covid-19-2/>.

¹⁸ Paragraph 13 of the 'Presidential Guidance in Connection with the Conduct of Employment Tribunal Hearings During the COVID-19 Pandemic', Presidents of Employment Tribunals (England and Scotland), 18 March 2020, <https://www.judiciary.uk/wp-content/uploads/2015/03/Presidential-Guidance-ET-Covid19.pdf>.

¹⁹ Paragraph 8 of the 'FAQs Arising From the Covid-19 Pandemic', The Employment Tribunals in England and Wales and Scotland, Presidents of Employment Tribunals (England and Scotland), 3 April 2020.

These commonly mentioned benefits of video mediation facilitate parties' access to personalised justice. In some of these cases video mediation is the only option, e.g. landlord-tenant disputes when the parties live in different continents, in others it helps all individuals meaningfully participate in the virtual mediation whose input is important. For example, young people may find interactions online more tolerable than sitting through a face-to-face mediation session in an unfamiliar and more impersonal environment. This highlights the potentials of online video mediation for example in the case of divorce, family conflict, and for mediation in the area of special educational needs and disabilities (SEND).²⁰

Mediation via videoconferencing also helps with access to personalised justice when

- ✓ parties prefer to and/or it is in their best interest to maintain distance;
- ✓ due to reasons of security or safety a face-to-face encounter unfeasible.

Parties may prefer to maintain distance because individuals show different levels of tolerance to conflict. People that are conflict avoidant make every effort to prevent conflict and, if it exists, avoid it or disengage as quickly as possible, whilst others are more comfortable with conflictual interactions.²¹ People that feel stronger than average anxiety about confronting the other party face-to-face may only be willing to mediate when the parties are physically separated. Physical separation often helps conflict avoidant individuals fully engage in a search for win-win solutions rather than avoiding the conflict or concede, making video mediation an excellent tool in enabling access to good quality personalised justice for these individuals. Further, individuals who are more able to tolerate conflictual interactions but are involved in a conflict characterised by power imbalance, may also feel calmer and safer when participating in video mediation, a benefit of text-based online mediation.²²

In relation to facilitating safety, videoconferencing enables dialogue between parties when face-to-face communication is literally impossible, e.g. peace processes when it is not possible to meet due to security and safety concerns.²³

b) Face-to-face and online video mediation: Is there a difference?

The instinctive assumption that video-based and face-to-face communication are largely the same poses a great threat to the quality of personalised justice offered in mediation. Mediators' and parties' better understanding of the differences and similarities of the two types of mediations are essential for choosing the optimal communication channel for the particular mediation. For example, parties to a conflict who would be open to face-to-face mediation may decide to opt for video mediation, if that is offered or recommended, as it is more convenient. However, this way they will lose out on the benefits that a "rich" in-person encounter offers compromising on the quality of justice. On the other hand, parties

²⁰ Margaret Doyle, 'Going Online, in a Hurry', UK Administrative Justice Institute, 10 April 2020, <https://ukaji.org/2020/04/10/going-online-in-a-hurry/>.

²¹ Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (San Francisco, CA: Jossey-Bass, 2000), 30-32.

²² Rebecca Brennan, 'Mismatch.com: Online Dispute Resolution and Divorce', (2011) 197(3) *Cardozo Journal of Conflict Resolution* 214-216.

²³ Melissa Conley Tyler and Susan R. Raines, 'The Human Face of On-line Dispute Resolution', (2006) 23(3) *Conflict Resolution Quarterly* 336.

that are not willing or able to take part in mediation face-to-face, may lose access to personalised justice if video mediation is not offered or recommended.

Whether online and in-person, in order to conduct a successful mediation, the mediator needs to build confidence and have good process skills. As their main confidence-building characteristic, the mediator needs to relate to all, convey a sense of caring and have chemistry with both parties.²⁴ Further, an interview study on mediation parties' lived experience has revealed that mediation is perceived by parties primarily as a learning process in which the mediator skilfully works on building a bridge between the sides. Participants felt that this work requires the mediator's understanding of parties' personalities.²⁵ Face-to-face communication allows both the parties and the mediator to experience all aspects of verbal and non-verbal communication in all their richness. Therefore, having the parties in the room helps achieve an in-depth encounter, creating space for connection and learning. In my own experience with using videoconferencing for individual and joint mediation sessions successfully, encounter, connection and learning can be achieved, however, *understanding* which is at the core of personalised justice, comes less readily. Therefore, bridging the difference between the parties requires a little more work.

As for process-skills, both online and face-to-face, a successful mediator is patient but persistent and they should never quit.²⁶ An obvious and commonly addressed difference is the necessity that the mediator builds up confidence in the use of technology and supports parties if things go wrong. The guidelines issued by the International Council for Online Dispute Resolution that specifically address video mediation²⁷ are a useful source regarding the technological aspect of the process. However, other angles of process-skills require more attention including exploration through empirical research.

The process in video mediation is essentially the same as in-person. However, when mediating using video, holding preparatory individual sessions with both parties prior to the joint mediation session greatly helps build rapport and ease parties into virtual interactions. Therefore, this is good practice even when the mediator normally wouldn't choose to conduct an individual meeting with the parties. Further, whilst the mediator tools stay the same in video mediation, as mediators use well-crafted questions, active listening, and rewording techniques, in my own experience, mediators often need to check more with parties to what extent they have embraced all aspects of what has been said. This is to build dialogue, deal with strong emotions and/or help parties overcome resistance.

Another unexplored difference between face-to-face and video mediation is the impact of the different information received through the two channels on the human brain. As the working (short-term) memory has limited capacity the conscious activity of the brain is also limited.²⁸ The cognitive load on the brain increases with videoconferencing since several features of video-based communication consume conscious capacity. Further, whilst in

²⁴ Stephen B. Goldberg and Margaret L. Shaw, 'The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three', (2007) 23 *Negotiation Journal* 398.

²⁵ Timea Tallodi, *How Parties Experience Mediation: An Interview Study on Relationship Changes in Workplace Mediation* (Switzerland: Springer, 2019), 246, 132.

²⁶ Goldberg and Shaw, 'The Secrets,' (n. 24) 398.

²⁷ 'ICODR Video Mediation Guidelines', The International Council for Online Dispute Resolution, April 2020, www.icodr.org.

²⁸ Stewart Martin, 'Measuring Cognitive Load and Cognition: Metrics for Technology-Enhanced Learning,' (2015) 20(7-8) *Educational Research and Evaluation*, 592-598.

face-to-face communication people process emotions unconsciously and rely on non-verbal cues to make emotional judgements,²⁹ in a video conversation people have to focus and make more effort to process non-verbal cues, and they are also exposed to long stretches of constant gaze. As the combined effect of all this, the brain has to work harder in videoconferencing, which makes video mediation more tiring than a face-to-face session. This needs to be considered when deciding on the length and frequency of mediation sessions that the mediator undertakes.

Overall, the most important challenge of the mediator is handling a different non-verbal communication in video mediation. The METTA model, which addresses movement, environment, touch, tone and appearance in the mediated conversation,³⁰ is a good tool to examine the non-verbal challenges of the mediator. For example, as for movement, whilst the mediator's whole body is not visible to the parties, it is important that the mediator sits upright and is positioned towards the computer, they occasionally nod and lean forward signaling active listening, and that they are neither too far from nor too close to the webcam.³¹ The mediator also needs to work on maintaining eye-contact. This can be rather challenging as one needs to look directly into the webcam but at the same time this loses sight of the party's non-verbal cues; also, looking into the camera gives a somewhat artificial look. Eber and Thomson recommend to "drag" the video window displaying the party close to the webcam,³² however, in my experience, on numerous devices and videoconferencing platforms this is not possible. Therefore, for many mediators real eye-contact is one of the most missed aspects of face-to-face mediation.

It is clear that if mediators study the differences between video-based and face-to-face mediation and take the necessary steps, they can conduct successful mediations via video. However, not being together in one room, the parties will also miss the sight and feeling of the other party's and mediator's whole body, not getting a clear picture of their body language and micro-signals. Therefore, the above individual factors need to be weighed when considering the optimal communication channel for mediation and, in particular, when the aim of mediation is to heal a particularly fractured relationship.

c) Digital exclusion: A new type of vulnerability

Access to justice is commonly associated with access to court and the initiatives to create a cheaper, faster and simpler legal procedure.³³ As an important aim of the ADR movement was to help these efforts by promoting cheap and fast alternative methods of dispute resolution, lack of access to justice in mediation was not a dominant concern. However, with the increase of online service provision mediators and ADR specialists need to consider digital exclusion which will become a core component of the changing concept of vulnerability.

²⁹ Guido Gainotti, 'Unconscious Processing of Emotions and The Right Hemisphere,' (2012) 50(2) *Neuropsychologia* 208.

³⁰ Noam Ebner and Jeff Thomson, '@Face Value? Non-verbal Communication and Trust Building in Online Video Based Mediation', (2014) 1 *International Journal of Online Dispute Resolution* 110-111.

³¹ *Ibid*, 120-121.

³² *Ibid*, 122.

³³ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Tehcnology and the Internet of Dispute Resolution* (OUP: Oxford), 40.

Digital exclusion, when defined broadly, includes individuals without access either to the internet or to a device, or the skills, ability, confidence or motivation to use it, and individuals who rely on digital assistance (i.e. assisted digital).³⁴ Overall, more than 11 million adults lack basic digital skills in the UK.³⁵ Further, in 2019 there were 4 million adults who had never used the internet. Whilst the age gap is reducing within this group, more than half (2.5 million) of these individuals were aged 75 years and over.³⁶ In 2019, 7% of households had no access to the internet in the UK.³⁷ Importantly, digital exclusion is the most common amongst otherwise vulnerable groups, including individuals that are older, unemployed, disabled, socially isolated, or are of lower educational background.³⁸

Therefore, awareness of digital exclusion is indispensable when offering mediation services online as a complete transition to videoconferencing can deprive already disadvantaged groups of access to personalised justice. Considerations regarding the assisted digital group are vital because when participating in video mediation one needs to feel comfortable with video-based communication and technology in order to be able to become absorbed in the mediated dialogue.

V. Conclusion

Previous research has left video mediation unexplored. However, the lockdown and social distancing measures due to Covid-19 provide mediators and researchers an exceptional opportunity to test and understand the use of video mediation and its potential to provide high quality personalised justice to disputants. The questions about video mediation no longer concern its viability, but rather the suitability of a particular dispute for video mediation. To this end, this article provides an initial insight into the process in which mediation provides personalised justice, which centres on parties' gradually deepening dialogue guided by the mediator, and the benefits and challenges of video mediation in this regard. The article argues that, when life gets back to the new normal, mediators must pause, reflect and reconsider their practice in order to be able to integrate videoconferencing into their service provision. Some key factors have been outlined that require consideration by the mediator and the disputants when choosing between in-person and video mediation. Making the right choice and mastering skills necessary for video mediation will allow mediators offer high quality justice via mediation.

³⁴ JUSTICE, 'Preventing Digital Exclusion from Online Justice', April 2018, 4, <https://justice.org.uk/our-work/assisted-digital/>.

³⁵ *Ibid*, 4.

³⁶ 'Internet Users in the UK: 2019', Statistics from Office of National Statistics (ONS), May 2019, <https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2019>.

³⁷ 'Internet Access: Households and Individuals- Great Britain, 2019', Statistics from ONS, May 2019, <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2019>.

³⁸ Ellen J. Helsper and Bianca C. Reisdorf, 'The Emergence of a "Digital Underclass" In Great Britain and Sweden: Changing Reasons for Digital Exclusion', (2016) *New Media and Society*, 27.

Open Justice, Participation and Materiality: Virtual Hearings and the Court of Protection

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Abstract

There has been much discussion about the use of technology in the justice system as a result of measures introduced by the UK government to respond to the Covid-19 pandemic. In this paper I articulate my own thoughts on the use of virtual hearings in light of the pandemic, specifically focusing on their use in contexts concerning potentially vulnerable participants, such as in the Court of Protection. In doing so, I highlight a number of challenges, opportunities and reflections on how we might respond to their use. I argue that in coming to analyse the use of virtual hearings, we should focus on the extent to which open justice is secured, the material differences between the virtual and physical court hearings and the participation of those affected by proceedings.

Key words

Open justice, virtual hearings, participation, Court of Protection

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I. Introduction

The swift adoption of virtual technology across the justice system of England and Wales has been a necessary response to the measures introduced by the UK government to respond to the Covid-19 pandemic. As widely publicised, the first fully virtual Court of Protection (CoP) trial was carried out by skype in mid-March¹ and many other hearings have similarly gone ahead virtually. Posts setting out the views of lawyers, of families and their supporters, and of researchers have appeared online and research is rapidly being undertaken to evaluate how those virtual hearings impact on access to justice.²

In this paper I set out my own views on the use of virtual hearings, focusing on three main areas: open justice, the loss of materiality caused by virtual justice and participant involvement in virtual hearings. These three issues must, I suggest, form the basis of rigorous and independent analysis of the use of virtual hearings post-pandemic. I specifically explore these issues in the context of the jurisdiction of the CoP, highlighting a number of challenges, opportunities and reflections.

a) Virtual hearings: A response to a pandemic or the future of justice?

Before I set out my reasons for focusing on the CoP, some context about the use of virtual hearings is required. What impact does a virtual hearing have on justice? Do virtual

¹ Catherine Baski, 'First all-skype trial tests crisis working at the Court of Protection', *The Law Gazette*, 19 March 2020, <https://www.lawgazette.co.uk/practice/first-all-skype-trial-tests-crisis-working-at-cop-/5103541.article>, accessed 6 May 2020.

² For example, research by the Civil Justice Council, 'Rapid consultation: The impact of COVID-19 measures on the civil justice system', 1 May 2020, <https://www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/>, accessed 6 May 2020.

hearings change the outcome of the case? Does virtual justice provide an equivalent experience for participants? Are particular participants disadvantaged by virtual hearings compared to others? How do we maintain the majesty and solemnity of the legal process through virtual hearings? These are all questions that were raised about virtual hearings even before the pandemic. Her Majesty's Courts and Tribunals Service (HMCTS) in England and Wales has been involved in a major court reform programme since September 2016³ and a central part of this was the incorporation of technology.⁴ Virtual hearings have been a long time coming and are the inevitable future of justice:⁵ there is greater flexibility of process; no travel time or costs associated with attending a distant court; they are arguably less intimidating; and, possibly more comfortable for participants as they dial in from their own home. Prior to Covid, though, the pace with which we were moving towards virtual justice was, relatively speaking, slow and measured.

Given the scale of the change involved in the movement to virtual justice, the cautious approach was the right one. However, the Covid-19 pandemic has changed all of that. Notwithstanding some opposition to the use of remote hearings,⁶ in my view it was the right response for the courts to move to the virtual realm. The alternative would have been to either stop all but the most urgent hearings completely, or participants in proceedings would have been placed at risk of contracting the virus by continuing with in person hearings. Neither of these would seem to be an appropriate response in the circumstances. The judiciary have, commendably, been flexible and responsive to the needs of different participants.⁷ The challenge, now, is to ensure that the movement towards virtual justice because of the pandemic does not undermine the careful and rigorous analysis of the potential impact of virtual hearings on the justice system.

b) The Court of Protection

I now turn to the context for my discussion in this paper. The CoP is a court with a lengthy history but now deals with disputes that arise under the Mental Capacity Act 2005 (MCA). These cases often concern vulnerable participants (referred to as "P") and section 2 MCA requires 'an impairment of, or disturbance in the functioning of, the mind or brain' as part of the test for a finding of incapacity, highlighting the complex issues at the intersection of disability, vulnerability and human rights. I focus on this court for two main reasons. First, as the CoP has been the focus of my research on access to justice and courts.⁸ I am aware of the many challenges that will be posed by virtual hearings in this context. From the wide

³ HM Courts and Tribunals Service, 'The HMCTS reform programme', last updated 6 February 2019, <https://www.gov.uk/guidance/the-hmcts-reform-programme>, accessed 6 May 2020.

⁴ Ibid.

⁵ Richard Susskind, *Online courts and the future of justice* (Oxford: Oxford University Press, 2019).

⁶ For further discussion of the different perspectives on the use of remote hearings in response to Covid-19 see Natalie Byrom, Sarah Beardon and Abby Kendrick, 'The impact of COVID-19 measures on the Civil Justice System', The Civil Justice Council and the Legal Education Foundation, May 2020, <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf>, accessed 12 June 2020.

⁷ See Mr Justice Macdonald, 'The Remote Access Family Court', Version 3, 3 April 2020, <https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-3-Final-03.04.20.pdf>, accessed 6 May 2020.

⁸ Jaime Lindsey, 'Testimonial injustice and vulnerability: A qualitative analysis of participation in the Court of Protection', (2019) 28 *Social and Legal Studies*; Jaime Lindsey, 'Competing professional knowledge claims about mental capacity in the Court of Protection', (2020) 28 *Medical Law Review*; Jaime Lindsey, 'Protecting vulnerable adults from abuse: Under-protection and over-protection in adult safeguarding and mental capacity law', *Child and Family Law Quarterly* (forthcoming).

range of professionals involved to participants with disabilities, CoP users are some of the most varied and potentially most vulnerable court users. Bringing together a range of contributors - professional participants, family members, friends, the person at the centre of the proceedings and others – is uniquely challenging. Second, the cases the CoP hears are of fundamental importance. They engage with individual liberty, human rights and questions about life and death. Even in times of Covid-19 these cases must go ahead, and, in fact, the work of the CoP is arguably even more important now; it is dealing with some of the most challenging and sensitive legal and ethical issues directly arising out of the pandemic, from decisions about life saving medical treatment to decisions about where a person can live and access to family members in care homes.

This includes two very recent cases heard during the pandemic, *BP v Surrey County Council & RP* [2020] EWCOP 20 and *VE v AO, The Royal borough of Greenwich and South East London CCG* [2020] EWCOP 23. *BP* concerned access by family members to a relative in a care home during the pandemic and *VE* concerned an application that it was in *VE*'s best interests to leave her care home to move in with her daughter. Both cases are deeply moving and I set out the facts of the latter case here to provide some context to the discussion. *AO* was an elderly lady, with a history of paranoid schizophrenia, who, in late 2019, was diagnosed with advanced terminal ovarian cancer. She was at risk of Covid-19 given both her terminal diagnosis and that she lived in a care home. Had *AO* remained in the care home, due to restrictions in place because of the pandemic, she would likely only have been allowed a short visit in her final dying moments from one relative.⁹ The case reached the CoP because *AO*'s daughter, *VE*, wanted *AO* to move in with her. Whereas the local authority and CCG thought that further assessments of *AO* were needed before that happened. The case proceeded on the basis of agreement by all that *AO* lacked the mental capacity to make her own decisions about where to live, with the dispute before the CoP being about best interests. By all accounts, *VE* and her family were committed to *AO*'s care and it was said that 'I have no doubt that *AO* is happy and content with *VE* and her family and it is highly likely that if she was in a position to express a choice she would want to live with them.'¹⁰ Ultimately the court held that it was in *AO*'s best interests to leave the care home and to move in with *VE*. *AO* did so immediately following the judgment on 20 April 2020 and, according to the judge, she 'sadly died on 22 April 2020 with her family around her. I do not know what she died of and whether she had, indeed, contracted Covid 19.'¹¹ The strain placed on families like *AO* and *BP*'s during the pandemic is unimaginable, but the judgments are important. They highlight that the courts are there to hear these disputes and can step in and provide families with protection in their times of need. These cases must continue to proceed virtually, but the impact of the virtual on the justice system must also be carefully considered.

II. Analysing Virtual Hearings

In this paper I highlight three issues which, I argue, should be the focus of any analysis of virtual hearings: open justice; materiality; participation. Whether in the CoP, family, criminal or commercial, whether research arising from the pandemic or for research that was already underway, these three areas of focus provide a useful starting point for analysing the use of virtual hearings in the justice system.

⁹ *VE v AO, The Royal borough of Greenwich and South East London CCG* [2020] EWCOP 23, para. 35.

¹⁰ *Ibid*, para. 14.

¹¹ *Ibid*, para. 45.

a) Open Justice

Open justice means a court, tribunal or decision-maker being transparent and accessible. For certain courts, openness may not be absolute, but transparency and accessibility should be guiding principles. Even in times of crisis, maintaining open justice should be a priority. Yet difficulties are being experienced by the public, press and researchers who wish to attend virtual hearings. The courts may wish to be open and accessible, but without a physical space that people can *attend*, courts are struggling to make the virtual hearing a 'destination'. The daily cause list and CourtServe website provide a useful starting point.¹² However, these websites so far have only provided information on the type of case, judge, type of hearing and similar administrative information. They do not provide, for example, a link to attend the hearing. In April 2020 I submitted an application to the HMCTS Data Access Panel¹³ and the Judicial Office for consideration of my own research request to observe virtual CoP hearings. I have now received approval for this research, but the time taken from submitting the application to observing my first virtual hearing was 51 days, highlighting that vital research opportunities are potentially being missed because of a lack of speed and clarity with which people can get involved.

Furthermore, how can we know whether justice is being done unless it is also seen to be done? This involves being able to scrutinise the conduct of hearings. I understand that CoP hearings, for example, will be recorded and it will be interesting to see if they will be accessible for research purposes in future. The Transparency Project¹⁴ has provided useful recommendations as to how these recordings might be methodically and carefully stored for future analysis, an approach which should be considered by the CoP and other jurisdictions too.

Openness does not just serve instrumental ends, though. Open justice reflects the wider values of public space, democracy and accountability.¹⁵ As Thomas de la Mare has recently written 'the role and exclusivity of the physical courtroom has been embedded as a cardinal principle or assumption of English open justice'.¹⁶ By keeping our courts open and accessible, we uphold these values and enable the public to engage with the justice system rather than view it as secret or separate from their shared public space. This perception of openness is particularly important for an institution such as the CoP, which had a reputation for secrecy and only opened up access to the public (and others) following a transparency pilot in 2016 and the subsequent implementation of Practice Direction 4C of the Court of Protection Rules 2017. Despite this increased openness in recent years, the pandemic has resulted in the suspension of Practice Direction 4C, meaning that CoP hearings are, once again, routinely being held in private.

¹² HM Courts & Tribunals Service, 'Daily court lists', <https://www.justice.gov.uk/courts/court-lists>, accessed 6 May 2020; CourtServe, <https://www.courtserve.net>, accessed 12 June 2020.

¹³ Further detail on this process is available here: HM Courts & Tribunals Service, 'Access to courts and tribunals for academic researchers', last updated 19 June 2018, <https://www.gov.uk/guidance/access-to-courts-and-tribunals-for-academic-researchers>, accessed 6 May 2020.

¹⁴ The Transparency Project, 'The remote family court – where does transparency fit in?', 2 April 2020, <http://www.transparencyproject.org.uk/the-remote-family-court-where-does-transparency-fit-in/>, accessed 6 May 2020.

¹⁵ See Linda Mulcahy, 'The unbearable lightness of being? Shifts towards the virtual trial', (2008) 35 *Journal of Law and Society* 464; Linda Mulcahy and Emma Rowden, *The democratic courthouse: A modern history of design, due process and dignity* (London: Routledge, 2019).

¹⁶ Thomas de la Mare QC, 'Coronavirus and public civil hearings', 30 March 2020, <https://coronavirus.blackstonechambers.com/coronavirus-and-public-civil-hearings/>, accessed 6 May 2020.

As I have made clear in the previous sections, the justice system must continue, even in times of crisis. Conceptually, though, the values of privacy and security on the one hand, and openness and transparency on the other, will come into conflict as virtual hearings become more commonly used. I suggest that the latter must be prioritised over the former. When evaluating the impact of virtual hearings, as researchers we must remember to reflect on our own experience of how accessible the justice system was, rather than focusing solely on the substance of what we discover.

b) The virtual versus the material court room

The virtual nature of remote court hearings raise a number of challenges,¹⁷ not least what I describe here as the “loss of materiality”. By this I mean that individual interaction with the court systems, buildings, processes, and people, has a material effect on that individual court user. The intra-action¹⁸ between all of the material factors involved in ‘going to court’ is different in the virtual contrasted with the physical realm. Virtual hearings change the materiality of the intra-action between court and user. Navigating the justice system is often a lengthy and complex process, but doing so virtually can lead to a loss of some of the material aspects of that navigational experience. The so-called “majesty of the law”, the role of judicial awe and prestige, the value that court room spaces hold in our culture, and the ritualistic experience of going to court all play a part in this perception of “having your day in court”. For many it will involve a metamorphosis, which incorporates the procedural history, getting prepared on the morning of the hearing, travelling to the court building, long periods of waiting, sitting in the room before the judge enters, hearing and seeing the range evidence often only a few metres away, and, ultimately, waiting for judgment. All of these aspects materially change a person, maybe only in subtle ways, but many aspects of this material process are missing, or at least different, in the virtual hearing.

Furthermore, in the virtual realm, some people are more materially present than others, with often only the barristers and judge on screen, unless a person is giving evidence. Others attending typically only do so via audio. This limits the visual aspects of their involvement and can be contrasted to the physical court room where all of those in attendance can at least be physically seen by the judge and each other. For example, Celia Kitzinger has written about her experiences supporting Sarah,¹⁹ the daughter of a man who was the subject of CoP proceedings. She writes that, for her, ‘there was a marked lack of empathy displayed for Sarah throughout this hearing’. The reason for this, she suggests, is that ‘except when Sarah was giving her witness statement and being cross-examined, she was not visible to other participants ... This meant it was easy for lawyers to forget that Sarah remained in the virtual courtroom throughout the hearing.’

¹⁷ For further reading see Mulcahy (n. 15); Linda Mulcahy, *Legal architecture: Justice, due process and the place of law* (Abingdon: Routledge, 2011); Emma Rowden and Anne Wallace, ‘Remote judging: The impact of video links on the image and the role of the judge’ (2018) 14 *International Journal of Law in Context* 14; Jo Hynes, Nick Gill and Joe Tomlinson, ‘In defence of the hearing? Emerging geographies of publicness, materiality, access and communication in court hearings’, *Geography Compass* (Forthcoming).

