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„COVID-19 and Human Rights - Public Conduct v. State Governance during a Global Health Crisis”

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Table of Abbreviations

ACHR	American Convention on Human Rights
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
Covid-19	SARS-Cov-2
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HK	Hong Kong
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
PPE	Personal Protective Equipment
SARS	Severe acute respiratory syndrome
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
USA	United States of America
WHO	World Health Organization

1. Introduction

Ever since the beginning of the global SARS-Cov-2 (Covid-19) pandemic in December 2019, the world as one knew it changed unimaginably. These changes not only affected domestic legal systems around the world, but also the international relations of the states. The impact of the Covid-19 pandemic made it clear how far globalisation had progressed and to what extent the world was already interconnected.

As the virus began to spread across the world in the first quarter of 2020, states and governments were forced to decide which actions to take to ensure the safety of the people and the structural and economic stability of the state. The phrase '*desperate times call for desperate measures*' gained more impact, as many governments were forced to implement strict precautionary regulations e.g., lockdowns. These included the closure of the service and gastronomy sector, the hospitality and cultural industry and educational institutions, such as schools and universities. Additionally, the freedom of movement was restricted to the most basic reasons for leaving the house, such as grocery shopping or going to work.

However, all these restrictions which were meant to keep the spread of Covid-19 at a low, were met with suspicion by the general public in Western societies. These doubts were strengthened when a handful of states, e.g., Sweden or USA, opted for very few restrictions in the lives of the public. Instead, their approach was to leave the development, i.e., containment of the coronavirus in the responsibility of the public.

Over the course of the year, these two contrasting approaches have led to the question whether governments are actually allowed to restrict its people in their most fundamental human rights for the protection of the public health or not. This reservation stems from the omnipresent idea within Western culture that the freedom of an individual is inviolable, and therefore should not be restricted. Keeping this firmly established point of view in mind, this brings up the follow-up question whether the different levels of restrictions undertaken by states might actually represent an international human rights crisis.

Or could these restriction measures just be the states' compliance towards their duty to govern and protect their people's right to health and the right to life during a global pandemic?

This seminar paper intends to challenge the idea that the restrictions placed upon the public represent a human rights violation and therefore an international human rights crisis. Instead, it argues that the enforced emergency measures were a necessary and unavoidable instrument to ensure the whole safety of the public. Whilst there are a countless number of human rights that had to be restricted, the focus of this analysis will lie mainly on the **right to life** and the **right to health**, whilst occasionally taking the **freedom of movement** into account.

In addition, this seminar paper will analyse the responsibility that lies in the public to contribute to the improvement of this global health crisis by following state regulations and its conduct, before drawing a short comparison between the attitudes in Western and Asian cultures regarding the pandemic. Following that, this paper introduces several suggestions on how the right to health could develop in the future and how general observance of human rights could be guaranteed. Finally, it will offer a personal conclusion with an answer to whether human right restrictions were an international human rights crisis or not.

2. Human Rights

*'Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death.'*¹: this is considered to be the simplest definition of what human rights are. They are universal, which means that every human being is equally entitled to them and to their implementation. Ideally, it was thought that no person, regardless of age, race, cultural background, gender, sexual orientation or religious affiliation, should ever be excluded from their entitlement to human rights. This derives from the crimes against humanity committed against minorities e.g., Jews, Sinti and Roma during the Second World War. Adding to that, they are also inalienable which means that they can neither be taken away from the individual, nor can their possessor give them away, thus meaning that they are inherent to the person. Nevertheless, they can be restricted if it is beneficial to matters concerning national security, which is the case in regard to the current coronavirus pandemic. Beyond that, they are *'interdependent, interrelated and indivisible'*², which signifies that no set of rights can fully function without the fulfilment of the others. If one set of human rights fails, then the enjoyment of the others will subsequently be hindered.

Examples for human rights include the right to life, the right to a fair trial, freedom from torture, and the right to health. These specific rights are considered to be fundamental human rights. Another term to describe such rights would be 'existential'. However, even though some are considered to be fundamental, in actuality all human rights are seen as equally valuable.

Divided into three different categories also known as the 'three generations', human rights are separated into first, civil-political rights, second, economic, social and cultural rights and third, collective-developmental rights. Whilst the first and second generation of human rights have

¹ Equality and Human Rights Commission, *'What are Human Rights?'* (Equalityhumanrights.com, 19 July 2019) <<https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights>> accessed 3 January 2021.

² UN Human Rights Council, *'Final report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'* (2020) UN-Doc A/75/163, §17.

been recognized as such in their respective covenants of 1966, the third generations is to this date lacking in such.

2.1 Right to Health

Among the plethora of human rights, there is the right to health. Combined with the right to life, these two represent the most existential human rights, and therefore the worthiest of protection during the current global pandemic.

The World Health Organization (WHO) describes the right to health in its preamble as *'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.'*³ Following this, the preamble declares the right to *'the enjoyment of the highest attainable standard of health'*⁴ a fundamental human right which is inherent to every human being. Shortly after, the Universal Declaration of Human Rights (UDHR) was released. According to art. 25 (1) UDHR *'everyone has the right to a standard of living adequate for the health and well-being of himself [...], including food, clothing, housing and medical care and necessary social services, [...].'*⁵

Taking the social conditions after the Second World War into consideration, it is comprehensible as to why the lawmakers decided to introduce a welfare-inspired approach in regard to the right to health. From this first glimpse into international treaty law, one can already deduce two conclusions:

- International lawmakers gave the individual governments the responsibility to take care of their own population's overall well-being and
- the right to health does not demand the state for the good health of every individual, but rather the enabling of proper enjoyment of the highest attainable standard of health a state can offer. This is because ultimately, the level of health cannot be controlled and guaranteed by a state, as physical and mental health depend on many internal and external factors e.g., genetic predispositions or the individual type of lifestyle including the nutritional diet, potential substance abuse, stress factors or unexpected accidents.

