

The responsibility of the Brazilian State for the right to life in the context of the COVID-19 pandemic

Fernanda Frizzo Bragato¹

The world was surprised in early 2020 by COVID-19, a disease caused by a new coronavirus (Sars-Cov-2) that, after registering the first cases in the city of Wuhan, China, in December 2019,² spread quickly to around the world. On 03/11/2020, the World Health Organization (WHO) declared COVID-19 as a pandemic.³ According to the WHO, as of April 26, 2,810,325 confirmed COVID-19 cases had been reported to the organization, including 193,825 deaths.⁴ In early March 2020, Italy was struck by a drastic and abrupt incidence of the disease, which led to complete social isolation in certain regions of that country.⁵ Then, other countries such as Spain, France, Germany and the United Kingdom underwent similar experiences, followed by the United States, the country that currently has the highest number of cases and deaths in the world.⁶

The mortality rate of the disease - not yet definitively determined - is higher among the elderly and people with comorbidities, but it also affects younger people.⁷ There is still no effective remedy for the treatment of this

¹ CNPq Researcher. Full Professor and Coordinator of Law Graduate Program at UNISINOS.

² WHO. Novel Coronavirus (2019-nCoV). SITUATION REPORT - 1 21 JANUARY 2020. Disponível em https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4. Acesso em 18Abr2020.

³ WHO. WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020. Disponível em <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>. Acesso em 18Abr2020.

⁴ WHO. Disponível em <https://covid19.who.int>. Acesso em 26Abr2020.

⁵ In 02/21, the first case was registered in the country; in 03/01 there were 1.686 cases. Disponível em <https://covid19.who.int/region/euro/country/it>. Acesso em 17Abr2020.

⁶ Almost 900 hundred cases and more than 46 thousand deaths in 04/26/2020, according to WHO. Disponível em <https://covid19.who.int>. Acesso em 21Abr2020.

⁷ Ver: Wayne C. Koff, Ph.D., and Michelle A. Williams, Sc.D. Covid-19 and Immunity in Aging Populations — A New Research Agenda. The New England Journal of Medicine. DOI: 10.1056/NEJMp2006761.

https://www.nejm.org/doi/full/10.1056/NEJMp2006761?query=featured_coronavirus. Acesso em 17Abr2020. Ver também: WHO. 14 April 2020 COVID-19 STRATEGY UPDATE. Disponível em

disease, nor a vaccine for its prevention.⁸ The WHO estimates that about 40% of cases will have mild illness, 40% will suffer moderate illness, including pneumonia, 15% of cases will suffer severe illness and 5% of cases will be critical.⁹ Scientists are still unaware of the reasons why some people present no symptoms while in other the virus lead to severe conditions and even death.¹⁰

The rapid spread of the disease ended up collapsing the health systems of some of the affected countries. In cases like Italy, the health system lost the ability to care for patients before completing a month since the first record of contagion of the disease (02/21), leading thousands of people to death, due to lack of medical support.¹¹ For this reason, WHO says that COVID-19 "threatens human life, livelihoods and the way of life of all individuals in all societies".¹²

In Brazil, the Ministry of Health (MS) declared, on 2/3/2020, "Public Health Emergency of National Importance (ESPIN) due to Human Infection with the new

<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/strategies-plans-and-operations>. Acesso em 18Abr2020.

⁸ Ver: Wayne C. Koff, Ph.D., and Michelle A. Williams, Sc.D. Covid-19 and Immunity in Aging Populations — A New Research Agenda. The New England Journal of Medicine. DOI: 10.1056/NEJMp2006761.

https://www.nejm.org/doi/full/10.1056/NEJMp2006761?query=featured_coronavirus. Acesso em 17Abr2020. Ver também: WHO. 14 April 2020 COVID-19 STRATEGY UPDATE. Disponível em <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/strategies-plans-and-operations>. Acesso em 18Abr2020.

⁹ WHO. 14 April 2020 COVID-19 STRATEGY UPDATE. Disponível em <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/strategies-plans-and-operations>. Acesso em 18Abr2020.

¹⁰ The New York Times. Why Epidemiologists Still Don't Know the Death Rate for Covid-19. April 17, 2020. <https://www.nytimes.com/2020/04/17/us/why-epidemiologists-still-dont-know-the-death-rate-for-covid-19.html?action=click&module=Top%20Stories&pgtype=Homepage>. Acesso em 18Abr2020.

