

Women's rights and gender equality during the COVID-19 pandemic

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1. *Introduction*

Whatever their causes, crises have a well-documented history of exacerbating existing gender inequalities and thereby affecting women both differently and more intensely than men.¹ This is true for the current COVID-19 emergency as well: while statistics suggest that men are more likely to die from the SARS-CoV-2 virus than women, it is widely acknowledged that the latter are bearing a disproportionate brunt of the State responses to the outbreak.²

Whereas COVID-19-related documents issued by international organisations and human rights bodies reveal a notable attention to how emergency measures have impacted women in particular, and disproportionately put the enjoyment of their human rights at risk, gender analysis has to date been conspicuously absent from the relevant writings of international legal scholars.³ Moreover, while an insightful literature in-

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¹ Committee on the Elimination of Discrimination against Women (CEDAW), 'General Recommendation No 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change' (7 February 2018) UN Doc CEDAW/C/GC/37 para 2.

² This is an important element to be emphasised: it is not the pandemic itself that disproportionately affects women, but rather the measures introduced by States to cope with it and mitigate its impact. See, eg, United Nations Secretary General, 'Policy Brief: The Impact of COVID-19 on Women' (9 April 2020) <www.unwomen.org/en/digital-library/publications/2020/04/policy-brief-the-impact-of-covid-19-on-women>.

³ Among the few notable exceptions, S De Vido, 'Gender Inequalities and Violence Against Women's Health during the COVID-19 Pandemic: An International Law Perspective' (2020) *BioLaw J – Rivista di BioDiritto* 77-105.



spired by feminist approaches has recently begun to address the gendered dimension of crisis situations,⁴ little research has been done so far, to the present author's knowledge, on what international human rights law has to say about the disparate impact that crises have on women and how to address it.⁵

This paper contributes to the existing literature by investigating the scope of States' obligations to realise women's rights and ensure gender equality amid the COVID-19 pandemic. To this end, the analysis focuses on three areas where the gendered consequences of emergency measures have been the most widespread and/or severe: the disproportionate impact of social distancing policies enacted to curb the spread of the virus on women's right to work (Section 2); the increased rates of gender-based domestic violence triggered by stay-at-home mandates and other emergency measures restricting the movement of people (Section 3); and the uniquely adverse consequences of the diversion of health resources towards COVID-19 management on women's access to maternal health and legal abortion (Section 4).⁶ The paper argues that specific human rights standards apply to States' emergency response, that either forbid the adoption of measures having a disproportionate adverse impact on women or impose on States specific and/or reinforced obligations to mitigate it, as a matter of priority.

⁴ See, eg, F Ni Aolain, 'Women, Vulnerability, and Humanitarian Emergencies' (2011) 18 *Michigan J of Gender & Law* 1-23; and, more recently, J Smith, 'Overcoming the 'Tyranny of the Urgent': Integrating Gender into Disease Outbreak Preparedness and Response' (2019) *Gender & Development* 355-369.

⁵ See, with a focus on, respectively, financial crises and disasters, A Kendrick, JP Bohoslavsky, 'Austerity Measures and Womens' Social and Economic Rights: We Need to Look Deeper', in C Binder et al (eds), *Research Handbook on International Law and Social Rights* (Elgar Edward 2020) 326-339; and G Simm, 'Disasters and Gender: Sexing International Disaster Law' (2021) 2 *YB Intl Disaster Law* 144-176.

⁶ Other areas of concern include: women's greater exposure to the COVID-19 infection due to their overrepresentation in the health sector, as physicians, nurses, or auxiliary staff, and to their lack of access to correctly sized personal protective equipment; the gender digital divide, that has disproportionately limited women's ability to access systems for remote justice and public administration services, implemented to reduce the spread of the virus; the underrepresentation of women in national and international decision-making on the response to COVID-19. See, eg, United Nations Office of the High Commissioner for Human Rights (OHCHR), 'COVID-19 and Women's Human Rights: Guidance' (15 April 2020) <www.ohchr.org/Documents/Issues/Women/COVID-19_and_Womens_Human_Rights.pdf>.



Before proceeding, an important caveat is in order. The intersection of gender with other characteristics, such as age, disability, national or ethnic origin, socio-economic condition, migratory status, or sexual orientation, mean that some women are exposed to the impact of crisis situations to a greater extent than others. Therefore, while due to space constraints this contribution leaves aside questions specifically concerning certain groups of women, such as older women, women with disabilities, women belonging to minority groups, or migrant women, it should be kept in mind that the greatest risks for women's human rights during the pandemic result from multiple and intersecting patterns of discrimination.⁷

2. Gender equality in work

It has been extensively documented that measures aimed at reducing social contacts have aggravated pre-existing gender inequalities in the effective enjoyment of the right to work: the employment drop caused by the shutdown of 'non-essential' businesses has mostly affected feminised sectors of the economy,⁸ at the same time that closures of schools and care facilities have amplified women's already disproportionate share of unpaid domestic labour and care responsibilities, reducing their ability to maintain jobs and pursue their professional advancement.⁹ It is estimated, for instance, that of 444,000 total job losses incurred in Italy in

⁷ See, eg, United Nations Working Group on Discrimination against Women and Girls, 'Responses to the COVID-19 Pandemic Must not Discount Women and Girls' (5 August 2020) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25808&LangID=E>. An extensive literature is available on the definitions and applications of the concept of 'intersectional discrimination' in international law and practice. See, eg, S Atrey, *Intersectional Discrimination* (CUP 2019) in particular chs II, III, and IV.

⁸ These sectors include the followings: accommodation and food services; real estate, business and administrative activities; manufacturing; and the wholesale/retail trade. See International Labour Organization, 'Policy Brief: The COVID-19 Response: Getting Gender Equality Right for a Better Future for Women at Work' (11 May 2020) <www.ilo.org/global/topics/coronavirus/WCMS_744685/lang-en/index.htm>.

⁹ See, eg, UN Women, 'COVID-19 and the Care Economy: Immediate Action and Structural Transformation for a Gender-Responsive Recovery' (2021) <www.unwomen.org/en/digital-library/publications/2020/06/policy-brief-covid-19-and-the-care-economy>. On the relationship between unpaid care, inequality, and women's human right, see extensively



2020, 72.9% concerned women, and that, as strict lockdown was implemented, Italian women were spending approximately 15 hours extra on childcare a week compared to their male counterparts.¹⁰

The right to work is protected, *inter alia*, under Articles 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 1 of the European Social Charter (ESC), and Article 6 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador'). Read in conjunction with the prohibition of discrimination contained in all the three treaties, they ensure equality between women and men in the enjoyment of the right to work, and forbid any sex direct or indirect discrimination in access to and maintenance of employment, the latter occurring when an apparently neutral policy or measure, because of structural patterns of discrimination and unequal power relationships between women and men, has a disproportionately negative impact on the former.¹¹

The right to work is recognised as being a means not only for subsistence, but also for personal development, self-realization, and social inclusion.¹² It is not, however, an absolute right. The ICESCR, the ESC and the Protocol of San Salvador, all contain a general limitation clause that allows States Parties to establish restrictions on the enjoyment the rights enshrined therein, provided that restrictions are prescribed by law, pursue a legitimate aim (i.e., the protection of national security, public order, public health, or public morals), are proportionate to the aim pursued, and are not incompatible with the nature of the rights at stake, that is, do

United Nations Special Rapporteur on Extreme Poverty and Human Rights, 'Unpaid Care Work and Women's Human Rights' (9 August 2013) UN Doc A/68/293.

