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Pandemics and Human Rights: Three perspectives on
human rights assessment of strategies against COVID-19

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European University Institute
Department of Law

**PANDEMICS AND HUMAN RIGHTS: THREE PERSPECTIVES ON
HUMAN RIGHTS ASSESSMENT OF STRATEGIES AGAINST COVID-19**

Martin Scheinin and Helga Molbæk-Steensig

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Abstract

The COVID-19 pandemic has been a challenge to human rights and human rights law globally. The epidemic itself as well as the measures enacted to contain it continuously affect the enjoyment of internationally protected human rights. Furthermore, populism traditionally thrives on crises which can provide legitimacy to extraordinary politics that consistently have proved to be the anti-thesis to human rights compliance and to checks on the power of the executive. In the case of COVID-19 however, democratic states have been dealing with a genuine crisis and extraordinary policies have been warranted. Despite claims to the contrary, human rights do not present a barrier to decisive action to contain the virus. In fact, this working paper argues the opposite. The paper presents three perspectives on how human rights can act as a guide in the fight against the pandemic. Chapter 1 contrasts human rights-based approaches to fighting the spread with populist or authoritarian approaches. It explains what human rights-based approaches to genuine crises look like, as opposed to approaches with little regard for fundamental rights, providing a reliable way to spot the difference. Chapter 2 engages in a methodological discussion on how reliably to measure human rights compliance and promotion in connection with a global pandemic and conducts a survey of existing guides and trackers. Finally, Chapter 3 presents a method for real-life application of the results of the analysis in Chapter 1 and the discussion in Chapter 2 in the form of an assessment model for human rights protection and promotion during the COVID-19 pandemic and beyond.

human rights, COVID-19, pandemics, permissible limitations, populism, positive obligations

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Preface

This EUI Working Paper consists of three contributions on human rights and COVID-19. It results from collaboration between myself and my PhD supervisee and research assistant *Helga Molbæk-Steensig*. The three pieces emanate from a research project funded by the EUI School of Transnational Governance after being approved by the EUI Research Council. With this Working Paper we are closing the project which, however, will have an afterlife. I want to thank the Research Council and the School of Transnational Governance for the funding, and the Law Department for accepting to publish the results in its Working Paper Series.

What is here presented as *Chapter 1* is a forthcoming book chapter in an edited volume on COVID-19 and human rights, as submitted to the editors. It presents an outline or checklist for human-rights-based strategies to combat COVID-19 or other epidemics, and contrasts such strategies against what we call populist or authoritarian responses to COVID-19. Here, I am the main author of the section on human-rights-based strategies, which originates from a paper that I presented on 13 May 2020 in the Faculty Seminar series of the EUI Law Department, with Professor *Lorna McGregor* as expert commentator. Helga, in turn, is the main author of the sections that compare human-rights-based strategies against their populist or authoritarian alternatives.

Chapter 2 is written by Helga. It takes stock of existing efforts by international organisations, academics, and non-governmental organisations to assess countries' responses to COVID-19. The objective of the survey is twofold: to assess what earlier or parallel work exists that will be useful for a comprehensive and systematic human rights assessment, and to explain where we think that we are making an original contribution when developing a framework and analytical tools for assessing human rights compliance in the fight against COVID-19 and future epidemics. The Chapter includes a presentation of the outcome of an earlier project by the United Nations Office of the High Commissioner for Human Rights where I had the pleasure of participating and which developed an indicator-based approach to assist UN human rights treaty bodies in their task of assessing how states comply with their legal obligations under human rights treaties.

Finally *Chapter 3*, written by myself, presents a model for assessing human rights compliance when states are confronted with a pandemic. The model is centred around a table that seeks to consolidate a systematic, comprehensive and analytical approach how to include all human rights, everyone's human rights, and all types of states' human rights obligations when assessing compliance at the level of a country's COVID-19 strategy. Filling out marks related to 12 boxes in the table will result in separate grades for four dimensions of human rights compliance and an overall grade that allows for comparisons across time or between countries. A first version of the assessment model was presented on 10 November 2020 to the Bonavero Discussion Group at the University of Oxford, with Professor *Jeff King* as expert commentator. Since then, I have kept improving the model, with great and often challenging feedback from Helga. I want to thank her and professors McGregor and King for the invaluable inspiration they have provided.

The Annexes represent the afterlife or verification phase of the project that is formally closing today. *Annex 1* is a marking sheet to be used by independent assessors chosen for their combination of country and human rights expertise, while *Annex 2* is the assessment table that will convert the marks into grades. Should the verification phase be successful, there will be a new publication that provides a method for and results from assessing the human rights compatibility of strategies to combat COVID-19. In the best case it will be of value also in respect of future pandemics.

The COVID-19 pandemic in 2020 caused much suffering, many deaths, and also numerous human rights violations. As that long year finally closes and vaccinations are being rolled out we may hope, although the death toll will likely remain high over much or all of 2021, that lessons have been and are being learned, also in respect of the necessity to comply with human rights while fighting a pandemic. As COVID-19 has been and remains a moving target, working on the human rights assessment of strategies against the pandemic has been a steep learning curve. On many issues, the known unknowns and the unknown unknowns have kept changing over 2020. Hence, also a human rights assessment of national or other measures to combat the epidemic has gone through many phases where focus or the centre of gravity has needed to move. As a careful

reader will realise, the three contributions published here may in some issues reflect differences in respect of some issues related to the weight attributed to one or the other dimension of assessing human rights compliance.

The challenges of conducting a comprehensive human rights assessment of strategies against COVID-19 became once again evident over the last weeks and days of the year 2020. New cases and deaths surged while a new and apparently more contagious variant of the virus was spreading. At the same time vaccinations were slowly being rolled out. How do such developments change the assessment of what is the optimally human-rights-conforming strategy? We hope that this Working Paper will provide both a convincing demonstration that it is, in principle, possible to answer this question, and that the model presented in Chapter 3 is a plausible suggestion on how to do it.

Florence, 31 December 2020,

Martin Scheinin

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Chapter 1: How a human rights-based response to health crisis differs from a populist or authoritarian one

Martin Scheinin and Helga Molbæk-Steensig

1. Introduction: COVID-19 and populism

The first defining characteristic of human-rights-based responses to COVID-19 is the recognition of the equal value and rights of every human being. Here, one needs to be aware that traditional, ancient, or medieval approaches to epidemics may have been based on prioritizing the collective, or the privileged regime, or the wealth and security of the nation. Lessons drawn from pre-codified-human-rights times may still permeate playbooks of epidemiologists which means that technocratic responses to the pandemic call for human rights scrutiny. The second defining characteristic is that human-rights-based responses are inclusive, democratic, and evidence-based, and they pay particular attention to protecting vulnerable individuals and groups.

Populism, on the other hand works in the opposite way. Leaders use rhetorical devices to divide the population into ‘The People’ and ‘the Other’ where only the welfare and the opinions of the first group is of interest.¹ In connection with the COVID-19 emergency this division is a recipe for disaster and a poor guide in political decision making. Those disregarded by the regime are just as much, if not more, at risk of infections. Recognizing populist responses is therefore important, even if the populists themselves have good reason and often significant resources available to attack scholarship labelling them as such. Identifying populist responses can help in predicting how the use of certain rhetorical tools useful for both the ‘left’ and the ‘right’ lead to policies aimed at reducing the checks on state power, dismantling of the rule of law while opening the backdoor for corruption and kleptocracy.² To render the term useful, scholars have struggled to establish objective indicators of populism. Some rely on overall analyses of party programs conducted or reviewed by country experts and verified through peer-review, grading parties by their populist tendencies,³ others rely mainly on rhetoric.⁴ Generally, these mappings represent academic consensus and may function as decent shorthand for most purposes, but they may lack the necessary traceability to dispel critique from the populists themselves. After all, a key aspect of populist platforms, in addition to the othering of individuals belonging to certain social or minority groups, is the rejection of experts and elites.⁵ The likes of Hungary’s Prime Minister Victor Orbán or Poland’s president of the Law and Justice Party Jarosław Kaczyński may be unimpressed with what thirty-five country experts or the wider community of social scientists have agreed upon. Another issue is that even these aggregated studies are not in full agreement. For example, the study led by Rooduijn includes the Italian Five Stars movement as populist⁶ whereas Eiermann et al.⁷ does not.

A way of getting around these issues is by using proxies. The proxy of studying securitizing rhetoric holds some promise. The main reason why the concept of populism is of interest to scholars, is that it is conceived as an intention to or grooming of the popular sentiment in preparation for the dismantling of constitutional safeguards and divisions of power. Securitization is the speech act of rendering a political topic into a security threat, a danger to the life of the nation, the necessity of a decisive response to which is not up for debate, and which in turn can be used to justify extraordinary politics⁸ including the use of emergency powers or the less structured allowance of human rights interferences with a wider margin of discretion afforded to the executive.

¹ Jan-Werner Müller, *Parsing populism: Who is and who is not a populist these days?*, 22 JUNCTURE (2015).

² Martin Sandbu, *Opinion: Populists and kleptocrats are a perfect match*, FINANCIAL TIMES, 2020.

³ Martin Eiermann, et al., *European populism: Trends, threats and future prospects*, 29 TONY BLAIR INSTITUTE FOR GLOBAL CHANGE (2017); Matthijs Rooduijn, et al., *The PopuList: An overview of populist, far right, far left and Eurosceptic parties in Europe*, (2019).

⁴ Kirk A Hawkins, et al., *Measuring Populist Discourse: The Global Populism Database* (2019).

⁵ CAS MUDDE & ROVIRA CRISTÓBAL KALTWASSER, *POPULISM: A VERY SHORT INTRODUCTION* (Oxford University Press. 2017).

⁶ Paul Lewis, et al., *Revealed: One in four Europeans vote populist*, 20 THE GUARDIAN (2018).

⁷ M. EIERMANN, et al., *EUROPEAN POPULISM: TRENDS, THREATS AND FUTURE PROSPECTS* (Blair Institute. 2017).

⁸ BARRY BUZAN, et al., *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* (Lynne Rienner Publishers. 1998).

Such speech acts can take the shape of using war-, weapon- or disease metaphors. Classics include the ‘war on terror’, ‘war on drugs’, the references to the influx of refugees or migrants as ‘an invasion’, or to domestic minorities as ‘a cancer’, or indeed, to carriers of COVID-19 as ‘invisible enemies’.

In relation to the COVID-19 pandemic, these markers of populism (dividing rhetoric, anti-science, and securitization) are readily applicable, but the situation is also doubly complex. Due to the nature of this crisis, governments have had to make decisions on the basis of incomplete medical and epidemiological information. It has also become clear that not acting to contain the virus or to alleviate suffering caused by it, is neither normatively neutral nor human-rights-wise acceptable. As a result we have seen democratic leaders legitimately using the language of emergency and making interferences in, or even derogations from, human rights, whereas some rulers that generally score high on the populism-scales have this time downplayed the emergency and blocked or reversed evidence-based measures to contain it.⁹ Jair Bolsonaro of Brazil and Donald Trump of the United States, for instance, not only aggravated the situations in their own countries but also bear some responsibility for catastrophic consequences of COVID-19 in wider South America, frustrating the declarations of a state of emergency in many of these countries.¹⁰ Does this mean that these leaders are not in fact populists? Hardly. In fact, their anti-elite, anti-expertise and anti-immigrant rhetoric, and the built-in tendency of the virus to hit disadvantaged communities hardest, fit in well with the populist othering of specific minority or socioeconomic groups. In this sense, downplaying the severity of the SARS-COV-2 pandemic bears some resemblance to the denial of the climate crisis that has permeated populist sentiments in the United States for years. For a human rights-compliant response to the COVID-19 pandemic, the government’s positive obligations to take effective measures to protect the population against adverse effects on human rights caused by the virus are as central as its negative obligations.

The academic community has not remained silent on this topic. With remarkable speed and from their various stages of lockdowns, this community has compiled several comparative collections of country reports on government responses to COVID-19. For instance, OpinioJuris collected a series of thematic blog posts on COVID, constitutionalism and rights.¹¹ Verfassungsblog gathered a large collection of country reports on constitutional challenges arising from COVID worldwide,¹² and Democracy Reporting International compiled reports from all twenty-seven EU member states on rule of law and human rights compliance of state measures against COVID.¹³ Furthermore, the UN Special Rapporteur on the promotion and protection of Human Rights while countering terrorism released a tracker of responses in cooperation with the ICNL,¹⁴ as did Oxford University (hereafter OxCGRT).¹⁵ What this chapter will contribute, is a guide to what a human rights-based approach to managing a pandemic looks like. This is based on existing international legislation and practice,

⁹ Kim Lane Scheppele, *Underreaction in a Time of Emergency: America as a Nearly Failed State*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL (2020).

¹⁰ David D. Kirkpatrick & José María León Cabrera, *How Trump and Bolsonaro broke Latin America's COVID-19 defences*, NEW YORK TIMES, 2020.

¹¹ Elizabeth Stubbins Bates, *COVID-19 Symposium: Article 2 ECHR’s Positive Obligations—How Can Human Rights Law Inform the Protection of Health Care Personnel and Vulnerable Patients in the COVID-19 Pandemic?*, OPINIOJURIS (2020); Nicolás Carrillo-Santarelli, *IACHR Decision in Vélez Loor v. Panama: COVID-19 and Human Rights in the Courts*, see id. at; Haniya Hasan, *Is an Ineffective State Response to COVID-19 a Violation of Human Rights?*, see id. at; Tim Fish Hodgson & Ian Seiderman, *COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health part 1 and 2*, see id. at; Kushtrim Istrefi, *To Notify or Not to Notify: Derogations from Human Rights Treaties*, see id. at; Matt Pollard, et al., *COVID-19 Symposium: The Courts and Coronavirus (Part I)*, see id. at; Nora Salem, *Proportionality of State Emergency Health Measures amid COVID-19*, see id. at; Barrie Sander & Luca Belli, *COVID-19 Symposium: COVID-19, Cyber Surveillance Normalisation and Human Rights Law*, see id. at; Martin Scheinin, *COVID-19 Symposium: To Derogate or Not to Derogate?*, see id. at; Nina Sun & Livio Zilli, *COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Exposure and Transmission*, see id. at; Sam Zarifi & Kate Powers, *COVID-19 Symposium: Human Rights in the Time of COVID-19—Front and Centre*, see id. at.11

¹² See list by Joelle Grogan, *Introduction & List of Country Reports*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL (2020).

¹³ Théo Fournier & Michael Meyer-Resende, *Phase Two of Covid-19 Responses Across the EU – The Rule of Law Stress Test Continued*, DEMOCRACY REPORTING INTERNATIONAL (2020).

¹⁴ *COVID-19 Civic Freedom Tracker: Keep Civic Space Healthy*, ICNL International Center for not-for-profit law and UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Aoláin, Fionnuala D. Ní.(2020), available at <https://www.icnl.org/covid19tracker/?location=61&issue=&date=&type=>.