¹¹ BBC Brasil. 'Em colapso': a dramática situação dos hospitais da Itália na crise do coronavírus. 19mar2020. Disponível em <https://www.bbc.com/portuguese/internacional-51968491>. Ver também nos seguintes links: <https://noticias.uol.com.br/ultimas-noticias/bbc/2020/03/19/em-colapso-dramatica-situacao-dos-hospitais-da-italia-na-crise-do-coronavirus.htm>; Acesso em 18Abr2020. <https://saude.estadao.com.br/noticias/geral,sistema-de-saude-da-italia-em-risco-de-colapso-por-causa-do-coronavirus-um-alerta-para-o-mundo,70003232061>. Todos com acesso em 18Abr2020.

¹² WHO. 14 April 2020 COVID-19 STRATEGY UPDATE. Disponível em <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/strategies-plans-and-operations>. Acesso em 18Abr2020.

Coronavirus (2019-nCoV)"¹³ and, on 3/20/2020, "state of community transmission of the coronavirus throughout the national territory".¹⁴ Law No. 13,979 was enacted on 2/6/2020, to provide for "measures to address the public health emergency of international importance resulting from the coronavirus responsible for the 2019 outbreak."¹⁵

On 06/04/2020, the Ministry of Health issued recommendations to the States for the adoption of social isolation measures, which may vary according to the different scenarios of virus circulation. According to the MS, "the municipalities and states of the country that have not exceeded the 50% occupancy rate of health services, after the coronavirus pandemic, can begin a transition to a format where only a few groups are in isolation."¹⁶ Several states of the Federation had already put in place such isolation measures¹⁷ that, despite the guidance of the MS, have been threatened by the actions of the President of the Republic, Jair Bolsonaro.

¹³ BRASIL. PORTARIA No 188, de 03/02/2020. Disponível <http://www.in.gov.br/web/dou/-/portaria-n-188-de-3-de-fevereiro-de-2020-241408388>. Acesso em 18Abr2020.

¹⁴ BRASIL. PORTARIA N. 454, de 20/03/ 2020. Disponível em <http://www.in.gov.br/en/web/dou/-/portaria-n-454-de-20-de-marco-de-2020-249091587>. Acesso em 18Abr2020.

¹⁵ Disponível em http://www.planalto.gov.br/ccivil_03/ato2019-2022/2020/lei/L13979.htm. Acesso em 18Abr2020.

¹⁶ BRASIL. Boletim Epidemiológico 7 – COE Coronavírus – 06 de abril de 2020. Disponível em <https://portalarquivos.saude.gov.br/images/pdf/2020/Abril/06/2020-04-06---BE7---Boletim-Especial-do-COE---Atualizacao-da-Avaliacao-de-Risco.pdf>. Acesso em 18Abr2020.

¹⁷ Some example: In Rio Grande do Sul, Decreto n. 55.128, de 19/03/2020 (Declara estado de calamidade pública em todo o território do Estado do Rio Grande do Sul para fins de prevenção e de enfrentamento à epidemia causada pelo COVID-19 (novo Coronavírus). Disponível em <https://saude.rs.gov.br/coronavirus-decretos-estaduais>. In São Paulo, Decreto n. 64.879, de 20/03/2020 (Reconhece o estado de calamidade pública, decorrente da pandemia do COVID-19, que atinge o Estado de São Paulo, e dá providências correlatas). Disponível em <https://www.saopaulo.sp.gov.br/wp-content/uploads/2020/03/decretos-64879-e-64880.pdf>. In Ceará, Decreto de N° 33.510, de 16/03/ 2020, que prevê uma série de medidas preventivas que devem ser aplicadas no sentido de conter a proliferação do novo coronavírus. Disponível em <https://www.ceara.gov.br/2020/03/17/cearenseando-19-entenda-o-decreto-de-emergencia-de-saude/>. In Goiás, Decreto nº 9.633, de 13/03/ 2020. Disponível em <https://www.goiias.gov.br/index.php/servico/95-covid-19/121084-decreto-atualiza-regras-de-emergencia-em-saude>. No Amazonas, Decreto nº 42.061, de 16 de março de 2020, que "DISPÕE sobre a decretação de situação de emergência na saúde pública do Estado do Amazonas, em razão da disseminação do novo coronavírus (2019-nCoV), e INSTITUI o Comitê Intersetorial de Enfrentamento e Combate ao COVID-19. Disponível em <https://www.legisweb.com.br/legislacao/?id=391363>. Todos com acesso em 18Abr2020.

