

The Right to Say No to COVID-19 Vaccines

International Human Rights Law Guarantees Rights and Prohibits Unlawful Restrictions

Introduction

International human rights law (IHRL) guarantees fundamental rights and freedoms (rights), prohibits any restriction of some rights and conditionally allows the temporary restriction of other rights in both emergency and non-emergency situations. In response to COVID-19, Canada and its provinces and territories (hereinafter referred to collectively as Canada) have summarily imposed, promoted and allowed the suspension or restriction of many rights guaranteed by IHRL. These measures call into question the scope and meaning under IHRL of rights guarantees, State obligations to protect and respect and State powers to suspend and restrict guaranteed rights. This commentary examines the lawfulness of current measures imposed, promoted or allowed by Canada to compel, force or coerce involuntary submission to vaccination with the Pfizer/ Comirnaty, Moderna/ Spikevax and AstraZenica/ Vaxzevria vaccines (the COVID-19 vaccines) by restricting or suspending the rights of unvaccinated persons and others (the Vaccine Mandates)¹.

Rights actually or potentially restricted or suspended by the Vaccines Mandates include rights to: education; equality and non-discrimination; equality before and the equal protection of the law; effective remedies for rights violations; freedom of thought, conscience and religion (belief); freedom from coercion to adopt a belief other than by choice; freedom of expression; freedom from torture and other cruel, inhuman or degrading treatment or punishment (ill treatment); freedom from non-consensual medical or scientific experimentation; health; informed consent to medical treatment; life; liberty and security of the person; movement; privacy; take part in the conduct of public affairs; work and earn a living by work freely chosen (work); and, due process and timely access to independent, competent and impartial tribunals to determine rights and remedy violations (judicial review). These rights, essential to survival, security of the person and participation in social, cultural and political community life, are guaranteed by several treaties including the United Nations (UN) International Covenant on Civil and Political Rights, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the UN International Covenant on Economic, Social and Cultural Rights. Under IHRL some of these rights are non-derogable and some are derogable. Non-derogable rights are those that cannot be restricted or suspended under any circumstances including a public health emergency. Derogable rights are those that may be restricted subject to the State complying with IHRL conditions. Restrictions that do not comply with the applicable are unlawful.

This commentary is preliminary and does not examine all rights restricted or suspended by the Vaccine Mandates and the examination of IHRL provisions and jurisprudence and identification of rights restricted is not exhaustive. Amongst the affected rights not considered are rights to an adequate standard

¹ See: [Alberta Health Services, Immunization of Workers for COVID-19](#), 14 September 2021; [Order of the Provincial Health Officer](#) (Pursuant to Sections 30, 31, 32, 39, 54, 67 (2) and 69 Public Health Act, S.B.C. 2008) Food and Liquor Serving Premises - September, 2021; [Order of the Provincial Health Officer](#) (Pursuant to Sections 30, 31, 32, 39, 54, 67 (2) and 69 Public Health Act, S.B.C. 2008) Gatherings and Event – September 10, 2021; [B.C. mandates COVID-19 vaccines for public service workers and long-term care visitors](#), CBC News, 5 October 2021; [Vaccine Covid-19 Vaccination Polices Mandatory for High-Risk Settings](#), 17 August 2021; and, [Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police](#), 6 October 2021

of living, participate in the cultural life of the community, housing and freedoms of assembly and association. Also not reviewed is the extensive jurisprudence of the Inter-American Human Rights System.

Summary

This commentary concludes that the Vaccine Mandates contravene Canada's IHRL obligations and are arbitrary and unlawful. The Vaccine Mandates should therefore be withdrawn immediately in favour of lawful measures that comply with IHRL standards and Canada's IHRL obligations, accord with the rule of law and democratic principles, and are supported by evidence as being effective, safe, proportional and necessary to preserve rights in a democracy.

The IHRL reviewed:

1. Guarantees the rights listed above as actually or potentially restricted or suspended by the Vaccine Mandates;
2. Prohibits restriction or suspension of non-derogable rights under any circumstances;
3. Guarantees the right to informed consent to medical treatment as an essential component of other rights including the right to health, to life and freedom from torture or ill-treatment;
4. Prohibits the use of force or coercion to compel involuntary submission to medical treatment;
5. Compels effective measures to ensure meaningful informed consent to medical treatment that include in the case of COVID-19 vaccines, public access to accurate and up-to-date information about the purpose, risks and benefits of the COVID-19 vaccines and education for medical personnel and the public about what constitutes informed consent;
6. Imposes obligations to prevent and treat disease that comply with IHRL and do not restrict or suspend rights;
7. Guarantees access to judicial review of rights limitations and effective remedies for violations;
8. Allows States to use emergency powers to limit derogable rights *only* when the State has:
 - a. issued a proclamation notifying the public of a state of emergency;
 - b. notified the UN Secretary General of the derogations from treaty obligations, their justification, purpose and duration;
 - c. ensured the emergency restriction of rights and derogation of State obligations strictly comply with requirements of legality, proportionality, concordance with IHRL and are temporary.
9. Allows States in non-emergency situations, to limit derogable rights for the purpose of, *inter alia*, protecting public health, *only when* the State has established that such measures are:
 - a. necessary in a democratic society to achieve a legitimate goal;
 - b. the only and least harmful means of achieving the stated legitimate goal;
 - c. proportionate to the likely benefits and potential harms;
 - d. lawful and compliant with IHRL obligations and temporary;
 - f. in the case of Vaccine Mandates, such measures must be supported by data establishing with reasonable certainty the long-term efficacy, safety and potential harms of the COVID-19 vaccines; and,
 - g. accompanied by compensation measures for victims of vaccine-related harm.

In imposing, promoting or allowing the Vaccine Mandates, Canada has failed to:

- Ensure a meaningful right to informed consent to medical treatment with a COVID-19 vaccine;
- Ensure that restrictions of derogable rights comply with IHRL requirements;
- Prohibit restriction or suspension of rights considered non-derogable;

- Ensure due process and fair trial with access as needed to legal aid, to determine the lawfulness of rights restrictions or suspensions and remedies for violations;
- Ensure compensation for injuries and damages caused by the restriction or suspension of rights or involuntary vaccination;²
- Ensure and allow the transparency, access to information and public debate necessary to assess and/or contest the lawfulness of the Vaccine Mandates;
- Ensure and allow access to information and education about alternatives such as early treatment and prophylaxis.

The IHRL requirements for the lawful restriction of derogable rights, of lawfulness, necessity and proportionality cannot be fully satisfied until the long-term efficacy and safety of the COVID-19 vaccines have been established to a reasonable degree of certainty, less harmful alternatives fully explored including to early treatment and prophylaxis, informed public debate has taken place, and the lawfulness of Vaccine Mandates and consequent restriction or suspension of rights have been determined.

