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# COVID-19 pandemic and derogation to human rights

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## ABSTRACT

Under international human rights law, States can limit the exercise of most human rights if it is necessary to protect the rights of others or collective interests. The exceptional circumstances brought by the COVID-19 global pandemic lead to more extensive, on both their scope and their duration, restrictions of human rights than in usual times. This article introduces the States' specific right to derogate to human rights in circumstances of public emergency and the conditions of a legitimate derogation in the context of COVID-19. It argues that States must ensure that the general measures they adopt to face the crisis do not disproportionately harm vulnerable people.

**KEYWORDS:** COVID-19, public health, human rights, derogation, European Court of Human Rights

The world is currently facing one of its most severe public health crises. At the time of this paper, there are more than 3 million confirmed cases of COVID-19 worldwide,<sup>1</sup> those numbers being far below the reality of the spreading since in various countries, only symptomatic persons are actually tested.

In Europe, the European Commission took the initiative to support short-time work and announced an investment of 37 billion euros to help small companies and the healthcare sector.<sup>2</sup> However, voices have been critical of the lack of action of the European Union (EU) and denounced the lack of European solidarity. It is worth recalling, nonetheless, that the member states did not confer a competence to the EU in public health. The EU has only a supporting competence in the field, which

1 Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering (CSSE) at John Hopkins, <https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>.

2 <https://audiovisual.ec.europa.eu/en/topnews/M-004631> (accessed Apr. 7, 2020).

excludes the adoption of laws. According to the treaty on the functioning of the EU, it can only ‘support, coordinate or supplement the actions of the Member States’,<sup>3</sup> in order to achieve common objectives. Therefore, in pandemics such as COVID-19, states remain the first authorities to take administrative and financial measures, and the EU can complement such policies.

This leads to a disparity of national strategies. Italy or France imposed a strict confinement in order to limit the spreading of the virus, going until curfews in a few municipalities. Denmark, with its smaller population and lower rate of confirmed cases, was able to adopt a softer version of confinement and social distancing after an early closing of the borders. None of those countries currently realizes massive testing like in Germany though, which fatality rate is lower than the other European states.<sup>4</sup>

Lack of masks and equipment continue to be a challenge and generate discourses on state sovereignty and practices of national priority despite collaborative initiatives. There will be a time to discuss the teachings of this crisis and to enhance a social Europe alongside the common market. Before that, this time of emergency also questions the protection of fundamental rights.

The 27 EU member states are also members, together with 20 other European states, of the Council of Europe, a regional organization based on the European Convention on Human Rights (ECHR). The European Court of Human Rights qualified this founding text as an ‘instrument of European public order’.<sup>5</sup> The Convention contains a list of rights, most of which can be limited for valid purposes including public health. Providing that they are ‘necessary in a democratic society’, those limitations are acceptable in normal times.<sup>6</sup> However, the COVID-19 crisis is not normal times. In the rhetoric of French President Emmanuel Macron, ‘we are at war’.<sup>7</sup> In those particular circumstances, the Convention holds a specific provision authorizing to derogate unilaterally to conventional rights. Article 15, entitled ‘derogation in time of emergency’, permits states ‘in time of war or other public emergency threatening the life of the Nation [...] to take measures derogating from its obligations . . .’<sup>8</sup> Similar provisions can be found in Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR), Article 27(1) of the American Convention on Human Rights (ACHR), or Article 4 of the Arab Charter on Human Rights. Singularly, the African Charter does not contain any provision on derogation, and the African Commission deduced that no derogation was possible.<sup>9</sup> The possibility to derogate in times of

3 Article 6, consolidated version of the Treaty on the Functioning of the European Union (TFEU), see also article 168 TFEU.

4 Billy Perrigo, *Why Is Germany’s Coronavirus Death Rate So Low?* (Time, Mar. 30, 2020), <https://time.com/5812555/germany-coronavirus-deaths/> (accessed Apr. 7, 2020).

5 *Loizidou v. Turkey* (preliminary objections), 1995, at 93.

6 There are ‘accommodation clauses’ as framed by Christoph Schreuer, ‘Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights’, 9 *The Yale Journal of World Public Order*, 113 (1982).

7 Michel Rose, ‘*We are at war*: France imposes lockdown to combat virus’ (Reuters, Mar. 16, 2020), <https://www.reuters.com/article/us-health-coronavirus-macron-restriction/we-are-at-war-france-imposes-lockdown-to-combat-virus-idUSKBN2133G5> (accessed Apr. 7, 2020).

8 For a commentary on Article 15, see WILLIAM SCHABAS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY* (OUP 2015).

9 African Commission on Human and Peoples’ Rights, *Sudan Human Rights Organization et al. v. Sudan*, 13–27 May, 2009, §165.

emergency does not substitute itself to permissible limitations of human rights, and if states can attain their public policy objectives without using derogatory measures, they should do it.<sup>10</sup>

Emilie Hafner-Burton et al. defined derogations as ‘a rational response to [the] uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties.’<sup>11</sup> Derogation clauses do not, according to Gerald L. Neuman, contradict the notion human right but may on the contrary contribute to their effective protection.<sup>12</sup> Indeed, states have positive obligations to protect the right to life,<sup>13</sup> which might justify derogations to some other human rights.

In application of Article 15(3) of the ECHR, Latvia,<sup>14</sup> Romania,<sup>15</sup> Armenia,<sup>16</sup> Estonia,<sup>17</sup> Moldova,<sup>18</sup> Georgia,<sup>19</sup> Albania,<sup>20</sup> North Macedonia,<sup>21</sup> Serbia,<sup>22</sup> and San Marino<sup>23</sup> notified the Secretary General of the Council of Europe that they were invoking this provision to face the ongoing pandemics. In application of Article 27(3) of the ACHR, Guatemala, Peru, Ecuador, Columbia, Bolivia, Panama, Chile, Honduras, Argentina, El Salvador, and the Dominican Republic notified the Secretary General of the Organization of American States (OAS) of the state of emergency, informing other states on the special regulations they adopted.<sup>24</sup> Several states renewed their notifications to the Council of Europe and the OAS. It is worth noting that European and American contracting parties of, respectively, the ECHR and the ICCPR on one hand, the ACHR and the ICCPR on the other hand, notified more often the respective regional organizations than the Secretary General of the UN.<sup>25</sup> In this regard, the Human Rights Committee published a statement on April 24, calling on state parties that have taken emergency measures ‘to comply without delay with their duty to

10 In that sense, see Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 24 Apr., 2020, CCPR/C/128/2, at §2 (c).

11 Emilie M. Hafner-Burton et al. “Emergency and Escape: Explaining Derogations from Human Rights Treaties”, in 65 INTERNATIONAL ORGANIZATION 673 (2011) at 680.

