

“LEST WE SHOULD SLEEP”:¹ COVID-19 AND HUMAN RIGHTS

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ABSTRACT

Any meaningful human rights law approach to COVID-19 must be holistic and recognize the breadth of the challenges to both economic, social, and cultural rights, and civil and political rights. It must be grounded in the threat posed by the disease but also address responses to it, and implicate a wide range of state and nonstate actors. Such an analysis should offer a positive vision of effective global reaction, and counter attempts to hijack rights to oppose legitimate pandemic measures.

I. INTRODUCTION

In a season of great uncertainty, one thing is clear: COVID-19 is a cataclysm for human rights and a foundational challenge to international human rights law.² The disease itself, and responses to it, together threaten nearly every human right guaranteed by international law nearly everywhere. As such, the pandemic calls into question the most useful roles for and approaches of many international human rights mechanisms, and the responses of scholars who must rethink many of their default stances.

International human rights law is a core part of the global legal order. This Essay argues that for this body of law, and related human rights ideas, to have a meaningful impact in the face of the pandemic, we need a thick analysis of what they mean. This approach must recognize the depth and breadth of the challenges, ground itself in the overwhelming threat posed by the disease but also address responses to it, consider both what states must do and must not do, and implicate a wide range of state and nonstate actors. To date, such analysis has been more clearly reflected in articulations from the Global South, or from those whose work includes economic, social, and cultural rights. However, the Western civil and political rights focused human rights establishment has insufficiently reflected such perspectives. Human rights must be more than a litany of prohibitions; it must also offer a positive vision of effective global reaction. Furthermore, attempts to hijack human rights to oppose legitimate pandemic measures such as masks must be directly addressed.

¹ UNDER THE RUBBLE (Lebanon Nour Productions 1983).

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² See INTERNATIONAL LABOUR ORGANIZATION, ILO MONITOR: COVID-19 AND THE WORLD OF WORK (2d ed. Apr. 7, 2020) (Noting that COVID-19 is the “worst global crisis since the Second World War.” *Id.* at 2.).

Hence, this Essay will survey a range of the human rights impacts of the pandemic and responses to it. It will offer a critical overview of some interventions by human rights actors. Finally, it will make the case for a twenty-first century holistic human rights approach to COVID-19 that can better guide global responses and strengthen relevant international systems.

II. THE IMPACT OF COVID-19 ON HUMAN RIGHTS

This Part surveys some challenges posed to human rights by the repercussions of the virus itself. As the Committee on Economic, Social and Cultural Rights (CESCR) noted, “the COVID-19 pandemic . . . is having devastating impacts throughout the world on all spheres of life.”³ The rights most affected include those to life and health. These direct impacts of the virus must be the starting point of any meaningful human rights analysis which too often, reflecting classical human rights impulses, speaks only or primarily to the negative consequences of the state response.

In fact, the sequelae of the pandemic itself and of government policies necessitated by it are deeply intertwined. It is impossible to assess responses without sufficiently analyzing the situation itself to which states are reacting (or claim to be) and how that affects all human rights. Skipping that step undermines human rights norms and the credibility of mechanisms that promote them. This in turn produces a rights discourse with limited resonance for populations living with the realities of the disease.

A. *The Right to Life*

Of the more than 30 million people confirmed infected with COVID-19, more than 947,500 have died in every region of the world, sometimes losing their lives unnecessarily when appropriate public health policies and effective leadership could have prevented their deaths.⁴ This alarming reality must be the starting point of any human rights assessment. Health care workers have paid a high price for defending the right to life of others, with countless thousands infected, and an unknown number dying.⁵ A long term task for the human rights project will be to memorialize all these victims, both to commemorate losses and spark improved policies.

Clearly, the right to life, this “supreme right” in the view of the UN Human Rights Committee (HRC), which has “crucial importance both for individuals and for society as a whole” and “constitutes a fundamental right, the effective protection of which is the prerequisite for the enjoyment of all other human rights,” is gravely at risk around the world due

³ Comm. on Econ., Soc. & Cultural Rights, Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights, para. 1, UN Doc. E/C.12/2020/1 (Apr. 17, 2020) [hereinafter CESCR].