¹⁰ See C Wenham, 'The Gendered Impact of the COVID-19 Crisis and Post-Crisis Period' – Study Requested by the European Parliament's Committee on Women's Rights and Gender Equality' (23 September 2020) <[www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2020\)658227](http://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)658227)>.

¹¹ See, eg, Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 18: The Right to Work – Article 6 of the International Covenant on Economic, Social and Cultural Rights' (6 February 2006) UN Doc E/C.12/GC/18 para 13.

¹² For a general overview, see A Nußberger, 'Work, Right to, International Protection', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2017).



not impair their minimum core or minimum essential level.¹³ This minimum core includes the right not to be discriminated in the enjoyment of rights, which in turn is subject to the 'usual test' of permissible differential treatment set out in the relevant practice of international human rights bodies: not every policy or measure that, based on prohibited grounds, treats persons in a similar situation differently or persons in different situations similarly, is discriminatory, but only those that have no objective and reasonable justification, that is, do not pursue a legitimate aim or do not provide for a reasonable relationship of proportionality between the means employed and the aim sought to be realised.¹⁴

In the instance of COVID-19 – given that shutdowns of 'non-essential' businesses and family services could arguably be considered as serving the legitimate aim of protecting public health by limiting the spread of the virus – the question is therefore whether, notwithstanding their disparate impact on women, these measures could be seen as striking a fair balance between the demands of the public interest and the protection of women's right to work; or whether, on the contrary, they should be deemed as entailing a gender-based indirect discrimination in the enjoyment of this latter right, in contrast with the standards set forth by international human rights law.

This question must be answered by referring to the margin of discretion that is granted to States in deciding on the nature and scope of the restrictions required to protect the general interests.¹⁵ In particular, ac-

¹³ These clauses are contained, respectively, in art 4 of the ICESCR; art G of the ESC; and art 5 of the Protocol of San Salvador. For an extensive discussion of the criteria that States have to meet when they wish to lawfully limit the enjoyment of human rights, including the respect of their minimum core, see A Muller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 Human Rights L Rev 557-601.

¹⁴ See, eg, in the field of economic, social, and cultural rights, CESCR, 'General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights) (2 July 2009) UN Doc E/C.12/GC/20 para 13. See also European Committee of Social Rights (ECSR), *Associazione sindacale «La Voce dei Giusti» v Italy*, Complaint No 105/2014, decision on the merits of 18 October 2016 para 74.

¹⁵ As well known, the doctrine of the margin of appreciation is justified on the basis of two principal rationales: the subsidiary role of international human rights bodies with respect to national authorities and the latter's better placement, because of their direct knowledge of their society and its needs, to appreciate the existence of a problem of

count must be taken that, while one can expect that restrictions to preserve public health against a virus as virulent as COVID-19 would be accorded a generous margin of discretion, the scrutiny of international human rights bodies is particularly stringent when vulnerable groups or groups subject to structural discrimination and disadvantage, including women, are involved,¹⁶ so that a policy having a disparate impact upon

public concern and assess the necessity of certain restrictive measures to address the concern at stake (see, eg, Y Shany, 'All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee' (2018) 9 *J Intl Dispute Settlement* 180-198, 183). Although the most considerable development of this doctrine has taken place in the case law of the European Court of Human Rights (ECtHR), the ECSR has followed suit (see, eg, *European Roma Rights Centre v Bulgaria*, Complaint No 31/2005 (30 November 2006) para 35) and other international human rights bodies have reached similar outcomes. See, eg, in the field of economic, social and cultural rights, CESCR, 'General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the Covenant)' (11 August 2005) UN Doc E/C.12/2005/4 para 32.

¹⁶ Reference to the concept of 'vulnerability', or to the interchangeable concept of 'social disadvantage', to identify certain individuals or groups that, being exposed to human rights violations to a greater extent than others, are entitled to enhanced legal protection, has become a recurrent feature in the reasoning of international human rights bodies, at both the universal and regional levels. An examination of relevant practice shows that while in some cases (eg, in connection with children or the elderly) vulnerability is understood as an inherent attribute of individuals, in others (eg, in connection with migrants or members of minority groups) it is considered as shaped by, and contingent upon, certain social factors or institutional contexts. Women's vulnerability ascribes to this latter understanding: women are not considered vulnerable as such, but rather as a consequence of structural patterns of discrimination and marginalization that, in many instances, place them at disadvantage with respect to the enjoyment of their human rights. Whereas, however, some international human rights bodies (such as the CESCR or the Inter-American Commission of Human Rights, hereafter 'IACmHR') consider women generally as especially vulnerable to human rights violations, others (such as the CEDAW or the ECtHR) refer to specific vulnerable groups of women, identified as women affected by multiple forms of discrimination (eg, young girls and older women, indigenous women, or women with disabilities) or women living in contexts of particular risk (eg, women victims of domestic violence; migrant women; or women in situations of armed conflict). Whereas some scholars have criticised the concept of vulnerability for arguably strengthening the marginalisation of the very individuals it seeks to protect, others have on the contrary emphasised its emancipatory features. In fact, an important facet of the vulnerability reasoning is the recognition that vulnerable individuals and groups should actively participate in the design and implementation of the special measures devised to promote their substantive equality and ensure the full enjoyment of their human rights. See I Nifosi-Sutton, *The Protection of Vulnerable Groups under International Human Rights Law* (Routledge 2017); and F



them could hardly be considered as proportionate to its legitimate purpose, unless special measures are taken to alleviate such impact.¹⁷

Accordingly, shutdowns of 'non-essential' businesses and care facilities should be considered proportionate to the aim of preventing the spread of COVID-19 only if Governments have identified and taken appropriate measures to mitigate the disparate impact that, owing to structural gender inequalities, namely labour market segregation and unequal division of unpaid care, they have on women. These might include, for instance, measures aimed at preventing women from disproportionately losing jobs during the emergency, such as credit, loans, and grants to sectors where they represent the majority of workers; measures aimed at supporting women who have been dismissed, such as cash transfers and other social assistance interventions, reaching not only the formal but also the informal sector, where women are overrepresented; measures aimed at promoting the re-entry of women into the labour market as early as possible, such as incentives to create gender-based employment opportunities; and measures addressing women's disproportionate burden for the provision of unpaid care, such as monetary compensation for job and

Ippolito, *Understanding Vulnerability in International Human Rights Law* (Editoriale Scientifica 2020).

