

COVID-19 and International Law: The Continuing Importance of International Law Obligations during Public Emergencies

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Abstract

The current COVID-19 pandemic has brought with it a number of growing global concerns, apart from its more apparent impact on human lives, economies and health systems across the world. Particularly concerning is an increase in military response to the pandemic, employed by countries as a means of enforcing lockdown regulations and curbing the spread of the virus. This increase in state power, through countries' armed forces, has seen alarming reports of alleged state abuses during both declared and de facto public emergencies, with alleged abuses ranging from more palpable assaults on human rights to the less obvious. In light of this complexity, this comment reflects on the importance of local responses to COVID-19 in upholding global human rights and humanitarian standards, as a guide to state responses to the pandemic. It does so by highlighting prominent examples from current global affairs, with at least two from South Africa, and extrapolating critical lessons using an international law perspective. The comment aims to serve as a reminder of the importance of human rights in times of crisis, both for South Africa and the world at large.

Keywords: COVID-19; international humanitarian law; public emergencies; South Africa COVID-19; international law obligations; armed force responses; State of Emergency

Introduction*

Our people will be looking to you to give them assurance, not as a force of might but as a force of kindness. They must know that you will be looking after them. Go and support our people. Go and defend our people.¹

So said President Cyril Ramaphosa as he stepped onto Doornkop army base, robed in camouflage, the Commander in Chief tasking his national defence force with an unprecedented mission—prevent the spread of COVID-19. In this comment, and with respect to the President’s comments, we reflect briefly on a global pandemic and the continuing—indeed critical—relevance of international law as a guide to state responses to the virus. In this respect, like international law, this is an international topic, because COVID is an international crisis. But we focus, in at least two examples below, on issues in South Africa, demonstrating the enduring importance of this topic for the country.

The rapidly shifting epicentre of the COVID-19 pandemic has brought with it an overwhelming impact on health systems across the world, with states placing their bets on prevention to limit the blow. In response, a number of states have adopted preventative solutions which included isolation, quarantine, lockdown regulations and notably, to enforce these measures, the deployment of police and military forces.

The militarisation of responses to the pandemic has resounded across the globe, with states having exercised emergency powers, employed war rhetoric and ‘armed’ their military forces in readiness for the attack that threatens their countries’ present and future. Running parallel to the pandemic, however, are alleged state abuses during both declared and de facto public emergencies. It is in the face of this increase in state power, as bestowed upon countries’ armed forces, that the critical topic presents itself—how international law continues to apply and bind the military during times of emergency.

After all, according to McGoldrick: ‘The response of a state to a public emergency is a litmus test of its commitment to the effective implementation of human rights. Experience has shown that such situations are commonly characterised by severe human rights violations, including rights that are known to be non-derogable.’²

* This comment is based on a speech prepared for the UK Foreign and Commonwealth Office seminar, delivered by Max du Plessis, on ‘The Role of the Armed Forces in Upholding International Law Obligations’ March 2021, Kyrgyzstan.

1 Unati Nkanjeni, ‘Ramaphosa on Police & Army as a Force of Kindness, Chancers and Saving Lives’ (*Times Live* 27 March 2020) <<https://www.timeslive.co.za/news/south-africa/2020-03-27-in-quotes--ramaphosa-on-police--army-as-a-force-of-kindness-chancers-and-saving-lives/>> accessed 12 March 2021.

2 Dominic McGoldrick, ‘The Interface between Public Emergency Powers and International Law’ (2004) 2(2) *International Journal of Constitutional Law* 380–429.

Responses to a Global Pandemic and the Role of Armed Forces

Notable examples of alleged state abuses and international responses thereto have emerged from South Africa, Cambodia and Israel. These examples provide critical lessons for the application of international law in the current discourse and will be expanded upon below.

South Africa: Guarding the Guards against Lockdown Brutality

South Africans were appalled in the early days of the lockdown to learn of the death of Collins Khosa, allegedly at the hands of members of the South African National Defence Force (SANDF), who were purporting to enforce lockdown regulations. The tragedy resulted in a High Court case before Fabricius J in the matter of *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others*.³ The case resulted in a stern judicial rebuke for the State and a warning for the police and the army to respect their domestic and international obligations when curbing the spread of COVID-19.