Nonetheless, *'[g]overnments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures'*⁶, says the Convention of the WHO. Here, the state is being called to act in terms of the health of the people. Still, the

³ Constitution of the World Health Organization, 22 July 1946, 14 UNTS 185, Preamble.

⁴ Ibid.

⁵ UNGA Res 217 A (III), *'Universal Declaration of Human Rights'* (10 December 1948) UN-Doc. A/RES/217 (III), Art. 25 (1).

⁶ (n 3).

right to health encompasses more facets a state needs to comply to when talking about a ‘healthy life’. For starters, the right to life, the right to food, clean and potable water and the right to decent housing are the foundation of the ‘right to health’.⁷

As explained by the General Comment No. 14 in regard to the right to health (art. 12 ICESCR), it also requires *inter alia* the right to work or to a good environment, the ‘strict implementation of equality, non-discrimination and human dignity.’⁸ Only when the standard of these basic principles is met, can medical infrastructures e.g., hospitals, medical treatments and medicine be used appropriately to serve the public adequately. Regarding the equal and non-discriminatory distribution of medical care, special attention needs to be paid to specific groups such as ‘*women, children and adolescents, persons with disabilities, migrants and persons living with HIV/AIDS*’.⁹ These groups are considered to be particularly dependent on state assistance and protection, as they are vulnerable due to socio-economic disparities, discrimination and inequality. This is where the social welfare aspect of the right to health comes to light. Ideally, the state should then also try to provide a full functioning healthcare system build up upon the aforementioned principles to further ensure the possibility of good health. All in all, the focus lies on state actions to warrant the best quality of life attainable for every individual.

Looking at this depiction, one could also compare the right to health to a ‘brick house’. A strong foundation is necessary to guarantee the stability of the house, but the bricks on top of such foundation need to be properly built-in as well. If one or several bricks for that matter are fitting loosely or missing, then such stability automatically decreases. Therefore, each and every component needs to be intact and well connected to one another, for they are essential to the proper existence of the house.

This fundamental human right is of great importance, because it interconnects a variety of existential socio-economic rights and ethical aspects to create a ‘mega’ composite human right. So, when a state complies with the obligations deriving from the right to health, a minimum standard of good health, together with a life honouring human dignity and equality should be expected. Taking all of this into account, it explains why the sole term ‘right to health’ is rather misleading, as it tends to only highlight one small aspect of the entire spectrum within it. It is because of this reasoning that the United Nations (UN) and other human right treaties prefer to

⁷ OHCHR and WHO, ‘*The Right to Health: Fact Sheet No. 31*’, (GE.08-41061, 2008) p. 3.

⁸ CESCR, ‘*General Comment No. 14: Right to the Highest Attainable Standard of Health (Art. 12)*’ (2000) UN Doc E/C.12/2000/4; §3.

⁹ OHCHR and WHO (n 7) p. 12.

describe it as '*the right to the highest attainable standard of physical and mental health*'.¹⁰ With so many slight variations in the written definition of the right, one of the most prominent ones is article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It dictates that '*state parties to the [...] Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*'.¹¹ Yet the article's appeal stems from the following paragraph 2, in which it enumerates a few specific obligations that the state has to meet such as '*(a) providing for the reduction of the still birth rate and infant mortality or (b) improving all aspects of environmental and industrial hygiene*'.¹²

However, for this paper, the focus lies on section (c) of paragraph 2, as it demands '*the prevention, treatment and control of epidemic, endemic, occupational and other diseases*'¹³ of the state. With the constant rise of the coronavirus cases, it is vital that states keep their obligations. They must take action to prevent or do their best to control and contain the spread of this infectious disease within their own territory. By doing so, states comply with their commitment to the right to health, which currently is more important than ever. The responsibility to act upon the right to health is subdivided into three different types: '*respect, protect and fulfil*'.¹⁴

'The obligation to **respect** demands states to honour the right to health of every individual, so as to not discriminate against them when they want to attain assistance from healthcare services. Within the obligation to **protect**, states must do the utmost possible to protect the fulfilment of the right to health from interfering third parties e.g., privatised healthcare, which may not act according to human right standards. To counteract this, the obligation to **fulfil** asks states to acknowledge the right to health and its value by implementing a series of domestic legislation which should ultimately lead to its fulfilment.'¹⁵ Within these general framework conditions regarding the obligation to ensure the best health possible, there exists a '*core minimum obligation*'¹⁶ which needs to be met by every state. Regardless of whether it finds itself in a good or bad financial position, states are committed to, at the very least, fulfil the demanded minimum of requirements. These minimum levels have been decided by the Committee on

¹⁰ OHCHR and WHO, (n 7) p. 5.

¹¹ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Art. 12 (1).

¹² Ibid, Art. 12 (2).

¹³ Ibid.

¹⁴ OHCHR and WHO, (n 7) p. 25.

¹⁵ CESCR, '*General Comment No. 14: Right to the Highest Attainable Standard of Health (Art. 12)*' (2000) UN-Doc E/C.12/2000/4; §33 - §36.

¹⁶ (n 14).

Economic, Social and Cultural Rights (CESCR) – a body of experts which monitor the implementation of the rights mandated under the ICESCR.

