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STATE OF EMERGENCY IN SOUTH AFRICA, MANDATORY COVID-19 VACCINATION AND INTERNATIONAL HUMAN RIGHTS LAW

Summary

Recent events across the globe have again brought the world's attention to the complex interrelationship between States of Emergency and the protection of fundamental human rights. South Africa was the first African country to declare a national state of emergency. As part of its emergency response to the Covid-19 pandemic, South Africa's Health Minister in April 2021 announced the launch of its mass vaccination campaign against Covid-19. Derogation provisions in the International Covenant on Civil and Political Rights allow for States Parties to lawfully suspend human rights guarantees to respond to an emergency "that threatens the life of the nation" To decide on both the presence of such an emergency and the nature and scope of derogations necessary to avert it, authorities have a wide margin of appreciation. Derogation from rights recognized under international human rights law to respond to "a threat to the life of the nation" is, however, not exercised in a legal vacuum. It is authorized by law, and as such, it is subject to several legal principles and standards. An emergency that threatens the life of the nation must imperil fundamental elements of statehood or the survival of the population. No State party has the right to violate citizens' right to life and the right to be free from torture, cruel, inhumane, or degrading treatment, and the right to be free from medical experimentation without free consent. These jus cogens norms are not derogable under any circumstances, even for the stated purpose of safeguarding the life of the nation during a public health emergency.

Keywords: COVID-19, vaccination, human rights, International Covenant on Civil and Political Rights, state of emergency.

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1. INTRODUCTION

In his book *Constitutional Government and Democracy* Carl Friedrich warned that all modern constitutional emergency powers, that fail to conform to any exacting standard of effective limitations upon a temporary concentration of power are liable to be transformed into totalitarian schemes if conditions become favorable to it (Friedrich, 1941). Recent events across the globe have again brought the world's attention to the complex interrelationship between states of emergency and the protection of fundamental human rights.

South Africa was the first African country to declare a national state of disaster only ten days after its first diagnosis of SARS-CoV2 on March 5, 2020. The declaration made in terms of the Disaster Management provided the government with wide-ranging powers to introduce regulations or directions to deal with the pandemic (du Plessis *et al.*, 2022). As part of its emergency response, South Africa's Health Minister on 9 April 2021, announced the launch of its "mass vaccination campaign against COVID-19, intending to inoculate more than 40 million people by February 2022". (Meldrum, Magome, 2021). South Africa's President called the mass vaccination campaign "the most ambitious and extensive in the country's history" (Ramaphosa, 2021). The South African Department of Employment and Labour then gazetted a directive in terms of the Occupational Health & Safety Act relating to vaccination in the workplace, which sets out the steps and processes employers must follow to introduce mandatory vaccination policies in their workplaces. Consequently, "Business for South Africa" issued a call for all employers to introduce vaccine mandates in the workplace, and many major South-African companies such as Anglo American, Aspen, Dis-Chem, Curro, Discovery, ENS Africa, EY, Life Healthcare, Mediclinic, MTN, Multichoice, Old Mutual, Right to Care, Sanlam, Sappi, Standard Bank Discovery, introduced mandatory vaccination policies affecting the lives of millions of South-African citizens (Business for SA, 2021).

International Human Rights Law ("IHRL") and peremptory norms are increasingly important today. Countries are no longer free to do as they like in the domestic sphere but are bound by international law (van Aardt, 2004). Article 2 of the International Covenant on Civil and Political Rights ("ICCPR"), which South Africa ratified without any reservation on March 10, 1999, determines that:

"Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" (UN General Assembly, 1966).

Additionally, South Africa adopted both ICCPR Optional Protocols on November 28, 2002, legally recognizing the United Nations Human Rights Committee (“UNHRC”) to receive and process individual complaints and communications. In terms of the *grundnorm* of international law, *pacta sunt servanda*, the South-African government has legal duty to comply with the ICCPR.

This raises three pertinent questions. Did the declaration of a *justitium* comply with the prescripts of the ICCPR? Can mandatory vaccination that presents a violation of the right to be free from medical experimentation without free and informed consent be legitimately derogated from? Does the fact that non-State actors imposed the mandatory vaccination absolve the State from any legal liability? This article explicates the IHRL rudiments regarding these three critical questions.

2. DID SOUTH-AFRICA’S DECLARATION OF A STATE OF DISASTER COMPLY WITH IHRL?

It has long been observed that one of the main instruments employed by governments to repress and deny the fundamental rights and freedoms of people has been the illegal and unwarranted declaration of a state of emergency (Agamben, 2008).

