

# LOST, ABANDONED, AND FORGOTTEN: REFUGEE PROTECTION IN THE TIME OF COVID

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## I. INTRODUCTION

The Coronavirus COVID-19 (COVID) is a contagious disease that had its first known case reported in China during December 2019.<sup>1</sup> By March

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2020, the World Health Organization (WHO) had declared that COVID was a pandemic and was rapidly spreading among countries worldwide.<sup>2</sup> Despite extensive research into the health impacts of the disease following the declaration as a pandemic, there is still much that we do not know. The impacts on global society, however, have been much clearer. COVID and the measures implemented by governments to combat its spread have resulted in massive challenges to the global economy and international society, as well as negative economic and social impacts within nearly every country in the world.<sup>3</sup> With that said, one particularly vulnerable group has been hit especially hard by the pandemic: refugees. Many countries have established states of emergency during COVID to block the entry of refugees,<sup>4</sup> but any such suspension must have a sufficient connection to its aim. If the goal is illusory or clearly not being achieved, then the suspension cannot be justified. Furthermore, any suspension must be proportional and adequately balance the harms imposed against the social gains. Finally, any suspension must be undertaken not from the position that states enjoy absolute sovereignty, but that sovereignty is always checked by human rights concerns.

It has been estimated that roughly 39% of the global population lived behind borders closed to non-citizens and non-residents by April 2020.<sup>5</sup> Indeed, the United Nations High Commissioner for Refugees (UNHCR) reported that fifty-seven states had fully closed their borders only one

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1. Marco Cascella et al., *Features, Evaluation, and Treatment of Coronavirus (COVID-19)*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. 1 (June 30, 2022) (originally published through StatPearls).

2. Domenico Cucinotta and Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, 91(1) ACTA BIOMED. 157-160 (Mar. 19, 2020).

3. See Warwick McKibbin & Roshen Fernando, *The Global Macroeconomic Impacts of COVID-19: Seven Scenarios* (Ctr. for Applied Macroeconomic Analysis, Working Paper No. 19, Feb. 29, 2020); N.T. Pramathesh Mishra et al., *Global Impacts of Pre- and Post-COVID-19 Pandemic: Focus on Socio-Economic Consequences*, SENSORS INT'L (Sep. 23, 2020).

4. See Nasar Meer & Leslie Villegas, *The Impact of COVID-19 on Global Migration 4* (May 27, 2020) (GLIMER, Working Paper) (uncovering that states had introduced "roughly 46,000 mobility restrictions," resulting in the closure of most international borders for most nonessential travel); *UN High Commissioner for Refugees Calls on States to Lift Remaining Pandemic-Related Asylum Restriction*, UNHCR (May 20, 2022), <https://www.unhcr.org/news/press/2022/5/6287a0634/un-high-commissioner-refugees-calls-states-lift-remaining-pandemic-related.html>; Miriam Jordan, *Appeals Court Allows 'Remain in Mexico' Policy to Continue Blocking Migrants at the Border*, N.Y. TIMES, (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/us/migrantsborder-remain-in-mexico-mpp-court.html>.

5. A smaller number of states shut their borders entirely, including in Central Asia and Ecuador. See Phillip Connor, *More than Nine-in-Ten People Worldwide Live in Countries with Travel Restrictions amid COVID-19*, PEW RES. CTR. (Apr. 1, 2020), <https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19/>.

month earlier.<sup>6</sup> Combined with measures by governments to prevent their citizens from leaving their territory and the largely halted global aviation industry,<sup>7</sup> the ability of vulnerable populations and individuals to seek asylum was massively curtailed.<sup>8</sup> Faced with the virulent pandemic,<sup>9</sup> many states went even further and adopted additional emergency measures<sup>10</sup> to help slow or halt the spread of COVID as much as possible. While many states preferred border closures, many also imposed health requirements on their populations, modified the conditions of visas, and even outright denied entry to their countries by people of specific nationalities.<sup>11</sup> By July 2020, more than 71,000 restrictive measures aimed at halting the spread of COVID were implemented by 219 states and territories.<sup>12</sup> Most relevant to this project is how at least ninety-nine states made no exceptions for people seeking asylum in their countries.<sup>13</sup>

At the height of the worldwide lockdown, 168 out of almost 200 countries fully or partially closed their borders with around ninety making no exceptions for those seeking asylum.<sup>14</sup> Some countries have pushed asylum seekers back to the countries they originally came from, or back to

6. See *COVID-19 Platform: Temporary Measures and Impact on Protection*, UNHCR [https://im.unhcr.org/covid19\\_platform/#\\_ga=2.208987670.5069971.1661399081-2017143156.1661399081](https://im.unhcr.org/covid19_platform/#_ga=2.208987670.5069971.1661399081-2017143156.1661399081) (last visited Mar. 7, 2022).

7. As of August 2020, there had been a 57-64% reduction in international passenger seats offered by airlines. INTERNATIONAL CIVIL AVIATION ORGANIZATION, EFFECTS OF NOVEL CORONAVIRUS (COVID-19) ON CIVIL AVIATION: ECONOMIC IMPACT ANALYSIS (Aug. 12, 2020).

8. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 12, (Dec. 16, 1966) (entered into force Mar. 23, 1976).

9. T. Alexander Aleinikoff et al., *Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and Other Displaced Persons*, 31 INT'L J. OF REFUGEE L. 549, 549 (2020).

