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Restrictions on human rights during the time of the pandemic

Speech by Yuval Shany

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Dear judges, colleagues, distinguished guests, friends,

I am grateful to have been invited to discuss with you questions relating to the application of human rights during the time of the pandemic. I sat on the United Nations Human Rights Committee during the first year of the pandemic and was instrumental in drafting its April 2020 statement on states of emergency, which adds to other statements made by the nine other global human rights bodies on the application of human rights during the pandemic. I will focus in my comments on the question of the application of restrictions on the enjoyment of human rights during the pandemic as reflected in the said statements. Lady Arden, who will be speaking after me, will discuss the proverbial “other side of the coin” – that is, positive obligations for States arising out of the pandemic.

There is little question that the COVID-19 pandemic created conditions which could justify restrictions or limitations under human rights instruments. The need to reduce infections has led in many countries to the adoption of restrictions on movement, such as lockdowns, limits on mass gatherings – including religious gatherings and political assemblies – physical distancing, and limited access to certain spaces, including workplaces, schools and hospitals, as well as international travel restrictions. A similar logic has also underlaid other measures with a professed epidemiological rationale, which nonetheless have a serious impact on the ability of individuals to enjoy their basic rights; these include mask mandates, vaccination passports and contact-tracing programmes. Some governments have also invoked the fight against the pandemic as a reason for restrictive measures such as the criminalisation of disinformation or limits on political activity, whose compatibility with international law standards is highly questionable.

All pandemic-related restrictions have to be assessed through the prism of the various limitation and derogation clauses existing under the relevant human rights treaties – often mirroring similar legal restrictions existing under domestic law. These limitation and derogation clauses typically include conditions of legality, legitimacy, necessity and proportionality. Given the gap between, on the one hand, the slow reaction time of the global human rights system – which typically operates in a reactive manner through individual communications that take years to resolve (and involves a high threshold for the issuance of interim measures of protection) or through cycles of State reporting which now tend to average around eight years per State – and, on the other hand, the need to provide urgent guidance to States concerning the implementation of the treaties during the pandemic, all global human rights bodies

have chosen to issue guiding statements. Such statements were issued sometimes alone and sometimes by working collectively across different committees and in cooperation with charter bodies such as special rapporteurs and with other UN officials. A review of these statements provides us with a snapshot of the main issues relating to limitations on rights during the pandemic that occupied the global system in “real time”, and the main normative approaches which the system has adopted.

The Human Rights Committee statement of 24 April 2000¹ dealt with the four aforementioned basic conditions for limiting rights, but within the context of a specific legal question: the invocation of emergency derogations pursuant to Article 4 of the ICCPR, which around twenty States parties formally made. The Committee was concerned, however, that many other States adopted emergency responses that appeared to exceed the scope of permissible limitations under the Covenant, without making explicit derogations – which invite, in turn, international supervision over whether the specific conditions for derogations have been met. These specific conditions include an official proclamation of emergency, notification to the Secretary-General, conformity with other international obligations, non-discrimination, and respect for non-derogable rights – which the Committee has construed so as to include also derogable rights that are essential for upholding non-derogable rights, such as the right of access to court or the right to an effective remedy.

The statement also underscored the objective previously articulated in the Committee’s General Comment No. 29² of “restoration of a state of normalcy where full respect for the Covenant can again be secured”, the need to limit the scope of derogations as far as possible and the need to consider the least harmful alternatives which would allow maximum enjoyment of Covenant rights.

Significantly, the statement also introduced an overarching “least harmful alternative” test – that is, that reliance on derogation should only be attempted when States are unable to simply rely on an available limitation under a relevant provision of the Covenant. In addition, the Committee reiterated the duty to treat all persons – including incarcerated persons – with humanity and respect for human dignity, and called on States to ensure that the discourse about the pandemic did not involve prohibited hate speech against marginalised or vulnerable groups including minorities and foreigners. Finally, the statement underscored the importance of preserving freedom of expression and open civic space as safeguards against abuse of emergency powers.

Other statements, issued by other treaty bodies, include the following.

- A call by the ten Chairs of the treaty bodies for all limitations to be applied within a valid legal framework³.
- Guidelines by the Working Group and Committee on Enforced Disappearance aimed at ensuring that the search for the disappeared remains a human rights priority even in times of pandemic, also stressing the

¹ Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, 24 April 2020, UN Doc. CCPR/C/128/2 (2020).