In his 1923 book *Das Reichsstaatsrecht* Julius Hatschek distinguishes between *objektive Notstandtheorie* according to which every act of State performed in conflict with the law during a state of emergency is illegitimate and, as such, is legally imputable, and a *subjektive Notstandtheorie*, according to which emergency State powers are grounded in a “constitutional or pre-constitutional natural right” of the State, concerning which good faith is sufficient to guarantee immunity (Hatschek, 1923, Agamben, 2008). The Post World War Two IHRL codified the former.

2.1 Article 4 (1) of the International Covenant on Civil and Political Rights

Derogation provisions in IHRL allow State Parties such as South Africa to lawfully suspend human rights guarantees to respond to an emergency “that threatens the life of the nation”. Article 4 (1) of the ICCPR determines that:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law[...]“

The Human Rights Commission (“HRC”) issued General Comments relating to Article 4 in 1981 and 2001, primarily dealing with measures taken in response to a public emergency and does not discuss in any detail what constitutes, or how to determine, a crisis that threatens the life of a nation (Human Rights Commission 1981, 1985). The Comments *inter alia* determine that “Not every catastrophe qualifies as a public emergency which threatens the life of the nation” and that States “should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances”. In April 2020, the United Nations Office of the High Commissioner of Human Rights (“OHCHR”) released a Statement entitled “Emergency Measure and Covid-19 Guidance” that also did not define the criteria of a “threat to the life of a nation” but did highlight that:

“Emergency powers should be used within the parameters provided by international human rights law, particularly the International Covenant on Civil and Political Rights (ICCPR), [...] Such powers should be time-bound and only exercised on a temporary basis with the aim to restore a state of normalcy as soon as possible.”

“The suspension or derogation of certain civil and political rights is only allowed under specific situations of emergency that ‘threaten the life of the nation’. Some safeguards must be put in place including the respect of some fundamental rights that cannot be suspended under any circumstance” (Office of the High Commissioner Human Rights, 2020).

Through the General Comments, the HRC and the OHCHR recognizes the sovereign right of the State to determine the existence of an emergency allowing for Article 4 to be invoked. IHRL also leaves the initial determination of an emergency to the State by only requiring that the state “carefully considers” the justification behind a derogation. Derogation provisions further recognize the principal obligations of the State as the protector of society and that in extraordinary situations, certain human rights guarantees need to be suspended within defined limits while still meeting core human rights obligations (Burchill, 2005). The critical question that needs to be addressed is whether the threat posed by Covid-19 ever constituted an emergency that threatened the life of the South-African nation?

3. STATES HAVE A MARGIN OF APPRECIATION

In determining whether a genuine public emergency exists, the ICCPR permits derogation only when exigent circumstances pose a demonstrable and objectively verifiable threat to the life of the nation. Because the ICCPR does not

define key terms such as life of the nation, national authorities and international tribunals are forced to exercise judgment in determining whether a particular emergency qualifies as an “emergency threatening the life of the nation” (Burchill, 2005, Cridle, 2014).

To decide on both the presence of such an emergency and the nature and scope of derogations necessary to avert it, authorities have a wide margin of appreciation. However, governments do not enjoy unlimited power but are subject to international human rights law (Cridle, 2014).

The margin of appreciation is the discretion left to a particular state to implement its preventative protection program how it sees fit. For this delegation of authority to operate effectively, governments must adhere to international human rights norms and standards. Deference to State derogations is not warranted if circumstances indicate that national authorities abuse emergency powers for political and financial exploitation.

Under the margin of appreciation standard, the burden lies on governments to rationalize and justify emergency declarations during *ex post facto* judicial review (Burchill, 2005, Cridle, 2014). The absence of such a “reasoned justification” would be sufficient ground for making a determination that IHRL has been breached (*Murray v. United Kingdom*, 1991; *Brannigan and McBride v. The United Kingdom*, 1993).

4. WHEN DOES AN EMERGENCY THREATEN THE LIFE OF THE NATION?

After six years of study by a special subcommittee and two additional years of revision by the full Committee on the Enforcement of Human Rights Law, the 61st Conference of the International Law Association (ILA), held in Paris from August 26 to September 1, 1984, approved by consensus a set of minimum standards governing the declaration and administration of states of emergency that “threaten the life of a nation”. The ILA’s Paris Minimum Standards define a public emergency as:

“An exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the State is composed” (Lillich, 1985; Lawless v Ireland, 1961).