Canada's IHRL Obligations

As a member of the United Nations (UN) and the Organization of American States (OAS) Canada has assumed general legal obligations to promote universal respect for and observance of rights and fundamental freedoms protected by IHRL. These duties are owed to individuals and to other States. As a signatory to many human rights treaties, Canada has assumed specific legal obligations to respect, protect and fulfill equally and without discrimination, the rights protected by each of those treaties. These legal obligations extend to all Canada's provinces and territories. Treaties ratified by Canada that specifically guarantee rights to health include the: *International Covenant on Economic, Social and Cultural Rights* (ICESCR)³, Articles 12, 7(b); *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW)⁴, Articles 10(h), 11(f), 12.1, 14.2(b); *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD),⁵ Article 5(iv); *Convention on the Rights of the Child* (CRC),⁶ Articles 3.3, 24.1, 25, 32; and, the *American Declaration of the Rights and Duties of Man* (ADRDM)⁷ Article XI. The *International Covenant on Civil and Political Rights* (ICCPR)⁸ guarantees the right to health as an integral part of another protected rights (such as to life, liberty and security of the person and freedom from torture and specifically guarantees non-derogable freedom from non-consensual medical or scientific experimentation (Articles 4.2, 7). The *Convention Against Torture and Other Cruel*,

² UN Human Rights Committee [General Comment No. 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#) CCPR/C/21/Rev.1/Add. 1326 May 2004 paras. 16-18.

³ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No. 46, 6 ILM 360 (entered into force 3 January 1976, accession by Canada 19 May 1976). [171 State Parties](#)

⁴ *Convention on the Elimination of All Forms of Discrimination against Women*, adopted 18 December 1979, entered into force 3 September 1981, UN Doc A/34/46, at 193 (1979) (CEDAW).

⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, 5 ILM 352 (entered into force 4 January 1969, accession by Canada 14 October 1970), (CERD).

⁶ *Convention on the Rights of the Child*, 44/25 of 20 November 1989, (entered into force 2 September 1990) (CRC).

⁷ Inter-American Commission on Human Rights (IACHR), [American Declaration of the Rights and Duties of Man](#), 2 May 1948.

⁸ *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), UN GAOR, 21st Sess. (1966) (ICCPR) UN Treaty Series, vol. 999, at p. 171, ratified by Canada 24 June 1987. [173 State Parties](#).

*Inhuman, or Degrading Treatment or Punishment*⁹ (UNCAT) has been interpreted as prohibiting the use of force or coercion to compel acceptance of irreversible medical intervention.¹⁰

Canada's IHRL obligations are also found in principles of customary international law, which form part of the common law under the doctrine of adoption.¹¹ This includes many provisions of the *Universal Declaration of Human Rights* (UDHR).¹² Canada has not ratified the *American Convention on Human Rights*, but is obligated to respect the provisions of the ADRDM,¹³ which is "recognized as a source of legal obligation for OAS member states, including in particular those states not party to the American Convention."¹⁴ The *American Convention* is considered "an authoritative expression of the fundamental principles set forth in the *American Declaration*"¹⁵

The Supreme Court of Canada has confirmed that "customary international law is automatically adopted into [Canadian] law without any need for legislative action"¹⁶ and that peremptory or *jus cogens* norms are fundamental tenets of international law that are non-derogable.¹⁷

Rights that are part of customary international law, and are also peremptory norms (*jus cogens*) from which no derogation is permitted even in times of national emergency, include rights to: equality and non-discrimination; freedom from arbitrary deprivation of life; freedom from torture and ill-treatment; freedom from non-consensual medical or scientific experimentation, due process; and, access to an independent, competent and impartial judiciary to determine rights and prevent and remedy violations.

Canada has a legal duty under domestic and international law to uphold the rule of law. The UDHR¹⁸ describes the rule of law as necessary to protect rights and essential to avoid "recourse, as a last resort, to rebellion against tyranny and oppression."¹⁹ The UN defines the rule of law as follows:

The "rule of law" is a concept at the very heart of the [UN] mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before

⁹ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, ratified by Canada June 1987.

[171 State Parties](#)

¹⁰ UN Committee Against Torture (CAT), [Concluding observations on the seventh periodic report of Canada](#), CAT/C/CAN/7, 21 December 2018, at paras. 50, 51, 54.

¹¹ In *R v Hape*, 2007 SCC 26 (CanLII), [2007] 2 SCR 292, the Supreme Court of Canada confirmed, at para. 39, "the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation".

¹² Lawyers Committee for Human Rights, "[What Is a Fair Trial? A Basic Guide to Legal Standards and Practice](#)" (New York, NY: March 2000) at n 7. See also *Beharry v Reno*, 183 F Supp 2d 584, 604 (EDNY 2002), noting that several IHRL instruments such as the UDHR have attained the status of customary international law because of their widespread acceptance.

¹³ Report No 105/09 Petition 592-07 Admissibility Hul'qumi'num Treaty Group Canada. 30 October 2009, para. 27.

¹⁴ Report No 52/07 Petition 1490-05 Admissibility Jessica Gonzales and Others U.S., 24 July 2007 para. 56.

¹⁵ *Mary and Carrie Dann v United States* (2002), Case No 11.140, Report No 75/02, at paras. 96-98.

¹⁶ *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 at para. 86.

¹⁷ *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176, at para. 151. *Ibid*, para. 83.

¹⁸ UN General Assembly, [Universal Declaration of Human Rights](#), 10 December 1948, 217 A (III),

¹⁹ *Ibid*, Preamble.

the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.²⁰

The binding nature of IHRL obligations on Canada has been confirmed by the Supreme Court of Canada. For example in *Divito v Canada* the Supreme Court of Canada ruled, “the [*Charter of Rights and Freedoms*] should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”²¹

All Canadian provinces and territories are bound by the rule of law and Canada’s IHRL obligations. For example, the ICCPR, Article 50 provides, “The provisions of the present Covenant shall extend to all parts of the federal States without any limitations or exceptions.” The UN *Vienna Convention on the Law of Treaties* (VCLT) mandates good faith performance of treaty obligations and prohibits Canada and other State Parties from invoking “provisions of its internal law as justification for its failure to perform a treaty.”²²

Rights Limited or Suspended by Vaccine Mandates

The Vaccine Mandates limit or potentially limit both derogable and non-derogable rights including rights guaranteed by the:

- ICCPR to: equality and non-discrimination (Article 2.1); equality before and the equal protection of the law (Article 26) ; effective remedies for rights violations (Article 2.3); freedom of belief (Articles 18.1, 4.2); freedom from coercion to adopt a belief other than by choice (Article 18.2, 4.2);; freedom of expression (Article 19); freedom from torture and ill treatment (Articles 7, 4.2); freedom from non-consensual medical or scientific experimentation (Articles 7, 4.2); life (Articles 6, 4.2); liberty and security of the person (Article 9); movement (Article 12); privacy (Article 17); take part in the conduct of public affairs (Article 25); and, to due process, fair trial and, access to judicial review (Article 14);
- ICESCR to: equality and non-discrimination (Articles 2, 3, 4); education (Article 13); health and the right to informed consent to medical treatment (Article 12); and, to work (Article 6).
- UNCAT to: freedom from torture and ill treatment (Articles 2, 16); and, effective remedies for rights violations (Articles 12, 13, 14).
- UDHR to: equality and non-discrimination (Articles 1, 2); freedom from torture and ill treatment (Article 5); equality before and equal protection of the law (Article 7); access to effective remedies for rights violations (Article 8); access to independent, impartial tribunals to determine rights (Article 10); privacy (Article 12); movement (Article 13); freedom of belief (Article 18); freedom of opinion and expression (Article 19); assembly and association (Article 20); take part in government (Article 21); work and free choice of employment (Article 23); adequate standard of living (Article 25); education (Article 26); and, to participate in cultural life (Article 27).
- ADRDM to equality before the law (Article II), education (Article XII), due process (Article XXVI), fair trial (Article XVII), freedom of expression (Article IV); health and well-being (XI),

²⁰ See: [UN and the Rule of Law: Rule of Law and Human Rights](#) and UN Security Council. 2004, [Report of the Secretary-General](#): The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, S/2004/616, para.6.

²¹ [Divito v Canada \(Public Safety and Emergency Preparedness\), 2013 SCC 47, \[2013\] 3 SCR 157](#), at para. 23. See also [Saskatchewan Federation of Labour v. Saskatchewan 2015 SCC 4, \[2015\] 1 SCR 245](#), at para. 64 and [R v Keegstra, 1990 CanLII 24 \(SCC\), \[1990\] 3 SCR 697](#), at p. 750.

²² [Vienna Convention on the Law of Treaties](#), 23 May 1969, CanTS No. 37, ratified/acceded to by Canada 14 October 1970 at paras. 26, 27.

life, liberty and personal security (Article I), movement (Article VIII), private and family life (Article V), and, to religious freedom (Article III),

Derogable Rights

The ICCPR creates two situations allowing the conditional limitation of protected rights namely when: a/ derogation/restriction is specifically allowed; and, b/ derogation is required to address a public emergency. The ICCPR specifically allows conditional restriction of rights to: liberty and security of the person (Article 9.1); movement (Article 12.3); manifestation of belief (Article 18.3); freedom of expression (article 19.3); assembly (Article 21); and, freedom of association (Article 22). Each of these ICCPR articles prohibit restrictions that do not comply with the conditions set out in the governing article. For example Article 12.3 prohibits any restrictions of freedom of movement “except those which are provided by law, are necessary to protect...public health or...the rights and freedoms of others, and are consistent with the other rights recognized in the [ICCPR].” To be lawful, restriction under the authority of any of these articles must also comply with IHRL requirements of lawfulness, necessity, proportionality and temporariness.

Article 4.1 of the ICCPR allows States, in an emergency “which threatens the life of the nation” to restrict some other derogable rights, subject to the State issuing a domestic proclamation of the emergency, providing international notification of the derogations and ensuring that the restrictions are lawful, necessary, proportionate, compatible with ICCPR objectives, temporary, and subject to review against abusive application. As stated by the UN Human Rights Committee (HR Committee),

Measures derogating from the provisions of the [ICCPR] must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the [ICCPR], States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers;²³

Non-Derogable Rights - Determinants

Rights considered non-derogable and therefore not subject to lawful restriction or suspension include:

- a/ rights accepted by customary international law as peremptory norms;
- b/ rights considered essential to the maintenance of other rights, the purpose and objects of the treaty guaranteeing the right, and/or to maintenance of the rule of law; and,
- c/ rights identified in the relevant treaty as non-derogable.

Peremptory Norms

A peremptory norm is defined by the VCLT as, “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”²⁴ The rights with peremptory norm status are a matter of debate amongst jurists and human rights specialists. Included

²³ HR Committee, [General Comment 29, States of Emergency \(article 4\)](#), CCPR/C/21/Rev.1/Add.11, 31 August 2001 at para. 2.

²⁴ VCLT, 23 May 1969, CanTS No. 37, ratified/acceded to by Canada 14 October 1970 at para. 53.

in the UN International Law Commission's "non-exhaustive" list of peremptory norms are prohibitions of torture and crimes against humanity.²⁵ The HR Committee identifies the right to life and freedom from torture and ill treatment as peremptory norms.²⁶ UNCAT rights to freedom from torture and access to effective remedies for violations are absolute and non-derogable. Among the rights identified by The Inter-American Human Rights System as peremptory norms are the right to equality and non-discrimination and the right to judicial review.²⁷

Essential Rights

A right is considered non-derogable when the right is essential to the maintenance of other protected rights, the object and purpose of the treaty guaranteeing the right or to the rule of law. For example with respect to the first category, a non-derogatory prohibition of torture would be rendered nugatory without being accompanied by non-derogatory rights to equal and non-discriminatory protection of the law, effective remedies and access to independent judicial review of complaints. Similarly derogation of rights to equality and non-discrimination would convert rights to privileges. Maintenance of the right to work is an essential component of other rights including the non-derogable right to life. The UN General Assembly includes equality before the law, participation in decision making and access to independent adjudication of laws as essential components of the rule of law.

Considering the right of states when signing or ratifying a treaty, to reserve the right not to abide by certain provisions, the HR Committee observes that reservations are not permitted for rights that are peremptory norms or essential to the rule of law and that States would have a "heavy onus to justify" a reservation contrary to the object and purpose of the ICCPR.²⁸

ICCPR rights that must be considered non-derogable as essential for upholding non-derogable rights or "ensuring respect for the rule of law and the principle of legality even in times of public emergency, [include] the right of access to the court, due process guarantees and the right of victims to obtain an effective remedy."²⁹ These include rights to: equality and non-discrimination, equality before and the equal protection of the law, effective remedies for rights violations liberty and security of the person, due process and access to judicial review to determine rights. The term "access to the court" must be interpreted as meaning timely, equal and non-discriminatory access, assisted where needed by legal aid, to an independent, impartial and competent tribunal to determine rights and remedy violations.

Derogation Prohibited by Treaty

The ICCPR Article 4.2 specifically prohibits, *inter alia*, restriction of rights to life, freedom from torture or ill treatment, freedom from non-consensual medical or scientific experimentation, freedom of belief, and freedom from coercion to adopt a belief other than by choice. The HR Committee emphasizes the immutability of these State obligations,

²⁵ [Report of the International Law Commission](#), A/74/10, 2019 at p. 203.

²⁶ HR Committee, [General Comment 29, States of Emergency \(article 4\)](#), CCPR/C/21/Rev.1/Add.11, 31 August 2001 at para.11.

²⁷ See: [Inter-American Court of Human Rights Advisory Opinion](#) OC-18/03, 17 September 2003, pp. 23, 24fflg; and, Augusto Cançado Trindade, [Jus Cogens: The Determination and the Gradual Expansion](#) of its Material Content in Contemporary International Case-Law.