10. Alan Greene, *State of Emergency: How Different Countries Are Invoking Extra Powers to Stop the Coronavirus*, THE CONVERSATION (Mar. 30, 2020, 10:25 PM), <https://theconversation.com/state-of-emergency-how-different-countries-are-invoking-extrapowers-to-stop-the-coronavirus-134495> [https://perma.cc/DW95-45P7]. See also Stephen Thomson & Eric C. Ip, *COVID-19 Emergency Measures and the Impending Authoritarian Pandemic*, 7 J. L. & BIOSCIENCES 1, 4 (2020).

11. *Global Mobility Restriction Overview*, INT'L ORG. FOR MIGRATION 1, 1 (July 9, 2020).

12. *Id.*; see also *Coronavirus: Travel Restrictions, Border Shutdowns by Country*, AL-JAZEERA (June 3, 2020), <https://www.aljazeera.com/news/2020/6/3/coronavirus-travel-restrictions-border-shutdowns-by-country>.

13. See U.N. Policy Brief: COVID-19 and People on the Move (June 3, 2020), <https://data.unhcr.org/en/documents/details/76793> (Eighty-one states made no exception as of March 11, 2021); see also *COVID-19 Platform*, *supra* note 6.

14. *Forced displacement passes 80 million by mid-2020 as COVID-19 tests refugee protection globally*, UNHCR (Dec. 9, 2020), <https://www.unhcr.org/en-us/news/press/2020/12/5fcf94a04/forced-displacement-passes-80-million-mid-2020-covid-19-tests-refugee-protection.html>.

other countries, including children.<sup>15</sup> This raises real concerns about a violation of a cornerstone of international refugee law: the principle of nonrefoulement. The principle of nonrefoulement states that a country cannot push a person back to another country where they will suffer severe human rights deprivations such as persecution or torture.<sup>16</sup> These global border closures caused serious problems for refugees, because now individuals who, under international law, have the right to seek asylum are denied the ability.<sup>17</sup>

For example, a flagrant violation of international law occurred when boats carrying asylum seekers in the Mediterranean seas were prohibited from landing and denied the right to disembark.<sup>18</sup> This goes against the international requirement under the law of the sea for the rescue of those in peril.<sup>19</sup> The closed borders had actually caused some refugees to attempt to return to their home countries in order to be in some place as opposed to being in transit, even when it was dangerous. But some of those who decided to return home to their own country were denied entry due to the fear they would bring in COVID-19, even though under international law, citizens have the right to return to their own country.<sup>20</sup>

Modern international law is closely tied to the protection of human rights, especially the rights of those in vulnerable populations like

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15. *Id.*

16. Off. of the High Comm'r for Human Rights (OHCHR), *The Principle of Non-Refoulement under International Human Rights* (Nov. 30, 2020), <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>; Oona Hathaway et al., *COVID-19 and International Law: Refugee Law – The Principle of Non-Refoulement*, JUST SECURITY (Nov. 30, 2020) <https://www.justsecurity.org/73593/covid-19-and-international-law-refugee-law-the-principle-of-non-refoulement/>.

17. *Id.*; Marta Crebelli, *COVID-19 and its Impact in the United States and European Union: A Tool to Circumvent Refugee Protection*, 27 ILSA J INT'L & COMP. 27 (2020).

18. Joanna Kakissis, *Asylum-Seekers Make Harrowing Journeys in Pandemic, Only to be Turned Back*, NPR (Feb. 13, 2021), <https://www.npr.org/2021/02/13/949182773/the-harrowing-journeys-to-safety-of-asylum-seekers-during-a-pandemic>.

19. *Id.*; Philip Roche, *The Rescue of Migrants at Sea – Obligations of the Shipping Industry*, NORTON ROSE FULBRIGHT (Mar. 2016), <https://www.nortonrosefulbright.com/en/knowledge/publications/09f857fc/the-rescue-of-migrants-at-sea—obligations-of-the-shipping-industry#:~:text=To%20SOLAS%20Chapter%20V%20was,the%20ship's%20master%20in%20delivering.>

20. *UN High Commissioner for Refugees Calls on States to Lift Remaining Pandemic-Related Asylum Restriction*, UNHCR (May 20, 2022), <https://www.unhcr.org/news/press/2022/5/6287a0634/un-high-commissioner-refugees-calls-states-lift-remaining-pandemic-related.html>; *The Principle of Non-Refoulement Under International Human Rights Law*, UN Human Rights Office of the High Commission, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>.

refugees.<sup>21</sup> Despite this, protections guaranteed by international law for the human rights of refugees have been undermined by many states during the COVID pandemic. Indeed, many violations were committed systematically on these vulnerable populations.<sup>22</sup> For the human rights of refugees to be properly protected, principles of non-discrimination and proportionality, which are already enshrined in international law, must be applied alongside a crackdown on the unchecked discretion of states in their handling of the pandemic before more suffering and violations of international law occur.<sup>23</sup>

The rest of this note breaks down into four sections. In the first section, I address the concept of non-discrimination and how it is protected within international law. Following a discussion of relevant international law, I explore how it has been applied to refugees during the COVID pandemic. In the second section, I tackle the issue of proportionality as it has been applied to international law (most often in the case of conflicts and wars). International law applies the logic of proportionality most clearly in the context of humanitarian law, which offers useful analogies for its application in refugee law. In the third section, I begin with an elaboration on sovereignty and how it implies unlimited discretion for states in managing their domestic affairs. I demonstrate that the purpose of sovereignty is to fulfill the needs of states, which are tied up in the lives and health of their populations. By allowing unchecked discretion in how various states deal with COVID (prioritizing their citizen populations over refugees), they are actually prolonging the pandemic and its costs. I conclude with a summary of the major takeaways related to the handling of the pandemic and what this trend means for the future of the treatment of refugees.