Although Mr. Bolsonaro does not implement his views and opinions in official orders, he has publicly been manifesting his disagreement with social isolation as well as disregarding social etiquette and distancing, as he keeps meeting people in public events and gatherings.¹⁸ The President's attitudes and speeches incompatible with the guidelines of his MS, WHO and scientific authorities were recognized in two lawsuits in the Supreme Federal Court. In precautionary decisions, the President was prevented from overturning the decisions of State, District and Municipal governments on social isolation, as well as the Federal Government from promoting advertising campaigns that encourage the population to fully resume economic activities.¹⁹ ²⁰ Because of

¹⁸ The Brazilian and foreign media report in abundance the position contrary to the Brazilian President's measures of social distance, as well as his non-compliance with the rules of social etiquette. See, for example: G1. Bolsonaro volta a ignorar orientações de distanciamento social em cerimônia no Planalto. <https://g1.globo.com/politica/noticia/2020/04/17/bolsonaro-volta-a-ignorar-orientacoes-de-distanciamento-social-em-cerimonia-no-planalto.ghtml> . Acesso em 18Abr2020.

¹⁹ In a precautionary decision issued on 03/31/2020, Minister Luis Roberto Barroso, at ADPF 669, prohibited the Federal Union "the production and circulation, by any means, of any campaign that preaches that" Brazil cannot stop "or that suggest that the population should return to its full activities, or that it express that the pandemic constitutes an event of minor severity for the health and life of the population." BRASIL. Supremo Tribunal Federal. Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental nº 669/DF. Requerente: Rede Sustentabilidade. Relator: Min. Roberto Barroso, 31 de março de 2020. Disponível em: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF669cautelar.pdf>. Acesso em: 18 abr. 2020.

²⁰ In another precautionary decision of 04/08/2020, issued in ADPF 672, Minister Alexandre de Moraes cautiously decided that "it is not the responsibility of the federal executive branch to unilaterally remove the decisions of state, district and municipal governments that, in the exercise of their constitutional competences, have adopted or will adopt, within their respective territories, important restrictive measures such as the imposition of distancing / social isolation, quarantine, suspension of teaching activities, trade restrictions, cultural activities and the circulation of people, among others mechanisms known to be effective in reducing the number of infected and deaths, as demonstrated by the WHO (World Health Organization) recommendation ". In the same decision, the Minister acknowledges and regrets that "in conducting this recent unprecedented crisis in Brazil and in the World, even in essential technical matters and uniform treatment at the international level, the serious divergence of positions between authorities at federal levels is notorious and even between federal authorities that are members of the same level of Government, causing insecurity, uneasiness and justified fear in the whole society.." BRASIL. Supremo Tribunal Federal. Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental nº 672/DF. Requerente: Conselho Federal da Ordem dos Advogados do Brasil. Relator: Min. Alexandre de Moraes, 08 de abril de 2020. Disponível em: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF672liminar.pdf>. Acesso em: 18 abr. 2020.

deep disagreements with his Minister of Health, Luiz Henrique Mandetta, President Jair Bolsonaro fired him on 4/16/2020.²¹

WHO recommends a series of measures to control and contain the pandemic, which depend on the context of each country and which involve the engagement of individuals, communities, States (governments) and private companies. In relation to States, WHO says that "the most important global response to COVID-19 so far, perhaps, has been to accurately diagnose, isolate and effectively treat all cases of the disease, including mild or moderate ones, with the aim of reducing transmission speed and successfully protecting healthcare systems."²² In other words, the main objective is "that all countries control the pandemic, delaying transmission and reducing mortality associated with COVID-19."²³

How to do this depends on the structure and resources of each state. The ideal, according to the WHO, is that "States should be able to test, diagnose, isolate, track contacts and quarantine them, in addition to involving the entire community in the response to COVID-19". At the same time, "governments must give the health system the support it needs to effectively treat patients with COVID-19 and maintain other essential social and health services for everyone." And if they need more time to implement these measures, "governments may have to implement general measures of physical distance and movement restrictions proportional to the health risks faced by the community".²⁴

When this capacity does not exist, the WHO recognizes that "measures of physical distance and movement restrictions, generally called "shut downs" and

²¹ BRASIL, Decreto de 16 de abril de 2020. Disponível em <http://www.in.gov.br/web/dou/-/decretos-de-16-de-abril-de-2020-252789914?inheritRedirect=true&redirect=%2Fweb%2Fguest%2Fsearch%3FqSearch%3D16%2520e%2520abril%2520e%25202020%2520e%2520mandetta> . Acesso em 18Abr2020.