²⁸ HR Committee, [General Comment No. 24 on issues relating to reservations](#) made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant CCPR/C/21/Rev.1/Add.6 11 November 1994 at para. 10. See also paras 9 and 11 regarding right to equality and non-discrimination and remedies.

²⁹ HR Committee - [Statement on derogations from the Covenant in connection with the COVID-19 pandemic](#), CCPR/C/128/2 (24 April 2020) at p. 2 (d).

States parties cannot resort to emergency powers or implement derogating measures in a manner that is discriminatory, or which violates other obligations they have undertaken under international law, including under other international human rights treaties from which no derogation is allowed. Nor can States parties deviate from the non-derogable provisions of the Covenant - i.e., article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent),...article 15 (the principle of legality in the field of criminal law), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion) - or from other rights which are essential for upholding the non-derogable rights found in the aforementioned provisions and for ensuring respect for the rule of law and the principle of legality even in times of public emergency, including the right of access to court, due process guarantees and the right of victims to obtain an effective remedy.³⁰

The ICESCR does not specifically allow derogation or restriction of the protected rights. In a directive entitled, Emergency Measures and COVID-19 Guidance, the UN Office of the Commissioner of Human Rights states,

The [ICESCR] does not include a provision on derogations. State obligations associated with the core content of the rights to food, health, housing, social protection, water and sanitation, education and an adequate standard of living remain in effect even during situations of emergency.³¹

Non-Derogable Rights under the ICCPR, ICESCR & UNCAT

IHRL prohibits derogation absolutely or recommends against the derogation of:

1. ICCPR rights to: equality and non-discrimination; equality before and the equal protection of the law; effective remedies for rights violations; freedom of belief; freedom from coercion to adopt a belief other than by choice; freedom from torture and ill treatment; freedom from non-consensual medical or scientific experimentation; life; due process; access to independent, competent and impartial tribunals to determine rights; participation in decision making; and, to effective remedies for rights violations.
2. ICESCR rights to: education, work, health and the right to informed consent to medical treatment; and,
3. UNCAT rights to freedom from torture and other ill treatment, freedom from non-consensual medical treatment and effective remedies for violations.

The right to informed consent to medical treatment and the companion right to refuse treatment without punishment must obviously be considered non-derogable in relation to COVID-19 vaccines. There are no IHRL provisions or jurisprudence that allow a State to lawfully override the decision of a competent adult to refuse medical treatment or to impose punishment. In addition, it is reasonable for a person to consider the COVID-19 vaccines as experimental and to refuse vaccination on that basis. In any event the UN Committee Against Torture (CAT) concluded that the use of force or coercion to compel involuntary

³⁰ *Ibid.*

³¹ OHCHR, [EMERGENCY MEASURES AND COVID-19: GUIDANCE](#), 27 April 2020

submission of indigenous women to sterilization contravened UNCAT prohibitions of torture and ill-treatment and requested a follow-up report from Canada.³²

In the follow-up report to CAT, Canada admits that,

- “Forced or coerced sterilization is a serious violation of human rights and medical ethics and constitutes a criminal offence in Canada” (at para. 15);
- “Because sterilization procedures have a significant impact on the body of the person subjected to the procedure, aggravated forms of assault are likely to apply where informed consent is not provided.” (at para. 17)
- Medical treatment must only be provided with the consent of the patient, or of a legally authorised substitute decision maker in certain cases.” (at para. 23)

The report goes to state that in Canada,

For consent [to medical treatment] to be considered valid it must be provided voluntarily by a person capable of providing consent and it must refer to the treatment and provider who will perform or undertake the treatment. Consent must also be informed, meaning that certain issues must be discussed with the patient prior to consent being obtained, such as material, expected consequences of the proposed treatment, special or unusual risks of the treatment, alternatives to treatment (and their risks), the likely consequences if no treatment is undertaken, and the success rates of different/alternative methods of treatment. The principle of respect for autonomy, at least in part, underpins the right to informed consent.³³

IHRL Rights to Health, Informed Consent and Freedom from Non-Consensual Experimentation

Rights to health, informed consent to medical treatment and freedom from non-consensual medical or scientific experimentation are now recognized and guaranteed by treaties and other instruments of the UN, the OAS and other regional organizations³⁴ The Nuremberg Code and Helsinki Declaration requirements of access to information, capacity to understand and freedom from coercion have been widely adopted as components of the right to informed consent to medical treatment. The duty of physicians has been codified by the World Medical Association (WMA) as, “[a] physician SHALL respect a competent patient’s right to accept or refuse treatment.”³⁵

³² CAT, [Concluding observations on the seventh periodic report of Canada](#), CAT/C/CAN/7, 21 December 2018, at paras. 50, 51, 54.

³³ [Information received from Canada on follow-up to the concluding observations on its seventh periodic report](#), CAT/C/CAN/FCO/7, 16 April 2020 at paras 15, 17, 23.

³⁴ This commentary does not examine the provisions or jurisprudence of the African Union, the European Union or other regional organizations regarding COVID-19 vaccine mandates. See: European Court of Human Rights, Case of *Vavricka and others v The Czech Republic*, No. 47621/13, 21 April, 2021. The Court ruled that vaccination of children for poliomyelitis, measles and other diseases as a condition of nursery school attendance and fining of parents did not violate the right to private family life. Available at: <http://hudoc.echr.coe.int/eng?i=001-209039>

³⁵ [The International Code of Medical Ethics](#), Adopted by the 3rd General Assembly of the World Medical Association, London, England, October 1949, and amended by the 22nd World Medical Assembly, Sydney, Australia, August 1968, the 35th World Medical Assembly, Venice, Italy, October 1983, and the WMA General Assembly, Pilanesberg, South Africa, October 2006.

Right to Health

The right to health was recognized as a fundamental right in 1946 by the Constitution of the World Health Organization (WHO), which states, “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without discrimination of race, religion, belief, economic or social condition.”³⁶

The right to health is recognized both as a specifically identified right and as an integral part of the other rights. The ICESCR Article 12 provides,

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

...

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

The UN Committee on Economic Social and Cultural Rights (CESCR) has noted the reliance and independence of rights to health on the realization of many other rights affected by the Vaccine Mandates. The CESCR concludes that these related rights are integral components of the right to health.

The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.³⁷

Right to Informed Consent to Medical Treatment

The right to health is defined as including freedoms from bodily interference, non-consensual treatment and from force or coercion to accept a treatment not freely chosen. The right to informed consent is considered as including access to information and participation in decision making. State duties to ensure and allow informed consent include duties to provide both education about informed consent and access to the information relevant its exercise.

The Office of the UN High Commission of Human Rights (OHCHR) and the WHO define the right to health as including, “the right to be free from non-consensual treatment.”³⁸ The CESCR defines the right to health as including, “the right to control one’s health and body...and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.”³⁹

³⁶ [Constitution of the World Health Organization](#), 1946, Preamble. UN General Assembly, *Entry into force of the constitution of the World Health Organization*, 17 November 1947, A/RES/131.