² Human Rights Committee, General Comment No. 29: U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

³ UN OHCHR Press Release, “UN Human Rights Treaty Bodies Call for Human Rights Approach in Fighting COVID-19”, 24 March 2020, <https://www.ohchr.org/en/press-releases/2020/03/un-human-rights-treaty-bodies-call-human-rights-approach-fighting-covid-19?LangID=E&NewsID=25742>.

need to ensure that limits on access to places of incarceration and changes in the manner of treatment of human remains due to the pandemic do not result in new cases of disappearance⁴.

- A statement by the Committee on the Elimination of Racial Discrimination⁵ underscoring the disparate impact (including domestic and sexual violence) of limitations on movement such as lockdowns on women, girls, persons with disabilities and women belonging to minority and indigenous groups, condemning the racially discriminatory manner in which certain limitations are enforced, and calling specifically for measures to ensure effective access to education in the face of restrictions imposed in the field. This is an issue that is highly relevant in situations involving a digital divide between different population groups within the State. Finally, it called for measures to promote the participation of minority groups in the design and implementation of the response to the pandemic.

- Four statements by the Committee on Economic, Social and Cultural Rights⁶: the **first** statement called for responses based on the best available scientific evidence, for core obligations under the Covenant for Economic, Social, and Cultural Rights to be prioritised, and for access to justice and to effective legal remedies to be ensured. Special attention was devoted in this statement to concerns about profiteering in foodstuffs, access to accurate information, and to the need not to impose limits on the export of medical equipment and on the flow of necessary goods in a manner that would harm the world's neediest populations. The second statement called for the easing of international sanctions and for international debt relief. A third statement by the Committee called for improved access to vaccines and condemned discriminatory limits and priorities in accessing them. It also urged effective action to counter misinformation concerning vaccines and recommended public consultations in setting access priorities. The fourth statement condemned vaccine nationalism and called for intellectual property rights that impede access to medicines and vaccines to be relaxed.

- The guidelines issued by the Committee on the Elimination of Discrimination against Women⁷ focused on the disproportionate impact on women of the restrictive measures adopted, on the need to protect women against gender-based violence during confinement, on equal participation of women in shaping responses to the pandemic and on the need to ensure continuous access by women to education. The Committee also issued a statement⁸ directing attention, *inter alia*, to multiple discrimination due to the impact of restrictive measures in terms of fuelling nationalism, populism and the like, and to the adverse impact of border closures on international solidarity. It also expressed concerns about financial resources being diverted away from gender equality-promoting institutions because of the pandemic.

⁴ Key Guidelines on COVID-19 and Enforced Disappearances, 18 Sept. 2020,

https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/COVID19/Guidelines_COVID-19_and_Enforced_Disappearance.pdf.

⁵ Committee on the Elimination of All Forms of Racial Discrimination, Statement on the coronavirus (COVID-19) pandemic and its implications under the International Convention on the Elimination of All Forms of Racial Discrimination, 7 August 2020, <https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/COVID19/Statement-CERD-COVID-19.docx>.

⁶ Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, 6 April 2020, UN Doc. E/C.12/2020/1; Statement by the Committee on Economic, Social and Cultural Rights, "COVID-19: UN Experts call for international solidarity to alleviate financial burdens of developing countries and the most vulnerable", 7 April 2020, https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/COVID19/COVID-19_Call_for_international_solidarity.docx; Committee on Economic, Social and Cultural Rights, Statement on universal and equitable access to vaccines for COVID-19, 27 Nov. 2020, UN Doc. E/C.12/2020/2 (2020); Committee on Economic, Social and Cultural Rights, Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property, 23 April 2021, UN Doc. E/C.12/2021/1 (2021).

⁷ Committee on the Elimination of All Forms of Discrimination against Women, Guidance Note on CEDAW and COVID-19, 22 April 2020, https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/COVID19/Guidance_Note.docx.

⁸ Statement of the Committee on the Elimination of All Forms of Discrimination against Women, "Call for joint action in the times of the COVID-19 pandemic", 21 April 2020,

https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/COVID19/CEDAW_Call_for_joint_action.doc.