The state must guarantee the following basic rights to every single individual within their territory:

- ‘Every person needs to be able to access health facilities, goods and services at all times without the fear of being rejected for matters concerning discrimination or marginalization. In this respect, especially vulnerable groups, such as for example HIV/AIDS patients etc., need to be assisted with respect and human dignity. The distribution of the abovementioned health elements needs to be carried out in an equitable and righteous manner.
- Everyone must be able to access essential foods that are of good nutritional value and safe for consumption.
- Every individual must be able to find some form of shelter or housing which offers a minimum level of sanitation (including soap or disinfectant) and also an adequate source of safe and clean drinking water.
- There needs to be a provision of the most essential medications.’¹⁷

While this list represents the minimum standard of health which should be met at all times, many developing countries have struggled so far to meet the overall requirements for the right to health. The reason for this unsatisfactory development might be the gradual manner in which the right to health is being realised. Understandably, a good standard of health within a state cannot be accomplished within a short time span but needs diligent and careful co-operation between the state and the health sector. Although its progressive completion is meant as a form of accommodation for the states to carefully work on the highest standard of health, it ultimately resulted in several states slightly neglecting this responsibility. Therefore, it is even more crucial and existential that states take these ‘guidelines’ serious during a global pandemic. It is the states’ decisions and the subsequent actions to those decisions which carry the weight of protecting countless of lives from severe distress or death. As the Special Rapporteur on the right to health quotes in his final report concerning Covid-19, *‘the wealthy protect themselves; the suffering is done by the poor’*.¹⁸ This emphasises how the lack of equality in all spheres of life e.g., an ever-growing wage gap and daily discrimination, lead to a point where the poor depend on the conscientious governance of their heads of state. However, if a state does not

¹⁷ Ibid.

¹⁸ UN Human Rights Council, ‘*Final report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*’ (2020) UN-Doc A/75/163, §44 citing Alcabes, ‘*Beyond technical fixes for coronavirus*’.

govern with transparency and scientific facts, then the poor will suffer the consequences of this bad governance. Therefore, it is to be expected that states act during a national health crisis to protect its citizens, even if it requires limitations on other human rights.

In summary, the right to health is a very wide-ranging construct of interconnected and interrelated rights. Indifferent of which treaty or comment definition one looks at, they all include one central commonality: the state's obligation to ensure the highest possible standard of physical and mental health for the public at all times. Therefore, and for the sake of public health, state actions must revert to extraordinary measures when fighting against a border-crossing pandemic.

3. Exercising Government Responsibility in Times of Crisis

Over the course of the past year, the feeling of fatigue, exhaustion and despair concerning the pandemic has spread throughout the world. The constant reminder of keeping a certain social distance, wearing specific respiratory masks and disinfecting one's hands after touching foreign objects are just the tip of the iceberg of rules to keep in mind during this global crisis. With the vast quantity of emergency restrictions that were enforced and the different news coverages, the overall co-operative attitude of the public started to change.

Restrictions from meeting family or friends, going to work, attending educational institutions or leaving the house for shopping purposes only catalysed the growing negative sentiment towards the governments or specific politicians. Due to the multiple and long-lasting lockdowns, many states observed the worsening of public conduct lived out in form of several demonstrations.

However, states and organizations such the European Union (EU) developed large budgeting plans to not only finance several sectors of life i.e., short-time work, commerce and tourism, but also the entire health sector, such as the medical or Personal Protective Equipment (PPE). Based on this financial burden, the European Commission (EC) decided to help its member states by creating a one of a kind '**rescEU stockpile**', which intends to secure '*medical equipment such as ventilators and protective masks to help EU countries in the context of the COVID-19 pandemic.*'¹⁹ To be precise, the EC will take over 90% of the financing, whilst the

¹⁹ European Commission, '*Covid-19: Commission creates first ever rescEU stockpile of medical equipment*' (ec.europa.eu, 19 March 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_476> accessed 12 January 2021.

hosting state, which is instructed to produce the entire PPE, finances the remaining 10%. By creating such a stockpile, the EC and a hosting state can guarantee quality-controlled supplies and faster deliveries to the other member states in this battle against the coronavirus. And yet, more conspiracy theories challenging the reality and severity of this virus surfaced. These received increasing attention from individuals unhappy with the various restrictions their states imposed on them, such as limiting the freedom of movement. Though this right is generally considered an entitlement, the law clearly gives a list of exceptions to this '*liberty of movement*'²⁰ in cases of '*public safety, [...] for the protection of health [...] or the protection of the rights and freedoms of others.*'²¹ Considering the incomprehensible public harm, the coronavirus caused worldwide, it would be irresponsible governance to let the virus spread uncontrolled, just because some find the measures too restrictive. The main priority of the states lies in protecting the lives of their citizens. Although states also need to protect all other sorts of civil, political, economic, social and cultural human rights, ultimately, it all boils down to the fact that lives need to be saved. As explained in the initial Human Rights section of the paper, these rights are inherent to the human being from birth until death. Hence, the most fundamental task is to protect the lives and health of the people, for it is those rights on which the other human rights are reliant on. If their lives cannot be saved, then ultimately, the fulfilment of any other type of rights is of no use to the deceased.

Based on these reasons, states are entitled to use emergency powers in order to comply with their duty to protect the people from harm that may lead to death.

3.1 Use of Emergency Powers

As already mentioned, the responsibility to ensure the best possibilities to attain the highest standard of health for the public lies within the state. Now that the entire globe is fighting the unpredictable spread of this novel virus and its mutations, accompanied by high death tolls, the responsibility weighs even heavier on the shoulders of the government. Therefore, wise and careful governance is to be expected.

Human Rights such as the right to life and the right to health are defined by international customary law and international human rights treaties. The ratification of such international law treaties creates obligations for the states, to which they are bound to comply with domestically.