³⁷ [CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health \(Art. 12 of the Covenant\)](#), 11 August 2000, E/C.12/2000/4, at para. 3..

³⁸ [OHCHR and WHO, Fact Sheet No. 31, The Right to Health](#), June 2008, No. 31, p. 3. Available at:

³⁹ [CESCR, General Comment No. 14](#), at para. 8.

The UN Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health (SR on health) states, “[i]nformed consent is a core element of the right to health, both as a freedom and an integral safeguard to its enjoyment (see A/64/272). The right to provide consent to treatment and hospitalization includes the right to refuse treatment (see E/CN.4/2006/120, para. 82).”⁴⁰

Access to information and participation in decision making are important elements of rights to health and informed consent to medical treatment. As stated by the CESCR,

“[A]ccessibility includes the right to seek, receive and impart information and ideas concerning health issues.”⁴¹

...

“A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.”⁴²

A study regarding the special requirements of informed consent to COVID-19 vaccines concluded,

Given the strong evidence that [anti-body dependent enhancement] is a non-theoretical and compelling risk for COVID-19 vaccines and the “laundry list” nature of informed consents, disclosure of the specific risk of worsened COVID19 disease from vaccination calls for a specific, separate, informed consent form and demonstration of patient comprehension in order to meet medical ethics standards. The informed consent process for ongoing COVID-19 vaccine trials does not appear to meet this standard.⁴³

The SR on health reporting on Croatia’s compliance with the ICESCR, recommended,

that the State ensure that informed consent is obtained by allocating adequate time to inform users about treatments, their effects and options on the basis of services that are sensitive to the rights of all users and through improved training of medical doctors and other health-care personnel in human rights and medical ethics.⁴⁴

Commenting on Canada’s failure to ensure a rights-based health system, the SR on health, reminded Canada that rights, including to informed consent and participation in decision making, must be protected by all provinces and territories and recommended,

concrete standards, such as nondiscrimination, acceptability, quality, informed consent or participation, that can be added to existing criteria on federal financial transfers under the Canada Health Transfer, so that those funds may be withheld or

⁴⁰ [Report of the SR on health](#), A/HRC/35/32, 28 March 2017, at para. 63.

⁴¹ CESCR [General Comment No. 14](#) at para. 12 (b)

⁴² *Ibid* at para. 11.

⁴³ [Informed consent disclosure to vaccine trial subjects of risk of COVID-19 vaccines worsening clinical disease](#), Timothy Cardozo, Ronald Veazey, *International Journal of Clinical Practice*, 2021;75:e13795

⁴⁴ [Report of the Special Rapporteur on health on his visit to Croatia](#), A/HRC/35/21/Add.2, 28 April 2017 at para. 118 (h). See also [Information received from Canada on follow-up to the concluding observations on its seventh periodic report](#), CAT/C/CAN/FCO/7, 16 April 2020 at para. 23.

reduced by the Government of Canada when human rights are not protected, respected and/or fulfilled by the provincial/territorial governments⁴⁵

Right to Freedom from Non-Consensual Medical or Scientific Experimentation

The right to freedom from non-consensual medical or scientific experimentation was recognized by The Nuremberg Code (1947), which established 10 standards to ensure the right to control one's own body and prohibit non-consensual medical experimentation. The standards identify the elements of informed voluntary consent as including: access to information, capacity to understand, and freedom from coercion.

The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion, and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision.

The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs, or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.⁴⁶

The World Medical Association's Helsinki Declaration, which later confirmed and expanded on the Nuremberg Code standards, emphasizes the importance of the right to refuse without reprisals and the need to record consent.⁴⁷

The potential subject must be informed of the right to refuse to participate in the study or to withdraw consent to participate at any time without reprisal.

After ensuring that the potential subject has understood the information, the physician or another appropriately qualified individual must then seek the potential subject's freely-given informed consent, preferably in writing. If the consent cannot be expressed in writing, the non-written consent must be formally documented and witnessed.

The right to freedom from non-consensual medical or scientific experimentation and the right to refuse without punishment codified by the Nuremberg Code are guaranteed by the ICCPR as part of freedom from torture and ill-treatment. Article 7 guarantees, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." The ICCPR Article 4.2 prohibits derogation of this right under any circumstances including a public emergency.

⁴⁵ [Report of the Special Rapporteur on health on Canada](#), 20 July 2019 A/HRC/41/34/Add.2, at paras. 34, 35.

⁴⁶ [The Nuremberg Code 1947](#) at para. 1. The Nuremberg Code 1947 was derived from the decision of the Nuremberg Military Tribunal in *United States v Karl Brandt et al.* which identified ten conditions prohibiting non-consensual medical experimentation on human subjects.

⁴⁷ World Medical Association, [Declaration of Helsinki Ethical Principles for Medical Research Involving Human Subjects](#), Adopted by the 18th WMA General Assembly, Helsinki, Finland, June 1964, and most recently amended by the 64th WMA General Assembly, Fortaleza, Brazil, October 2013, at paras. 26. See also paras 25 to 32 on informed consent.

The CAT, reviewing Canada's compliance with UNCAT, found that forced or coerced sterilization (of indigenous women) is treatment prohibited by UNCAT. The CAT went on to recommend not only investigation, accountability and compensation for victims, but also education of medical personnel and adoption of a clear definition of the requirement for free, prior and informed consent.⁴⁸ Like non-consensual sterilization, forced or coerced treatment with a COVID-19 vaccine is an irreversible interference with and alteration of an individual's bodily integrity and therefore prohibited under any circumstances by both the UNCAT and the ICCPR.

COVID-19 Vaccines 'Still Essentially Experimental'

Use of the COVID-19 Pfizer, Moderna and AstraZeneca vaccines went ahead in Canada authorized only on Interim Order Authorizations. On 16 September 2021 these vaccines were reported as approved under the new names respectively of Comirnaty, Spikevax, and Vaxzevria.⁴⁹ United States approval of Comirnaty and Spikevax was based on observations made during a mere 4 to 6 months after the second dose. The approvals include mandatory commitments to monitor long-term safety and efficacy including adverse reactions.⁵⁰ Pfizer's Patient Information Leaflet states, "people who take the [Pfizer Covid-19 Vaccine (Comirnaty)] should be aware that it is still essentially experimental."⁵¹ (emphasis added) Moderna Inc. describes Moderna as an "unapproved vaccine" and states that the safety and efficacy of Spikevax for pregnant women, breast-fed infants and children under 12 has not been established.⁵² An AstraZeneca fact sheet cautions that the vaccine be administered to certain groups only "if a risk assessment deems that the benefits outweigh the potential risks for the individual, and if informed consent includes discussion about the limited data on the use of COVID-19 vaccine in these populations."⁵³ There is currently no data on the intermediate or long-term safety or efficacy of the vaccines and concerns about the efficacy and safety are increasing.⁵⁴ Available data on adverse reactions to COVID-19 vaccines cannot be used to accurately assess safety as reporting systems such as US Vaccine Adverse Event Reporting System (VAERS) involve voluntary reporting.⁵⁵

A recent study of data from 68 countries found no discernable relationship between percentages of the population fully vaccinated and new COVID-19 cases and concluded that non-pharmaceutical prevention

⁴⁸ CAT, [Concluding observations on the seventh periodic report of Canada](#), CAT/C/CAN/7, 21 December 2018, at paras. 50, 51, 54.

