CENTER *for* REPRODUCTIVE RIGHTS

Sexual and Reproductive Health and Rights, Access to Justice, and COVID-19

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Cases involving the provision, or lack thereof, of **essential health services are urgent, and must be heard during this pandemic in order to protect fundamental human rights**. The global consensus is that a case should be considered urgent if postponing the hearing would result in irreparable harm.[1] When determining the urgency of a case, courts should also give particular consideration to cases involving populations that are at greater risk for abuse, including women, children, racial or ethnic minorities, and indigenous communities.[2]

As established in the International Commission on Jurists' guide on Courts and COVID-19, the "judiciary…plays an essential role in securing the rule of law by ensuring that the actions of the other branches of government respect the law."[3] This role becomes even more important during a national emergency, when states increase their executive power in an effort to control the emergency.[4] As a result, the judiciary must ensure that the state is not overstepping its international and regional human rights obligations, including its obligations to ensure the uninterrupted delivery of essential health services.

In *General Comment No. 36*, the Human Rights Committee expressed the view that the duty to protect life also implies that States should take appropriate measures to address the general conditions in society that may prevent individuals from enjoying their right to life with dignity.[5] This obligation includes ensuring access to essential goods and services, including healthcare.[6] The failure of a state to provide essential health services is a violation of the right to health,[7] and it is the court's responsibility to hold the state accountable for the violation of such rights, including to ensure access to health services.[8] Sexual and reproductive health services are so critical that the Committee on Economic, Social, and Cultural Rights has stated that access to reproductive healthcare is part of the core minimum obligations states must realize immediately vis-à-vis the right to health in the International Covenant on Economic, Social, and Cultural Rights.[9]

Human rights bodies, including the Committee on the Elimination of Discrimination, the Committee on Economic and Cultural Rights, and the Committee on the Rights of the Child agree that **sexual and reproductive health is a vital component of essential health services that must continue during the COVID-19 pandemic.**[10] Regional human rights bodies have also emphasized the importance of access to sexual and reproductive health services during the pandemic. The African Commission on Human and People's Rights' Special Rapporteur on the Rights of Women in Africa issued a statement urging African states to "to adopt the principle of equality in all COVID-19 related responses while providing special protection to women and girls through access to sexual and reproductive health services."[11] The Inter-American Commission on Human Rights also issued guidance urging states to "[g]uarantee the availability and continuation of sexual and reproductive health services during the pandemic crisis."[12] Furthermore, the World Health Organization also categorizes reproductive health as a "high priority" essential service and urges countries to maintain access to reproductive health services throughout the

COVID-19 pandemic.[13] Therefore, the provision of sexual and reproductive health services is considered essential under both international and regional human rights law and global medical standards, and states must include sexual and reproductive healthcare as a vital component of basic health services.

According to guidance from international and regional human rights bodies and instruments, the following sexual and reproductive health services must be provided during the COVID-19 pandemic:

Services that must be provided during the pandemic:

1. Timely access to safe and legal abortions and post-abortion care;
2. Quality, respectful maternal health care;
3. Timely access to contraception, including emergency contraception;
4. Full access to sexual and reproductive health services and information

1. **Timely access to safe and legal abortions and post-abortion care.** Timely abortion access is essential to preserve the life and health of pregnant people. International human rights bodies have long recognized the connection between restrictive abortion laws, high rates of unsafe abortion, and maternal mortality.[14] Moreover, the CEDAW Committee has found that the denial or delay of safe abortion and post-abortion care, and forced continuation of pregnancy, are forms of gender discrimination and gender-based violence.[15] In *General Comment No. 36 on the right to life*, the Human Rights Committee has reaffirmed that States have a duty to ensure that women and girls do not have to undertake unsafe abortions as part of preventing foreseeable threats to the right to life.[16] For example, *General Comment No. 2* of the Maputo Protocol urges states to "ensure availability, accessibility, acceptability and good quality reproductive health care, including…safe abortion for women."[17]
    a. In order to ensure safe and effective access to abortion, **states must remove legal and administrative barriers to abortion services, including to medical abortion.**[18] Medication abortion is a safe, cost-effective means for enabling women and girls to end an unwanted pregnancy. Misoprostol, the primary active drug for medication abortion, is included in the World Health Organization's *Model List of Essential Medicines*, indicating that governments should register it as an essential medicine.[19] CESCR's *General Comment No. 22* reinforces the obligation to ensure access to essential medicines, including "medicines for abortion,"[20] and specifically regarded the removal of sexual and reproductive health medications from national drug registries as a retrogressive measure.[21] Furthermore, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) also includes the "right of everyone: . . . (b) To enjoy the benefits of scientific progress and its applications…,"[22] which may be interpreted to include pharmaceutical and medical advancements, such as medical abortion.