²⁰ Protocol No. 4 of the ECHR, 16 December 1963, ETS No. 046, Art. 2 §1

²¹ Ibid, §3

This also applies during times of a global pandemic. The violation of a human right automatically means a breach of contract, which is unacceptable in the international community. Apart from that, some of the international human rights e.g., right to life, right to a fair trial, the right to freedom etc., have been incorporated into the national constitutions of many states. Therefore, this would also represent a violation against each state's specially selected core principles included in their constitution.

In order to avoid any kind of domestic or international uproar in extraordinary cases where certain human rights need to be suspended for the good of the population, human rights treaty bodies have found a special solution of how to approach such exceptionalities, namely by the **derogation of human rights**. This kind of state action is legitimized by so called **emergency powers** or measures. As the name already suggests, their use is intended for emergency situations. The term **state of emergency** is '*a situation of national danger or disaster in which a government suspends normal constitutional procedures in order to regain control.*'²², serving the purpose to create order and stability. By partially suspending the usual legislation, rights and freedoms of the public may be secured. However, emergency powers have a set of conditions that need to be observed at all times. Apart from requiring a national danger or disaster, such measures need to be of a temporary nature. Ideally, they should not become part of the actual legislation, but be deposed after the emergency has been put under control. Additionally, they need to be tailored to the level of severity, meaning they have to be flexible and proportionate to the crisis and be in constant development.²³ While this level of power would be alarming on national level, as it could allow for potential abuse of power of a single person (as it has been the case with Hungary's prime minister²⁴), there are special limitations to these powers on international level.

Within the various human rights treaties, derogation articles have been included which clearly describe when and how such articles may be used and by what point states need to return to normality. It is a very carefully monitored system which aims to help states find their way back to the compliance of human rights after the crisis has been averted. When thinking of omitting already existing duties to specific human right treaties, states need to keep in mind that they are nonetheless bound to all other international treaties they ratified. Permitted derogations of some human rights cannot justify possible negligence towards other international treaty commitments.

²² Lexico, <https://www.lexico.com/definition/state_of_emergency> accessed 15 January 2021.

²³ Univ.-Prof. Ebrahim Afsah, KU Emergency Laws in Comparative Perspective, WS2019.

²⁴ Lydia Gall, 'Hungary's Orbán uses Pandemic to Seize Unlimited Power' (hrw.org, 23 March 2020) <<https://www.hrw.org/news/2020/03/23/hungarys-orban-uses-pandemic-seize-unlimited-power>> accessed 15 January 2021.

Following this, this paper is going to demonstrate the functioning of derogation clauses e.g., Art. 4 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 27 of the American Convention on Human Rights (ACHR) on the example of Art. 15 of the European Convention on Human Rights. All three articles determine and regulate the use of emergency powers in the same way, with the only exception being that the list of non-derogable rights varies in length.

3.1.1 Art. 15 European Convention on Human Rights

The European Convention on Human Rights is an international treaty created for the '*protection of the human rights and fundamental freedoms of the people*'.²⁵ As the leading human rights organisation in Europe, it was the Council of Europe (CoE) which drew up and developed this instrument. At this present time, all member states of the CoE (48 states) have signed it and made it their standard of human rights observance.

Art. 15 of this treaty beholds a derogation clause in its first paragraph which describes '*time of war or other public emergency threatening the life of the nation*' to be justifiable situations to utilise the clause, and therefore to derogate from their duties to fulfil the human rights within the convention. To better understand what a '*public emergency*' entails, the European Commission of Human Rights drew up a clear definition for the term in one of its reports from 1969. The report was written on the '*Greek case of 1969*'²⁶, in which the justification for derogation based on a public emergency was questioned, since the '*military government had created the emergency itself*'.²⁷

According to §153 of the report, the prerequisites for a public emergency demand it to be '*(1) actual or imminent, (2) its effects must involve the whole nation, (3) the continuance of the organised life of the community must be threatened and finally (4) the crisis [...] must be exceptional, in that the normal measures [...] permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate*'.²⁸ The current pandemic does not only meet all the required conditions, but it also represents a threat to the life of countless of people. Still, the European Court of Human Rights (ECtHR) must review whether the use of emergency powers in from of a derogation clause is an absolute **necessity** to any given case.

²⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 005.

²⁶ *Denmark, Norway, Sweden and the Netherlands v. Greece* (the Greek Case) (1967) No.3321/67 and 3 others.

²⁷ Christoph Schreuer, *Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights* (1982) 9 YJIL 113, p. 125

²⁸ EC and ECtHR, '*The Greek Case*', 1969, European Ybk 1, §153.

Then §1 continues to elaborate on the conditions needed for the valid usage of the clause. The measures responding to the public emergency may under no circumstances go beyond the ‘*extent strictly required by the exigencies of the situation*’.²⁹ In general terms, the state facing the public emergency may have enhanced powers to decide which measures to take to control the emergency from worsening and to protect the ‘life of the nation’.³⁰ However, the respective state does not have unlimited power when developing the necessary emergency measures, no matter how grave the crisis is. States that decide to utilise this derogation clause must always keep in mind that they need to preserve the nation in its entirety, including its political legal basic principles e.g., democracy. The ECtHR monitors the states by means of a list of considerations, on whether they are acting within the given scope of the situation.

Examples of those would be *inter alia*, ‘*whether ordinary laws would have been sufficient to meet the danger caused by the public emergency*’³¹ or ‘*whether the measures are a genuine response to an emergency situation*’.³² Thus, the state can enforce measures fitting to the protection of the people, as long as they are **proportionate** to the situation at hand. In summary, emergency measures need to be constructed based on the **principles of necessity and proportionality**.