An authoritative interpretation of the derogation provisions under the IC-CPR has also been provided in the American Association for the International Commission of Jurists (AAICJ) Siracusa Principles (International Commission of Jurists, 1984). The Siracusa Principles determines that:

“A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State; and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant” (International Commission of Jurists, 1984).

In terms of IHRL, a public emergency threatening the life of a nation must therefore contain the following key characteristics: it must be actual or imminent; its effects must involve the whole nation; the continuance of the organized life of the community must be threatened; the crisis or danger must be exceptional in that the standard measures for the maintenance of public safety, health, and order, are plainly inadequate (The Greek case, 1969; Mariniello, 2019).

The criteria stress the extraordinary nature of a public emergency as being a situation where ‘normality’ is undoubtedly impossible, and the ordinary day-to-day life of society cannot be followed.

Derogation from rights recognized under international law “to respond to ‘a threat to the life of the nation’ is not exercised in a legal vacuum. It is authorized by law, and as such, it is subject to several legal principles” and standards. A proclamation of a public emergency should be made in good faith based upon an objective assessment of the actual situation to determine to what extent, if any, it poses “a threat to the nation’s life” (International Commission of Jurists, 1984).

5. DID THE THREAT FROM COVID-19 MEET THE CRITERIA OF AN EMERGENCY “THREATENING THE LIFE OF A NATION”?

An emergency that threatens the nation’s life must imperil fundamental elements of statehood or the survival of the population (Fitzpatrick, J. 1994). A public health emergency that does not meet the criteria set out in (a) to (d) above would not constitute a legitimate threat to the life of the nation, and any human rights infringing public health measures instituted pursuant to such a public health emergency would be unlawful in terms of IHRL (Criddle, 2014).

5.1. Was the threat from Covid-19 actual or imminent?

By mid-2020, it became evident to objective data-analyst that the predictive modeling and limited data initially used by many governments around the globe to justify their emergency regulations, which *inter alia* comprised models that predicted more than 2,000,000 Covid-19-related deaths in the United States, 375,000 in South Africa and 100,000 in Sweden during 2020, were highly speculative, woefully inaccurate and vastly overstated the potential mortality rates and the threat to the life of the nation (Ioannidis, Cripps, Tanner, 2020, Hudson, 2020, Magness, 2020).

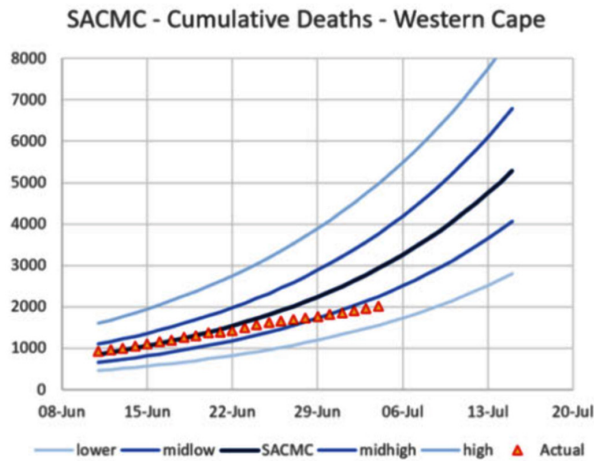


Figure I: South-Africa, Western Cape Region, Prediction v Reality

Source: www.pandata.org

Dr. Ioannidis, the CF Rehnberg Chair in Disease Prevention at Stanford University, in a July 2020 interview, sounded the alarm by pointing out that modelers were “Astronomically Wrong” in Covid-19 Predictions. Ioannidis’s research at the time revealed that “medical data suggest the fatality risk is far lower than earlier estimates had led policymakers to believe” and “is almost 0%. The median fatality rate is roughly 0.25 percent” (Miltimore, 2020).

According to the WHO, by December 31, 2020, 352,225 or less than 0.15% of Americans out of a population of 331,515,730 had died; as a result of Covid-19 (WHO, 2022). In the UK, the official death toll stood at 72,548 at the end of 2020 out of a population of approximately 66 million citizens (UK Office for National Statistics, 2022). By December 31, 2020, South Africa, with a population of more than 60 million, recorded 28,033 deaths, and Sweden, with a population of 10.4 million, recorded 9,654 deaths (WHO, 2022).