¹⁵ OxCGRT, *The Oxford COVID-19 Government Response Tracker (OxCGRT)*, University of Oxford: Blavatnik School of Government(2020), available at <https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker>.

and as will be evident, it differs widely from populist/authoritarian approaches, but also goes against the claim that human rights would prevent governments from effectively battling the pandemic.

2. Human rights-based responses to COVID-19

Even in societies not following the populist-authoritarian approach outlined above, there is a grave risk that an evidence-based approach to COVID-19 is seen as a balancing act between information generated by the two epistemic communities of epidemiologists and economists, the latter term here not only referring to academics but also to many powerful policy actors. It would then be for the elected politicians to ‘strike a balance’. Decisions need, however, to be informed also by other epistemic communities, including human rights experts, and social scientists who can assess how people actually behave and why. A human-rights-conforming strategy must protect the human rights of the population, understood holistically as interdependent and indivisible. The right to life deserves primacy but also other human rights require careful analysis. What follows below is a twenty-point outline for national strategies to combat COVID-19. This list differs from for example Human Rights Watch’s checklist¹⁶ in that it deals with both the emergency phases and the long-term measures that are proving necessary for living with the virus. The list is illustrated by both positive and negative examples since one country may have in some respect acted in accordance with human rights while at the same time having been insensitive or even ignorant to human rights in other respects.

1. When empirical (epidemiological and other) information is incomplete, it is permissible and from a human rights law perspective even an obligation of States to make strategic decisions based on assumptions. Not to do anything is not a normatively neutral, or normatively acceptable, approach. Human rights, including the right to life and the right to health come with significant positive obligations to protect and ensure their enjoyment.¹⁷ The Government Response Stringency Index¹⁸ and the timeline it presents for different countries demonstrate that early responses have had lasting positive results in containing the epidemic (e.g. Germany or South Korea), while countries that acted late often are suffering both of continued high levels of transmission and deaths, and of more far-reaching restrictions upon liberty such as in Brazil and the U.S.

2. When making decisions based on assumptions, international human rights law prescribes that responsible governments should err on the side of human rights compliance. Other things being equal, the option should be chosen that is in best conformity with human rights, understood holistically, in line with the principle of interdependence and indivisibility of all human rights both political and civil, and economic and social rights.¹⁹ In practice this is a complex exercise. Human rights will many times be on both sides of the equation, calling for a nuanced and comprehensive assessment. Compliance with one right may often provide a legitimate aim that justifies limitations upon another. China and Italy, for instance, were two countries that acted early to restrict public gatherings.²⁰ This is of course a measure that could violate human rights, but also one which when accompanied by human-rights-protective considerations, can be a permissible interference when balanced against the potential impact on the rights to life and health of not restricting public gatherings. Procedural safeguards, temporal limitations of any restrictions, or facilitation of alternative safer ways for assemblies to take place are all modalities for reconciling the implementation of economic, social, and cultural rights and other human rights.

¹⁶ *COVID-19: A Human Rights Checklist*, Human Rights Watch (2020), available at <https://www.hrw.org/news/2020/04/14/covid-19-human-rights-checklist>.

¹⁷ International Covenant on Civil and Political Rights, (United Nations General Assembly 1966). (hereinafter ICCPR) Article 2 and General Comment (hereinafter GC) No. 31, International Covenant on Economic, Social and Cultural Rights, (United Nations General Assembly 1966). (hereinafter ICESCR) Article 2 and GC No. 3, UN Treaty Body Database) All General Comments (GC) are available in the *UN Treaty Body Database*, Office of the High Commissioner (2020), available at http://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11.

¹⁸ Hannah Ritchie, et al., *Our World in Data: Statistics and Research Coronavirus (COVID-19)* (2020), available at <https://ourworldindata.org/coronavirus>.

¹⁹ Resolution 48/121 on the report of the Third Committee (A/48/632/Add.2) on the World Conference on Human Rights, (United Nations General Assembly, Forty-eighth session: Agenda item 114 (b) 1994). And Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 (Office of the High Commissioner for Human Rights, United Nations 1993). Para I.5.

²⁰ Ritchie, et al. 2020. See note 18.

3. Human rights assessment cannot be replaced by proxies. For instance, giving a boost to the economy by easing restrictions that will prevent contagion cannot be justified simply by saying that liberty should prevail. Furthermore, exclusive focus on intensive care (ICU) capacity proved a bad proxy for the right to life, as for instance people in nursing homes for the elderly will often not be transferred to ICU. This is where the technocratic epidemiological strategy of Sweden failed.²¹ Human rights assessment should be based on international human rights treaties and their institutionalized practices of interpretation as to what is normatively required under them. This means being guided by the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) from 1966, and the institutionalized interpretive practice under them, including but not limited to General Comments issued by the respective treaty bodies, as well as by the added value of other human rights treaties such as the Convention on the Elimination of Discrimination Against Women, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, and International Convention on the Elimination of All Forms of Racial Discrimination.

4. When, as will many times be the case, human rights appear to collide, the essential or minimum core of one human right should be presumed to have priority in respect of non-core dimensions of other, colliding human rights.²² Any proposed restrictive measures must undergo a structured assessment for their permissibility: the essential core of every human right needs to remain protected, restrictions must be proven necessary which translates to both being effective towards the proclaimed legitimate aim and being minimally intrusive in respect of human rights, and the resulting human rights intrusion must remain proportionate to the effect delivered. In practice, the right to life²³ should always receive extra careful consideration in the assessment of proposed measures or available options. This does not, however, mean that simply stating the aim of saving lives would relieve a State from its other human rights obligations so that it could, for instance, disregard the essential core of freedom of expression²⁴ or freedom of movement²⁵. Some restrictions upon these and other rights may very well be justified, others not. For instance, the temporary sealing off of the capital region of Finland, including one third of the whole country's population, emulated the Italian experience in Lombardy. It seems however, that in Finland it was ill-designed as a blunt measure to protect the right to life, especially for the population within the capital region, since it was not accompanied by effective measures of support and protection to vulnerable groups.²⁶

5. In the context of a deadly epidemic, the right to life has a very close relationship with the right to health²⁷ and other economic, social or cultural rights (ESC). Therefore, states cannot ignore these when designing a human-rights-based strategy against COVID-19. For instance, the right to an adequate standard of living,²⁸ or the right to education,²⁹ remain applicable during a pandemic and need to be included in a comprehensive human rights assessment. Just like civil and political rights, ESC rights may appear on both sides of the equation when deciding about concrete steps to take. Emerging studies suggest that the right to health and the right to education may be best optimized by keeping kindergartens and primary schools open with safety

²¹ "The overall objective ...[is] to 'flatten the curve' so that large numbers of people do not become ill at the same time." Press release: Strategy in response to the COVID-19 pandemic, (2020), Swedish Prime Minister's Office, Sweden. By 29 October 2020, COVID-19 deaths in Sweden had reached 588 per million inhabitants while in the other Nordic countries the number was between 35 and 123. See, Ritchie et al: <https://tinyurl.com/y29t6tch>.

²² ICCPR GC No. 27 para. 13, ICESCR GC No. 14 para 43, Charter of Fundamental Rights of The European Union (European Union 2012) (hereinafter EU Charter) Article 52 (1).

²³ ICCPR Article 6 and GC No. 36.

²⁴ ICCPR Article 19 and General Comment No. 34, *Disease pandemics and the freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (Office of the High Commissioner for Human Rights) (2020).

²⁵ ICCPR Article 12 and General Comment No. 27.

²⁶ Martin Scheinin, *The COVID-19 Emergency in Finland: Best Practice and Problems*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL (2020).

²⁷ ICESCR Article 12 and General Comment No. 14. Press release: Special Rapporteur Dainius Pūras: COVID-19 measures must be grounded first and foremost on the right to health, Office of the High Commissioner for Human Rights (2020).

²⁸ ICESCR Article 11 and General Comments Nos. 4, 7, 12 and 15

²⁹ ICESCR Article 13 and General Comment No. 13

measures, while at the same time adopting hybrid models of onsite and online education for adolescents, with focus on meeting special educational needs.³⁰

6. States have an obligation to counter any discrimination, by public or private actors, in the fight against the epidemic, and also any discriminatory impact of the epidemic itself.³¹ Potential situations of discrimination that require particular attention include: nursing homes for the elderly,³² many persons with disabilities,³³ prisons and any other places of detention,³⁴ migrant workers housed in close quarters (e.g. workers in construction or seasonal agriculture), people doing precarious work, and underprivileged immigrant or ethnic communities.³⁵ The COVID-19 outbreak within the meatpacking industry and in the surrounding community in Gütersloh, Germany, provides an illustrative case of (i) the role of precarious and exploitative working conditions in the spread of the virus, (ii) targeted and local, rather than blunt and nationwide, measures in addressing contagion, and (iii) the role of the law and courts in reviewing the proportionality of the restrictions resulting from such measures.³⁶

7. All measures must have proper constitutional basis and safeguards.³⁷ The controversial Hungarian declaration of a ‘state of danger’ on the basis of vague constitutional provisions and the subsequent adoption of the so-called Enabling Act which allows the government to rule by decree without a sunset clause, is an example of how the lack of a proper legal basis and procedural safeguards impact the intrusiveness of restrictive measures.

8. Many measures to combat the epidemic can be introduced as voluntary, in the form of evidence-based recommendations. Where a culture of protecting oneself and strangers does not take hold, human rights law will permit the introduction of obligatory and enforced restrictions that meet the permissible limitations test. They should be secondary to voluntary measures, backed by evidence as to their effect of preventing or reducing contagion, targeted, temporary and minimally intrusive so as to comply with the requirement of being necessary in a democratic society, and the resulting intrusion should remain proportionate to the evidence-proven benefit obtained.³⁸ Mandatory measures must lapse after their prescribed time of temporary validity, unless renewed based on a new assessment of them being necessary.

9. One instance where mandatory measures appear justified as human-rights-compliant even without a preceding effort to rely on mere recommendations, is the risk of super-spreading events in the form of public gatherings or certain types of them. Mass events (such as concerts or mass sports events) may need either to be made safe or prohibited for a defined period, renewable if necessary. The same applies also to smaller gatherings when they represent contagion-risky activities (e.g. team sports practice, nightclubs, and discotheques). The policies and the resulting legal instruments must be evidence-based rather than compromises resulting from lobbying by business actors. The State of New York that has been very severely affected by COVID-19 issued a series of regulations that seek to address the role of restaurants and bars in contagion.³⁹

³⁰ Josh Michaud & Jennifer Kates, *What Do We Know About Children and Coronavirus Transmission?* (2020).

³¹ ICESCR Article 2 and General Comment No. 20, ICCPR Article 26 and General Comment No. 18, CEDAW, CERD and CRPD.

³² ICESCR General Comment No. 6, *Press release*: Statement by Michelle Bachelet: “Human Rights of older persons in the age of COVID-19 and beyond” with the High Commissioner for Human Rights and the new Independent Expert on the enjoyment of all human rights by older persons, (2020), Office of the High Commissioner for Human Rights.

³³ CRPD, ICESCR General Comment No. 5.

³⁴ ICCPR Article 10 and General Comment No. 21; Interim Guidance COVID-19: Focus on Persons Deprived of Their Liberty (IASC - Inter Agency Standing Committee of OHCHR and WHO 2020).

³⁵ ICESCR Article 7 and General Comment No. 23, *Covid-19 and the Human Rights of Migrants: Guidance* (Office of the High Commissioner for Human Rights) (2020). *Press release*: Commissioner for Human Rights Dunja Mijatović (2020), Statement: Governments must ensure equal protection and care for Roma and Travellers during the COVID-19 crisis, Council of Europe.

³⁶ Judgment no. 13 B 940/20.NE, (Oberverwaltungsgericht Nordrhein-Westfalen).

³⁷ ICCPR General Comment No. 27, paras. 11-18, *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states*. (Council of Europe) (2020).

³⁸ ICCPR General Comment No. 37 para. 40.

³⁹ Executive Order: Continuing Temporary Suspension and Modification of Law Relating to the Disaster Emergency. No. 202.43 (New York State ed., Governor Andrew M. Cuomo June 19 2020).

10. Where restrictions are imposed upon such public gatherings that represent the exercise of human rights, authorities must provide and facilitate safe options for the meaningful exercise of freedom of assembly including demonstrations,⁴⁰ and freedom of religion,⁴¹ as well as the right to family life, which includes the right to arrange important events such as weddings or funerals.⁴² Such arrangements and requirements must be evidence-based and may include, for instance, a combination of online and offline activities, an obligation to wear face masks, or the compartmentalization of a single event into smaller safe ones. Recent Human Rights Committee General Comment No. 37 on freedom of assembly, and discussions around it provide best practice guidance.⁴³

11. While human rights law allows for temporary lockdowns and curfews, such measures should always have a proper legal basis, be evidence-based, geographically targeted, and temporary.⁴⁴ This requires a strong preference for micro-lockdowns rather than nationwide measures, and transparent indicators on what constitutes compelling evidence that such a lockdown is necessary. Evidence could for example be a predefined absolute number of new cases, the local or regional value for the effective reproductive number (R) of the virus and its change from the previous monitoring period.

12. The aim of strategies adopted by governments should be to protect the life and human rights of all members of the population. This entails remaining vigilant in respect of SARS-CoV-2 and determined to stop any new occurrence of exponential growth at the relatively flat bottom of the curve. Regular monitoring and publication of R at national and regional level should be a key indicator in applying this strategy. Following its first crisis phase, Italy provides a promising example of transparent weekly national and regional monitoring reports.⁴⁵

13. Special attention must be given to protecting members of vulnerable segments of society, including but not limited to the elderly, and with full respect of their dignity and human rights. Instead of isolation, they must be offered attention, support, activities, and regular meetings with their close ones, while at the same time minimizing the risk of contagion. Germany's overall relative success in preventing COVID-19 deaths is for a major part attributed to managing to limit transmission in long-term care facilities.⁴⁶

14. Human rights are not only legal obligations of States but also have an interpersonal ethical dimension. In particular in Western societies, there is a need to promote a culture of people protecting both themselves and strangers, through routine hygienic measures such as frequent washing of hands with soap and avoiding all contact with others when sick. The wearing of a face mask to protect others should be promoted as a routine in defined situations such as when using public transport, in intergenerational contact, or in shops and when providing or receiving services. While obligatory mandates will often be justified under human rights law, cultural adaptation may best be served through evidence-based recommendations. The modest level of inconvenience of face masks during an epidemic, including during the potentially long phase when the virus remains dormant in society or keeps reappearing as outbreaks, is the 'new normal'. Facemasks have a role both in stopping the exponential growth of the epidemic and in suppressing contagion where R has already been pressed down but new cases nevertheless keep emerging. Probably these elements of COVID-19 strategies will continue also beyond this epidemic as a cultural adaptation in the West, following the example of many Asian countries where the same happened before the emergence of SARS-CoV-2. Vietnam is referred to as a success story in the containment of the COVID-19, and its continuing imposition of an obligation to wear facemasks is a part of that story.⁴⁷

⁴⁰ ICCPR Article 21, freedom of association ICCPR Article 22.