When South Africa's hard lockdown was first imposed in March 2020, it was backed up by the president's declaration that the military would be co-opted to assist in limiting the movement of people by enforcing the command that citizens stay at home.⁴

On the evening of Good Friday, and day fifteen of South Africa's first national lockdown, Collins Khosa was in his home when two uniformed members of the SANDF walked into his yard in Alexandra, allegedly carrying whips.⁵ Seeing an unattended camping chair and a half-full cup of alcohol in the yard, the soldiers apparently accused him and his friend, Thabiso Muvhango, of violating the lockdown imposed on 27 March as part of the measures to curb the spread of the COVID-19.⁶ Khosa's life partner painted a harrowing picture in her affidavit before the court of the hours before Khosa's death.⁷ She describes explicitly the vandalism of Khosa's property by the soldiers (then accompanied by three more SANDF members who were called as backup), the

3 2020 (7) BCLR 816 (GP) (hereinafter the *Khosa* judgment).

4 *ibid* at paras 29 and 30. The President announced that the SANDF would be deployed to assist SAPS to enforce the lock-down Regulations. On 25 March 2020, the President issued President's Minute 78 of 2020 which reads as follows: 'By virtue by the powers vested in me in terms of s201(2)(a) of the Constitution of the Republic of South Africa, 1996, read with s18(1) of the Defence Act (Act 42 of 2002), I hereby authorise the employment of 2820 (15 battalions), support elements and equipment of the SANDF enrolled in terms of ss52 and 53 of the said Defence Act, for service assistance of other State Departments and borderline control. The period of deployment will be from 26 March 2020 until 26 June 2020.' The President signed this minute, and it was co-signed by the appropriate minister of the Cabinet.

5 *ibid* para 34.

6 *ibid*.

7 *ibid*.

physical abuse and humiliation endured by Khosa at the hands of the soldiers and his eventual demise, allegedly as a consequence of the abuse.⁸

In seeking justice for his death, a civil suit was brought against the Minister of Defence, presided over by Fabricius J. It was an urgent case, which highlighted a number of key principles.

First, Fabricius J stressed that the defence force's primary object was to defend and protect the republic, its territorial integrity, and its people in terms of the Constitution.⁹ He went on to emphasise South Africa's international humanitarian obligations¹⁰, particularly in terms of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (hereinafter the Torture Convention).¹¹

He quoted section 4(4) of the Torture Act, which states that, 'no exceptional circumstances, including any state of emergency, may be invoked as a justification for torture [our emphasis].'¹² He further noted, significantly, that Article 12 of the Torture Convention requires South Africa to:

... ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed. This obligation is underpinned by Article 13 which requires South Africa to 'ensure that any individual who alleges that he has been subjected to torture...has a right to complain to, and to have his case promptly and impartially examined by its competent authorities.

Acutely aware of the potential for State brutality during the lockdown period in particular, Fabricius J then referenced the United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials and the United Nations Guidelines on Less-Lethal Weapons Enforcement 2020 as practical guidelines for how different instruments and methods may be used to minimise force.¹³ He unreservedly agreed that it would cost the state little to adopt or adapt to either of these documents as guidelines during the lock-down.¹⁴

His ultimately ordered the South African National Defence Force to instruct their members to act in accordance with the Constitution and the law, including customary

8 *ibid.*

9 *ibid* para 49.

10 *ibid* para 54.

11 The Torture Convention was ratified by South Africa and domesticated through the Prevention and Combatting of Torture of Persons Act 13 of 2013.

12 *ibid* para 55.

13 *ibid* para 124.

14 *ibid.*

international law and international agreements binding on the Republic.¹⁵ The judgment was a warning to the SANDF to adhere to the absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment, and to apply only the minimum force that is reasonable to enforce the law.¹⁶ To ensure that superiors did not escape responsibility, he ordered ministers to warn all members of the SANDF, the SAPS and any Military Police, as well as their entire chains of command, that failure to report, repress and prevent acts of torture or cruel, inhuman or degrading treatment or punishment within five days, will result in individual criminal, civil and/or disciplinary sanctions.¹⁷

A number of key principles arose from this case. The first is that of accountability. For rights to be guaranteed, they must be identified and codified within the legal system and form part of the rule of law, and those exercising public power must, as a matter of law, respect them. One of those protections, as the *Khosa* case confirms, is the duty to not subject members of the public to acts of torture or degrading treatment. This case, has yet again raised the question of who guards the guards? The answer is the judges, and Fabricius J's judgment is a commendable example of a bulwark against lockdown brutality.

The second key principle is that even in times of emergency, certain rights may not be derogated from. The *Khosa* judgment confirms the right to life, and freedom from torture and demonstrated that these rights may not be violated by armed forces under circumstances of an emergency.