- A joint statement by the UN Committee against Torture and the Subcommittee on the Prevention of Torture, the UN Special Rapporteur on Torture and the Chair of the Board of Trustees of the UN Voluntary Fund for Victims of Torture⁹ drew attention to the vulnerability associated with the situation of persons detained in confined spaces, and expressed concerns about the use of excessive force to enforce curfews.
- The Subcommittee on Prevention of Torture also issued statements¹⁰ calling on States to reduce prison populations, maintain the operation of detention complaint procedures, provide for alternative visiting arrangements in places of detention, refrain from automatically using disciplinary isolation protocols for medical isolation purposes, and treat individuals in quarantine as free agents in all respects other than for enforcing the quarantine itself and regard them as persons deprived of liberty entitled to all fundamental safeguards.
- A statement by the Committee on the Rights of the Child¹¹ drawing attention to the health, education, economic and recreational impacts of extended pandemic-related restrictions, and calling on States to explore creative solutions such as outdoor activities and child-friendly broadcast services, to ensure access to online learning and to strengthen child protection services for children in lockdown. It also called on States to consider releasing children from detention if they could not be visited there, to refrain from detaining children for violating COVID-19 regulations and not to invoke financial difficulties as an impediment to the implementation of the Convention on the Rights of the Child.
- The Committee on Migrant Workers issued three statements¹² in collaboration with a series of other international bodies and officials working on migrants' rights. The first statement called for the implementation of special safeguards when responding to COVID, including by respecting the standards set out in the Convention on the Rights of All Migrant Workers and Members of their Families and by ensuring that emergency measures are necessary, legitimate, proportionate and non-discriminatory, providing virtual access to education to children of migrants, establishing "firewalls" between enforcement of immigration law and access to health and other public services, reducing immigration detention, and considering suspending deportations during the pandemic. The second statement called

⁹ Joint statement issued by the UN Committee against Torture, the UN Subcommittee on Prevention of Torture, the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, and the Board of Trustees of the UN Voluntary Fund for Victims of Torture, "COVID-19 Exacerbates the risk of Ill-Treatment and Torture Worldwide", 26 June 2020, <https://www.ohchr.org/en/statements/2020/06/covid-19-exacerbates-risk-ill-treatment-and-torture-worldwide-un-experts?LangID=E&NewsID=25995>.

¹⁰ UN OHCHR Press Release, UN Torture Prevention Body: "COVID-19 Shows Need to Strengthen National Preventive Mechanisms", 2 July 2020, <https://www.ohchr.org/en/press-releases/2020/07/un-torture-prevention-body-covid-19-shows-need-strengthen-national?LangID=E&NewsID=26031>; Subcommittee on Prevention of Torture, Advice of the Subcommittee to States parties and national preventive mechanisms relating to the coronavirus disease (COVID-19) pandemic, 25 March 2020, UN Doc. CAT/OP/40/2 (2020).

¹¹ Statement of the Committee on the Rights of the Child: "The Committee on the Rights of the Child warns of the grave physical, emotional and psychological effect of the COVID-19 pandemic on children and calls on States to protect the rights of children", 8 April 2020, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/STA/9095&Lang=en.

¹² UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and UN Special Rapporteur on the human rights of migrants, Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants, 26 May 2020, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf>; UN OHCHR Press Release, "COVID-19: Governments must protect the rights of migrants during the pandemic and beyond, UN experts urge", 26 May 2020, <https://www.ohchr.org/en/press-releases/2020/05/covid-19-governments-must-protect-rights-migrants-during-pandemic-and-beyond?LangID=E&NewsID=25904>; UN Committee on Migrant Workers (CMW), UN Special Rapporteur on the human rights of migrants, Office of the United Nations High Commissioner for Human Rights (OHCHR), Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa of the African Commission on Human and Peoples' Rights, Special Representative of the Secretary General on Migration and Refugees of the Council of Europe and Rapporteur on the Rights of Migrants of the Inter-American Commission on Human Rights, Joint Guidance Note on Equitable Access to COVID-19 Vaccines for All Migrants (2020), <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/JointGuidanceNoteCOVID-19-Vaccines-for-Migrants.pdf>; UN OHCHR Press Release, "Stranded migrants need safe and dignified return" – UN Migrant Workers Committee, 1 Oct. 2020, <https://www.ohchr.org/en/press-releases/2020/09/stranded-migrants-need-safe-and-dignified-return-un-migrant-workers?LangID=E&NewsID=26325>.

for the rights of migrants in detention facilities to be protected and for safe and dignified repatriation to be arranged; and the third statement called for equitable access of migrants to vaccines.