⁴¹ ICCPR Article 18 and General Comment No. 22.

⁴² ICCPR Articles 17 and 23 and General Comments Nos. 16 and 19.

⁴³ Martin Scheinin, U.N. Human Rights Committee General Comment No. 37 on Freedom of Assembly: An Excellent and Timely Contribution. 24.9.2020 (Reiss Center on Law and Security at New York University School of Law. 2020).

⁴⁴ ICCPR Article 12 and General Comment No. 27.

⁴⁵ *Report monitoraggio settimanale Covid-19: bassa criticità, ma in alcune aree casi in aumento*, MINISTERO DELLA SALUTE (2020) [available at: http://www.salute.gov.it/portale/nuovocoronavirus/dettaglioNotizieNuovoCoronavirus.jsp?lingua=italiano&id=4941](http://www.salute.gov.it/portale/nuovocoronavirus/dettaglioNotizieNuovoCoronavirus.jsp?lingua=italiano&id=4941).

⁴⁶ Hannah Ritchie, et al., *Our World in Data: Statistics and Research Coronavirus (COVID-19)(2020)*, at <https://ourworldindata.org/covid-exemplar-germany>.

⁴⁷ Ibid. <https://ourworldindata.org/covid-exemplar-vietnam>.

15. Carriers of SARS-CoV-2 need to be found through constant vigilance and testing. They and their families must be afforded support, whether arriving from abroad or infected within the country. Quick and reliable tests must be available at request, including a follow-up test after an optimal number of days if the first one turned out negative. Testing only symptomatic cases will discover only the tip of the iceberg and needs to be complemented by access to testing by asymptomatic persons, screening amongst potentially exposed categories of persons and, if need be, pooling of tests where systems become overburdened. In Europe, for instance Denmark, Germany, Iceland, and Norway in proportion to the number of cases found tested extensively early on.⁴⁸ Highly restrictive measures, such as enforced quarantine or detention,⁴⁹ should be applied individually and with caution even where the law provides for that option, in order not to engage in arbitrary detention or demotivate people from seeking to be tested.

16. Where smartphone apps alerting of potential risk of contagion are introduced, their success relies on their accordance with the right to privacy.⁵⁰ Since they require a high number of downloads and uses in order to be successful, they cannot work without the cooperation of the population, and special care must be taken not to miss parts of the population that do not have access to a smart phone. In practice, this means that public trust is central to their success. COVID-19 must not act as an excuse for a new wave of mass surveillance, nor can it appear to be doing this. To this end, exposure alerting apps must be truly voluntary, also in relation to private actors, and they must not collect identifiable personal data. As an example, using the proxy of the number of downloads as a success-rate, Iceland has 40 percent population coverage with its voluntary app whereas India has less than 10 percent with their mandatory app.⁵¹ Whenever an app user is diagnosed with the virus, he or she should be free to decide whether a generic alert is sent to other app users who were in the proximity of the person during the possibly contagious phase. They should then have a right to get tested, with secured quick and easy access. As such apps should not be used in traditional contact-tracing of contagious illnesses, they should not be called contact-tracing apps. Their only function should be alerting app users who were in the vicinity of a person who has tested positive. By October 2020 very few countries had succeeded in establishing high enough public trust that enough people have downloaded them for the apps to live up to their potential. This includes countries where the privacy parameters have been designed to be in accordance with human rights standards such as Germany,⁵² Ireland,⁵³ and Finland.⁵⁴

17. While wide testing both for SARS-CoV-2 and for antibodies showing a past infection will be necessary in the fine-tuning of a human-rights-based strategy, such testing should be based on representative randomized samples of the population and used for epidemiological monitoring and forecasting. So-called ‘immunity passports’ to segregate between two categories of people whose rights and obligations may be differentiated, should be rejected.⁵⁵ Seropositive status should therefore be excluded as a criterion for recruitment. That said, it would be permissible to offer to active employees a test in order to assess what protective equipment a person will need to wear. Seropositive status is a matter of sensitive personal data which can be discussed in confidence with the employer’s doctor but must not be available to the employer or line manager.

18. Labor law and social security law should be amended to guarantee people’s income, so that it can be made a legal requirement and promoted as a cultural adaptation that nobody will go to school or to work or use public transport with the slightest symptoms of a respiratory infection. Wearing a mask should be only a secondary solution. In all instances of a quarantine or of staying at home because of any respiratory infection

⁴⁸ *ibid.* <https://tinyurl.com/yxodps3b>. (accessed 23.9.2020)

⁴⁹ ICCPR Article 9 and General Comment No. 35.

⁵⁰ ICCPR Article 17 and General Comment No. 16, Johannes Abeler, et al., *COVID-19 contact tracing and data protection can go together*, 8 JMIR MHEALTH AND UHEALTH (2020).

⁵¹ Allison Gardner, *Contact-tracing apps: there’s no evidence they’re helping stop COVID-19*, THE CONVERSATION, 2020, october 21st.

⁵² Hannah Ritchie, et al., *Our World in Data: Statistics and Research Coronavirus (COVID-19)* (2020), <https://ourworldindata.org/covid-exemplar-germany>.

⁵³ *Privacy and the Irish government’s COVID Tracker App*, Irish government(2020), available at <https://covidtracker.gov.ie/privacy-and-data>.

⁵⁴ *Koronavilkku the Finnish COVID Tracking app*, Finnish Institute for Health and Welfare(2020), available at <https://koronavilkku.fi/en/>.

⁵⁵ ICCPR Article 26 and General Comment No. 18, ICESCR Article 7 and General Comment No. 23, *The looming disaster of immunity passports and digital identity*, PRIVACY INTERNATIONAL, 2020.

symptoms, the law must secure a salary or adequate social security benefit and prohibit dismissal because of such absence.⁵⁶ During the first half of 2020, many countries provided some form of income support to citizens under lockdowns and quarantines,⁵⁷ but many job retention schemes only benefit those in regularized employment, excluding the precariously employed and the underemployed, not to mention irregular workers. Direct money transfers as used in for instance Japan, the United States, and Serbia, are a heavy drain on the economy without necessarily reaching the people most in need.⁵⁸ Similarly, measures against the virus may isolate irregular workers from their employers. Italy experienced this when the agricultural sector found itself without access to its workforce, necessitating an unprecedented regularization of irregular workers.⁵⁹

19. Means of transport must be made safe. An analogy can be sought from the nuisance, architectural changes, technology, and money put into making air travel safe against the threat of terrorism. In all means of public transport (buses, trains, boats, airplanes etc.), physical distancing must be systematically secured between passengers, attention must be paid to contagion risk because of air-conditioning or airflows, and any queueing and other congestion before departure and upon arrival must be eliminated. Travel time may become longer, and airline prices may rise, which are parts of the process of cultural adaptation. If cruise ships cannot be made safe, the world may need to be without them. In early August 2020 multiple clusters of contagion emerged in relation to cruise ships in Norway, including the famous coast cruise Hurtigruten.⁶⁰ In response, a regulation was issued to cap the number of passengers at one hundred.⁶¹

20. Travel bans based on country of nationality or departure, or the closing of borders, are usually not human-rights-compliant measures. It is a danger also to public health to promote the populist myth that the foreigner is the carrier of the virus. SARS-CoV-2 will remain dormant in many societies, and therefore any clusters of contagion need to be found early. Instead of travel bans and restrictions, countries should facilitate general but primarily voluntary testing before or during travel or upon arrival, and provide easy access to a second test after an optimal number of days. Any mandatory tests must be administered by health professionals in compliance with medical ethics which requires individual assessment of the person having either contracted the virus or been exposed to contagion. Non-discriminatory individual quarantine orders based on objective medical criteria, including concerning the likelihood of the person having been exposed to contagion, are compatible with human rights. Advance information about these measures will de facto reduce travel without impeding it. Actual measures by governments have been very different and uncoordinated.⁶² Human rights considerations have usually played a very small role in designing the measures.

3. *Conclusion: the choice between populism and human rights*

The unprecedented and still accumulating experience of the COVID-19 pandemic demonstrates the urgent need for human-rights-based strategies for pandemics. There cannot be a single human rights strategy for all countries and all epidemics, simply because of differences between viruses, rates and means of contagion, probability of population immunity, the proportion of infections resulting in death or permanent disability, the impact on national health services, and availability of vaccination and medication. SARS-CoV-2 is a ‘perfect storm’ of a virus with a combination of natural characteristics that resulted in a global pandemic and a death toll that within its first nine months exceeded a million persons.

It is, however, also readily evident that several of the policies enacted by incumbent politicians and rhetoric furthered by certain opposition politicians, are in direct non-compliance with international human rights law and best practice. In terms of rhetoric, U.S. president Trump was quick to insist calling COVID-19

⁵⁶ ICCPR Article 26 and General Comment No. 18, ICESCR Articles 6, 7 and 9 and General Comments Nos. 18, 19 and 23.

⁵⁷ Hannah Ritchie, et al., *Our World in Data: Statistics and Research Coronavirus (COVID-19)* (2020), at <https://ourworldindata.org/grapher/income-support-covid?time=2020-09-20>.

⁵⁸ *Supporting livelihoods during the COVID-19 crisis: Closing the gaps in safety nets* (OECD: Organization for Economic Cooperation and Development) (2020).

⁵⁹ Gaia Testore, *Italian government adopts targeted regularisation for migrant workers*, EUROPEAN WEBSITE ON INTEGRATION: MIGRANT INTEGRATION INFORMATION AND GOOD PRACTICES, 18.5.2020.

⁶⁰ *Sjøfartsdirektoratets Rapport fra Revisjon av Sikkerhetsstyringssystemet* (Sjøfartsdirektoratet) (2020).

⁶¹ Endr. i covid-19-forskriften, 2020-1182 (Helse- og omsorgsdepartementet 03.08.2020).

⁶² Ritchie et al: <https://ourworldindata.org/grapher/international-travel-covid?time=2020-07-31>.

the ‘Chinese virus’, sparking a surge in Sinophobia, discrimination, and hate crimes against people of Asian descent.⁶³ Similarly, the leader of the right-wing populist Lega in Italy, Matteo Salvini, quickly and falsely linked the spreading of COVID-19 with the disembarkation of boat refugees in Italian harbours.⁶⁴ Although the government led by Giuseppe Conte did not take part in the same inflammatory rhetoric, it did bow under pressure by closing Italian harbours to disembarkation of refugees rescued at sea, declaring that Italy was no longer a Place of Safety in accordance with the UN Convention on the Law of the Sea.⁶⁵

In terms of anti-expert sentiments, Donald Trump was particularly vocal, ignoring or suppressing expert advice, denouncing recommendations from the World Health Organization and preposterously suggesting the injections of bleach as a cure for COVID-19.⁶⁶ He also was particularly ready to question potential results of elections taking place during the pandemic, but he was not alone in using this crisis to meddle with the democratic process. The Polish presidential election was thus contentious for taking place with short deadlines and strict rules for participation whilst much of Europe was under lockdown, which disenfranchised much of Poland’s PIS-critical diaspora. In other places elections have been postponed. In Hungary, the Enabling Act has put it into the hands of the prime minister to decide when, if ever, it will be safe to conduct new elections.⁶⁷ The International Foundation for Electoral Systems found that 111 elections worldwide were postponed due to COVID-19. While certainly not all of these are delayed for sinister purposes, a pandemic increases risks especially in less established democracies.

Experiences in different parts of the world with human rights-based responses to COVID-19 will be a major contribution with lasting impact towards global preparedness for new epidemics and pandemics. The pathogens will be different, and the set of measures that meet the requirements of being both effective and human-rights-conforming will be different. But the role of the normative framework of international human rights law should be the same, and therefore some or many of the elements of adequate human rights strategies adopted during, or in the aftermath of, COVID-19 will be essential in combating future pandemics.

Similarly, the pandemic has also shown how incompetently populists and authoritarians are likely to react to real crises, whether opportunistically extending emergency powers like Hungary’s Victor Orbán or by first downplaying the crisis like Jair Bolsonaro of Brazil or Donald Trump in the United States and then, as the situation gets worse, redirecting public funding earmarked for anti-pandemic measures into favourite private corporations.⁶⁸ The benefit of contrasting populist-authoritarian political choices with the human rights-based approach, where human rights are continuously present on both sides of the equation, and where all human rights matter, when carefully considering each step to take, is that such an analysis makes it obvious that populist-authoritarian regimes are not in compliance with international law and best practice. Nor is it in any way effective in combatting COVID-19. Their disregard for international rules and norms is in turn easily recognizable as the populists’ trademark disdain for accountability.

⁶³ Suyin Haynes, *As coronavirus spreads, so does xenophobia and anti-Asian racism*, TIME.COM (2020).

⁶⁴ Dire.it, *Coronavirus, Salvini: “Migranti l’unico problema, il governo ha morti sulla coscienza”*, 2020.

⁶⁵ Decree on Italy as a Place of Safety, No. M/INF/UFGAB/REG/DECRET.LR.0000150.07-04-2020 (Internal Affairs and Health The Ministry of Transport in Concert with the Ministries of Foreign Affairs 2020).

⁶⁶ Rachel Schraer, *Coronavirus: Outcry after Trump suggests injecting disinfectant as treatment*, BBC, 2020 April 24.

⁶⁷ Kriszta Kovács, *Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL (2020).

⁶⁸ Aaron Gregg & Yeganeh Torbati, *Pentagon used taxpayer money meant for masks and swabs to make jet engine parts and body armor*, THE WASHINGTON POST, September 22 2020.

Chapter 2: Methodological considerations when tracking policy responses to COVID-19: A survey of guides and trackers

Helga Molbæk-Steensig

1. Introduction

The COVID-19 pandemic has challenged societies all over the world. Faced with a deadly pandemic most states have enacted measures against the spread of the virus and attempted at least some policies aiming at alleviating the dire social and economic consequences of both the illness and the measures against it. Human rights are a vital framework in this regard and have been addressed as such by several key actors from the beginning.