¹⁸ Drawing on the work of Karen Barad who has emphasised the material effects that happen when we interact with the world around us, see Karen Barad, ‘Posthumanist performativity: toward an understanding of how matter comes to matter’, (2003) 28 *Signs: Journal of Women in Culture and Society*, 815; Karen Barad, *Meeting the universe halfway: quantum physics and the entanglement of matter and meaning*. (London: Duke University Press, 2007).

¹⁹ Celia Kitzinger, ‘Remote justice: a family perspective,’ 29 March 2020, available at: <http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/>.

This is a powerful article and one that reminds us of the need to balance more carefully judicial and legal perspectives on the justice process against the experiences of the “lay user” or those who the case directly impacts. As Linda Mulcahy has articulated, there is a ‘fear of the laity’²⁰ which can be seen in court room design with the public being restricted and contained to ever smaller areas. Such an approach is being replicated, and arguably exacerbated, by the virtual hearing, as material spaces are giving way to even smaller (or in some cases absent) virtual spaces. Similarly, virtual hearings can change the neutrality of that court room space, with each participant having a different set up, backdrop and technological savviness. Further, the use of virtual hearings may limit the legal representatives’ interactions with their own clients, who, for example, cannot so easily pass notes forward or have a quick discussion in the break. These micro-interactions shape the social dimensions of our justice system and it is not so easy to replicate these via the virtual medium.

The perceived coldness and distance of the virtual space from a human perspective is also clear from reading the reflections of non-legal professionals on the recent virtual CoP hearing.²¹ Something material and experiential is patently missing from the virtual court room, not least the ability to pick up subtle cues of behaviour which extend beyond audio. This resonates with much of the socio-legal research on the social spaces of justice and this must be accounted for in any weighing up of the value of the virtual hearing. While these challenges are no reason to abandon the virtual hearing altogether during the pandemic, they require thinking about the virtual hearing differently and considering the implications of this loss of materiality head on.²² In the longer term, technology must be seen as an enabling device, rather than an end in itself. Meaning that if it is not enabling in a specific case or particular types of case, then it ought to be abandoned.

c) Participation

The final issue I explore here concerns who participates in virtual hearings, and how. Here, I focus on the participation of those directly affected by the proceedings. In general civil and commercial litigation this will be the claimants and defendants, in CoP proceedings it will be the person whose capacity or best interests is in dispute, in criminal proceedings it could be the complainant and the defendant, and in family proceedings the child, husband, wife or other interested party. In the CoP specifically, research has shown that P’s participation in proceedings has been limited, despite rule changes which attempted to remedy this.²³ I have argued elsewhere that this is a cultural, rather than legal or policy problem.²⁴ It is the paternalistic assumptions (which are perhaps heightened at times of crisis) about P’s ability to participate, caused primarily by well-meaning concerns about P’s welfare.

²⁰ Mulcahy, ‘The unbearable lightness of being?’, (n. 15), 95.

²¹ Kitzinger (n. 19).

²² For further discussion see David Tait, ‘Rituals and spaces in innovative courts’, (2018) 27 *Griffith Law Review* ; Mulcahy and Rowden (n. 15).

²³ See, Court of Protection Rules 2017, rule 1.2 and Practice Direction 1A. For further discussion see, Paula Case, ‘When the judge met P: The rules of engagement in the Court of Protection and the parallel universe of children meeting judges in the Family Court’, (2019) 39 *Legal Studies*; Lindsey, ‘Testimonial injustice and vulnerability’ (n. 8).

²⁴ Lindsey, *ibid*.

In the context of the virtual hearing, Hayden J has made clear that P's participation in virtual proceedings is something about which '[i]maginative ideas are welcome to ensure that P participates in their proceedings where they are able to do so safely and proportionately'.²⁵ He, perhaps optimistically, goes on to say that once the court returns to physical hearings, 'it will be necessary for the momentum not to be lost and for parties to be imaginative about bringing P into the process'. While it is important that the CoP is now prioritising P's participation, what they mean by participation appears to be quite narrow.

Attendance at a hearing is defined as 'participation... by listening and/or viewing the hearing...'. I am surprised that P's involvement in hearings is viewed so conservatively. Would it not be possible to secure P's direct participation in virtual hearings too? Of course, in some cases this will not be appropriate perhaps where, for example, P has a disorder of consciousness or does not wish to be an active participant. But in others, P may well have something to contribute and want to take a more active role. Furthermore, this approach frames P's involvement in hearings in one direction – that P can listen or view the hearing – rather than recognising the benefits to the *other participants* of seeing or hearing P. There is value in judges, lawyers and other professionals seeing P, to hear her speak, see her interaction with others or simply understand her embodiment and materiality more acutely. These aspects of P's participation in virtual hearings seems to have been missed with the current approach.

Yet now, when Ps are likely to be facing real challenges,²⁶ is when we most need the courts to hear the voices of P, as well as her family, friends and those close to her. Across all legal proceedings people affected by decision-making ought to be heard,²⁷ a right which should not depend on their particular capabilities or willingness to fight to be heard. It is commendable that the CoP have provided guidance on the issue of P's participation and the need to secure it. However, it is challenging enough to secure P's participation at 'normal' times, such that it is questionable whether this aim will be achieved in times of crisis.

There are, however, ways of improving the participation of those impacted by proceedings. For example, where participants have support needs, the use of communication aids and technology specific to their needs can be incorporated if enough time and thought is given to the issue. Practical solutions could be adopted such as: the use of virtual break out rooms during hearings; simply asking the person if they want to be seen on screen and/or speak, and if so, when, without assuming that their silence or invisibility is chosen; scheduling hearings at a time of day suitable for individual Ps. There are many ways of facilitating participation, but the cultural barriers that existed prior to Covid-19 will simply be reinforced and potentially exacerbated by the move to virtual hearings if participation is not placed centre of the debate.

III. What Next?

The legal landscape will be changed by our chosen response to this pandemic, and in ways that provide many opportunities to incorporate the virtual. We must do so, though, with a thought for those people directly affected and for the wider values of the justice

²⁵ All of the guidance issued to date is available at: <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/family-law-courts/court-of-protection-guidance-covid-19/>.

²⁶ See for example the earlier discussion of recent CoP case law.

²⁷ See *Shtukaturov v Russia* [2012] 54 E.H.R.R. 27, paras. 72, 91.

system. None of the challenges raised by virtual hearings are impossible to overcome and the use of technology is both inevitable and a hugely beneficial enabling device for the administration of justice. With thought, time and resources, most of the issues can begin to be resolved to harness the positive potential of technology as an aid to the justice system.

As with any radical developments, we must be cautious, consistently evaluate, and subsequently respond to the weight of evidence. In this article I have emphasised three core issues that I think ought to be given priority in analysing the use of virtual hearings: open justice; loss of materiality; participation. Researching virtual justice with these factors in mind will better enable us to understand the true impact of Covid-19 on the justice system.



Big Data and Technology

Big Data and Technology

Big Data and Technology: A Discussion

Elena Abrusci, Antonio Coco, Talita de Souza Dias, Audrey Guinchard and Sabrina Rau
[DOI: 10.5526/xgeg-xs42_033]

Several of the authors in this section took some time to discuss some of the common themes that arose in their papers and the synergies between them.

It was recognised that states have an obligation to counter the spread of mis-information regarding Covid-19. This stems from their obligations to protect, respect and fulfil the right to life and right to health. States' due diligence obligations are important in this regard, particularly when the evidence is insufficient to find states responsible for the outright breach of rights; they would nevertheless have obligations for which they could be found responsible to exercise due diligence by taking appropriate steps to forestall the abuses.

Whether states will be responsible when individuals follow "fake news" advice, for example will depend on who creates and disseminates the fake news. There is a clear connection to state responsibility when state leaders are directly responsible for creating and spreading the harmful fake news themselves. When non-state actors spread the news, the state can be responsible in a secondary sense for failing to exercise due diligence to protect against the online spread of fake news which is detrimental to life or health, though this may not necessarily extend to liability for the actions taken by private individuals who act in furtherance of the fake news. The boundaries between the prevention of mis-information and censorship will depend on the facts in a particular case. The prevention of mis-information about health during a pandemic is perhaps a clear issue, whereas states' role in preventing the spread of other types of mis-information outside of an emergency context may be closer to censorship; the boundaries are not always clear. Many of the digital platforms are privately owned and the UN Guiding Principles on Business and Human Rights have a normative framework which addresses such issues, though businesses' engagement with it is voluntary. Nevertheless, it was recognised that few states have been willing to go so far as to interrupt tech companies' business model related to paid advertisements – the usual source of fake news. Instead, efforts have so far focused, mainly, on calling for greater transparency for political ads.

Discussants recognised the complexities of the due diligence concept which had slightly different meanings under the laws of state responsibility and corporate responsibility, and depending the types of harms involved. Also, the timeframe as to when due diligence obligations are activated may differ, depending on the legal framework. Under human rights law, the obligations are activated at an early stage given the focus on preventing violations. This is not necessarily the case with other subsets of public international law. Clearly, the timing of obligations is important for the prevention of online harms, given the fast pace in which information is disseminated.

With respect to the "do no harm" principle, discussants considered whether it was a sufficient basis to foster greater compliance by states and tech companies with their obligations. For states, due diligence refers to exercising best efforts. The content of what "best efforts" might entail in a given context is less clear. For businesses, there is arguably a clearer meaning of what due diligence means, especially in respect to the procedural

steps businesses should be taking to identify and respond effectively to risks, as set out in the UN Guiding Principles. Greater clarity on the content of due diligence may be difficult to achieve, because it is so context specific. Also, particularly from the Business and Human Rights perspective, there is a constant need to balance different rights (expression, privacy etc) and a more content-led definition may impede the necessary balancing exercises. Also raised was the need for standards to accurately set out the need for continual due diligence, to better account for technological advancements after products are unleashed, and/or for new circumstances giving rise to new or heightened risks. The ongoing research of Coco and de Souza Dias is currently assessing the content of due diligence rules within the different sub-disciplines of public international law, to look for commonalities, and potentially evidence of any general principles of international law. Further consideration of how the principles are applied domestically in different tort law contexts may equally be a useful area for further research.

Discussants also considered the important discipline of data protection, an area canvassed by Guinchard in her paper and broader research. The interpretation of “personal data” within data protection legislation is broad, which provides another avenue for the protection of privacy and the policing of online content. Data protection frameworks incorporate the balancing of rights and set out detailed procedural rules, however enforcement has been weak, so tech companies have often escaped scrutiny. Also, the ways in which the laws are enforced country to country differs significantly. There is a lack of transparency from companies related to disclosure of what data they own and how they use it, but equally, states and public institutions lack political will to press tech companies too hard. This also becomes a problem of due diligence, whether states are taking adequate steps to meet their due diligence obligations in respect of tech companies.

When states collaborate directly with tech companies, the problems tend to be magnified. Neither party has satisfactory procedures in place, and thus the combination simply accentuates the unsatisfactory procedures, and the state becomes even less well placed to enforce regulations. With respect to data misuse during Covid-19, there is relative transparency about the data to be used by the UK’s planned tracing App. What is less clear is the data store, and it is also unclear what data the government will be seeking and using from private companies.

Our Digital Footprint under Covid-19: Should We Fear the UK Digital Contact Tracing App?

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Abstract

With the objective of controlling the spread of the coronavirus, the UK has decided to create and, since 5 May 2020, is live testing a digital contact tracing app, under the direction of NHS X, a branch of NHS Digital, and with the help of the private sector. Given the lack of details as to what the app will exactly do or not do, there are fears that the project will increase government surveillance beyond the pandemic. While I share these concerns, I argue that we need to simultaneously tackle one of the most significant, yet overlooked, contributors to the problem of government surveillance: our inflated digital footprint, stemming from our use of digital technology, and the basis of 'surveillance capitalism', a business model left largely unchallenged, which results in surveillance, and stems from the non-compliance with data protection laws. A systematic enforcement of the General Data Protection Regulation (GDPR) on the private sector would disrupt the current dynamics of surveillance which are hidden in plain sight.

I. Introduction

Confronted with the Covid-19 public health crisis, more than 30 countries have already instituted measures to track people's movements, with the objective of controlling the spread of the virus and/or people's movement.¹ Mobile phone apps are central to these efforts.² The UK has decided to create and, since 5 May 2020, is live testing a digital contact tracing app, under the direction of NHS X, a branch of NHS Digital, and with the help of the private sector. The app has so far attracted a number of concerns, correlative recommendations,³ and a draft Bill.⁴ Given the lack of details as to what the app will do, fears exist that the project will create a huge data trove, without adequate safeguards, in violation of data protection laws and human rights, and with the potential to open the door to extensive government surveillance beyond the management of the current public health crisis.

I share those concerns and agree with the various recommendations put forward but I argue that we need to simultaneously tackle one of the most significant, yet overlooked,

¹ Andrew Roth and others, 'Growth in surveillance may be hard to scale back after pandemic, experts say' *The Guardian*, 14 April 2020.

² Ada Lovelace Institute, 'Exit through the App Store? A rapid evidence review on the technical considerations and societal implications of using technology to transition from the COVID-19 crisis,' 20 April 2020.

³ Ibid.; academics in: Rachel Coldicutt, 'Open Letter: Contact Tracking and NHSX,' *Medium*, 23 March 2020; Matthew Ryder QC et al., 'COVID-19 & Tech responses: Legal opinion,' 30 April 2020; House of Commons Science and Technology Committee, 'Oral evidence: UK Science, Research and Technology Capability and Influence in Global Disease Outbreaks', HC 136, Questions 302-384, 28 April 2020; Joint Committee on Human Rights (JCHR), 'Human Rights and the Government's Response to Covid-19: Digital Contact Tracing', 6 May 2020.

⁴ Initially, an academic initiative, Lilian Edwards et al., 'The Coronavirus (Safeguards) Bill 2020: Proposed protections for digital interventions and in relation to immunity certificates. Version 5.1,' 6 May 2020, <https://osf.io/preprints/lawarxiv/yc6xu/>; now a proposal put forward by the JCHR, 'Committee drafts Bill on Covid-19 (Coronavirus) Contact Tracing App', 15 May 2020.

contributors to the problem of government surveillance: our inflated digital footprint, the basis of ‘informational capitalism’ or ‘surveillance capitalism’, a set of surveillance practices elevated to a business model and left largely unchallenged.⁵ To do so requires the systematic enforcement of the General Data Protection Regulation (GDPR) and the UK Data Protection Act 2018 on the private sector so as to disrupt the current dynamics of surveillance which are hidden in plain sight.

After a brief outline of the data protection law framework applicable to the processing of personal data in general, I will sketch the main elements of the controversy surrounding the app before explaining its context, i.e. the surveillance business model that part of the private sector has adopted, in violation of data protection laws. I will thereafter highlight the resulting dynamics and why they need challenging, concluding that enforcement by the UK data protection regulator, the Information Commissioner Office (ICO) should play a central role in altering these dynamics, beyond the Covid-19 crisis.

II. The Backdrop: The Data Protection Law Framework

The GDPR, like the Directive 1995/46/EC it replaced on 25 May 2018, established a number of legal requirements for the processing of personal data. The principles are the necessity (not just convenience of processing) and proportionality of the processing as to the types of data collected, the purposes for which they are used, the time during which they are needed for processing, and the legal grounds to justify the processing.⁶ Controllers, who decide the purposes and means of processing, should ensure compliance with the above principles and demonstrate compliance. Processors acting on behalf of controllers have, since the GDPR, a much more pro-active role in ensuring compliance, with specific duties, independently of controllers’ own obligations (Article 28 GDPR).

Compliance with data protection laws is not a tick-box exercise to be undertaken after the digital technology has been created. In case of high risk processing, such as health data processing, data protection impact assessments have become mandatory, so as to mitigate risks, and if mitigation is not possible, to decide whether the processing should be pursued at all.⁷ Compliance with human rights is also central to data protection by design.⁸ Indeed, the ultimate objective of all these rules, in the GDPR (Recital 4) and in the Directive (Recital 2), is that ‘the processing of personal data should be designed to serve mankind’. The controversy surrounding the digital contact tracing app centres around these sets of obligations.

III. The Controversy Surrounding the UK Digital Contact Tracing App

NHS X leads the development of the app, with the help of the private sector. It thus determines the purpose and means of processing, and as a data controller, needs to ensure compliance with the key principles. The companies it works with are likely to be considered as processors, acting on behalf of NHS X which should instruct them to

⁵ Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (New York: Oxford University Press, 2019); Shoshana Zuboff, *The Age of Surveillance Capitalism: The fight for a human future at the new frontier of power* (London: Profile Books, 2019).

⁶ Articles 5 and 6 GDPR, very similar to Articles 6 and 7 Directive.

⁷ Article 35 GDPR.

⁸ Recital 4 GDPR; the ICO Elizabeth Denham, JCHR, ‘Oral evidence (virtual proceeding): The Government’s response to Covid-19: human rights implications’, HC 265, Questions 10-14, 4 May 2020.

implement data protection by design. The little information NHS X has so far provided has remained scattered and vague.⁹ The app processes Bluetooth data to be stored in a 'backend datastore' and aggregated with some data sets, such as the Covid-19 test results and the details of the 111 call,¹⁰ but without further details beyond the potential or likelihood of adding geolocation data in a future iteration of the app.¹¹ This centralised approach allows creating a social graph of individuals' and their interactions with others to understand the spread of the disease and hot spots of infections. Hence doubts as to implementing data minimisation. Furthermore, the exact purposes for which the data will be used have not been explained, beyond a vague reference to tracing and research, raising issues as to compliance with the purpose limitation. Time limitation is also a problem since the Bluetooth data, 'enmeshed with wider data', cannot be deleted.¹²

Regarding the legal grounds to justify processing, NHS X has continuously indicated that consent will be sought, presenting consent as an indicator of its commitment to privacy and the law.¹³ It is however extremely unlikely that consent can justify the processing, especially for research, in light of the long standing EU guidance on data protection consent,¹⁴ specifically repeated for Covid-19 tracing apps.¹⁵ NHS X seems to confuse the voluntary nature of using the app with the legal justification for processing data, despite the ICO having expressly pointed out the difference.¹⁶ This betrays wider issues as to the understanding of the law and the nature of the conversations with the ICO.

To reassure critics, NHS X has finally opened the source code of the app, but not of the datastore,¹⁷ and published the data protection impact assessment (DPIA),¹⁸ voluntarily submitted the DPIA to the ICO.¹⁹ Nevertheless, since 'the devil is in the details',²⁰ especially with regard to the datastore, suspicions as to the UK government's surveillance capability have not abated. In fact, the JCHR appears to be alarmed by the speed of the piloting and intended roll out.²¹ Data protection by design requires to pause and ascertain those risks *before* the app is rolled out, not afterwards.

⁹ Only two official statements -of 28 March and 28 April 2020-, with information added when Matthew Gould, head of NHS X, testified before the House of Commons Science and Technology Committee on 28 April 2020, and the JCHR on 4 May 2020.

¹⁰ Matthew Gould, Indra Joshi, and Ming Tang, 'The power of data in a pandemic,' 28 March 2020, <https://healthtech.blog.gov.uk/2020/03/28/the-power-of-data-in-a-pandemic/>.

¹¹ House of Commons Science and Technology Committee (n. 3), Q340, 376.

¹² Matthew Gould, Q20, JCHR, 'Oral evidence (virtual proceeding): The Government's response to Covid-19: human rights implications', HC 265, Questions 10-14.

¹³ House of Commons Science and Technology Committee (n. 3), Q 326, 340, 341, 364, 366; JCHR, 'Oral evidence (virtual proceeding): The Government's response to Covid-19: human rights implications', HC 265, Q17.

¹⁴ Article 29 Working Party, 'Guidelines on consent under Regulation 2016/679. WP 259 rev.01,' 2018. Now replaced by EDPB, 'Guidelines 05/2020 on consent under Regulation 2016/679. Version 1.0,' 4 May 2020.

¹⁵ EDPB, 'Statement of the EDPB Chair on the processing of personal data in the context of the COVID-19 outbreak,' 16 March 2020.

¹⁶ ICO, 'COVID-19 Contact tracing: data protection expectations on app development,' 4 May 2020.

¹⁷ 'Source code of the digital contact tracing Covid-19 app,' Github, 7 May 2020, <https://github.com/nhsx>.

¹⁸ DPIA.

¹⁹ ICO, 'Statement in response to media enquiries about the Data Protection Impact Assessment for the NHSX's trial of contact tracing app', <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/05/dpia-for-the-nhsx-s-trial-of-contact-tracing-app>.

²⁰ Prof Lilian Edwards, House of Commons Science and Technology Committee (n. 4), Q362.

²¹ JCHR, 'Human Rights and the Government's Response to Covid-19' (n. 3), 12; JCHR, 'Oral evidence (virtual proceeding): The Government's response to Covid-19: human rights implications', HC 265, Q 17.

So far, recommendations have centred on restricting government's abuse of power. I argue that this approach will not suffice. Once we start looking at the digital contact app from the perspective of the digital ecosystem and our massive digital footprint,²² the app can hardly be seen as 'something new because this degree of surveillance of members of the public has never been contemplated before'.²³

IV. Contextualising the Controversy: A Business Model Resulting in Surveillance

Our society tolerates commercial practices that result in massive and intrusive surveillance, which if they had originated from governments, we would be, I submit, up in arms. Because they come from the private sector and are more diffused, lost in an ecosystem so opaque that we do not know exactly what our digital footprint consists of and who has access to it,²⁴ we have not opposed them. Let us look at Bluetooth which the digital contact app will use. Bluetooth has been invented for connecting two devices, for example a pen to a tablet. Bluetooth's use was transformed when Apple created in 2013 the iBeacon for apps to micro-target consumers in stores.²⁵ Bluetooth is now ubiquitous in airports, hotels, and shops to 'customise their experience', an euphemism that masks the tracking of their movements.²⁶ Thus, while Bluetooth has undeniable benefits, it also has an inherent capacity for surveillance.

Now, let us imagine the following Covid-19 scenario. The lockdown has eased, an employer interviews three different individuals, hiding from each a smartphone with the app on.²⁷ Each interviewee has the app; one tests positive for Covid-19; the interviewer receives notification. Will the interviewer decide that hiring the interviewee is not worth the risk, or on the contrary, in the (false?) belief that herd immunity can be built on, will it favour the interviewee who had Covid-19, as employers and slave owners used to do for those who contracted the yellow fever in 19th century New Orleans?²⁸ Whichever decision the modern employer will take, how will the interviewees know whether the positive testing for Covid-19 influenced the decision? The current debate on the Covid-19 digital contact tracing app has not really pointed out this inherent risk of misuse, independently of whether a decentralised or centralised approach is adopted.

More generally, given the wide use of Bluetooth in the private sector, where are the studies on the resulting surveillance? If iBeacon had been invented by a governmental intelligence agency, would our reaction have been different? Surveillance in Western countries is still

²² David L. Chaum, 'Security without identification: transaction systems to make big brother obsolete,' *Commun. Assoc. Computing Machinery* 28, no. 10 (1985). The author, at the origins of key elements of cryptography and the dark web, is cited in the PEPP-PT project, which is somewhat ironic given the criticisms of surveillance for the PEPP-PT project, PEPP-PT (n. 39).

²³ Joanna Cherry, considering the app as something new, Member of the JCHR, 'Oral evidence (virtual proceeding): The Government's response to Covid-19: human rights implications,' HC 265, Q4 p10.

²⁴ See the work of ICSI—UC Berkeley and IMDEA Networks, "The Haystack Project," 21 February 2020, <https://www.haystack.mobi>.

²⁵ Michael Kwet, 'In Stores, Secret Bluetooth Surveillance Tracks Your Every Move' *New York Times*, 14 June 2019. Nic Newman. Apple iBeacon technology briefing. *J Direct Data Digit Mark Pract* 15, 222–225 (2014).

²⁶ *Ibid.*

²⁷ The scenario is not mine, see (in French) Xavier Bonnetain, 'Le traçage anonyme, dangereux oxymore. Analyse de risques à destination des non-spécialistes (website),' 23 April 2020, <https://risques-tracage.fr>.

²⁸ Kathryn Olivarius, 'Immunity, Capital, and Power in Antebellum New Orleans', (2019) 124 *The American Historical Review* 425.

associated with state agencies, but they do not need anymore to directly collect data when they have an enormous readily available pool of data collected by others ... in the private sector. When in 2013, Snowden revealed the PRISM programme, it became clear that the NSA focused on building its capacity to *aggregate* and *analyse* the data, relying on US private companies to give the data.²⁹

We live in a digital ecosystem where many of the innovative digital technologies we use have been developed in direct opposition to the core legal principles of data protection by design. Instead of minimising processing to what is needed to provide a service, a number of businesses have thrived on collecting as much data as possible from consumers, often under the guise of 'free services', and by buying and selling the resulting profiling to data brokers. The context directly related to the Covid-19 digital contact tracing apps is particularly representative of this business model's approach to data protection and the risks it creates. Apps on smartphones, fitbits, smartwatches, now abound that collect various health information: the number of steps per day, the speed of the walk/run, weight, height, BMI, and/or various medical health information the user can enter. Many of these health apps violate the GDPR by collecting far too much data, for too long, without transparency, and without securing the data.³⁰

As a result, the private sector has access to a granularity of information that can be shocking. Nowadays, an insurer -who acquires supposedly anonymised data from a supermarket loyalty scheme to feed into its predictive algorithm- can identify a client who buys fennel as a healthy conscious consumer who is unlikely to be of high risk, and who thus should be offered a lower premium.³¹ Fennel in the UK is a luxury vegetable that not all supermarkets will sell. Most people from deprived areas cannot afford it. 'Given the correlation between unhealthy lifestyles and lower incomes, the risks are only too clear' of discrimination and of further entrenching the inequalities of our society.³² Yet, the impact on human rights and on the social fabric of our society is barely understood. Over time, the surveillance resulting from this business model is proving to be no less dangerous to human rights than those of governments.