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21. See MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 320, 322 (Oxford Univ. Press, 2nd ed. 2018) (1980); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AMER. J. OF INT'L L. 866, 869 (Oct. 1990).

22. See Amanda B. Egdell et al., *Pandemic Backsliding: Violations of Democratic Standards During COVID-19*, 285 SOC. SCI. & MED. 1, 2 (July 24, 2021); Roojin Habibi et al., *Do Not Violate the International Health Regulations During the COVID-19 Outbreak*, 395 THE LANCET 664, 665 (Feb. 13, 2020); Francisco-José Quintana & Justina Uriburu, *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, 114 AMER. J. OF INT'L L. 687, 692 (Oct. 2020); Muhammed Rahman et al., *Mental Distress and Human Rights Violations During COVID-19: A Rapid Review of the Evidence Informing Rights, Mental Health Needs, and Public Policy around Vulnerable Populations*, 11 FRONTIERS IN PSYCHIATRY 1, 1 (Jan. 2021).

23. G.A. Res. 2200A (XXI), *supra* note 8, art. 7.

## II. INTERNATIONAL HUMAN RIGHTS LAW, NON-DISCRIMINATION, AND STATES OF EMERGENCY

In the best of times, refugee populations are vulnerable in ways that the citizens of states are not, due to their poorer living conditions and lack of ability to access social and economic safety nets. These vulnerabilities have only worsened during the pandemic due to greater difficulties in maintaining social distancing and COVID safety measures in overcrowded detention centers and refugee camps.<sup>24</sup> Furthermore, the restrictions on movement resulting from government efforts to crack down on the spread of COVID have resulted in more impediments for refugees to access basic services,<sup>25</sup> such as public healthcare, child and social protections, education, and income support.<sup>26</sup> To make matters worse, in some cases, refugees have been outright excluded from obtaining these services.<sup>27</sup> From the standpoint of fighting the spread of COVID, this does not make much sense, as the UNHCR observed that “the virus does not distinguish between nationals and migrants, and having a two-tiered system in place to access [for example] essential medical service during this health crisis serves no one’s interest.”<sup>28</sup> These occurrences of discrimination seem counter to the efforts to ensure non-discrimination through international law.

### A. Non-Discrimination

Regarding the term “discrimination,” as presented in the International Covenant on Civil and Political Rights, the Human Rights Committee has stated that it might be best interpreted in the following manner:

the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based

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24. For instance, in Bangladesh as of June 16, 2020, thirty-eight COVID-19 cases among refugee communities had been confirmed and two people had died. See STATE RESPONSES TO COVID-19: A GLOBAL SNAPSHOT AT 1 JUNE 2020 61-2, 79, 82 (Nichole Georgeou & Charles Hawksley eds. 2020). However, it has been noted that testing rates are low and that numbers are likely higher than has been reported. See Amy Bainbridge, *A Coronavirus Crisis is Building Inside Cox’s Bazar, the World’s Largest Refugee Camp*, ABC NEWS (June 16, 2020), <https://www.abc.net.au/news/2020-06-16/rohingya-refugees-co-xs-bazar-coronavirus/12356046>.

25. *Global COVID-19 Emergency Response*, UNHCR (Aug. 28, 2020), [https://reporting.unhcr.org/sites/default/files/28082020\\_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf](https://reporting.unhcr.org/sites/default/files/28082020_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf).

26. *Integrating Migration into COVID-19 Socio-Economic Response: A Toolkit for Development Partners*, INT’L ORG. FOR MIGRATION i, ii (Aug. 2020).

27. *Id.*

28. Lena Kainz, *As COVID-19 Slows Human Mobility, Can the Global Compact for Migration Meet the Test for a Changed Era*, MIGRATION POL’Y INSTITUTE (Apr. 2020), <https://www.migrationpolicy.org/news/covid19-global-compact-migration-faces-test>.

on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>29</sup>

Furthermore, the Inter-American Court of Human Rights has wrestled with the concept and meaning of equality, and has presented this response regarding the place of discrimination within international law:

that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.<sup>30</sup>

So important is the notion of equality and protection against discrimination in international law that the following determination is expressed within the second preambular paragraph of the United Nations Charter: “[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”<sup>31</sup> Starting from this basis, Articles 1(2) and (3) of the United Nations Charter outline the purposes of the organization “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” and in order

“to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>32</sup>

While Article 2(1) of the UN Charter confirms that the organization is based on the principle of sovereign equality in regard to all members, the principle of non-discrimination itself is reaffirmed in regard to human rights in Articles 13(1)(b), 55(c), and 76(c).<sup>33</sup> Specifically, Article 55(c) of the UN Charter asserts that peace and security within the international system depends, in large part, on the extent there exists “universal respect for, and observance of, human rights and fundamental freedoms for all without

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29. UNHRC, *General Comment No. 18: Non-discrimination*, 37<sup>th</sup> Sess., U.N. Doc. HRI/GEN/1/Rev.6, ¶ 7.

30. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 (ser. A) No. 4, ¶¶ 55-7 (Jan. 19, 1984).

31. U.N. Charter, preamble, ¶ 2.

32. *Id.* art. 1, ¶¶ 2-3.

33. *Id.* art. 13, ¶ 1(b), art. 55, art. 76.

distinction as to race, sex, language, or religion.” That being said, the importance of the principle of non-discrimination to international law in regard to human rights might best be emphasized by the Human Rights Committee as, “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a based and general principle relating to the protection of human rights.”<sup>34</sup>

### *B. Protections Against Discrimination in International Law*

Given concerns about discrimination in the international community being large enough to warrant specific references to this phenomenon in the UN Charter itself, it should be no surprise that numerous attempts have been made to protect against its occurrence in international law. Notable examples include the Universal Declaration of Human Rights (UDHR),<sup>35</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>36</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>37</sup> It should be noted that Article 2 of the UDHR prohibits distinctions of any kind, which can be interpreted as meaning that there are no differences that might be legally tolerated under international law.