Addressing the pandemic within the framework of human rights is, however, not as simple as invoking the right to health. Nor is it as simple as counting the interferences with the rights to assembly and freedom of movement. In line with the principle of interdependence and indivisibility of all human rights, the UN Special Rapporteurs declared already in March 2020 that “The COVID-19 crisis cannot be solved with public health and emergency measures only; all other human rights must be addressed too”.⁶⁹ Following this, international organisations, NGOs and researchers have issued numerous recommendations for states on how to handle the COVID-19 pandemic in accordance with human rights. At the latest count, the Office of the High Commissioner for Human Rights (OHCHR) had issued 16 statements and guides on how the pandemic should be handled with regards to different policy areas and vulnerable groups, the WTO had issued more than 40 guides from public information posters to technical and legal guidance for states, the COE and OECD had likewise issued their guides. Not all of these are based in international human rights law, but their advice and the data they are based on, can still be utilised as human rights indicators. Several rights-focused NGOs, such as the Human Rights Watch, Amnesty International, and Privacy International have also been active issuing policy recommendations with basis in one or more human rights. More are likely to follow as the pandemic continues spreading. The introduction of vaccines will be game changing, but initial limited availability, uneven proliferation as well as disinformation and vaccine denial will remain human rights concerns. Some guides are supported by graphically polished trackers, tracking both the virus, including infections, recuperations, and deaths, and policy measures to contain the spread. These trackers may have a use for ascertaining the efficiency of certain measures, though this requires particular methodological vigilance. Another use is to keep track of states where the executive power has used the crisis as an opportunity to cement power and diminish parliamentary or judicial checks. This exercise is, however, also not as simple as assuming good governance on the basis of low mortality numbers, or non-postponement of elections.

We already have access to a complex landscape of indicators both normative and descriptive. What this chapter will attempt, is a to create a meta-guide on how these existing indicators may be utilised for a comprehensive human rights framework for battling COVID-19 as well as the next pandemic. It will be addressing the different leanings or focuses of the guides and trackers in terms of positive and negative obligations for states, utilising the methodological framework of the UN Human Rights Indicators report from 2012⁷⁰ structured for the human rights concerns most prevalent in connection with a global pandemic. The remainder of the chapter will proceed in the following manner: First there will be a section presenting the human rights indicators’ methodology in relation to the basket structure developed in the previous chapter and clarified and quantified by Martin Scheinin in Chapter 3. Hereafter follows an overview of key guides and then a section on the different trackers, and finally some concluding remarks suggesting how to utilise the different indicators.

2. Methodology

The COVID-19 crisis unfolded fast, and especially in the early months, there were a lot of unknowns. First and foremost, the virus was new and there was a knowledge gap in how it spread, how dangerous it was, how

⁶⁹ *Press release*: No exceptions with COVID-19: “Everyone has the right to life-saving interventions”, United Nations Special Procedures of the Human Rights Council. (2020).

⁷⁰ *Human Rights Indicators: A Guide to Measurement and Implementation* (The Office of the United Nations High Commissioner for Human Rights) (2012).

fast it mutated, and who might be particularly vulnerable to it. A lot of these questions have now been answered, but it is still uncertain which long-term effects infections may have, and it is still a puzzle determining exactly what makes some populations more vulnerable to infections than others. There is also continuous economic and behavioural uncertainty, some measures cannot be enforced easily, and will instead rely on populations creating norms to observe them without enforcement. In the longer-term, compliance fatigue, loneliness, and the mental load of constant vigilance and prolonged abstract empathy may reduce the power of these norms and place limits on the types of measures states can enact successfully and without encountering widespread civil disobedience. Even legally we must await court decisions on the legality of certain measures before it can be established confidently which interferences were considered proportional in which jurisdictions. Because of this complex interplay between knowns and unknowns, enforceable and non-enforceable rules and recommendations, we must rely on indicators from several sources to create as complete a picture as possible of states' human rights obligations and the degree to which different policies contribute to or derive from these.

When the UN Office of the High Commissioner for Human Rights in 2012 published its guide to establishing concrete and effective indicators for the progress of, and attacks on various human rights, the reasoning was quite clear; citing Galbraith the report states that "if it is not counted, it tends not to be noticed".⁷¹ This holds true also in connection with human rights adherence during the COVID-19 crisis. States early on kept track of confirmed infections, deaths, and the availability of key resources such as intensive care units (ICUs), and human rights NGOs kept track of interferences with civil and political rights. In this environment the plight of certain vulnerable groups was in danger of unfolding in obscurity, and as such it is not surprising that the OHCHR focused its guides on women and children at risk of domestic violence, the increased risks for incarcerated persons, disabled persons, and disadvantaged minorities. These guides shed light on something that would otherwise be in danger of not being noticed.

The human rights indicators report, primarily geared towards assisting the human rights treaty bodies in their task to assess compliance with respective human rights treaties, sought to set up a methodology for establishing operationally feasible indicators for universal, inalienable, interrelated, interdependent and indivisible human rights. This means simultaneously pursuing a stringent and pragmatic approach. The report creates a framework of different types of rights and indicators to measure adherence to them. The data for these indicators may or may not originally have been produced with human rights in mind, to assess adherence to and promotion of human rights. An initial differentiation is established between structural, process and outcome indicators.⁷² Here structural refers to the adoption and ratification of human rights instruments or of national constitutions or comparable legal frameworks. In the COVID-19 context the structural indicators relate of course to which human rights instruments each state is bound by, but something a bit more fluid such as official acceptance of the authority of the WHO and the adherence to the principle of sharing information about the makeup of different mutations and the spread of the virus within a country could also reasonably be thought of as structural indicators, since without these central structures, it becomes very difficult to tackle human rights concerns in the COVID-19 context at all. Process indicators measure which efforts have been made to respect and promote a human right, whereas outcome indicators assess the results of these efforts as facts on the ground.

Most of the indicators we may be able to review are process indicators. In the context of a global and deadly pandemic, there is an obligation of conduct to limit its interference with human rights. Things that can be counted include the legislation and regulations enacted, the allocation of resources to alleviate economic suffering or inequalities in accessibility of education in a distance learning scenario, or the availability and accessibility of healthcare, information, water and sanitation, and so on. In terms of outcome indicators, it becomes a bit trickier. Standardised testing may reveal whether inequalities in education have exasperated during the crisis, and numbers of deaths from violent attacks in domestic settings may indicate whether vulnerable groups were reached. Many if not all of these indicators however, have a tendency to be available

⁷¹ Id. at, 1.

⁷² Id. at, 35, 110.

only after the fact. An example of this in the COVID-19 context is the excess deaths indicator for which accurate numbers may be delayed for up to 48 months.⁷³

Some outcomes are more difficult to assess than others. In the COVID-19 context the rights to life and health are particularly central and it may be tempting to utilise official numbers of infections⁷⁴ or excess deaths as outcome indicators for these rights. Unfortunately, these are not reliable indicators on their own. In addition to unpredictable measurement errors, in the form of limited testing capabilities and differences in tallying methodologies where states may have a soft-power based motivation to understate death-tolls, the exponential nature of the spread of the virus makes it a particularly erratic and unpredictable indicator. The relatively low overall risk of infection coupled with the role of super spreaders⁷⁵ mean that there is a great deal of chance involved in how far and how fast the virus spreads. The emergence of the British variant known as B.1.1.7⁷⁶ in December 2020, which appeared to be more contagious, increasing R0 by 0.4,⁷⁷ serve as a reminder that SARS-COV-2 is a rapidly mutating virus, as does the alarm caused the Danish Cluster 5 variant in the fall of 2020, although it appears to have been successfully detained. At the time of writing there are already six main strains and hundreds of smaller mutations within each of these. Thus, even if we could clean the death tolls for measurement error, which was attempted with the excess death's analysis,⁷⁸ which still could not take into account the decline in fatal outcomes from the regular flu and decreased traffic, the spread still depends heavily on demographic indicators, such as population density and the age distribution,⁷⁹ and may also be influenced by the specific strain of the virus that has spread. While we may be able to take some variables into account, there may also be hidden factors that vary between countries and can influence the severity and fatality of the disease, among these both blood type,⁸⁰ intensity of ultraviolet light,⁸¹ and the proliferation of an old version of the tuberculosis vaccine have been suggested.⁸² Regardless of whether each of these particular hidden variables turn out to be decisive when replicated,⁸³ they do imply that the use of both official numbers of infected, intubated and fatal cases, as well as excess death tolls, may implicate too many hidden variables and as a result be too uncertain to reasonably utilise them as an outcome indicator on their own. When combined with other indicators, however, excess mortality might act as a proof of a negative outcome predicted by process indicators in specific, localised, and isolated situations, such as over-crowded prisons or other facilities. Despite these caveats, in Chapter 3 Martin Scheinin proposes a prominent place for the general population death toll but contextualised with other indicators when graded by country- and human rights experts. The reasoning is that high mortality rates in the general population after the initial suppression of the virus, should not be considered a mere natural catastrophe. Following the second quarter of 2020 states had more information available on the virus and should therefore have tailored their responses to their specific demographic situations to avoid a second wave. For the reasons mentioned above, chance still plays too large a role to use the death tolls on their own also after July 2020, but contextualisation with process indicators and

⁷³ Charlie Giattino, et al., *Excess mortality during the Coronavirus pandemic (COVID-19)*, University of Oxford(2020), available at <https://ourworldindata.org/excess-mortality-covid>.

⁷⁴ Such as: Ritchie, et al. 2020. or *Worldometer: Coronavirus*, (2020), available at <https://www.worldometers.info/coronavirus/>.

⁷⁵ Fedor Kossakovski, *Interview with Lidia Morawska: Why some people are superspreaders and how the body emits coronavirus*, NATIONAL GEOGRAPHIC, 2020.

⁷⁶ or SARS-CoV-2 VUI 202012/01.

⁷⁷ *Rapid increase of a SARS-CoV-2 variant with multiple spike protein mutations observed in the United Kingdom* (European Centre for Disease Prevention and Control) (20 December 2020).

⁷⁸ Lasse S Vestergaard, et al., *Excess all-cause mortality during the COVID-19 pandemic in Europe—preliminary pooled estimates from the EuroMOMO network 2020. Utilised by the Economist.*, 25 *EUROSURVEILLANCE* (2020).

⁷⁹ Economist, *Why rich countries are so vulnerable to covid-19*, THE ECONOMIST, November 16th. 2020.

⁸⁰ Michael ZietzJason Zucker, Nicholas P Tatonetti, *Associations between blood type and COVID-19 infection, intubation, and death*, 11 *NATURE COMMUNICATIONS* (2020).

⁸¹ Bengt Holmstrom, *The Seasonality of COVID-19* (Princeton University: Bendheim centre for finance 2020).

⁸² J De Vrieze, *Can a century-old TB vaccine steel the immune system against the new coronavirus*, *SCIENCE* (2020); Michael Zietz, et al., *Associations between blood type and COVID-19 infection, intubation, and death*, 11 *NATURE COMMUNICATIONS* (2020); De Vrieze, *SCIENCE*, (2020).

⁸³ The poor situation in Eastern Europe in the fall compared to the spring of 2020 suggests the tuberculosis vaccine may not have been decisive after all. Tamara Popic & Alexandru D Moise, *Coronavirus: why is eastern Europe's second wave so much worse than its first?*, THE CONVERSATION (2020).

discourses furthered by the states as will be done by country experts when launching the assessment model presented in Chapter 3 allows for a, careful, utilisation of these data.

In addition to the differentiation between structural, process and outcome indicators, the indicators report suggests differentiating in the measurement of states' obligations to respect, protect and fulfil, with 'respect' covering what is often referred to in the literature as negative obligations, 'fulfil' covering positive obligations, and 'protect' covering the positive obligation to prevent horizontal (i.e. private actor) violations of human rights.⁸⁴ Abandoning the language of negative/positive obligations in favour of respect, protect and fulfil is useful to reject the notion that ensuring civil and political rights does not place demands on states' resources. While a state may refrain from censoring or direct discrimination without the use of funds, there is a demand for resources in ensuring the accessibility of information both private and public and in protecting against horizontal discrimination. Similarly ensuring the right to assembly and association entails facilitation on the part of the state. Furthermore, rights generally considered to give rise to positive obligations, may also in some cases require the state to refrain from action or to ensure protection from horizontal threats to the rights to health, education, and development. In connection with COVID-19, indicators regarding these types of rights are interlinked. Refraining from enacting stay-at-home orders or mask-wearing requirements may negatively impact the rights to life and health, while at the same time stay-at-home orders may impact different communities and vulnerable groups in disproportionate ways. Depending on the information provided and alleviating policies, the same measure may thus impact several different rights positively or negatively. When keeping in mind the respect, protect and fulfil methodology, the situation is clarified and what appears as a contradiction emerges as simply several obligations which happen to be influenced by the same policies. In analytical terms we move from a situation where we strike a balance between a human right and other reasonable concerns, to one in which human rights are present on both sides of the equation guiding the state not to either issue stay at home orders or not to, but to determine additional measures to increase human rights protection whichever decision is ultimately taken.

Finally, the report highlights cross-cutting rights and norms. These are procedural rights as well as non-discrimination principles. In the COVID-19 context, rule of law principles may also be conceived as cross-cutting rights. The outbreak and spread of SARS-COV-2 was and is an extraordinary event, and many governments have been calling for extraordinary powers to address it, but as the pandemic drags on, the question emerges of how permanent an emergency can be.⁸⁵ Ensuring checks on the executive in times of crisis, facilitation of the continued services of courts, allowing citizens to legally question anti-COVID measures, and facilitating democratic elections and peaceful transitions of power with similar safeguards to those held during non-emergency times are all part of cross-cutting rights and norms the fulfilment of which can be measured with appropriate indicators.

In addition to the framework outlined above the report differentiates between quantitative and qualitative as well as objective and subjective indicators, preferring objective over subjective and quantitative over qualitative, depending on availability, not unlike in the social sciences in general.⁸⁶ We will do the same, with the added detail of preferring singular indicators over composite ones. Composite indicators like the OxCGRT's stringency index are useful for shorthand estimates, but when attempting to determine whether there is adherence to any singular right, they prove more difficult to work with.⁸⁷ Furthermore, compositions may drag in different directions, counting elements together which on their own might point in different directions in terms of fulfilling certain human rights. In practical terms subjective indicators, such as assessments by country experts can fill gaps left by the quantitative indicators.

For purposes of clarity and ease of use, we will rely on four categories of rights which may be tracked in different manners utilising the human rights indicators framework. The first basket concerns itself with rights

⁸⁴ Human Rights Indicators: A Guide to Measurement and Implementation, 12. 2012.

⁸⁵ *Principles to Uphold the Rule of Law and Good Governance in Public Health Emergencies* (Bingham Centre for the Rule of Law) (2020).

⁸⁶ Human Rights Indicators: A Guide to Measurement and Implementation, 18-19. 2012.