⁴⁹ [Pfizer, Moderna COVID-19 vaccines get full Health Canada approval — and new names](#), Global News, 16 September 2021.

⁵⁰ [Comirnaty and Pfizer-BioNTech COVID-19 Vaccine](#), 22 September 2021 at Package Insert and Approval letter.

⁵¹ [Pfizer Covid-19 Vaccine \(Comirnaty\) PATIENT INFORMATION LEAFLET](#) at p. 2.

⁵² See: [Product Monogram, Moderna Inc.](#), 16 September 2021, at paras. 1.1, 7.1 and, [Fact Sheet for Recipients and Caregivers](#), Moderna Inc., 27 August 2021. Available at <https://www.fda.gov/media/144638/download>

⁵³ [AstraZeneca Vaccine, BC Centre for Disease Control](#), 14 September 2021

⁵⁴ See: [A Report on the U.S. Vaccine Adverse Events Reporting System \(VAERS\) of the COVID-19 Messenger Ribonucleic Acid \(MRNS\) Biologicals](#), Jessica Rose, PhD, MSc, BSc, Science, Public Health Policy and The Law, Volume 2:59-80, May, 2021, Clinical and Translational Research, p. 73; [Open Letter to Dr. Bonnie Henry, Adrian Dix, and Premier John Horgan](#); [Open letter Regarding University Vaccination and Testing Mandates](#), Daniel Smilek, David M Haskell, William J. McNally, Nikolai Kovalev, 1 September 2021; [Open Letter to Dr. Santa Ono President and Vice-Chancellor of UBC](#), Dr. Steven Pelech, Dr. Chris Shaw; 9 September 2021; [The Case Against Mandatory Vaccines](#), Dr. Bryam Bridle, Canadian Covid Care Alliance; Covid Vaccine Mandates, Dr. J. Michael Vila, 21 September 2021; [Vaccine concerns weighed against natural immunity](#) *The COVID-19 vaccine train forges ahead with reckless speed and destinations unknown*, John Zwaagstra, PhD, 20 September 2021; RE: Mandatory mRNA vaccine mandate for Alberta physicians, [Submissions to Alberta College of Physician & Surgeons](#), Dr. Eric Payne, 15 September 2021.

⁵⁵ R. Lazarus et al, [Electronic Support for Public Health—Vaccine Adverse Event Reporting System \(ESP:VAERS\)](#)

measures are needed.⁵⁶ Lack of transparency and access to accurate information has stifled much needed debate regarding these issues and proper assessment of the vaccines even amongst medical specialists.

State Duties to Prevent, Treat and Control Disease

The CESCR has identified state duties to promote and protect public health by, *inter alia*, providing immunization, prevention, treatment, education, access to urgent medical care, epidemiological surveillance and data collection. The ICESCR, Article 12(2) (c) states, “The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ... (c) The prevention, treatment and control of epidemic, endemic, occupational and other disease.”

The CESCR⁵⁷ confirms state obligations:

- (b) To provide immunization against the major infectious diseases occurring in the community;
- (c) To take measures to prevent, treat and control epidemic and endemic diseases;
- (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
- (e) To provide appropriate training for health personnel, including education on health and human rights.

None of these duties allow States to restrict or suspend by force, coercion or imposition of penalties the individual’s right to freedom from non-consensual medical treatment, freedom from non-consensual medical experimentation or to voluntary informed consent. The CESCR warns,

Issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights. The Committee wishes to emphasize that the Covenant’s limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States.⁵⁸

Several UN and OAS human rights experts and treaty monitoring bodies have warned against the use of any measures that force or coerce submission to COVID-19 vaccines by restricting or suspending rights of individuals who chose not to be vaccinated.

The Inter-American Commission on Human Rights (IACHR) cautions that a perceived need for mass vaccination does not authorize States to override the individual’s right to informed consent or the right to refuse medical treatment. The IACHR calls on States to fulfill duties to ensure, “access to all the relevant information on vaccines, on access to them, and on their application, protecting the right to informed

⁵⁶ Subramanian, S.V., Kumar, A., [Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States](#). *Eur J Epidemiol* (2021).

⁵⁷ [CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health](#) (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, at para. 44.

⁵⁸ *Ibid*, at para.28.

consent.”⁵⁹ The ACHR also reminds States that, “[p]rotecting the right to access public information and ensuring effective communications are crucial for successful mass immunization from COVID-19 and for the exercise of the right to informed consent.”

The WHO published observations cautioning against the imposition of any measures compelling COVID-19 vaccination “by direct or indirect threats of imposing restriction in cases of non-compliance.” The WHO concluded that it “does not support the direction of mandates for COVID-19 vaccination, having argued that it is better to work on information campaign and making vaccines accessible.”⁶⁰ (emphasis added)

In relation to COVID-19 vaccines the Parliamentary Assembly of the Council of Europe passed a resolution urging its members and the European Union to,

7.3.1- ensure that citizens are informed that the vaccination is not mandatory and that no one is under political, social or other pressure to be vaccinated if they do not wish to do so;

7.3.2 - ensure that no one is discriminated against for not having been vaccinated, due to possible health risks or not wanting to be vaccinated;⁶¹ (emphasis added)

The Special Rapporteur on health has cautioned with respect to COVID-19 that, “prioritization of public health can – but must not – be used to curtail human rights.”⁶² (emphasis added)

To enable informed consent regarding the COVID-19 vaccines, Canada must provide public access to accurate and up-to-date data about: the risk of contracting, being hospitalized with and dying from COVID-19; the risks (for various age, gender and health demographics) of experiencing, being hospitalized with and dying from vaccine-related adverse effects; and, the long-term efficacy and safety of the COVID-19 vaccines. Failure by the State to ensure and allow dissemination of such information obviates the right to informed consent for those individuals requiring the information. The pronouncements and assurances of elected and public health officials do not constitute the type of information required by IHRL to enable informed consent.

Right of States to Limit Rights to Protect Public Health

IHRL allows States to impose measures temporarily limiting some derogable rights in two situations--in normal times and in times of an emergency—on condition of strict compliance with the IHRL standards and principles applicable to the situation and the measures limiting protected rights.

Rights protected by the ICESCR to work (Article 6, 7); health (Article 12); and education (Article 13) should be treated as non-derogable and therefore not subject to restriction in normal times or an emergency. These rights are essential to maintenance of other rights (e.g. life, equality, security of the person) and therefore must be treated as non-derogable. The UN Office of the High Commissioner of

⁵⁹ *IACHR and its SRESCER Call on American States to Make Public Health and Human Rights the Focus of All their Decisions and Policies Concerning the COVID-19 Vaccine*, para. 4 of Guaranteeing universal access to vaccines, with priorities based on public health criteria, 5 February 2021.