12 Gerald L. Neuman, *Constrained Derogation in Positive Human Rights Regime*, in EVAN J. CRIDDLE, HUMAN RIGHTS IN EMERGENCIES (CUP, 2026), pp. 15–31.

13 Article 2 ECHR, Article 4 ACHR, Article 6 ICCPR.

14 Notification 16 March 2020, <https://rm.coe.int/09000016809ce9f2>. On the same day, Latvia also made a notification off derogation to the ICCPR, <https://treaties.un.org/doc/Publication/CN/2020/CN.105.2020-Eng.pdf>.

15 Notification of 16 Mar., 2020. And to the ICCPR: <https://treaties.un.org/doc/Publication/CN/2020/CN.121.2020-Eng.pdf>, 20 Mar., 2020.

16 Notification of 19 Mar., 2020, <https://rm.coe.int/09000016809cf885>.

17 Notification of 20 Mar., 2020, <https://rm.coe.int/09000016809cfa87>.

18 Notification of 18 Mar., 2020, <https://rm.coe.int/09000016809cf9a2>.

19 Notification of 23 Mar., 2020, <https://rm.coe.int/09000016809cffi20>.

20 Notification of 31 Mar., 2020, <https://rm.coe.int/09000016809e0fe5>.

21 Notification of 2 Apr., 2020, <https://rm.coe.int/09000016809e1288>.

22 Notification of 6 Apr., 2020, <https://rm.coe.int/09000016809e1d98>.

23 Notification of 14 Apr., 2020, <https://rm.coe.int/09000016809e2770>.

24 The list of notifications can be found here: [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_suspension\\_guarantees.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_suspension_guarantees.asp).

25 To that date, only 5 member states of the Council of Europe and 6 states of the OAS notified the Secretary General of the UN concerning derogation to the ICCPR.

provide immediate notification to the Secretary General of the UN.<sup>26</sup> To this date, neither the UK nor Germany notifies the Council of Europe of their intent to derogate in this COVID-19 context. France, who had made such notifications between 2015 and 2017 in the context of terrorist attacks, did not do it either, despite the declaration of state of health emergency, the severity, and generality of the measures already taken.<sup>27</sup> Similarly, the USA, which ratified the ICCPR in 1992, did not make a notification to the Covenant.<sup>28</sup>

In normal times, the exercise of fundamental rights can conflict with each other or with collective interests. States are entitled to balance such interests and limit some of those rights if necessary. In exceptional circumstances, more severe restrictions and derogations can be admitted. In the following sections, we discuss the applicability of the derogatory regime to human rights in the context of COVID-19, before analyzing the conditions of application of valid derogatory measures. In particular, we insist on the need to protect vulnerable people, by taking some specific measures and/or by refraining to adopt too invasive measures.

### I. THE STATES' DISCRETION TO CHARACTERIZE A 'PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION'

According to the ECHR, derogation can apply 'in times of war or other public emergency threatening the life of the nation.' More recent legal instruments usually do not refer to 'war' but contain similar reference to public emergency. The ICCPR refers to a 'time of public emergency which threatens the life of the nation . . .';<sup>29</sup> while the ACHR mentions a 'time of war, public danger, or other emergency that threatens the independence or security of a State Part'.<sup>30</sup>

In his early speeches, the French President Macron recurrently used the metaphor of war, which had also been used by former Presidents Sarkozy and Hollande in connection with the terrorist attacks in order to justify, at the time, the state of emergency. Linguists and communication experts diverge on such rhetoric: while the war rhetoric is not unusual in the medical area ('fighting cancer', etc.) and makes clear about the severity of a situation, it also allows to gather the nation together toward the same objective and to oust opponents by likening them to traitors. The metaphor might well serve as a political justification for the serious human rights limitations the President was about to announce. From the perspective of international law, however, it does not waive the state of its obligations. Like the ECHR, adopted in 1945, the Geneva Conventions of 1949 refer to 'war or of any other armed conflict.' The word 'war' fell

26 Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 24 Apr., 2020, CCPR/C/128/2.

27 France made a reservation to Article 15 stating in particular that 'that the circumstances [ . . . ] in Section 1 of Act No. 55–385 of 3 Apr., 1955 regarding proclamation of a state of emergency, and in which it is permissible to apply the provisions of those texts, must be understood as complying with the purpose of Article 15 of the Convention'. Although it is inspired from the 1955 legislation, the Parliament adopted a new and specific statute in the COVID-19 context [[link here](#)].

28 Upon ratification by the USA, the ICCPR became the 'supreme law of the land' under the US Constitution. However, the country made a declaration when it ratified: "That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing."

29 Article 4(1).

30 Article 27(1).

into desuetude<sup>31</sup> and it is now referred to conflict between armed forces.<sup>32</sup> If the European Court of Human Rights never defined the word ‘war’, the appeals Chamber of the International Criminal for the Former Yugoslavia offered a general definition that has since being broadly endorsed by other legal instruments: ‘an armed conflict exists whenever there is a resort to armed force between States.’<sup>33</sup> From the above definition, it appears clearly that international law precludes the characterization of the ongoing crisis as a ‘war.’

On another hand, the European Court of Human Rights defined ‘other public emergency threatening the life of the nation’ as ‘an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.’<sup>34</sup> On the basis of the French version, the Court found that the emergency must be ‘actual or imminent.’<sup>35</sup> The criterion of the imminent nature of the emergency is of crucial importance in context of pandemics, since it allows the states to anticipate and take early restrictive measures and derogations in order to avoid more severe derogations later. There is no doubt that COVID-19 crisis fits with those criteria, with an actual and imminent threat (depending of the country) to all individuals’ right to health and right to life.

However, states usually have some discretion concerning the characterization of public emergency as they are best placed to assess the risks.<sup>36</sup> The international judge’s scrutiny applies more strictly to the necessity of the particular derogatory measures.