⁸⁷ It should be noted here, that OxCGRT has also made their individual measurements in the stringency index available for download, which is highly useful for other researchers. Available here: <https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker> (accessed 4.1.2021)

that must be fulfilled, and which entail substantial positive obligations, to ensure individuals' rights to health, life, security of person, as well as economic and social rights such as the right to adequate standard of living and to education. Many of these rights will be relevant to measure in terms of process indicators, such as whether a state has devoted resources to improve its healthcare system and follows WHO guidelines,⁸⁸ whether it has a programme for supporting livelihoods during lockdowns,⁸⁹ or whether resources have been allocated to support the transition to online teaching. Legislation and regulation can also be process indicators here indicating what the state has done to halt spread of the virus. Outcome indicators are even more useful, measuring the real impact on educational levels, the jobs lost or retained, the number of people living above or below the poverty line before and after the pandemic. States' acquirement of personal protective equipment for healthcare workers is another potential indicator. A worrying indicator that has emerged from the Netherlands, but which may later be replicated in other countries is the fall in cancer diagnoses in 2020, likely not because fewer people have cancer, but because people have delayed visits to healthcare professionals due to restrictions or overwhelmed healthcare systems.⁹⁰

The second basket deals with rights that must be respected, and where the states should, as far as a balanced approach allows, limit the interference with the political and civic rights of their citizens. This basket focuses on rights to personal liberty and freedom of movement, privacy, assembly, expression, religion, and property. Since these deal with limitations on freedom, it makes most sense to measure them in terms of process indicators, what rules have been enacted, with which types of incentives and penalties. It is not useful in this regard to look at for example real changes in movement, for example using mobile phone tracking as Vinceti et al did to measure the adherence to lockdown measures in Italy.⁹¹ The reason why this outcome indicator may not be as relevant for the rights measures in basket 2, is that where social norms take hold to postpone important events, avoid gatherings and limit mobility, this would be a positive outcome rather than a negative one. The existence of rules interfering with human rights is therefore a better indicator for an interference with these types of rights. In fact adherence to the rules may well be an indicator that compliance fatigue has been avoided with good communication and governance, rather than evidence of draconian measures. Determining whether an interference with these rights constitutes a violation is traditionally done with a permissible limitations test reviewing the legality, legitimate aim, proportionality, and necessity of the interference. Outcome indicators from basket 1 may be utilised to inform this test.

The third basket deals with the cross-cutting right to non-discrimination, both direct and indirect and as negative and positive obligations. International organisations have been particularly active in providing guidance to states on this, pointing out the increased risks of infections or other detrimental effects of the COVID-19 crisis to minorities, elderly, young people, migrants and persons with disabilities.⁹² Process indicators illuminating to which degree a state is living up to its obligations in connection with COVID-19 include whether it has enacted positive measures to protect groups which are most at risk of infection. It may also be relevant to ascertain whether the state authorities have abstained from associating the virus with certain groups based on age, ethnicity, or status. This cross-cutting norm also relates to the substantive rights in baskets 1 and 2, and the same outcome indicators may be used to ascertain the adherence to the rights in basket 3. If skill levels fall more among minority youth than among the population in general because of distance learning, or if people in facilities are disproportionately more likely to be infected or less likely to receive treatment when they are, this could be an indicator that these groups have been either forgotten or directly discriminated

⁸⁸ T Hale, et al., *Lockdown rollback checklist: Do countries meet WHO recommendations for rolling back lockdown*, 4 UNIVERSITY OF OXFORD. ACCESSED (2020).

⁸⁹ Supporting livelihoods during the COVID-19 crisis: Closing the gaps in safety nets. 2020.

⁹⁰ Avinash G Dinmohamed, et al., *Fewer cancer diagnoses during the COVID-19 epidemic in the Netherlands*, 21 THE LANCET ONCOLOGY (2020).

⁹¹ Marco Vinceti, et al., *Lockdown timing and efficacy in controlling COVID-19 using mobile phone tracking*, ECLINICALMEDICINE (2020).

⁹² Mijatović, 2020, No exceptions with COVID-19: "Everyone has the right to life-saving interventions", 2020, UNODC, WHO, UNAIDS and OHCHR Joint Statement on Covid-19 In Prisons and other Closed Settings, 2020, Statement by Michelle Bachelet: "Human Rights of older persons in the age of COVID-19 and beyond" with the High Commissioner for Human Rights and the new Independent Expert on the enjoyment of all human rights by older persons, 2020, Covid-19 and the Human Rights of Migrants: Guidance, 2020, Covid-19 and Women's Human Rights: Guidance, 2020, Covid-19 and The Human Rights of LGBTI People, 2020, Covid-19 and the Rights of Persons with Disabilities: Guidance, 2020, Racial Discrimination in the Context of The Covid-19 Crisis, 2020)

against. A key differentiation in this regard is between availability and accessibility.⁹³ Help for people experiencing domestic violence, or support for groups particularly hard hit by the restrictions enacted to limit the spread of the virus, may well be available without being easily accessible to those most in need. Here incidence-based outcome indicators are useful to get a clearer picture.

The fourth and final basket deals with another cross-cutting principle, namely the rule of law, including processual rights. Initially, structural indicators will be useful in ascertaining adherence to this basket. Any measures enacted or emergency powers allocated, must be in accordance with the law and with proper constitutional insurances. Support for and adherence to WHO guidelines will also fall in this category. Process indicators will also be relevant, favouring safeguards enacted in measures and emergency powers both temporal, scope wise, and in terms of ensuring oversight and opportunities for individuals and institutions to challenge measures. Outcome indicators will be relevant for example in terms of whether or by how much length of procedures at the courts are increased due to the extraordinary circumstances, and to what degree key elements in the right to a fair trial, such as equality of arms or assistance by a lawyer is upheld. Ensuring continuation of democratic processes and safety in the holding of elections also fall within this basket.

In the following sections, existing indicators are mapped in accordance with which baskets they may contribute to. The chapter attempts to differentiate between guides and trackers, understood as normative and descriptive instruments, respectively. To some extent however, this division is artificial since as will become clear even descriptive trackers carry some implicit normative assumptions.

3. The guides

One of the most influential but also hotly contested international organisations active in managing the COVID-19 emergency is the World Health Organisation (WHO),⁹⁴ which already in April issued its guidance entitled “Addressing Human Rights as Key to the COVID-19 response”. In terms of recommendations, its main focus was on basket 3, combatting direct and indirect discrimination, stigma, and violence caused or exasperated by the virus or measures against its spread.⁹⁵ Otherwise it furthered mainly utilitarian and epidemiologically informed arguments on the distribution of limited personal protection equipment resources and quarantine measures, but also noted that this necessarily included respect for economic and social rights, since quarantine measures need a full package of these in order to be feasible, and with civil and political rights, since limiting interference with these and the duration of interference, as well as ensuring a proper legal basis, is key for public support. Ultimately the WHO argues that “Not conforming to these safeguards not only runs the risk of a range of human rights violations of the most vulnerable but will also ultimately undermine the larger public health objectives.” In the abstract the WHO guidelines may therefore contribute to all four of our baskets, but it is light on details regarding baskets 1, 2, and 4.

The Council of Europe (COE) guidelines on the other hand, which came out in April 2020 as well, are focused primarily on the Rule of law (basket 4) and the Civil and Political rights (basket 2), though it also makes reference to the prohibition of discrimination and the positive obligations of states to ensure particularly vulnerable groups and those at increased risk of violence in uncertain times.⁹⁶ While the Council of Europe includes only 47 member states, and the understanding of the rights is tied in with the European Convention on Human Rights’ specific formulations, the guidelines are readily applicable in any state concerned with upholding democracy, the rule of law or both in times of emergency. A central point of the COE guidelines is the *sine qua non* nature of legality. Any measure whether adopted through regular or emergency procedures must be in accordance with the rule of law applicable in the affected area. The COE rule of law guidelines also prescribe temporal and material limitations on any emergency powers and the measures enacted. In connection

⁹³ Human Rights Indicators: A Guide to Measurement and Implementation, 40. 2012.

⁹⁴ The WHO has been particularly harshly criticised in the US with key actors arguing that it was too deferential to China and should have done more to alleviate the crisis. Unclear early recommendations concerning masks did not help. In July of this year the contention reached a point where the United States notified the UN of its withdrawal from the WHO which will take place on July 6th 2021, leaving the institution severely underfunded if the country does not retract the notification before that date.

⁹⁵ *Addressing Human Rights as Key to the COVID-19 Response*. (World Health Organization) (2020).

⁹⁶ Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states. 2020.

with the right to life (ECHR article 2) and the prohibition of torture, inhuman and degrading treatment (ECHR article 3), the COE notes the positive obligations of the state, both with regards to the people as a whole and in particular with regards to people who have been deprived of liberty by the state and may therefore find themselves in conditions where physical distancing is difficult or impossible to uphold. In its guidelines, the COE also suggests that the emergency situation, and derogations under ECHR article 15 may create some leeway in terms of timelines under the right to a fair trial (ECHR article 6) but no additional room for manoeuvre concerning the rights to equality of arms or to representation. Furthermore, it focuses on the positive duty of the state to provide accurate and timely information about the pandemic and the guidance on protective measures that citizens should take both under ECHR articles 2 and 3 and under freedom of information (ECHR article 10). In relation to the threat of disinformation, the COE suggests that providing sufficient information from the part of the state and allowing democratic scrutiny and debate on the states' measures should be the first priority, and malicious spreading of disinformation should be tackled only with ex post sanctions.⁹⁷ Concerning the right to privacy (ECHR article 8), the COE acknowledges the potential epidemiological tracking power of new technologies, but also raises concerns about the treatment of personal data in this regard, referring to its 108+ convention from 2018 for the protection of individuals with regard to the processing of personal data.⁹⁸

The UN Office of the High Commissioner for Human Rights (OHCHR) and OECD have a stronger focus on Economic and Social rights (basket 1). The OECD's recommendations are not first and foremost rights-based, but concerning economic and social rights they contain detailed recommendations on ensuring that work protection schemes benefit under- and irregularly employed, protects small and medium businesses and that access to healthcare does not depend on employment.⁹⁹ Meanwhile, the OHCHR is the international organisation with probably the most comprehensive focus on economic and social rights, guiding states to ensure access to housing, healthcare, education, food, water and sanitation as well as protection from economic hardship. It also contains detailed guidance on avoiding direct and indirect discrimination on the basis of ethnicity, minority or indigenous peoples' status, disability, age, gender, or sexuality and alleviating the suffering of vulnerable groups.¹⁰⁰ On the rule of law and civil and political rights on the other hand, its guidance is more sparse.

For our purposes the COVID-19 specific guidance can thus be informed by these official guides, but none of them are complete, so they must be complemented with existing recommendations and human rights law constructed for other purposes.

4. Trackers

Human Rights Watch and Privacy International, two international NGO's have published reports that appear to fall in between guides and trackers, suggesting measures that may be problematic for states to take, and calling out states that have taken them. For Privacy International this is mainly related to the right to privacy, arguing against the suggestion to create immunity passports, and warning privacy concerns in the use of cell phone tracking for quarantine enforcement or contact tracing.¹⁰¹ Human Rights Watch's checklist on the other hand is more comprehensive materially, encompassing both positive and negative obligations of the state to protect against the virus and social impacts of the emergency as well as rule of law obligations, suggesting a propensity towards the positive obligations of states. In terms of tracking, it picks out illustrative examples rather than treating every state's policies, relying mainly on subjective qualitative datapoints in the form of expert assessments. The ongoing work by Grogan and Weinberg under the Reconnect project works in a similar way, it provides a guide on rule of law adherence, along with both legal and pragmatic reasoning, as well as a wider project assessing and tracking the rule of law principles in different countries. The pragmatic

⁹⁷ Id. at, p 5-7.

⁹⁸ Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data, (Council of Europe ed.).

⁹⁹ Supporting livelihoods during the COVID-19 crisis: Closing the gaps in safety nets. 2020; A roadmap for fair and sustainable recovery that people can trust, § C/MIN(2020)9 (OECD Organisation for Economic Co-operation and development ed., 2020).

¹⁰⁰ COVID-19 Guidance: Human Rights at the Heart of the Response, (Office of the High Commissioner for Human Rights, 13 May 2020).

¹⁰¹ *The looming disaster of immunity passports and digital identity*, PRIVACY INTERNATIONAL, 2020.

reasoning for human rights and rule of law adherence are particularly interesting in connection with the assessment made earlier in this chapter that compliance fatigue is an increasing risk in an ongoing pandemic. The Reconnect project thus provides evidence that clarity of communication and strict adherence to legality and proportionality diminish the amount of non-compliance with measures.¹⁰² The Bonavero institute's report from 27 jurisdictions also has a Rule of law focus (basket 4), but includes elements privy to our other baskets as well such as privacy (basket 2), equality (basket 3) and the right to life and health (basket 1).¹⁰³ Another promising tracker based on quantification of country reports is the Lex-Atlas project, which is still under development and proposes tracking a wide range of human rights and rule of law indicators, which might be added to each of our baskets.¹⁰⁴

Trackers unlike guides, do not make direct suggestions concerning which types of measures states can take and which alleviating steps should be included. Most trackers do, however, surreptitiously suggest focus on one or more of our baskets. Some focus on liberty and civil and political rights, suggesting that interferences in freedom rights is generally problematic. This is the case with the IDEA-tracker, which for example in the case of Italy has changed the colour it uses for freedom of religion from a positive green to a problematic yellow with reference to the ban on religious gatherings during the emergency in spring 2020.¹⁰⁵ The same is the case for the COVID-19 Civic Freedom Tracker sponsored by the current UN Special rapporteur for protecting Human Rights while countering terrorism, Fionnuala Ní Aoláin. It tracks impacts on the rights of expression, privacy, and assembly, but has not been updated since August 2020.¹⁰⁶

Other trackers appear to lean towards positive rights enforcement and to some extent favour measures against COVID-19 spread without necessarily considering the impact on freedom rights. This is the case for example for the OxCGRT's Stringency Index which creates a composite score combining measures that interfere with freedom rights (restrictions on gatherings, closing of public transport, schools and workplaces, stay at home orders and restrictions on internal and external movement, contact tracing, and mandatory face coverings) with positive obligations and support for the population (public information campaigns, testing policy and availability).¹⁰⁷ This generally suggests a understanding of measures against the spread of the virus as mostly helpful, also when it interferes with human rights. Others again have different foci. The IMF's Policy response tracker deals with economic responses governments are taking to limit the human and economic impact of the COVID-19 pandemic, whereas the UNICEF tracker deals with how the crisis impacts one vulnerable group in particular, namely children.

5. Concluding remarks

The SARS-COV-2 virus spread globally and put populations all over the world at risk of the COVID-19 illness. Many societies enacted similar measures to reduce the spread, but with varying levels of stringency and consistency. Some societies also enacted alleviating measures to limit the negative impact of the initial interferences with mobility and the right to assembly, but with varying degrees of resources at their disposal and of political will to prioritise vulnerable groups. This makes the COVID-19 a source for potentially the largest comparative law and politics study in recent times. The international community of scholars have been keenly aware of this and have gathered information on a remarkable scale, while institutions, both governmental and non-governmental, have curated this information into trackers and guides. The current issue is thus not lack of information, but an overwhelming avalanche of it. What this paper has aimed to provide is

¹⁰² Alice Donald & Philip Leach, *Human Rights: The Essential Frame of Reference in the Global Response to COVID-19*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL (2020); Nyasha Weinberg & Joelle Grogan, *Effective Pandemic Management Requires the Rule of Law and Good Governance* (2020).