In addition to global efforts, there have been several attempts to protect against discrimination in international law at the regional level. Examples of this are the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights, and the European Convention on

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34. See UNHRC, *supra* note 29, at 185, ¶ 1.

35. UDHR Article 1 states, “All human beings are born free and equal in dignity and rights,” while UDHR Article 2 states, “Everyone is entitled to all the rights and freedoms set forth in this Declaration 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” In terms of the right to equality, UDHR Article 7 states, “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” G.A. Res. 217 (III) A, *supra* note 8, art. 1, 2, 7.

36. Article 26 is the cornerstone of protection in the Covenant against discrimination, which reads, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” *Id.* art. 26.

37. Under Article 2(2) state parts agree “to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” *Id.* art. 2, ¶ 2.



Human Rights.<sup>38</sup> It is also noteworthy to bring attention to the fact that the principle of non-discrimination is contained within the four 1949 Geneva Conventions as well as their Additional Protocols from 1977.<sup>39</sup> Each of the provisions contained in these sources of international law indicate that, even in the direst of circumstances, the states of the international system who have signed onto these conventions are strictly bound to respect specific legal human standards, such as the right to equal treatment and the principle of non-discrimination.<sup>40</sup>

It should also be noted, however, that each of these three regional treaties discussed above also allows for the derogation of international legal obligations for protection in strictly specified conditions. Even in these circumstances, however, both the International Covenant on Civil and Political Rights and the American Convention on Human Rights assert that this derogation cannot involve discrimination on the basis of race, color, sex, language, religion, or social origin.<sup>41</sup> Despite progress being made at the level of international law in terms of protections for individuals and groups from discrimination, acts taken by states that violate human rights have continued to occur. In regard to the COVID pandemic, the declaration of a State of Emergency is being held up as a justification for these violations.

### *C. States of Emergency*

It is important to be aware that, despite what appears to be suggested by the wording in Article 2 of the Universal Declaration of Human Rights<sup>42</sup> and Article 2(1) of the International Covenant on Civil and Political

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38. See African [Banjul] Charter and People's Rights, OAU Doc. CAB/LEG/67/3, art. 2 (June 27, 1981) (entered into force Oct. 21, 1986); Org. of Am. States, American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), art. 1 (1978); Eur. Consult., Ass., *European Convention on Human Rights*, 4.XI.1950, art. 15(1) (Dec. 10, 1948).

39. For full text, see Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S.; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S.; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S.; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S.; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S.; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S..

40. U.N., *Equality and Non-discrimination*, UN, <https://www.un.org/ruleoflaw/thematic-areas/human-rights/equality-and-non-discrimination/> (last visited Oct. 12, 2022).

41. For the relevant texts, see G.A. Res. 2200A (XXI), *supra* note 8, art. 4.

42. G.A. Res. 217 (III) A, *supra* note 8, art. 2.

Rights,<sup>43</sup> not all distinctions between persons and groups of persons are automatically classified as discrimination in the true sense of the term. This follows from the consistent case law of a number of international monitoring bodies, which recognize that distinctions between people are justified provided that they are generally reasonable and imposed in order to reach an objective and legitimate purpose. Unfortunately, it is undeniable that all states will, at one point or another, be confronted with crises. Wars, societal upheaval, environmental change, and even pandemics like COVID will eventually crop up and incentivize states to limit the human rights of their citizens in order to restore peace and order. The Inter-American Court of Human Rights made a concession regarding these potential states of emergency when it stated:

“it is equally true that, starting with the notion of the essential oneness and dignity of the human family, it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree [from guaranteeing these rights].”<sup>44</sup>

That being said, these circumstances have generally been constrained to those in which the life or existence of the state as an internationally recognized entity is at stake,<sup>45</sup> even though discrimination is explicitly protected against.

Declaring a State of Emergency in response to COVID allows a state to implement restrictions on movement and other activities in an effort to curtail the spread of the disease and, ideally, end the pandemic sooner and at a lesser cost. A public health emergency is, in fact, one of the few circumstances in which it is permissible for a state to constrain movement and the right to leave the territory of said state.<sup>46</sup> However, restrictions on healthcare, supplies necessary to ensure survival, and the human rights of refugees are harder to justify. Though the costs associated with the COVID pandemic have been high socially, economically, and in terms of public health, it is hard to argue that the existence of the state itself is at direct risk. Yet, these restrictions have still been inflicted on vulnerable refugee populations.

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43. G.A. Res. 2200A (XXI), *supra* note 8, art. 2, ¶ 1.

44. Proposed Amendments, *supra* note 30, ¶ 58.

45. Though war is explicitly referenced in the second two treaties, none of the referenced treaties mention pandemics. *See* G.A. Res. 2200A (XXI), *supra* note 8, art. 4, ¶ 1; American Convention on Human Rights, *supra* note 38, art. 27, ¶ 1; European Convention on Human Rights, *supra* note 38, art. 15, ¶ 1.