In light of this context, the concerns as to government surveillance through the building of the digital contact tracing app take a different resonance. Undoubtedly, we should ensure that it does not happen, and the safest way to do so is to entrench safeguards in primary legislation. Nevertheless, we should be equally concerned about the possible actions from the private sector and the dynamics that they contribute to. Transparency and accountability should be demanded not just of government, specifically here NHS X, but also of the private sector involved in the project. This discussion has largely been missing, despite data protection laws constituting an excellent starting point to challenge the current dynamics of the project.

²⁹ Glenn Greenwald and Ewen MacAskill, 'NSA Prism program taps in to user data of Apple, Google and others,' *The Guardian*, 7 June 2013.

³⁰ As the Belgian Data Protection Authority stated on 31 March 2020, <https://www.autoriteprotectiondonnees.be/le-covid-19-et-lutilisation-dapplications-de-sante>; Norway Consumer Council, "Report: Out of Control", 14 January 2020, <https://www.forbrukerradet.no/undersokelse/no-undersokelsekategori/report-out-of-control/>.

³¹ Hannah Fry, 'Hello World: How to be Human in the Age of the Machine', Doubleday, 2018, and interview at <https://www.noted.co.nz/tech/tech-tech/how-algorithms-can-go-rogue-whos-at-the-wheel>.

³² Editorial, 'The Guardian view on big data and insurance: knowing too much,' *The Guardian*, 27 September 2018.

V. Revisiting the Controversy: The Need to Challenge the Dynamics of the Digital Contact Tracing App Project

NHS X indicated it works notably (but not exclusively) with Microsoft, Google, Palantir, Amazon Web Services and Faculty AI.³³ Because the government does not have the in-house expertise to build these apps, that it resorted to the private sector should not surprise. This collaboration however needs to respect the rules set out in the GDPR, notably Article 28 GDPR. Controllers have to choose processors who can demonstrate compliance with data protection by design (Article 28(1) GDPR); if the processors' track record does not give full confidence, controllers can refuse to choose them.³⁴ Furthermore, processors have the duty to assist controllers in fulfilling their obligations, with an expectation to be pro-active (Article 28(3) GDPR). The problem is that NHS X has chosen companies whose implementation of the GDPR has been recently challenged either formally, by a data protection regulator, or informally by academic scientists.

Google has been found twice in breach of data protection laws;³⁵ and a complaint for its use of a tracking ID on Android has just been filed before the Austrian Data Protection Authority.³⁶ While Microsoft has a very different business model from Google's, in November 2018, the Dutch Government concluded that its processing of personal data for a wide range of its products³⁷ violated the GDPR core principles (data, purpose and time limitations). The EU regulator reached the same conclusions in its preliminary investigation.³⁸ Has the impact of these findings of non-compliance been assessed on the UK contracts in general and on the development of the Covid-19 app in particular? Furthermore, in May 2019, Palantir, which business model is based on buying and selling huge troves of (personal) data,³⁹ was criticised for selling to the US immigration agency tracking software that enables the agency to take decisions in breach of human rights.⁴⁰

Consequently, doubts as to whether NHS X has complied with Article 28(1) GDPR arise. That NHS X could not confirm, a week before the restricted launch of the app, that Apple and Google would be forbidden to turn off the app at any point, despite having the power to delete the app from their stores, does not give full confidence that NHS X has ensured

³³ Gould, Joshi, and Tang (n. 10). House of Commons Science and Technology Committee (n. 3), Q302-384.

³⁴ EDPS, 'EDPS Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725.'

³⁵ (in English) CNIL, 'Deliberation of the Restricted Committee SAN-2019-001 of 21 January 2019 pronouncing a financial sanction against GOOGLE LLC.,' 21 January 2019, <https://www.cnil.fr/en/cnils-restricted-committee-imposes-financial-penalty-50-million-euros-against-google-llc>, paras. 105, 109.

³⁶ By the NGO NYOB, 13 May 2020, <https://noyb.eu/en/complaint-filed-against-google-tracking-id>.

³⁷ A summary by those who audited the firm is available at Privacy Company, 'New DPIA on Microsoft Office and Windows software: still privacy risks remaining (long blog),' 29 July 2019, <https://www.privacycompany.eu/blogpost-en/new-dpia-on-microsoft-office-and-windows-software-still-privacy-risks-remaining-long-blog>. For the full reports: <https://www.rijksoverheid.nl/documenten/rapporten/2019/06/11/data-protection-impact-assessment-windows-10-enterprise>.

³⁸ Upon referral, EDPB, 'EDPS investigation into IT contracts: stronger cooperation to better protect rights of all individuals,' 21 October 2019.

³⁹ Peter Waldman, Lizette Chapman, and Jordan Robertson, 'Peter Thiel's data-mining company is using War on Terror tools to track American citizens. The scary thing? Palantir is desperate for new customers,' *Bloomberg Business Week*, 19 April 2018.

⁴⁰ Marisa Franco, 'Palantir has no place at Berkeley: they help tear immigrant families apart,' *The Guardian*, 31 May 2019.

that the companies only act on its instructions.⁴¹ Similarly, if the companies hired are not already fully compliant, doubts exist as to whether they are in a position, for example, to point out to the controller that its instruction may violate the GDPR (Article 28(3) GDPR). Has any of companies for example challenge NHS X's use of consent, when the GDPR violation is likely? Willingness to 'get it right',⁴² while laudable, may well not suffice if the structures for compliance are inadequate. Trust in the project cannot rest on the hope that things will turn out all right, especially at a time of crisis.

To summarise, when each partner of a project experiences their own difficulties in complying with data protection laws, their collaboration has the potential to multiply the risks of non-compliance and human rights violations. The GDPR provides the tools to challenge these dynamics.⁴³ Difficult questions can be asked, but the answers do not have to be provided to the general public. It falls therefore on the data protection regulator, in the UK the ICO, to question decisions that potentially violate the GDPR. So far the Judicial Committee on Human Rights has not been impressed by the ICO's approach to the NHS X's project.⁴⁴ More importantly maybe, the Committee had already noted in 2019 a wider trend of not enforcing data protection laws with sufficient vigour. Hence the Committee's recommendation for the Government to review 'whether there are adequate measures in place to enforce the GDPR and DPA in relation to how internet companies are using personal data, including consideration of whether the ICO has the resources necessary to act as an effective regulator.'⁴⁵ In May 2020, the recommendation is to create a specific monitoring body for real-time auditing. In the long term, is this a viable solution? Lack of enforcement leaves a vacuum, where others are forced to take decisions which are not within their role⁴⁶ and which they do not want to take.⁴⁷ It would be more beneficial to strengthen the ICO's capacity to enforce, not the least by internally separating its roles of advisor, investigator and decision-maker, as the Financial Conduct Authority does, to avoid inherent conflicts of interests.⁴⁸

VI. Conclusion

The pandemic has revived fears of governments creating or extending massive surveillance programmes under the cover of fighting the coronavirus and exiting the lockdown. I have demonstrated that the NHS X project suffers from enough flaws with regard to data protection laws to give substance to these fears: a lack of transparency, the recurring vagueness of the little information provided, and the choices made regarding the processors when their compliance with data protection laws can be patchy.

⁴¹ House of Commons Science and Technology Committee (n. 3), Q 358, 383 – it is commendable though to ask for time to check the answer.

⁴² Matthew Gould, JCHR, "Oral evidence" (n. 12), Q18.

⁴³ But it will not resolve some issues of data sharing facilitated by other legislations, as correctly pointed out by Michael Veale, JCHR, 'Oral evidence (virtual proceeding): The Government's response to Covid-19: human rights implications,' HC 265, Q13.

⁴⁴ JCHR, 'Oral evidence (virtual proceeding): The Government's response to Covid-19: human rights implications,' HC 265, Q17.

⁴⁵ Ibid.

⁴⁶ Ada Lovelace Institute, 'Exit through the App Store' (n. 2) 10.

⁴⁷ Microsoft called for regulation of facial recognition, Joseph Menn, 'Microsoft turned down facial-recognition sales on human rights concerns,' *UK Reuters*, 17 April 2019.

⁴⁸ The ICO did not see the conflict, JCHR, 'Oral evidence (virtual proceeding): The Government's response to Covid-19: human rights implications,' HC 265, Q17.

Nevertheless, these fears should not mask that part of the private sector indulges into building our digital footprint and use it to extensively monitor us, independently of what governments do. Fitbits and health apps on smartphones are the latest expression of a business model based on little to no compliance with data protection laws. It should be of no surprise then that these businesses pay lip service to privacy rights and to the broader range of human rights which the technology may or will interfere with. In that sense, governments' surveillance could be seen as the last step of a process that has started in part of the private sector. If neither side has an internal culture of compliance, how can they be expected to take responsibility to ensure all safeguards are in place?

To their discharge, the poor enforcement of data protection laws has not contributed to foster a strong culture of compliance with data protection laws. Time has come for a systematic enforcement of the GDPR, which would ultimately bear fruits beyond the decisions taken on specific controllers and processors. The minimisation of processing, and thus of our digital footprint, would become an entrenched habit for all technology developers, with the ripple effect that any deviation would stand out and be easier to challenge. Convenience and functionality of digital technologies do not have to trump the necessary standards of security, privacy, and human rights. It is time to create an environment where developers are rewarded for designs that 'serve mankind' rather than for those that serve short term interests destructive of the fabric of our society.

With Great Reliance Comes Great Responsibility: The Role of Technology Companies during Covid-19

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Abstract

Technology companies have been playing a key role during Covid-19 from assisting state responses to improving quality of life during lockdown. These companies are providing means of communication, work, education, social and cultural life that would otherwise be impossible. As tech companies are now playing an essential facilitating role in enabling human rights in this way, a key question emerges: Should tech companies facilitating essential services bear special responsibilities?

This paper argues that tech company obligations are heightened to the extent that the means through which they meet their due diligence obligations are amplified. This will be demonstrated by first illustrating the unique role that tech companies are playing during Covid-19, and second, examining whether special obligations should apply to those companies that are facilitating essential services. Third, this paper will recommend practical steps in the form of three types of human rights impact assessments (HRIAs) that companies should carry out as a starting point to understanding how they can meet their responsibility to respect human rights.

I. Introduction

Tech companies are providing crucial tools to overcome social isolation, promote social cohesion and raise awareness of health and safety guidelines during the pandemic.¹ Not only do they improve quality of individual life, but by assisting states to deliver public functions, and helping courts, doctors' surgeries, counselling and advice centres, schools and others to operate through online platforms, they are enabling the enjoyment of human rights which would otherwise not be possible due to schools, places of work and public spaces being closed during lockdown.

This demonstrates not only the great reliance of individuals and states on technology but also the tremendous opportunities that technology presents. However, not all technology and data processing practices bring about positive human rights impacts. In fact, technology poses a wide range of risks to human rights. The main human rights risks typically associated with technology are the right to privacy, freedom of expression, and non-discrimination, but risks go well beyond these and can affect all human rights.²

* The Human Rights, Big Data and Technology Project is funded by the Economic and Social Research Council [grant number ES/M010236/1].

¹ United Nations, 'Shared Responsibility, Global Solidarity: Responding to the socio-economic impacts of COVID-19', March 2020, 6, available at https://www.un.org/sites/un2.un.org/files/sg_report_socio-economic_impact_of_covid19.pdf.

² Lorna McGregor, Vivian Ng, Ahmed Shaheed, Elena Abrusci, Catherine Kent, Daragh Murray and Carmel Williams, 'The Universal Declaration of Human Rights at 70: Putting Human Rights at the Heart of the Design, Development and Deployment of Artificial Intelligence' Human Rights, Big Data and Technology Project, University of Essex, 20 December 2018, 11-14.

Considering this two-fold nature of technology, safeguards must be a priority to ensure that advantages may be harnessed without endangering human rights. Safeguards may take various forms depending on the enforcing actor. While states are the main duty bearers under international law and are required to protect, respect and fulfil human rights, businesses under the UN Guiding Principles on Business and Human Rights (UNGPs) have a responsibility to respect human rights by preventing, mitigating and remedying any actual or potential adverse human rights impacts caused, contributed or linked to their business operations and activities.

Recognising that technology companies are serving as sole facilitators of essential services in a time when they are inaccessible any other way raises two red flags in regard to potential human rights harms. These are (1) harms associated with the use and deployment of these tech products and services and (2) harms resulting from a lack of access to these services.

To prevent and mitigate both of these harms, it is important to understand what responsibilities both companies and states have in regard to human rights. While the role of the State is significant in this context, the scope of this paper is limited to the responsibilities of tech companies and the safeguards they must put in place to meet their responsibility to respect under the UNGPs.

This paper will argue that tech company obligations are heightened to the extent that the means through which they must meet their due diligence obligations are amplified. This means that policies and processes to identify and address adverse impacts must be proportionate to the potential severity of impact of their operations among other factors. This will be demonstrated by illustrating the unique role that tech companies are playing during Covid-19, examining whether special obligations should apply to those companies that are facilitating essential services, and recommending practical steps in the form of three types of HRIAs as a starting point to understanding how tech companies can meet their obligation to respect human rights.

II. The Role of Tech Companies - Digital Society in Lockdown

Technology is being used in all facets of Covid-19 responses. The Internet of things (IOT) market is providing assistance through technology such as drones for sanitation, smart thermometers for tracking virus spread, autonomous vehicles for deliveries and various wearables that measure vitals.³ Tech companies are also assisting governments in digitalising their services, spreading public health and safety information, conducting data analysis to track infection rates, and developing contact tracing apps.⁴ At an individual level, communication apps and platforms provide the means of online teaching, video conferencing for work, online gaming, and streaming services that enable the enjoyment of public and private life online.

³ Alexandra Rehak, 'IoT impact in the COVID-19 world', 22 April 2020, <https://www.omdia.com/resources/product-content/iot-wins-and-challenges-in-the-covid-19-world>; Thomas Brewster, 'Palantir, The \$20 Billion, Peter Thiel-Backed Big Data Giant, Is Providing Coronavirus Monitoring To The CDC', 31 March 2020, <https://www.forbes.com/sites/thomasbrewster/2020/03/31/palantir-the-20-billion-peter-thiel-backed-big-data-giant-is-providing-a-coronavirus-monitoring-tool-to-the-cdc/#4a6619ff1595>.

⁴ 'NHS COVID-19 App', NHSX, <https://www.nhs.uk/covid-19-response/nhs-covid-19-app/>, accessed 14 June 2020.

Many of these products and services are not new but already played some role in our daily lives pre-Covid-19. The use of the technology itself is, in this way, not novel. What is different now is that individuals, businesses and states many times do not have any choice but to use technology to enable many parts of ordinary daily life from work to school and healthcare. For example, even before Covid-19 there was a high adoption of education technology (EdTech), with global investments reaching US\$18.66 billion in 2019.⁵ This EdTech however served as a supplementary tool in addition to the main source of education through face-to-face learning. During Covid-19 however, as the pandemic response measures require school closures in many countries, online/distance learning is the only mechanisms through which education is enabled.⁶ The complete reliance on technology and the lack of choice to use the tools both from the side of the individual as well as the educational institution, whether public or private, is what makes the difference significant.

With many public spaces closed and lock down measures limiting face-to-face interactions, trends of increased tech use can be observed in various areas. Tech companies offering means of communication are in particularly high demand such as Zoom, Hangouts Meet and Google Classroom which experienced significant spikes in their usage (figure 1).⁷

According to a survey by Kantar, web browsing has generally increased by 70% and social media engagement by 61% over normal usage rates.⁸ Additionally, individual companies saw dramatic rises in particular apps. Facebook reported that, by 24 March, total messenger use increased by more than 50% over the previous month and, 'in those places hit hardest by the virus', voice and video calling more than doubled on Facebook Messenger and WhatsApp.⁹ See figure 2 for group call minutes by Facebook Italy for example.¹⁰

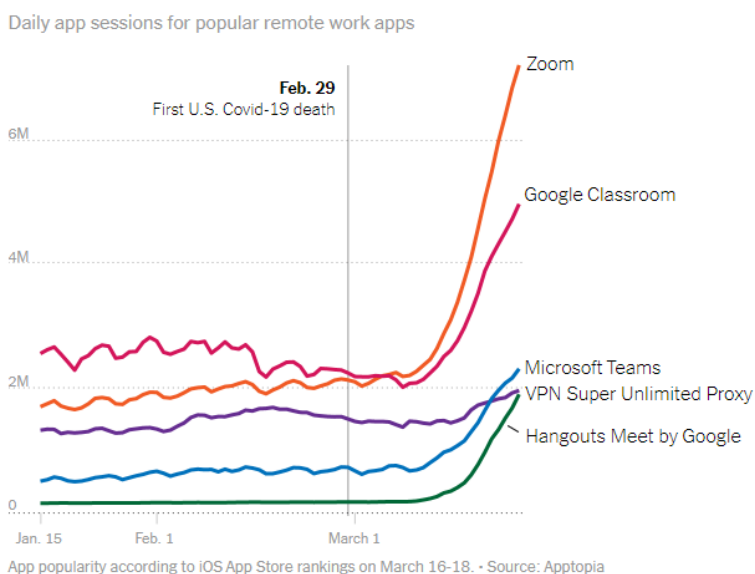


Figure 1 Daily app usage for popular remote working apps

⁵ Cathy Li and Farah Lalani, 'The COVID-19 pandemic has changed education forever. This is how', World Economic Forum, 29 April 2020, <https://www.weforum.org/agenda/2020/04/coronavirus-education-global-covid19-online-digital-learning/>.

⁶ Laura Bicker, 'Coronavirus: How South Korea is teaching empty classrooms', BBC News, 10 April 2020.

⁷ Ella Koeza and Nathalie Popper, 'The Virus Changed the Way We Internet', New York Times, 7 April 2020.

⁸ 'COVID-19 Barometer: Consumer attitudes, media habits and expectations', Kantar, 3 April 2020, <https://www.kantar.com/Inspiration/Coronavirus/COVID-19-Barometer-Consumer-attitudes-media-habits-and-expectations>.

⁹ Alex Schulz, 'Keeping Our Services Stable and Reliable During the COVID-19 Outbreak', Facebook, 24 March 2020, <https://about.fb.com/news/2020/03/keeping-our-apps-stable-during-covid-19/>.

¹⁰ Ibid.

Rising numbers of users and changing public policies may indicate new demographics and different operational contexts which can alter the effect that services have on human rights. While companies are accustomed to evolving user bases and spikes in demand, Covid-19 is producing unprecedented rapid changes. Zoom CEO Eric Yuan, in his public letter, noted that Zoom services were built primarily for enterprise customers and that it was not designed for every person working, studying, and socialising from home with a much broader set of users using the services in a myriad a ways.¹¹ Facebook similarly reported t hat while its services are built to withstand 'spikes during events such as the Olympics or New Year's Eve,' they are predictable and happen infrequently, unlike the spikes experienced during Covid-19.¹²

Group Call Time (minutes) in Italy

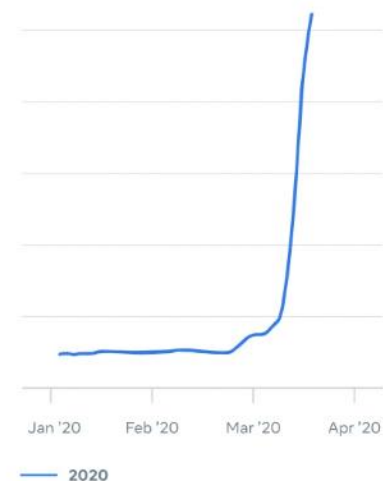


Figure 2 Facebook statistics from Italy

The UN Working Group on Business and Human Rights has explained that 'some businesses have a special role in this situation because of the nature of their products or services' referring specifically to those providing life-saving products.¹³ Under what category, however, do we put products and services which act as the only means of enabling the enjoyment and fulfilment of human rights? With offices, schools, courts and other public services closing or operating at limited capacity, some obvious associated rights can immediately be said to be at risk, such as the right to education, work, and fair trial. However, thanks to new technology allowing for some parts of society to function, many people in the world are still in a position to enjoy these rights, at least to an extent. Significant disparities in access to technology, often referred to as the digital divide, are however preventing many individuals from reaping these benefits and can constitute human rights harm for people who are already marginalised.¹⁴ The technology does not fulfil or enable the right to life itself, but rather enables the enjoyment of other human rights, which cannot be fulfilled in any other way during this time.

Following this realisation, one may wonder whether tech companies that provide such rights-enabling services should have special responsibilities. If a tech company is, for example, the operator of a platform that serves as the only means through which education is enabled, should the company bear greater responsibility?

¹¹ Eric S. Yuan, 'A message to Our Users', Zoom Blog, 1 April 2020, <https://blog.zoom.us/wordpress/2020/04/01/a-message-to-our-users/>.

¹² 'How production engineers support global events on Facebook', Facebook Engineering, 12 February 2018, <https://engineering.fb.com/production-engineering/how-production-engineers-support-global-events-on-facebook/>.

¹³ OHCHR, 'Ensuring that business respects human rights during the covid-19 crisis and beyond: the relevance of the UN Guiding Principles on Business and Human Rights', <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25837&LangID=E>, accessed 14 June 2020.

¹⁴ Lorna McGregor and Dr. Ahmed Shaheed, 'The COVID-19 pandemic: Five urgent principles for leaving no one behind through technology', 19 May 2020, <https://www.universal-rights.org/nyc/blog-nyc/the-covid-19-pandemic-five-urgent-principles-for-leaving-no-one-behind-through-technology/>.

III. Business Respect for Human Rights

Given these changes in function and operational context, understanding the role of tech companies in respecting human rights is crucial. Does the essential facilitating, or rights enabling, nature of their products and services change their responsibility in regard to human rights? This section will demonstrate why the responsibility to respect of tech companies remains the same, yet calls for heightened means of meeting that responsibility. This will be done by (1) recalling the business responsibility to respect human rights, (2) understanding the importance of proportionate means of meeting that responsibility and (3) examining why they do not bear special responsibilities, such as those of states.

a) Back to basics

Under the UNGPs all businesses have a responsibility to respect human rights. This means that they should prevent and mitigate any adverse human rights impact they may have caused, contributed to, or are linked to.¹⁵ This includes human rights impacts within their business operations, supply chains and business relationships, as well as impacts on individuals and communities that may be adversely affected by their products and services. In this way the UNGPs provide an accountability framework based on prevention, oversight, monitoring and remedies for victims. The UNGPs do not create new substantive human rights obligations but rather enshrine states' obligations to protect human rights from third party harm and articulate businesses' responsibilities to respect human rights and provide effective remedy.¹⁶

Businesses respect human rights by conducting human rights due diligence, which is the ongoing process whereby a company assesses its human rights impacts, acts upon the findings, transparently reports and provides effective remedies to affected rightsholders.¹⁷ The detailed process can be seen in figure 3 below. Respecting human rights is not only good for rights holders but can also support businesses in building consumer trust and mitigating future legal liability. As confirmed by the UN Working Group on Business and Human Rights in its Covid-19 Statement: 'human rights due diligence is key to ensuring that any risks to people are identified and mitigated.'¹⁸

¹⁵ UN, 'Guiding principles on business and human rights: implementing the United Nations 'Protect, Respect and Remedy' framework', HR/PUB/11/04, January 2012, Principle 13, p 14.

¹⁶ John Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights,' (2017) *Working Paper Series*, Harvard University, p. 1.

¹⁷ UN, 'Guiding principles', (n. 15), Principle 17.

¹⁸ 'Ensuring that business respects human rights', (n. 13).

A Human Rights Due Diligence process

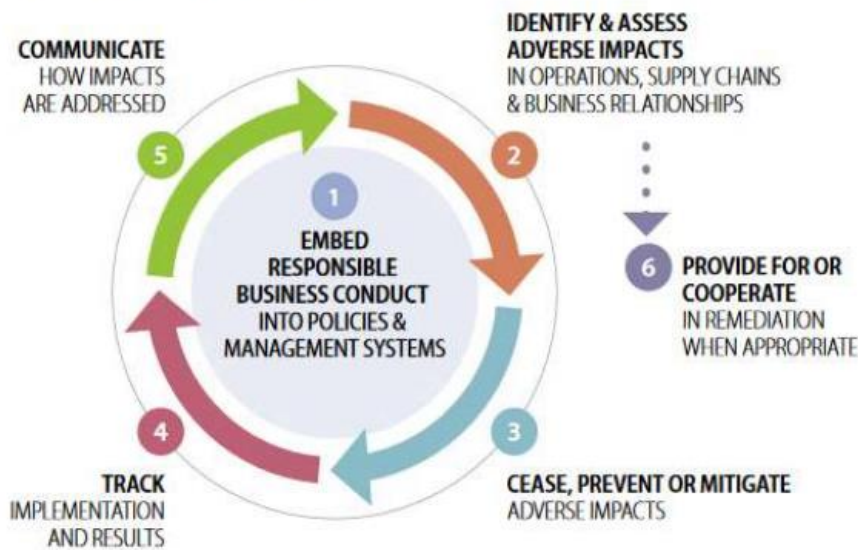


Figure 3 OECD (2018). OECD Due Diligence Guidance for Responsible Business Conduct.
<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

The responsibility to respect human rights applies to all businesses regardless of the sector, size, operational context, ownership and structure.¹⁹ However, ‘the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.’²⁰ This means that companies must have measures in place which are proportionate to the factors listed above. Considering this specification, it can be argued that due to a significant and rapid change to the operational context of some tech companies which change the potential severity of impacts, the means by which they must meet their responsibility to respect are heightened.

b) Why businesses don’t bear special responsibilities

According to the UNGPs, it is a company’s responsibility to respect human rights and a State’s responsibility to protect human rights. In the case that a company is the sole enabler of a right, the State would bear the responsibility to ensure that the company’s services are available and accessible to everyone. The company’s responsibility would however remain to ensure that the products and services it provides “do no harm” and to prevent, mitigate and remedy any adverse human rights impacts.

Whether or not it is a rights enabling service is, therefore, irrelevant to the extent that the company must ensure, at all times, that no human rights harms are caused, contributed to or linked to its business operations. The means through which the company meets its responsibility is heightened however, as potential severity of impact, scale and scope are affected by being the sole rights-enabler. The risk may continually change due to a range of extraneous factors and therefore ongoing human rights due diligence and impact assessments are required in order to ensure harms are prevented and mitigated.