¹⁰³ *A Human Rights and Rule of Law Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 27 Jurisdictions* (Oxford University) (2020).

¹⁰⁴ Jeff King, *Lex-Atlas: Covid-19: A global academic project mapping legal responses to Covid-19.*, University College London(2020), available at <https://lexatlas-c19.org/>.

¹⁰⁵ IDEA, *COVID-19 and Democracy: The Global State of Democracy indices*, International Institute for Democracy and Electoral Assistance (IDEA)(2020), available at <http://www.idea.int/gsod-indices/covid19globalmonitor>.

¹⁰⁶ COVID-19 Civic Freedom Tracker: Keep Civic Space Healthy. 2020.

¹⁰⁷ OxCGRT. 2020.

therefore a guide for navigating what is already out there. By reading trackers and guides as structural, process or outcome indicators useful for assessing a given state's adherence to substantial rights of the socio-economic kind(basket 1) or the civil and political kind (basket 2), to cross-cutting norms and principles of non- and anti-discrimination (basket 3), or to procedural rights within the context of the rule of law(basket 4), the trackers become comparable and complementary rather than dichotomous. Rather than rejecting the IDEA or the Civic Freedom trackers as wrong because their almost exclusive focus on basket 2, we can use them in concert with the OxCGRT tracker, and the rule of law guides and trackers from the COE and the Reconnect project to get a clearer picture of the challenges facing each society and make better recommendations. In the next chapter Martin Scheinin will do exactly this, presenting a generalisable model for determining how to utilise the framework of human rights to address a pandemic, whether COVID-19 or another potential future pandemic or epidemic.

Chapter 3. A proposed model for the human rights assessment of COVID-19 strategies

Martin Scheinin

1. Introducing the model

In Chapter 1 of this Working Paper the two authors jointly presented an outline for a human-rights-based approach to national or other strategies to combat the COVID-19 pandemic. That chapter is a manuscript for a forthcoming book chapter and contains a proposal of a 20-point checklist, based on the known particulars of the SARS-Cov-2 virus and the experiences of countries faced with the epidemic during its first nine months (January to September 2020). While the checklist is primarily tuned for a context where the epidemic is under control at least to some degree, it does not exclude the possibility of such control being lost during one or several phases of rapid exponential growth of the epidemic. In such circumstances one may be faced with a genuine threat to the life of the nation and, as a consequence, emergency powers may legitimately be activated. A human rights checklist is needed also in those times, and human rights law does provide answers also during a state of emergency. That said, we claim that our 20-point checklist is of particular relevance in situations where the first emergency phase has been experienced and a country strives to suppress the epidemic and prevent any new phases of its exponential growth.

In subsequent Chapter 2 Helga Molbæk-Steensig mapped and surveyed existing guides and trackers related to securing or assessing the human rights compatibility of COVID-19 strategies. It provides a background concerning what others have done in this area, and for why what we propose here is novel. Chapter 2 also summarises the 2012 report by the UN Office of the High Commissioner for Human Rights concerning an indicator-based methodology to assist the UN human rights treaty bodies in their task comprehensively to assess whether countries comply with their human rights treaty obligations.

This current Chapter, in turn, will present and explain the proposed strategy assessment model. It provides an analytical and comprehensive framework for marking and grading the respective human rights record of countries when combating COVID-19. It allows for comparisons over time and between countries or regions. The resulting numerical grades (50 to 100, while anything below 50 is graded as a fail or a human rights violation) will serve as a single marker concerning how well a country or region fared when confronted with this particular epidemic. The responsibility of the choices made in constructing the elements of the assessment model, their indicators and weights, rests with me. My co-author Helga Molbæk-Steensig has provided inputs and critical insights into the process but the reader should be aware of the fact that some of the critical remarks she presents in Chapter 2 might also apply to what I am proposing here in Chapter 3. My explanation for possible divergences in opinion is that while Helga ultimately seeks to assess countries' efforts in combating the epidemic, my mindset focuses on the need to identify any human rights violations even after best effort.

Much of the thinking behind the proposed assessment model is based on my earlier work as consortium leader for the multidisciplinary research project SURVEILLE.¹⁰⁸ In that project, funded from the EU Commission's Seventh Framework Program, we assessed a range of surveillance technologies when used in different contextual situations for their capacity to produce better security at acceptable financial cost (efficiency), for resulting moral hazards in society (ethical issues) and for their human rights impact (legal limitations). We built a multidisciplinary model to mark and score the performance of technologies assessed in respect of the

¹⁰⁸ Martin Scheinin & Tom Sorell, *Surveillance: Ethical issues, legal limitations, and efficiency: Synthesis report from WP4, merging the ethics and law analysis and discussing their outcomes*, (2015). SURVEILLE (Surveillance: Ethical Issues, Legal Limitations, and Efficiency) was a Collaborative Project that in 2012-2015 received funding from the European Union's Seventh Framework Programme for research, technological development and demonstration, under grant agreement no. 284725.

three dimensions,¹⁰⁹ and used three separate expert teams to conduct the assessments.¹¹⁰ In a resolution of 29 October 2015, the European Parliament endorsed the methodology we developed in SURVEILLE.¹¹¹

As this Working Paper is being finalized in late December 2020, COVID-19 has been with us for a full year. There are new negative developments but also light at the end of the tunnel, as vaccines are being rolled out for their global administering to populations in the hope of reaching sufficient levels of immunity, so that the virus can be first suppressed and hopefully even eliminated. Before that, during the final months of 2020, the world and in particular Europe and the United States had to encounter exponential and uncontrolled new phases of the epidemic, with death tolls in many countries far exceeding what had been thought of as the emergency phase in the early months of the pandemic. While the earlier peak levels might have appeared to many unprepared nations as a natural catastrophe, what we have witnessed towards the end of the year is a man-made catastrophe and therefore also a human rights failure. Western countries did not fall victim to an uncontrolled ‘second wave’ that came from the outside and hit them badly and unavoidably. Instead, they had failed to take proper action even if they full well knew that the virus remained active within their societies and populations. Decisions may have been driven by wrong reasons, wrong priorities, or they may have been taken by listening to wrong, or at least too few, epistemic communities. A comprehensive and holistic commitment to human rights has not been a lodestar even for generally human rights conscious EU Member States.

To those who think that the assessment model presented in this Chapter is too strict, my response is that as the second half of 2020 demonstrates a grave human rights failure in many parts of the world, a human rights assessment of the strategies that resulted in that failure must be prepared to say so. It is of course true that the demographics of each country greatly affect the likely death toll, so that societies with a large proportion of elderly people, especially when highly urban and with much intergenerational contact, are likely to be hit worse than countries where the population is dispersed and young, or intergenerational contact beyond the nuclear family (of, say, parents below 50 and their children) is infrequent. As these facts were known, or should have been known, early on during the pandemic, each country had a chance and a human rights obligation to develop a COVID-19 strategy that is adjusted to its demographics. While structural preconditions for human rights compliance and policies, as well as programs and efforts actively to promote and protect human rights, matter in human rights assessment, so do outcomes.

Against this backdrop, an effort is made in this Chapter to present an analytical model for assessing the human rights conformity of national or other responses to COVID-19. The model seeks to take into account all human rights and their interdependent and indivisible nature, as well as the coexistence of negative obligations of States not to violate human rights and their positive obligations to protect and fulfil human rights. The model acknowledges and places emphasis on the fact that in decisions about measures against COVID-19, human rights quite often appear on both sides of the equation, most typically as a dilemma between protecting the population’s health and lives, and at the same time not interfering unnecessarily with the exercise of liberties and freedoms, such as freedom of movement or freedom of assembly. When faced with these dilemmas, decision-makers must not turn away from human rights on the basis of their alleged or assumed indeterminacy. Rather, what is needed is more human rights, more human rights arguments, more human rights assessment and even more law. This is what the proposed model seeks to demonstrate.

¹⁰⁹ Surveillance project: *Briefing note: Assessing surveillance technologies: A nuanced approach for determining security benefits against financial costs, moral hazards and impact on fundamental rights* (European Commission) (2015).

¹¹⁰ See in particular SURVEILLE multidisciplinary technology assessments deliverables: Tom Sorell, et al., *SURVEILLE Deliverable 2.6 Matrix of Surveillance Technologies*, SURVEILLE SURVEILLANCE: ETHICAL ISSUES, LEGAL LIMITATIONS, AND EFFICIENCY (2013); Tom Sorell, et al., *Deliverable D2.8 SURVEILLE Paper Assessing Surveillance in the Context of Preventing a Terrorist Act*, SURVEILLE SURVEILLANCE: ETHICAL ISSUES, LEGAL LIMITATIONS, AND EFFICIENCY (2014); Tom Sorell, et al., *SURVEILLE Deliverable D2.9: Consolidated survey of surveillance technologies*, SURVEILLE SURVEILLANCE: ETHICAL ISSUES, LEGAL LIMITATIONS, AND EFFICIENCY (2015); Coen van Gulijk, et al., *SURVEILLE Deliverable 3.8 Report combining results of all effectiveness research*, SURVEILLE SURVEILLANCE: ETHICAL ISSUES, LEGAL LIMITATIONS, AND EFFICIENCY (2014); and P.H.A.J.M. van Gelder, et al., *SURVEILLE Deliverable 3.9 Final report of WP3*, SURVEILLE SURVEILLANCE: ETHICAL ISSUES, LEGAL LIMITATIONS, AND EFFICIENCY (2015). Presenting the results from the efficiency research (all available at <https://surveillance.eu.eu>).

¹¹¹ In paragraph 28 of the resolution, the European Parliament “*Considers that any decision to use surveillance technology should be based on a thorough assessment of necessity and proportionality; welcomes the results of the SURVEILLE research project, which offers a methodology for assessing surveillance technologies taking legal, ethical and technological considerations into account;*” See: European Parliament resolution of 29 October 2015 on the follow-up to the European Parliament resolution of 12 March 2014 on the electronic mass surveillance of EU citizens (European Parliament 2015).

The proposed model will allow for comparisons between countries, or for comparisons across different points of time in respect of one and the same country. But this is not the primary purpose of the model. Rather, it is intended as a practical tool to be relied upon when decisions need to be taken and there nevertheless is hesitation as to which choice is the optimally human-rights-conforming one. The model builds upon work of multidisciplinary nature towards human rights indicators, developed to assist the United Nations human rights treaty bodies in their assessment of countries' compliance with human rights treaties, as was summarized in Chapter 2.

2. Presenting the strategy assessment model in a single table

The proposed model for assessing the human rights conformity of national or other strategies against COVID-19 is presented on the following page in the form of one single table (a matrix). The table consists of four 'baskets' representing different groups or dimensions of human rights, jointly aiming at comprehensive coverage. Each basket has three 'items' that aim at jointly being representative for the respective basket as a whole, and allowing the separate grading of performance in respect of each basket. Failing in respect of any basket is taken as a human rights violation, also resulting in an overall failing grade for the strategy under assessment. If there is no fail (human rights violation) for any of the four baskets, the overall grade will be assigned by calculating the average of the four marks. As an analogy that explains the strict nature of the assessment, reference is made to judgments by the European Court of Human Rights: what ultimately matters for the applicant and for the general public is whether the Court established that the country in question violated human rights. Where, however, none of the four baskets results in a failing grade, a different analogy of Concluding Observations by UN human rights treaty bodies is in place: there will be a combination of 'positive aspects' and 'concerns', sometimes with qualifying adjectives.

Table. Strategy assessment Model¹¹² Model for assessing, marking and grading the human rights compatibility of strategies to combat COVID-19 by countries or other actors			
1. Positive obligations; mainly economic, social & cultural rights	2. Non-interference; mainly civil and political rights	3. Equality and non-discrimination; broadly understood	4. Rule of law
1A. The right to life and the right to health (50%)	2A. Freedom of movement, also as a proxy for general liberty (30%)	3A. Active measures re vulnerable groups including the elderly, persons with disabilities, underprivileged ethnic groups (40%)	4A. Appropriateness of the reliance on emergency powers, if resorted to (30%)
1B. The right to education (25%)	2B. Right to privacy and protection of personal data (30%)	3B. Gender aspects, incl. domestic violence (30%)	4B. Requirement of legal basis (30%)
1C. The right to an adequate standard of living (25%)	2C. Freedom of assembly (also as a proxy for freedom of religion and political rights generally) (40%)	3C. Arbitrariness as discrimination, e.g. as denial of rights or services or as favouritism (30%)	4C. Access to justice (fair trial) and remedies (right to a remedy) (40%)
1D. Grade: sum of 0-100% where <50 is fail (human rights violation)	2D. Grade: sum of 0-100% where <50 is fail (human rights violation)	3D. Grade: sum of 0-100% where <50 is fail (human rights violation)	4D. Grade: sum of 0-100% where <50 is fail (human rights violation)
Overall Grade for human rights compliance of a strategy to combat COVID-19: Average of the four grades unless there is any failing grade. If all four grades are >49, the Overall Grade is their average, i.e. between 50 and 100. If there is a single failing mark, the overall grade is also fail. The outcome will also be expressed verbally as human rights violation (any of the grades <50) / situation of human rights concern (50-59) / human rights compliance (60-69) / best practice of human rights compliance (70-100).			

¹¹² © Martin Scheinin 31.12.2020

3. Explanations to the table

In this section brief explanations are given for each item in the strategy assessment model presented above in the form of a single table. The baskets are numbered from 1 to 4. Each of them contains three items, marked with the letters A to C. This means that for the assessment process there are 12 different aspects of human rights compliance that are to be captured by attributing first 12 marks and ultimately an overall grade to a country's strategic performance. Some of the items in each basket have different weights, reflecting different levels of strategic importance. The actual assessment of a country's performance takes place by giving a numerical value for each aspect of it in the 12 boxes 1A to 4C. To simplify the assessment process and to counter any eventual biases, each item is initially marked on a scale between 0 and 10 by the assessor. The effect of the different weights of the items will be taken into account separately in order to arrive for the final (weighted) mark for each item.

The following row, from 1D to 4D, is then filled in by calculating the sum of the numerical values above in the same column, so for instance 2D is the sum of the final (weighted) marks 2A, 2B and 2C. These sums are thought of as percentages of best possible performance in respect of each basket as a whole. Anything below 50% is treated as a failing grade for the whole basket.