Cambodia: Power Grabbing as Another Form of Virus

Another concern during a pandemic is the manner in which states may attempt to usurp additional power under the guise of a response to the virus. Although not acting during a declared public emergency, the Cambodian State attempted to gain a new lever of political control through its de facto exercise of public emergency powers.

According to De Falco, 'Cambodia has, to date, largely avoided the ravages of the ongoing global coronavirus pandemic. It has not, however, managed to avoid ... the "parallel pandemic" of using the spread of the virus as a pretext to enact emergency measures that stifle dissent, side-line political opposition, and consolidate power.'¹⁸

15 *ibid* para 146.

16 *ibid*. Fabricius J further ordered that within five days, pending the outcome of disciplinary proceedings, all members of the SANDF who were present at or adjacent to 3885 Moeketsi Street, Far East Bank, Alexandra, Johannesburg on 10 April 2020, be placed on precautionary suspension, on full pay.

17 *ibid*.

18 Randle De Falco, 'Opportunism, COVID-19, and Cambodia's State of Emergency Law' (*Just Security* 3 August 2020) <<https://www.justsecurity.org/71194/opportunism-covid-19-and-cambodias-state-of-emergency-law/>> accessed 4 March 2021.

Almost immediately after the virus hit the country, Cambodian Prime Minister Hun Sen issued a warning that anyone who spreads ‘fake news’ about the coronavirus would be regarded as a ‘terrorist’.¹⁹ On March 9, two people were arrested for allegedly spreading fake news related to COVID-19 over social media.²⁰ Two days later a third person was arrested, on the same charge. As infection rates increased, Hun Sen announced his intention of declaring a state of emergency.²¹ However, instead of making such a declaration, Hun Sen announced that a new law would be drafted outlining the government’s powers during a state of emergency.²²

Shortly after his announcement of the pending law, a leaked draft of its text was circulated and met with condemnation by United Nations (UN) experts and various human rights and civil society groups.²³ On 17 April 2020, Special Rapporteur for the UN, in response to the situation in Cambodia, strongly reiterated that: ‘emergency measures must be necessary and proportionate to the crisis they seek to address.’²⁴ She urged that a state of emergency, ‘should be guided by human rights principles and should not, under any circumstances, be an excuse to quash dissent or disproportionately and negatively impact any other group.’²⁵

There are lessons to be learnt from the Cambodian experience. The first is that the real virus has given rise to an offshoot—a second political one, namely that of exploiting medical and social emergencies for political ends. Article 4 of the International Covenant on Civil and Political Rights specifically provides that, ‘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* [our emphasis].’

The second is that the world is watching. The UN special rapporteurs and civil rights groups were unmoved by the so-called ‘creeping’ power grab. The UN Human Rights Commission, in its COVID-19 response, stated that: ‘A state of emergency should be guided by human rights principles, including transparency. A state of emergency should not be used for any purpose other than the public necessity for which it is declared, in

19 *ibid.*

20 *ibid.*

21 *ibid.*

22 *ibid.*

23 ‘Cambodia’s State of Emergency Law Endangers Human Rights, Warns UN Expert’ (*United Nations Human Rights Office of the High Commissioner*) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25801&LangID=E>> accessed 4 March 2021.

24 *ibid.*

25 *ibid.*

this case to respond to the COVID-19 pandemic. It should not be used to stifle dissent.
 ...²⁶

Israel: the Discriminatory Distribution of Vaccines and Flouting of Extraterritorial Duties

In February 2021, the Palestinian Authority accused Israel of refusing to allow approximately 2 000 coronavirus vaccine doses destined for Gaza health workers into the blockaded coastal strip.²⁷ The health ministry of the Palestinian Authority, based in the occupied West Bank, had planned to send the Russian Sputnik V doses to Gaza, a separate territory run by Hamas. However, the ministry claimed that Israel had blocked the transfer.²⁸

This demonstrates a gross violation of humanitarian law. While Israel has, to date, achieved the biggest vaccination rate in relation to its population size, the vaccine roll-out plan only covers citizens of Israel, including Israeli settlers living inside the West Bank, and Palestinian residents of Jerusalem. It excludes the nearly five million Palestinians who live in the West Bank and Gaza Strip, under Israeli military occupation.²⁹

Amnesty International has called on Israel, as the occupying power, to honour its obligations under international humanitarian law and human rights law, particularly Article 56 of the Fourth Geneva Convention which includes the duty of maintaining, ‘the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics.’³⁰

Here again, lessons are important. First, the United Nations (UN) unequivocally recognises Israel as the occupying power over both Gaza and the West Bank. This is best exemplified in the UN Security Council in 2004 passing binding Resolution 1544, explicitly ‘[r]eiterating the obligation of Israel, the occupying Power, to abide

26 UN ‘Emergency Measures and COVID-19: Guidance’ United Nations Human Rights Office of the High Commissioner, 27 April 2020) <https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf> accessed 4 March 2021.