At the end of §1, the clause demands ‘*that such measures are not inconsistent with its other obligations under international law*’.³³ This ensures that the state considering derogating from the duties to the ECHR was aware that its other obligations under international law would still be intact. States sign and ratify several international instruments that result in obligations which need to be kept, otherwise resulting in a breach of contract. Therefore, it needs to be clear that the state cannot violate its duties of another treaty simply because they share a similar provision. As the ECHR was inspired by the ICCPR of 1966, the suspension of human rights under the ICCPR cannot be assumed. Additionally, states must continuously respect the provisions of humanitarian law, especially the ones from the four Geneva Conventions, the aim of which is to ‘humanise’ war and improve its damaging effects on soldiers and civilians.³⁴

§ 2 of Art. 15 ECHR enumerates the human rights which do not permit derogation. They are called non-derogable rights and include: Art. 2 – the right to life, except in respect of deaths

²⁹ ECHR 1950, Art. 15 §1.

³⁰ European Court of Human Rights, ‘*Guideline on Art. 15 of the European Convention on Human Rights – Derogation in time of emergency*’, 31 August 2020, §17 citing *Ireland v. United Kingdom*, ECtHR [1978] Series A No. 25, § 207.

³¹ ECtHR, ‘*Guideline on Art. 15 of the European Convention on Human Rights – Derogation in time of emergency*’, 31 August 2020, §21.

³² Ibid.

³³ (n 30)

³⁴ Schreuer (n 27) p. 130

resulting from lawful acts of war, Art. 3 – the prohibition of torture and from other forms of ill-treatment; Art. 4 §1 – the prohibition from slavery or servitude and finally Art. 7 – no punishment without law.³⁵ Regardless of how the emergency might develop, there can never be a situation as severe as to justify the violation of these aforementioned non-derogable rights. However, the insertion introduced in Art. 2 regarding the right to life is interesting, as it presents '*lawful acts of war*' as a justification to derogate from the right to life. Art. 2 (4) of the Charter of the United Nations clearly prohibits the '*threat or use of force*'³⁶, thereby including the act of war. Therefore, the only justifiable situation with which the exception of Art. 2 ECHR would correlate is the case of **self-defence** as standardised in Art. 51 of the UN-Charter. While the ECHR permits this extent of derogation, Art. 4 ICCPR and Art. 27 ACHR do not and therefore demand the ultimate protection of the right to life.³⁷

Lastly, §3 of Art. 15 ECHR demands the notification of the use of the derogation clause and the therefrom resulting measures to the Secretary General of the CoE. Additionally, the state must give reasons as to why it needs to derogate from its treaty obligation. Here, the Courts verify whether the given situation fits to the definition of public emergency. Throughout the entirety of the crisis, the state must '*keep the Secretary General of the Council of Europe fully informed of the measures*'³⁸ the states are implementing. These will have to undergo constant review of the Court. When the crisis has been averted and the actual reasons for the use of emergency measures are not given anymore, then the state is required to inform the Secretary General of CoE of the end of the use of the emergency measures. In this written letter, it also needs to clarify, starting from what point onwards the treaty provisions will be '*fully executed*'³⁹ again.

All of these requirements have the effect of publicity, which then transitions to accountability. A state which derogates from its treaty duties by emergency measure needs to be monitored and held accountable, especially when these emergency regulations lead to non-notified human rights violations. Therefore, these derogation clauses can be compared to an **international security system**, as it forces the states to follow the ordinances and thereby, human rights violations can be prevented.

³⁵ ECtHR 2020 (n 31) §28.

³⁶ Charter of the United Nations, 26 June 1945, Art. 2 (4).

³⁷ Schreuer (n 27) p. 130/131.

³⁸ ECHR 1950, Art. 15 §3.

³⁹ Ibid.

4. Civil Obligations Respective to Human Rights

As it has become evident in the previous chapters, the enjoyment of human rights comes with a set of respective obligations the states need to commit to. However, what has not been apparent is the fact that these obligations also address every individual in the general public. The **civil obligation** to contribute to the evolvement, fulfilment and especially the compliance of human rights plays a vital role in how they can be enjoyed. States may meet every requirement listed by international treaties and standards. Still, depending on the level of cooperation from the general public, human rights might be lived out rather freely or in a more restricted way. As human rights and obligations are a two-sided coin, so are the state and its people. Both pairs are inseparable.

Ideally, if the state wants the people to comply with the temporary emergency measures that entail vast restrictions on some of the most existential human rights i.e., the freedom of movement, they need to prove that they are worthy of the people's trust and willingness to cooperate. A government must always act with transparency in order to gain the trust of its people. Particularly during times of a health crisis, where the general public is frightened and confused by an overflow of true and false information on media channels, they depend on the state's reassurance and assistance. It is important to prove that their decisions are supported by scientifically accurate facts and are in the best interest of the people.

Even though this would be the most ideal relationship between a state and its people, the truth of the matter is that on an international level many states do not fully act upon these principles, which makes co-operation with its citizens more difficult. Therefore, during this challenging crisis, governments need to be honest and transparent with the people and appeal, if they hope to win this battle against the virus.