²² WHO. 14 April 2020 COVID-19 STRATEGY UPDATE. Disponível em <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/strategies-plans-and-operations>. Acesso em 18Abr2020.

²³ Id.

²⁴ Id.

"lock downs", can delay the transmission of COVID-19, limiting contact between people".²⁵ However, the WHO warns that "these measures can have a profound negative impact", and that "disproportionately affect disadvantaged groups, including people in poverty, migrants, internally displaced persons and refugees, who tend to live in overcrowded and under-resourced places, and depend on daily work for subsistence." Even so, "the premature lifting of physical distance measures is likely to lead to an uncontrolled resurgence in the transmission of COVID-19 and an expanded second wave of cases", if states do not adopt "careful planning and in the absence of expanded capacities for public health and clinical care". The WHO is not sure how long the movement and restraining measures should take, but they suggest to States that they plan for periods of two to three months.²⁶

Parmet and Sinha²⁷ argue that, in the United States, travel bans and mandatory quarantines will not alone contain the outbreak and that other measures need to be taken. Among these measures, they suggest that it is necessary to "flatten the curve", delaying the spread of COVID-19 since the health system cannot sustain a massive influx of infectious cases. Another measure is to reduce obstacles to testing and care. In addition, noncitizens must be protected from the adverse consequences of immigration when looking for exams or care or to track contact and, finally, the financial impact of "surprise accounts" coming from health plans during the pandemic.

A study published by the Imperial College of London, on 03/26/2020, outlined different scenarios of the disease's evolution in different countries,

²⁵ Therefore, as we have always said, lock-downs in their own right are not a solution but those population-wide physical distancing measures have proved quite effective in countries where there's been a rapid escalation of cases, sometimes as a result of not being successful in containing the disease in the first place. Those measures have served to suppress some of the transmission. https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-15apr2020.pdf?sfvrsn=1b9ed28d_2

²⁶ Id.

²⁷ Wendy E. Parmet, J.D., and Michael S. Sinha, M.D., J.D., M.P.H. Covid-19 — The Law and Limits of Quarantine. April 9, 2020. N Engl J Med 2020; 382:e28 DOI: 10.1056/NEJMp2004211. Disponível em <https://www.nejm.org/doi/full/10.1056/NEJMp2004211?query=TOC>. Acesso em 17Abr2020.

considering the adoption of different types of social isolation and also none. As a general conclusion, the study estimated that “in the absence of interventions, COVID-19 would result in 7 billion infections and 40 million deaths this year”. However, “the adoption of mitigation strategies focused on protecting the elderly (60% reduction in social contacts) and slowing down, but not interrupting transmission (40% reduction in social contacts for a broader population) can reduce this burden by half, saving 20 million lives, but we anticipate that even in this scenario, health systems in all countries will be quickly overburdened”.²⁸ For Brazil, with a population of 212,559,409 people, the scenario outlined was as follows:

- Scenario 1- No mitigation measures:
Infected population: 187,799,806
Deaths: 1,152,283
Individuals in need of hospitalization: 6,206,514
Individuals in need of ICU: 1,527,536
- Scenario 2 - With social distance from the entire population:
Infected population: 122,025,818
Deaths: 627,047
Individuals in need of hospitalization: 3,496,359
Individuals in need of ICU: 831,381
- Scenario 3 - With social distance AND STRENGTHEN the distance of the elderly:
Infected population: 120,836,850
Deaths: 529,779
Persons in need of hospitalization: 3,222,096
Individuals in need of ICU: 702,497
- Scenario 4 - With late suppression
Infected population: 49,599,016
Deaths: 206,087
Individuals in need of hospitalization: 1,182,457
Individuals in need of ICU: 460,361
Demand for hospitalization at the peak of the pandemic: 460,361
Demand for ICU beds at the peak of the pandemic: 97,044

²⁸ Patrick GT Walker, Charles Whittaker, Oliver Watson et al. The Global Impact of COVID-19 and Strategies for Mitigation and Suppression. Imperial College London (2020), doi: <https://doi.org/10.25561/77735>. Disponível em <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-Global-Impact-26-03-2020.pdf>. Acesso em 18Abr2020.