27 AFP, ‘Palestinians Accuse Israel of Blocking COVID-19 Vaccines to Gaza’ (*Arab News*, 16 February 2021) <<https://www.arabnews.com/node/1810071/middle-east>> accessed 5 March 2021.

28 *ibid.*

29 ‘Denying COVID-19 Vaccines to Palestinians Exposes Israel’s Institutionalized Discrimination’ (*Amnesty International*, 6 January 2021) <<https://www.amnesty.org/en/latest/news/2021/01/denying-covid19-vaccines-to-palestinians-exposes-israels-institutionalized-discrimination/>> accessed 6 March 2021.

30 *ibid.*

scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.’ As an occupying power, it must abide by its duties and may not use the COVID crisis to discriminate against or dominate people under occupation.

Second, the same principle can be illustrated by way of the duties of extra-territoriality. In this regard Article 2(1) of the International Covenant on Civil and Political Rights³¹ (hereinafter the ICCPR), to which Israel is a party,³² states: ‘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 recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ Thus, the rights to health of the Palestinian people must accordingly be respected because the occupied territories fall within Israel’s asserted military jurisdiction.

In this context, it may be helpful to consider what the UN Human Rights Committee has recently re-emphasised:

... in the face of the COVID-19 pandemic, States parties must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction, and it recognizes that such measures may result in certain circumstances in restrictions on the enjoyment of individual rights guaranteed by the Covenant.³³

In conclusion on Israel’s practices, the Committee urged that:

State parties cannot resort to emergency powers or implement derogating measures in a manner that is discriminatory, or which violates other obligations they have undertaken under international law, including under other international human rights treaties from which no derogation is allowed.³⁴

South Africa—the Potential for Crimes against Humanity in the COVID-context

Turning to South Africa it has now become known that certain South African government officials have been implicated in misappropriating funds dedicated for

31 UNGA Res 2200A (XXI) (16 December 1966) (adopted and opened for signature, ratification and accession, entry into force 23 March 1976) in accordance with Art 49.

32 UN ‘UN Treaty Body Database’ *United Nations Human Rights Treaty Bodies* <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=84&Lang=EN> accessed 12 March 2021.

33 UNCHR Office of the High Commissioner, ‘Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic’ (30 April 2020) <<https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>> accessed 4 March 2021.

34 *ibid.*

protecting health workers who serve to combat COVID.³⁵ This raises questions about the type of legal liability that might ensue, bringing to mind the interplay between international criminal law (ICL) and public health. This is now seriously considered by respected international criminal lawyers.³⁶ In the Covid context, the question is whether ICL could be utilised to expose and hold accountable those who increase the vulnerability of their populations. This would include holding business and other leaders accountable for their public health responses. But so too would those responsible for the large-scale corruption and looting of public health resources in South Africa. These questions are critical and are currently being considered by international lawyers. They include: the application of the doctrine of superior responsibility (a form of liability that punishes the failure of the superior to act) in situations where those in power deliberately fail to take all necessary steps to contain the propagation of a potentially deadly virus, while being fully aware of the consequences. the debate over whether senior party and government officials (again under the doctrine of superior responsibility) can be held responsible for the failure to act against their own rank and file.

South Africa is a member of the Rome Statute of the International Criminal Court (the Rome Statute), which lists a host of serious international crimes. Article 7(1)(k) of the Rome Statute reads: ‘For the purpose of this Statute, “crime against humanity” is an act “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.’ The statute lists a category of such ‘acts’, including murder, rape, torture, committed against a civilian population. The crime includes ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.’ As Scheffer points out, such public health malpractice could rise to the level of a crime against humanity, which is not far-fetched, given the rising death tolls and populations’ health and lives at ever-increasing risk.