The final row, common for all four baskets, contains the overall grade for a country's strategic human rights performance when combating COVID-19. If any one of the baskets results in a failing grade, also the overall grade is a fail. If all four grades from the baskets are at least 50%, the overall grade is the average of a country's four grades 1D to 4D. The overall grade is also expressed verbally, so that grades 50 to 59 represent a pass with some human rights concerns, grades 60-69 good performance as to human rights compliance, and anything from 70 to 100 represents good or best practice in human rights compliance.

For each item, an indicator or a set of indicators will be used to assist the marking. As the assessment is intended to be comprehensive in respect of all human rights and their different aspects, the selected indicators need to include structure, process and outcome indicators.¹¹³ The proposed indicators used to assign grades for the twelve items are explained below as instructions for marking in respect of the 12 items. Because readily available statistical data that could universally serve as common indicators are difficult to identify, the use of the model is designed as an expert assessment process: an open-ended pool of country experts will perform the marking in order to verify and apply the assessment model. The assessors are advised to keep in mind the quest for comprehensive assessment, by thinking about themselves as individual members of a human rights treaty body, with a task of assessing whether and to what degree the COVID-19 strategy of the country under review represents human rights compliance. In addition to relying on the identified indicators, the assessors are advised to rely on their country expertise and human rights expertise. If an individual assessor does not have the expertise to give marks under all twelve items, they are advised to leave blank the box in question.¹¹⁴

To simplify the assessment process, the assessors will use a single uniform scale from 0 to 10 under each of the twelve items, to assign initial (unweighted) marks. The different weights of the items, as presented below, are taken into account as a separate step of assigning a final (weighted) mark for each item.¹¹⁵

3.1 Basket 1

Item 1A is the only one in the whole model that has been allocated the weight of 50% within a basket. This choice reflects the centrality of *the right to life* in the catalogue of human rights. Basket 1 is about

¹¹³ See, preceding Chapter 2 by Helga Molbæk-Steensig.

¹¹⁴ The marking sheet, including its instructions, is presented as Annex 1 to this Working Paper.

¹¹⁵ The assessment table is presented as Annex 2 to this Working Paper.

the positive obligations of a state to protect human rights, also when faced with a lethal pandemic. The ultimate indicator for a state's compliance with the right to life and the closely associated *right to health* is the death toll of COVID-19. While countries with bad luck, disadvantageous geographical location or an aging population should not be blamed for a human rights failure merely for these factors, by 1 July 2020 every country in the world was nevertheless in a situation where it should have known what measures were needed in order to reduce the death toll of COVID-19 for their territory with its specific demographic makeup. Many countries failed, including in the West, and a human rights assessment should not shy away from concluding so. It is proposed to use as a presumption or rule of thumb the value of eight (8) COVID-19 daily deaths per one million inhabitants as a benchmark, so that if the rolling 7-day average was for longer than one month above that value, the country is given an initial mark of zero under item 1A. Where statistics on COVID-19 deaths are unreliable, excess deaths compared to the seasonal average may be used instead. A constant death toll below one (1) COVID-19 death per million inhabitants throughout the six-month time period will justify the maximum initial mark of 10.¹¹⁶

Item 1A relies heavily on an *outcome indicator*. That said, the assessors are advised to treat the proposed outcome indicator and its benchmarks just identified as a point of departure for their assessment based on country expertise and human rights expertise. *Process indicators* may also be taken into account by the assessor, such as rapid provision of face masks and other personal protective equipment to health care professionals and the population, the upgrading of hospital and ICU capacity for COVID-19 patients while keeping other health services operative, or timely and adequate measures, including testing, to contain the epidemic. The assessor may then adjust the rule-of-thumb-based mark based on the death toll, either upwards or downwards, to arrive at an initial mark between 0 and 10. For the overall assessment, this is then multiplied by 5 as the final mark for item 1A.

Item 1B has the weight of 25 % in basket 1. It addresses the *right to education* and relies on a *process indicator*: official policies and their implementation through regulations or recommendations are assessed for their conformity with upholding the right to education in times of COVID-19. An evidence-based approach of differentiating between age groups depending on their likelihood of transmitting the virus, measures to make in-person teaching safe, such as face masks, ventilation, physical distancing, group size, as well as combining in-person and distance education will all affect the mark. The same goes for special measures to secure education to those with the highest need for it, such as members of underprivileged minorities or persons with disabilities. Doing nothing while the epidemic itself affects schools and other educational institutions will be assessed as poor performance. The assessor assigns an initial mark between 0 and 10, and this is multiplied by 2,5 towards a final mark of maximum 25.

Item 1C also has the weight of 25% in basket 1. It seeks to capture the *right to an adequate standard of living, the right to social security, the right to work and the rights at work* through a single *outcome indicator*, namely the portion of people receiving adequate income support when dismissed or furloughed from work during COVID-19, prevented from going to work because of lockdowns, including irregular and part-time workers, or because of being ill or in quarantine because of COVID-19. Full coverage of all these situations would give a mark of 10 which would then be multiplied by 2,5 for a final mark of 25, thirty percent would give a mark of 3 while fifty percent coverage would give a mark of 5 and so on.

3.2 Basket 2

¹¹⁶ The proposed benchmarks take into account that on a global level the number of daily deaths per million inhabitants remained below 1 for most of the second half of 2020 and only at its peak level reached 1,5. In contrast, the EU average remained under 1 until 1 October but then was between 6 and 8 (but not above 8) from 10 November to the end of 2020. Individual EU countries fared very differently, also when comparing for instance the Netherlands and Belgium, Sweden and Finland, or France and Germany. When faced with a rising death toll, some countries managed to turn the tide rapidly, others not. Mainly on the basis of the experience of EU countries, the proposed scale is: daily (7-day average) death toll between 1 July and 31 December 2020 was for more than one month above 8 = initial mark 0; 7-8 = 1, 6-7 = 2, 5-6 = 4, 4-5 = 6, 3-4 = 7, 2-3 = 8, 1-2 = 9, below 1 = 10.

Item 2A, as all items in basket 2, focuses on civil and political rights, also known as civil liberties. The first item allows assessment of a country's performance in respect of one of these rights, *freedom of movement* which is particularly affected by lockdowns, curfews or less severe restrictions on free movement, including across national borders. The weight of this right in basket 2 is 30% and it is understood as being representative for the degree of liberty generally in times of COVID-19. For all items in basket 2, the marking relies on one single *process indicator*, namely the application of a permissible limitations test. Full compliance with all the requirements of the test gives an initial mark of 10. Restrictions that breach the permissible limitations test¹¹⁷ result in a mark of zero: this is the case for restrictions without a legal basis, or without a legitimate aim, or in breach of the inviolable core of freedom of movement. Restrictions that are problematic in some other respects will allow for the assessor's initial marking on a sliding scale between 0 and 10, namely the quality of the assessment of the requirements of necessity, specificity and proportionality. Whether the measures were evidence-based will be decisive for the marking under these three criteria that will be decisive unless there was a failing mark of zero on one of the three mandatory grounds mentioned earlier. The assessor is instructed to allocate roughly one third of the mark to travel across national borders and two thirds to movement within the country. For instance, closing international borders without a proper legal basis would therefore result in zero points on that aspect but leave a range between 0 and 7 to be allocated on the basis of how the country performed in respect of movement within the country. In-country freedom of movement will primarily be assessed in respect of actual restrictions such as curfews or nationwide or other lockdowns but also making public transport safe, including by requiring the wearing of a face mask, may be taken into account. Under all three items in basket 2, the user should exercise discretion whether a single breach of a mandatory requirement for restrictions results in a mark of zero for the whole item, or whether there were other measures related to the same item where restrictions were introduced properly, so that this justifies offsetting a single failure. For all items in basket 2, the assessor assigns an initial mark between 0 and 10 which is then multiplied by 3 or 4, depending on the weight of the item in the basket.

Item 2B addresses the *right to privacy* and the *right to the protection of personal data* and has the same weight as item 2A, namely 30%. It also applies the same methodology, the permissible limitations test as a *process indicator* where the assessor will allocate a grade between 0 and 10 which will then be multiplied by 3 for the final grade. The assessment will focus on the use of surveillance in times of COVID-19: home searches, identity checks, traditional methods of contagion tracing, new methods of contact-tracing or proximity-alerting apps, the reliance on 'immunity passports' as basis for access to work or premises will all be relevant contexts that will allow for a country-specific assessment of the conformity with the permissible limitations test of any interferences upon privacy or data protection rights. An obligation or recommendation to wear a face mask is not treated as a privacy intrusion when conducting the assessment.

Item 2C is about the right to *freedom of assembly* which is intended as a representative proxy¹¹⁸ also for a wider group of civil or political rights, namely those of *freedom of association, religion and political participation*. When gatherings of people are banned or restricted, also these rights may be adversely affected and this should be taken into account in the assessment. Because it covers a wider range of human rights, this item has the weight of 40% within basket 2. Again, the permissible limitations test is used as a *process indicator* which the assessor will grade on a scale of 0 to 10 which will be multiplied

¹¹⁷ In its recent (2020) General Comment No.37 on freedom of assembly, UN document General comment No. 37, (Human Rights Committee ed., United Nations 2020). the UN Human Rights Committee has presented a comprehensive framework for the assessment of the permissibility of limitations. Amongst authoritative interpretive documents based on human rights treaties it is unique in that it includes both the mandatory requirement of leaving intact the essential core of a human rights (para. 36) and an analytically rigorous formulation of the requirement of proportionality (para. 40). The framework established by the Human Rights Committee is fully compatible with the case law by the European Court of Human Rights but it is more precisely articulated. See, also, Scheinin & Sorell, (2015). pp. 9-14.

¹¹⁸ One important finding from the SURVEILLE project was that the right to privacy if broadly understood (including also the right to the protection of personal data) was shown to be a good proxy for assessing the general human rights impact of surveillance technologies. See Scheinin & Sorell, (2015). pp. 4 and 8.

by 4 for the final mark. As under item 2B, an obligation or recommendation to wear a face mask when people gather is not treated as a human rights intrusion.

3.3 Basket 3

Item 3A as well as basket 3 as a whole address *equality and non-discrimination* in times of COVID-19. The first item has a weight of 40% and assesses special measures in respect of vulnerable groups such as the elderly, persons with disabilities, and underprivileged ethnic groups. The epidemic affects different population segments differently, and for instance lethality increases sharply above a certain age. This simple fact explains a major part of the big differences in death rates in different countries. Also, underprivileged ethnic groups that live in close quarters and often in multi-generational families would be much more vulnerable to the epidemic than some others. However, measures taken to protect for instance the elderly or persons living in nursing homes must also be human-rights-compatible in order to receive a high mark for item 3A. The marking will be based on process indicators (regulations, policies and recommendations issued to protect vulnerable individuals) and outcome indicators (disaggregated data on severe forms of illness or deaths), as available. The assessor uses a scale of 0 to 10 for the initial mark, which is then multiplied by 4 towards a final mark of maximum 40.

Item 3B addresses the gender impacts of COVID-19 and its countermeasures. The item is weighted as 30% within basket 3. Lockdowns and other restrictions upon freedom of movement, as well as many people not going to work or school may have given rise to heightened levels of domestic violence. Hence, special measures are needed to respond to such incidents and to protect the victims who overwhelmingly are women. Again, a combination of process indicators (programs and policies) and outcome indicators (incidence-based data) can be used to assign an initial mark, between 0 and 10 which is then multiplied by 3 towards a final mark of maximum 30.

Item 3C follows the case law by the Human Rights Committee by addressing arbitrariness as discrimination. Even where a comparator receiving different treatment may be impossible to identify, arbitrary denial of a benefit or the consideration of a case should be addressed as a form of discrimination. Here, the user is encouraged to rely on incidence-based data as outcome indicator to assess a possible increase in complaints or cases filed with a range of bodies including ordinary, labour and administrative courts, ombudsperson institutions and the police concerning arbitrary denial or ignorance of a request, or corruption or favouritism. Efforts to attribute blame for COVID-19 to immigrants, asylum-seekers or ethnic minorities by politicians or in the media (scapegoating) may also be taken into account in the assessment. The assessor uses a scale of 0 to 10, which will be multiplied by three for a maximum final mark of 30.

3.4. Basket 4

Item 4A relates to the human rights consequences of the use of emergency powers. This is understood broadly as the declaration or maintaining of a state of emergency provided by either the Constitution or other pre-existing or ad hoc law enacted by Parliament, or by justifying governmental action with a reference to extra-constitutional emergency powers. The maximum initial mark assigned by the assessor is 10, based on the structural indicator of there being no reliance on any emergency powers. Resorting to extra-legal emergency powers or the misuse of existing emergency powers for inappropriate purposes will result in a mark of zero. If lawfully activated emergency powers have been relied upon, the assessor will assign a mark between 0 and 10 on the basis of the adequacy of human rights considerations while resorting to emergency powers. The initial mark is multiplied by 3 to produce the final mark of maximum 30.

Item 4B also carries the weight of 30% within basket 4 that as a whole assesses the rule of law dimension of human rights compliance. Here, the mark is based on the structural indicator of the existence of a legal basis for any governmental measure that has an adverse effect upon human rights. If all measures had a legal basis, the full initial mark of 10 is assigned. If action without legal basis was a recurring

feature, the mark is zero. If there are some instances of failing to identify the legal basis for action that affects human rights, the assessor is invited to assign a grade between 0 and 10 which will then be multiplied by 3 for the final mark.

Item 4C relates to access to justice (including but not limited to the human *right to a fair trial*) and to remedies (reflecting the human *right to a remedy*) and carries the weight of 40% within the rule of law basket. Outcome indicators (incident-based statistics) are to be preferred, and the scale of 0 to 10 is available to the assessor in evaluating to what extent COVID-19 and the measures taken to combat the epidemic had an adverse effect in respect of the human rights at issue. Factors such as whether all or some courts were closed, whether cases were suspended or aborted, whether oversight institutions remained active etc. will affect the mark. The initial mark (0 to 10) is multiplied by 4 towards a final mark of maximum 40, entailing that this item is regarded as the most important for grading purposes within basket 4.

3.5. Use of the model

The proposed model itself does not assume any specific point or period of time for its application. It can be used to assess human rights performance throughout the whole period of the epidemic, i.e. from January 2020 to the date of assessment. Perhaps a more useful assessment of actual strategic responses should relate to a defined period of time starting from a date when one can safely assume that there was sufficient experience and information concerning the virus SARS-CoV-2 and the epidemic COVID-19 to allow for an informed strategic response. It is recommended that the primary use of the model would relate to assessing the human rights performance of individual countries from 1 July to 31 December 2020. If another assessment is then made for, say, the period from 1 January to 30 June 2021, a comparison over time of a country's strategic human rights performance becomes possible. Notably, such comparison would not be about the numbers of new cases of COVID-19 or new deaths as such but about the human rights conformity of the response.