⁴ Johns Hopkins University Coronavirus Resource Center, *COVID-19 Case Tracker*, at <https://coronavirus.jhu.edu> (as of September 18, 2020).

⁵ See, e.g., Cecile Mantovani, *Over 90,000 Health Workers Infected with COVID-19 Worldwide: Nurses Group*, REUTERS (May 6, 2020), at <https://www.reuters.com/article/us-health-coronavirus-nurses/over-90000-health-workers-infected-with-covid-19-worldwide-nurses-group-idUSKBN2211XH>; Stephanie Nebehay, *One in 7 Reported COVID-19 Infections Is Among Health Workers, WHO Says*, REUTERS (Sept. 17, 2020), at https://www.reuters.com/article/us-health-coronavirus-who-healthworkers/one-in-7-reported-covid-19-infections-is-among-health-workers-who-says-idUSKBN2681TR?campaign_id=154&emc=edit_cb_20200917&il=0&instance_id=22292&nl=coronavirus-briefing®i_id=126020829&segment_id=38416&te=1&user_id=7dd3592cc2df37863a4669b8ce53d28c.

to the pandemic.⁶ While most emphasis is placed in human rights law and practice on prohibiting “arbitrary deprivations of life” by human acts or omissions, the HRC also noted that “[t]he duty to protect life . . . implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life”⁷ Those include: “the prevalence of life-threatening diseases.”⁸

In many contexts, marginalized groups who face structural inequalities, including indigenous peoples, minorities, older persons, and persons with disabilities, have been disproportionately represented among the dead, while at the same time the virus has also killed indiscriminately across all socioeconomic groups, ages, and identities.⁹ The terrible dialectical reality of both the universal reach and the discriminatory impacts needs to be addressed in a holistic human rights analysis.¹⁰ They are not counterpoints, but vital complements.

Human rights discourse must center all these enormous global losses. It must be haunted by the big question they pose to us collectively, especially in this season of haphazard reopening and peaking cases: what will we do globally and nationally to prevent additional losses? To borrow the words from a documentary about armed conflict: “The dead are not sleeping. They are watching us lest we should sleep.”¹¹ The urgency haunting that view must infuse the field of human rights.

B. The Right to the Highest Attainable Standard of Health

The lives of the millions battling the virus have also been affected by varying degrees of ill health.¹² The stress and stigma that accompany the virus have also exacerbated its mental health effects.¹³ Moreover, there have been numerous secondary effects on physical health, including suspension of vaccination campaigns and impacts on maternal health.¹⁴

It is well established in international human rights law that everyone has the right to the highest attainable standard of health, both physical and mental. Significantly, this includes an obligation on states to take the steps necessary for “[t]he prevention, treatment and control of epidemic . . . diseases.”¹⁵ The CESCR underscores that, as with the right to life, “health is a fundamental human right indispensable for the exercise of other human rights.”¹⁶

⁶ UN Human Rights Comm., General Comment No. 36, para. 2, UN Doc. CCPR/C/GC/36 (Sept. 3, 2019).

⁷ *Id.*, para. 26.

⁸ *Id.*

⁹ See, e.g., The COVID Tracking Project, *The COVID-19 Racial Data Tracker*, at <https://covidtracking.com/race>.

¹⁰ For critique of overly group-based analyses of climate change, see Report of the Special Rapporteur on Extreme Poverty and Human Rights, paras. 19, 24, UN Doc. A/HRC/41/39 (July 17, 2019).

¹¹ UNDER THE RUBBLE, *supra* note 1.

¹² Matthew Zirui, Chek Meng Poh, Laurent Rénia, Paul A. MacAry & Lisa F. P. Ng, *The Trinity of COVID-19: Immunity, Inflammation and Intervention*, 20 NAT. REV. IMMUNOLOGY 363 (Apr. 28, 2020), available at <https://pubmed.ncbi.nlm.nih.gov/32346093>.