46. G.A. Res. 2200A (XXI), *supra* note 8, art. 12, ¶ 3.

#### D. The Case of COVID and Refugees

Any derogation must functionally advance the reason for said derogation. Under the International Covenant on Economic, Social, and Cultural Rights, the non-discrimination obligation applies to all individuals within a state, including refugees,<sup>47</sup> and is not susceptible to derogation.<sup>48</sup> For this reason, the Committee on Economic, Social, and Cultural Rights has urged all state signatories of the treaty to adopt special, targeted measures to protect and mitigate the impacts of the COVID pandemic on vulnerable populations such as refugees.<sup>49</sup> Despite this, many states have acted to lodge formal notices of derogation in response to the COVID pandemic.<sup>50</sup>

Part of the issue surrounding the treatment of refugees during the COVID pandemic lies in part within a provision of Article 9 of the Refugee Convention, which states:

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.<sup>51</sup>

This provision was likely left purposefully vague to allow signatory states greater leeway in pursuing their own self-interests, as “grave and exceptional circumstances” was intended to capture the difficult-to-define grey area that exists between the more narrow concept of a national emergency and the more expansive concept of national security.<sup>52</sup> At its core, these human rights treaties serve to minimize violations during

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47. See Comm. On Econ., Soc. And Cultural Rights, General Comment No. 20: Non-Discrimination in Economic Social and Cultural Rights, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

48. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 4, (Dec. 16, 1966) (entered into force Jan. 3, 1976).

49. Comm. On Econ., Soc. And Cultural Rights, Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights, ¶ 15, U.N. Doc. E/C.12/2020/1 (Apr. 6, 2020).

50. Martin Scheinin, *COVID-19 Symposium: To Derogate or Not to Derogate?*, OPINIOJURIS (June 4, 2020), <http://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>.

51. Convention Relating to the Status of Refugees art. 9, July 28, 1951, 189 U.N.T.S 150.

52. Ulrike Davy, *Article 9 1951 Convention, in The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* 781, 787, 792 (Andreas Zimmermann et al. eds., Oxford Univ. Press, 2011).

emergencies by authorizing states to “derogate”—that is, to suspend certain civil and political liberties in response to grave crises.<sup>53</sup>

In an initial examination of the COVID pandemic, which has indeed proven to be an expansive threat to states and their populations on many levels, this exception would seem to apply. However, it is still hard to make the case that discrimination against refugee populations in favor of a state’s own population is necessary during the pandemic, especially as the provision of aid to these populations in line with the demands of international law will actually contribute to ending the pandemic sooner, as providing such assistance will diminish the spread of the disease. Despite this clear-cut logic, many refugees have been discriminated against, as they are seen as the source of the spread of COVID-19 in specific regions. The fact remains that many refugees are not granted access to adequate medical care nor the freedom of movement necessary to work and provide for their families.<sup>54</sup> A particularly poignant example of this is projections surrounding Cox’s Bazar in Bangladesh, which is the location of some 600,000 Rohingya refugees. These massive numbers of people suggest that an outbreak of COVID would lead to rapid exhaustion of medical resources, camp hospitals being overwhelmed in less than fifty-eight days, and a surge in deaths.<sup>55</sup> It is clear that the actions of states are violating international law regarding their treatment of refugees,<sup>56</sup> which has, in no way, contributed to a positive impact on ending the COVID pandemic sooner in their respective countries. Though only one example, the situation in Cox’s Bazar illustrates how derogating the rights of refugees to health and life during the COVID pandemic has not worked and makes the situation worse.

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53. Emile M. Hafner-Burton et al., *Emergency and Escape: Explaining Derogations From Human Rights Treaties*, 65 INT’L ORG. 673, 673 (2011).

54. WORLD HEALTH ORG. [WHO], WORLD HEALTH STATISTICS: MONITORING HEALTH FOR THE SUSTAINABLE DEVELOPMENT GOALS, at 3 (2020).

55. Qais Alemi et al., *Refugees and COVID-19: Achieving a Comprehensive Public Health Response*, 98(8) BULL. WORLD HEALTH ORG. 510, 510 (2020).

56. *Marckx v. Belgium*, App. No. 6833/74, ¶ 2 (June 13, 1979), <https://hudoc.echr.coe.int/fre?i=001-57534>; see generally UNHRC, *General Comment No. 18: Non-discrimination*, *supra* note 29.

### III. INTERNATIONAL HUMANITARIAN LAW AND THE PRINCIPLE OF PROPORTIONALITY

#### A. Proportionality

According to the principle of proportionality in international law, the legality of an action will be determined based on the balance between the objective sought and the means and methods pursued to attain the said objective, as well as the consequences of the action itself. Essentially, this implies that there is an obligation on behalf of the actor to appreciate the context of a given situation prior to deciding if an action is illegal or legal under international law.

In terms of its use in international law, the principle of proportionality is often applied within the context of militant conflicts. It is particularly important to balance the argument by an actor regarding military necessity when it comes to the legality of the use of force. This principle is often applied in the case of individual or group self-defense, in the event of a state deploying armed forces to restore order or ensure public safety, and in cases of domestic or international conflicts. Moreover, international humanitarian law, as applied to armed conflicts,<sup>57</sup> draws upon the principle of proportionality to limit the damages caused by military operations against the civilian population and infrastructure. International humanitarian law prohibits any attack that may cause “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>58</sup> Over time, it has become recognized that the principle of proportionality is a rule of customary law, that is applicable at both the international and domestic levels during armed conflicts.<sup>59</sup>

While primarily used in reference to armed conflicts, the principle of proportionality also comes into play in situations in which restrictions to human rights are imposed by a state in the name of national security, or the defense of public order in situations of unrest or terrorism. In such situations, it is the responsibility of the international conventions on human rights, as well as courts at the national or regional level, to recall the context and content of the requirement for proportionality. From this jurisprudence, human rights would remain applicable to individuals and groups in these

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57. *What are jus bello and jus in bello?*, INT’L COMM. OF THE RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

58. Protocol Additional, *supra* note 39, art. 51, 57.

59. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, INT’L COMM. OF THE RED CROSS (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 1984).

crisis situations, except in the case of legitimate derogations made by states acting in accordance with international law procedures that allow them to do so. That being said, even in these situations, refugees would possess protection from refoulement.