⁶⁰ *Covid-19 and Mandatory Vaccination: Ethical Considerations and Mandate*, The WHO, 21 April 2021.

⁶¹ The Parliamentary Assembly of the Council of Europe *Covid-19 vaccines: ethical, legal and practical considerations*, [Resolution 2361 \(2021\)](#), 27 January 2021, at para. 7.

⁶² [Final report of the Special Rapporteur on the right to health](#), Dainius Pūras, A/75/13, at para. 92.

Human Rights (OHCHR) recently released statement on emergency and COVID measures states, “[a]s CESCR does not include a derogation clause it is assumed that rights protected such as those to education and employment must be maintained even during a national emergency.”⁶³

Under normal circumstances the ICCPR specifically allows limitation of rights to: liberty and security of the person (Article 9.1); movement (Article 12); freedom to manifest one’s belief (Article 18.3); freedom of expression (Article 19.3); freedom of peaceful assembly (Article 21); and, freedom of association with others (Article 22.2). Any limitations must strictly comply with terms of each Article. For example, limitations of the right to movement must be “provided by law” and “necessary for the protection of...public health or...the rights and freedoms of others, and are consistent with the other rights recognized in the [ICESCR].”⁶⁴ Limitations of rights to liberty and security of the person must be “in accordance with such procedures as are established by law” and “respect the inherent dignity of the human person.”⁶⁵ The ICCPR specifically prohibits “arbitrary or unlawful interference” with privacy.⁶⁶ The OHCHR stresses even in non-emergency times, measures to limit rights “must meet the requirements of legality, necessity and proportionality, and be non-discriminatory.”⁶⁷

Any measure limiting rights must fulfill IHRL requirements of lawfulness, legitimacy, necessity, and proportionality and must be temporary:

1. **Lawfulness** –A measure can be arbitrary and unlawful even if authorized by law. To be lawful the limitation must be in accordance with IHRL obligations and with procedures established by a domestic law, be accessible to the public, precise and predictable and contain elements of necessity, proportionality and reasonableness.⁶⁸
2. **Legitimacy** –measures restricting rights must be designed and capable of achieving a goal that is clearly stated, capable of being assessed and in accordance with IHRL obligations;
3. **Necessity** – measures restricting rights must be necessary to achieve a legitimate goal and be the only and least harmful means available;
4. **Proportionality** – Measures limiting rights must be proportional to the reasonably expected benefits and in accordance with publically available data establishing that less intrusive means of achieving the goals are ineffective;
5. **Temporary** – the limitations must be temporary. Promises of periodic review should not be taken as complying with this requirement.

Emergency Measures

It is important to stress that “The sole justification [for emergency measures] is defence of the democratic order, which in turn is defined not as a political system but as a set of values that is based on human rights as a whole.”⁶⁹ Emergency measures must serve to protect and preserve rights protected by IHRL, the rule

⁶³ Office of the High Commissioner of Human Rights, [Emergency Measures and COVID-19: Guidance](#), 27 April 2020.

⁶⁴ ICCPR, Article 12.3.

⁶⁵ ICCPR Article 9.1, 10.

⁶⁶ ICCPR Article 17.

⁶⁷ OHCHR, [Emergency Measures and COVID-19 Guidance](#).

⁶⁸ See opinions regarding arbitrary limitation of rights to liberty: HR Committee, [General comment no. 35, Article 9 \(Liberty and security of person\)](#), 16 December 2014, CCPR/C/GC/35, at para. 12; Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, 6 July 2015, Guideline 15, Standard of Review.

⁶⁹ SR on Human Rights and States of Emergency, [The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency](#), 23 June 1997, E/CN.4/Sub.2/1997/19, at para. 101.

of law and democracy and can never lawfully be used to justify the restriction or suspension of rights other than in furtherance of these duties and principles.

In times of public emergency, the ICCPR Article 4.1 allows States to impose “exceptional and temporary” limitations of derogable rights. The HR Committee has determined that such emergency measures are only allowed when there is “a public emergency that threatens the life of the nation” and the State has “officially proclaimed a state of emergency”⁷⁰ and informed other State parties of the derogation through notice to the UN Secretary-General of the measures taken, reasons for and law supporting.⁷¹ States must “provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation.”⁷² It is up to the State imposing limitations in emergency situations or under the conditions allowed in non-emergency times by the ICCPR, to justify the limitations in accordance with IHRL.

Article 4.2 of the ICCPR specifically prohibits derogation under any circumstances, including national emergency, from the guarantees in: Article 6 (right to life); Article 7 (freedoms from torture and ill-treatment and non-consensual medical or scientific experimentation); Article 18 (freedom of belief and from coercion to adopt a belief other than by choice); and Articles 11, 15 and 16. The HR Committee states,

The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the preemptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 [right to life] and 7 [freedom from torture and other cruel, inhuman or degrading treatment or punishment]).⁷³

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) was developed to deter states from using illegal states of emergency to arbitrarily restrict ICCPR rights and provides,

No state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant’s guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent...These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.”⁷⁴

All measures to restrict ICCPR rights must be lawful, necessary, proportionate, compatible with ICCPR objectives, temporary, and subject to review against abusive application. States cannot use Article 4.1 to justify limitation of rights protected by other international law.⁷⁵

⁷⁰ HR Committee, [General Comment 29, States of Emergency \(article 4\)](#), CCPR/C/21/Rev.1/Add.11, 31 August 2001 at para. 2

⁷¹ *Ibid* at para. 17;

⁷² *Ibid* at para. 5.

⁷³ *Ibid* at para. 11.

⁷⁴ UN Commission on Human Rights, [The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights](#), 28 September 1984, E/CN.4/1985/4, at paras. 58, 69 (b).

⁷⁵ See: HR Committee [General Comment No. 29](#) at paras. 4, 6, 9, 10, 12; ICCPR Article 5(2); and, The Siracusa Principles.