¹³ See, e.g., Betty Pfefferbaum & Carol S. North, *Mental Health and the COVID-19 Pandemic*, NEW ENG. J. MED. (Apr. 13, 2020), at <https://www.nejm.org/doi/full/10.1056/NEJMp2008017>.

¹⁴ See Doctors Without Borders, *Keeping Essential Medical Services Running During the COVID-19 Pandemic* (May 22, 2020), at <https://www.doctorswithoutborders.org/what-we-do/news-stories/story/keeping-essential-medical-services-running-during-covid-19-pandemic>.

¹⁵ International Covenant on Economic, Social and Cultural Rights, Art. 12(2)(c), Dec. 16, 1966, 993 UNTS 3 [hereinafter ICESCR].

¹⁶ CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para. 1, UN Doc. E/C.12/2000/4 (Aug. 11, 2000).

Equality is a core component of the right to health which must be enjoyed by everyone “without discrimination of any kind.”¹⁷ Moreover, other aspects of human rights are “pre-requisites” for the right to health, such as “rights to science.”¹⁸ The CESCR reminded states in 2020 that they “have a duty to make available and accessible to all persons, without discrimination, especially to the most vulnerable, all the best available applications of scientific progress necessary to enjoy the highest attainable standard of health.”¹⁹ This clearly applies to treatments and vaccines for COVID-19.

C. Additional Rights Affected by the Pandemic

In addition to impacts on rights to life and health, the pandemic has also made it too dangerous in many circumstances to enjoy a range of other rights, such as: freedoms of movement and assembly, which are vital to human social existence; the right to work, which is essential for subsistence; and rights to take part in public cultural life and access public spaces which are constitutive of human society and vital for wellbeing. Government responses, addressed below, have increased these impacts, but the virus itself is the underlying cause.²⁰

III. THE IMPACT OF STATE RESPONSES TO COVID-19 ON HUMAN RIGHTS

The responses by states to COVID-19—some necessary and legitimate, and others unlawful—have compounded the negative impacts. Like the pandemic itself, they have threatened nearly every right across the spectrum of the Universal Declaration of Human Rights.²¹ As noted, some of these measures are legitimately required by the pandemic. However, they may still have had grave effects on human rights that must be addressed. Furthermore, there clearly have been numerous illegitimate responses not conducive to protection of public health and having deleterious impacts on human rights, sometimes intentionally so. This is deeply troubling and has received the lion’s share of attention from some human rights actors, in particular those working on civil and political rights.

In particular country situations, the handling of pandemic measures worsened their effects, such as in India where almost no warning was given before the lockdown, stranding millions of migrants.²² The lack of orchestrated mitigation efforts was so dire that local rights

¹⁷ ICESCR, *supra* note 15, Art. 2(2).

¹⁸ Report of the Special Rapporteur in the Field of Cultural Rights, UN Doc. A/HRC/20/26 (May 14, 2012).

¹⁹ CESCR, General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/25, at para. 70 (Apr. 30, 2020) [hereinafter CESCR General Comment No. 25].

²⁰ See ASEAN Intergovernmental Commission on Human Rights (AICHR), Press Release on Coronavirus Disease 2019 (COVID-19) (May 1, 2020), at <https://aichr.org/news/press-release-on-coronavirus-disease-2019-covid-19-by-the-asean-intergovernmental-commission-on-human-rights-aichr>; and Inter-American Commission on Human Rights, *Pandemic and Human Rights in the Americas* (Apr. 10, 2020), available at <http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>.

²¹ See *e.g.*, Security Council, Senior Officials Sound Alarm Over Food Insecurity, Warning of Potentially “Biblical” Famine, in Briefings to Security Council, UN Press Release SC/14164 (Apr. 21, 2020).