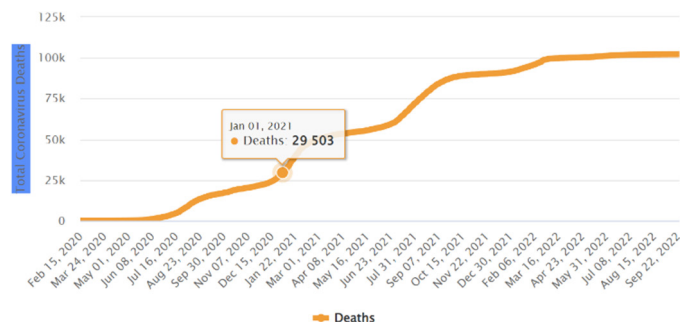


Figure II: Total Corona Deaths in South-Africa (linear scale)

Source: Worldometer (2022)

Numerous states across the globe, including South Africa, used arbitrary increases in the number of positive PCR tests, which amplifies fragments of live or dead virus found in nose and throat swabs, as justification to implement emergency measures. This is problematic from an *ex post facto* objective legal analysis since:

- **The PCR test was never designed to detect pathogens.** The Reverse-Transcriptase Polymerase Chain Reaction (PCR) test is described in the media as the “gold standard” for SARS-CoV-2 diagnosis. However, the Nobel Prize-winning inventor of the process, Kerry Mullis, never intended it to be used as a diagnostic tool for detecting disease (James, 2020).
- **PCR tests have a history of being inaccurate and unreliable.** The PCR tests for Covid-19 produce false-positive results by reacting to DNA material that is not specific to SARS-CoV-2 (Shyu *et al.*, 2020; Li *et al.*, 2020; Lisbon Court of Appeal, 2020; Patrick *et al.*, 2006). The late President of Tanzania, John Magufuli, submitted samples of goat, pawpaw and motor oil for PCR testing, and all came back positive for the virus (Reuters, 2020).
- **The CT values of the PCR are 100% faulty at 35 cycles.** It is widely documented and known that any test using a CT value over 35 is potentially meaningless. This alone invalidates over 90% of the alleged positive Covid-19 cases (Jafaar *et al.*, 2021; Swiss Policy Research, 2021).
- **The WHO Admitted PCR tests produced false positives.** In December 2020, the WHO issued a briefing memo on the PCR process instructing labs to be wary of high CT values causing false-positive results (Knighty, 2020).
- **The Corman Drosten paper that is the root of every Covid-19 PCR test worldwide is questionable** (Corman *et al.*, 2020). Since the paper’s publication, a consortium of over 20 scientists has petitioned for the withdrawal of the paper, detailing ten significant errors in the paper’s methodology (Borger *et al.*, 2020).

- **The CDC admitted that PCR tests “may not indicate the presence of an infectious virus”, yet it was used to do exactly that in the case of Covid-19.** A report by the research charity Collateral Global and academics at Oxford University in February 2022 concluded that as many as one-third of all positive PCR cases might not have been infected with SARS-Cov-2 at all (Macfarlane, 2022).

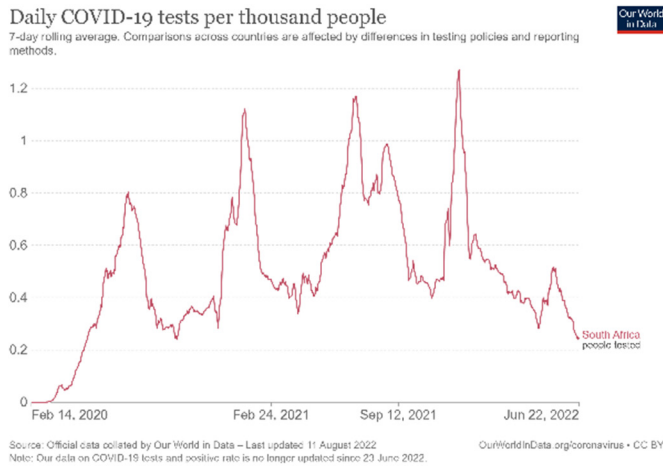


Figure III: Daily COVID-19 tests in South-Africa

Source: Our World in Data

Notably, there was a direct correlation between increased testing and the so-called first, second, third, and fourth “waves” of Covid-19 and renewed and more stringent emergency measures in South Africa (Our World in Data, 2022).

The highly speculative modeling, the significant percentage of asymptomatic Covid-19 infections, and the potential for false-positive tests rendered the positive PCR results and projected death numbers extremely unreliable statistics and most definitely not credible to justify a legitimate state of emergency.

Finding: The threat from Covid-19 was neither actual nor imminent concerning the scale and severity used as justification to enact a state of disaster.