Nonetheless, as the general public demands compliance towards the human rights from the state, it also needs to follow the measures set by the government. Agreeing to this point, the preamble of the WHO Convention mentions that the health of the people is '*dependent upon the fullest co-operation of individuals and states.*'⁴⁰

However, to further validate the fact that every individual is asked to be involved in the upholding of human rights, further legal sources of different backgrounds need to be consulted. The Universal Declaration of Human Rights of 1948 declares in its preamble that '[...] **every**

⁴⁰ Constitution of WHO, 1946, (n 7) Preamble.

individual and every organ of society, keeping this Declaration constantly in mind, [...] shall strive to secure their universal and effective recognition and observance [...]'.⁴¹

So, not only state members to the Declaration, but also their respective peoples are bound to act according to the human rights mandated by the treaty. Moreover, every individual is asked to observe the ordinances of the treaty in order to aspire for a state where human rights are universally kept and protected.

Art. 29, which also belongs to the UDHR, describes how the individual is obliged with their own duty to contribute to the observance of human rights. Paragraph (1) dictates that *'[e]veryone has duties to the community in which alone the free and full development of his personality is possible.'*⁴² From this, one can conclude that the state and its citizens are a large community. A community with similar views and opinions, should act unified during times of crises. These duties can be interpreted as a form of *quid pro quo* for the 'free and full personal development' every person enjoys within their community. It is only equitable that the citizens of a state take part in the protection of the right to life and right to health of everyone within their society.

Then, paragraph (2) of the same article proceeds by explaining the reasons when the enjoyment of every person's human rights might be restricted for the well-being of the community. It states that *'[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'*⁴³ Ultimately, this paragraph justifies limitations to one's human rights and calls for an equilibrium of human rights observances within the society. The rights of some can never be seen as more valuable or put above the rights of others. The concept of inherency needs to be respected at all times. For example, in regard to the current health crisis, the sole refusal of wearing protective respiratory masks cannot be put above another person's health or life. While the number of restrictions may be tedious, the lives of some cannot be risked due to a lack of responsibility towards one's community. A society needs to act in unison to combat the spread of the coronavirus. Especially the lives of the vulnerable groups e.g., *inter alia* elderly people, people with severe pre-conditions and front-line workers will depend on the solidary act from society.

⁴¹ UNGA Res 217 A (III), 'Universal Declaration of Human Rights' (10 December 1948) UN-Doc. A/RES/217 (III), Preamble.

⁴² Ibid, Art. 29 (1).

⁴³ Ibid, Art. 29 (2).

In the EU, member states create their union policies keeping the basic principles of the Treaty on European Union (TEU) in mind. According to art. 2, those are *'[...] respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.'*⁴⁴ This would explain why the EC decided to finance the 'rescEU stockpile' of medical equipment. All these values are similar to the ones described above or in other international treaties concerning human rights. This shows that the principles of respect, solidarity, equality and non-discrimination are the core elements that keep democracies and social societies grounded and unified.

It is therefore surprising to observe that such a self-centered attitude has taken root in the population of Western cultures. The feeling of solidarity is weak and instead, the willingness to act upon the measures enforced by the governments has been declining with the progression of the lockdowns.

In Asia however, the attitude towards the coronavirus pandemic and the necessary emergency measures has been quite accepting. Due to those intense differences in popular attitudes and approaches regarding Covid-19, it is interesting to make a brief comparison between the two.

4.1. Western vs. Asian Approach

No state has been exempted from the consequences of the Covid-19 pandemic. Whilst every state has had to implement some sort of emergency measure to combat against the virus, the public sentiment towards co-operating with the government has been different depending on the country and the culture.

In Western cultures such as Europe or the United States of America, the population has been suspicious of the use of emergency powers from the beginning. The level of distrust has gone so far as to resulting in divided public opinions. One side believes the severity and dangers concerning the coronavirus to be true. Therefore, they are overall supportive of the security measures. The other, however, represents the opinion that the entire pandemic is a scheme by states to implement a new rule of law, one that intends to exercise full authority on the public, omitting the use of human rights and freedoms. Based on those fears of being stripped of their human rights, those people began to defy the restrictive regulations that seemed like a violation of their rights. This latter behaviour, however, lacks in compassion towards vulnerable people and is what leads to new, even lengthier lockdowns due to slow declining numbers.

⁴⁴ 'Consolidated version of the Treaty on European Union' (26 October 2012) 2012/C 326/01, Art. 2.

Meanwhile, in Asia, the general public has been more accepting of the strict implementation of emergency measures. As a consequence, Hong Kong, Singapore and Vietnam for example have thus shown a relatively mild course of Covid-19 infections compared to states in the Western world. Respectively, they are managing the Covid-19 pandemic without having to shut down the entire commerce and gastronomy sector and with only partial nation-wide lockdowns.

How can these differences in the population's level of cooperation be explained? One idea would be to look at their varying historical background.

Ever since the age of colonialism and imperialism, the Europeans initiated major oversea voyages towards the American continent, which were driven on personal gain. The American Revolution and the French Revolution are two examples of events that shaped the public's independence from a powerful regent. In other words, one can say that the shift from a monarchy to a republic also meant a further detachment from government. Ultimately, the aim was to become one's own regent. As a consequence, the trust in the outdated system subsided. Whereas in Asia, the situation looked differently. China was the most powerful empire during the 16th and 17th century. It ruled with force and severity and managed to introduce a so-called '*tribute system*'⁴⁵ within Asia. By doing so, the neighbour states were thereby subjected to China. Instead of developing a mentality of detachment from the government, the Asian countries followed the theory of Confucius regarding filial piety, which explained the importance of respecting and obeying one's parents. Over the course of time, this mindset was implemented on the relationship between the state and the population. While the state represented the higher positioned parents, which had to be respected at all times, the population fulfilled the duties of the grateful children, who were appreciative of the parents' wise governance. Out of this mentality, the general sentiment in Asian cultures grew to be respectful, obedient and law-abiding, which is still applicable to this date.⁴⁶

It is due to defining events in history that cultural identities and mentalities are shaped. In the Western cultures, independence and self-reliance are two very common traits within the people, whereas in Asia, the importance of family unity and solidarity with one's community is vital. This difference has been made more noticeable during the current health crisis. In Asia, the majority of the public feel a sense of responsibility towards improving the Covid-19 situation. Even though the emergency measures are more restrictive in comparison to those of the West, the general public follows the ordinances given by the government, as they are aware of the importance of collective participation. One example for a solidarity act would be Hong Kong.