²² Joanna Slater & Niha Masih, *In India, the World’s Biggest Lockdown Has Forced Migrants to Walk Hundreds of Miles Home*, WASH. POST (Mar. 27, 2020), at https://www.washingtonpost.com/world/asia_pacific/india-coronavirus-lockdown-migrant-workers/2020/03/27/a62df166-6f7d-11ea-a156-0048b62cdb51_story.html.

campaigners warned of famine.²³ In numerous contexts, such as South Sudan,²⁴ governments used the pandemic as an excuse to harass political opponents. Or to encroach upon categories of rights long targeted, such as Polish government action against sexual and reproductive rights.²⁵

However, the overall picture is complicated. Human rights law recognizes that state inaction can be as dangerous to human rights as wrongful action. It must not be forgotten that there have been many states, including both stable democracies and those grappling with various levels of authoritarianism, that have instead or also failed to take adequate national measures, such as Brazil, Russia, Sweden, and the United States. Hence, human rights bodies and mechanisms must reinforce their role not only as curbing actively abusive behavior by states, but also as spurring negligent states to act appropriately.

When human rights experts analyze the negative consequences of state conduct, they must also remember the totality of human rights law, which does allow limitations of some rights in some circumstances,²⁶ and derogations in emergencies, in accordance with international law. There are also vital prohibitions that disallow using one's own rights as a sword "aimed at the destruction of any of the rights and freedoms" of others.²⁷ These provisions represent a core part of the norms. They are often conveniently forgotten by human rights advocates (while simultaneously too commonly invoked by states in ways that violate international law). Limitations on certain rights, such as the freedoms of assembly and of movement, to protect public health can be entirely legitimate and are built into the international norms guaranteeing those rights. The HRC issued guidance recognizing that in response to COVID-19 states may need to derogate from or limit some obligations, but must do so in accordance with relevant international legal rules, including necessity, proportionality, and nondiscrimination.²⁸

Indeed, governments at many levels, including in democracies such as Germany and South Korea, have saved millions of lives during the pandemic in part by effectively limiting exercise of certain rights in accordance with international law.²⁹ Ordinary people widely complied with these provisions, often at great cost, recognizing that limits were essential to safeguard their own rights and those of others in the "human family."³⁰ Those seeking to impose certain limits lawfully, such as by mandating masks in public, were sometimes actually acting as human rights defenders in doing so.

²³ Murali Krishnan, *Coronavirus: India's Lockdown Turning into Humanitarian Crisis*, DW (May 9, 2020), at <https://www.dw.com/en/coronavirus-indias-lockdown-turning-into-humanitarian-crisis/a-53377588>.

²⁴ Office of the UN High Commissioner for Human Rights (OHCHR) Press Release, Working Together to Better Protect South Sudan's Vulnerable During COVID-19 (June 23, 2020), at <https://www.ohchr.org/EN/NewsEvents/Pages/Voices-from-the-Field-South-Sudan.aspx>.

²⁵ OHCHR Press Release, Poland Urged Not to Criminalise Sex Education or Tighten Access to Abortion (Apr. 16, 2020), at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25796&LangID=E>.

²⁶ See, e.g., ICESCR, *supra* note 15, Art. 4; International Covenant on Civil and Political Rights, Arts. 18–19, 21–22, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

²⁷ ICCPR, *supra* note 26, Art. 5; GA Res. 217 (III) A, Universal Declaration of Human Rights, Art. 30 (Dec. 10, 1948) [hereinafter UDHR].

²⁸ Human Rights Comm., Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, UN Doc. CCPR/C/128/2 (Apr. 24, 2020).

²⁹ *Ambassador Samantha Power: Rethinking Global Governance*, BBC (June 23, 2020), at <https://www.bbc.com/uk/sounds/play/p08hp2mj>.

³⁰ *Id.*

While it is reprehensible when states misuse public health claims as a justification for violating human rights, we must also entirely reject misuse of rights claims to subvert necessary and legitimate public health measures in ways that gravely undermine the rights of others. Examples include attempts to coopt rights language to justify holding large religious and cultural gatherings around the world which became super-spreader events,³¹ or refusal to wear masks in public.³² Rights language has been invoked by persons seeking to do such things and this should give us pause.³³

However controversial, the duties to others that go along with human rights³⁴ are important to signal during a pandemic. (Of course, this must be done while exercising caution regarding government manipulation of this construct.) Never has the fraught relationship between individual and collective rights been more important to address; choices made by some can so directly affect many others. Thus, it is essential that rights voices make clear that human rights generally should be exercised in a way that protects the right to life and health of all now.