Provided that the same period of time is defined and all countries subject to assessment have by its start went through the first shock of COVID-19, the model allows for comparisons between countries for their strategic human rights performance in the fight against the pandemic.

COVID-19 and action taken to combat the epidemic have given rise to an exceptionally wide range of human rights as being implicated, and also to a very rich variety of different types of human rights obligations of states. The assessment model proposed here seeks comprehensive coverage of all categories of human rights and all types of state obligations under them. The baskets and the items within them intentionally overlap to some degree. The application of the model will demonstrate that very often human rights are on both sides of the equation when assessing a single measure. Therefore, only a comprehensive and holistic understanding of human rights can provide an answer to the question which decision would be optimally compatible with human rights.

As was explained above, the weighted final marks for the three items in each basket will be added to each other, producing the overall grade for a basket. If that grade is below 50, it is taken as a failing grade, i.e., a human rights violation, for that basket and ultimately also for the assessment as a whole. This means that if a country gets a mark of zero for its death toll (item 1A), it is very likely to fail the overall assessment. Abuse of emergency powers (a mark of zero under item 4A) makes it still quite likely that it will fail under basket 4 and hence the whole assessment. Failures in respect of two out of three items in basket 2 concerning any of the three mandatory requirements for any restrictions on civil liberties (legal basis, legitimate aim, respecting the inviolable core) will on its own result in a failing grade for basket 2 and the assessment as a whole.

The rules concerning marking and grading are strict, as they should be when human rights are at issue. The pandemic has created a major challenge to any society and its official institutions. While this is understandable as a simple fact, it does not justify human rights violations. Human rights violations occur even in normal times, and during COVID-19 we can expect more of them. Hence, there is an

expectation that many countries will fail the assessment, and that those countries will be located in all parts of the world. Likewise, there is an expectation that many countries in different parts of the world, rich and poor, will pass the assessment, even if with only a slight margin. The purpose of the exercise is not condemnation but the verification and demonstration of the adverse human rights impact of COVID-19 and any ill-informed countermeasures. Hopefully the greater awareness obtained will then result in the inclusion of human rights expertise in national or other strategies against epidemics, and in their implementation.

4. Illustration and verification

It is assumed that countries that chose a strategy of early suppression and elimination of the epidemic, combined with continuous vigilance in respect of any new outbreaks, will perform best under the model, provided that their measures – even the strictest ones – were chosen and implemented in a human-rights-conforming manner, including by respecting the principle of proportionality. Here, New Zealand comes out as a likely champion. Its geographical location also allowed for choices that would have been much more difficult to make elsewhere.

That said, the performance of many other Western countries such as Germany, Canada, Norway or Finland shows that not only island states had their opportunity to make good decisions. Geographical location may explain why these countries did not choose a consistent elimination strategy but, rather, sought to ‘control’ the epidemic through their measures. At least for most of the duration of the pandemic so far, these countries probably deserve a passing grade. Of concern, and also as an indication of the particularly challenging nature of SARS-CoV-2, is however the fact that in November and December 2020 registered COVID-19 deaths even in Germany rose to a level that might justify a mark of zero for item 1A and would therefore most likely result in a failing grade for basket 1, and therefore also an overall failing grade. Would this mean that Germany’s COVID-19 strategy was compatible with human rights for most of the time but that it failed for a limited period of time in November 2020? Or does one have to accept that as the overall strategy could not prevent a human rights failure in November 2020, the strategy itself was incompatible with human rights? At least in the case of Germany, one feels compelled to arrive at the latter verdict: in November 2020, Germany did not fall victim to a natural catastrophe, and neither to the reckless actions by its neighbours. Germany was all the time a key player in the European Union, and happened also to have its Presidency in the second half of 2020.

The purpose of presenting the strategy assessment model in this EUI Working Paper is to make it available for any interested persons who may want to test it or rely on it. As the two authors of this working paper have in 2020 spent a considerable part of their research time in studying how different countries perform in respect of human rights when combating COVID-19, the understanding and insights gathered has informed the design of the model, including the selection of the four baskets and the three items in each of them. It would nevertheless be premature to present actual grades for various countries here.

Instead, at this stage it is sufficient to present some tentative illustrations or hypotheses of what kind of results the assessment model may produce. Focusing as an example on the time period from 1 July to 31 December 2020, one can expect that countries that had suppressed or even eliminated the epidemic early on, perhaps even through authoritarian means that are problematic in respect of other human rights, may have found it easier to comply with human rights later on. Also, one may expect that island states or countries otherwise relatively isolated in geographical sense would have performed relatively well, but only provided that they have retained effective measures to nip in the bud any recurrence of the virus and done so in compliance with human rights. Further, countries where the average age of the population is young have probably been in a position to perform better in respect of baskets 1 and 3 than countries with an aging population – but again only if they have refrained from violating human rights, including under baskets 2 and 4.

Again, by way of illustration, it appears that Sweden's relaxed approach to the epidemic, seemingly respecting the liberty and human rights of its inhabitants, has been a strategic human rights failure and the country has performed badly in respect of baskets 1 and 3 or at least items 1A and 3A. The other Nordic countries, in contrast, may be expected to get a passing grade, even if the rising death toll in Denmark towards the end of 2020 may cause a fail for basket 1 due to the higher weighting of item 1A.

It appears likely that the United States COVID-19 strategy – or the lack of one – will result in a failing grade also in a human rights assessment. Of the large EU countries, Germany and Italy may deserve credit for their strategic efforts to keep the epidemic under control through necessary and proportionate restrictions on freedom of movement and other liberties. That said, as even they in late October (Italy) or in November (Germany) lost control of the epidemic, the resulting death toll will give rise to some low grades for the period in question, perhaps even a failing grade.

What will follow after the publication of this Working Paper is that the strategy assessment model will be tested through a network of country experts who will conduct the initial marking by applying a uniform scale between 0 and 10 in respect of all 12 items. Here, we will rely on expert assessment by people who are both country experts and experts in respect of human rights law. We seek to rely on persons who have already been selected by other academics for comparable expert assessment tasks in respect of COVID-19, instead of looking for persons who might be assumed to be favourable in respect of the strategy assessment model developed here. The results from these expert assessments will be published in 2021, first as a new EUI Law Department Working Paper. We also welcome volunteers. Therefore, anyone who is interested in joining the open-ended panel of experts that will conduct the assessments, is invited to contact the authors. In the resulting publication, it will be indicated which experts were recruited on the basis of their earlier selection for other tasks, and which ones joined as volunteers.

5. *Will we be prepared for the next pandemic?*

On a global scale COVID-19 has proven to be an unprecedented epidemic, comparable only to the so-called Spanish flu of 1918-1920. As the year 2020 ends and we arrive in January 2021, the death toll is about to reach 2 million persons in a period of 12 months. Many others have been permanently maimed. Epidemiologically, the virus SARS-CoV-2 has created a 'perfect storm': it causes a respiratory tract infection, it is transmitted through aerosols, droplets and surfaces, and it has a relatively high natural rate of reproduction (R_0). It hits different people differently, resulting in long and undetected chains of asymptomatic transmission but also in the occurrence of superspreader individuals and superspreading events where people gather, and it causes a very severe or lethal illness to many, especially but not limited to people over a certain age or with pre-existing vulnerabilities. The societal and specifically human rights challenges have been particularly serious because this epidemic seemingly allows many people to lead their normal lives with a small likelihood of falling seriously ill, while at the same time it constitutes a lethal risk to many of their immediate neighbours. When people do fall seriously ill, to a comparatively high proportion of them the course of the illness is such that it requires hospitalization and lengthy intensive care, potentially resulting in the overwhelming of the health care systems of even the richest countries.

COVID-19 will not be the last global pandemic. There will be other epidemics which will represent a different combination of the same or of different parameters. As the strategy assessment model presented here is based on the particulars of this pandemic, it will not be readily applicable in respect of other pathogens and epidemics. But we claim that the model will be *adaptable* to future situations. The basic design of the model, and probably also the four baskets, may have lasting value, even if the specific items included in the baskets, and their indicators and weights will need to be adjusted. The experience of COVID-19 calls for a change in the governance of epidemics and pandemics: human rights, human rights law, and human rights experts deserve a bigger role than what has been the case. Designing a strategy, and every measure taken when implementing it, requires human rights assessment, not the least

because human rights will be on both sides of the equation, as we have many times stated in this Working Paper.

But before we are there, the proposed model will need to be tested, verified and adjusted through a process relying on qualified experts to apply it in respect of a number of countries.

Annexes

Annex 1: Marking sheet to be used by expert assessors

Human rights assessment of national (or other) COVID-19 strategies

General instructions to the assessor

This template requires the use of a scale between 0 and 10 for twelve different items that jointly are intended to represent the comprehensive scope of all internationally protected human rights and all types of state obligations resulting from them, understood holistically and as interdependent. The assessor is advised to read the presentation of the assessment model, written by Professor Martin Scheinin. Although the assessment process relies on indicators, such as quantitative statistical data, the assessor is advised to keep in mind the quest for comprehensive assessment. The assessor may think about herself as a member of a human rights treaty body, assessing whether the country under review represents best practice (marks 7 to 10), is otherwise in compliance (mark 6), gives rise to concern (mark 5) or is in violation of human rights (marks 0 to 4). In addition to relying on the indicators identified for the assessment, the assessor is advised to rely on her country expertise and her human rights expertise. If the assessor does not have the expertise to give marks under all twelve items, she should leave blank the boxes where she feels so.

The marks given by the assessor in respect of the twelve (or less) items will subsequently be amalgamated into grades under four different ‘baskets’. i.e. aspects of human rights compliance. Each basket includes three of the twelve items. Inside a basket, the items are weighted differently when calculating the grade for the basket and ultimately an overall grade. These calculations are performed separately and need not be provided by the assessor. The assessor should, however, be aware of the fact that while a human rights violation (mark between 0 and 4) under a single item does not yet result in a failing grade, two such assessments within one basket will usually result in a failing grade from that basket and therefore also as the overall grade.

Marking sheet to be used by expert assessors	
Country: <input style="width: 90%;" type="text"/>	Period of time: <input style="width: 90%;" type="text"/>
Basket 1. Positive obligations; mainly economic, social & cultural rights	
Item 1A. The right to life and the right to health	
Mark (0 to 10): <input style="width: 60px;" type="text"/>	
Reasons recorded by assessor: <div style="border: 1px solid black; height: 100px; margin-top: 5px;"></div>	
Item 1B. The right to education	
Mark (0 to 10): <input style="width: 60px;" type="text"/>	
Reasons recorded by assessor: <div style="border: 1px solid black; height: 100px; margin-top: 5px;"></div>	

Item 1C. The right to an adequate standard of living

Mark (0 to 10):

Reasons recorded by assessor:

Basket 2. Non-interference; mainly civil and political rights

Item 2A. Freedom of movement, also as a proxy for general liberty

Mark (0 to 10):

Reasons recorded by assessor:

Item 2B. Right to privacy and protection of personal data

Mark (0 to 10):

Reasons recorded by assessor:

Item 2C. Freedom of assembly (also as a proxy for freedom of religion and political rights)

Mark (0 to 10):

Reasons recorded by assessor:

Basket 3. Equality and non-discrimination; broadly understood
Item 3A. Special measures re vulnerable groups including the elderly, persons with disabilities, underprivileged ethnic groups
Mark (0 to 10): <input type="text"/>
Reasons recorded by assessor:
Item 3B. Gender aspects, incl. domestic violence
Mark (0 to 10): <input type="text"/>
Reasons recorded by assessor:
Item 3C: Arbitrariness as discrimination, e.g. as denial of rights or services or as favouritism
Mark (0 to 10): <input type="text"/>
Reasons recorded by assessor:
Basket 4. Rule of law
Item 4A: Use of emergency powers
Mark (0 to 10): <input type="text"/>
Reasons recorded by assessor:

Item 4B: Requirement of legal basis

Mark (0 to 10):

Reasons recorded by assessor:

Item 4C: Access to justice (fair trial) and remedies (right to a remedy)

Mark (0 to 10):

Reasons recorded by assessor:

Contact information of the assessor

Name:

Affiliation and title (to be used when listing the assessors):

E-mail address:

Additional information about the qualifications of the assessor for the task:

Country: <input type="text"/>		Period of time: <input type="text"/>	
1. Positive obligations; mainly economic, social & cultural rights	2. Non-interference; mainly civil and political rights	3. Equality and non-discrimination; broadly understood	4. Rule of law
1A. The right to life and the right to health Initial mark from assessor: <input type="text"/> x 5 = Final mark:	2A. Freedom of movement, also as a proxy for general liberty Initial mark from assessor: <input type="text"/> x 3 = Final mark:	3A. Active measures re vulnerable groups including the elderly, persons with disabilities, underprivileged ethnic groups Initial mark from assessor: <input type="text"/> x 4 = Final mark:	4A. Appropriateness of the reliance on emergency powers, if resorted to Initial mark from assessor: <input type="text"/> x 3 = Final mark:
1B. The right to education Initial mark from assessor: <input type="text"/> X 2.5 = Final mark:	2B. Right to privacy and protection of personal data Initial mark from assessor: <input type="text"/> x 3 = Final mark:	3B. Gender aspects, incl. domestic violence Initial mark from assessor: <input type="text"/> x 3 = Final mark:	4B. Requirement of legal basis Initial mark from assessor: <input type="text"/> x 3 = Final mark:
1C. The right to an adequate standard of living Initial mark from assessor: <input type="text"/> x 2.5 = Final mark:	2C. Freedom of assembly (also as a proxy for freedom of religion and political rights generally) Initial mark from assessor: <input type="text"/> x 4 = Final mark:	3C. Arbitrariness as discrimination, e.g. as denial of rights or services or as favouritism Initial mark from assessor: <input type="text"/> x 3 = Final mark:	4C. Access to justice (fair trial) and remedies (right to a remedy) Initial mark from assessor: <input type="text"/> x 4 = Final mark:
1D. Grade: sum of 1A to 1C where <50 is fail (human rights violation) Grade: <input type="text"/>	2D. Grade: sum of 2A to 2C where <50 is fail (human rights violation) Grade: <input type="text"/>	3D. Grade: sum of 0-100% where <50 is fail (human rights violation) Grade: <input type="text"/>	4D. Grade: sum of 0-100% where <50 is fail (human rights violation) Grade: <input type="text"/>
Overall Grade for human rights compliance of a strategy to combat COVID-19: Average of the four grades unless any basket results in a failing grade in which case the final grade is also fail. If there are any missing values, the weight of that item shall be eliminated by dividing with the maximum possible mark and multiplying by 100. The outcome expressed verbally is 'human rights violation' (any of the grades <50) / 'situation of human rights concern' (50-59) / 'human rights compliance' (60-69) / 'best practice of human rights compliance' (70-100). Overall Grade: <input type="text"/>			

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