## II. THE STATES’ OBLIGATION TO AVOID POTENTIALLY DISPROPORTIONATE MEASURES

The international legal order is structured around the principle of state sovereignty, ie on the independence of states. Internally, state authorities have ‘the monopoly on the legitimate use of physical force.’<sup>37</sup> The state powers, nonetheless, are not without limits. International human rights conventions impose conditions under which a derogation to human rights can be justified.

Beyond the requirement of notification,<sup>38</sup> the implementation of derogatory measures needs to meet certain substantive criteria. First, states cannot derogate to non-

31 WILLIAM SCHABAS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY* (OUP 2015), at 594.

32 Karl J. Partsch, « Experiences Regarding the War and Emergency Clause (art.15) of the European Convention of Human Rights, (1971) 1 ISRAEL YEARBOOK ON HUMAN RIGHTS 327.

33 ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 Oct., 1995, § 70.

34 *Lawless v. Ireland* (1961), § 28.

35 Deemed to be the authentic one in the ‘Greek case’: *Denmark, Norway, Sweden, Netherlands v. Greece* (1969), §122.

36 See *Lawless v. Ireland* (1961) § 28; concerning the ICCPR see *Human Rights Committee Landinelli Silva et al. v. Uruguay* (1981), § 8.3.

37 Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY*, translated by H. H. Gerth and C. Wright Mills. Oxford University Press (1946).

38 Article 4(1) ICCPR requires an official recognition of the emergency in the country that intends to use derogation. See also General Comment no 29—States of emergency (Article 4), §2. CCPR/C/21/Rev.1/Add.11. Concerning the ACHR, in *Zambrano Vélez et al. v. Ecuador* (2007), the Inter-American Court found that ‘failure to comply with this duty to inform implies the failure to comply with the obligation contained in Article 27(3)’.

derogable rights, among which the right to life,<sup>39</sup> prohibition of torture and ill treatments,<sup>40</sup> prohibition of slavery,<sup>41</sup> and no punishment without law.<sup>42</sup> Apart from those rights, which are the only ones enumerated by the ECHR,<sup>43</sup> the inclusion of other rights in the list of non-derogable rights differ from an international instrument to another. Since the ICCPR's list is broader, for instance, a contracting state of both the ECHR and the ICCPR will not be able to use Article 15 ECHR to derogate to a right only characterized as non-derogable in the ICCPR.<sup>44</sup> Interestingly, the Arab Charter integrates in this category some rights directly threatened by the COVID-19 crisis: the right to liberty and security,<sup>45</sup> freedom to leave one's country,<sup>46</sup> or the right to seek political asylum.<sup>47</sup> The Human Rights Committee explains this characterization of certain rights as non-derogable because 'their suspension is irrelevant to the legitimate control of the state of national emergency' but also because 'derogation may indeed be impossible' for certain rights like freedom of conscience.<sup>48</sup> Besides, a few rights are peremptory norms of general international law or *jus cogens*, which according to the Vienna Convention on the Laws of Treaties excludes any derogation.<sup>49</sup>

Second, and concerning other rights, Article 15 of the ECHR states that derogating measures must be 'strictly required by the exigencies of the situation' and 'not inconsistent with its other obligations under international law'. In addition, measures cannot discriminate between national and non-nationals.<sup>50</sup> The strict necessity implies to demonstrate a close link between the situation and the measures and that less invasive measures would have been inefficient. Despite the specificity of emergency situations, the Human Rights Committee stated in its exactly, general comment no 29 on Article 4 of the ICCPR that the principle of proportionality was indeed 'common to derogation and limitation powers'.<sup>51</sup>

In order to prevent the spreading of COVID-19, states usually started by imposing self-confinement. This restriction of the right to liberty and security actually finds an

39 Article 2 ECHR, Article 6 ICCPR, Article 4 ACHR, Article 5 Arab Charter.

40 Article 3 ECHR, Article 7 ICCPR (including prohibition of scientific experimentations without free consent. Although not in the text of the ECHR, its case law also characterized it as ill treatments), Article 5 ACHR, Article 8, see also Article 9 (no medical or scientific experimentation without free and informed consent) Arab Charter.

41 Article 4 ECHR (slavery and forced labor), Article 8 ICCPR (slavery, servitude, but not including forced labor), Article 6 ACHR (slavery and forced labor), Article 10 Arab Charter (slavery and forced labor).

42 Article 7 ECHR, Article 15 ICCPR, Article 9 ACHR, Article 15 Arab Charter.

43 Additional protocols to the ECHR contains clauses prohibiting derogation to the abolition of death penalty (see Protocols 6 and 13), the principle *ne bis in idem* (Protocol 7).

44 FRÉDÉRIC SUDRE, DROIT EUROPÉEN ET INTERNATIONAL DES DROITS DE L'HOMME (PUF 2011) at 159. See also Christoph Schreuer, "Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights", 9 THE YALE JOURNAL OF WORLD PUBLIC ORDER, 113 (1982), at 129.

45 Article 14 Arab Charter.

46 Article 27 Arab Charter.

47 Article 28 Arab Charter.

48 General Comment 23, UN Doc. CCPR/C/21/Rev.1/Add.6, para 10.

49 Vienna Convention on the Laws of Treaties (1969), art 53.

50 *A and others v. the United Kingdom* (2009), § 190; see also ICCPR article 4(1). In this regard, the Inter-American Court of Human Rights found that non-discrimination was a *jus cogens* norm in an opinion of 2003, Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 Sept., 2003, Juridical Condition and Rights of Undocumented Migrants, § 101.

51 General Comment no 29—States of emergency (article 4), §2. CCPR/C/21/Rev.1/Add.11, at § 4.

explicit support in the ECHR, which Article 5§1 (e) authorizes ‘the lawful detention of persons for the prevention of the spreading of infectious diseases [ . . . ]’, providing that this is made in ‘accordance with a procedure prescribed by law.’<sup>52</sup> Because of the scale of this pandemic, the general nature and duration of the restrictive measures might only be justifiable under the derogatory regime.