An additional issue to consider consists of how histories of bad human rights policies made COVID-19 even more deadly. Austerity measures weakened health care systems.³⁵ Deficiencies in implementation of the right to adequate housing meant that millions could not stay home.³⁶ Failure to enforce norms prohibiting violence against women condemned thousands to quarantine with their abusers.³⁷ All this underscores the ongoing relevance of implementing the entire human rights framework as part of pandemic response and recovery.

IV. RESPONSES BY HUMAN RIGHTS ACTORS

Many positive human rights initiatives have been taken,³⁸ only a selection can be surveyed here. Perhaps most importantly in the UN system, UN Secretary-General António Guterres released a policy paper, “COVID-19 and Human Rights: We Are All in this Together,”³⁹ in

³¹ See Jon Emont & Saeed Shah, *Coronavirus Is Spreading at Religious Gatherings, Ricocheting Across Nations*, WALL ST. J. (Mar. 18, 2020), at <https://www.wsj.com/articles/coronavirus-is-spreading-at-religious-gatherings-ricocheting-across-nations-11584548174>.

³² Ritu Prasad, *Coronavirus: Why Is There a US Backlash to Masks?*, BBC (May 5, 2020), at <https://www.bbc.com/news/world-us-canada-52540015>.

³³ U.S. Vice-President Pence offered a rights-based justification of COVID-era campaign rallies. Kevin Breuninger, *Coronavirus: Pence Defends Trump Campaign Rallies Despite Surge in Coronavirus Cases: “We Have an Election Coming Up this Fall,”* CNBC (June 26, 2020), at <https://www.cnbc.com/2020/06/26/coronavirus-pence-defends-trump-campaign-rallies-despite-surge-in-cases.html>.

³⁴ UDHR, *supra* note 27, Art. 29.

³⁵ CESCR, *supra* note 3, para. 4.

³⁶ Special Rapporteur on the Right to Adequate Housing, COVID-19 Guidance Note (Apr. 23, 2020), available at https://www.ohchr.org/Documents/Issues/Housing/SR_housing_COVID-19_Guidance_informal_settlements.pdf.

³⁷ UN Secretary-General, Policy Brief: The Impact of COVID-19 on Women (Apr. 9, 2020), available at https://www.un.org/sites/un2.un.org/files/policy_brief_on_covid_impact_on_women_9_apr_2020_updated.pdf.

³⁸ See, e.g., International Justice Resource Center, *COVID-19 Guidance from Supranational Human Rights Bodies*, at <https://ijrcenter.org/covid-19-guidance-from-supranational-human-rights-bodies>. See generally Center for Economic and Social Rights, at <https://www.cesr.org>.

³⁹ See UN Secretary-General, COVID-19 and Human Rights: We Are All in this Together (Apr. 2020), available at https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf [hereinafter UN Sec-Gen Policy Brief].

which he called for human rights to guide approaches to the pandemic. In presenting this report, he argued that “[a] human rights lens puts everyone in the picture and ensures that no one is left behind.”⁴⁰ The secretary-general set out three aims: “to strengthen the effectiveness of the response to the immediate global health threat; mitigate the broader impact of the crisis on people’s lives; and avoid creating new or exacerbating existing problems.”⁴¹ He called for effective rights-respecting action to respond to COVID-19 and also to deal with the economic and social impacts of measures taken.⁴²

The coordinating committee of special procedures of the UN Human Rights Council briefed the Council remotely.⁴³ The Special Procedures likewise called on states to center human rights and stressed that principles of nondiscrimination, participation, and accountability needed to be applied to all health-related policies. The experts expressed concern about inequality in distribution of Personal Protective Equipment (PPE) within and between states. However, they largely focused on limits on state power rather than on the needed responses by states.⁴⁴

The Council of Europe’s policy guidance likewise centers the issue of limiting state power (e.g., rules on derogation and limits on emergency powers), rather than on the totality of the threats posed by COVID-19 or relevant state obligations.⁴⁵ This represents a negative vision of what human rights mean in this context that, while a critical component, only emphasizes respecting rights but not fulfilling or ensuring them.