IHRL requires States to make—prior to imposing emergency measures—a public proclamation informing the public of the purpose, nature, scope and duration of the proposed emergency measures and the human rights affected.⁷⁶ In the absence of a proclamation, the measures imposed are not lawful. States must then provide notification to the international community and other States by giving notice to the Secretary General of the UN General Assembly and to the Secretary General of the OAS. This international notice must include full information regarding; the proclamation of emergency and the laws authorizing and governing; facts justifying the proclaimed emergency; anticipated effects of the derogations; and, termination date. Failure to immediately provide required notification is a breach of the State's obligations under the ICCPR and to other State parties.⁷⁷ All measures to restrict ICCPR rights must be lawful, necessary, proportionate, compatible with ICCPR objectives, temporary, and subject to review against abusive application. States cannot use Article 4.1 to justify limitation of rights protected by other international law.⁷⁸

The WHO has recommended States seeking to impose vaccine mandates that limit protected rights to produce relevant data and ensure compensation for victims of vaccine-related harm.⁷⁹

Regarding imposition of Vaccine Mandates, the State must also produce data enabling the domestic and international communities to assess the necessity lawfulness and proportionality of the emergency derogation of rights to the stated purpose. The WHO states,

Data on efficacy and effectiveness should be available that shows the vaccine is efficacious in the population for whom vaccination is to be mandated and that the vaccine is an effective means of achieving an important public health goal. For instance, if mandatory vaccination is considered necessary to interrupt transmission chains and prevent harm to others, there should be sufficient evidence that the vaccine is efficacious in preventing serious infection and/or transmission. Alternatively, if a mandate is considered necessary to prevent hospitalization and protect the capacity of the acute health care system, there should be sufficient evidence that the vaccine is efficacious in reducing hospitalization. Policy-makers should carefully consider whether vaccines authorized for emergency or conditional use meet evidentiary thresholds for efficacy and effectiveness sufficient for a mandate.⁸⁰

The WHO also recommends any vaccine mandate “should be implemented with no-fault compensation schemes to address any vaccine-related harm that might occur.”⁸¹

⁷⁶ See: SR on Human Rights and States of Emergency, [The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency](#), 23 June 1997, E/CN.4/Sub.2/1997/19, paras. 59-63; and, HR Committee General Comment No. 29 at para. 2.

⁷⁷ See: [The Siracusa Principles](#), paras. 42 to 50; SR on Human Rights and States of Emergency, *The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency* at para. 60; and, HR Committee General Comment No. 29 at para.

⁷⁸ See: HR Committee [General Comments No. 29](#) at paras. 4, 6, 9, 10, 12; ICCPR Article 5(2); and, *The Siracusa Principles*

⁷⁹ *Covid-19 and Mandatory Vaccination: Ethical Considerations and Mandate*. See also on State duty to provide reparation, HR Committee [General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#) CCPR/C/21/Rev.1/Add. 1326 May 2004 para. 16.

⁸⁰ [Covid-19 and Mandatory Vaccination: Ethical Considerations and Mandate](#), WHO, 21 April 2021.

⁸¹ *Ibid.*

Strict compliance with IHRL is essential to establishing the lawfulness of Vaccine Mandates to restrict or suspend the derogable rights of vaccinated and unvaccinated persons. Restriction or suspension of non-derogable rights is unlawful. For unvaccinated persons, the Vaccine Mandates proposed and implemented in Canada effectively extinguish the right to freedom from non-consensual medical experimentation and to informed consent to medical treatment and severely restrict other rights including rights designated by the ICCPR, HR Committee, OHCHR and the ACHR as non-derogable and not subject to lawful limitation.

The UN Secretary General while expressing appreciation of the need for special measures to address COVID has stated, “All measures must incorporate meaningful data protection safeguards, be lawful, necessary and proportionate, time-bound and justified by legitimate public health objectives.”⁸²

In the words of the CESRC any limitations of rights must be;

...in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the [CESRC], in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.

...

...such limitations must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review⁸³

Conclusion

Rights actually or potentially limited by Vaccine Mandates include:

1. Derogable rights guaranteed by the ICCPR to: freedom of expression; liberty and security of the person; movement; privacy and manifestation of belief; and,
2. Non-Derogable rights guaranteed by the ICCPR to: equality and non-discrimination; equality before and the equal protection of the law; effective remedies for rights violations; freedom of belief; freedom from coercion to adopt a belief other than by choice; freedom from torture and ill treatment; freedom from non-consensual medical or scientific experimentation; life; due process and access to independent, competent and impartial tribunals to determine rights;
3. Non-Derogable right guaranteed by UNCAT to: freedom from torture and ill treatment; freedom from non-consensual medical or scientific experimentation; freedom from force or coercion to compel non-consensual medical treatment;⁸⁴ and, effective remedies for rights violations;
4. Non-Derogable rights⁸⁵ guaranteed by the ICESCR to: equality and non-discrimination; education: work: health and the right to informed consent to medical treatment.

⁸² UN, [COVID-19 and Human Rights: We are all in this Together](#), April 2020 at p. 16. :

⁸³ CESCR, [General Comment No. 14: The Right to the Highest Attainable Standard of Health](#) (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, at paras. 28, 29.

⁸⁴ CAT, [Concluding observations on the seventh periodic report of Canada](#), CAT/C/CAN/7, 21 December 2018, at paras. 50, 51, 54.

⁸⁵ OHCHR, [EMERGENCY MEASURES AND COVID-19: GUIDANCE](#), 27 April 2020

The restrictions and suspensions of derogable rights imposed by the Vaccine Mandates do not comply with: a/ ICCPR conditions; b/ IHRL requirements of lawfulness, necessity, proportionality or legitimacy for emergency or non-emergency measures restricting rights; or, c/ the requirements of domestic proclamation and international notifications for emergency measures. In addition Canada has failed to produce the information needed for the public to fully understand or assess the scope and purpose, lawfulness, legitimacy, necessity, necessity and proportionality of the Vaccine Mandates and consequent restriction and suspension of rights. Any limitations of non-derogable rights resulting from Vaccine Mandates are therefore unlawful.

Canada has not complied or fully complied with IHRL mandatory obligations to:

- a/ ensure the right to informed consent to COVID-19 vaccines through provision of adequate information and education as identified by the Nuremberg Code, Helsinki Declaration, CAT, CDESCR, SR on health, ACHR, Council of Europe and the WHO; and,
- b/ comply with IHRL requirements of non-emergency and emergency measures with the purpose or potential to restrict or suspend derogable rights; and,
- c/ respect, protect, ensure and prohibit limitations of non-derogable rights.

The Vaccine Mandates should therefore be withdrawn immediately in favour of measures that are less harmful, comply with IHRL standards and Canada's IHRL obligations, accord with the rule of law and democratic principles, and are supported by evidence as being effective, safe, lawful, proportional and necessary in a democracy to preserve rights.

Released for discussion 28 October 2021

This commentary is not exhaustive, may contain errors and does contain omissions. This advance version is released to enable people to examine and assess the lawfulness of Vaccine Mandates that restrict or suspend rights and to promote respect for and adherence to IHRL, the rule of law and the democratic principles threatened by the Vaccine Mandates.

Feedback is welcome to
Gail Davidson,
Member of the Law Society of British Columbia (retired status)
justgail@portal.ca

Omissions include:

- Relevant provisions and jurisprudence of UN treaties to which Canada is a party other than the ICCPR ICESCR and UNCAT;
- Relevant jurisprudence of the Inter-American Human Rights System;
- Examination of personal and societal harms caused by restriction and suspension of derogable and non-derogable rights;
- Review of Canadian law other than Canada's IHRL obligations;
- Studies and opinions questioning the efficacy, safety of the COVID-19 vaccines and the need for mass vaccination.