Considering the hospitals’ lack of essential resources, starting by ventilators and masks for medical staff, the measures of confinement appear as a necessary mean to limit the spreading of the virus.<sup>53</sup> Depending on different factors in a given country, the imposition of fines for persons not respecting social distancing or curfews might also be considered as strictly required if really dissuasive. Yet, the extent of the confinement in Italy, Spain, or France (which started between March 9 and 17 and are not scheduled to end before May) is unprecedented, and the risk is that this state of emergency, together with serious restrictions to human rights, becomes the norm.

In a resolution on April 10 addressing COVID-19, the Inter-American Commission warned the states on the risk of excessive measures: ‘Even in the most extreme and exceptional cases in which suspension of certain rights may become necessary, international law lays down a series of requirements such as legality, necessity, proportionality and timeliness, which are designed to prevent measures such as a state of emergency from being used illegally or in an abusive or disproportionate way, causing human rights violations or harm to the democratic system of government.’<sup>54</sup>

The intrinsic link between the measures and the fight against the pandemic will call for a reduction of invasive measures with the progressive improvement of the situation.<sup>55</sup> The principle of proportionality requires a continuous evaluation of the strict necessity of derogatory measures. This is what states do when they reassess on a regular basis the need to postpone their measures. If the European Court of Human Rights does not require a strict temporary nature of the adopted measures, admitting that they could last ‘many years’,<sup>56</sup> the General Comment no 29 of the ICCPR considers that duration, together with geographical coverage and material scope, must be strictly required by the exceptional situation.<sup>57</sup> In its recent statement on COVID-19, the Human Rights Committee reiterated the ‘temporary basis’ of states exceptional

52 Such limitation is not explicitly mentioned by Article 7 ACHR (right to personal liberty) or by Article 9 of the ICCPR but enters in the general possible exceptions of Article 7§2 ACHR and Article 9§1.

53 In a statement of interpretation of the right to health, the European Committee of Social Rights approved this type of measures: European Committee of Social Rights, *Statement of interpretation on the right to protection of health in times of pandemics*, 21 Apr., 2020.

54 IACHR, *Pandemic and Human Rights in the Americas*, Resolution 1/2020, 10 Apr., 2020, § 3(g), <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>.

55 In that regard, see the Human Rights Committee Statement on April 24: ‘Where possible, and with a view of the need to protect the life and health of others, States parties should replace COVID-19-related measures that prohibit activities relevant to the enjoyment of rights under the Covenant with less restrictive measures that allow such activities to take place, while subjecting them to necessary public health requirements such as physical distancing’. Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, 24 Apr., 2020, CCPR/C/128/2, §2 (b).

56 *A and others v. the UK* (2009), § 178. For an argument defending a more rigorous scrutiny by the European Court of Human Rights, see Triestino Mariniello, *Prolonged emergency and derogation o human rights: why the European Court should raise its immunity system*, 20 GERMAN LAW JOURNAL 1 (2019), pp. 46–71.

57 General Comment no 29—States of emergency (article 4), §2. CCPR/C/21/Rev.1/Add.11, §4.

emergency powers.<sup>58</sup> It is critical that parliaments and national judges are in capacity to scrutinize the necessity and proportionality of governmental measures.

In order to evaluate the strict necessity, the Inter-American Commission recommends in particular to the OAS Member States that ‘all restrictions or suspensions are based on the best scientific evidence.’<sup>59</sup> However, there is a lot of uncertainty concerning the transmission of the coronavirus, its effects, and complications. States also learn from other countries’ experiences. While several European states applied the principle of precaution, others, like Sweden, chose not to lockdown despite the controversy.<sup>60</sup> At this stage, given the current knowledge of COVID-19, it is hard to evaluate the adequacy of the restrictions and their proportionality. Nevertheless, discriminatory measures targeting immigrants, people of Asian origin, or foreign workers would violate international human rights law.<sup>61</sup>

The second substantive criteria for a valid derogation, the absence of incompatibility of a state’s measures with ‘its other obligations under international law’, refers mainly to international humanitarian law, of conventional and customary source, and some conventions of the World Trade Organization.<sup>62</sup> It can also refer to dissimilar international obligations pursuant to different derogatory clauses. When applicants to the European Court of Human Rights relied on Article 4 of the ICCPR to argue that derogatory measures were excessive, the Court did not find an incompatibility with this other international obligation.<sup>63</sup>

If the actions or inactions decided by legislators and governments in the COVID-19 context affect everyone, they can particularly harm vulnerable persons like homeless people, disabled and isolated persons, detainees or migrants, etc. The context of emergency calls for vigilance concerning the effectiveness of their rights.

### III. VIGILANCE TO MEASURES DISPROPORTIONALLY AFFECTING VULNERABLE POPULATIONS

State obligations under international human rights law are predominantly divided between obligations to respect, to protect, and to fulfill human rights. This categorization is still compatible with the distinction, for all rights, between positive obligations and negative obligations. As the European Court of Human Rights stated, the Convention is ‘intended to guarantee not rights that are theoretical or illusory but rights that are

58 Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 24 Apr., 2020, CCPR/C/128/2, §2.

59 General Comment no 29—States of emergency (article 4), §2. CCPR/C/21/Rev.1/Add.11, §27.

60 On Sweden’s herd immunity strategy and the overrepresentation of older people and foreign residents in the death rates see <https://www.bbc.com/news/world-europe-52395866>.

61 People of Asian ethnicity reported discrimination since the start of the crisis. In the USA, President Donald Trump recently announced his plan to suspend immigration, which might lead to future measures targeting foreigners. <https://www.nytimes.com/2020/04/20/us/politics/trump-immigration.html>. In Germany and Austria, it was reported that Romanian people work under conditions that do not guarantee their protection: <https://www.theguardian.com/world/commentisfree/2020/apr/16/western-europe-food-east-european-workers-coronavirus>.

62 LUDOVIC HENNEBEL AND HÉLÈNE TIGROUDJA, TRAITÉ INTERNATIONAL DES DROITS DE L’HOMME (Pedone, 2d ed. 2018) § 604.

63 See *Brannigan and McBride v. the United Kingdom* (1993). In relation to the Geneva Conventions see *Marshall v. the UK* (dec), *Hassan v. the UK* [GC] (2014).

practical and effective.<sup>64</sup> Therefore, states must also prevent violations of human rights by private actors (horizontal effect), which are particularly relevant in the context of confinement in private structures.