⁴⁵ Univ.-Prof. Miloš Vec, KU Völkerrechtsgeschichte WS2020/21.

⁴⁶ Aris Teon, '*Filial Piety in Chinese Culture*' (2016) The Greater China Journal < <https://china-journal.org/2016/03/14/filial-piety-in-chinese-culture/>> accessed 20 January 2021.

Despite having had turbulent years of social unrest and protests against the local government due to the ‘introduction of a new extradition bill that would have allowed criminals to be extradited to China’⁴⁷, the people of HK paused the protests when it became apparent that this new virus was dangerous and to be taken seriously. Experienced by the SARS epidemic of 2003, the general public and government decided to act fast to contain the spread of the coronavirus. Some of those measures *inter alia* were the restriction of flights from abroad and forcing every incoming traveller to spend two, now three, weeks in self-isolation. Additionally, the checking of body temperatures before entering an office building, disinfecting public buildings daily and public transportation by robots, etc., are just a few of the enforced measures. Without any efforts by the state, the population started to wear the respiratory masks, as wearing a mask helps in reducing the spread of droplets containing the coronavirus, or any other germs for that matter. By doing so, one not only looks after the health of one’s fellow community, but one’s own well-being is indirectly protected as well. Apart from being a sign of mutual respect and solidarity for one another, it also means that the obligation to participate in the observance of each other’s right to life and right to health is being fulfilled. Every human being needs to respect the rights of every other person. By voluntarily refusing to at the very least keep a distance from one another and wearing the required protective gear, one is indirectly putting the lives of the people, especially of the vulnerable groups, in potential danger. As this virus is unpredictable, one cannot say for certain who might survive an infection with Covid-19. Moreover, patients suffering from other severe illnesses that require medical treatment might find themselves in a worrisome position, as overloaded health facilities and overworked front-line workers will not be able to attend to their needs. Here, once again, their rights to life and health are being violated due to a factor which could have been prevented, if the general public trusted and followed the health regulations enforced by governments.

How far this sense of duty and solidarity goes was shown when Hong Kong introduced an *ad hoc* lockdown towards the end of January 2021. As case numbers kept rising in a densely populated district, the government enforced this lockdown in which for 48 hours, all residing citizens were asked to stay at home to be tested. In that timespan, almost 10.000 people were tested for Covid-19. While this definitely represented an inconvenience to the people, they still co-operated since it was for the best of their community.⁴⁸ All in all, this sort of cohesion within

⁴⁷ BBC News, ‘The Hong Kong protests explained in 100 and 500 words’ (bbc.com, 28 November 2019) <<https://www.bbc.com/news/world-asia-china-49317695>> accessed 20 January 2021.

⁴⁸ Raj Sanj, ‘Hong Kong’s First Coronavirus Lockdown’ (scmp.com, 23 January 2021) <https://www.youtube.com/watch?v=rU1MGK_p0vU> accessed 26 January 2021.

the people and the respect towards one another is what has kept the numbers in Hong Kong and many other Asian states low.

Therefore, it would definitely be desirable for Western societies to take the Asian approach as an example. By implementing temperature checks at all entrances, enforcing daily disinfection and weekly tests, schools and office buildings could reopen again. As a consequence, new work positions, based on the manpower needed to implement these large-scale operations, would be created, thereby giving people in short-time work or in unemployment the chance to re-enter the workforce. This could perhaps also alleviate the lock-in depression symptoms many people are experiencing due to their boredom and loneliness of being isolated at home. Keeping the hygienic measures in mind, if one could persuade the general public to accept the respiratory masks as the best solution in this crisis, then there might be the possibility of opening up more leisure activities e.g., museums. In summary, the West should consider these well-functioning concepts from other cultures to one day combat this crisis.

5. Future Development of Human Rights

The past year was globally challenging for many reasons. So far, there have been over 100 million infections and 2 million deaths worldwide. The gap between rich and poor has widened to such an extent that another ‘150 million people have fallen below the poverty line as a result of the corona pandemic.’⁴⁹ And due to uncertainties in the educational and work sector, the social climate in many states has been tensing up.

However, this pandemic has also shed a light on national and international deficiencies concerning the fulfilment of human rights. Though it is still raging through the entire world and its global containment will most likely take some time, the crisis highlighted a few key issues in the field of law of human rights. It has become apparent that underfunding of the health sector has been the common problem in many states. As the right to health is so faceted, states must also consider that the other rights surrounding the right to health need to be taken care of as well.

Fortunately, international solidarity and cohesion has been very present in many different ways throughout this experience. As pandemics do not distinguish between state borders, this

⁴⁹ Welt, ‘Die Pandemie stürzt 150 Millionen Menschen in absolute Armut’ (welt.de, 7 October 2020) <<https://www.welt.de/finanzen/article217344032/Weltbank-Corona-stuerzt-150-Millionen-zusaetzlich-in-absolute-Armut.html>> accessed 22 January 2021.

pandemic cannot be contained by every state individually. Therefore, it is all the more important that heads of state are in constant exchange of scientific information in regard to the pathogen or protective measures. Furthermore, states supported each other by aiding in the production or delivery of respiratory masks, as ‘China, among others, did with Italy at the beginning of the pandemic.’⁵⁰ Even though the states are doing their best to govern their people out of this pandemic, in the future, when Covid-19 is contained, human rights and their implementation need to be respected and observed in a much stronger manner from both the state and its people.