The lessons from this are clear. The first is that intentional abuse of official power to profit from the pandemic is an attack on the civil population of South Africa that will compound or cause serious bodily, and mental health injuries. The second is the potential for legal accountability for crimes against humanity under international criminal law. The third is that by observing these crimes through an international criminal law lens, there is hope that accountability still exists. Crimes against humanity must be dealt with under what is known as ‘universal jurisdiction,’ dockets may be filed

35 Max du Plessis op ed, ‘Covid 19 and Crimes against Humanity: South Africa Has Gone Low, it Must Now Aim High’ (*Daily Maverick*, 11 August 2020) <<https://www.dailymaverick.co.za/article/2020-08-11-covid-19-and-crimes-against-humanity-south-africa-has-gone-low-it-must-now-aim-high/>> accessed 12 March 2021.

36 See for example, the piece by US-based scholar, David Scheffer, ‘Is it a Crime to Mishandle a Public Health Response?’ (*Council on Foreign Relations*, 22 April 2020) <<https://www.cfr.org/article/it-crime-mishandle-public-health-response>> accessed 12 March 2021.

in other countries by victims, concerned citizens and NGOs, asking for specialised international criminal law prosecutors to act against perpetrators of these crimes.

Conclusion

Given the unprecedented crisis facing the world, it is important to bear in mind that local responses must meet global standards. The *Khosa* case is an example of the role courts play in scrutinising abuses by the military, highlighting the fact that states' derogations will be closely watched to ensure—as in Cambodia—that the virus cannot be exploited by the powerful to oppress minorities or the opposition. Humanitarian law principles demand that access to vaccines, especially in occupied territories such as Gaza and the West Bank, must be provided without discrimination. International criminal law has the potential to hold accountable leaders and businesses for their responses to public health crises.

All states have a duty to balance their responses to the virus by rational, principled, and rule of law responses. In this regard the Human Rights Committee of the UN has clarified States Parties' obligations when derogating from Covenant provisions during a public emergency, noting that measures must be of 'an exceptional and temporary nature.'³⁷ A number of UN Committees have also called on states to continue the application of these principles during COVID-19, with special concern for displaced and vulnerable persons.³⁸

37 UN 'General Comment No.29 States of Emergency (Article 4)' (United Nations Digital Library, 31 August 2001) <<https://digitallibrary.un.org/record/451555?ln=en>> accessed 4 March 2021.

38 The calls to uphold the rights of women and girls during the current pandemic include: UN CEDAW Office of the High Commissioner 'Call for Joint Action in the Times of the Covid-19 Pandemic' (21 April 2020) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDA.W/STA/9158&Lang=en> accessed 2 March 2021; The UN Committee on Migrant Workers and the UN Special Rapporteur on the human rights of migrants to protect the rights of migrants and their families, irrespective of their migration status, see UNCHR Office of the High Commissioner 'Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants by the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and the UN Special Rapporteur on the human rights of migrants' (26 May 2020) <<https://www.ohchr.org/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf>> accessed 2 March 2021; and the Subcommittee on Prevention of Torture to not derogate from the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in places of deprivation of liberty (such as detention facilities, psychiatric hospitals and closed refugee camps) and even during exceptional circumstances and emergencies that threaten the life of the nation 'Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic' (*ReliefWeb*, 7 April 2020) <<https://reliefweb.int/report/world/advice-subcommittee-prevention-torture-states-parties-and-national-preventive>> accessed 4 March 2021.

In a press release in March 2020, the UN Human Rights Treaty Bodies called for global leaders to ensure and facilitate the protection of human rights when adopting measures to curb the threats of COVID-19.³⁹ That call is for the protection of human rights at all times, and for countries that are not in conflict, to remember that the state's response to the pandemic should be, as President Ramaphosa stressed, to protect and serve, not abuse and oppress.

The International Committee of the Red Cross (ICRC) emphasised the need for states, especially those under occupation, to conform with the applicable rules of international law, including international humanitarian law when taking measures to address the COVID-19 pandemic. This, according to the Committee, includes striking a balance between 'health imperatives, military necessity and humanitarian action.' The ICRC laid down ground rules for the continued application of international humanitarian law, especially in times of armed conflict.⁴⁰ Failure to do so, runs the risk that collective and individual responses to the pandemic could do more harm than good.

39 UNCHR Office of the High Commissioner, 'Human Rights Treaty Bodies Call for Human Rights Approach in Fighting COVID-19' (24 March 2020) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25742&LangID=E>> accessed 5 March 2021.

40 ICRC, 'IHL Rules on Humanitarian Access and Covid-19' (31 March 2020) <<https://www.icrc.org/en/document/covid-19-how-ihl-provides-crucial-safeguards-during-pandemics>> accessed 6 March 2021.

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