In a situation of public health emergency like in normal times, human rights compliance might require the adoption of specific measures that make the basic rights of vulnerable people as effective as the rest of the population. The disregard of those particular needs in the context of Article 15 might raise issues of proportionality.<sup>65</sup> In its resolution on 10 April 2020, the Inter-American Commission of Human Rights requires states to take into account ‘the particular effects [their restrictions or suspensions of rights] may have on the most vulnerable groups, in order to ensure that the impact is not disproportionate, and take such affirmative measures as may be necessary. Any decision or measure taken in this context must take gender, intersectional, linguistic and intercultural perspectives particularly into account.’<sup>66</sup> Alarming situations are numerous. In the following sections, we focus on the respective situations of women, detainees, and elderly people, as they are emblematic of vulnerability in time of crisis. Vulnerability is a social construct that should guide the state to ensure equality between people.<sup>67</sup> In our view, this requires in some cases to adapt the general measures to their specific situation but also to ensure that specific restrictions are indeed strictly needed.

### A. Adapting general measures to vulnerable people needs

#### *The case of detainees and women in confinement*

A first risk of imposing self-confinement is the increase of domestic violence. Several countries reported a rise of around 30 per cent of domestic violence since the beginning of the crisis.<sup>68</sup> Confinement leads to social isolation and higher risks of aggressiveness especially when people are locked in small apartments. While domestic violence concerns both men and women, it particularly affects women and their children, and the WHO characterizes it as a major public health problem. According to the UN Committee on the elimination of discrimination against women, the prohibition of gender-based violence has become a ‘principle of customary international law’,<sup>69</sup> and

64 *Airey v. Ireland* (1979), at 24.

65 A focus on vulnerable persons allows considering both the effectivity of rights and the disproportion of their limitations or derogations. It differs from the protection of specific groups against discrimination. The USA made a reservation to the ICCPR in order to limit the interpretation of anti-discrimination to protected groups: ‘The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based “solely” on the status of race, color, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.’

66 IACHR, Pandemic and Human Rights in the Americas, Resolution 1/2020, 10 Apr., 2020, § 3(g), <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf> § 27.

67 There is an abundant literature on vulnerability. For works on vulnerability and the European Court of Human Rights, see a.o. LAURENCE BURGEN (ED), *LA VULNÉRABILITÉ SAISIE PAR LES JUGES EN EUROPE* (PEDONE 2014). See also Lourdes Peroni and Alexandra Timmer, *Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law*, 11 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW*, 1056 (2013).

68 See the brief by UN Women, “COVID-19 and Ending Violence Against Women and Girls.” On gender-based approach to COVID-19, see [https://www.unfpa.org/sites/default/files/resource-pdf/COVID-19\\_A\\_Gender\\_Lens\\_Guidance\\_Note.pdf](https://www.unfpa.org/sites/default/files/resource-pdf/COVID-19_A_Gender_Lens_Guidance_Note.pdf) (accessed Apr. 7, 2020).

69 CEDAW, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 14 July, 2017, at 2. *CEDAW/C/GC/35*. As a principle of customary law, it is a source of law regardless of the fact that the USA only signed and did not ratify the CEDAW.

states need 'to act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life.'<sup>70</sup> This obligation applies to prevent gender-based violence by private actors.<sup>71</sup>

In order to ensure that derogatory measures do not to disproportionately affect women, Marlène Schiappa, the French secretary of State on Equality between Women and Men, implemented early several measures of protection, including pop-up counseling centers at supermarkets but also an alert system in pharmacies.<sup>72</sup> The system is currently applied and is apparently of help for some women.<sup>73</sup> However, it is unlikely to be sufficient. Since the beginning of the confinement, associations in France reported that they received less calls than in usual times. Victims of domestic violence usually call when they are outside their home. If associations invite women to run away in such circumstances, the issue remains about where to go, shelters being saturated, and how to ensure a follow-up.<sup>74</sup> Among other recommendations in the COVID-19 crisis, the Inter-American Commission on Human Rights called on states to develop reporting mechanisms, to expand the supply of shelters, to promptly and thoroughly investigate facts, and to develop mass media campaigns.<sup>75</sup>

On another hand, confinement particularly affects detainees. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) declared that 'protective measures must never result in inhuman or degrading treatment of persons deprived of their liberty.'<sup>76</sup> In its statement on COVID-19, the Human Rights Committee also insisted on states' duty 'to treat all persons, including persons deprived of their liberty, with humanity and respect for their human dignity, and they must pay special attention to the adequacy of health conditions and health services in places of incarceration.'<sup>77</sup> While pointing out the necessity of confinement and social distancing in the sanitary crisis we are facing, the French Défenseur des Droits reminded the need to be particularly vigilant to the situation of detainees whose vulnerability is increased in such circumstances.<sup>78</sup> Social distancing is not applicable, going out of the cell is limited, visits of relatives are not permitted, and access to education and other activities is impossible.<sup>79</sup> Many rights are at stake, including a serious threat on health if one co-detainee gets infected by the virus. A possible way

70 Cedaw General Recommendation 12 (1989).

71 CEDAW, General Recommendation 19 (1992), at 9 and 24 (a).

72 <https://edition.cnn.com/2020/04/02/europe/domestic-violence-coronavirus-lockdown-intl/index.html>.

73 See for an example *Violentée, elle donne l'alerte en pharmacie*, Nord Littoral, 5 Apr., 2020, <https://www.nordlittoral.fr/39492/article/2020-04-05/violentee-elle-donne-l-alerte-en-pharmacie> (accessed Apr. 7, 2020).

74 <https://www.franceinter.fr/societe/confinement-une-situation-dangereuse-pour-les-femmes-victimes-de-violences>.

75 [https://www.oas.org/en/iachr/media\\_center/PReleases/2020/074.asp](https://www.oas.org/en/iachr/media_center/PReleases/2020/074.asp).

76 Council of Europe, CPT, Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic, 20 Mar., 2020.

77 Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 24 Apr., 2020, CCPR/C/128/2, §2(e).