5.1 Suggestions for Human Rights Development

Albeit the future is unpredictable, the development of human rights and work towards an improvement in that field should be considered. Therefore, possible suggestions for such will follow.:

- States must invest more into the fulfilment and expansion of the right to health. As already proven several times, it is vital to the existence of humanity. Vulnerable groups are dependent on a well-functioning healthcare system that covers the medical needs of the whole population. Adding to that, mental health should not be underestimated and must also be covered by the healthcare plan. The fact that especially society’s most vulnerable members are dangerously exposed to this virus without an adequate healthcare system should not be tolerated. Ideally, this minimum standard of welfare should be introduced internationally.
- Existing Health Care systems should undergo a detailed monitoring, potentially from an international organisation e.g., WHO to see where they are lacking in compliance towards the principles of respect, equality and non-discrimination. States will have to constantly work on improving the healthcare systems, thereby reaching new goals and slowly reaching the realisation of the right to health.
- New laws and policies protecting vulnerable groups and their non-discrimination should be enforced and made public, so that every person feels enabled to reach for a good health standard without fear of marginalisation or rejection. The respect for human dignity should come first in such situations.
- Internationally, every human right treaty should include an independent article, in which the right to health is standardized. While the minimum core obligations are already set,

⁵⁰ Zeit Online, ‘Maskendiplomatie’ (zeit.de, 20 March 2020) <<https://www.zeit.de/politik/ausland/2020-03/coronakrise-china-hilfsgueter-italien-usa-coronavirus-covid-19>> accessed 22 January 2021

these new articles should also explicitly address the individual and remind them of their duty to partake in the observance of human rights, especially of this one.

- In regard to the third generation of human rights, new treaties should be developed where the rights to health of the vulnerable such as women and children, elderly people, severely ill persons or HIV/AIDS patients are the main subject of the instruments.
- Art. 4 ICCPR, Art. 15 ECHR and Art. 27 ACHR need to be advertised more openly for what they really are. They are derogation clauses invented for cases of emergency, in which the exercise of human rights must be limited for a certain timespan. If they are not presented to the population as emergency powers which actually protect the human rights concept, then the public will fear their use. It needs to become clear that by using these specific clauses the actions of the states will be monitored by the courts and commissions respective to the treaties.
- On the basis of international law, these derogation clauses should be implemented by more states and should be monitored more closely, so that no human rights violations can occur. Additionally, the respective courts or possibly newly created instruments need to pay a closer attention that emergency measure do not integrate into the ordinary legislation of a state after the crisis has been contained.
- Overall, the enforcement of international law and its principles has to become stricter. Be it through 'naming and shaming' techniques or stronger sanctions, human rights need to be respected and their implementation needs to become more equal on the world. It cannot be that some people can count on their state to act, whereas other people know they cannot count on the proper governance of their heads of states.
- Finally, the general public needs to be made aware of the obligations they have under domestic and international law. If the states aspire to work more closely with its people, it needs to invest into their education. States need to work on the relationship the public has with the laws and their respective obligations. By doing so, more cooperation during times of crises can be achieved.

6. Conclusion

Whether the aforementioned suggestions will be applied or not only time will tell. The main point, however, is that states and their populations need to learn to work together. Divided and without trust, the pandemic will never be defeated. Only if the public starts taking the emergency measures serious, especially the use of the respiratory mask and the social distancing, will there be a noticeable change in case numbers and potentially more human rights restored. Rights do not function, when their obligations are not being honoured. The public needs to realise that they are just as much responsible for the observance of human rights as states are. Now more than ever, cooperation and the sentiment of ‘*solidarity and hope*’⁵¹ within the people and the states are essential to win the war against the invisible, yet extremely deadly virus.

In that sense, the Covid-19 pandemic is not a human rights crisis in terms of states trying to implement emergency measures as a new ‘normal’ legal order. It also does not intend to condone human rights violations. On the contrary, the pandemic forced states out of their comparatively complacent state into taking action in times of crisis. While some human rights had to be temporarily suspended, the right to health and its complex structure of additional rights to e.g., food, water, housing, work, medical treatment and medication were brought to the foreground. With the attention shifted to what is truly existential in life i.e., health, food, water and housing, states can hereinafter focus on an improved observance and fulfilment of everyone’s human rights.

Yet, this emergency represented to be a crisis in many ways. Apart from the financial difficulties, 2020 turned out to be a **crisis in the healthcare sector**. Radical changes will have to happen from the states’ side. However, the missing sense of compassion, empathy, solidarity and respect from parts of the people is in fact evidence of a **crisis in public solidarity**.

As societies which pride themselves to be so technologically advanced, communities need to watch their public conduct and lend a hand when the world is experiencing an international crisis. One cannot permit that mankind loses its core value – humanity. As UN Secretary General Antonio Guterres said during his first virtual press conferences: ‘*This is, above all, a human crisis that calls for solidarity.*’⁵²

⁵¹ United Nations University, ‘UN Secretary General: Covid-19 Pandemic calls for coordinated Action, Solidarity and Hope’ (unu.edu, 19 March 2020) <<https://unu.edu/news/news/un-secretary-general-covid-19-pandemic-calls-for-coordinated-action-solidarity-and-hope.html>> accessed 23 January 2021.

⁵² Ibid.

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