¹⁹ UN. “Guiding principles”, (n. 15) Principle 14.

²⁰ Ibid.

c) Proportionate means of meeting the responsibility to respect

The “means” of demonstrating respect refers to the ‘scale and complexity of the processes the enterprise needs to have in place in order to know and show that it is respecting human rights’.²¹ The means of demonstrating this respect is dependent on the size, sector, operational context, ownership and structure, but most of all to the severity of a business’s adverse human rights impacts. The process must therefore be proportionate to the human rights risk of its operations.²² This means that the policies and processes a company has must reflect and encompass the severity of impact, size, sector and operational context as well as its ownership and organizational structure. For example, a large multinational enterprise is more likely to undertake diverse and complex activities than a smaller one which increases its human rights risk.²³ Their policies and processes for demonstrating respect for human right must be reflective of these factors. Similarly, the sector and operational context in which a business operates is likely to determine which risks are probable in its operations.

While the general sector, ownership and structure of most companies has not changed during Covid-19 for tech companies, the operational context and size for most has, as illustrated in section II above. It follows that the severity of impact a company has may have changed and that therefore enhanced means should be provided to respond to these changes to ensure human rights are respected throughout their operations.

This means that businesses must first understand how the new operational context, in this case Covid-19, affects their operations and thereby their users through the products and services they provide. The only way to achieve this is to conduct human rights impact assessments as a first step.

IV. Three Types of HRIAs Tech Companies Should be Conducting

HRIAs are the first step to identifying, understanding, assessing and addressing the adverse effects of tech products and services. They provide an opportunity for companies to assess and review the types of due diligence they have already undertaken for their products, and to reevaluate whether changes are required to ensure they respect human rights. Key criteria for a human rights impact assessment process include participation, non-discrimination, empowerment, transparency, and accountability, and in terms of content should include a benchmark of human rights standards, actual and potential impacts caused or contributed to, assessment of the severity of impact, impact mitigation measures and access to remedy.²⁴

HRIAs are the only way for companies to identify the adverse human rights impacts their products might have before a rights holder is affected. It is the way through which effective remedies can be provided and a precautionary approach to new products and relationships

²¹ UN, ‘The Corporate Responsibility to Respect Human Rights- an Interpretive Guide’, HR/PUB/12/02, January 2012, 19.

²² Ibid.

²³ Ibid.

²⁴ Nora Götzmann, Tulika Bansal, Elin Wrzoncki, Cathrine Poulsen-Hansen, Jacqueline Tedaldi and Roya Høvsgaard, ‘Human Rights Impact Assessment Guidance and Toolbox’, Danish Institute for Human Rights, 2016, 22-28.

can be ensured. HRIAs should be conducted as early as possible in the lifecycle of a project and repeated at regular intervals or “critical gateways” which include project expansions and significant changes in social and political circumstances.²⁵ This is definitely the case during Covid-19.

For the purposes of this paper HRIAs are divided in three categories of when they are needed: (1) when new products are developed, (2) new partnership and collaborations are formed, and (3) when a product or service is exposed to a new context. All of these three triggers can be observed in the tech sector during Covid-19 and therefore require significant attention especially if linked to providing or facilitating access to essential services.

a) Baseline HRIAs for new products

For new products and services, baseline HRIA are essential to gather information in order to understand the current state of enjoyment of human rights in any particular operational context. The process should include all risks throughout the development and deployment of any new product, from conceptualisation to design, testing and deployment.²⁶ This may be based on knowledge gained from HRIAs for similar products, desk based research on socio-economic and political context, expert human rights reports such as from civil society, academia and international organizations, and most importantly consultation with potentially affected rights holders.

Consultation and meaningful engagement with rights-holders, duty bearers and other relevant parties through surveys, interviews, focus groups and other means are primary ways to understand actual and potential impact.²⁷ It is from this baseline assessment that existing impacts are analysed and future impacts can be predicted. The benchmark for the assessment must be international human rights standards. The baseline data should also ‘inform the selection of human rights indicators, against which predicted change and any measures to address the predicted impacts can then be measured and tracked over time’.²⁸

Establishing this baseline is crucial to understanding what potential impacts a particular technology may have especially if it has not yet been deployed. An example of this is the current development of various contact tracing apps around the world which bring about a range of human rights concerns, specifically in regard to privacy and surveillance.²⁹

Applying the UNGP framework, companies developing contact tracing apps should consider what they know of human rights impacts from assessments of similar products both internally and externally, how they may meaningfully consult with potentially affected rights holders, and how impacts stand up to the scrutiny of the benchmark of international human rights standards and principles.

²⁵ Ibid, 12.

²⁶ Lorna McGregor, Daragh Murray and Vivian Ng, ‘International Human Rights Law as a Framework for Algorithmic Accountability’, (2019) 68(2) International and Comparative Law Quarterly 309.

²⁷ Götzmann et al, (n. 24) 51.

²⁸ Ibid, 53.

²⁹ Amos Toh and Deborah Brown, ‘How Digital Contact Tracing for COVID-19 Could Worsen Inequality’, Human Rights Watch, 4 June 2020.

b) Renewed HRIAs for existing products

Many of the products and services that are enabling individuals to overcome isolation, to work from home and maintain a social life are possible through already existing products and services. These include various social media platforms, communication apps, search engines, cloud storage and others. If companies providing such tools have operationalized the UNGPs, then a baseline HRIA should already exist prior to the rollout of the particular product. This will give the company an understanding of the types of impacts that their product is having on human rights in various operational contexts. Many companies may not have this in place however, and therefore new baseline HRIAs may be needed.

Products that have been operational pre-Covid-19 but which are facing increasing numbers of users, different demographics, and different socio-economic operational contexts must consider the effects of these variances on human rights, and/or whether the severity of impact has changed. The unprecedented uses of Zoom, as previously mentioned, is an illustration of this.³⁰ Understanding that its products are used in new and different ways should trigger a renewed impact assessment.

c) HRIAs for new and existing business relationships

The third type of HRIA is needed to assess how existing and new business relationships affect human rights. This is significant as companies are responsible not only for the human rights impact they cause and contribute to, but also those to which they are linked.³¹ This includes direct business partners, suppliers, distributors, government relationships and others.³²

Particularly when it comes to public private partnerships, it is key that relationships and procurement standards are transparent to foster access to information for the public. Companies need to consider for whom and how they make particular technologies available as some states, for example, may not have sufficient human rights protections in place, which could mean that a collaboration would increase risks to human rights. Companies such as Amazon, Google and Microsoft have each been criticised for their governmental projects, particularly those relating to facial recognition, drone surveillance and border policing.³³

Key aspects for consideration of human rights impacts of business relationship is whether any existing relationships are contributing to human rights harm, whether ending or beginning business relationships may cause human rights harm, whether certain actors due to their past record of abuse, or use of technology present risks to human rights and whether specifically government requests are legal necessary and proportionate. Asking these types of questions not only enables respect for human rights but also protects the business itself.

³⁰ Yuan (n. 11).

³¹ UN, 'Guiding principles', (n. 15) Principle 13, 16 (c), 17, 19.

³² European Commission, 'ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights', June 2013, 32, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/information_and_communication_technology_0.pdf.

³³ ACLU, 'Pressure mounts on Amazon, Microsoft and Google against selling facial recognition to government', 15 January 2019, <https://www.aclu.org/press-releases/pressure-mounts-amazon-microsoft-and-google-against-selling-facial-recognition>.

VI. Implications Post-Covid-19: Preparing for a Better World

Covid-19 has brought to the forefront the true binary nature of technology. The tremendous potential of technology has been demonstrated in facilitating everything from personal conveniences, to essential and government services. At the same time, however, all the alarm bells have been rung in validating how new and existing technologies and data processing practices can affect not only the right to privacy and freedom of expression but all human rights.

To enjoy the benefits and keep the harms at bay, safeguards must be the top priority. This chapter has demonstrated that the responsibility of companies is to respect human rights through means that are proportionate to their severity of impact. For tech companies during Covid-19 this means heightened responsibility to have enhanced due diligence measures because of the significant and rapid change in operational context and thereby potential severity of impact.

While Covid-19 serves as a perfect example of the types of HRIAs that should be triggered, it should not take a global pandemic to assess or reassess risk. Moving forward beyond the pandemic, ongoing due diligence must be a main concern of businesses. The role of technology will presumably not diminish over time and with numerous global challenges looming and a rise in tech-solutionism, respect for human rights must become the new normal.

Businesses are however not alone in this. States must ensure that all human rights are protected, especially when it comes to potential third party harm.³⁴ The safeguards should encompass comprehensive regulation, mandatory due diligence requirements, and effective oversight to ensure human rights are protected. Only when all actors understand their respective responsibilities and do everything within their power to protect and respect human rights can the full potential of technology be realised and sustainable, inclusive and resilient growth be ensured.

³⁴ UN, 'Guiding principles', (n. 15) Principle 1.

An ‘Infodemic’ in the Pandemic: Human Rights and Covid-19 Misinformation

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I. Introduction

The UN Secretary-General and the World Health Organisation have described the level of misinformation and disinformation surrounding the Covid-19 pandemic as an ‘infodemic’.² Misinformation and disinformation are often referred to as ‘fake news’.³ While both involve the spread of false or misleading information, misinformation is typically spread by people who do not realise that the information is false. By contrast, with disinformation, the person sharing the information knows it is false and usually shares it with the intent to cause harm.⁴ Since the beginning of the Covid-19 pandemic, two major patterns of misinformation and disinformation online have emerged. First, racist, xenophobic and hateful messages and memes have been shared online, blaming and scapegoating particular groups for the origin and spread of Covid-19.⁵ Second, misinformation has spread on the causes, symptoms and possible treatment of the virus. In this paper, we focus on the effects of the spread of misinformation which, if followed, could result in significant harm to health and, in extreme situations, life.⁶

This paper explores the responses that states and social media companies have taken to address misinformation on the causes, symptoms, and possible treatment of Covid-19 and assesses their compliance with existing obligations under international human rights standards and norms, including the UN Guiding Principles on Business and Human Rights. Addressing misinformation typically requires a plurality of measures, such as media literacy programmes, promotion of good journalism, increased transparency on advertising, in some circumstances, content moderation, and supervision by courts and regulators.⁷ For reasons of space, this chapter focuses on the three main approaches

¹ The Human Rights, Big Data and Technology Project is funded by the Economic and Social Research Council [grant number ES/M010236/1]. The authors are listed in alphabetical order to reflect equal contributions.

² ‘UN Tackles ‘infodemic’ of misinformation and cybercrime in COVID-19 crisis’, UN Department of Global Communication, <https://www.un.org/en/un-coronavirus-communications-team/un-tackling-%E2%80%98infodemic%E2%80%99-misinformation-and-cybercrime-covid-19>; World Health Organisation, Coronavirus diseases 2019 (COVID-19) – Situation Report-85, 15 April 2020, https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200415-sitrep-86-covid-19.pdf?sfvrsn=c615ea20_4_2.

³ Claire Wardle and Hossein Derakhshan, ‘Information Disorder. Toward an interdisciplinary framework for research and policymaking’, Council of Europe Report DGI 09-2017, 27 September 2017, 15-17.

⁴ Ibid, 20-22.

⁵ ‘COVID-19 fears should not be exploited to attack and exclude minorities – UN expert said’, OHCHR, 30 March 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25757&LangID=E>.

⁶ Julie Posetti and Kalina Bontcheva, ‘Disinfordemic: Deciphering COVID-19 disinformation’, UNESCO Policy Brief 1, April 2020.

⁷ Elena Abrusci, Sam Dubberley and Lorna McGregor, ‘Disinformation and Human Rights’, HRBDT Report, forthcoming 2020. See also European Commission, A multi-dimensional approach to disinformation.

taken by states and businesses to address Covid-19 misinformation. These are, at one end of the spectrum, the actions taken by states and social media platforms to meet their obligations under the right to the highest attainable standard of health (right to health) through ‘information accessibility’.⁸ At the other end of the spectrum, the companies’ content removal policies and their compatibility with the UN Guiding Principles on Business and Human Rights and the states’ application of criminal laws to address misinformation and the associated risks to human rights.

II. Information Accessibility

In recent years, there has been a surge in online misinformation, including in the field of public health. The Covid-19 pandemic, however, has taken public health misinformation to a new level. Incomplete and continuously evolving scientific understanding of this novel virus and how it can be effectively treated, as well as the lack of a vaccine, have created the conditions for misinformation to flourish. This includes misinformation on possible treatments or cures for Covid-19, such as recommendations to eat garlic, drink bleach, consume high volumes of alcohol, and use ultraviolet lights.⁹ Following some of this misinformation could have serious health repercussions and at the most extreme, result in death. For instance, journalists reported that in Iran, viral online misinformation surfaced about the beneficial effects of ingesting methanol and alcohol-based sanitisers to protect against the virus. This reportedly led to hundreds of people ingesting large quantities of the two substances, causing the death of over 300 people and serious illness.¹⁰

The right to the highest attainable standard of health (right to health) includes ‘information accessibility’, defined by the UN Committee on Economic, Social and Cultural Rights as ‘the right to seek, receive and impart information and ideas concerning health issues’.¹¹ Education and public awareness campaigns are widely recognised as a baseline measure to address misinformation, although on their own cannot provide a full solution to misinformation.¹² This is both because of the increasing sophistication of misinformation, which makes it more difficult to detect, and because these measures place a too heavy burden on the individual, without addressing the root causes of misinformation. However, when combined with other approaches, media literacy programmes constitute an important and necessary measure for providing individuals with the tools to self-assess the reliability of some pieces of information. In the Covid-19 context, meeting this dimension to the right

Report of the independent High level Group on fake news online disinformation, March 2018, available at https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50271.

⁸ CESCR, ‘General Comment No. 14: The Right to the Highest Attainable Standards of Health (Art. 12)’, UN Doc. E/C.12/2000/4, 11 August 2000 (hereinafter CESCR General Comment No.14).

⁹ For a detailed list of country-specific coronavirus misinformation see Poynter dedicated web page, <https://www.poynter.org/ifcn-covid-19-misinformation/>.

¹⁰ Christine Roger, ‘Social Media Misinformation that Led to 300 Deaths in Iran Claimed that Drinking Methanol was a Cure for COVID-19’, Tech Times, 29 March 2020, <https://www.techtimes.com/articles/248428/20200329/social-media-misinformation-that-led-to-300-deaths-in-iran-claimed-drinking-methanol-was-a-cure-for-covid-19.htm>.

¹¹ CESCR, General Comment No. 14 (n. 7).

¹² See, among others, European Commission, ‘A multi-dimensional approach to disinformation. Report of the independent High level Group on fake news online disinformation’, March 2018 and Digital, Culture, Media and Sport Committee, ‘Disinformation and “fake news”: Final Report’ House of Commons, 14 February 2019.

to health is particularly important given the virality of misinformation on Covid-19 on social media platforms.¹³

a) State Action on Information Accessibility

Some states have introduced educational and public awareness campaigns to counter misinformation on Covid-19.¹⁴ For instance, several countries, such as the UK, have partnered with the WHO on the '#Stop the spread' campaign, where they commit to using public broadcast channels to counter misinformation and promote public health advice.¹⁵ The UK has also established a 'rapid response unit' with health experts, designed to 'stem the spread of falsehoods and rumours which could cost lives'.¹⁶ The Indian Government has launched a WhatsApp chatbot to counter Covid-19 related misinformation.¹⁷

The nature and extent of actions that states are required to take to ensure 'information accessibility' is not well developed under international human rights law. However, the Covid-19 'infodemic' raises a number of interesting questions on the scope of the obligation. First, the question arises whether general public awareness campaigns that address key myths concerning Covid-19 are sufficient, or whether states are under an obligation to tailor their messages to the specific types of misinformation in circulation, given that some misinformation on possible treatments is country-specific. Misinformation may also relate to particular groups, which, if left unaddressed in public health messaging, could raise issues of discrimination.

Second, the question arises whether 'information accessibility' entails an expectation of timeliness, given that time may be of the essence when health misinformation has gone viral. Finally, the means by which states adopt public health awareness campaigns on Covid-19 may also be critical as misinformation that spreads online, often then spreads offline, including through families and friends. In light of the ongoing digital divide, it is likely to be insufficient for states to focus public health awareness campaigns exclusively on digital media; other actions may also be required, such as public messaging by post, public broadcasting and billboards. It is unclear the extent to which states have taken these types of questions into account when developing campaigns to counter misinformation in their country.

A particularly serious dimension to misinformation on Covid-19 has been the role of political leaders, including heads of state or government, in amplifying misinformation. For example, videos and tweets by Brazil's President Bolsonaro have circulated widely in which he claimed that Covid-19 is not more dangerous than a normal flu for people with a healthy lifestyle.¹⁸ President Trump has been at the centre of several claims that drinking or injecting bleach and hitting 'the body with tremendous ultraviolet or powerful light' would

¹³ Scott Brennen and others, 'Types, sources, and claims of COVID-19 misinformation', Oxford Reuters Institute, Oxford Internet Institute, Factsheet, April 2020.

¹⁴ See, for instance the '#Stop the spread' campaign, coordinated by WHO with national governments worldwide, <https://www.who.int/news-room/feature-stories/detail/countering-misinformation-about-covid-19>.

¹⁵ Ibid.

¹⁶ 'Government cracks down on spread of false coronavirus information online', GOV.UK, 30 March 2020, <https://www.gov.uk/government/news/government-cracks-down-on-spread-of-false-coronavirus-information-online>.

¹⁷ As reported by Julie Posetti and Kalina Bontcheva, 'Disinfordemic: Deciphering COVID-19 disinformation', (n. 5) 10.

¹⁸ Ibid, 4.

contribute to defeating the virus, against medical advice.¹⁹ The involvement of political leaders in the spread of misinformation both amplifies it, securing wider reach, and may have the effect of validating the misinformation, potentially giving the impression that it is 'official' advice. General Comment 14 of the UN Committee on Economic, Social and Cultural Rights includes as part of states' obligations to protect the right to health, a prohibition of 'intentionally misrepresenting health-related information'.²⁰ The question therefore arises whether in such contexts, the amplification of misinformation by state officials, particularly if repeated once contested by health authorities, violates the right to health.

b) Tech Companies' Action on Information Accessibility

Tech companies and social media platforms have been particularly active in addressing Covid-19 mis/disinformation, signaling a distinct approach to how they address other forms of mis and disinformation on their platforms. This has included the issuance of a joint statement by Facebook, Google, LinkedIn, Microsoft, Reddit, Twitter and YouTube in which, for the first time, they publicly committed to joining forces to address misinformation.²¹

In the past few years, tech and social media companies have been developing different responses to mis- and disinformation.²² They have generally taken a cautious approach and have not yet introduced measures to address some of the fundamental enablers of these phenomena, such as the business model behind digital advertising; the challenge of assessing what constitutes mis- or disinformation; and the extensive protection given to freedom of political expression by the US constitution.²³ By contrast, in relation to Covid-19, major tech companies have taken a proactive approach to counter health misinformation, partnering with international organisations and national health institutions, addressing the issues of monetisation of content and digital ads and introducing new definitions of what constitute misinformation for Covid-related content.

A common response by tech companies has been to 'elevate' content from the WHO and other national health bodies to users searching for information on Covid-19, in order to counter misinformation with trusted information from recognised health authorities. This has been also supported by the 'Verified' initiative launched by the UN to provide a platform with trusted and accurate content about Covid-19.²⁴ Google has launched an SOS Alert system which makes WHO coronavirus resources more easily accessible when users

¹⁹ William J. Broad and Dan Levin, 'Trump Muses About Light as Remedy, but Also Disinfectant, Which Is Dangerous', *The New York Times*, 24 April 2020.

²⁰ CESCR, 'General Comment No. 14' (n. 7).

²¹ See the statement as reported by Catherine Shu, 'Facebook, Reddit, Google, LinkedIn, Microsoft, Twitter and YouTube issue joint statement on misinformation', *TechCrunch*, 17 March 2020, <https://techcrunch.com/2020/03/16/facebook-reddit-google-linkedin-microsoft-twitter-and-youtube-issue-joint-statement-on-misinformation/>.

²² David Kaye, *Speech Police. The Global Struggle to Govern the Internet* (New York: Columbia Global Reports, 2019), 84-98.

²³ For a detailed discussion of content governance challenges see Access Now, '26 recommendations on content governance', Policy Paper, March 2020.

²⁴ UN, 'UN launches new initiative to fight COVID-19 misinformation through 'digital first responders'', 21 May 2020, <https://news.un.org/en/story/2020/05/1064622>.

enter the search terms, “Covid-19” or “coronavirus”.²⁵ YouTube has also added a banner redirecting users to the WHO web portal on all videos that reference Covid-19.²⁶ Similarly, the search function on Facebook has been altered so that any user searching for topics related to Covid-19 on Facebook is shown results encouraging them to look at the website of the WHO or national health authorities for the latest information.²⁷ The order of the newsfeed has also been changed to prioritise these websites in users' newsfeeds. Likewise, WhatsApp has worked with the WHO to create a Health Alert system that is designed to answer questions from the public about Covid-19 and provides prompt, reliable and official information 24 hours a day and worldwide and in several languages.²⁸

As a general matter, the prioritisation of content can be seen as a less invasive approach than content removal.²⁹ However, in some circumstances, where deprioritised content is placed so low on a feed that it may never be seen by a social media user, it may have the same effect as content removal.³⁰ Content prioritisation can therefore raise questions around freedom of expression, particularly if the prioritisation process results in the exclusion of particular voices or perspectives from the social media space.³¹ These wider concerns about content prioritisation may be distinguishable from a narrow and temporary context of a public health pandemic, where information from national public health authorities and the WHO designated as trusted partners is elevated over other content. This may be seen as a necessary, legitimate and proportionate restriction over other health messages, in order to ensure that social media users see the most up to date health information on Covid-19 and to combat misinformation.

Social media companies have also taken the decision to restrict advertising and demonetise certain content as a means of deterring users from uploading particularly shocking or attractive content on the virus only for getting higher revenues. The business model of digital advertising is based on users' views and, therefore, videos with higher numbers of views are more lucrative and ads featured on these videos will generate more revenue for the platform. This has been considered as one of the obstacles to effectively addressing online misinformation and its human rights impacts.³² YouTube decided to demonetise all Covid-19 related videos and does not allow ads on them.³³ However, after pressure from a news agency complaining about significant loss due to these restrictions, YouTube has already made some exceptions, such as allowing monetisation on videos coming from 'respectable' news agencies.³⁴

²⁵ Sundar Pichai, 'Coronavirus: How we're helping', Google-The Keyword, 6 March 2020, <https://www.blog.google/inside-google/company-announcements/coronavirus-covid19-response/>.

²⁶ Ibid.

²⁷ Mark Zuckerberg, 'update on the steps we're taking to respond to the coronavirus', Facebook, 4 March 2020, <https://www.facebook.com/zuck/posts/10111615249124441>.

²⁸ WhatsApp, 'The World Health Organization launches WHO Health Alert on WhatsApp', <https://www.whatsapp.com/coronavirus/who>.

²⁹ Article 19, 'Side-stepping rights: Regulating speech by contract', Policy Brief 2018, <https://www.article19.org/wp-content/uploads/2018/06/Regulating-speech-by-contract-WEB-v2.pdf>, 28-29.

³⁰ Access Now, '26 recommendations on content governance' (n. 22).

³¹ UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 'Annual Report to the General Assembly', UN Doc. A/73/348, 29 August 2018, 25.

³² Nathalie Marechal, Ellery Roberts Biddle, 'It's Not Just the Content, It's the Business Model: Democracy's Online Speech Challenge', Ranking Digital Rights Report, March 2020.

³³ Pichai, 'Coronavirus: How we're helping' (n. 24).

³⁴ YouTube Help, 'Coronavirus diseases 2019 (COVID-19) updates', 20 May 2020, <https://support.google.com/youtube/answer/9777243?hl=en>.

Following a similar approach, Facebook has banned ads and listings of any alleged alternative cure for the virus (not supported by health authorities), thus reducing its potential revenue. At the same time, the social media platform has also granted the WHO unlimited free ad space and some free space to national health organisations.³⁵ A similar initiative has been also implemented by Twitter, which, despite its standard policy of not allowing political ads, decided to let governmental health authorities advertise links to trustworthy information.³⁶

III. Content Removal

In addition to elevating content from the WHO and national public health authorities, social media platforms have modified their content moderation policies to more effectively fact-check and/or remove Covid misinformation, with an increased reliance on automated systems.³⁷ As a general matter, the main structural problem platforms face with moderating misinformation is the difficulty, and sometimes impossibility, of assessing with objectivity and certainty the veracity of information without actually making or being seen to be making value, moral or political judgments on particular forms of speech or risking censorship and unduly restricting freedom of expression.³⁸ However, social media platforms appear to have taken a different approach to health misinformation on Covid-19.³⁹

For instance, Facebook has decided to remove any ‘false claim and conspiracy theory that have been flagged by leading global health organisations’ and that causes immediate harm to users.⁴⁰ This is distinct from misinformation that does not ‘directly result in physical harm’ which is referred to the fact-checkers and, if rated false, is explicitly labelled as such and demoted on users’ news feeds.⁴¹

Twitter has taken a similar approach and has also changed its definition of harm and what constitutes harmful content. Prior to the pandemic, a post was considered harmful only if a user reported it. Once reported, the platform would assess it and take action where it deemed necessary. Twitter has now decided to take a more proactive approach to content removal. As explained in its blog by Twitter’s Customers and Legal, Policy and Trust & Safety leads, any content that ‘goes directly against guidance from authoritative sources of global and local public information’ will be assessed and, if needed, removed,⁴² without the need for the users to report it.

³⁵ Zuckerberg, ‘update on the steps’ (n. 26).

³⁶ Twitter, ‘Coronavirus: Staying safe and informed on Twitter’, 3 April 2020, https://blog.twitter.com/en_us/topics/company/2020/covid-19.html#definition.

³⁷ Google, ‘Actions to reduce the need for people to come into our offices’, 16 March 2020, <https://blog.google/inside-google/company-announcements/update-extended-workforce-covid-19>; Vijaya Gadde and Matt Derella, ‘An update on our continuity strategy during COVID-19’, Twitter Blog, 16 March 2020 (updated 1 April 2020), https://blog.twitter.com/en_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19.html.