¹⁷ See CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art 2, para 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23 para 12; and 'Statement: An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (10 May 2007) UN Doc E/C.12/2007/1 paras 4 and 6. In its letter to States Parties in relation to the protection of Covenant rights in the context of the 2007–2008 economic and financial crisis, for instance, the CESCR's Chairperson stressed that any policy change or adjustment in response to the crisis should comprise all possible measures to mitigate growing inequalities and ensure that the rights of disadvantaged groups were not disproportionately affected. See CESCR, 'Letter to States Parties dated 16 May 2012' (16 May 2012) UN Doc CESCr/48th/SP/MaB/SW. On this point, see G Adinolfi, 'Aggiustamento economico e tutela dei diritti umani: un conflitto inesistente per le istituzioni finanziarie internazionali?' (2014) 8 *Diritti umani e diritto internazionale* 319-350, 348-349. The same understanding has been expressed by the CESCR in its 'Statement on the Coronavirus Disease (Covid-19) Pandemic and Economic, Social and Cultural Rights' (6 April 2020) UN Doc E/C.12/2020/1, paras 14-15. See also, analogously, ECSR, 'Statement on COVID-19 and Social Rights' (24 March 2021) <<https://rm.coe.int/statement-of-the-ecsr-on-covid-19-and-social-rights/1680a230ca>>.



income losses caused by increased household and childcare responsibilities.¹⁸

Under international human rights law, temporary special measures in favour of women are not only permitted, but also mandatory, if they are shown to be necessary in order to accelerate the achievement of women's substantive equality in fields of social life where particular burdens are placed on them as a result of gender-based stereotypes. Article 4 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), for instance, obliges its States Parties to adopt and implement temporary special measures as the most appropriate means to accelerate *de facto* equality for women under the Convention.¹⁹

The Committee on Economic, Social and Cultural Rights (CESCR) and the European Committee of Social Rights (ECSR) have both turned to temporary special measures in order to achieve substantive equality between women and men in the enjoyment of ESC rights, including in the field of employment. The CESCR has explained that the application of the principle of equality under Article 3 of the ICERSC 'will sometimes require that States parties take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination';²⁰ and the ECSR has likewise emphasised that, since the purpose of the Charter 'is to protect rights not merely theoretically, but also in fact', States Parties are required 'to take specific steps aimed at removing *de facto* inequalities affecting women'²¹.

States are not exempted from the obligation to adopt temporary special measures in favour of women during the COVID-19 emergency: on the contrary, a heavy burden is cast upon them to justify their failure to

¹⁸ See 'Policy Brief: The Impact of COVID-19 on Women' (n 2) 5-9; and, more extensively, UN Women, 'Feminist Ideas for a Post-Covid-19 World – The Social Protection Response to COVID-19 has Failed Women: Towards Universal Gender-Responsive Social Protection Systems' (2021) <www.unwomen.org/en/digital-library/publications/2021/09/feminist-plan-for-sustainability-and-social-justice>.

¹⁹ See CEDAW, 'General Recommendation No 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, On Temporary Special Measures' (2004).

²⁰ See CESCR, 'General Comment No 16' (n 15) para 15.

²¹ The ECSR has interpreted art 20, para 3, of the ESC, which merely allows the adoption of specific measures designed to remove *de facto* inequalities between women and men in matters of employment and occupation, as placing a positive obligation on the States Parties. See, eg, 'Conclusions 2002 – Romania – Article 20' 2002/def/ROU/20/EN (31 March 2002) 495.



meet this obligation. Ensuring the enjoyment of economic, social and cultural rights on a non-discriminatory basis is in fact a core obligation of States.²² Therefore, a lack of available resources is not, under any circumstances, an objective and reasonable justification for the failure to implement this obligation, unless every effort has been made to all available resources to meet it, as a matter of priority.²³

COVID-19-related policy documents issued by international human rights bodies supports this understanding. The Inter-American Commission on Women (CIM), for instance, has required the needs of women to be prioritised in responding to the pandemic, and has called for special actions to be undertaken, including in the fields of employment and social protection, to avoid gender-based discrimination in the enjoyment of human rights.²⁴ Analogously, the CESCR and the ESCR have urged States to accord appropriate priority to the most socially vulnerable groups in the designment of measures aimed at mitigating the consequences of COVID-19, in order to avoid imposing a further socio-economic burden on them.²⁵

3. *Domestic violence*

Compelling evidence also demonstrates that lockdowns and home confinement measures implemented to contain the spread of COVID-19

²² See (n 14) above and accompanying text.

²³ See CESCR, 'General Comment No 3' (n 17) para 10; and 'Statement: An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (n 17) para 6. On some occasions, the concept of core obligations has been interpreted more strictly, as 'non-derogable' minimum core obligations. See CESCR, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (11 August 2000) UN Doc E/C.12/2000/4 para 47. This understanding, however, has attracted the criticism of many commentators, who have found it too absolute and dissociated from the actual capacity of States to realise the Covenant rights. For this view, see among others, J Tobin, *The Right to Health in International Law* (OUP 2011) 238-241.

²⁴ CIM, 'COVID-19 in Women's Lives: Reasons to Recognize the Differential Impacts,' OEA/Ser.L/II.6.25 (10 April 2020) 16.

²⁵ CESCR, 'Statement on the Coronavirus Disease (Covid-19) Pandemic and Economic, Social and Cultural Rights (n 17) paras 12 and 14; CESC, 'Statement on COVID-19 and Social Rights' (n 17).

and prevent the collapse of national health-care systems have led to escalating rates of domestic violence, imposing thousands of women to be locked up with abusive partners and family members, at the same time that, due to the redirection of resources towards fighting the virus, services needed by victims, including shelters, helplines, and police interventions, were in many States being reduced or entirely impaired.²⁶ The rate of increase in reports of domestic violence has ranged from around 25 per cent to 30 per cent (in France and the United Kingdom), to 74 per cent (in the Russian Federation), to as high as 300 or 400 per cent (respectively, in China and Canada).²⁷

Domestic violence is a violation of women's human rights: infringements of the rights to life, to be free from torture and ill-treatment, to personal integrity, and to private and family life, have all been found in cases involving violence between members of the family or domestic unit.²⁸ Furthermore, domestic violence is a form of gender-based discrimination, as it is rooted in patriarchal attitudes and stereotypes with respect to women's roles within homes, and it affects women disproportionately, being committed against them in greater numbers than against men.²⁹

²⁶ See, eg, United Nations Special Rapporteur on Violence against Women, its Causes and Consequences, 'Intersection between the Coronavirus Disease (COVID-19) Pandemic and the Pandemic of Gender-Based Violence against Women, with a Focus on Domestic Violence and the "Peace in the Home" Initiative' (24 July 2020) UN Doc A/75/144.