5.2. Did the threat of COVID-19 involve the whole population?

After some initial uncertainty regarding the crude mortality rate of Covid-19 and its impact on different sections of the population, it soon became apparent that Covid-19 only poses a threat to a tiny segment of the population that falls in one of the vulnerable categories.

Infection fatality rates for Covid-19 depend heavily on age and underlying health conditions. By August 2020, it was evident that the absolute risk of Covid-19 was extremely low for people younger than 65 years of age. In a peer-reviewed study published in *Science Direct* in September 2020, Dr. John Ioannidis noted that “People <65 years old have very small risks of COVID-19 death even in pandemic epicenters and deaths for people <65 years without underlying predisposing conditions are remarkably uncommon. Strategies focusing specifically on protecting high-risk elderly individuals should be considered in managing the pandemic” [Ioannidis *et al.*, 2020].

Country	Case Fatality	Crude Mortality
United States of America	1.6%	0.22%
United Kingdom	1.5%	0.21%
South Africa	0.28%*	0.15%
Ethiopia	1.8%	0.005%
Sweden	1.3%	0.14%
France	1.6%	0.17%
India	1.3%	0.03%
Brazil	2.8%	0.28%

Table I: Case Fatality and Crude Mortality Rate of South-Africa

Source: Johns Hopkins University (Johns Hopkins, 2021, Ikalafeng *et al.*, 2022*)

As of February 2021, the global infection fatality rate (“IFR”) was approximately 0.15% with 1.5–2.0 billion infections (Ioannidis, 2021).

Finding: The threat from Covid-19 did not involve the whole population.

5.3. Was the continuance of the organized life of the South-African community threatened by Covid-19?

The threat from Covid-19, as conceived by numerous governments around the globe related to a threat of overwhelming the capacity of hospital intensive care units (Tessier, Stavrakis, 2020). The main argument to defend emergency measures was that “flattening the curve” would have prevented a rapid influx of cases and protect healthcare systems from collapse. However, most healthcare systems were nowhere near the projected collapse. Both the South-African director-general of the Department of Health and the head of South Africa’s Medical Association confirmed in 2020 and 2021, respectively, that the country’s hospitals were not being overwhelmed, despite a massive spike in Covid cases (Gerber, 2020, BBC News a, 2021). What was feared was a very limited and restricted “potential ICU Capacity crisis” rather than an emergency threatening the continuance of all elements of the organized life of the community (BBC News b, 2021; Sisak, 2020).

To meet this threshold, the threat to the organized life of the community should be so severe and impact the day-to-day life of society in such a way that normality is no longer possible (Fitzpatrick, J., 1994). This is a very high threshold as it means that ordinary law and government institutions are no longer effective in controlling society as a whole (Burchill, 2005). This was never the case with Covid-19. In most countries across the globe, including South Africa, Covid-19 caused significantly fewer deaths than other diseases in prior years. Compare for instance the 28,033 Covid-19 deaths in 2020 with the 75,302 parasitic disease deaths in 2018.

No.	Main groups of underlying causes of death (based on ICD-10)	Number	Percentage
3	Diseases of the circulatory system (I00-I99)	85 656	18,9
9	Certain infectious and parasitic diseases (A00-B99)	75 302	16,6
7	Symptoms and signs not elsewhere classified (R00-R99)	61 222	13,5
8	External causes of morbidity and mortality (V01-Y98)	54 160	11,9
1	Neoplasms (C00-D48)	45 086	9,9
14	Diseases of the respiratory system (J00-J99)	41 237	9,1
19	Endocrine, nutritional and metabolic diseases (E00-E90)	32 832	7,2
6	Diseases of the digestive system (K00-K93)	11 619	2,6
17	Diseases of the genitourinary system (N00-N99)	9 954	2,2
10	Diseases of the nervous system (G00-G99)	9 875	2,2
18	Diseases of the blood and immune mechanism (D50-D89)	9 643	2,1
12	Certain conditions originating in the perinatal period (P00-P96)	7 747	1,7
2	Mental and behavioural disorders (F00-F99)	2 764	0,6
15	Congenital malformations (Q00-Q99)	2 746	0,6
5	Diseases of the musculoskeletal system etc. (M00-M99)	2 052	0,5
16	Diseases of the skin and subcutaneous tissue (L00-L99)	1 453	0,3
13	Pregnancy, childbirth and puerperium (O00-O99)	560	0,1
11	Diseases of the ear and mastoid process (H60-H95)	59	0,0
4	Diseases of the eye and adnexa (H00-H59)	47	0,0
Total		454 014	100