78 Tribune, *Coronavirus: « Sauvegardons les droits fondamentaux pendant la crise sanitaire »*, Le Monde, 20 Mar., 2020, [https://www.lemonde.fr/idees/article/2020/03/20/coronavirus-sauvegardons-les-droits-fondamentaux-pendant-la-crise-sanitaire\\_6033892\\_3232.html?fbclid=IwAR24jv1dVEgUJbQ4nT7Y\\_rb7DWPRHG1HsbUfc925mGSv1kWSuDyxLEH-9K4](https://www.lemonde.fr/idees/article/2020/03/20/coronavirus-sauvegardons-les-droits-fondamentaux-pendant-la-crise-sanitaire_6033892_3232.html?fbclid=IwAR24jv1dVEgUJbQ4nT7Y_rb7DWPRHG1HsbUfc925mGSv1kWSuDyxLEH-9K4) (accessed Apr. 7, 2020).

79 *Id.*

to prevent serious violations of human rights of detainees would be to limit the cases of detention and offer alternative sanctions when possible. States took initiatives in that sense.<sup>80</sup> However, it is to be feared that governments overlook this issue. On March 26, 2020, a French government order extended the maximum duration of pre-trial detention, which the Minister of Justice has interpreted as implying an automatic prolongation of all detentions.<sup>81</sup> This raises clear issues of proportionality, especially because international courts addressed the structural issue of prison overcrowding, to which pre-trial detention contributes and found that it could constitute an inhuman and degrading treatment.<sup>82</sup> As a non-derogable right, such treatments would be in violation of human rights law without any scrutiny on proportionality.

The American and European Courts of Human Rights dealt with the protection of health in detention.<sup>83</sup> In particular, an analogy can be made with the European case *Cătălin Eugen Micu v. Romania* concerning the spread of transmissible diseases.<sup>84</sup> In that case, the applicant alleged he had caught hepatitis C while in prison and that the authorities had failed to provide appropriate medical treatment. The Court found no violation of Article 3 prohibiting ill treatments because it was impossible to determine if the applicant's disease was the result of the prison authorities' inactions. However, the Court indicated something instructive for future cases, stating that 'the spread of transmissible diseases [ . . . ] should be a public health concern, especially in the prison environment. On this matter, the Court considers it desirable that, with their consent, detainees can have access, within a reasonable time after their admission to prison, to free screening tests for hepatitis and HIV.'<sup>85</sup> Besides preventive measures, states have positive obligations to protect detainees' health. The Court found that the failure of state authorities to take any measures despite the deterioration of an applicant's health constituted a violation of Article 3.<sup>86</sup> In *Sakkopoulos v Greece*, the Court found no violation of Article 3 because the authorities had taken measures to protect the detainee's health and that the deterioration of his state was not imputable to them.<sup>87</sup>

In the COVID-19 context, it is imperative that detainees get broadly tested and that authorities take appropriate measures toward the persons infected or those refusing

80 France, Circulaire, 14 March 2020 on the adaptation of the judicial activity. Concerning immigration detention, the UK released 300 persons: <https://www.theguardian.com/uk-news/2020/mar/21/home-office-releases-300-from-detention-centres-amid-covid-19-pandemic>.

81 Hannelore Cayre, *Qui es-tu Nicole Belloubet, pour l'asseoir à ce point sur les libertés publiques?*, Libération, 31 Mar., 2020, [https://www.liberation.fr/debats/2020/03/31/qui-es-tu-nicole-belloubet-pour-t-asseoir-a-ce-point-sur-les-libertes-publiques\\_1783694?fbclid=IwAR2VDPpSbyQKxQuTlGpSv1MguX1h\\_7Zif0tcFSPj-sKRbdMjUoZTGYL\\_24](https://www.liberation.fr/debats/2020/03/31/qui-es-tu-nicole-belloubet-pour-t-asseoir-a-ce-point-sur-les-libertes-publiques_1783694?fbclid=IwAR2VDPpSbyQKxQuTlGpSv1MguX1h_7Zif0tcFSPj-sKRbdMjUoZTGYL_24) (accessed Apr. 7, 2020).

82 ECtHR *W.D. c. Belgique* (2016) § 169. See also IACTHR, *Caesar v. Trinidad and Tobago* (2005), § 143, « *The State shall adopt, within a reasonable time, such measures as may be necessary to bring the conditions of detention in its prisons into compliance with the relevant international human rights norms, in the terms of paragraph 134 of this judgment.* » The Inter-American Commission adopted the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas" (2008). At the UN level see United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), A/RES/70/175, which are a revision of Standard Minimum Rules for the Treatment of Prisoners, originally adopted in 1955 and approved by the Economic and Social Council in 1957 and 1977.

83 See a.o. Vera Vera et al. (2011), § 50.

84 *Cătălin Eugen Micu v. Romania* (2016).

85 *Idem* § 56.

86 *Mouisel v. France* (2002).

87 *Sakkopoulos v Greece* (2004).

the tests in order to ensure that other detainees do not get infected. Unlike the above-mentioned cases where the European Court found that the bad health situation was not attributable to the prison authorities, the spreading of COVID-19 would otherwise be attributable to the state as a failure to act. In this regard, the recent refusal of a district judge in the UK to consider Julian Assange's request for bail<sup>88</sup> highlights the exposure of detainees. The judge found in late March that '[a]s matters stand today this global pandemic does not, of itself, yet provide grounds for Mr Assange's release.'<sup>89</sup> It is now alleged that there were coronavirus cases and one death in the Belmarsh prison, where the founder of WikiLeaks is detained. Assange apparently has a lung condition that would make him vulnerable to the virus.<sup>90</sup> If this was confirmed, and the authorities refused to adjust his detention or release him on parole, then they would breach the European Convention. Besides, the judge's concern about the 'substantial grounds' to believe that Assange would not return to his extradition hearing if he was released<sup>91</sup> is irrelevant when it comes to the right to be free from inhuman or degrading treatment.

In that respect, it is worth noting that on March 24, the European Court of Human Rights communicated for the first time an application concerning COVID-19 on that particular issue of detention. The applicant, a 60-year-old and ill man currently in the UK, is facing extradition to the USA and claims that in the context of COVID-19, where he would be exposed to a life sentence without parole, such extradition would be in breach of Article 3 prohibiting inhuman and degrading treatment.<sup>92</sup> Before the Court's decision, which will be very instructive, states must take measures to ensure that anti COVID-19 measures do not unnecessarily harm people in detention.