²⁷ Although official rates are alarming, it has been widely observed that they are likely an underestimate of the true scale of the problem. The fact that, in a number of countries, direct contact of domestic violence helplines by survivors decreased, compared to the patterns of calls from before the pandemic, suggests that, during periods of quarantine and lockdown, women are unable to seek help because they are subject to a higher degree of control by their abusers. This is what has been seen in Italy, where police have reported that domestic violence calls have reduced by approximately 40% in comparison with previous years. See UN Women, 'COVID-19 and Ending Violence Against Women and Girls' (2021) <www.unwomen.org/en/digital-library/publications/2020/04/issue-brief-covid-19-and-ending-violence-against-women-and-girls>.

²⁸ For an in-depth analysis, see S De Vido, *Donne, violenza e diritto internazionale. La convenzione di Istanbul del Consiglio d'Europa del 2011* (Mimesis 2016) ch 1.

²⁹ See, eg, Inter-American Commission on Human Rights (IACmHR), *Maria da Penha v Brazil*, Case 12.051 Report No 54/01 (16 April 2001) para 59 (finding a violation of the Applicant's right to equal protection before the law under art 24 of the ACHR, together with her right to have her life, her physical, mental, and moral integrity, her personal safety, and personal dignity respected); ECtHR, *Opuz v Turkey*, App no 33401/02 (ECtHR, 9 June 2009) para 198 (finding a violation of the prohibition of



There is a well-established positive obligation on States, under international human rights law, to take all appropriate measures to prevent and protect women from gender-based violence, including domestic violence. In particular, States have both a 'systemic' obligation, which is an obligation of result, to have a proper legislative and administrative framework in place to prevent, investigate, prosecute, and provide reparation and support for acts of domestic violence against women generally; and a 'case-specific' obligation, which is instead an obligation of due diligence, to take all appropriate measures to prevent acts of domestic violence against one or more particular woman or women, to investigate, prosecute and punish perpetrators, and to provide reparations and support to the victim(s).³⁰

These obligations are not susceptible to suspension in times of emergency under the derogatory regimes provided for by International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), and the American Convention on Human Rights (ACHR) alike.³¹ The rights to life and to be free from torture and ill-

discrimination under art 14, in conjunction with arts 2 and 3 of the Convention). See also CEDAW, 'General Recommendation No 35 on Gender-Based Violence against Women, Updating General Recommendation No 19' UN Doc CEDAW/C/GC/35 (26 July 2017) para 21.

³⁰ This distinction – which rests on the circumstance that certain norms oblige States to obtain, through a certain conduct, a result whose realisation does not entail a particular risk or uncertainty, while other norms oblige States to adopt a certain conduct in itself, aside from the result of that conduct, because its realisation is, by its own nature, uncertain or subject to risk – is drawn from R Pisillo Mazzeschi, 'Responsabilité de l'État pour violation des obligations positives relatives aux droits de l'homme' (2009) 333 *Recueil des Cours de l'Académie de Droit International* 175-506 chs III and IV.

³¹ Derogation clauses are contained in art 4 of the ICCPR; art 15 of the ECHR; and art 27 of the ACHR. Provided that certain procedural and substantial requirements are met, they exonerate the States that invoke them from international responsibility for failing to respect their treaty obligations. For an extensive account, see E Sommaro, *Stati d'emergenza e trattati a tutela dei diritti umani* (Giappichelli 2018). There are few doubts that the COVID-19 pandemic is 'a public emergency threatening the life of the nation' that, under the ICCPR, the ECHR and the ACHR alike, justifies the recourse to derogation measures. See, respectively, Human Rights Committee (HRC), 'Statement on Derogations from the Covenant in connection with the COVID-19 Pandemic' UN Doc CCPR/C/128/2 (30 April 2020); Council of Europe (CoE), 'Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: A Toolkit for Member States' SG/Inf(2020)11 (7 April 2020) para 1; IACmmHR, 'Pandemic and Human Rights in the Americas' Res 1/2020 (10 April 2020) para 21. As of 18 November 2021, 10 States have notified derogations from the ECHR; 12 States have notified



treatment enshrined in all the three treaties, as well as the right to personal integrity protected by the ACHR, are in fact non-derogable rights, meaning that there are no circumstances in which a suspension of their corresponding obligations is admitted. As for the right to respect for private and family life under the ICCPR and the ECHR, it can be safely maintained that States cannot justify their reduced ability to combat domestic violence based on a permissible derogation from its corresponding obligations. Both the ICCPR and the ECHR forbid in fact any derogation that would entail a breach of a Party's 'other obligations under international law';³² an expression, that would cover both obligations to prevent, punish, and provide reparation and support for acts of domestic violence, arising under other relevant treaties – such as the CEDAW or the Council of Europe Convention Action against violence against women and domestic violence (CPCVWDV) – that, lacking a derogating clause, have been interpreted as remaining fully applicable in times of emergency;³³ and/or analogous obligations descending from the prohibition of dis-

suspensions of guarantees under the ACHR; and 14 States have notified derogations from the ICCPR.

³² This is one of the substantive conditions which States must comply with to lawfully derogate from their human rights obligations under art 4 ICCPR and art 15 ECHR. Furthermore, derogation measures must be strictly required by the exigencies of the situation, implying that the severity of the measures resorted to must be proportionate to the gravity of the emergency situation that threatens the life of the nation, and they must be non-discriminatory. See below (n 63) and (n 64) and accompanying text.

³³ In several occasions the CEDAW Committee has stressed that the obligations of States Parties do not cease in periods of armed conflict or in states of emergency: see, eg, 'General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (16 December 2010) UN Doc CEDAW/C/GC/28 para 11, or 'General Recommendation No 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations' (1 November 2013) UN Doc CEDAW/C/GC/30 para 2. As for the CPCVWDV, see CoE, 'Declaration of the Committee of the Parties to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence on the Implementation of the Convention during the COVID-19 Pandemic' (20 April 2020) <<https://rm.coe.int/declaration-committee-of-the-parties-to-ic-covid-/16809e33c6>>; and 'For Many Women and Children, the Home is not a Safe Place – Statement by the President of GREVIO, Marceline Naudi, on the Need to Uphold the Standards of the Istanbul Convention in Times of a Pandemic' (24 March 2020) <<https://rm.coe.int/grevio-statement-covid-24-march-2020/pdfa/16809cf55e>>.



crimination on the basis of sex, including gender-based domestic violence, which has attained the status of customary international law binding upon all States.³⁴

Turning to the exact scope of States' positive obligations, it has to be considered that, whether it is generally at the discretion of each State to decide on the kind of measures to be taken to safeguard the rights of those within its jurisdiction, this discretion must be exercised in light of a requirement of effectiveness.³⁵ Therefore, the measures necessary to be put in place are context-specific, that is, depending on the particular circumstances in which they are called to operate.