including deaths due to MDR-TB and XDR-TB

Table II: South-African Distribution of deaths by main causes of death, 2018

Source: Department of Statistics South Africa

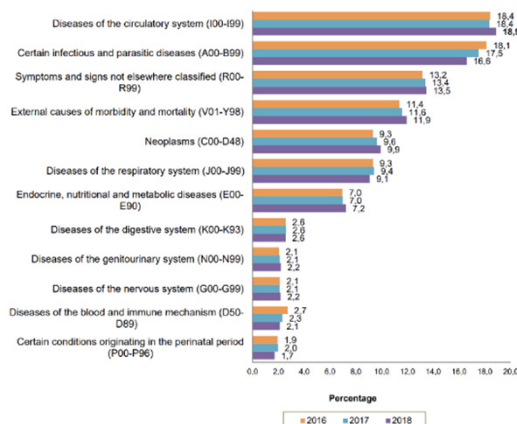


Figure IV: Percentage distribution of deaths by main groups of causes of death, 2016–2018*

Source: Department of Statistics South Africa

The fact that numerous other diseases caused significantly higher deaths than Covid-19 was evident globally. The following graph shows the worldwide Covid-19 deaths as of March 31, 2021, compared to all-cause deaths in earlier years.

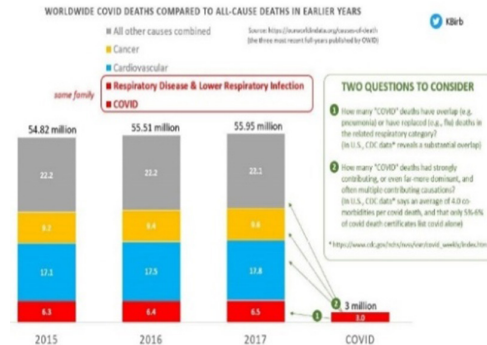


Figure V: Worldwide deaths compared to all cause deaths in earlier years

Source: Department of Statistics South Africa

It is evident that numerous other causes of death, such as cancer, cardiovascular disease, and other respiratory diseases, had a significantly more cumbersome impact on society than Covid-19. Yet, these did not trigger any emergency measures.

Finding: The continuance of the organized life of the community was not threatened by Covid-19!

5.4. Was Covid-19 crisis exceptional in that normal measures for public health and safety are plainly inadequate?

It is almost impossible to contemplate a rationale “reason of State” (*raison d’etat*) that a disease with a country specific infection fatality rate of 0.28% present such an extraordinary crisis that normal measures for public health and safety are plainly inadequate. Numerous typical measures could have been implemented to address the Covid-19 health threat, such as:

- cheap and effective prophylactics and early treatment protocols (Alam *et al.*, 2020; Million *et al.*, 2020; Morgenstern *et al.*, 2021; C19 Protocols, 2022);
- a protect the vulnerable approach (Kuldorf *et al.*, 2020);
- augmentation of the ICU Capacity by allocating resources to field hospitals (Tessier, Stavakis, 2020);
- the Swedish approach (Salo, 2020);
- the Natural Herd Immunity Approach (Alexander 2021).

In September 2021, Uttar Pradesh, India's most populous State with 230 million people, was nearly Covid-19-free following the proactive use of Ivermectin, included in home health care kits (Trialsite Staff, 2021).

Finding: Covid-19 do not represent such an extraordinary crisis that normal measures for public health and safety were plainly inadequate.

6. CAN MANDATORY VACCINATION THAT PRESENT A VIOLATION OF THE RIGHT TO BE FREE FROM MEDICAL EXPERIMENTATION WITHOUT FREE AND INFORMED CONSENT EVER BE LAWFUL IN TERMS OF IHRL?

The m-RNA vaccines are new experimental biotechnology with unknown long-term real-world consequences; m-RNA has never been licensed for use in humans before Covid-19 (van Aardt, 2022a). Until the end of August 2021, all Covid-19 vaccines were merely EUA-authorized, not approved, or licensed. EUA products are by definition experimental, which requires people to be given the right to refuse them in terms of Federal law, Title 21 USC § 360bbb-3(e)(1)(A)(ii) (I-III) of the Federal Food, Drug, and Cosmetic Act (van Aardt, 2021). Despite the fact that the FDA approved Comirnaty at the end of August 2021 and Spikevax at the end of January 2022, medium and long-term safety and efficacy have not been proven in any Covid-19 vaccine (US Department of Health and Human Sciences, 2021). Joan-Ramón Laporte Roselló, an external expert for the European Medicines Agency on pharmacovigilance and an honorary professor at the University of Barcelona, during February 2022 asserted that mass Covid vaccination is unprecedented “global experiment” (Boralevi, 2022). On May 13, 2022, Dr. Robert Malone, one of the inventors of the m-RNA biotechnology used in the Covid-19 vaccines, read a joint statement representing 17,000 physicians and medical scientists and declared that:

“After two years of scientific research, millions of patients treated, hundreds of clinical trials performed and scientific data shared, [...] the data confirm that the COVID-19 experimental genetic therapy injections must end [...] these products do not prevent infection, replication and transmission [...] the vast majority of COVID infections are in those who have been vaccinated” (Malone *et al.*, 2020).

Covid-19 vaccines are experimental by all scientific, medical, and legal standards (van Aardt, 2022a).

6.1. Article 4 (2) of the International Covenant on Civil and Political Rights

While Article 4(1) of the ICCPR provides that, in a time of public emergency that threatens the life of the nation, State parties may take actions derogating from their duties under the Covenant to the degree strictly required by the pressures of the situation. Article 4(2), however, explicitly determines that “no derogation from article 7 may be made under this provision”.

6.2. Article 7 of the International Covenant on Civil and Political Rights

Article 7 of the ICCPR unambiguously dictates that “no one shall be subjected without his free consent to medical or scientific experimentation”. On April 24, 2020, the UNHRC again reiterated that:

“State parties cannot resort to emergency powers or implement derogating measures that violate obligations under international human rights treaties from which no derogation is allowed. State parties cannot deviate from the non-derogable provisions of the Covenant, such as article 7, or from other rights that are essential for upholding the non-derogable rights, even in times of public emergency” (UN Human Rights Committee, 2020).

Therefore, a person’s right to free consent to medical or scientific experimentation is a non-derogable fundamental human right *jus cogens* that cannot be violated, not even in times of a public health emergency (van Aardt 2022b; Koji 2001).

The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR expressly affirm that:

“No State party shall, even in a time of emergency threatening the life of the nation, derogate from the covenant’s guarantees of the right to life and the right to freedom from torture; from cruel, inhumane, or degrading treatment or punishment, and from medical or scientific experimentation without free consent. These rights are not derogable under any circumstances, even for the stated purpose of safeguarding the life of the nation” (International Commission of Jurist. 1984).

The Siracusa Principles further establish that no State, including those not parties to the Covenant, may suspend or infract, even in times of a public health emergency, the fundamental human right to freedom from medical or scientific experimentation without free consent (International Commission of Jurist, 1984).

The Paris Minimum Standards similarly instruct that, even in circumstances where a *bona fide* declaration of a state of emergency has been announced, the government concerned must refrain from suspending those basic human rights that are regarded as non-derogable under Article 4 of the ICCPR (Lillich, 1985). The Paris Minimum Standards specifically determine that during the period of the existence of a public emergency, the government may not derogate from internationally prescribed rights that are by their own terms “non-suspendable” and not subject to derogation, and they confirm that the fundamental rights and freedoms guaranteed by international law, such as the right to free and informed consent for any medical experiment, shall remain non-derogable even during emergencies (Lillich, 1985).

6.3. *Mandatory Vaccination Demanded by Major South-African Companies (Non-State Actors)*

In terms of the “Doctrine of State Responsibility for Human Rights Abuses Committed by Non-State Actors”, governments cannot sideline their international legal obligations not to derogate the non-derogable right to be free from medical experimentation without free consent (van Aardt, 2004). Governments cannot coerce or allow private institutions such as colleges, schools, private employers, airlines, and others to mandate Covid-19 vaccination for citizens to be able to work and earn a living. The choice between being vaccinated against Covid-19 or not being employed and losing one’s livelihood is, in fact, no choice at all – but the same as mandating a vaccine – directly contravening all relevant *jus gentium* and *jus inter gentes* in relation to the derogation of non-derogable fundamental human rights.

In terms of this obligation, the State party to the Covenant must prevent, investigate, and punish any violation of the fundamental human rights recognized and protected by the Convention, whether committed by State or non-State actors (van Aardt, 2004). Significantly, the duty to ensure protected human rights and freedoms places a positive legal duty on State parties to the Convention to protect individuals from the harmful acts and omissions of not only the State or its representatives but also private institutions (van Aardt, 2004). The general Article 2 ICCPR obligation to ensure (secure) protected human rights consists of four principle State obligations: a duty to prevent, a duty to investigate, a duty to punish, a duty to remedy (van Aardt, 2004).