### **B. Assessing the necessity of specific restrictions of vulnerable people's rights**

#### *The case of extra-confinement of elderly people and suspension of women's reproductive rights*

General measures of confinement aim to avoid the overcrowding of hospitals and help to manage limited resources. In particular, it intends to protect elderly people who are the most vulnerable to the pandemics. On April 13, Emmanuel Macron announced the progressive lift of restrictions from May 11 but initially said that older people would have to stay confined. He later clarified that no discriminatory measure

88 Lizzie Dearden, *Julian Assange: Judge refuses to release Wikileaks founder from prison over coronavirus outbreak* (Independent, 25 Mar., 2020), <https://www.independent.co.uk/news/uk/crime/julian-assange-coronavirus-prison-bail-release-belmarsh-latest-a9424621.html> (accessed 20 Apr., 2020).

89 *Julian Assange denied bail in UK after claiming 'high risk' of catching coronavirus* (The Guardian, 25 Mar., 2020), <https://www.theguardian.com/media/2020/mar/26/julian-assange-denied-bail-in-uk-after-claiming-high-risk-of-catching-coronavirus> (accessed 20 Apr., 2020).

90 Andrew Blake, *Assange lawyers request bail for jailed WikiLeaks publisher, citing coronavirus pandemic* (Washington Times, 24 Mar., 2020), <https://www.washingtontimes.com/news/2020/mar/24/julian-assanges-lawyers-to-request-bail-for-jailed/> (accessed 20 Apr., 2020).

91 *Julian Assange denied bail in UK after claiming 'high risk' of catching coronavirus* (The Guardian, 25 Mar., 2020) *supra*.

92 Hafeez v. U.K., communicated case, 24 Mar., 2020, <https://hudoc.echr.coe.int/eng#%7B%22section%3A%22itemid%3A%22itemid%3A%22itemid%3A%22%7D>]. In the Soering case, the Court had found that the a state could be found responsible for the extradition of a man to a country (the US) where he would risk the death penalty, *see* Soering v. UK (1989).

would be adopted, rather calling to individual responsibility.<sup>93</sup> Beyond the confusion in the French authorities' communication, this shows that the rhetoric of vulnerability, together with the rhetoric of war, has been intensively used in order to provide political justifications to more restrictions.<sup>94</sup> Some authors have denounced this instrumentalization of the concept to deny the elderly's capacity to make choices and promote a 'public order of individual protection'.<sup>95</sup>

However, protection of vulnerable people is not only an issue of autonomy. Unlike the European cases in which the European Court protected the applicants' autonomy to inflict oneself pain or to refuse life-saving treatment as part of private life,<sup>96</sup> the elderly cannot only be infected by COVID-19 but can also infect other people, among which, other vulnerable people. This is more about the protection of the right to health<sup>97</sup> of the most fragile than about resilience. Paradoxically, in this context, the vulnerability of old people is even increased by the fact that the lack of resources leads hospitals to make choices on the basis of better chances of survival and younger patients are getting priority to access ventilators.<sup>98</sup> In this context, the war rhetoric might finally well characterize the management of emergency and scarce resources.<sup>99</sup> This reality, which forces medical staff to act in contradiction with the prohibition of

93 *Macron moves to calm fears of 'age discrimination' in easing lockdown* (RFI, 18 Apr. 2020), <http://www.rfi.fr/en/france/20200418-macron-calms-fears-of-age-discrimination-in-easing-of-covid-19-lockdown-older-people-france-coronavirus> (accessed 20 Apr., 2020).

94 Speeches of President Macron on 12 March and 16 March.

95 Muriel Rebourg and Stéphanie Renard, « De l'éventualité d'une prolongation du confinement spécifique aux personnes âgées: que sommes-nous prêts à sacrifier? », *RDLF 2020 chron. n°30* [[http://www.revuedf.com/droit-administratif/de-leventualite-dune-prolongation-du-confinement-specifique-aux-personnes-agees-que-sommes-nous-prets-a-sacrifier/#\\_ftn10](http://www.revuedf.com/droit-administratif/de-leventualite-dune-prolongation-du-confinement-specifique-aux-personnes-agees-que-sommes-nous-prets-a-sacrifier/#_ftn10)]. "ordre public de protection individuelle".

96 For *Jehovah Witnesses, refusing blood transfusions despite the risk of dying* see *Jehovah's witnesses of Moscow and others v. Russia* (2010). The Court found that the freedom to refuse specific treatment was vital to self-determination and personal autonomy, and the public interest of preserving life needed to yield to the patient's stronger interest in directing the course of his or her life. Unlike a situation of pandemics, refusing a transfusion does not affect other individuals. On autonomy and the right to inflict oneself pain see *KA and AD v. Belgium* (2005), where the Court only found a violation of the convention (Article 8) because the victim had withdrawn her consent, and not because of public values. Again, autonomy in those cases did not conflict collective interests. On another hand, see the 'right to try' cases, in which the Court found that the states did not exceed their margin of appreciation by prohibiting access to experimental treatments to dying patients (*Durissotto v. Italy* (2014), *Hristozov and others v. Bulgaria* (2012)). In those cases, restrictions were based on public health.

97 Concerning the right to health of older people, see Committee on Economic, Social and Cultural Rights, General Observation n°41 on the right to health (ICESCR) (2000), E/C.12/2000/4: 'With regard to the realization of the right to health of older persons, the Committee [...] reaffirms the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment. Such measures should be based on periodical check-ups for both sexes; physical as well as psychological rehabilitative measures aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity' -§ 25. See also article 23 of the European Social Charter (revised, 1996).

98 Haven Orecchio-Egresitz, *Faced with tough choices, Italy is prioritizing young COVID-19 patients over the elderly. That likely 'would not fly' in the US*, *Business Insider*, <https://www.businessinsider.com/prioritizing-covid-19-patients-based-age-likely-wont-fly-us-2020-3?r=US&IR=T> (accessed 20 Apr., 2020).