In line with this, there seems to be a trend, in the practice of international human rights bodies, especially of regional human rights courts, towards the recognition that to a widespread or systemic context of violence existing in certain societies or historical periods correspond 'reinforced' States' duties to protect women against abuse. This understanding, which rests upon and is closely connected with the recognition of the special vulnerability of women victims of gender-based violence,³⁶ has a twofold implication. On the one side, it affects the determination of when States' obligations arise vis-à-vis a certain situation of structural risk, implying the abandonment of the traditional approach requiring the existence of an 'imminent' threat of harm known (or to be known) by public authorities, and the anticipation of States' obligations to a stage when a present (but yet not immediate) threat exists that the authorities know (or ought to know).³⁷ On the other side, it affects the content of State's

³⁴ See CEDAW, 'General Recommendation No 35' (n 29) para 2.

³⁵ See, eg, ECtHR, *Valiulienė v Lithuania*, App no 33234/07 (ECtHR, 26 March 2013) para 75; ICtHR, *Case of González et al. ('Cotton Field') v Mexico*, Series C No 205 (16 November 2009) paras 258 and 279.

³⁶ See, in this regard, the insights offered by F Ippolito, *Understanding Vulnerability in International Human Rights Law* (n 16) 127-130 and 271-273.

³⁷ The judgement of the ECtHR in *Talpis v Italy*, App no 41237/14 (ECtHR, 18 September 2017) is illustrative in that respect: dealing with a case of conjugal violence, the ECtHR challenged the so-called 'Osman' test of 'real and immediate risk' and stated that, due to the specific conditions of vulnerability of the victim and to the context of widespread abuse and violence in which the facts of the case had occurred, an anticipated duty to protect women arose on State authorities. The judgment follows the way paved by Judge Pinto De Albuquerque in his Concurring Opinion in the case of *Valiulienė v Lithuania* (n 35), where he suggested that 'a more rigorous standard of diligence is especially necessary' in societies where the problem of domestic violence is widespread. See S De Vido, 'States' Positive Obligations to Eradicate Domestic Violence: The Politics

obligations to prevent such threat from materialising and cope with its potential adverse impact, implying both a duty to strengthen the legal and administrative framework in place to protect victims generally, and a duty to act with special promptness and vigour in specific cases.³⁸

Although this practice deals with situations occurred in ordinary times, there is scope to argue that, despite the wide discretion that domestic authorities tend to be granted when difficult decisions about the prioritisation of scarce resources are to be taken³⁹, these ‘reinforced’ obligations apply as well in times of emergency, like the COVID-19 pandemic. International human rights bodies have in fact increasingly called on States to take into special account (and indeed prioritise the response to) the increased risk of gender-based violence to which women are exposed during emergencies;⁴⁰ and notably, this approach has been shared

of Relevance in the Interpretation of the European Convention on Human Rights’ ESIL Reflections (6 July 2017) <https://esil-sedi.eu/post_name-119>.

³⁸ In the (in)famous ‘Cotton Field’ case, for example, dealing with the disappearance, mistreatment, and killing of three young women, the Inter-American Court of Human Rights found that, when public authorities had knowledge that a powerful wave of gender-based violence was occurring in Ciudad Juárez, where the facts of the case had taken place, they should have strengthened the general framework in place to counter the risk for women of being victims of abuse. Moreover, the Court emphasised that, owing to the specific context of gender-based violence of which the State was aware, as soon as the victims of the case were reported to have disappeared, public authorities should have discharged their investigation duty according to a standard of ‘strict due diligence’, taking immediate actions to find them alive and prevent their death. See ICtHR, *Case of González et al. (‘Cotton Field’) v. Mexico* (n 35) paras 282-283, with further analysis in E Tramontana, ‘Lucha contra la violencia de género. Aportes del Sistema Interamericano de Derechos Humanos’, in A von Bogdandy et al (eds), *La tutela jurisdiccional de los derechos: del constitucionalismo histórico al constitucionalismo de la integración* (IVAP 2012) 455-480, 471-474.

³⁹ This is especially so under the jurisprudence of the ECtHR. See, eg, *Lopes De Sousa Fernandes v Portugal*, App no 56080/13 (ECtHR, 19 December 2017) para 175. According to the Strasbourg Court, furthermore, this discretion is wider in the sphere of emergency response in relation to an event which is beyond human control, than in relation to events of a man-made nature. See *Case of Budayeva and others v. Russia*, App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008) para 135.

⁴⁰ See, eg, CEDAW, ‘Concluding Comments of the Committee on the Elimination of Discrimination against Women: Indonesia’ UN Doc CEDAW/C/IDN/CO/5 (10 August 2007) para 39, referring to women victims of the Tsunami of 2005; IACmmHR, ‘Annual Report 2008 – Chapter IV: Human Rights Developments in the Region: Haiti’ (25 February 2009) OEA/Ser.L/V/II.134 paras 297-299 and para 317(1), referring to the humanitarian crisis caused by the four hurricanes that swept through Haiti between



by the International Law Commission in its Draft Articles on the Protection of Persons in the Event of Disasters, whose coverage has been interpreted as including disease outbreaks, including the present pandemic.⁴¹

COVID-related policy documents issued by international human rights bodies support this view, suggesting that to the greater risk of domestic violence created by emergency isolation measures correspond greater States' preventive and protective obligations.⁴²

As such, as soon as isolation measures were implemented, Governments should have taken into consideration the structural risk arising from women's forced confinement at homes and should accordingly have adopted measures aimed at preventing such risk from concretising, and mitigating any of its adverse consequences, both generally and in dealing with specific cases. At the general level, in particular, public authorities

August and September 2008; CESCR, 'Concluding Observations on the Third Periodic Report of Japan' (10 June 2013) UN Doc E/C.12/JPN/CO/3 para 24, referring to the relief response to the Great East Japan Earthquake and the Fukushima nuclear accident.

⁴¹ Draft art 6 states that: 'Response to disasters shall take place ... on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable'. The Commentary notes that '[i]n many contexts, gender inequalities constrain the influence and control of women and girls over decisions governing their lives They are often disproportionately affected and exposed to risks, including increased loss of life and livelihoods and gender-based violence, during and in the aftermath of disasters'. See 'Draft Articles on the Protection of Persons in the Event of Disasters, with Commentaries' (2016) II/2 YB of Intl L Commission UN Doc A/CN.4/SER.A/2016/Add.1 (Part 2) 39-40. On the inclusion of COVID-19 in the coverage of the Draft Articles, see A Ozturk, 'Covid-19: Just Disastrous or the Disaster Itself? Applying the ILC Articles on the Protection of Persons in the Event of Disasters to the Covid-19 Outbreak' (24 April 2020) ASIL Insights <www.asil.org/insights/volume/24/issue/6/covid-19-just-disastrous-or-disaster-itself-applying-ilc-articles>. Similarly, the General Assembly, in its Resolution on 'Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations', has requested States to ensure that all aspects of response to emergencies 'take into account the specific humanitarian needs and vulnerabilities of all components of the affected population' including girls and women, and in this regard has encouraged 'efforts to ensure gender mainstreaming'. See Res 69/135 (12 December 2014) UN Doc A/RES/69/135 Preamble (point 7) and para 35.