Jus inter gentes, governments, have an international legal obligation “to take reasonable steps to prevent human rights violations” by public and private actors (van Aardt, 2004). The duty to prevent includes all those means of an

administrative, legal, and political nature that promote the protection of human rights and guarantee that any violations are considered and treated as illegal acts, which must lead to the punishment of those responsible and the legal duty to indemnify the victims for damages (van Aardt 2004).

On April 27, 2020, the OHCHR affirmed that States should take measures to prevent human rights violations and abuses perpetrated by State and non-State actors during a state of emergency. The OHCHR further reminded States that claims of such violations and abuses should be investigated to end the violation, bring offenders to justice, and provide victims with protection and effective remedies (UN Office of the High Commissioner of Human Rights, 2020).

7. CONCLUSION

On April 4, 2022, South Africa ended its national “state of disaster” over the coronavirus pandemic, which was in effect for 750 days and allowed the government to impose some of the most draconian public health restrictions anywhere in the world (Farge, 2020). From the rudimentary analysis set out in this article, it is evident that Covid-19 did not pose a “threat to the life of the South-African nation”, rendering the declaration of the *justitium* unlawful.

The subjectivity inherent in individual states determining what constitutes a threat to the life of the nation has proven disastrous during the Covid-19 crisis as government officials abused emergency powers to the detriment of human rights protection around the globe. Human rights derogation can only be justified as a temporary mechanism for empowering states to protect human rights rather than as a device for enabling national authorities to advance their own interests in a manner that compromises human rights protection (Burchill, 2005).

The position by State parties that Covid-19 represents an actual public emergency threatening the nation does not meet the standards established in IHRL. If a disease with a global infection fatality rate of 0.15% can be used to justify gross violations of fundamental human rights *jus cogens* and obligations *erga omnes*, then the government’s *de facto* have *carte blanche* to completely disregard any and all international human rights obligations with impunity. Sadly, this is precisely what occurred. The Covid-19 crisis has been widely used to justify prevalent and pervasive human rights violations.

In terms of Article 4 (2) of the ICCPR, read with Article 7, it is illegal for any government to make Covid-19 vaccines mandatory or to allow non-State actors such as large corporations to make Covid-19 vaccines mandatory.

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VANREDNO STANJE U JUŽNOJ AFRICI, OBAVEZNA VAKCINACIJA PROTIV COVID-19 I MEĐUNARODNO PRAVO LJUDSKIH PRAVA

Sažetak

Nedavni događaji širom sveta ponovo su skrenuli pažnju sveta na složeni međunarodni odnos između vanrednog stanja i zaštite osnovnih ljudskih prava. Južna Afrika je bila prva afrička država koja je proglasila nacionalno vanredno stanje. Kao deo svog hitnog odgovora na pandemiju kovida 19, ministar zdravlja Južne Afrike je u aprilu 2021. najavio pokretanje kampanje masovne vakcinacije protiv kovida 19. Odredbe o derogaciji u Međunarodnom paktu o građanskim i političkim pravima dozvoljavaju državama članicama da zakonito suspenduju garancije ljudskih prava kako bi odgovorile na hitan slučaj „koji ugrožava život nacije”. Kako bi odlučile o prisutnosti takve vanredne situacije, kao i o prirodi i obimu odstupanja neophodnih da se to spreči, vlasti imaju široku slobodu procene. Međutim, odstupanje od prava priznatih međunarodnim pravom o ljudskim pravima da se odgovori na „pretnju životu nacije” ne sprovodi se u pravnom vakuumu. Određen je zakonom i kao takav podleže nekim pravnim principima i standardima. Vanredno stanje koje pretilo životu nacije mora ugroziti osnovne elemente državnosti ili opstanak stanovništva. Nijedna država članica nema pravo da krši pravo građana na život i pravo na slobodu od mučenja, okrutnog, nehumanog ili ponižavajućeg postupanja, kao i pravo na slobodu od medicinskih eksperimenata bez slobodnog pristanka. Ove jus cogens norme se ne mogu derogirati ni pod kojim okolnostima, čak ni za navedenu svrhu zaštite života nacije tokom situacije ugroženosti javnog zdravlja.

Ključne reči: *kovid 19, vakcinacija, ljudska prava, Međunarodni pakt o građanskim i političkim pravima, vanredno stanje.*

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