³⁸ David Kaye, *Speech Police. The Global Struggle to Govern the Internet*, 84-98.

³⁹ Sam Gregory, Dia Kayyali and Corin Faife, ‘COVID-19 Misinformation and Disinformation Responses: Sorting the Good from the Bad’, WITNESS, May 2020, <https://blog.witness.org/2020/05/covid-19-misinformation-response-assessment/>.

⁴⁰ Zuckerberg, ‘update on the steps’ (n. 26).

⁴¹ Ibid.

⁴² Vijaya Gadde and Matt Derella, ‘An update on our continuity strategy during COVID-19’, Twitter Blog, 16 March 2020 (updated at 1 April 2020), https://blog.twitter.com/en_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19.html.

While these new approaches to dealing with Covid-19 misinformation apply to general users, they are limited in application if the person spreading the misinformation is a public figure. For example, according to Facebook's policy on fact-checking, political ads and political content is exempt from this check to preserve full freedom of political expression, fundamental in a democratic society.⁴³ In line with this, Facebook decided not to remove any of Trump's posts, even those going against WHO recommendations.⁴⁴ Twitter has adopted a different stance by stating that it would add labels correcting misinformation 'to anyone sharing misleading information that meets the requirement of our policy, including world leaders'.⁴⁵ For instance, on non-Covid-19 related posts, Twitter has recently fact-checked and hidden two posts by Trump that were deemed, respectively, to be false and glorifying violence.⁴⁶

While, on their face, the policies appear to be straightforward, there is very little public information on the types of content that social media platforms have deemed to fall under these policies. This is particularly important to understand given that the removal of content depends on the interpretation of whether a piece of content 'directly results in physical harm', which is likely to involve a complex and subjective assessment. This is likely to be accentuated further considering that the determination is now made mostly through automation, due to many of the human content moderators being furloughed or relocated to other tasks.⁴⁷ Without transparency and greater information on how these decisions are being made, it is difficult to assess the scale and breadth of their application and their compatibility with freedom of expression in practice.⁴⁸

Internal grievance mechanisms constitute a key safeguard against overly broad content removal. Again, however, it is unclear how quickly these processes are able to deal with appeals and very little data are available on the nature and outcomes of such appeals, thus limiting our understanding of how they protect freedom of expression and the right to a remedy under the UN Guiding Principles on Business and Human Rights.⁴⁹

IV. The Application of Criminal Law

Finally, some states have applied their criminal law, either by using existing anti-disinformation laws (many of which cover misinformation of the type discussed in this chapter) or by adopting new ones. For instance, Singapore is reported to have used its existing anti-disinformation law to address the spread of misinformation on Covid-19,

⁴³ Nick Legg, 'Facebook, Elections and Political Speech', Facebook Newsroom, 24 September 2019, <https://about.fb.com/news/2019/09/elections-and-political-speech/>.

⁴⁴ Sheera Frenkel and Davey Alba, 'Trump's Disinfectant Talk Trips Up Sites' Vows Against Misinformation', The New York Times, 30 April 2020.

⁴⁵ 'Coronavirus: Twitter will label Covid-19 fake news', BBC News, 12 May 2020.

⁴⁶ Kate Conger and Mike Isaac, 'Defying Trump, Twitter Doubles Down on Labeling Tweets', The New York Times, 28 May 2020.

⁴⁷ Louise Mtsakis, 'Coronavirus Disrupts Social Media's First Line of Defense', Wired, 18 March 2020, <https://www.wired.com/story/coronavirus-social-media-automated-content-moderation/>

⁴⁸ See, among others, 'A Conversation with UN Special Rapporteur David Kaye: COVID-19 and Freedom of Expression', Just Security, 21 May 2020, <https://www.justsecurity.org/70288/a-conversation-with-u-n-special-rapporteur-david-kaye-covid-19-and-freedom-of-expression/>; UN Special Rapporteur on Freedom of Expression, 'Disease pandemics and the freedom of opinion and expression, UN Doc. A/HRC/44/49, 23 April 2020, 49-53.

⁴⁹ Article 19, 'Viral Lies: Misinformation and the Coronavirus', Policy Brief, March 2020. See also UN Guiding Principles on Business and Human Rights, Pillar III, UN Doc. HR/PUB/11/04, 2011.

including false claims on how the virus spread.⁵⁰ Resort to this law to deal with Covid-19 raises a number of concerns from a human rights perspective. As the NGO Article 19 argued when it was first enacted, the definition of disinformation is very vague, which risks broad and subjective application.⁵¹ The penalties are also particularly severe with up to 10 years of imprisonment. As a result, the concern is that the law has a chilling effect on freedom of expression without actually addressing the spread of misinformation, including on Covid-19.⁵² Thailand is also reported to have applied its anti-disinformation laws to deal with misleading information about the spread of the virus.⁵³

In other countries that do not have dedicated anti-disinformation laws, existing criminal laws have been interpreted to include misinformation. For instance, in India, one-hundred people have reportedly been arrested on charges related to spreading misinformation about the virus,⁵⁴ following a broad interpretation of the existing provisions in the Indian Penal Code.⁵⁵ Individual states have also introduced specific legislation, such as the state of Maharashtra that passed an order specifically related to the pandemic of Covid-19, reportedly requiring that ‘any information on the virus must be approved by the government before dissemination’.⁵⁶

Other states have approved new legislation that criminalises Covid-19 misinformation. An example is that of Hungary, whose ‘coronavirus legislation’ includes a provision that ‘provides penalties of up to five years in prison for those spreading misinformation during the pandemic’.⁵⁷ The government justifies the provision to prevent ‘distortions that could undermine or thwart efforts to protect the public against the spread of the virus’.⁵⁸ However, journalists and NGOs have criticised the measure as a possible gateway for censorship of independent journalists and dissenting voices in the country.⁵⁹

The criminalisation of misinformation through general anti-disinformation laws, specific Covid-19 legislation or the application of general criminal law has been criticised for its incompatibility with international human rights law.⁶⁰ Many anti-disinformation laws are vaguely formulated, with unclear guidance on implementation and often with excessive

⁵⁰ Ibid and Shibani Mahtani, ‘Singapore introduced tough laws against fake news. Coronavirus has put them to test’, The Washington Post, 16 March 2020; Kirsten Han, ‘Coronavirus: How effective is Singapore’s Anti-Fake News Law?’, The News Lens, 8 April 2020, <https://international.thenewslens.com/article/133521>

⁵¹ See, for instance, Article 19, ‘Singapore: New law on “online falsehoods” a grave threat to freedom of expression’, 9 May 2019, <https://www.article19.org/resources/singapore-new-law-on-online-falsehoods-a-grave-threat-to-freedom-of-expression/> and ‘Singapore fake news law a ‘disaster’ for freedom of speech, says rights group’, The Guardian, 9 May 2019.

⁵² Ibid.

⁵³ ‘Stop using “fake news” laws in battle against coronavirus, MP say’, ASEAN Parliamentarians for Human Rights, 12 February 2020, <https://aseanmp.org/2020/02/12/stop-fake-news-laws-coronavirus/>

⁵⁴ Bhavya Dore, ‘Fake News, Real Arrests’, Foreign Policy, 17 April 2020, <https://foreignpolicy.com/2020/04/17/fake-news-real-arrests/>

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Shaun Walker, ‘Hungarian journalists fear coronavirus law may be used to jail them’, The Guardian, 3 April 2020.

⁵⁸ Comment made by Orban’s spokesman, Zoltan Kovacs, as reported in *ibid.*

⁵⁹ See, for instance, Reporters Without Borders, ‘COVID-19 and press freedom: Europe must oppose measures proposed by Viktor Orban’, 26 March 2020, <https://rsf.org/en/news/covid-19-and-press-freedom-europe-must-oppose-measures-proposed-viktor-orban>.

⁶⁰ Access Now, ‘Fighting misinformation and defending free expression during COVID-19: recommendation for states’, Policy Report, April 2020; Article 19, ‘Viral Lies: Misinformation and the Coronavirus’.

sanctions. As such, they can infringe freedom of expression directly, as enshrined in Article 19 UDHR and ICCPR, and can produce a chilling effect, where users refrain from exercising their freedom of expression because of the fear of the possible punishment.⁶¹ Prior to the Covid-19 pandemic, these laws were already criticized as posing disproportionate limitations to individuals' freedom of expression while placing little responsibility on the platforms.⁶²

Anti-disinformation laws remain a problematic measure, even under the exceptional circumstances of a pandemic.⁶³ As repeatedly warned by Access Now and Article 19, 'under no circumstances should any government allow people's fundamental rights to fall victim to this pandemic'⁶⁴ and states should use criminal penalties only 'as a last resort and in the most severe cases'.⁶⁵ Indeed, according to Access Now, criminal law is not an appropriate tool to fight misinformation and 'broad criminalisation of speech can contribute to the worsening of the ongoing health crisis'.⁶⁶ Rather, they recommend addressing the issue through different responses that do not pose further threats to human rights, such as media and digital literacy and stronger data protection laws.

V. Conclusion

The Covid-19 pandemic has illustrated the serious impact misinformation can have on individuals and society, both directly by threatening the rights to health or life of the individuals who believe the misinformation and act upon it, and indirectly, by undermining public health initiatives.

The approaches adopted by states and tech companies underscore the ongoing need to identify the parameters of human rights-compliant approaches to dealing with misinformation. This is a continuing challenge as many approaches are necessary but insufficient while others are overly broad and introduce new challenges.

At one end of the spectrum, the critical importance of access to media pluralism and accurate and reliable information as a baseline for addressing misinformation has been underlined by both states and tech companies' approaches to Covid-19 misinformation. This aligns with the plea by the UN Special Rapporteur on freedom of expression⁶⁷ and the work that UN agencies such as UNESCO are undertaking to enhance digital and media literacy and 'good journalism' more generally.⁶⁸ In this regard, social media platforms have adopted new approaches to elevating content in order to ensure that users are exposed to

⁶¹ UN SR on Freedom of Expression, 'Disease pandemics and the freedom of opinion and expression' (n. 47), 42.

⁶² Ibid. See also, Joint Declaration on "Fake News," Disinformation and Propaganda', The United Nations (UN) 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 (3 March 2017), <https://www.osce.org/fom/302796>.

⁶³ UN OHCHR, 'Emergency Measures and Covid-19: Guidance', 27 April 2020.

⁶⁴ Ibid and Access Now, 'Fighting misinformation.' (n. 59)

⁶⁵ Ibid.

⁶⁶ Ibid, 3.

⁶⁷ ⁶⁷ UN SR on Freedom of Expression, 'Disease pandemics and the freedom of opinion and expression' (n. 47), 58-63.

⁶⁸ UNESCO, 'Combating the disinfodemic: Working for truth in the time of COVID-19', <https://en.unesco.org/covid19/disinfodemic>.

accurate and reliable information. Questions arise, however, on whether this type of approach is contained to public health misinformation, particularly due to the possibility of partnerships with national public health authorities and the WHO, or whether it can – or should - be replicated in other contexts.

At the other end of the spectrum, the Covid-19 pandemic has underscored the wider risks to human rights posed by approaches to counter misinformation through overly broad content removal processes, the adoption of dedicated anti-disinformation laws and the extension of the criminal law to deal with misinformation.⁶⁹ In particular, the over-reliance on automated systems to remove content and not simply flag it can raise significant problems as well as the definition of which kind of political speech should be subject to content moderation rules. As these approaches have serious consequences for human rights, the ‘infodemic’ raises the urgent need to identify measures that are compatible with international human rights law, so that mis and disinformation can be effectively addressed without introducing new risks to human rights in the process. This can only be achieved through increased transparency, thorough human rights due diligence, meaningful multi-stakeholders engagement and accountability for states and companies.

⁶⁹ UN SR on Freedom of Expression, ‘Disease pandemics and the freedom of opinion and expression’ (n. 47), 41-53.

Cyber Due Diligence in Public Health Crises

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I. Introduction

Over the past two decades, the internet has become part of our daily lives. As the Covid-19 outbreak unfolds, our dependence on cyberspace has become even greater. Health systems are operated partially through information and communication technologies (ICTs), policymakers share vital and often confidential ideas through digital channels, and public information is disseminated by the media on their websites and mobile apps. The crisis has also forced us to move significant aspects of our personal and professional lives online. Parliaments around the world are holding sessions via video-link, medical appointments are now conducted online, and those who can work from home rely on their internet connections to hold online meetings, send and receive messages.

Whilst cyberspace has become a fertile field for malicious operations that may compound an existing health crisis, it also offers countless opportunities to respond more effectively to such crises. States are bound by several rules of international law requiring them to behave diligently in order to prevent, halt or redress harmful cyber operations — what we call ‘cyber due diligence duties’. In this contribution, we explore how compliance with such obligations must be part of States’ responses to epidemics and other health crises. On the one hand, failure to implement protective measures of due diligence or reasonable care in cyberspace can have disastrous consequences in the fight against Covid-19 and other diseases — especially when harmful cyber operations target critical infrastructure, such as the healthcare sector. In particular, the inability or unwillingness to prevent or halt cyber operations against hospitals or research facilities can hamper efforts to test and treat patients or to develop a vaccine. On the other hand, cyber due diligence measures can proactively bolster the capacity and resilience of States’ online networks and systems, enabling a more rapid recovery from health crises. For instance, with the necessary safeguards in place, contact tracing apps and the dissemination of accurate public health information on social media can help contain the spread of the disease.

The international community already benefits from a suitable — if patchy — international legal and policy framework laying down States’ duties to act diligently in preventing, halting and remedying harmful cyber operations against systems and infrastructures which are essential during health crises. States must implement those obligations, *inter alia*, by adopting measures aiming at: establishing an adequate national legal framework; monitoring cyber threats; enhancing the security and resilience of relevant systems and infrastructure; engaging in constructive international cooperation and dialogue. By behaving diligently in cyberspace, States will more likely be able to contain the spread of Covid-19, prevent further harm and pursue an effective recovery from the outbreak.

II. States’ Reactions to Cyber Operations against the Healthcare Sector

In its ‘initial pre-draft report’ issued in April 2020, the UN Open-Ended Working Group on cybersecurity (OEWG) reaffirmed the need to implement, at all times, strong protective measures for critical infrastructure against the malicious use of ICTs. Even though the concept of ‘critical infrastructure’ may vary across States, it is generally understood to

include, at the very least, medical facilities and other healthcare services, electricity grids, water and sanitation systems,¹ as well as financial and electoral services. Interference in the networks and systems of these vital activities could have disastrous consequences not only on a State's national security but also its social, political and economic stability and development.²

The risk and impact of malicious cyber operations against such infrastructure are heightened during a public health emergency. For cyber criminals and hacker groups, many of which are notorious State proxies, the public distress and vulnerability caused by the Covid-19 outbreak are an opportunity that can be exploited for personal or political gain.³ For instance, attempts have been made to steal the results of vaccine clinical trials from Oxford University's database, leading to increased cybersecurity measures.⁴ Likewise, hospitals and laboratories in the Czech Republic were targeted by ransomware attacks, forcing delays in scheduled operations.⁵ There have also been reports of Covid-19-related phishing messages and fraudulent websites worldwide, whose content has ranged from fully-fledged disinformation campaigns to sales of inexistent medical equipment.⁶ The potentially destabilising impact of such operations has prompted strong reactions from several States.

As part of the UK's response, the Secretary of State for Health recognised that 'the network and information systems held by or on behalf of the NHS [National Health Service] in England or those bodies which provision public health services in England must be protected to ensure those systems continue to function to support the provision of services intended to address coronavirus and COVID-19'.⁷ For this purpose, executive directions were adopted to enable the National Cyber Security Centre to strengthen the ability of those networks and systems 'to resist, at a given level of confidence, any action that compromises the availability, authenticity, integrity or confidentiality of stored or

¹ Czech Republic, 'Comments submitted by the Czech Republic in reaction to the initial "pre-draft" report of the Open-Ended Working Group on developments in the field of information and telecommunications in the context of international security', April 2020, <https://front.un-arm.org/wp-content/uploads/2020/04/czech-republic-oweg-pre-draft-suggestions.pdf>.

² UN Open-Ended Working Group on developments in the field of information and telecommunications in the context of international security (OEWG), 'Second "Pre-draft" report of the OEWG', 27 May 2020, <https://front.un-arm.org/wp-content/uploads/2020/05/200527-oweg-ict-revised-pre-draft.pdf>, § 22.

³ Davey Winder, 'Cyber Attacks Against Hospitals Have 'Significantly Increased' As Hackers Seek To Maximize Profits', *Forbes*, 8 April 2020; John E Dunn, 'DDoS attack on US Health agency part of coordinated campaign', *Naked Security (Sophos)*, 18 March 2020, <https://nakedsecurity.sophos.com/2020/03/18/ddos-attack-on-us-health-agency-part-of-coordinated-campaign/amp/>; Sean Gallagher, Andrew Brandt, 'Facing down the myriad threats tied to COVID-19', *SophosNews*, 14 April 2020 <https://news.sophos.com/en-us/2020/04/14/covidmalware/>.

⁴ Jamie Grierson, Hannah Devlin, 'Hostile states trying to steal coronavirus research, says UK agency', *The Guardian*, 3 May 2020.

⁵ Catalin Cimpanu, 'Czech hospital hit by cyberattack while in the midst of a COVID-19 outbreak', *ZDNet*, 13 March 2020, <https://www.zdnet.com/article/czech-hospital-hit-by-cyber-attack-while-in-the-midst-of-a-covid-19-outbreak/>.

⁶ Catalin Cimpanu, 'State-sponsored hackers are now using coronavirus lures to infect their targets', *ZDNet*, 13 March 2020, <https://www.zdnet.com/article/state-sponsored-hackers-are-now-using-coronavirus-lures-to-infect-their-targets/>.

⁷ UK Department of Health and Social Care, 'The Consent to Activities Related to the Security of NHS and Public Health Services Digital Systems (Coronavirus) Directions 2020', 24 April 2020, <https://www.gov.uk/government/publications/security-of-nhs-and-public-health-services-digital-systems-coronavirus-directions-2020>, 1.

transmitted or processed data or the related services offered by, or accessible via, those network and information systems.’⁸

In the same vein, referring to recent cyber threats against health and research facilities in the UK, Europe and the US,⁹ the UK Foreign Secretary recalled that ‘[i]nternational law and the norms of responsible state behaviour must be respected and all states have an important role to play to help counter irresponsible activity being carried out by criminal groups in their countries.’¹⁰ Similar calls for compliance with the “norms of responsible state behaviour” and international law applicable to cyberspace to protect the healthcare sector came — among others — from Australia,¹¹ the Czech Republic,¹² Estonia,¹³ the Nordic countries¹⁴ and the US.¹⁵ More tellingly, the European Union, upon condemning ‘malicious cyber activities targeting essential operators [...] including in the healthcare sector’, ‘call[ed] upon every country to exercise due diligence and take appropriate actions against actors conducting such activities from its territory, consistent with international law’.¹⁶

It emerges from those declarations that many States believe in the existence of a legal and policy framework to increase cybersecurity and resilience, made up of binding rules and principles of customary and conventional international law; and ‘non-binding norms of responsible state behaviour’.¹⁷ Central to such a two-pronged framework is the idea that, as a corollary of their sovereignty, States must exercise “cyber due diligence”, that is, act to the best of their abilities to prevent, halt and redress a range of harmful cyber operations emanating from their territory. This, together with the above statements, suggests that, in times of public health emergency, States ought to exercise due diligence in cyberspace.

⁸ Ibid, Section 2.

⁹ UK National Cyber Security Centre, ‘Cyber warning issued for key healthcare organisations in UK and USA’, 5 May 2020, <https://www.ncsc.gov.uk/news/warning-issued-uk-usa-healthcare-organisations>.

¹⁰ UK Foreign & Commonwealth Office (FCO), ‘UK condemns cyber actors seeking to benefit from global coronavirus pandemic’, 5 May 2020, <https://www.gov.uk/government/news/uk-condemns-cyber-actors-seeking-to-benefit-from-global-coronavirus-pandemic>.

¹¹ Stilgherrian, ‘Australia and US call out cyber attacks on hospitals during COVID-19 pandemic’, *ZDNet*, 27 April 2020, <https://www.zdnet.com/article/australia-and-us-call-out-cyber-attacks-on-hospitals-during-covid-19-pandemic/>.

¹² Czech Republic, (n. 1).

¹³ ‘Reinsalu condemns cyber attacks against Czech critical infrastructure’, *ERR News*, 20 April 2020, <https://news.err.ee/1080058/reinsalu-condemns-cyber-attacks-against-czech-critical-infrastructure>.

¹⁴ ‘Joint statement from Denmark, Finland, Iceland, Sweden and Norway by Ambassador Mona Juul at the Arria-meeting on Cyber stability and conflict prevention’, 22 May 2020, <https://www.norway.no/en/missions/UN/statements/security-council/2020/arria-cyber-stability-and-conflict-prevention>.

¹⁵ US Department of State, ‘The United States Concerned by Threat of Cyber Attack Against the Czech Republic’s Healthcare Sector’, 17 April 2020, <https://www.state.gov/the-united-states-concerned-by-threat-of-cyber-attack-against-the-czech-republics-healthcare-sector/>.

¹⁶ Council of the European Union, ‘Declaration by the High Representative Josep Borrell, on behalf of the European Union, on malicious cyber activities exploiting the coronavirus pandemic’, 30 April 2020, <https://www.consilium.europa.eu/en/press/press-releases/2020/04/30/declaration-by-the-high-representative-josep-borrell-on-behalf-of-the-european-union-on-malicious-cyber-activities-exploiting-the-coronavirus-pandemic/>. See also the recent call by over 120 academics and experts, ‘The Oxford Statement on the International Law Protections Against Cyber Operations Targeting the Health Care Sector’, *Oxford Institute for Ethics, Law and Armed Conflict*, May 2020, <https://elac.web.ox.ac.uk/the-oxford-statement-on-the-international-law-protections-against-cyber-operations-targeting-the-hea>.

¹⁷ ‘Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security’, UN Doc. A/70/174, 22 July 2015, § 13.

Without measures of prevention, control and crisis response, overburdened healthcare facilities around the world risk collapsing, and full recovery may be slow if not impossible.

III. Cyber Due Diligence between International Law and Policy

Due diligence has recently gained prominence in the cyber domain as a way to hold States indirectly accountable for harms caused by third parties. Responsibility arises from a failure to prevent or redress harms originating from or transiting through their jurisdiction, without the need to factually or legally attribute the conduct to the State in question. Thus, several States and scholars have supported a customary rule or principle requiring States to exercise due diligence in cyberspace, in what has been termed 'cyber due diligence'.¹⁸ According to one iteration of this rule, States 'must exercise due diligence in not allowing [their] territory [...] or cyber infrastructure under its governmental control, to be used for cyber operations that affect the rights of, and produce serious adverse consequences for, other states.'¹⁹ However, some governments have been reluctant to accept this formulation as a binding rule of customary international law.²⁰ Instead, a very similar articulation of cyber due diligence has been recognised by the UN Group of Governmental Experts (GGE) on cybersecurity as well as the UN General Assembly as a voluntary, non-binding norm of responsible State behaviour. It affirms that 'States *should* not knowingly allow their territory to be used for internationally wrongful acts using ICTs.'²¹

The confusion surrounding the concept of cyber due diligence seems to result from its treatment as a standalone obligation or principle. It may well be that a cyber-specific due diligence rule is emerging,²² but this claim should not detract from the fact that international law in its entirety applies by default to cyberspace — or, more accurately, to ICTs — and States have unanimously and explicitly recognised as much.²³ Thus, the pre-existing range of international obligations of due diligence requiring States to prevent, stop or redress certain harms are already applicable to harmful cyber operations. These include two rules of general application in international law, covering all fields of State activity, as well as rules found in specialised international legal regimes.

The first comes from the 1949 *Corfu Channel* case between the UK and Albania. There, the International Court of Justice (ICJ) held that 'it is every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.'²⁴ This

¹⁸ Michael N. Schmitt, 'In Defense of Due Diligence in Cyberspace,' (2015) 125 *Yale LJ Forum* 68.

¹⁹ Michael N. Schmitt, (ed) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge : Cambridge University Press, 2017), Rule 6, 30 (emphasis added).

²⁰ Liisi Adamson, 'Recommendation 13(c),' in UN Office of Disarmament Affairs, *Voluntary, Non-Binding Norms for Responsible State Behaviour in the Use of Information and Communications Technology: A Commentary* (New York: United Nations, 2017), 55, § 12.

²¹ UN GGE Report (n. 17), § 13(c) (emphasis added).

²² See, e.g., France, Ministère des Armées, '*Droit International appliqué aux opérations dans le cyberspace*', 2019, 10; Australia, Department of Foreign Affairs and Trade (DFAT), 'Australia's International Cyber Engagement Strategy — Annex A: Australia's position on how international law applies to state conduct in cyberspace', 2020, <https://www.dfat.gov.au/publications/international-relations/international-cyber-engagement-strategy/aices/chapters/annexes.html#Annex-A>; Organization of American States, 'Improving Transparency – International Law and State Cyber Operations: Fourth Report (Presented by Prof. Duncan B. Hollis)', CJI/doc. 603/20 rev.1, 5 March 2020, §§ 56ff.; Republic of Korea, 'Comments on the pre-draft of the OEWG Report', 14 April 2020, <https://front.un-arm.org/wp-content/uploads/2020/04/200414-rok-comment-on-pre-draft-of-oewg.pdf>, 2.

²³ See, e.g., UN GGE Report (n. 17), §§ 26-28.