One of the best responses was the statement issued by the African Commission on Human and Peoples’ Rights which balances all of these aspects. It begins with an assessment of risks posed by the virus to human rights, both for the entire continent and also disproportionately for “vulnerable sections of society.”⁴⁶ It stresses “the imperative of putting in place a well thought out public health emergency plan, [and] . . . introducing measures for preventing . . . the spread of the virus . . .”⁴⁷ It then sets out rules which must be respected by states, including the principles of legality and equality, but also requires states to take measures to

⁴⁰ *Id.* at 2; see also UN Press Release, *We Are all in this Together: Human Rights and COVID-19 Response and Recovery* (Apr. 23, 2020), at <https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and>.

⁴¹ *Id.* at 3.

⁴² *Id.* at 3 (“Nothing in this paper seeks to tie the hands of States in shaping an effective response to the pandemic.”).

⁴³ See OHCHR Press Release, *Human Rights Council Talks COVID-19 with Independent Experts* (Apr. 30, 2020), at <https://www.ohchr.org/EN/NewsEvents/Pages/HRCTalksCOVID19WithIndependentExperts.aspx>. See generally OHCHR, *UN Special Procedures and COVID-19 Working Document Covering Information as of 28 April 2020*, available at https://www.ohchr.org/Documents/HRBodies/SP/COVID19_and_SP_28_April_2020.pdf.

⁴⁴ See OHCHR, *COVID-19 and Special Procedures*, at <https://www.ohchr.org/EN/HRBodies/SP/Pages/COVID-19-and-Special-Procedures.aspx>; UN Geneva Press Release, *Human Rights Council Discusses Human Rights Implications of the COVID-19 Crisis with its Special Procedures Mandate Holders*, at <https://www.ungeneva.org/en/news-media/press/taxonomy/term/175/58989/human-rights-council-discusses-human-rights-implications>.

⁴⁵ See Council of Europe, *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis* (Apr. 7, 2020), at <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>.

⁴⁶ See African Comm’n on Human & People’s Rights Press Release, *Press Statement on Human Rights Based Effective Response to the Novel COVID-19 Virus in Africa*, at <https://www.achpr.org/pressrelease/detail?id=483>.

⁴⁷ *Id.*

deal with noncompliance with public health measures. Finally, it surveys the role of nonstate actors, emphasizing that:

Various sectors of society from individuals to political leaders, private sector and other social actors, community leaders, media, public opinion leaders and religious institutions bear special responsibilities . . . for implementation of the prevention and containment measures. Individuals have a duty in accordance with Article 27(1) of the African Charter to comply with the prevention and containment measures not only to safeguard their health but also to ensure that they do not become the medium for infecting others . . .⁴⁸

V. TOWARD A HOLISTIC HUMAN RIGHTS APPROACH

In constructing holistic human rights responses going forward, we must remember that what is particular about the COVID-19 pandemic is the totality of the potential threat to most human rights around the world in a relatively compressed timeframe.⁴⁹ In this “new normal,” maintaining international human rights law as a meaningful foundation of the global legal order springing from the UN Charter (let alone making the already needed enhancements in its role) requires a human rights analysis as multifaceted as the impacts of the virus itself.

COVID-19 “vividly illustrates the importance of the indivisibility and interdependence of all human rights.”⁵⁰ A pandemic requires nothing less than a pan-normative approach. This means actually taking into consideration the range of rights: civil, cultural, economic, political, and social, while also recognizing what the HRC has termed the centrality of the right to life. It will also be essential to take as seriously the issue of accountability for willful violations of economic, social, and cultural rights, as of civil and political rights, during the pandemic.⁵¹

Indeed, the connections between all categories of rights are critical to consider in this crisis. COVID-19 reminds us that the bifurcation of the covenants on civil and political rights and on economic, social, and cultural rights, was a political and legal choice, not a reflection of the lived reality of the exercise of rights. Amartya Sen’s assertion of the vital role of political rights and freedom of expression in preventing famines⁵² echoes in recent scientific findings that if Chinese authorities had listened to whistleblowers like Dr. Li Wenliang,⁵³ rather than interrogating them, and had taken necessary public health measures early on, 95 percent of coronavirus cases might have been avoided.⁵⁴ The right to life is dependent on the enjoyment of

⁴⁸ *Id.*

⁴⁹ Other phenomena, such as climate change, may cause widespread damage, yet the timeframe is longer. In fact, the persistence of climate change during the pandemic means the discipline of human rights must respond to compound disasters.