2. **Quality, respectful maternal health care.** As resources are reallocated to respond to the pandemic, it is critical that all people have access to quality maternal health care, free from discrimination, violence and coercion.[23] Resource constraints and emergency situations are often precursors to human rights violations in maternal health settings, such as mistreatment and abuse of women during delivery and lack of informed consent. Such violations disproportionately impact historically marginalized populations, such as racial and ethnic minorities, the LGBTQIA+ community, people with disabilities, people living with HIV, and poor or rural women and girls, and governments must take steps to guarantee women and girls' rights in these settings.[24]

3. **Timely access to contraception, including emergency contraception.** Guaranteeing access to contraception can mitigate near-term demands on the healthcare system that would result from unplanned pregnancy. States must ensure access to contraceptive information and services as an essential measure for enabling people to avoid unintended pregnancy, which can have significant impacts on their lives and health.[25] International and regional human rights bodies agree that ensuring access to contraception is crucial for fulfilling fundamental reproductive rights.[26]

4. States must also ensure that marginalized communities (e.g., people with disabilities, racial or ethnic minorities, or adolescents) also have **full access to sexual and reproductive health services and information.**[27] At the regional level, the Inter-American Commission underscored the importance of access to information, urging states to "…particularly step up comprehensive sex education measures and the distribution via accessible media of information in readily understandable language to reach the broad diversity of women."[28]

Sexual and reproductive healthcare providers must be considered essential workers and permitted to travel to their place of employment.

Furthermore, as sexual and reproductive health services are considered essential, **sexual and reproductive healthcare providers must be considered essential workers** and permitted to travel to their place of employment, and continue to provide critical reproductive health services to women and girls.

IMPACT OF POSTPONING ACCESS TO SEXUAL AND REPRODUCTIVE HEALTH SERVICES

There is an urgent need for justices to continue to adjudicate sexual and reproductive health and rights cases, as the lack of access to such services can have a lasting impact on women and girls. Human rights bodies have repeatedly recognized the dire consequences of lack of access to sexual and reproductive health services, and more recently, have applied these concerns to the possible outcomes of the current COVID-19 pandemic.[29]

For example, the UN Working Group on Discrimination Against Women and Girls noted that "the proliferation of barriers to healthcare, especially pregnancy-related healthcare, will profoundly jeopardize women's safety and well-being."[30]

If access is severely limited, the attendant impacts of COVID-19 have the potential to severely undermine access to abortion services, as travel restrictions limit transportation options, the economic slowdown pushes many individuals into more precarious financial situations, and healthcare system capacity becomes increasingly limited. Measures that undermine access to abortion care, such as lack of access to justice or judicial authorizations for safe abortion services, **will force people to seek out unsafe abortion services** or services later in pregnancy, putting their lives and health at risk.[31] In addition, disrupted supply chains and reallocation of health resources during COVID-19 can have dire impacts on access to contraception, further increasing the likelihood of unwanted pregnancies and raising the need for abortion services.[32] In maternal healthcare settings, restrictions on pre- and post-natal care increases the likelihood of complications during labor and delivery.

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RECOMMENDATIONS FOR ADDITIONAL ADJUSTMENTS DURING THE PANDEMIC

As the COVID-19 pandemic will continue indefinitely, new modalities for healthcare service provision must be developed in order to ensure access sexual and reproductive health and rights. To that end, human rights bodies have published the following recommendations for states to remove barriers to accessing sexual and reproductive health services.

1. Issue directives that establish legal and policy measures to encourage telemedicine and strengthen access to medical abortion, contraception, and quality maternal healthcare;[33]

2. Establish protocols or circulars to ensure continued access to effective and transparent remedies and redress for violations of the right to sexual and reproductive health,[34] and;

3. Issue directives permitting courts to broadcast prophylactic health information (e.g., proper handwashing techniques, self-care and first aid, basic health and hygiene information, and where communities can access specific reproductive health services) on all possible methods of communication.[35]