- Scenario 5 - With early suppression
Infected population: 11,457,197
Deaths: 44,212
Persons in need of hospitalization: 250,182
Individuals in need of ICU: 57.423
Demand for hospitalization at the peak of the pandemic: 72,398
Demand for ICU beds at the peak of the pandemic: 15,432²⁹

Another study carried out at Harvard University also shows that to prevent the capacity for intensive care from being exceeded, a prolonged or intermittent social distance may be necessary until 2022.³⁰

The WHO has been helping States around the world to address solutions to the health emergency crisis installed by the new coronavirus and to preserve as many human lives as possible, but its rules are not mandatory by States. However, if any UN member state refuses to follow WHO guidelines, it can be, at the same time, breaching binding international standards, like those provided for in multilateral human rights treaties.³¹ This is because the COVID-19 pandemic puts at risk and/or affects the most essential rights of human beings that are protected in these treaties and impose obligations on States to respect, protect and guarantee them. These rights are mainly life, personal integrity, personal freedom and health.

²⁹ Compilation of study data by the Brazilian Nursing Association. Disponível em <http://www.abennacional.org.br/site/2020/03/29/saiu-a-modelagem-estatistica-do-imperial-college-london-para-os-cenarios-do-covid-19-no-brasil/>. Acesso em 18Abr2020.

³⁰ Kissler, Stephen M. et al. Projecting the transmission dynamics of SARS-CoV-2 through the postpandemic period. *Science* 10.1126/science.abb5793 (2020). Disponível em <https://science.sciencemag.org/content/early/2020/04/14/science.abb5793>. Acesso em 21Abr2020.

³¹ International conventions or treaties are sources of international law, according to art. 38, of the Statute of the International Court of Justice. However, as Cançado Trindade observes, "The formation and evolution of contemporary international law goes well beyond the consideration of the formal" sources "of international law, listed in Article 38 of the CIJ Statute (cf. supra). Such formal "sources" were never intended (and could not) be exhaustive, and recourse to them has been, over the years, nothing more than an exercise in overcoming analytical positivism, which has never found or provided a convincing explanation of the validity international legal standards. Such formal "sources" came to be seen as the means by which international law has been formed ". in: Cançado Trindade, Antônio Augusto. *Princípios do direito internacional contemporâneo* / Antônio Augusto Cançado Trindade. 2. ed. rev. atual. – Brasília: FUNAG, 2017.P. 118.

At least from a legal point of view, there is a reason for this: States, particularly those that ratify international human rights treaties, such as the UN International Covenant on Civil and Political Rights (ICCPR)³² and the San José Pact of Costa Rica (ACHR),³³ have an undeniable obligation to protect and guarantee life, that is the supreme human right. As the UN Human Rights Committee notes in its General Observation No. 36, regarding the meaning of Article 6 of the ICCPR, having the right to life means that no one can be the object of actions or omissions that cause or may cause an unnatural or premature death and the right to enjoy a dignified life. By nonderogable, it is understood the right that cannot be suspended in any way, even in situations of armed conflict or other situations of public emergency that threaten the life of the Nation, as provided for in art. 4, 2 of the ICCPR.³⁴

In item 7 of the aforementioned Observation 36, the HRC clarifies that the States parties to the ICCPR have different duties³⁵ in relation to the right to life. First, it has a duty to respect, which implies refraining from engaging in conduct that results in arbitrary deprivation of life. Second, it has a duty to guarantee the right to life and to adopt due diligence to protect people's lives against deprivation caused by persons or entities whose conduct is not attributable to the State. Here, it is important to note, according to the Committee, that these duties extend "to reasonably foreseeable assumptions of life threatening and life-

³² UN International Covenant on Civil and Political Rights, ratified by Brazil and internalized by the Decree nº 592/1992. Disponível em http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm. Acesso em 19Abr2020.

³³ American Convention on Human Rights of the OAS, ratified by Brazil and internalized by the Decree 678/92. Disponível em http://www.planalto.gov.br/ccivil_03/decreto/D0678.htm . Acesso em 19Abr2020.

³⁴ NACIONES UNIDAS. Comité de los Derechos Humanos. Pacto Internacional de Derechos Civiles y Políticos. Observación General num. 36. Artículo 6: derecho a la vida. 3 de setembro de 2019. Disponível em: https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_SP.pdf. Acesso em 19Abr2020.