⁵⁰ CESCR, *supra* note 3, para. 3.

⁵¹ LAWRENCE O. GOSTIN, *GLOBAL HEALTH LAW* 257–69 (2014).

⁵² Amartya Sen, *Press Freedom: What Is It Good for?*, 42 *INDEX ON CENSORSHIP* 6, 9 (2013).

⁵³ Emma Graham-Harrison, Tom Phillips & Justin McCurry, *Doctor Who Blew Whistle Over Coronavirus Has Died, Hospital Says*, *GUARDIAN* (Feb. 6, 2020), at <https://www.theguardian.com/world/2020/feb/06/whistle-blower-chinese-doctor-dies-from-coronavirus>.

⁵⁴ Shengjie Lai, et al., *Effect of Non-pharmaceutical Intervention for Containing the COVID-19 Outbreak in China*, *NATURE* 2 (2020).

many other rights. States cannot argue that implementation of other civil and political rights in accordance with international law is an impediment to protecting this core right.

With regard to economic, social, and cultural rights, we must recall the integrated vision of the Indian Supreme Court in the *Olga Tellis* case that the right to life is meaningless without the right to a livelihood because “no person can live without the means of living . . . Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.”⁵⁵ Hence, negative impacts on economic and social rights due to measures legitimately taken to protect the right to life from the coronavirus must also be appropriately mitigated to truly respect the right to life itself.

Nor can cultural rights be forgotten. Rights guaranteed by Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), including artistic freedom and rights to science are a vital part of the response. As writer Stephen King tweeted: “If you think artists are useless, try to spend your quarantine without music, books, poems, movies and paintings.”⁵⁶ Moreover, as the CESCR indicated in its new General Comment on aspects of Article 15, “The right to participate in and to enjoy the benefits of scientific progress and its applications is . . . instrumental in realizing the right to health.”⁵⁷

It is telling that on the website of the Office of the High Commissioner for Human Rights, the COVID-19 guidance on emergency measures is twice as long as that on access to health care.⁵⁸ Indeed, an entire document was prepared just to provide guidance about emergency measures. Rather than discussing the affirmative need of states to take such measures to protect life and health where governments were failing to do so, it primarily emphasizes what states cannot do.⁵⁹

True, human rights norms are designed in part to police state action. However, they also relate to the responsibilities of nonstate actors, from international financial institutions developing global economic responses to transnational corporations manufacturing PPE. This should be fully reflected in human rights analysis. Sometimes it is precisely robust state action to counter nonstate actors that needs to be unleashed to ensure, protect and maximize rights for all. As the UN secretary-general noted, governments have to take extraordinary measures to preserve human life now.⁶⁰

The secretary-general of the Council of Europe correctly explained that, “The major social, political and legal challenge facing . . . member states will be their ability to respond to this crisis effectively, whilst ensuring that the measures they take do not undermine . . . human rights, democracy and the rule of law . . .”⁶¹ However, the document containing this assertion itself failed to reflect this balance.

⁵⁵ *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545 (India).

⁵⁶ Stephen King (@StephenKing), TWITTER (Apr. 3, 2020), at <https://twitter.com/StephenKing/status/1246098663174266882?s=20>.

⁵⁷ CESCR General Comment No. 25, *supra* note 19, para 67.

⁵⁸ See OHCHR Press Release, COVID-19 Guidance, at <https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx>.

⁵⁹ *Id.* Further information regarding application of the right to health is available in CESCR statement, *supra* note 3.

⁶⁰ See UN Sec-Gen Policy Brief, *supra* note 39, at 2.