⁴² See, eg, UN Women, 'COVID-19 and Ending Violence Against Women' (n 27) 7; Inter-American Commission of Women – Follow-up Mechanism to the Belém do Pará Convention (MESECVI), 'Violence against Women and the Measures to Contain the Spread of COVID-19' (2020) OEA/Ser.L/II.6.26 <www.oas.org/en/cim/docs/COVID-19-RespuestasViolencia-EN.pdf>; CoE, 'Declaration of the Committee of the Parties to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence on the Implementation of the Convention during the COVID-19 Pandemic' (n 33).



should have not only reinforced the framework already in place to counter domestic violence but also implemented additional measures tailored to the specific needs arising in the context of the pandemic. This includes expanding the capacity of shelters and developing protocols for the care of women exposed to COVID-19; increasing the availability of reporting services and creating safe spaces, e.g. pharmacies or supermarkets, where women could report abuses without alerting perpetrators; and improving the capacity of enforcement and judicial bodies to respond to reported violence and raising their awareness about the increased risk of domestic abuse. In dealing with specific cases, public authorities should have strengthened protection measures for women and girls at risk, for example by monitoring domestic units with histories of violence, and should have acted with special vigour and promptness in the investigation of reported abuses, the prosecution of perpetrators and the provision of necessary care to the victims.⁴³

4. *Access to maternal health and legal abortion*

Finally, a number of States have included certain gender-specific reproductive health services (in particular, maternal care, abortion and post-abortion care) among ‘non-essential’ services to be reduced or interrupted during the emergency in order to divert financial, human, and clinical resources to the treatment of COVID-19 patients.⁴⁴ In Italy, for instance, due to the Government’s failure to immediately deem abortion

⁴³ *ibid.*

⁴⁴ United Nations Working Group on Discrimination against Women and Girls, ‘Women’s and Girls’ Sexual and Reproductive Health Rights in Crisis’ (28 April 2021) UN Doc A/HRC/47/38 para 26. See also United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ‘Sexual and Reproductive Health Rights: Challenges and Opportunities during the COVID-19 Pandemic’ (16 July 2021) UN Doc A/76/172 para 24.



as 'essential health care', some facilities suspended abortion services during the first months of the pandemic.⁴⁵ In Hungary, to make another example, surgical abortions were ceased as a result of the Government's ban on 'non-life-saving procedures'.⁴⁶

Reproductive rights are an integral part of the right to health, as enshrined, for instance, in Article 12 of the ICESCR.⁴⁷ They are also found to be protected under many other human rights, most notably the right to respect for private and family life (for example, *ex* Article 17 of the ICCPR, Article 8 of the ECHR and Article 11 of the ACHR) and, under specific circumstances, the right to freedom from torture and ill-treatment (for example, *ex* Article 7 of the ICCPR and Article 3 of the ECHR).⁴⁸

International human rights bodies have increasingly recognised that substantive equality requires the specific health needs of women be taken into account as an essential prerequisite for the realization of the full range of their human rights, and have accordingly emphasised that a health care system which lacks appropriate gender-sensitive reproductive services is not in conformity with the right to health taken together with the prohibition of discrimination on the grounds of sex.⁴⁹ But are States

⁴⁵ Only on March 30, 2020, the Health Ministry clarified that abortion services were non-deferrable. See Human Rights Watch, 'Italy: Covid-19 Exacerbates Obstacles to Legal Abortion' (30 July 2020) <www.hrw.org/news/2020/07/30/italy-covid-19-exacerbates-obstacles-legal-abortion>.

⁴⁶ C Moreau, M Shankar, A Glasier at al, 'Abortion Regulation in Europe in the Era of COVID-19: A Spectrum of Policy Responses' (2021) 47 *BMJ Sexual and Reproductive Health* 1-8, 2-3. For further examples and analysis of State action to limit abortion access during the pandemic, see S De Vido, 'Gender Inequalities and Violence Against Women's Health' (n 3) 91-93.

⁴⁷ See, eg, CESCR, 'General Comment No 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2 May 2016) UN Doc E/C.12/GC/22.

⁴⁸ See, eg, HRC, *Mellet v Ireland*, Comm no 2324/2013 (17 November 2016); ECtHR, *R.R. v. Poland*, App no 27617/04 (ECtHR, 28 November 2011); IACtHR, *Case of I.V. v. Bolivia* (30 November 2016). For an overview of relevant standards, see J Gebhard, D Trimiño, 'Reproductive Rights, International Regulation' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2017).

⁴⁹ See, eg, at the universal level, CEDAW Committee, 'General Recommendation No 24: Article 12 of the Convention (Women and Health)' (1999) UN Doc A/54/38/Rev.1 para 11; CESCR, 'General Comment No 14 (n 23) para 21; at the regional level, IACtHR, *Case of Artavia Murillo et al ("In Vitro Fertilization") v Costa Rica*, Serie C No 257 (28 November 2012) para 300.



expected to conform to this standard in times of crisis to the same extent as in ‘ordinary’ times?

The diversion of financial and human resources away from reproductive health care, and the resulting imposition of curtailments on relevant services, amount in practice to a retrogression in, or a restriction on, the enjoyment of reproductive rights.

The States’ duty to progressively achieve the full realisation of ESC rights under the ICESCR, the ESC and the ACHR alike, entails that any deliberately retrogressive measure (that is, any measure reducing the existing level of protection of a recognised right) should in principle be avoided.⁵⁰ In the extreme circumstances under which steps backwards may be inevitable, including in the context of financial or economic crises, natural disaster, or health crises, States must ensure that such measures are only temporary; are necessary and proportionate; are not directly or indirectly discriminatory; and are compatible with, at the very least, the minimum core content, i.e. a minimum essential level, of each of the rights protected.⁵¹ This applies equally with regard to the right to health.⁵²

⁵⁰ The CESCR evaluates retrogressive measures that States take when they face resource constraints under art 2(1) of the Covenant. For a comparison between ‘retrogressive measures’ for reasons of resource constraints under art 2(1), on the one hand, and ‘limitations’ of ESC rights for other reasons under art 4 of the Covenant, on the other hand, see, eg, A Muller ‘Limitations to and Derogations from Economic, Social and Cultural Rights’(n 12) 585-591.