99 See also Diane Roman, « Ils ne mourraient pas tous, mais tous étaient frappés' Le Coronavirus, révélateur des ambiguïtés de l'appréhension juridique de la vulnérabilité », *RDLF 2020 chron. n°15* [[http://www.revuedf.com/droit-administratif/ils-ne-mourraient-pas-tous-mais-tous-etaient-frappes-le-coronavirus-revelateur-des-ambiguites-de-lappréhension-juridique-de-la-vulnerabilite/#\\_ftnref4](http://www.revuedf.com/droit-administratif/ils-ne-mourraient-pas-tous-mais-tous-etaient-frappes-le-coronavirus-revelateur-des-ambiguites-de-lappréhension-juridique-de-la-vulnerabilite/#_ftnref4)].

non-discrimination in healthcare,<sup>100</sup> and opposes the principle of special protection of the most vulnerable, needs to be compensated by preventive measures. In countries where ventilators and masks are dramatically missing, extra-confinement might be the less restrictive means. Nevertheless, the need to such special restrictions needs to be assessed regarding the aim to effectively fight the pandemics and taking into account the physical and psychological impacts of confinement. Such special restrictions would become unconventional if they lasted more than strictly needed to alleviate hospitals.

Another example of specific restrictions concerns women's reproductive rights. Women's access to contraceptives but also to legal abortions is threatened. As the crisis urges the reorganization of hospitals to deal with the pandemics, it becomes necessary to delay the timing of abortion. However, gender-neutral emergency regulations do not integrate this need<sup>101</sup> or even take advantage of the crisis to remove rights. Poland, for instance, takes advantage of the lockdown to discuss a ban of abortion in case of fetal abnormality.<sup>102</sup> In the USA, a federal appeals court upheld a Texas order to resume abortion ban, and the governor of the state of Indiana called abortion clinics 'to cancel or postpone elective and non-invasive procedures'.<sup>103</sup>

If the protection of health falls within the scope of private life (Article 8), the European Court of Human Rights is usually reluctant in interfering in states' management of scarce resources in healthcare. In *Pentiacova and others v. Moldova*, for instance, in which patients complained about not having free access to dialysis, the Court noted 'that the applicants' claim amounts to a call on public funds which, in view of the scarce resources, would have to be diverted from other worthy needs funded by the taxpayer. [blank] While it is clearly desirable that everyone should have access to a full range of medical treatment, including life-saving medical procedures and drugs, the lack of resources means that there are, unfortunately, in the Contracting States many individuals who do not enjoy them, especially in cases of permanent and expensive treatment.' This pragmatic approach would certainly apply to women's access to reproductive services in time of emergency, justifying some adjustments. However, a public health crisis cannot be used as a pretext to legitimate unnecessary derogations to women's rights.<sup>104</sup>

The European Court of Human Rights case law is more modest than the Inter-American Court of Human Rights and the Human Rights Committee on the gender approach to reproductive rights.<sup>105</sup> Nonetheless, the Court's position is clear: if states are free to recognize a right to abortion outside a particular threat on the life or health

100 See especially article 12 International Covenant on Economic, social and cultural rights (ICESCR).

101 Stéphanie Hennette-Vauchez, *L'urgence (pas) pour tou(te)s*, LA REVUE DES DROITS DE L'HOMME, April 2020, <https://journals.openedition.org/revdh/8986> (accessed Apr. 7, 2020).

102 Sebastian Shukla and Alex Klosok, *Poland debates abortion bill amid coronavirus lockdown* (CNN, 16 Apr., 2020), <https://edition.cnn.com/2020/04/15/world/poland-abortion-law-intl/index.html>.

103 Alexandra Kukulka, *Indiana governor calls on abortion clinics to cancel or postpone 'elective' procedures in COVID-19 pandemic response* (Chicago Tribune, 3 Apr. 2020), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-planned-parenthood-order-st-0404-20200403-4limx74nevc2ncb34m7coyloym-story.html> (accessed 14 Apr., 2020).

104 Mark J. Stern, *Federal Appeals Court lets Texas Resume Abortion Ban* (Slate, March 31, 2020), <https://slate.com/news-and-politics/2020/03/fifth-circuit-texas-coronavirus-abortion-ban.html> (accessed Apr. 7, 2020).

105 See, for instance, IACtHR, *Artavia Murillo and others v. Costa Rica*. For the Human Rights Committee, see *Jane Mellet v. Ireland*, 31 March 2016 CCPR/C/116/D/2324/2013.

of the pregnant woman, they have the obligation to ensure the effectiveness of this right as soon as it is protected by domestic law.<sup>106</sup> When the woman's health is threatened, the Court's protection is even stronger. Therefore, specific measures infringing women's reproductive rights such as making abortion impossible would likely be considered too invasive and not strictly required to manage scarce medical resources.

#### IV. CONCLUSION

Human Rights Courts will certainly be overwhelmed by applications in the aftermaths of the COVID-19 crisis. There are few doubts that this health crisis is an emergency threatening the life of the nation. If states have some discretion to determine the emergency, international human rights courts will scrutinize the necessity of the measures adopted to face it by applying the principle of proportionality. States must pay particular attention to vulnerable populations in order to ensure they are not disproportionately affected. In their scrutiny, international courts would rely on different indicia to determine if, at the time they were adopted, less severe measures could have achieved the same results. The duration of those measures will be considered. In this regard, we already observed some loosening of self-confinement after a few weeks, which might call for the adoption of other proportionate but more adapted measures. In certain cases, applicants might claim a violation of the prohibition of torture, inhuman, and degrading treatment, which applies in particular in the context of detention. International human rights conventions converge to characterize this right as non-derogable, which should presumably lead to the responsibility of the state.<sup>107</sup> Beyond the current management of this emergency, this crisis shows the fragility of health systems, urging governments to review their strategies and to (re)invest massively in the healthcare sector.

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106 See especially *A, B and C. v. Ireland* (2010). For health reasons see *R.R. v. Poland* (2011) and *Tysi c v. Poland* (2007).

107 'should' because the case law shows that despite the gravity of certain acts, diplomatic concerns play in the scrutiny. In *Jurisdictional Immunities of the State*, the International Court of Justice found that 'there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the preemptory nature of the rule which it is alleged to have violated' (§84). The Grand Chamber of the European Court of Human Rights relied on this case to find the absence of universal jurisdiction of civil courts in torture cases and to uphold the granting of state immunity to a foreign government despite acts of torture. See *Nait-Liman v. Switzerland* [GC] (2018), see also *Al-Adsani v. the United Kingdom* [GC] (2001).