### *B. Protection from Refoulement*

With no positive, enforceable right to asylum on behalf of refugees in existence, protection from refoulement<sup>60</sup> has become regarded as the fundamental norm regarding refugee protection.<sup>61</sup> Much like the principle of proportionality, protection from refoulement for refugees has garnered such widespread acceptance that it has attained the status of customary international law, and there may well be a strong case for its recognition as *jus cogens*.<sup>62</sup>

While some may claim that the COVID pandemic can be categorized as being a “grave and exceptional circumstance” that warrants the derogation of international human rights in the interests of implementing temporary restrictions to ensure a quicker transition out of the pandemic, this is not the case. According to Oona Hathaway,<sup>63</sup> the drafters of the Refugee Convention did not end up adopting an all-encompassing power of derogation for times of national crisis and rejected additional reasons for invoking provisional measures, such as “public order.”<sup>64</sup> For this reason, it would be difficult to justify restrictive measures against refugees by stating that such measures are being implemented to contain the pandemic on behalf of national security concerns.<sup>65</sup> Even then, such efforts are explicitly not allowed to include refoulement under the Refugee Convention and any measures against refugees themselves would need to be applied on an

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60. Refoulement is best thought of as the forcible return of asylum seekers or refugees to their country of origination, where they are liable to be subjected to persecution or become subject to serious harm. For a more in-depth discussion, see Davy, *supra* note 52, art. 33.

61. For a broader discussion of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees, see *generally* U.N. Refugee Agency, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007).

62. Cathryn Costello & Michelle Foster, *Non-Refoulement as Custom and Jus Cogens: Putting the Prohibition to the Test*, 46 NETH. Y.B. OF INT'L L. 273, 273 (2015).

63. Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 L. & CONTEMP. PROBS. 115, 115 (2008).

64. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 297 (Cambridge Univ. Press, 2nd ed. 2021).

65. Jean-François Durieux & Jane McAdam, *Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*, 16 INT'L J. OF REFUGEE L. 4, 4 (2004).

individual basis.<sup>66</sup> For this reason, there is no legal justification under international humanitarian law for the violations of refoulement that have occurred over the course of the COVID pandemic.

### C. *Waging War on COVID*

In both Article 4(1) of the International Covenant on Civil and Political Rights and Article 15(1) of the European Convention on Human Rights, a principle of proportionality in the case of a public emergency threatening the existence of a state is included. Under this inclusion, states would be allowed to take measures outside of their legal obligations to human rights only to the extent necessary to deal with the emergency situation of the COVID pandemic itself and no further. Indeed, the UN Human Rights Committee has called for states to:

not derogate from their duty to treat all persons, including persons deprived of their liberty, with humanity and respect for their human dignity, and must pay special attention to the adequacy of health conditions and health services in places of incarceration, and also to the rights of individuals in situations of confinement...<sup>67</sup>

Furthermore, this call has also been supported by judgments in a number of international humanitarian law cases. In its judgment in the case of *Aksoy v. Turkey*, the ECHR recalled that:

it falls to each Contracting State, with its responsibility for “the life of [its] nation,” to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. . . . Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, inter alia, the States have gone beyond the ‘extent strictly required by the exigencies’ of the crisis.

As a consequence, the derogative measures must be strictly required by the exigencies of the specific situation and only that specific situation.<sup>68</sup>

What if the COVID pandemic was on the same level as war and genocide in international humanitarian law? After all, the lives of billions of people have been radically altered over the past two years. Millions have lost their lives, the global economy has been rocked in a way that hasn’t been felt since the Great Depression, and governments around the world

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66. Davy, *supra* note 52, at 802.

67. U.N. Human Rights Comm., *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, ¶ 2(e) UN CCPR/C/128/2 (Apr. 30, 2020).

68. *Aksoy v. Turkey*, App. No. 21987/93, ¶ 68 (Dec. 18, 1996) <https://hudoc.echr.coe.int/fre?i=001-58003>.

continue to ask that their citizens make sacrifices for the good of all. Yet, even if we were to equate the COVID pandemic to war or genocide under international humanitarian law, a case can still be made that the principle of proportionality has been violated regarding the treatment of refugees via the Convention on the Prevention and Punishment of the Crime of Genocide, which states in its first Article:

“the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

While Article II (a) presents what acts might be considered genocidal in nature, such as those generally committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>69</sup> Particularly, three acts under Article II stand out as being applicable to the treatment of refugees during the COVID pandemic: killing members of a group, causing serious bodily or mental harm to members of a group, or deliberately inflicting on a group conditions of life calculated to bring about the physical destruction of the said group in whole or in part. An identical definition of genocide can be found in the Rome Statute of the International Criminal Court under Article 6, as well as in both Article 4(2) of the Statute of the International Tribunal for the Former Yugoslavia and Article 2(2) of the Statute of the International Tribunal for Rwanda.

In the fight against COVID, like an enemy invading your country, you don’t exert efforts against them where they are not present. You secure your defenses, build up your forces, strike hard and fast to disrupt the enemy, and, hopefully, knock them out before too much damage can be caused. Letting this enemy build strongholds from which to strike within pockets of refugees is not in the best interests of states.