⁶¹ Council of Europe, *Coronavirus: Guidance to Governments on Respecting Human Rights, Democracy and the Rule of Law* (Apr. 8, 2020), at <https://www.coe.int/en/web/portal/-/coronavirus-guidance-to-governments-on-respecting-human-rights-democracy-and-the-rule-of-law>.

While human rights law offers important procedural rules that must be followed now, such as those on derogations and limitations, human rights as a broader discipline is not solely procedural, nor is it only legal. It is also substantive and interdisciplinary, and its core principles are as important to project now as its technicalities. One of these inadequately discussed values is solidarity which runs through many human rights instruments, and is critical to pandemic responses.⁶² This is a moment to emphasize provisions such as ICESCR Article 15(4), which recognizes the importance of transnational cooperation in achieving rights, such as the right to benefit from scientific progress.⁶³

In 2020, we need a thick human rights analysis. Many Western human rights responses have focused solely on the pandemic as an opportunity for state political repression,⁶⁴ which is a core aspect of the reality especially in certain countries, but only one component. One leading human rights academic and UN expert warned ominously: “A life in which your physical health is guaranteed but every other right has been taken away—that would be meaningless.”⁶⁵ Another described COVID-19 as a “pathogen of repression.”⁶⁶ Of course, on the flip side, enjoying rights to freedom of expression or assembly, and then dying or unwittingly giving someone else a fatal illness, is equally meaningless. We need to think simultaneously about respecting, protecting, ensuring, and fulfilling human rights, and to be cautious when generalizing given the divergent experience of different populations. States must be constrained to respect international law through, for example, condemnation of misusing public health claims to justify a raid on an LGBT shelter as recently occurred in Uganda.⁶⁷ But, states must also be empowered to take positive action to guarantee human rights—to act in accordance with science to protect life and health, to guarantee provision of PPE, and to take effective steps to defeat the virus. What is also clear is that the difficulty of achieving all this has been exacerbated by the lack of leadership committed to protecting rights in many countries.⁶⁸ This is especially harmful now in a complex global emergency that requires states to respond in a strategic and agile manner, and to have the trust of populations.

VI. CONCLUSION

There have been some, but not yet enough, positive human rights responses to this deadly season. These need to be mainstreamed and magnified. A fuller account of human rights can

⁶² See Allyn L. Taylor & Roojin Habibi, *The Collapse of Global Cooperation Under the WHO International Health Regulations at the Outset of COVID-19: Sculpting the Future of Global Health Governance*, 24 ASIL INSIGHTS 15 (June 5, 2020), at <https://www.asil.org/insights/volume/24/issue/15/collapse-global-cooperation-under-who-international-health-regulations>.

⁶³ ICESCR, *supra* note 15, Art. 15(4).

⁶⁴ See, e.g., Gabrielle Bruney, *My Concern Is that Authoritarians May Use COVID-19 as a Cover*, ESQUIRE (June 15, 2020), at <https://www.esquire.com/news-politics/a32474899/fionnuala-ni-aolain-interview-coronavirus-covid-19-lessons>.

⁶⁵ *Id.*

⁶⁶ Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, para. 4, UN Doc. A/HRC/44/49 (Apr. 23, 2020). This report makes important points, including about provision of reliable public health information to the public.

⁶⁷ See, e.g., Alice McCool, *Court Orders Release of Jailed LGBT+ Ugandans After Coronavirus Charges Dropped*, REUTERS (May 18, 2020), at <https://www.reuters.com/article/us-health-coronavirus-uganda-lgbt/court-orders-release-of-jailed-lgbt-ugandans-after-coronavirus-charges-dropped-idUSKBN22U2DO>.

⁶⁸ Chetan Bhatt, Keynote Address, Fédération Internationale des Droits de l’Homme (June 23, 2020) (text on file with the author).

offer a roadmap for effective response to COVID-19, and thus help mobilize all relevant actors, ensuring they do not “sleep” in the face of widespread suffering. Only such a vision of human rights can enable the global order to achieve the essential goal of building humanity’s resilience in this pandemic, and beyond.