- The Committee on the Rights of Persons with Disabilities has also published two statements¹³. One statement (issued with another UN official) called for rapid de-institutionalisation of persons with disabilities and for the inclusion and effective participation of persons with disabilities in the planning of pandemic responses. The second statement endorsed a report by the Office of the High Commissioner for Human Rights calling for specific responses to the pandemic regarding persons with disabilities, in the light of best international practices that include exempting support persons for persons with disabilities from movement restrictions, relaxing confinement rules for persons with disabilities, and releasing prisoners with disabilities.

The upshot of these multiple statements is that global bodies have made only a limited push against the actual need to impose broad restrictions on human rights during the pandemic. However, they have made a stronger push towards establishing side constraints relating to the scope and design of the restrictions adopted, and an even stronger push still towards introducing corrective or harm-reducing measures. Let me address three key aspects that illustrate this general approach.

First, human rights restrictions in times of pandemic are seen by the global bodies as a “necessary evil” – something which governments not only can resort to, but should resort to in order to protect public health and the right to life. So, the question is not whether or not to restrict, but how to restrict and what to restrict. The statements show in this connection a major concern about operating within existing legal frameworks – domestic laws, including emergency laws, and limitation and derogation provisions of international treaties – and preserving access to judicial fora and to legal remedies and maintaining a civic space even during the pandemic. In other words, there is a strong push towards maintaining the rule of law during exceptional times, maintaining judicial control over the measures applied and preserving democratic institutions. In this respect laws, courts and law-enforcement facilities and, more broadly, the civic space where claims are articulated and voiced, are viewed by the treaty bodies as an essential service which cannot be shut down even in the face of a pandemic.

Second, the statements show considerable concern regarding the disparate impacts of pandemic-related measures – a concern about indirect discrimination, that is, that measures which on the face of it apply to everyone equally, affect in particularly harmful ways individuals in situations of vulnerability, including persons who may be subject to multiple or intersectional discrimination such as minority women or children with disabilities. The expertise and focus of the specialised treaty bodies on specific categories of victims – migrants, prisoners, disappeared persons and the like – help them to flesh out these specific harms and to call for mitigating steps and preventive measures such as the participation of women or

¹³ Joint Statement by the Chair of the United Nations Committee on the Rights of Persons with Disabilities, on behalf of the Committee on the Rights of Persons with Disabilities and the Special Envoy of the United Nations Secretary-General on Disability and Accessibility, “Persons with Disabilities and COVID-19”, 1 April 2020, <https://www.ohchr.org/en/statements/2020/04/joint-statement-persons-disabilities-and-covid-19-chair-United-nations-committee?LangID=E&NewsID=25765>; Committee on the Rights of Persons with Disabilities, Statement on COVID-19 and the human rights of persons with disabilities, 9 June 2020, <https://www.ohchr.org/en/news/2020/06/statement-covid-19-and-human-rights-persons-disabilities?LangID=E&NewsID=25942>.

minority groups in the design and implementation of response measures, or the release of persons from immigration detention.

Third, where the statements are relatively short is on the subject of abusive measures involving unnecessary or disproportionate responses to the pandemic, such as bans on political demonstrations, the use of non-voluntary surveillance programmes, the criminalisation of “fake news” and the suspension of parliament on grounds of health concerns. It is expected that such case-specific abuses will be reviewed by global bodies and by the European Court in the coming years. It is regrettable, for instance, that in its recent review of Israel¹⁴, the UN Human Rights Committee did not focus more intently on the use of the Israeli Security Agency (ISA) for contact-tracing or the abrupt closing of the borders, including for Israeli citizens left outside the country – both measures which have been taken in a similar or analogous manner by other governments.

In sum, the pandemic constituted not only a public health challenge and a humanitarian crisis; it was also a challenge to the very resilience of the international (and domestic) human rights framework. Whereas the legal framework seems to have remained applicable and adaptable, the quality of actual monitoring by global bodies – a system facing great difficulties and challenges even in ordinary times – has suffered considerably because of the disruption of treaty body activities in Geneva and the lack of effective alternatives to in-person meetings. Other regional and domestic courts have also confronted real difficulties. Regrettably, we may see, as a result, the human rights harms inflicted by the pandemic crisis for years to come.

Thank you for your attention.

¹⁴ Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Israel, UN Doc. CCPR/C/ISR/CO/5 (2022).