In summary, the continued denial of access to welfare and other forms of support for refugees during the COVID pandemic goes directly against the Refugee Convention. Despite the requirements for states to provide the same standards of treatment and assistance to lawful refugees as would be given to their own citizens, states continue to violate these requirements.<sup>70</sup>

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69. G.A. Res. 260A (III), Convention on the Prevention and Punishment of the Crime of Genocide, art. II (Dec. 9, 1948) (entered into force Jan. 12, 1951).

70. Again, the discussion of Rohingya refugees suffering in refugee camps in Bangladesh referenced previously bears mentioning here. Proper provisions of care and medical assistance to the Rohingya in Cox’s Bazar would have saved lives and spared needless suffering, while also help slow the spread of the COVID pandemic. Yet this is not what happened. See Alemi, *supra* note 55, for a more complete description of how Bangladesh violated international humanitarian law in this case.



#### IV. UNCHECKED DISCRETION AND THE MOCKERY OF INTERNATIONAL OBLIGATIONS OF REFUGEE LAW

International law does not view sovereignty as conferring unlimited discretion in regard to human rights violations.<sup>71</sup> In order to understand the problem of unchecked discretion regarding the abrogation of human rights to refugees during the COVID pandemic, it would be best to start with an understanding of the sovereignty of the state itself.

##### *A. Sovereignty and Discretion*

The sovereignty of states might best be understood as a bundle of properties rather than a single characteristic, including the authority to govern, the supremacy of this governing authority, the independence of this governing authority, and the territoriality of this governing authority.<sup>72</sup> The independence of the state and the fact that it is associated with a defined territorial space allow for discretion in how states handle their internal affairs.

In recent decades, however, there has been some debate over the place of international law in regard to state sovereignty, as some have asserted that the relationship has changed as a consequence of the emergence of human rights.<sup>73</sup> Those who assert that the sovereignty of states is limited by the norms of human rights might disagree on where those limits lie,<sup>74</sup> but all accept the underlying idea that the said limits do exist.<sup>75</sup> Critics point to the uncertainty over the precise limits themselves, contributing to a situation in which there is no identifiable source of human rights and, as such, it is simply a representation of morals and not law.<sup>76</sup> These critics go on to mention the expansion of human rights language to include diverse

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71. See BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT (2011); see Dominik Eisenhut, *Sovereignty, National Security and International Treaty Law. The Standard of Review of International Courts and Tribunals with regard to 'Security Exceptions,'* 48 ARCHIV DES VÖLKERRECHTS 431 (2010).

72. Hathaway, *supra* note 63, at 120.

73. *Id.* at 145.

74. *Id.*

75. See Kofi Annan, *Two Concepts of Sovereignty*, THE ECONOMIST 1, 3 (Sep. 18, 1999); see generally Louis Henkin, *Human Rights and State Sovereignty*, SIBLEY LECTURE 31 (Mar. 1999); see generally W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AMER. J. OF INT'L L. 866 (Feb. 27, 2017).

76. See Harv. Univ. Inst. of Politics, *Human Rights Debate: Is the Language of Rights Useful in the Fight Against Poverty?* Youtube (Feb. 26, 2005), <https://www.youtube.com/watch?v=TrXp2ADK2go> [hereinafter Harvard video]; see generally Christina Ochoa, *Advancing the language of human rights in a global economic order: An analysis of a Discourse*, 3 B.C. THIRD WORLD L. J. 57 (Jan. 2003).

new issues, such as labor rights, rights to healthcare, rights to food, and even the right to be free from poverty.<sup>77</sup>

According to Hathaway,<sup>78</sup> these critics do have some merit to their arguments. The idea that states do not have unchecked discretion in dealing with issues that impinge upon human rights might well override the principles of autonomy and self-determination in international law. That being said, Hathaway also states that such critics are wrong to argue that human rights cannot be justified outright as a limitation on state authority, as sovereignty is itself a social and legal construction of the modern international legal system. States cannot claim recognition and unchecked discretion based on the place of sovereignty in international law while at the same time claiming not to recognize the requirements under international law to protect human rights.<sup>79</sup>

Under sovereignty, as the legitimate legal authority of a population within a specific territory, states receive a number of benefits under international law, including protection from the threat or use of force against them. In return for this protection and membership in the international community, states are expected to accept some limits on their own behaviors. While states that are not counted as members of the international community would not have these obligations, they would also not have the protections that membership affords them.<sup>80</sup> The UN Charter notes that the notion of state sovereignty carries with it obligations to provide for the welfare of their populations and meet certain obligations to the international community.<sup>81</sup>

These sentiments have been supported in international courts as well. In its 1988 judgement of the *Velasquez Rodriguez v. Honduras* case, the Inter-American Court for Human Rights affirmed that, regardless of the crimes committed, the power of the state is not unlimited, nor may it resort

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77. Harvard video, *supra* note 76.

78. Hathaway, *supra* note 63, at 146.

79. It should also be kept in mind that the concept of state sovereignty itself is still a relatively new concept in the international community. It is possible that the collective international laws regarding human rights are also going through a period of internalization, in which case the unchecked discretion regarding their lack of protection may not prove to be an issue forever. *See also* this work for an overview of why sovereignty is more recent in construction than the Treaty of Westphalia. Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*. 55 INT'L ORG. 251, 281 (2001).