Endnotes

1. Matt Pollard, *The Courts and COVID-19,* INTERNATIONAL COMMISSION OF JURISTS, (April 6, 2020), *available at* https://www.icj.org/wp-content/uploads/2020/04/Universal-ICJ-courts-covid-Advocacy-Analysis-brief-2020-ENG.pdf [hereinafter Matt Pollard, *The Courts and COVID-19*].
2. Matt Pollard, Mathilde Laronche and Viviana Grande, *COVID-19 Symposium: The Courts and Coronavirus (Part II)*, Opinio Juris, INTERNATIONAL COMMISSION OF JURISTS (April 3, 2020), *available at* https://opiniojuris.org/2020/04/03/covid-19-symposium-the-courts-and-coronavirus-part-ii/.
3. Matt Pollard, *The Courts and COVID-19*, *supra* note 1.
4. *Id.*
5. Human Rights Committee, *General Comment No. 36: On the right to life (Art. 6 of the International Covenant on Civil and Political Rights),* para. 26, U.N. Doc. CCPR/C/GC/36 (2018) [hereinafter Human Rights Committee, *Gen. Comment No. 36*].
6. Committee on Economic, Social and Cultural Rights, *General Comment No. 22: On the right to sexual and reproductive health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights*), U.N. Doc. E/C.12/GC/22, paras.13, 28, 45, 57, 62 (2016) [hereinafter CESCR Committee, *General Comment No. 22*]; Human Rights Committee, *General Comment No. 36*, *supra* note 5, at para. 8; Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation No. 24: Article 12 of the Convention (Women and Health),* (20th Sess., 1999), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, paras. 12(d), 17, U.N. Doc. A/54/38/Rev.1, chap I (1999) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*].
7. CESCR Committee, *General Comment No. 22*, *supra* note 6; Committee on the Rights of the Child, *General Comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health*, (66th Sess., 2013), para. 40, U.N. Doc. CRC/C/GC/15 (2013) [hereinafter CRC Committee, *Gen. Comment No. 15*]; Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),* (22nd Sess., 2000) U.N. Doc. E/C.12/2000/4 (2000) [hereinafter CESCR Committee, *Gen. Comment No. 14*].
8. CESCR Committee, *General Comment No. 22, supra* note 6, at paras. 45, 49(h); CESCR Committee, *Gen. Comment No. 14, supra* note 7, at paras. 55, 59-61; CEDAW Committee, *General Recommendation No. 24, supra* note 6, at para. 13; CRC Committee, *Gen. Comment No. 15, supra* note 7, at para. 73(b).
9. CESCR Committee, *General Comment No. 22, supra* note 6, at para. 49(c); In 2017, the Inter-American Commission of Human Rights issued a statement articulating states' fundamental obligation to ensure timely and adequate access to health services that only women, female adolescents, and girls need, free from all forms of discrimination and violence, in accordance with existing international commitments on gender equality. Inter-American Commission on Human Rights, *IACHR Urges All States to Adopt Comprehensive, Immediate Measures to Respect and Protect Women's Sexual and Reproductive Rights*, Press Release 165/17, (Oct. 23, 2017), *available at* https://mailchi.mp/dist/iachr-urges-all-states-to-adopt-comprehensive-immediate-measures-to-respect-and-protect-womens-sexual-and-reproductive-rights?e=07a43d57e2 ["Denying access by women and girls to legal and safe abortion services or post-abortion care can cause prolonged and excessive physical and psychological suffering to many women, especially in cases involving risks to their health, unviability of the fetus, or pregnancies resulting from incest or rape."].