²⁴ *Corfu Channel Case (United Kingdom v Albania)*, Merits, 9 April 1949, ICJ Reports (1949) 4, 22 (emphasis added).

particular obligation seems to apply with respect to “acts contrary to the rights of other States”, without there necessarily being a violation of a particular rule of international law.²⁵ It imposes on States a standard of diligent behaviour, i.e. to employ their best efforts, to prevent or stop such acts.²⁶ It is triggered by actual or constructive knowledge that the acts in question are being or will be committed and limited by a State’s capacity to act.²⁷

The second rule of international law establishing a due diligence duty of general application is the “no-harm” or “good neighbourliness” principle. Although this principle has gained most prominence in the environmental context, its origins go far back to nineteenth century State-to-State disputes about the treatment of aliens abroad.²⁸ The rule was most clearly articulated in the 1941 *Trail Smelter* award, where the arbitral tribunal held that a State ‘owes at all times a duty to protect other states against injurious acts by individuals from within their jurisdiction.’²⁹ The principle is now embodied in the ILC’s 2001 Articles on Prevention of Transboundary Harm from Hazardous Activities,³⁰ which are deemed to reflect customary international law, at least in significant part.³¹ Article 3, in particular, acknowledges that States have a duty to ‘take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.’ The ICJ sanctioned the customary nature of this duty in the 1996 *Nuclear Weapons* Advisory Opinion,³² while the ILC itself recognised its applicability beyond the environmental realm.³³ Unlike the rule articulated in *Corfu Channel*, the no-harm principle requires States to prevent transboundary harm even if caused by activities that are lawful or not contrary to the rights of other States.³⁴ As it explained, this is an obligation of due diligence, not

²⁵ The Tallinn Manual 2.0, going beyond the ICJ reasoning, argues that such acts are limited to internationally wrongful acts by a State, or acts committed by other entities that would have been internationally wrongful if committed by the State from where the harm originates or through which it transits. See Schmitt, *Tallinn Manual* (n. 19) 39, § 34; 34, § 14, 35–36, § 21.

²⁶ See e.g. Schmitt, *Tallinn Manual* (n. 19) 30; Karine Bannelier-Christakis, ‘Cyber Diligence: A Low-Intensity Due Diligence Principle for Low-Intensity Cyber Operations?’, (2014) 14 *Baltic Y Intl L* 5; International Law Association (ILA), ‘Study Group on Due Diligence in International Law, Second Report,’ July 2016, 2.

²⁷ Robert Kolb, ‘Reflections on Due Diligence Duties and Cyberspace,’ (2015) 58 *GerY Intl L* 123–24; Schmitt, *Tallinn Manual* (n. 19) 44–45, §§ 7-9; 47, §§ 16-18; Russell Buchan, ‘Cyberspace, Non-State Actors and the Obligation to Prevent Transboundary Harm,’ (2016) 21(3) *J Confl & Sec L* 441–42.

²⁸ See, e.g., *Alabama Claims Arbitration (USA v UK)* (1872) 29 RIAA 125, 127, 129, 131-132; *Wipperman Case (USA v Venezuela)* (1887), reprinted in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. 3 (1898–1906), 3041; *Neer Case (USA v Mexico)* (1926) 4 RIAA 60, 61-62. See also *Trail Smelter Case (USA v Canada)*, (1941) 3 RIAA 1911, 1963-1965.

²⁹ *Trail Smelter Case*, *ibid*, 1963.

³⁰ ILC, ‘Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries’, in ‘Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)’, UN Doc. A/56/10, 144-170.

³¹ Timo Koivurova, ‘Due Diligence,’ *Max Planck Encyclopedia of Public International Law*, February 2010, § 10.

³² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ GL No 95, [1996] ICJ Rep 226, para 29.

³³ ILC, Draft articles on Prevention of Transboundary Harm (n. 30), 148-149. See also Jutta Brunée and Tamar Meshel, ‘Teaching an Old Law New Tricks: International Environmental Law Lessons for Cyberspace Governance,’ (2015) 58 *Ger Y Intl L* 134–35; Koivurova (n. 31), §§ 16, 23, 44-45.

³⁴ Failure to exercise the requisite diligence leads to liability to redress the harm by compensation, once it materialises — with international responsibility arising if the State fails to effect such redress. ILC, Draft articles on Prevention of Transboundary Harm (n. 30), 150.

requiring States ‘to guarantee that the harm would not occur’ but ‘to exert [their] best possible efforts to minimize the risk’ thereof.³⁵

Duties of due diligence can also be found in specialised bodies of international law, which, as noted earlier, apply by default to ICTs in the absence of carve-outs. With respect to Covid-19, it is helpful to recall that international human rights law (IHL) imposes on States positive obligations to safeguard the enjoyment individual human rights, including civil, political, economic, social and cultural rights, online and offline.³⁶ These positive obligations entail a range of due diligence duties requiring States to adopt all reasonable measures to protect and ensure the human rights of individuals subject to their jurisdiction against threats posed by private or public entities or external circumstances, such as natural disasters or epidemics.³⁷ Due diligence, in this context, describes the standard of conduct against which State compliance with those obligations is measured.³⁸ Covid-19-themed or related cyberattacks, such as those described in Section II above, have the potential to harm *inter alia* individuals’ rights to life, health, privacy and freedom of expression.³⁹ Accordingly, States must do their best to prevent, stop and remedy such cyber operations — to the extent that they occur within a State’s territory or jurisdiction — whether or not they are perpetrated by State agents, private individuals or simply result from an accident.⁴⁰ In this respect, one should recall that identifying the scope of a State’s jurisdiction for IHL purposes is particularly problematic in respect to cyberspace or ICTs,⁴¹ given their transboundary nature and the different ‘layers’ of which they are made — physical, logical and personal.⁴² Although this issue is beyond the scope of this contribution, it suffices to note that any model of extraterritorial jurisdiction over human rights online⁴³ is subject to a State’s the capacity to act, as well as the foreseeability of the harm or threat.

³⁵ *Ibid*, 154.

³⁶ See also UN Human Rights Council, Resolution 32/13, ‘The promotion, protection and enjoyment of human rights on the Internet’, UN Doc. A/HRC/RES/32/13, 31 July 2016, § 1.

³⁷ *Bărbulescu v. Romania*, Appl. no. 61496/08, 5 September 2017, § 110, with respect to the right to privacy.

³⁸ HRC, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, § 8; Samantha Besson, ‘Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!’, *ESIL Reflections* 9, no. 1, 28 April 2020, 4–5.

³⁹ Marko Milanovic and Michael N. Schmitt, ‘Cyber Attacks and Cyber (Mis)Information Operations during a Pandemic’, *J Natl Sec L & Pol*, forthcoming, <http://dx.doi.org/10.2139/ssrn.3612019>.

⁴⁰ In the context of cyberspace, see Schmitt, *Tallinn Manual* (n. 19) Rule 36, 196–201; Milanovic and Schmitt, (n. 39), 22. See generally *Velásquez-Rodríguez v Honduras* (Merits), Ser. C. No. 4, 29 July 1988, §§ 172-173; *Öneryıldız v. Turkey*, Appl. No. 48939/99, 30 November 2004, §§ 89-90, 97-110; *Rantsev v. Cyprus and Russia*, Appl. No. 25965/04, 7 January 2010, §§ 218-223; *M. Özel and Others v. Turkey*, Appl. nos. 14350/05, 15245/05 and 16051/05, 17 November 2017, §§ 173-174.

⁴¹ Marko Milanovic, ‘The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life,’ (2020) 20(1) *Hum Rts LR* 21–24,.

⁴² Clare Sullivan, ‘The 2014 Sony Hack and the Role of International Law,’ (2015-16) 8(3) *J Natl Sec L & Pol* 454, fn 88.

⁴³ Different human rights bodies and scholars have oscillated between different models of extraterritorial jurisdiction: a) spatial, requiring control over physical infrastructure (e.g. a server or satellite; see e.g. *Banković v. Belgium* (Admissibility), App no 52207/99, 12 December 2001, §§ 74-82); b) personal, requiring control of the individual victim/right-holder (see e.g. HRC, General Comment 31 (n. 38), § 10); c) activity-based, whereby control must be exercised over the activity in question (e.g. the acts hacking a computer; see e.g. HRC, ‘General Comment No. 36: Right to Life (Art. 6)’, UN Doc. CCPR/C/GC/35, 3 September 2019, § 22); or d) functional, requiring control over the enjoyment or exercise of the rights in question, broadly defined (e.g. HRC, General Comment 36, *ibid*, § 63; Yuval Shany, ‘Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law,’ (2013) 7(1) *Law & Ethics of Hum Rts* 47.

International humanitarian law (IHL) also establishes a range of due diligence obligations.⁴⁴ Cyberwarfare has become a common feature of modern armed conflicts. Malicious cyber operations have the potential to intentionally or indiscriminately render civilian infrastructure dysfunctional, disrupting the provision of services essential to the civilian population.⁴⁵ Thus, during armed conflict and even in peacetime, States must behave diligently in adopting measures to protect civilians against the effects of violent cyberattacks.⁴⁶ Likewise, they have a general duty to act with due diligence to ensure that parties to an armed conflict do not violate IHL, including in cyberspace.⁴⁷

Crucially, the applicability of this comprehensive, yet multifaceted and patchy framework in cyberspace has received support from several States, especially in times of Covid-19. For instance, France,⁴⁸ Austria,⁴⁹ Australia,⁵⁰ and the Czech Republic⁵¹ have not only expressed concern for cyberattacks against health and research facilities but also explicitly recognised the binding nature of due diligence obligations under international law, IHRL and/or IHL.

The “voluntary, non-binding norms of responsible state behaviour”, first outlined in the 2015 GGE Report and reaffirmed in the context of the pandemic,⁵² also seem to embrace a preventive and precautionary approach in respect of harmful cyber operations. They send a message that resonates even more clearly during a public health crisis: States should take reasonable steps and appropriate measures to protect their critical infrastructure from ICT threats, especially those that can compound the crisis or hinder an effective response to the outbreak. Of particular importance in this context are the following measures that States are encouraged to take: enactment of domestic legislation,⁵³ monitoring,⁵⁴ confidence-building,⁵⁵ and international cooperation and capacity-building.⁵⁶

⁴⁴ See e.g. Marco Longobardo, 'The Relevance of the Concept of Due Diligence for International Humanitarian Law,' (2020) 37(1) *Wisc Intl LJ* 44.

⁴⁵ ICRC, 'International Humanitarian Law and Cyber Operations during Armed Conflicts — ICRC position paper', 28 November 2019, , 5.

⁴⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977, Art. 58; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), Rules 22-24.

⁴⁷ Geneva Conventions of 1949, common Art.1; AP I, Art. 1(1).

⁴⁸ France, 'France's response to the pre-draft report from the OEWG Chair', April 2020, <https://front.un-arm.org/wp-content/uploads/2020/04/contribution-fr-oewg-eng-vf.pdf>.

⁴⁹ Austria, 'Pre-Draft Report of the OEWG - ICT: Comments by Austria', 31 March 2020, <https://front.un-arm.org/wp-content/uploads/2020/04/comments-by-austria.pdf>.

⁵⁰ Australia, 'Australia's comments on the Initial "Pre-draft" of the report of the UN Open Ended Working Group in the field of information and telecommunications in the context of international security (OEWG)', 16 April 2020, <https://front.un-arm.org/wp-content/uploads/2020/04/final-australia-comments-on-oewg-pre-draft-report-16-april.pdf>.

⁵¹ Czech Republic, (n. 1).

⁵² See, e.g., n. 48, 49, 50 above.

⁵³ See, e.g. "Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security", UN Doc. A/68/98, 24 June 2013, § 32(a).

⁵⁴ See, e.g., 'Regional Consultations series of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security', December 2019, <https://www.un.org/disarmament/wp-content/uploads/2019/12/collated-summaries-regional-gge-consultations-12-3-2019.pdf>, 17.

⁵⁵ UN GGE Report (n. 17), §§ 16-18.

⁵⁶ *Ibid*, §§ 19-23.

But the responsibility to adopt those measures arises *not only* from voluntary commitments made in that report, the OEWG and other fora, or the resulting social expectation. These various measures may be required in different circumstances by the range of international obligations of due diligence outlined earlier — to the extent that such measures would be a way to prevent, halt and redress harmful cyber operations.

IV. Cyber Due Diligence Measures and their Impact on the Pandemic

The general thrust of due diligence obligations is to require States to do what they *can* do. Such duties do not impose pre-determined measures, but demand from States reasonable efforts to prevent, stop or redress harm, subject to their capacity to act in the circumstances and their knowledge or foreseeability of the harm or risk. Thus, their extent varies on the basis of available resources, the degree and type of harm or risk they seek to avert, as well as a State's capacity to influence the behaviour of the perpetrators. In this way, due diligence obligations afford a degree of flexibility and deference to States, but they are accompanied by a core procedural obligation of result to put in place the necessary governmental capacity to fulfil applicable obligations.⁵⁷ This means that, beyond this minimal threshold, each State may be required to adopt different due diligence measures depending on the circumstances. As the ICJ recalled in the *Bosnian Genocide* case, due diligence calls for an *in concreto* or contextual assessment of State behaviour.⁵⁸ Also, any cyber due diligence measures must be consistent with other international obligations that a State may have, especially their negative and positive obligations in respect of human rights affected by adopted measures.

The following measures are particularly suitable, if not essential, to any attempt at preventing, halting and redressing online harms that may either compound ongoing health problems or jeopardise the effective recovery therefrom.

a) National legal framework

Any plan of action to implement cyber due diligence measures ought to begin with the establishment of an adequate national legal framework.⁵⁹ An adequate national legal framework in this sense would include, first and foremost, the prohibition or criminalisation of harmful cyber conduct. Likewise, the availability of civil remedies alongside provision for effective investigations and prosecutions of malicious cyber behaviour are instrumental in deterring, preventing and redressing ensuing harms.⁶⁰ In a context where most ICT infrastructures are owned, controlled or operated by multinational or foreign corporations, States must also pass appropriate national legislation regulating their human rights impact and imposing relevant corporate due diligence standards. Such measures should address: online disinformation, whether through content moderation or counter-speech; internet security and availability; as well as software vulnerability — all of which depend on

⁵⁷ ILC, Draft articles on Prevention of Transboundary Harm (n. 30), 155-156, in particular commentary to Article 3, § 17 and commentary to Article 5. See also Koivurova (n. 31), § 21; Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States,' (1992) *Ger Y Intl L* 26–27; Kolb (n. 27), 117, 127. Koivurova, para 21; Pisillo-Mazzeschi, 26–27; Kolb, 117, 127.

⁵⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, [2017] ICJ Reports 43, 26 February 2007 §§ 430-431.

⁵⁹ HRC, General Comment 31, (n. 38), §§ 7, 13; HRC, General Comment 36, (n. 43), §§ 4, 13, 22.

⁶⁰ *Nicolae Virgiliu Tănase v. Romania*, Appl. no. 41720/13, 25 June 2019, § 127; HRC, General Comment 31, *ibid*, §§ 8, 18; HRC, General Comment 36, *ibid*, §§ 13, 19, 27-28.

corporate action. Other legislative measures of particular relevance in a health crisis include the provision of response and preparedness plans for cyber emergencies, along with an effective system for monitoring compliance with the law by State officials and third parties, to the extent permitted by international law.⁶¹

b) Monitoring

This brings us to the second type of cyber due diligence measures that States should and often must — to the extent practicable — adopt at all times, including during health crises: effective monitoring or surveillance of cyberspace. To be sure, obligations of due diligence do not necessarily require States to do the impossible to anticipate all possible online harms by ostensibly policing the internet and seeking information about potential threats. But they do require States to use their existing technical and financial resources to halt or prevent malicious cyber operations which they know or should have known about, again, to the extent possible and permitted by other rules of international law — in particular, the human rights to privacy and freedom of expression.

Notably, in light of recent cyber threats facing the healthcare sector, Australia urged all States to “exercise increased vigilance to ensure their territory is not a safe haven for cybercriminals.”⁶² In the same spirit of vigilance, the UK Health Secretary put the Government Communications Headquarters (GHCQ) in charge of monitoring “any information relating to the security of any network and information system held by or on behalf of the NHS or a public health body during the period ending on 31st December 2020.”⁶³ Digital technologies may also be used to monitor spaces and individuals to contain the spread of Covid-19, consistently with international law. Examples include video surveillance, contact tracing technologies and crowdsourcing systems.⁶⁴

c) Confidence-building

The implementation of methods to enhance cybersecurity and mutual trust among States, also known as “confidence-building” measures,⁶⁵ may also be necessary to counter and prevent harmful cyber operations against the healthcare sector and other critical infrastructure during the Covid-19 outbreak and other public emergencies. Such measures may be required to the extent that they can address existing security vulnerabilities, such as data breaches or software flaws, or increase resilience in the recovery from harmful cyber operations, such as the creation of 24/7 Cyber Emergency Teams.⁶⁶

These measures may also be required, moreover, to comply with the IHL rule stipulating that “[t]he civilian population and individual civilians shall enjoy general protection against

⁶¹ HRC, General Comment 36, (n. 43) § 21.

⁶² Australia, DFAT and Australian Cyber Security Centre, ‘Unacceptable malicious cyber activity: Joint Statement’, 20 May 2020, <https://www.dfat.gov.au/news/news/unacceptable-malicious-cyber-activity>; Stilgherrian, (n. 11).

⁶³ UK, Coronavirus Directions 2020, (n. 7), Section 4.

⁶⁴ Josh Toussaint-Strauss, Alex Hern, Simon Roberts, Joseph Pierce, Paul Boyd and Ryan Baxter, ‘How Covid-19 contact tracing can help beat the pandemic’, *The Guardian*, 8 May 2020; Nancy Fiesler, ‘Crowdsourcing COVID-19’, *Harvard Medical School: News & Research*, <https://hms.harvard.edu/news/crowdsourcing-covid-19>.

⁶⁵ UN GGE Report (n. 17), §§ 16-18.

⁶⁶ *Ibid.*, § 17(c).

dangers arising from military operations.⁶⁷ Precautionary measures are particularly important in cyberwarfare, given the co-dependency and interconnectivity between civilian infrastructures and lawful military objectives.⁶⁸ Thus, they may play a key role in preventing cyberattacks directed against military targets from spilling over onto civilian systems, including hospitals and other critical infrastructure.⁶⁹

d) International cooperation and capacity-building

As neither the internet nor the pandemic knows territorial boundaries, international cooperation and institutional dialogue are crucial to prevent further outbreaks, contain the spread of the disease and eventually eliminate it. As the 2015 GGE report rightly acknowledges, '[i]nternational cooperation and assistance can play an essential role in enabling States to secure ICTs and ensure their peaceful use.'⁷⁰

Thus, it not surprising that several governments have recently called upon other States to cooperate with each other as well as with international institutions, particularly the World Health Organisation, in the context of the pandemic. The Czech Republic, for example, noted that "[t]he rising number of cyberattacks on medical facilities worldwide reinforce [sic] the need for coordinated global action to protect [the] public health care sector from malicious ICT activities."⁷¹ Similarly, Estonia affirmed that '[t]he international community should urgently address cyberattacks against hospitals and other essential medical services that threaten already strained healthcare entities.'⁷² Likewise, facing questions about its response to such threats, the UK reminded that it is 'working closely with [its] allies to hold the perpetrators to account and deter further malicious cyber activity around the world.'⁷³

Such calls for increased cooperation are not merely hortatory but may be required under existing international law. In particular, the Corfu Channel and no-harm principles may require States to alert or notify third States about the risk of malicious cyber operations emanating from or transiting through their territory. During armed conflict, States must cooperate with other States and with the UN to ensure respect for IHL.⁷⁴

Importantly, State cooperation may also be necessary to build the technical and financial capacity of less developed States to prevent, stop and redress online harms. In an interconnected world, security vulnerabilities in one State may compromise the integrity of systems beyond national borders.

⁶⁷ AP I, Art. 51.

⁶⁸ Ibid, Art. 52(2).

⁶⁹ Laurent Gisel, Tilman Rodenhäuser, 'Cyber operations and international humanitarian law: five key points', *Humanitarian Law & Policy*, 28 November 2019, <https://blogs.icrc.org/law-and-policy/2019/11/28/cyber-operations-ihl-five-key-points/>.

⁷⁰ UN GGE Report (n. 17), § 19.

⁷¹ Czech Republic, (n. 1).

⁷² 'Reinsalu condemns cyber attacks against Czech critical infrastructure' (n. 13).

⁷³ FCO, 'UK condemns cyber actors', (n. 10).

⁷⁴ Henckaerts and Doswald-Beck (n. 46), Rule 144: Practice, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule144.

V. Conclusion

As essential services are now more than ever connected to the internet and other digital networks, measures of cyber due diligence are necessary to contain the spread of Covid-19, prevent further outbreaks and ensure a full recovery from the current crisis. Such measures are not only required as a matter of policy and good governance, but also by existing international law. Whether or not a standalone principle or rule of “cyber due diligence” exists, the international community already benefits from a comprehensive legal and policy framework to tackle online harms in times of Covid-19 and other health crises, even if it is spread across different international legal regimes. This framework — a true patchwork of different obligations — includes at the very least the Corfu Channel and no-harm principles, and positive State obligations under specific bodies of law such as IHRL and IHL. Their interpretation and implementation are guided and complemented by the norms of responsible State behaviour and other voluntary commitments made by States. Accordingly, States cannot reasonably invoke the absence of a specific binding international rule governing of cyber harms as an excuse for inaction in the fight against Covid-19 and other health crises.



Accountability

Accountability

Accountability: A Discussion

Antonio Coco, Panagiota Kotzamani, Tara Van Ho and Meagan Wong [DOI: 10.5526/xgeg-xs42_038]

The discussants considered the different framings of accountability and legal responsibility and how these related to a range of contexts brought about by Covid-19. However, because of the limitations of existing frameworks of legal responsibility, it was recognized that it will not always be possible for them to link to the various contexts and factual scenarios which arise from Covid-19; necessarily, there will be gaps.

Legal responsibility is a narrower subset of what is a much wider or diffuse understanding of accountability, the latter concept including also notions of political or moral blame. There is often a wish to find some kind of moral or political blame for what one or more actors did or did not do, or to recognise formally that what was done was insufficient or failed in some way to respond effectively to individuals' or groups' needs or rights. Often it will be difficult for frameworks of legal responsibility to respond to these calls for accountability.

State responsibility as a legal concept is not about blame. It's focus is on the breach of an international obligation; if a breach is determined, a new legal relationship emerges which results in an obligation to cease the wrongful act and make full reparations for injury caused by the internationally wrongful act. Furthermore, as a secondary rule of international law, state responsibility is fully dependent on whether what can be considered a primary rule, has been breached. Thus, the process of determining and apportioning state responsibility says little about the underlying breach of the primary rules which will be situation specific, and is not about apportionment of blame, though determinations of legal responsibility will inevitably still carry some moral apportionment of right and wrong, at least from the perspective of public perceptions.

Similarly, criminal law, and international criminal law in particular is quite restricted in its ability to address the various contexts arising from states' and other actors' responses to Covid-19. This is because of the narrow set of acts or omissions which may be understood to fall within the definitions of crimes, but also because of the need for some personal culpability, in most if not all, instances.

The discussants considered some of contexts arising from Covid-19, to illustrate these points, but also to think through some potential openings for responsibility, for further exploration. For example, several of the papers in the collection explore what has been recognised as a truism – that Covid-19 discriminates; individuals from certain communities are more likely to contract the disease and have a lower likelihood of surviving it, because of the social determinants of health. The policies behind the responses to the pandemic may also exacerbate these social determinants of health and indeed some of these appear to sacrifice the weakest in society. There is a need to consider how this impacts on responsibility.

Thus, if Covid-19 discriminates, do states' and others' actions and in-actions (or under-actions) have implications for legal responsibility? International law does not cater well for this type of scenario. There are a number of ways in which responsibility can be argued,

though none of these are easy arguments to make or foolproof. For instance, some of the subordinate forms of criminal responsibility such as aiding or abetting or complicity (before even arriving at superior responsibility) aid in assisting to capture some aspects of the factual contexts relevant to Covid-19 health responses. However, there will still remain challenges with respect to individual culpability and the degree to which the actions and omissions fit within the narrow definitions for international crimes.

Also, one might consider how Covid-19 may exacerbate international crimes which are already taking place. For instance, in Syria, the ongoing attacks against health workers and hospitals may constitute a war crime. If these are done with the knowledge of the pandemic and the risks to local populations, the Covid-19 facts may extenuate the crimes even though there may not have been a specific intention to spread Covid-19; further spread of Covid-19 impacting on the health and lives of local populations was however the natural and necessary outcome of the attacks. Thus, there could be an argument to be made about responsibility which may derive from the act of continuing the attacks with the knowledge of the pandemic.

In general, the point was made that international law does not deal well with widely diffused impacts, particularly where there are multiple actors acting in parallel, though not necessarily in a coordinated fashion. Perhaps one area which merits further exploration is the framing used by the UN Guiding Principles on Business and Human Rights recognize that businesses owe responsibility for the harms they “cause or contribute to”. The Guiding Principles do not clarify what this phrase “cause or contribute to” means, however the early interpretations suggest that one can contribute to a harm even if what one is doing is not in itself illegal, so long as the act is going to further the crimes of others. The Guiding Principles do not set out a framework for criminal responsibility; they are more concerned with a corporate or similar standard of responsibility. Nevertheless, the Guiding Principles may be helpful in thinking through how principles of responsibility that concern a multitude of actors can be conceived of.

Failure to Act in Times of Pandemic: Is There a Role for the International Criminal Law Doctrine of Superior Responsibility?

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Abstract

This article explores the responsibility of military or civilian superiors in international criminal law for their failure to act in relation to a potentially lethal virus epidemic or pandemic. In this direction, two different angles of the issue are discussed. The first focuses on the responsibility of individuals in positions of power for their failure to prevent the spread of the virus or provide adequate health support to an epidemic or pandemic affected population, when this population is used as a target group for the commission of crimes against humanity, war crimes or even genocide. The second refers to the responsibility of these superiors for their failure to prevent their subordinates to use such an epidemic or pandemic as a mean to commit crimes against humanity or war crimes. It is argued that, in order for superior responsibility to be attributed in these circumstances, a careful consideration on the theory of omission and the nature of superior responsibility is required.