80. U.N. Charter art. 2, ¶ 4.

81. U.N. Secretary-General, *A More Secure World: Our Shared Responsibility*. Secretary-General's High-Level Panel on Threats, Challenges, and Change, ¶ 29, U.N. Doc. A/59/565 (Dec. 2, 2004).

to any means to which it is capable of attaining its goals.<sup>82</sup> For this reason, modern sovereignty is not unconditional, nor do states possess unchecked discretion when dealing with issues like human rights. Even if some human rights are up for debate, a fundamental core that should not be open to discussion is the prohibition of state-sanctioned torture, political killings, or genocide. Unfortunately, in the case of refugees seeking redress for human rights violations, they will have to exhaust domestic remedies prior to pursuing international mechanisms.<sup>83</sup>

### *B. Rational Surrender of Unchecked Discretion*

Might it not be in the best interests of states to surrender unchecked discretion when it comes to the treatment of the human rights of refugees? Perhaps. The reasoning behind this is tied up in the relationship of the state to international law. While adherence to many of these principles is voluntary for states, they still limit the future behavior of states and give authority to others over specific actions. They are right to do so. According to Hathaway,<sup>84</sup> states stand to gain from binding themselves to international law, as doing so helps them avoid short-term temptations and achieve long-term goals. For example, by refusing to cave into public pressure to restrict the human rights of refugees in order to uphold international law, their refugee population might well be healthier during the duration of the pandemic, leading to fewer COVID cases, and a sooner ending of the pandemic with less costs incurred by the state.

Related to this logic are assertions made by political theory institutionalists that effective regimes, like treaties, could allow for states to pursue cooperative activities that set aside short-term power maximization in favor of the attainment of long-term goals.<sup>85</sup> Adherence to international laws on human rights in the context of the COVID pandemic would likely translate into better care for vulnerable refugee populations, which, in turn, would constrain the spread of COVID and lower overall costs to the state.

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82. *Velazquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 154 (July 29, 1988).

83. *See* No. 14668, International Covenant on Civil and Political Rights Adopted by the General Assembly of the United Nations art. 41, Dec. 19, 1966, 999 UNTS 171; G.A. Res. 2200A (XXI), *supra* note 8, art. 2; G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 11, ¶ 3 (Dec. 21, 1965); European Convention on Human Rights, *supra* note 38, art. 26; American Convention on Human Rights, *supra* note 38, art. 50; African [Banjul] Charter and People's Rights, *supra* note 38, art. 50; UNESCO, *Procedure for the protection of human rights: the legislative history of the 104 EX/3.3*, L.A.2009/WS/1, ¶ 14 (2009).

84. Hathaway, *supra* note 63, at 144.

85. ROBERT O. KEOHANE & JOSEPH S. NYE, JR., *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 158-65 (1977).

With this being the case, states might relinquish unchecked discretion in terms of their sovereignty by entering into and upholding international agreements on human rights. Weak democracies, for example, would help ensure the future protection of human rights by signing onto institutions like the European Convention on Human Rights, as doing so might prevent backsliding on these protections.<sup>86</sup> Signing onto international agreements on human rights, while constraining some rights of individuals, will improve collective benefits by ensuring the human rights of a state's own citizens are protected elsewhere in the world. The benefits of pursuing actions like this have already been definitively proven in the case of international standards for mail, weights and measures, and general commerce (among other areas).<sup>87</sup> Finally, by agreeing to international treaties regarding the protection of human rights, states also attain a way to overcome the collective action dilemma, as these agreements generally require reciprocal commitments from the states signing onto them.<sup>88</sup>

If states were to set aside unchecked discretion regarding the human rights of refugees in pandemics, such as this current COVID pandemic, they might well gain collective benefits that would not otherwise have been attained. Provision of aid to refugees at the behest of international human rights law will, by the nature of pandemics, lead to healthier refugees in these vulnerable populations. This will, in turn, lower infection rates and the number of deaths, as well as allow for a quicker transition to a post-pandemic period in which less costs are imposed on the state and its population. As this will be the case, the costs of surrendering unchecked discretion in this scenario do not outweigh the tangible benefits of doing so.

## V. CONCLUSION

Throughout this note, I have examined the issues related to the enforcement of the principles of discrimination, proportionality, and the problem of unchecked discretion regarding the protection of the human rights of refugees during the COVID pandemic. Given the nature of pandemics and how they can spread across borders and populations regardless of the wishes of states and their governing bodies, withholding protections for the human rights of refugees is a violation of international law and counterproductive in the struggle to end a pandemic. The derogation of responsibility to protect the human rights to health and life in

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86. See generally Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

87. Hathaway, *supra* note 63, at 144.

88. *Id.*

refugee populations not only harms those directly experiencing restrictions, but will likely lead to a longer-lasting pandemic that will inflict additional costs on states' own citizens that might not otherwise have been the case.

While public opinion might call for strong measures and restrictions on refugees, which governments are inclined to agree to in order to gain the public's support, the peace and security of the state would be better served by applying the protections of human rights equally to both citizens and refugees. Concentrated efforts by states and the international legal community to ensure this occurs will help protect human rights for all. Moreover, when it comes to the issue of unchecked discretion, should states get away with violating the rights of refugees during the COVID pandemic, it is possible that, during future crises, they will begin abrogating the human rights of their own citizens to the degree they can get away with. Should many states do this, it will become impossible to hold violators accountable for these actions. In such a scenario, legal interventions, such as those that occurred in Nuremberg, Yugoslavia, Rwanda, and Darfur, would be presented as an overreach by the international community into domestic affairs that are the sole purview of the state itself.

While it would be correct to say that a balance must be struck between the legitimate rights of the state vis-à-vis the human rights of its citizens and vulnerable groups such as refugees, one set of rights should not be over-emphasized over another during crises like the COVID pandemic such that state instability or mass oppression results. In summary, states should pursue international law's principles of non-discrimination and proportionality to guarantee the human rights of refugees and make efforts not to hide violations of human rights behind the excuse of unchecked discretion. Doing so will ensure human rights for all are preserved, and pandemics like COVID will pass more quickly and at less cost than would otherwise be the case.