⁵¹ In a number of general comments, the CESCR has highlighted that the adoption of any retrogressive measures incompatible with the core obligations would be impermissible. This interpretation implies that the Committee considers the minimum core of rights as a bar to the adoption of retrogressive measures, and as a matter of priority in decisions concerning the use of ‘the maximum’ available resources towards the full realisation of the provisions of the Covenant. See, eg, CESCR ‘General Comment No 19: The Right to Social Security (Art 9 of the Covenant)’ (4 February 2008) UN Doc E/C.12/GC/19 para 64. The ECSR and the IACmmHR have engaged with the notion of retrogressive measures in analogous terms. See, eg, ECSR, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v Greece*, Complaint No 66/2011 (23 May 2012) para 47; and IACmmHR, *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru*, Case 12.670 Report No 38/09 (27 March 2009) 134-147. For a discussion on this point, see A Nolan, NJ Lusiani, C Courtis, ‘Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights’, in A Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 121-145.

⁵² CESCR, ‘General Comment No 16’ (n 15) para 48.



Similar conditions govern restrictions to qualified rights, including the right to the private life, in those treaties (for instance, the ECHR) that do not expressly recognise the right to health: to be permitted, restrictions have to be determined by law, pursue a legitimate aim, including the protection of public health, and be 'necessary in a democratic society', that is, proportionate to the legitimate aim pursued.⁵³ The review of this latter requirement involves, in principle, a test of suitability, which examines whether the disputed measure is suitable to achieve its legitimate aim; a test of necessity or less restrictive means, which requires that the measure chosen is the least intrusive option, among those equally suitable and effective, to achieve the envisaged objective; and a test of proportionality in the strict sense, which entails an assessment of whether the measure causes an excessive detrimental impact on the applicant's rights, if compared to its beneficial outcomes. Analogously to retrogressions, restrictions cannot be applied so as to suppress a right completely or entirely jeopardise its essence, that essence consisting of a minimum core that individuals shall never be deprived of.⁵⁴

Hence – going without saying that, where denial of reproductive care reaches the level of severity to trigger the prohibition of torture or ill-treatment, restrictions are never admitted – the analysis on the human rights compatibility of emergency measures restricting women's access to maternal health and legal abortion should be conducted on two levels. First, it has to be determined whether such measures curtail women's right to reproductive health to such an extent as to impair its very essence, in which case, they cannot under any circumstances be considered permitted. Secondly, and if this first query is not answered in the affirmative, it must be assessed whether the measures in question should otherwise be considered incompatible with women's reproductive rights, in

⁵³ For a detailed analysis on these criteria, see, among others, J Gerards, *General Principles of the European Convention on Human Rights* (CUP 2019) in particular chs 8, 9, and 10.

⁵⁴ The concept of the essence of rights has appeared for the first time in the ECtHR's judgement in the *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium*, App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (ECtHR, 23 July 1968) para 5, and has subsequently appeared regularly in the Strasbourg Court's case law. The HRC has made similar statements with regard to limitations to the Covenant's rights. See, eg, 'General Comment No 32 – Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial' (23 August 2007) UN Doc CCPR/C/GC/32 para 19.



that, assuming both that they meet the legality test and that they genuinely serve the legitimate aim of protecting the capacity of health systems from the virus, they fail to bear a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

As to the first question, namely whether access to maternal care and abortion services can be considered as belonging to the essence of women's right to reproductive health, the answer is different whether one looks at the jurisprudence of regional human rights courts or, instead, at the quasi-jurisprudence of United Nations treaty bodies. Only these latter have in fact provided unambiguous indications on the core obligations arising from the right in question. It is the ESCR Committee's view, for instance, that minimum essential levels of satisfaction of the right to reproductive health comprise the provision of maternal (pre-natal as well as post-natal) care, the prevention of unsafe abortions – to which, evidence shows, women turn to when abortion is restricted or safe abortion is unavailable – and the delivery of post-abortion care.⁵⁵ In line with this understanding, reductions or suspensions of maternal health or abortion services in response to the COVID-19 pandemic should be considered, without any need for further inquiry, as prohibited retrogressions in women's enjoyment of the right to health at the national level.

On the contrary, regional human rights courts have so far refrained from expressively referring to the concept of the essence of fundamental rights in the scrutiny of restrictions upon women's reproductive rights.⁵⁶

⁵⁵ See CESCR, 'General Comment No 14' (n 23) para 44, and 'General Comment No 22 on the Right to Sexual and Reproductive Health (n 47) para 49 (2). See also HRC, 'General comment No 36 on article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36 para 8.

⁵⁶ This reflects more generally the profound difference in the approaches taken by UN treaty bodies, on the one hand, and by regional human rights bodies, on the other hand, with regard to reproductive rights and especially to the right to safe abortion. Whether in fact UN treaty bodies have increasingly required States to ensure that women are not forced to undergo clandestine abortions, including by amending legislations that contain a general prohibition of all abortions except where the mother's life is in danger, a more restrained position has been taken by the ECtCR and the IACmHR, according to which States have the obligation to ensure the effectiveness of the right to abortion as soon as it is protected by domestic law, but outside a particular threat on the life or health of the pregnant woman they are free to decide to what extent abortion can be legally limited. For references and discussion, see L Poli, 'Aborto e diritti umani fondamentali: Corte europea dei diritti umani e *treaty bodies* a confronto' (2017)11 *Diritti umani e diritto internazionale* 189-212.



Accordingly, an evaluation of proportionality is warranted to determine if reductions or suspensions of maternal health care or legal abortion amidst COVID-19 are acceptable under the ECHR or the ACHR.

In this regard, looking for instance at ECHR system, one can expect that, although a wide margin of appreciation would be recognised to States in the allocation of limited health resources during the outbreak,⁵⁷ other factors might induce the Strasbourg judges to be rigorous in their assessment of States' compliance with the Convention. These factors include: the importance of the rights at stake, namely, the fact that measures affecting access to reproductive health interfere with the individual's enjoyment of intimate or key rights, including self-determination and physical and moral integrity;⁵⁸ the highly intrusive nature of the contested interference, given the time-sensitive nature of maternal health and abortion services, as well as the difficulty or impossibility to travel abroad for such services during the pandemic;⁵⁹ the circumstance that the measures at stake only affect women, and that the Court considers certain 'suspected grounds' of differentiation, including sex, as almost inherently disproportionate;⁶⁰ and, finally, considering the weight attached by the

⁵⁷ As already observed, the ECtHR constantly grants States a wide margin of appreciation when the issue involves an assessment of priorities as to the allocation of limited State resources. At the same time, the Court's case law shows that States are accorded a broad discretion when setting the legitimate aims to be pursued in the context of a financial or economic crisis, so that measures affecting human rights are accepted, unless individuals are totally deprived of the rights at stake. See L Mola, 'The Margin of Appreciation Accorded to States in Times of Economic Crisis – An Analysis of the Decision by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures' (2005) 5 *Lex Social: Revista de Derechos Sociales* 174-194, 186.