Key words:

International criminal law, civilian and military superiors, commission by omission, deliberate failure to exercise control, due diligence

I. Introduction

This paper considers the international criminal law issues epidemics and pandemics raise with reference to the responsibility of specific individuals for the commission of international crimes.¹ The discussion on how pandemics/epidemics are linked to international criminal responsibility has been prompted by the current Covid-19 situation, but it can relate to similar scenarios of other lethal viruses' propagation in various parts of the world.² In order to explain the focus of the paper, it is useful to clarify first how an epidemic or a pandemic is linked to international criminality. By their construction, international crimes cover a limited number of human rights violations. These limitations are two-fold: in terms of their elements, international crimes have a specific *actus reus* and a specific *mens rea*.³ In

¹ The international criminal law analysis of this paper focuses primarily on the Statute and case law of the International Criminal Court, which is currently the only permanent international criminal tribunal, with potential universal jurisdiction - subject to state membership.

² Since 2016, Yemen is facing the world's largest cholera epidemic, with more than 1 million cases so far, a situation that has created a humanitarian crisis in this war-torn country. The 2014–2016 Ebola epidemic in West Africa was, according to the WHO 'the largest and most complex Ebola outbreak since the virus was first discovered in 1976'. In 2009, a H1N1 outbreak in North America led to a pandemic, while, by 2010, most countries in the world had confirmed infections, See, WHO, 'Yemen: WHO continues efforts in the fight against cholera', 27 February 2020, <http://www.emro.who.int/yem/yemen-news/who-continues-efforts-in-the-fight-against-cholera.html>; WHO, 'Ebola virus disease', https://www.who.int/health-topics/ebola/#tab=tab_1; WHO, 'What is the pandemic (H1N1) 2009 virus?', 24 February 2010, https://www.who.int/csr/disease/swineflu/frequently_asked_questions/about_disease/en/, accessed 7 May 2020.

³ See Articles 6-8 of the Rome Statute of the International Criminal Court (ICC Statute) for the *actus reus* of the international crimes of genocide, crimes against humanity and war crimes; and Article 30 for the *mens rea* of international crimes, which as a general rule is intent of the first or second degree-excluding *dolus eventualis*/recklessness and negligence.

terms of their scope, international crimes require specific “conditions”: genocidal acts need to be conducted under the specific genocidal intent;⁴ crimes against humanity have to be committed as part of a widespread or systematic attack directed against any civilian population;⁵ and war crimes require a belligerent nexus, i.e. to be closely related to the hostilities of an international or non-international armed conflict.⁶

As a result, many of the potential human rights implications of a lethal virus’ spread will not reach the level of international crimes. In terms of the current Covid-19 pandemic, a number of governments have been accused of policy failures leading to mass unnecessary deaths, posing the question of whether their leaders can be accused for the commission of crimes against humanity.⁷ Leaving aside the *mens rea* requirements of international crimes - and even in the rare scenario that a government has intentionally allowed the spread of Covid-19 in the country -, it is this author’s view that these deaths cannot form the basis of a crime against humanity. This is because there is a lack of a widespread or systematic attack against civilians, with knowledge of this attack: inadequate measures against the spread of Covid-19 in a country (even if the inadequacy is intentional) cannot be considered as a purposeful attack of the state mechanism against the whole population of this country. The relatively high standard of widespread or systematic attack distinguishes *crimes* against humanity from human rights violations, and its fulfilment requires attack against a specific civilian group -instead of the whole civilian population of a country in general -, without this creating a “discriminatory ground” requirement⁸ for crimes against humanity in international law.⁹

Exploring further the notion of attack, another possibility arises, even though it is not a Covid-19 feature: the scenario of a state unleashing a deadly virus against the population of another state as an act of aggression.¹⁰ Aggression is considered an international crime under the ICC Statute, which however is very strictly construed: “act of aggression” means the use of *armed* force by a State and, in particular, the invasion or attack by the armed forces of a State of the territory of another State.¹¹ Even though an interpretative expansion of the ‘armed forces’ definition in order to include biological weapons may be possible, it exceeds the scope of this paper. By applying, hence, strictly, the elements of the crime of

⁴ Article 6 of the ICC Statute: “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

⁵ Article 7 of the ICC Statute.

⁶ *Prosecutor v Kunarac et al.* (Trial Chamber Judgment), ICTY, IT-96-23 & 23/1, 22 February 2001, para. 402.

⁷ See, for example, Carli Pierson, ‘Trump Could Face International Human Rights Law Consequences for his Coronavirus Pandemic Response’, *The Independent*, 10 April 2020; Brazilian Association of Jurists for Democracy, ‘Bolsonaro Denounced for Crimes against Humanity before the International Criminal Court’, 3 April 2020, <https://peoplesdispatch.org/2020/04/03/bolsonaro-denounced-for-crimes-against-humanity-before-the-international-criminal-court/>; Isabelle Khurshudyan, ‘Coronavirus Spreads Rapidly in Belarus as Leader Denies Pandemic Exists’, *The Independent*, 2 May 2020.

⁸ With the exception of persecution as a crime against humanity, see *Prosecutor v Kupreškić et al* (Trial Chamber Judgment), ICTY, IT-95-16, 14 January 2000, para. 606.

⁹ A more extended discussion on the nature of crimes against humanity and of international crimes in general, however, is out of the scope of this paper and is not fit for the purposes of this collective publication.

¹⁰ Dan Kaszeta, ‘No, the coronavirus is not a biological weapon: There are many reasons to be skeptical of conspiracy theories about the origins of the disease’, *The Washington Post*, 27 April 2020.

¹¹ See, Article 8bis (2)(a) of the ICC Statute, as well as the remaining sub-paragraphs (b)-(g), all of which refer to ‘traditional’ modes of warfare, requiring the use of armed forces.

aggression, a leader of a country cannot be found criminally responsible in international law.

For these reasons, the analysis of this paper focuses on scenarios of a state's or an armed group's deliberate failure to provide adequate health care to a specific population, either as part of a(n) (state) ethnic cleansing campaign, or in order to gain military advantage in the armed conflict by targeting civilians. These scenarios fulfill the elements and conditions of the international crimes of genocide, crimes against humanity, and war crimes, as previously presented. More specifically, the paper explores the potential responsibility of superiors - state leaders and military commanders - for the commission of these international crimes by taking advantage of an outbreak of an epidemic or pandemic. Such incidents are already taking place when epidemics strike, and this is a reality international criminal law needs to seriously take into consideration. In the ongoing hostilities in the Democratic Republic of the Congo, armed groups have refused access of humanitarian and medical personnel and their supplies to specific populations amidst the Ebola epidemic. The extent of these incidents and their links to crimes against humanity and war crimes led to the adoption of UN Resolution 2439 (2018), where the Security Council warns of the illegality of such practices and requests the responsible parties to cease this practice.¹² Since the beginning of the war in Yemen, the parties to the conflict have been attacking humanitarian and medical personnel fighting against the cholera outbreak. They have also banned medical supplies and denied the affected population access to treatment.¹³ In any case, targeting a civilian population by preventing their access to medical help is a common war tactic, and a violation of international humanitarian law.¹⁴

Discussing the responsibility of superiors in these circumstances, the article establishes a distinction between responsibility of a superior as a participant to the international crime and as a perpetrator of a separate crime of dereliction of duty. Identifying a clear theoretical framework for this distinction is important, as a superior who is considered a wilful participant to an international crime will, naturally, be more severely punished than a superior who is a perpetrator to a dereliction of duty crime due to their negligent failure to supervise their subordinates adequately. In this direction, it has to be noted that a well-justified application of the rules of individual criminal responsibility is even more important when it comes to international criminal law. International crimes are usually the product of collective criminality, where there are individuals in hierarchical positions who are remote from the crime scene but are, nevertheless, responsible for ordering or allowing their commission. Having in place an international criminal law theory to link these individuals to the international crimes is of utmost importance for international justice.

II. Direct and Indirect Superior Responsibility in International Criminal Law

In international criminal law, an individual, who has a position of authority can be responsible for the commission of an international crime, as a superior and/or together with the physical perpetrator(s). In this sense, the superior is a perpetrator when they have

¹² UN Security Council, Security Council resolution 2439 (2018), UN Doc. S/RES/2439 (2018), 30 October 2018.

¹³ See Human Rights Watch, 'World Report 2019: Yemen', <https://www.hrw.org/world-report/2019/country-chapters/yemen>, accessed 30 April 2020,.

¹⁴ In the war in Syria, for example, deliberate deprivation of medical aid to the 'opponent' civilian population has been a widespread tactic by both parties to the conflict. See Jonathan Whittall, 'My enemy's doctor is my enemy', *The Huffington Post*, 10 April 2013.

control over the criminal outcome, as any other individual, or, due to their position, when they have control over the will and acts of their subordinates.¹⁵ In the latter case, the concepts of ordering, soliciting or inducing the commission of an international crime are also relevant.¹⁶ This type of superior responsibility is called ‘direct superior responsibility’ because the superior becomes responsible for their participation in the crime through their own deliberate acts or omissions.

When it comes to omissions, it has to be noted that criminal law recognises the commission of international crimes not only through actions, but also through omissions. Law is a normative pursuit and, thus, its rules are not limited to a mere description of physical acts.¹⁷ Criminal responsibility is attached to the individual for his or her conscious contribution to the crime committed. This means that, in certain circumstances, a lack of action in the sense of omission can contribute to the criminal outcome in the same way as an act of commission.¹⁸ Such an omission assimilates to an ‘active’ contribution to the crime, which leads to what the common law jurisdictions refer to as ‘commission by omission’¹⁹ and the continental law jurisdictions as ‘perpetration through an inauthentic omission’.²⁰

Nevertheless, the omissions of a superior can also entail criminal responsibility for them under a different concept: “indirect” superior responsibility²¹ or the “superior responsibility doctrine” as it is commonly called.²² In the case of indirect superior responsibility, responsibility attaches to the superior, not for their own omissions leading to the criminal outcome, but for their failure to prevent the acts of their subordinates who eventually committed the crime. In other words, the superior responsibility doctrine refers to the responsibility of the superiors - regardless of whether they are military commanders or civilian leaders - for their failure to effectively control their subordinates and take reasonable and adequate steps to prevent the commission of the crime, or to punish them after the crime has been committed.

This latter type of superior responsibility - failure to prevent or punish - has led to significant uncertainty in international criminal law regarding the attribution of criminal responsibility to the superior.²³ This is because the duty of the superior to supervise their subordinates,

¹⁵ See Article 25(3)(a) of the ICC Statute; *Prosecutor v Jean-Pierre Bemba Gombo* (Pre-Trial Chamber II), ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’, ICC-01/05-01/08-424, 15 June 2009, para. 347; *Prosecutor v Thomas Lubanga Dyilo* (Pre-Trial Chamber I), ‘Decision on the Confirmation of Charges’, ICC-01/04-01/06, 29 January 2007, paras. 326-341; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Pre-Trial Chamber I), ‘Decision on the Confirmation of Charges’, ICC-01/04-01/07, 30 September 2008, paras. 480-86.

¹⁶ See Article 25(3)(b) of the ICC Statute.

¹⁷ Kai Ambos, *Treatise on International Criminal Law, Vol I: Foundations and General Part* (Oxford: Oxford University Press, 2013), 180-81.

¹⁸ See, George Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998), 51.

¹⁹ Regarding English law see, for example, *R v Stone & Dobinson* (1977) QB 354; *R v Gibbins & Proctor* (1918) 13 Cr App Rep 134, where it has been discussed how crimes of active conduct can be committed by omission.

²⁰ In German criminal law, for example, this is the concept of “*unechtes Unterlassung*” established in section 13 of the German Penal Code (Strafgesetzbuch, StGB).

²¹ See, Commentary of the International Law Commission on Art. 6 of the Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/CN.4/L.532 (1996), para. 1.

²² See Article 28 of the ICC Statute.

²³ Volker Nerlich, ‘Superior Responsibility under Article 28 ICC Statute: For What exactly is the superior held responsible?’ (2007) 5(3) *Journal of International Criminal Justice* 665; Otto Triffterer, ‘Command responsibility – crime sui generis or participation “as otherwise provided” in Art. 28 Rome Statute’ in Jörg

which would have enabled them to prevent their crimes in the first place, can give rise to a different type of responsibility as well: that of commission of a separate crime of dereliction of duty.²⁴ Indeed, in criminal law, there are certain crimes that can be committed only through an omission: there are situations, where an individual by omitting to act allows for a certain outcome to take place, a behaviour which the law feels should be punishable. One such example -which is criminalised by several, but not all jurisdictions- is when an individual fails to save someone who finds themselves in danger, when the act of saving can be done without the individual risking their own life.²⁵ In these type of crimes, the perpetrator is responsible not for the outcome but solely for their inaction, which allowed the outcome to happen. Thus, these crimes have been characterised as “authentic omission” crimes,²⁶ where the individual becomes the perpetrator of a special crime of dereliction of duty - a duty that has been created by each particular authentic omission crime.

After explaining this distinction, the next section analyses the responsibility of military commanders and civilian leaders, based on Article 28 of the ICC Statute, in order to apply the suggested theoretical framework to Covid-19 related scenarios in the last section.

III. Analysing the Responsibility of the Superior in Article 28 of the ICC Statute

In contrast to the *ad hoc* criminal tribunals, which approached the notion of superior in a unified approach, Article 28 of the ICC Statute distinguishes between the responsibility of military commanders (subparagraph(a)) and the responsibility of civilian superiors (subparagraph (b)). The main difference is that military commanders can be found responsible, not only for the intentional failure to prevent the crimes of their subordinates or to punish them, but also for their negligent failure (should have known standard). On the contrary, a civilian superior can be found responsible only when their failure has been intentional, or they were wilfully blind to the crimes of their subordinates (must have known standard).

Based on the analysis of the previous section on the types of omissions in criminal law, it is suggested that the different levels of *mens rea* of the superior regarding their control over the crimes of their subordinates can lead to different types of superior responsibility. When a superior, either a military commander or a civilian leader, knows that their subordinates are about to commit a crime and they purposefully refrain from intervening, then this omission is, in fact, an act in disguise, in other words an inauthentic omission, leading to commission (of the crime) by omission. Therefore, the intentional omission of the superior to prevent the crime of others constitutes participation in the crime, under the same principles governing perpetration and/or ordering. It is proposed that this type of superior responsibility can be interpreted as covering the situation where an individual

Arnold and others (eds), *Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70 Geburtstag*(München: C.H. Beck, 2005); Chantal Meloni, *Command Responsibility in International Criminal Law* (T.M.C. Asser Press, 2010); Kai Ambos, ‘Superior Responsibility’, in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary*(Oxford: Oxford University Press, 2002); Maria L. Nybondas, *Command Responsibility and its Applicability to Civilian Superiors* (T.M.C. Asser Press, 2010).

²⁴ See, for example, Ambos, *Treatise on International Criminal Law*, (n. 17) 231.

²⁵ See, for example Art. 223 of the French Criminal Code; Section 323(c) German Strafgesetzbuch.

²⁶ Kai Ambos, ‘Omissions’, in Ambos et al. (eds) *Core Concepts in Criminal Law and Criminal Justice, Volume 1: Anglo-German Dialogues* (Cambridge: Cambridge University Press 2020), 20-21.

capable of exercising control over others, intentionally fails to do so.²⁷ Under the proposed framework, the notion of control is crucial because it provides the causal link between the inauthentic omission of the superior and the criminal outcome by the acts of the subordinates. Such a causal link is required to establish principal participation in the crime.²⁸ The individual who has effective control over others and consciously allows them (or fails to take reasonable steps to prevent) to commit a crime is, without a doubt, linked to the criminal outcome as much as the physical perpetrator is.²⁹

In the case of military commanders, however, Article 28(a) of the ICC Statute renders them responsible for negligence as well. In this case, there is no doctrinal basis for commission by omission, as explained in the previous section. A superior should not be responsible for the crime of others if he/she was not aware of them, even if he/she neglected in his/her duty to supervise them properly. Arguing otherwise would create a type of vicarious liability, where the individual lacks the appropriate *mens rea* for the commission of the crime. Such a liability contrasts, nevertheless, with the criminal law principle of personal culpability, which 'lies at the heart of the criminal law paradigm'.³⁰ As in national criminal law,³¹ an individual should be found responsible only for their specific share to the commission of an international crime.³²

It is proposed, in the latter case, that the military commander should be responsible for a separate dereliction of duty crime, for neglecting to properly supervise his or her subordinates. This due diligence duty emanates from the superior-subordinate relationship, as the outcome of the superior's effective control over their subordinates.³³ The same conclusion can be drawn regarding the responsibility of both military commanders and civilian leaders when it comes to their failure to punish their subordinates after the crime commission. As the superior cannot be a perpetrator to a crime that has already been committed, their omission to punish their subordinates can only be punishable as a separate crime of dereliction of their relevant superior duties.

The dualistic interpretation of Article 28 of the ICC Statute proposed in this article has a clear advantage in the context of the attribution of responsibility in international criminal law. It incorporates the superior responsibility doctrine in the general theoretical framework

²⁷ See also, Meloni (n. 23), 197-98. However, she limits the responsibility of the superior in such a case to accomplice liability and excludes principal liability, 198.

²⁸ *Prosecutor v Germain Katanga* (Trial Chamber II), 'Judgment pursuant to article 74 of the Statute', ICC-01/04-01/07, 7 March 2014, para. 767.

²⁹ In the same direction, Triffterer argues that '[i]ntentionally omitting an act presupposes that the person has the factual possibility and is aware that he can step out of his or her passivity and become active in a way demanded by the situation as the case may be'. See, Triffterer (n. 23), 911.

³⁰ Allison Danner and Jenny Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', (2005) 93(1) *California Law Review* 75, 134.

³¹ See Andrew Ashworth and Jeremy Horder, *Principles of criminal law* (Oxford: Oxford University Press, 2013) 182.

³² According to the Appeals Chamber in *Tadic*, '[t]he basic assumption must be that in international law as much as in national systems the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some way participated (*nulla poena sine culpa*)', *Prosecutor v Dusko Tadic* (Appeal Judgment) ICTY, IT-94-1-A, 15 July 1995, para. 186.

³³ Under this perception, the English courts, for example, have recognised control as a 'pro-duty factor': which establishes a specific relationship between two parties and, thus, certain duties of the one towards the other. See *Sutradhar v Natural Environment Research Council* [2006] UKHL 33, paras. 38, 48.

on the modes of responsibility. Attributing responsibility to the superior in relation to subordinates' crimes is not, anymore, a peculiar, *sui generis* doctrine of individual criminal responsibility, constituting an exception to the modes of participation in international criminal law.³⁴ Instead, it follows the basic criminal law rule of personal culpability, according to which, an individual becomes criminally responsible when their own acts and minds are sufficiently linked to the criminal outcome.³⁵

IV. How does superior responsibility relate to pandemic-affected international crimes?

As explained in the introduction, the spread of a virus such as Covid-19 and the consequent outbreak of an epidemic or a pandemic can be used as a tool or provide the context for the commission of international crimes. In such a case, international criminal law can attribute responsibility to military commanders or superior leaders, either for crimes committed via their own omissions or for failure to prevent the crimes of their subordinates.

Based on the doctrinal analysis of omission and superior responsibility in the previous sections, the following scenario may occur. In the middle of a state campaign to eliminate a specific minority group within a certain geographical area, the civilian leader of the state deliberately omits to prevent the spread of a deadly virus among this population or deliberately omits to adopt the required health measures in order to fight the pandemic or epidemic. Such a deliberate omission is considered as an act in disguise, an inauthentic omission, according to the analysis provided in the first section. Thus, the superior can be responsible for the commission of a crime against humanity by omission, i.e. extermination by deprivation of access to medicine, calculated to bring about the destruction of part of a population³⁶ and/or persecution by intentional and severe deprivation of fundamental rights,³⁷ as is the right to health.³⁸ This is the case of direct superior responsibility,³⁹ as the superior is in a position to effectively control the state apparatus and deliberately refrains from ordering the state services to introduce the appropriate measures against the virus. If this state campaign has also a genocidal intent against a specific population – the intent to destroy a group as such⁴⁰ - then the superior can be found responsible for the commission of genocide, in addition to crimes against humanity and/or war crimes, depending on the facts.

This scenario can be linked to the Rohingya crisis in Myanmar, where the Rohingya population is facing a widespread/systematic attack by the Myanmar security forces.⁴¹ In this direction, the state deliberately refrains from providing health care to the Rohingya and/or prevents their access to it.⁴² Under the current Covid-19 pandemic, this would mean

³⁴ Otto Triffterer and Roberta Arnold, 'Article 28: Responsibility of commanders and other superiors', in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (3rd ed. Beck-Hart-Nomos, 2016), 1060.

³⁵ *Prosecutor v Tadić* (Appeal Judgment), (n. 32), para. 186.

³⁶ See Articles 7(1)(b) and 7(2)(b) of the ICC Statute.

³⁷ See Articles 7(1)(h) and 7(2)(g) of the ICC Statute.

³⁸ See Article 12 of the International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 16 December 1966.

³⁹ See Article 25(3)(a) of the ICC Statute.

⁴⁰ See Article 6 of the ICC Statute.

⁴¹ Global Conflict Tracker, 'Rohingya Crisis in Myanmar', 10 June 2020, <https://www.cfr.org/global-conflict-tracker/conflict/rohingya-crisis-myanmar>.

⁴² Human Rights Watch, 'Rohingya Crisis', <https://www.hrw.org/tag/rohingya-crisis>, accessed 2 June 2020.

that the Rohingya community is left unprotected against the spread of the disease.⁴³ In case of a Covid-19 death toll in the Rohingya area, the deliberate omissions of the state leaders could render them responsible as perpetrators of crimes against humanity: extermination by deprivation of access to medicine, calculated to bring about the Rohingya population destruction; and/or persecution of this group by intentional and severe deprivation of their right to health. It has to be also noted that there are allegations of the Rohingya persecution having reached the level of genocide.⁴⁴ If the genocidal intent of destroying, in whole or in part, a national, ethnical, racial or religious group, as such, is proved, then the omissions of the state leaders regarding the protection of the Rohingya against Covid-19 can be considered as 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.⁴⁵ If this is the case, then the leaders can be responsible for the commission of genocide by omission.

A similar scenario can apply regarding detention centres and forced labour camps in oppressive states. In Eritrea, for example, it is estimated that there exist more than 200 detention facilities for political prisoners arbitrarily detained by the state. The sanitary provisions and medical aid to prisoners are almost non-existent, while torturing and killing of prisoners is a common practice. In these conditions, it can be argued that the state seeks to exterminate or, in any case, persecute these detainees in a systematic way. Due to the current spread of Covid-19 around the world, NGOs warn that the refusal of the government to provide adequate health care renders the detainees defenceless against the pandemic.⁴⁶ If there is indeed a spread of Covid-19 in these detention centres, then the deliberate omissions of the state leaders to provide medical aid to the infected can be characterised as extermination by deprivation of access to medicine or persecution via deprivation of their right to health. Based on the theoretical framework developed in the previous section of this paper, these leaders can be responsible as perpetrators of inauthentic omission crimes against humanity.

The situation described in the previous scenarios is rather straightforward, as long as the (inauthentic) omissions of the superior are sufficiently linked to the criminal outcome and can be, thus, treated as acts. The issues arise when we turn to analyse a similar scenario under the umbrella of indirect superior responsibility (Article 28 of the ICC statute). Consider the following scenario: in a war-torn country, a belligerent group is in control of a particular area, which includes villages with a "hostile" civilian population. The epidemic/pandemic that is already present in the country reaches these villages. The soldiers of the belligerent group use the presence of the virus to their advantage and prevent the affected population from seeking health care and/or do not allow NGOs access to the village in order to provide it. As a result, the majority of the civilian population dies. Willful killing of civilians and impediment of humanitarian relief to civilians in need are

⁴³ See also Leah Carter, 'Myanmar: Armed Conflict Puts Brakes on COVID-19 Response', discussing how the armed conflict in Myanmar leaves the persecuted ethnic minorities unprotected against the coronavirus pandemic, Deutsche Welle, 7 May 2020.

⁴⁴ UN Human Rights Council, 'Report of the Independent International Fact-Finding Mission on Myanmar', UN Doc. A/HRC/39/64, 12 September 2018.

⁴⁵ Article 6(c) of the ICC Statute.

⁴⁶ Amnesty international 'Eritrea: Detainees in Overcrowded and Unsanitary Conditions Defenceless against COVID-19', 21 May 2020, <https://www.amnesty.org/en/latest/news/2020/05/eritrea-detainees-in-overcrowded-and-unsanitary-conditions-defenceless-against-covid19/>.

considered grave breaches of the Geneva Conventions and the customary humanitarian law resulting in the commission of war crimes.⁴⁷

This scenario can materialise in Yemen where there is a long-standing conflict between the state forces and belligerent groups. Humanitarian organisations in the country report that the armed groups involved in the hostilities continue to target health care facilities and block access to humanitarian aid, despite the pleas of the international community to protect civilians from Covid-19 infection and prevent the spread of the virus in the region.⁴⁸ In this direction, the UN Secretary-General António Guterres issued an appeal for a global ceasefire so that populations most vulnerable to the spread of Covid-19 can have access to humanitarian aid.⁴⁹

Following the analysis of Article 28 in section III above, it is apparent that in case there is spread of Covid-19 in Yemen, the armed groups' superiors can be found liable under two different sets of circumstances. This depends on the *mens rea* of the individual who exercises effective control over the physical perpetrators. If the military commander is aware or wilfully blind of the acts of their subordinates leading to the commission of war crimes and they deliberately refrain from stopping them, then their omission is in any case a disguised act, an inauthentic omission. Indeed, if the military commander decided to intervene and stop the subordinates under their control, then the crime would not have been committed. Therefore, in case of their inaction, the military commander should be found responsible- alongside with their soldiers- for commission of war crimes, as a perpetrator who is in control of the criminal outcome.

However, if the military commander does not know about the acts of their subordinates, because they have been negligent in their duty to supervise them properly, they cannot be considered as participants to the war crime, due to the lack of intent towards the crime. In this case, Article 28 (a) establishes a new crime, that of dereliction of duty, which the military commander can be found responsible for. As the military commander is not responsible for an international crime his/her sentence should be considerably shorter than that of his/her soldiers who committed the war crime. Finally, responsibility for the dereliction of duty crime of Article 28 is attached to the military commander if he/she also omits to punish their subordinates after he/she finds out that they have committed the war crime. This is because a responsible commander has also a duty to punish his/her soldiers when they violate the laws of war⁵⁰ and Article 28 incorporates this duty in the ICC Statute.