10. *See, e.g.,* CEDAW Committee, *Guidance Note on CEDAW and COVID-19*, para. 2 (2020), *available at* https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx [hereinafter CEDAW Committee, *Guidance Note on CEDAW and COVID-19*] ["States parties must continue to provide gender-responsive sexual and reproductive health services, including maternity care, as part of their COVID-19 response. Confidential access to sexual and reproductive health information and services such as mod ern forms of contraception, safe abortion and post-abortion services and full consent must be ensured to women and girls at all times, through toll-free hotlines and easy-to-access procedures such as online prescriptions, if necessary free of charge. States parties should raise awareness about the particular risks of COVID-19 for pregnant women and women with pre-existing health conditions. They should provide manuals for health workers guiding strict adherence to prevention of infection, including for maternal health, during pregnancy, at-birth and the post-delivery period."]; Office of the UN High Commissioner for Human Rights (OHCHR), *Statement by the UN Working Group on discrimination against women and girls: Responses to the COVID-19 pandemic must not discount women and girls*, (2020), *available at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25808&LangID=E.
11. Hon. Lucy Asuagbor, Special Rapporteur on the Rights of Women in Africa, Press Release of the Special Rapporteur on the Rights of Women in Africa on violation of women's rights during the COVID-19 Pandemic, African Commission on Human and People's Rights, (May 6, 2020), available at https://www.achpr.org/pressrelease/detail?id=495.
12. Inter-American Commission on Human Rights (IACHR), *Pandemic and Human Rights in the Americas*, Res. 1/20, para. 53 (April 10, 2020), *available at* http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf.
13. World Health Organization, *COVID-19 Operational Guidance,* (June 1, 2020), *available at* https://www.who.int/publications/i/item/covid-19-operational-guidance-for-maintaining-essential-health-services-during-an-outbreak.
14. CESCR Committee, *Gen. Comment No. 22*, *supra* note 6, at paras. 10, 28; Human Rights Committee, *Gen. Comment No. 36*, *supra* note 5, at para. 8.
15. Committee on the Elimination of Discrimination against Women, *General Recommendation No. 30: Women in conflict prevention, conflict, and post-conflict situations*, *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, para. 18, U.N. Doc. CEDAW/C/GC/30 (2013) [hereinafter CEDAW Committee, *Gen. Recommendation No. 30*]; CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 6, at paras. 11, 14.
16. Human Rights Committee, *Gen. Comment No. 36*, *supra* note 5, at para. 8.
17. African Commission on Human and People's Rights, *General Comment No. 2* on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, para. 53, [hereinafter *General Comment No. 2* of the Maputo Protocol] available at https://www.achpr.org/legalinstruments/detail?id=13
18. CESCR Committee, *General Comment No. 22, supra* note 6, at para. 12.
19. World Health Organization, *Model Lists of Essential Medicines*, 21st List, p. 47, (2019), *available at* https://www.who.int/medicines/publications/essentialmedicines/en/.
20. CESCR Committee, *Gen. Comment No. 22*, *supra* note 6, at para. 12.
21. *Id.* at para. 38.
22. International Covenant on Economic, Social and Cultural Rights (CESCR), *adopted* Dec. 16, 1966, art. 15(1), G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976).
23. CEDAW Committee, *Guidance Note on CEDAW and COVID-19*, *supra* note 10, at para.2.
24. *See, e.g., General Comment No. 2* of the Maputo Protocol, *supra* note 17; Alyne da Silva Pimentel Teixeira v. Brazil, CEDAW Committee, Commc'n No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008 (2011).

25. CESCR Committee, *Gen. Comment No. 22*, *supra* note 6, at paras. 13, 28, 45, 57, 62; Human Rights Committee, *Gen. Comment No. 36*, *supra* note 5, at para. 8; CEDAW Committee, *Gen. Recommendation No. 24, supra* note 6, paras. 12(d), 17.
26. *Id.*
27. *See, e.g.,* CESCR Committee, *General Comment No. 22*, *supra* note 6, at paras. 19, 24; CEDAW Committee, *General Recommendation No. 24*, *supra* note 6, at paras. 18, 31(b); CRC Committee, *Gen. Comment No. 15, supra* note 7, at para. 53.
28. Inter-American Commission on Human Rights (IACHR), *Pandemic and Human Rights in the Americas*, Res. 1/20, para. 53 (April 10, 2020), *available at* http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf [hereinafter IACHR, *Pandemic and Human Rights in the Americas*].
29. *See, e.g.,* CEDAW Committee, *Guidance Note on CEDAW and COVID-19*, *supra* note 10, at para.2.; OHCHR, *Statement by the UN Working Group on discrimination against women and girls: Responses to the COVID-19 pandemic must not discount women and girls*, (2020); Hon. Lucy Asuagbor, Special Rapporteur on the Rights of Women in Africa, *Press Release of the Special Rapporteur on the Rights of Women in Africa on violation of women's rights during the COVID-19 Pandemic,* African Commission on Human and People's Rights, (May 6, 2020); IACHR, *Pandemic and Human Rights in the Americas*, *supra* note 28, at para. 53.
30. OHCHR, *Statement by the UN Working Group on discrimination against women and girls: Responses to the COVID-19 pandemic must not discount women and girls* (2020).
31. *See, e.g.*, Human Rights Committee, *Gen. Comment No. 36*, *supra* note 6, at para. 8; *General Comment No. 2* of the Maputo Protocol, *supra* note 17, at arts. 18 – 20.
32. World Health Organization, *COVID-19: Operational guidance for maintaining essential health services during an outbreak*, Section 6 (March 25, 2020), *available at* https://www.who.int/publications-detail/covid-19-operational-guidance-for-maintaining-essential-health-services-during-an-outbreak.
33. CEDAW Committee, *Guidance Note on CEDAW and COVID-19*, *supra* note 10, at para. 2 (2020); OHCHR, *COVID-19 and Women's Rights,* (2020), *available at* https://www.ohchr.org/Documents/Issues/Women/COVID-19_and_Womens_Human_Rights.pdf.
34. CESCR Committee, *Gen. Comment No. 22*, *supra* note 6, at para. 49.
35. IACHR, *Pandemic and Human Rights in the Americas*, *supra* note 28.