⁵⁸ See, eg, ECtHR, *Dudgeon v United Kingdom*, Series A No 45 (23 September 1981) para 52; *Evans v the United Kingdom*, App no 6339/05 (ECtHR, 10 April 2007) para 77; *Schlumpf v Switzerland*, App no 29002/06 (ECtHR, 8 January 2009) para 104.

⁵⁹ The absence of impediments to the applicant travelling abroad to undergo an abortion has been used by the Strasbourg Court as an argument to exclude a violation of her rights under the Convention. See ECtHR, *A., B. and C. v. Ireland*, App no 25579/05 (ECtHR, 16 December 2010) paras 158-159.

⁶⁰ WA Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 574. The ECtHR has referred to sex, sexual orientation, ethnic origin, and nationality as examples of 'suspect categories'. See, eg, *Eweida and Others v the United Kingdom*, Apps no 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) para 71. Even when the Court has not spoken of 'suspect grounds', the Court has sometimes suggested that certain forms of distinction require 'particularly serious and weighty reasons' in order to be justifiable. See, eg, in connection with sex-based

Court to scientific expert opinion, the fact that the World Health Organisation (WHO) has classified reproductive care as an essential health service to be prioritized for continuation even during the most acute phases of the pandemic.⁶¹

That being said, the question remains whether reductions or suspensions of maternal health or legal abortion amidst COVID-19 could be justifiable under the derogatory regime provided for by the ICCPR, the ECHR and the ACHR, at least in those cases where denial of reproductive care does not reach the level of severity to infringe the non-derogable right to be free from torture or ill-treatment or in those cases where States are bound to ensure women's access to reproductive services under other treaties – such as the CEDAW or ICESCR – that, lacking a derogation clause, have been interpreted as remaining fully applicable in times of emergency.⁶²

This query throws us back to a test of proportionality, which is indeed common to limitation and derogation powers:⁶³ derogating measures must be strictly required by the exigencies of the situation, implying not only that they should be resorted to only when ordinary measures are insufficient to cope with the emergency and be the least draconian to those apt to contribute to its solution, but also that they should not cause an excessive compression of the rights at stake, considering the nature of

discrimination, *Rangelov v Germany*, App no 5123/07 (ECtHR, 22 March 2012) para 102.

⁶¹ See WHO, 'Interim Guidance: Maintaining Essential Health Services: Operational Guidance for the COVID-19 Context' (1 June 2020) <www.who.int/publications/i/item/WHO-2019-nCoV-essential_health_services-2020.2> accessed 18 November 2021. On the weight attached by the ECtHR to scientific expert opinion, see K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 55-56 and references therein.

⁶² As already stated, the CEDAW has repeatedly stressed that States Parties' obligations do not cease in periods of armed conflict or in states of emergency (n 33 above). As for the ICESCR, the CESCR has not yet explicitly addressed whether derogation from the Covenant is allowed in a public emergency and under what conditions. Scholars have interpreted the absence of a derogation clause to mean that the suspension of economic, social and cultural rights is not permitted. See, eg, B Saul, D Kinley, J Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014) 258-259.

⁶³ HRC, 'General Comment No 29: Article 4: Derogations during a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11 para 4.



the rights and the exigencies of the situation.⁶⁴ This include a prohibition of differentiating between groups or persons based on prohibited grounds, without an objective and reasonable justification.⁶⁵

There is no doubt that restrictions on maternal care and abortion services run afoul of these requirements: under a rigorous derogation analysis, emergency measures that may irremediably impinge on the physical and moral integrity of individuals, and that reflect and foster structural gender inequalities, should be found too invasive and discriminatory, and should therefore engage the responsibility of the concerned States.

5. *Concluding remarks*

The above analysis shows that in crisis situations like the current pandemic States do not act in a legal vacuum with respect to gender equality: clear standards can be inferred from international human rights treaties, as interpreted by their monitoring bodies, that either forbid the adoption

⁶⁴ Art 4(1) of the ICCPR; art 15(1) of the ECHR; and art 27(1) of the ACHR. For a detailed analysis of the relevant practice see E Sommaro (n 31) 55-72, 134-141, and 200-207.

⁶⁵ While this condition is expressly provided for by the ICCPR and the ACHR, the ECtHR has found it to be implicit within the ECHR pursuant to the principle of proportionality: when assessing if derogating measures were 'strictly required by the exigencies of the situation', the Court examines whether they involved an unjustifiable discrimination. See, eg, ECtHR, *A. and Others v the United Kingdom*, App no 3455/05 (ECtHR, 19 February 2009) para 173. The relevant provisions of the ACHR and the ICCPR differ in that the former requires that derogating measures 'do not involve discrimination on the ground of race, color, sex, language, religion, or social origin', while the latter confines the scope of the prohibition to discrimination 'solely' on prohibited grounds. This has led some commentators to argue that the ICCPR does only bar those measures that intentionally, that is, in targeted way, are directed against persons of a certain race, color, sex, etc. See, eg, T Buergenthal, 'To Respect and Ensure: State Obligations and Permissible Derogations' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia UP 1981) 72-91, 83. The question, however, loses much of its importance if one considers that a differential treatment that has no objective and reasonable justification would most probably fail the proportionality test that is applied to establish whether the requirement of 'strict necessity' is met. COVID-related documents issued by relevant human rights bodies have particularly emphasised that emergency measures should not be designed or implemented in a discriminatory manner. See HRC, 'Statement on Derogations' (n 31) para 2(d); CoE, 'Respecting Democracy' (n 30) para 3.4; IACmHR, 'Pandemic and Human Rights' (n 30).



of measures having a disparate adverse impact on women or impose on States specific and/or reinforced obligations to mitigate it.

This is grounded in the understanding that, due to underlying discriminatory gender norms, practices and societal structures, women are at greater risk than men to suffer human rights violations and are therefore in needs of special legal protection. The implication is twofold. The first is that, when interferences in women's human rights are at stake, States are recognised a narrow margin of discretion, and a heavy weight is attached to applicants' interests in evaluating the proportionality of the contested measures. The second implication is that particularly stringent obligations are imposed on States to afford effective and adequate protection to women, with the aim of meeting their specific needs, breaking the cycle of gender-based vulnerability or disadvantage, and fostering substantive equality between men and women.

An investigation of the practice of international human rights monitoring bodies supports the argument that these standards apply also during crises, like the current pandemic, when gender structural inequalities that often go unnoticed in 'ordinary' times are brought to the fore and exacerbated, exposing women to human rights violations differently and more severely than men. Notably, this practice also shows an emerging understanding according to which not only should States ensure that emergency responses do not overlook women's needs, but they should also address these needs as a matter of priority, through measures that are commensurate to the specific risks arising in crisis situations. In view of the wide leeway that States tend to be granted during emergencies, this a very important development and one that should hopefully be corroborated by international monitoring bodies' decisions on future claims that might arise from the gendered impact of the COVID-19 response.