The advantage of this approach cannot be ignored. Establishing the commission of international crimes amidst a humanitarian crisis is complex enough as it is, but it presents even more difficulties when it is escalated by the chaos an epidemic outbreak can create in volatile conditions. Having a solid theory to rely upon when it comes to the contribution of superiors in the crime commission is an undeniable asset for their successful prosecution under international criminal law and their final conviction.

⁴⁷ See Article 8(2)(a), (b)(xxv), (c)(i), (e)(iii) of the ICC Statute, depending on whether there is an international or non-international armed conflict.

⁴⁸ Afrah Nasser, 'COVID-19 in Yemen – A Perfect Storm', Human Rights Watch, 14 April 2020, <https://www.hrw.org/news/2020/04/14/covid-19-yemen-perfect-storm>.

⁴⁹ UN News, 'COVID-19: UN Chief Calls for Global Ceasefire to Focus on "the true fight of our lives"', 23 March 2020, <https://news.un.org/en/story/2020/03/1059972>.

⁵⁰ See, for example, Art 86 and 87 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

V. Conclusion

This article has explored international criminal law's contribution to the global response against an epidemic or a pandemic, when a virus outbreak is used for or aids the commission of international crimes. In these circumstances, the omissions of the superiors - military commanders and civilian leaders - to prevent the spread of the virus or their failure to control their subordinates can render them responsible in international criminal law. The superior's ability to exercise effective control over the criminal outcome and/or over the physical perpetrators can establish their responsibility either for commission of an international crime by omission or for a separate crime of dereliction of duty, depending on the superior's *mens rea* for the underlying international crime.

The Law of State Responsibility and the Covid-19 Pandemic

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I. Introduction

The Covid-19 pandemic has raised questions of international responsibility of States; in particular, whether States can be internationally responsible for the failure to prevent and the spread of the outbreak internally and externally across international borders;¹ and other matters pertaining to international health law.² Also, as highlighted in earlier contributions in this publication, the Covid-19 pandemic raises tensions and questions in domestic and international law. These draw to light questions of State responsibility for acts – or omissions – by States for various conduct that may come into question. This is particularly so when States are unable to perform obligations owed under international law to other States, international organizations or individuals, as a result of their domestic policies and actions to deal with the Covid-19 pandemic.

This contribution provides an overview of the rules of international law concerning the responsibility of States for their international wrongful acts, and how these rules are relevant in the Covid-19 pandemic. The international law of State responsibility, as formulated by the International Law Commission in the 2001 Articles on the responsibility of States for internationally wrongful acts (“2001 ILC Articles”),³ depicts the general conditions under international law for a State to be responsible for wrongful acts and the legal consequences that flow by operation of law. These general conditions are understood as the secondary rules of State responsibility, which result from the breach of primary rules, i.e. rules of customary international law or treaty law that provide international obligations on States.

With regard to primary rules, States have very different obligations under various international legal frameworks which play an especially significant role during the pandemic, e.g., international health law; international human rights law; international refugee law; international investment law; international trade law; international environmental law and international water law. Thus, this contribution does not look at the primary rules, of which there are many under the aforementioned legal frameworks, and some have been examined in detail elsewhere in this publication; but rather focuses on the secondary rules under international law that apply when a State has acted in breach of any obligation arising from one or more of these primary rules.

¹ Article 2, International Health Regulations 2005.

² Pedro A. Villarreal, ‘Covid-19 Symposium: “Can they really do that?” States’ Obligations under the International Health Regulations in Light of Covid-19 (Part I),’ 31 March 20, available at: <http://opiniojuris.org/2020/03/31/covid-19-symposium-can-they-really-do-that-states-obligations-under-the-international-health-regulations-in-light-of-covid-19-part-i/>.

³ ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, ‘Report of the International Law Commission on the work of its 53rd session’ (23 April-1 June and 2 July-10 August 2001) UN Doc A/CN.4/SER.A/2001/Add.1 [2001 ILC Articles].

This contribution will be structured as follows:

(i) the general principles of State responsibility that govern the concept of an internationally wrongful act of a State will be explained. Within this analytical framework, the complexities of various factual situations that pertain to the Covid-19 pandemic will be drawn out. As will be elaborated upon, the attribution of conduct to a State and the finding of a breach of an international obligation cannot be established in the abstract, but needs to be characterised on the basis of factual situations that arise.

(ii) Due to the unprecedented and extraordinary nature of the Covid-19 pandemic, it is relevant to examine whether States may rely on circumstances precluding wrongfulness as a defence so to speak for not complying with their international obligations in times of the Covid-19 pandemic. Three grounds appear plausible: *force majeure*, distress and necessity.

(iii) In the event that there is a breach of an international obligation, plausible – or not so plausible - inter-State claims may arise. In light of these developments, the content (or substance) of State responsibility will be discussed from the premise that international responsibility flows from the breach of the international obligation and that a new legal relationship arises from the internationally wrongful act. The legal consequences of an internationally wrongful act give rise to an obligation on the responsible State to cease the wrongful conduct, and make full reparation for the injury caused by the international wrongful act.

(iv) Lastly, the practical aspects of the invocation of the responsibility of a state will be explained in the context of who is entitled to bring a claim. Ultimately, as will be shown, forms of invocation vary, and will depend on the circumstances surrounding the internationally wrongful conduct and available fora.

Before engaging in the present inquiry, a point of clarification must be made from the outset that the international law of State responsibility provides default rules for determining the existence and consequences of internationally wrongful acts. These rules are expressed in customary law so are applicable generally, whether or not the particular instrument refers to them, but are also mostly dispositive, so can be suspended by *lex specialis* (special or more precise law) in particular instruments and institutions.⁴ For example, the World Trade Organization's dispute settlement mechanism partly replaces rules on implementation, by substituting countermeasures with treaty-based suspension of concessions; and partly replaces rules on reparation, by removing the possibility to claim compensation. In some international tribunals, issues governed by the law of State responsibility will be articulated in a substantially similar manner but without relying on their technical terminology; the treatment of rules on attribution in some of the case law of the European Court of Human Rights is one example.⁵ In short, State responsibility has potentially very broad coverage but may sometimes be under-appreciated by specialists in particular fields of international law, either because of *lex specialis* or the development of specialist terminology.

⁴ Article 55, 2001 ILC Articles, *ibid*. See also, Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law,' (2006) 17(3) *Eur J Intl L* 483.

⁵ James Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights,' in Anne van Aaken and Iulia Motoc (eds) *The European Convention on Human Rights and General International Law*, Online Journal (Oxford University Press, 2018) 178.

II. The Internationally Wrongful Act of a State

Article 1 of the 2001 ILC Articles stipulates: ‘Every internationally wrongful act of a State entails the international responsibility of that State.’ This is the underlying premise of the law of State responsibility, for which the remainder of the 2001 ILC Articles follows from.⁶ Thus, in the context of the Covid-19 pandemic, every internationally wrongful act of a State would entail international responsibility.

Perhaps the most obvious point of departure when discussing State responsibility and the Covid-19 pandemic, without apportioning blame,⁷ would be questioning whether State(s) could be held internationally responsible for not preventing the spread of the virus outbreak internally or externally beyond their borders.⁸ To adopt a black-letter analytical framework premised on the 2001 ILC Articles, the inquiry would need to formulate the aforementioned conduct of a State as an internationally wrongful act. Accordingly, Article 2 of the ILC Articles stipulates:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.

Thus, on a general level, conduct in relation to not preventing,⁹ protecting against, controlling,¹⁰ the spread of the virus internally or externally would have to be identified in line with the nomenclature of ‘an act’ or an ‘omission’ depending on the primary rule in question.¹¹

⁶ ILC Commentary to Article 1, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Yearbook of the International Law Commission, 2001, vol. II, Part Two (hereinafter “ILC Commentary”) 32.

⁷ See Commentary to Article 2, ILC Commentary.

⁸ Gian Luca Burci, ‘The outbreak of the Covid-19 Coronavirus: are the International Health Regulations fit for purpose’ 27 February 2020, available at <https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/>; Caroline Foster, ‘Justified Border Closures do not violate the International Health Regulations 2005’ 11 June 2020, available at <https://www.ejiltalk.org/justified-border-closures-do-not-violate-the-international-health-regulations-2005/>.

⁹ See the three Part entry by Antonio Coco and Talita de Souza Dias on due diligence and Covid-19: Part I: Due Diligence and COVID-19: States’ Duties to Prevent and Halt the Coronavirus Outbreak, 24 March 2020, available at: <https://www.ejiltalk.org/part-i-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>; Part II: Due Diligence and COVID-19: States’ Duties to Prevent and Halt the Coronavirus Outbreak; 25 March 2020, available at: <https://www.ejiltalk.org/part-ii-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>; Part III: Due diligence and COVID-19: States’ Duties to prevent and halt the Coronavirus outbreak, 25 March 2020, available at: <https://www.ejiltalk.org/part-iii-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>. See also, their co-authored paper in this publication.

¹⁰ Article 2, International Health Regulations (2005).

¹¹ In the Corfu Channel case, the Court observed that the laying of the minefield which caused the explosions ‘could not have been accomplished without the knowledge of the Albanian government’ and [...] ‘the obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them.’ It further observed that Albania neither notified the existence of the minefield, nor warned the British warships of the imminent danger and held that ‘nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania,’ Corfu Channel case, Judgment of April 9th,

A point can be made here about the aforementioned general principles of State responsibility in relation to the determination of an international wrongful act of a State: that the meaning and content of these secondary rules cannot be interpreted in their abstract, but rather the inquiry shifts towards the application of these rules, i.e. whether a particular set of facts can amount to conduct that is an act or omission attributable to the State and that would constitute a breach of an international obligation.

As mentioned in my introduction, different primary rules under various legal frameworks under international law govern different conduct. Thus, it is likely that different obligations are called into question and when determining whether there is a breach of an international obligation, the principal focus should be on the primary obligation concerned. Pursuant to Article 12 of the 2001 ILC Articles, a breach of an international obligation exists 'when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.' Accordingly, the law of State responsibility does not differentiate between treaty law or customary international law and is not concerned with the origin of the obligation breached.

Drawing upon a more specific context, allegations have been made that China has acted in breach of obligations under the International Health Regulations (2005), an internationally binding agreement between 196 countries including all members of the World Health Organization (WHO); particularly Article 6 (notification) and Article 7 (information-sharing during unexpected or unusual public health events).¹² Not wanting to comment here on the validity of these allegations, the point I wish to elucidate is that these are specific obligations which speak to obligations to notify and share information respectively. These primary rules differ from other primary rules that may also be applicable in the context of conduct to not prevent the spread of the virus outbreak internally or externally, e.g. the no-harm rule in a transboundary context and the concomitant obligation of due diligence that stems from this primary rule;¹³ or obligations in relation to conditions of detention;¹⁴ or port denials and restrictions.¹⁵ Thus, the point is that State responsibility for acts or omissions that amount to conduct that did not prevent or contain the virus outbreak need to be determined on a rule by rule basis in accordance

1949: ICJ Reports 1949, p.4, at p.22 and 23. Also, in the Consular Staff in Tehran case, the Court held that the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.', United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, p.3, at para.63.

¹² See Peter Tzeng, 'Taking China to the International Court of Justice over Covid-19,' 2 April 2020, available at: <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/>.

¹³ Attila Tanzi, 'State liability' in Max Planck Encyclopedia of Public International Law, para.3; see also the earlier contribution by Antonio Coco and Talita de Souza Dias in this publication on 'Cyber due diligence in public health crises'.

¹⁴ For example, see the earlier contribution by Carla Ferstman in this publication on 'Detention and pandemic exceptionality.'

¹⁵ See Alina Miron, 'Port Denials and Restrictions in Times of pandemic: Did International Law lose its North Star', 20 April 2020, available at <https://www.ejiltalk.org/port-denials-and-restrictions-in-times-of-pandemic-did-international-law-lose-its-north/>.

to whether the conduct is attributable to the State under international law and constitutes a breach of the obligation arising from the primary rule in question.

Another aspect which merits further consideration pertains to the internal measures and restrictions in relation to responding to the Covid-19 pandemic, i.e. broadly speaking, lockdowns which entail severe restrictions of movement and retail trade. Indeed, “lockdown” measures raise discussion as to their legality under domestic law;¹⁶ but in any event, Article 3 of the 2001 ILC Articles is clear that when determining a breach of an international obligation by a State, the characterisation ‘of an act of a State as internationally wrongful is governed by international law.’¹⁷ Thus, if the conduct in question is lawful under domestic law, this does not affect the characterisation under international law that the act is internationally unlawful.¹⁸ However, what may affect the characterisation is the nature of the primary rule itself as some primary rules have restrictions or derogations,¹⁹ e.g. Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights.²⁰ Thus, when determining whether there is a breach of an international obligation the principal focus should be on the content of the primary obligation concerned.

Whilst continuing down the inquiry pertaining to internal measures imposed by States in dealing with the Covid-19 pandemic, it may be of particular interest to think about the structural and capacity-building measures,²¹ and strategies of States in providing a public health response to Covid-19,²² and also the standards and decisions of States within the sphere of domestic health law.²³ Obviously, infrastructure for capacity-building, as well as healthcare systems differ in every State, and whether States commit an internationally wrongful act in this regard is dependent on the primary rule in question which applies. Here, the Commentary to Article 2 of the 2001 ILC Articles may be helpful that there is no general rule pertaining to standards for breach of an obligation:

whether they involve some degree of fault, culpability or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any

¹⁶ See Jeff King, ‘The Lockdown is Lawful’, 1 April 2020, available at <https://ukconstitutionallaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful/>; Jeff King ‘The Lockdown is Lawful: Part II’, available at: <https://ukconstitutionallaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii/>.

¹⁷ Article 3, 2001 ILC Articles (n. 3).

¹⁸ Ibid.

¹⁹ See, Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

²⁰ See Alessandra Spadaro, ‘Do the containment measures taken by Italy in relation to COVID-19 comply with human rights law?’, 16 March 2020, <https://www.ejiltalk.org/do-the-containment-measures-taken-by-italy-in-relation-to-covid-19-comply-with-human-rights-law/>; Mariel Morales Antoniazzi and Silvia Steininger, ‘How to protect human rights in times of Corona? Lessons from the Inter-American Human Rights Systems’, 1 May 2020, available at: <https://www.ejiltalk.org/how-to-protect-human-rights-in-times-of-corona-lessons-from-the-inter-american-human-rights-system/>.

²¹ See Giulio Bartolini, ‘Are you ready for a Pandemic? The International Health Regulations Put to the Test of Their ‘Core Capacity Requirements’, 1 June 2020, available at: <https://www.ejiltalk.org/are-you-ready-for-a-pandemic-the-international-health-regulations-put-to-the-test-of-their-core-capacity-requirements/>.

²² Lorna McGregor, ‘Contact-tracing Apps and Human Rights’, 30 April 2020, available at <https://www.ejiltalk.org/contact-tracing-apps-and-human-rights/>.

²³ For example, see the earlier contribution by Sabine Michalowski in this publication, ‘The use of age as a triage criterion.’

presumption in this regard as between the possible standards. Establishing there is a matter for the interpretation and application of the primary rules engaged in the given case.²⁴

III. Circumstances Precluding Wrongfulness

Under the law of State responsibility, there are circumstances that a State may plead to preclude the wrongfulness of conduct that would otherwise be a breach of the international obligations of the State concerned.²⁵ In a manner of speaking, this would provide a “defence” against a claim for the breach of an international obligation. According to the ILC Commentary, ‘they do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists.’²⁶ Three circumstances have been identified as being potentially relevant:²⁷ *force majeure*, distress and necessity. Before examining each respective circumstance in more detail, three points can be made from the outset. First, whether or not a circumstance precluding wrongfulness may apply, is dependent on the nature of the primary rule, e.g. some obligations under human rights treaties which are subject to derogations may exclude the plea of necessity. Second, the ILC had drafted these circumstances to have a high threshold in the sense that it would not be easy for States to rely on them to preclude wrongfulness for conduct which would ordinarily be in breach of an international obligation. Third, the relevance or appropriateness of these circumstances would depend on each State for the particular obligation concerned. There is no “blanket” circumstance that would apply to all States for all the breach of all international obligations during the Covid-19 pandemic.

With regard to *force majeure*, Article 23 stipulates:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if: (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the State has assumed the risk of that situation occurring.²⁸

It would appear that *force majeure* strikes at the capacity for States to do something, i.e. emphasis on “materially impossible” in the circumstances for the State to perform the obligation. States who are unable to comply with their international obligations during the Covid-19 pandemic would have to prove the material impossibility of performance. Further,

²⁴ Commentary to Article 2, ILC Commentary (n. 6), p.35.

²⁵ Note that Article 26 stipulates: ‘Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.’

²⁶ Commentary to Chapter V, ILC Commentary (n. 6), p. 71.

²⁷ Federica Paddeu and Freya Jephcott, ‘Covid-19 and Defences in the Law of State Responsibility: Part I’, 17 March 2020, available at <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/>.

²⁸ Paddeu and Jephcott have identified five criteria for a successful claim for *force majeure*: A successful claim of *force majeure* must fulfill 5 conditions: (i) there must be an unforeseen event or an irresistible force (the ‘triggering event’); (ii) the event or force must be beyond the control of the State; (iii) the event must make it ‘materially’ impossible to perform an obligation; (iv) the State must not have contributed to the situation; and (v) the State must not have assumed the risk of the situation occurring. Each of these will be assessed in turn, except for (v) which is likely to depend on the specific language of particular treaty commitments. Ibid.

according to the ILC Commentary to Article 23, force majeure differs from a situation of distress or necessity because ‘the conduct of the State involved which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.’²⁹ It is likely that the failure of performance by a State of an international obligation as a result of restrictive measures or a nation-wide lockdown is not involuntary.

Distress under Article 24 stipulates:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.
2. Paragraph 1 does not apply if: (a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the act in question is likely to create a comparable or greater peril.³⁰

According to the Commentary to Article 24, distress may only be invoked where ‘a State agent has acted to save his or her own life or where there exists a special relationship between the state organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.’³¹ It is difficult to imagine how States would be able to establish there is a special relationship between the State organ or agent that committed the breach of an international obligation and persons in danger (presumably the entire human population within the State).

This brings the analysis to Article 25:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril;
 - and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.³²

According to the ILC Commentary to Article 25, ‘the term “necessity” is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other

²⁹ Commentary to Article 23, ILC Commentary (n. 6), p.76.

³⁰ Paddeu and Jephcott suggest the following criteria for a successful claim of distress: the State would need to prove that: (i) threat to life; (ii) a special relationship between the State organ and the persons in question; (iii) that there was no other reasonable way to deal with the threat; (iv) that it did not contribute to the situation; and (v) that the measures were proportionate., ‘Federica Paddeu and Frey Jephcott, ‘Covid-19 and Defences in the Law of State Responsibility: Part II’, 17 March 2020, available at: <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-ii/>.

³¹ Commentary to Article 24, ILC Commentary (n. 6), p. 80.

³² Paddeu and Jephcott (n. 30) suggest the following criteria for a successful claim of necessity: the State would need to prove that: (i) threat to life; (ii) a special relationship between the State organ and the persons in question; (iii) that there was no other reasonable way to deal with the threat; (iv) that it did not contribute to the situation; and (v) that the measures were proportionate.

international obligation of lesser weight or urgency.³³ It is also stated that necessity ‘arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.’³⁴ States wishing to rely on the plea of necessity would thus have to prove that the obligation in breach was irreconcilably incompatible with an essential interest. This is likely to be very difficult, as intended by the drafters.

In a similar vein to the preceding analysis, whether a State can make a successful plea of *force majeure*, distress or necessity needs to be determined in accordance with whether a particular set of facts that arise from the circumstances surrounding the primary rule can fit into the content of the respective secondary rules of State responsibility.

IV. Content of International Responsibility

Upon the finding of an internationally wrongful act by a State – the next point of inquiry, which may find increasing relevance in the Covid-19 pandemic landscape, is one of legal consequences under the regime of State responsibility.³⁵ Indeed, under the black-letter nomenclature of the 2001 ILC Articles, the content (or substance) of international responsibility is the new legal relationship that arises upon the commission by a State of an internationally wrongful act. State responsibility also extends towards breaches of international law where the primary beneficiary of the obligation breached is an individual or an entity other than a State.³⁶ There is also a plurality aspect to the content of State responsibility in accordance with Article 33 that ‘the obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.’

Although there may be an inclination to understand reparations for an internationally wrongful act as entitlement for damages from the injured State (or individual or other entity) for the wrongful conduct,³⁷ the regime of State responsibility situates legal consequences as obligations that arise from the breach of an international obligation. Stemming from the breach of an international obligation, the core legal consequences under the regime of State responsibility are the obligations of the responsible State to cease the wrongful conduct (Article 30) and to make full reparation for the injury caused by the internationally wrongful act (Article 31). It should be emphasised that these are new obligations that stem by operation of law from the breach of an international obligation; and thus reparations are not an entitlement by the injured State, individual or entity but rather an obligation from the wrongdoing State to make full reparation.

³³ Commentary to Article 25, ILC Commentary (n. 6), p. 80.

³⁴ Ibid.

³⁵ This is not to say that a State may not face legal consequences of conduct which is internationally wrongful outside of State responsibility, e.g. under the law of treaties framework. See ILC Commentary (n. 6), p.86.

³⁶ Article 33, 2001 ILC Articles (n. 3).

³⁷ Helen Davidson and Alison Rourke, ‘Trump says China could have stopped Covid-19 and suggests US will seek damages’, *The Guardian*, 28 April 2020; Tim Walker, ‘First thing: Trump’s latest coronavirus take – sue China’, *The Guardian*, 28 April 2020.

The forms of reparation for the injury caused by the internationally wrongful act can take the form of 'restitution, compensation and satisfaction, either singly or in combination.'³⁸ We are reminded that 'blackletter does not call for reparation of any and all consequences flowing from the wrongful act' and that 'it is only damage for injury caused by the wrongful act [...] in breach of the particular primary rule that has to be repaired.'³⁹

In the similar vein as the foregoing analysis on general principles of State responsibility, the content and form of reparation for internationally wrongful conduct during the Covid-19 pandemic would need to be brought out to light through the international process of claims by States depending on the availability of fora.

V. Implementation

The inquiry now takes on a more practical consideration, i.e. the implementation of State responsibility. This refers to how the obligations to make reparations towards a beneficiary of the obligation can be invoked under international law; and who is entitled to claim. The most obvious starting point is that an injured State is entitled pursuant to Article 41 of the 2001 ILC Articles to invoke the responsibility of another State if: (a) the obligation breached is owed to that State individually; or (b) a group of States including that State, or the international community as a whole; and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation. According to the ILC Commentary to Article 42, invocation should be understood as 'taking measures of a relatively formal character for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal.'⁴⁰

In practice, Article 43 of the ILC Articles stipulates 'an injured State which invokes the responsibility of another State shall give notice of its claim to that State.' The Commentary to this provision elaborates that 'although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc.'⁴¹ Obviously in practice, invocation would take different forms depending on the States involved and the availability of fora.

A final note is that in the event that the breach of the international obligation has an *erga omnes* character,⁴² Article 48(1) allows a State other than an injured State to invoke responsibility if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole. According to Article

³⁸ Article 34, 2001 ILC Articles (n. 3).

³⁹ Martins Paparinskis, 'COVID-19 Symposium: COVID-19 and the foundations of international law', 31 March 2020, available at <http://opiniojuris.org/2020/03/31/covid-19-symposium-covid-19-and-the-foundations-of-international-law/>.

⁴⁰ Commentary to Article 42, ILC Commentary (n. 6), p.117.

⁴¹ Commentary to Article 43, ILC Commentary (n. 6), p.119.

⁴² Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3, paras.33-34.

48(2), a State other than an injured State that is entitled to invoke responsibility may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.⁴³ Notably, the invocation of responsibility pertains to the obligation of reparation to the injured State and the beneficiaries of the obligation breached and *not* to the State making the claim.

Suffice to say, these practical steps with regard to invoking the content of responsibility for wrongful conduct committed during the Covid-19 pandemic, i.e. obligations of the responsible State to make full reparations depend on many other factors such as the particular set of facts and circumstances, availability of fora and evidence pertaining to the breach of the international obligation.

VI. Conclusion

This contribution has provided an overview to how the secondary rules of State responsibility apply to internationally wrongful acts by States during the Covid-19 pandemic. I have pointed out that the determination of an internationally wrongful act, i.e. the attribution of conduct to a State and the finding of a breach of an international obligation is entirely premised on the nature of the underlying primary rule. I have also pointed out how the Covid-19 puts forward complex factual situations – of which – there is no simple cut and paste approach of applying the black-letter rules of State responsibility, but rather the inquiry pins on which set of facts and circumstances may amount to a finding of an internationally wrongful act. Likewise, the legal consequences that flow from operation of law for the breach of an international obligation, i.e. forms of reparations, depend on the nature of the primary rule which is breached and the circumstances surrounding the wrongful act; and remain to be seen depending on the availability of judicial process. Be that as it may, it is important to understand that entitlement to a claim is not an entitlement of damages as such, but rather an entitlement to invoke the responsibility of a wrongdoing State, to fulfil its obligations to cease the wrongful conduct (Article 30) and to make full reparation for the injury caused by the internationally wrongful act (Article 31). A legal relationship arises between a wrongdoing State and an injured State (or other beneficiaries of the obligation) which entitles the latter to invoke the international responsibility of the former. Ultimately, claims whether plausible or not so plausible will depend on the primary rule that has been breached. In light of the factual complexity of the Covid-19 pandemic, and the plethora of primary rules of international law that apply to States, it is likely that new and interesting questions of State responsibility will arise during the international process of the application of the black-letter rules in claims to come.

⁴³ See Commentary to Article 48, ILC Commentary (n. 6), p.126-128.