³⁵ The ACDH stipulates in its art. 1 (1) that "The States Parties to this Convention undertake to respect the human rights and freedoms recognized therein and to guarantee their free and full exercise [...]". Similarly, art. 2 (1) of the PIDCP provides that "The States Parties to the present Covenant undertake to respect and guarantee [...] the rights recognized [in it]".

threatening situations” and that “States Parties may have committed a violation of Article 6, even if these threats and situations do not lead to loss of life.”³⁶

As Peterke teaches, States' obligations regarding human rights can be negative (“duty to respect”) and positive (“duty to protect” and “duty to guarantee”). The duty to respect “means that the State is obliged to respect the sphere legally protected by a human right; he must refrain from illegal interference with it.”³⁷ This duty is also called “negative” or “not doing”, because it requires the State to be passive, in the sense of not taking measures (legislative, administrative, etc.) incompatible with human rights - hence it is an obligation with immediate effectiveness.”³⁸

However, human rights also “result in obligations that require the State to take an “active” stance, that is, taking certain proactive measures.”³⁹ The duty to protect stems from the fact that “human rights are not only threatened and violated by States, but also by non-governmental agents, and States are, in principle, obliged to protect individuals under their jurisdiction against such dangers.” The general criteria to find a violation of the duty to protect human rights are: “a) the knowledge, by the State, of a concrete danger or the obligation to know it; b) objective possibility of avoiding the violation of rights; c) Failure to take sensible and appropriate action.”⁴⁰

The duty to guarantee is divided into the duty to facilitate and the duty to provide. The duty to facilitate corresponds to “the creation of the legal,

³⁶ NACIONES UNIDAS. Comité de los Derechos Humanos. Pacto Internacional de Derechos Civiles y Politicos. Observación General num. 36. Artículo 6: derecho a la vida. 3 de setembro de 2019. Disponível em: https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_SP.pdf. Acesso em 19Abr2020.

³⁷ “Es un principio de derecho internacional que el Estado responde por los actos de sus agentes realizados al amparo de su carácter oficial y por las omisiones de los mismos aun si actúan fuera de los límites de su competencia o en violación del derecho interno.” Corte IDH. Caso Velásquez Rodríguez Vs. Honduras. Fondo. Sentencia de 29 de julio de 1988. Serie C No. 4. párr. 170.

³⁸ PETERKE, Sven (coord.). Manual prático de direitos humanos internacionais / Brasília: Escola Superior do Ministério Público da União, 2009. P. 155.

³⁹ Id. P. 157.

⁴⁰ Id. P. 158.

institutional and procedural assumptions necessary to enable holders to effectively realize their human rights.” Peterke says that this duty can be fulfilled through “policies or action plans, the creation and improvement of certain institutions, as well as the drafting and enactment of certain laws”.⁴¹ The Inter-American Court of Human Rights clarifies that the duty to guarantee includes due diligence to prevent, investigate and punish any violation of the rights recognized by the Convention and, in addition, to seek restitution of the right and compensation for damages.⁴² The duty to provide is closely related to economic, social and cultural rights. The emergence of this duty is born, for example, according to the author, in cases of “natural catastrophe or another disaster that threatens the lives of victims, who are hungry and do not have access to drinking water”, which may justify seeking international assistance, when the State does not have sufficient financial resources.”⁴³

To fulfill the obligation to respect and guarantee lives, the WHO recommends⁴⁴ to States mass testing and health systems prepared to receive cases of COVID-19.⁴⁵ However, COVID-19 is a pandemic disease, still untreated and without a vaccine, highly contagious and which, in 20% of cases,⁴⁶ evolves to severe conditions that require hospital support, without which the chances of dying are practically certain. That is, the lives of all human beings are in danger.

⁴¹ Id. P. 161.

⁴² Corte IDH. Caso Velásquez Rodríguez Vs. Honduras. Fondo. Sentencia de 29 de julio de 1988. Serie C No. 4. Párr. 166.

⁴³ PETERKE, Sven (coord.). Manual prático de direitos humanos internacionais / Brasília: Escola Superior do Ministério Público da União, 2009. P. 161.

⁴⁴ WHO. 14 April 2020 COVID-19 STRATEGY UPDATE. Disponível em <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/strategies-plans-and-operations>. Acesso em 18Abr2020.

⁴⁵ In the case of countries like Brazil, which not only recognize the universal right to health in its Constitution (art. 6), but have ratified the International Covenant on Economic, Social and Cultural Rights and the Protocol of San Salvador that provide health as a human right, there is a responsibility to respect and guarantee the right to health, by itself, and not as a result of the right to life.

⁴⁶ WHO. 14 April 2020 COVID-19 STRATEGY UPDATE. Disponível em <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/strategies-plans-and-operations>. Acesso em 18Abr2020.

While it is known that no matter how well equipped a health system is, many lives are being and will still be lost, it is also true that many will be saved if critically ill patients have access to hospital support. However, considering that the number of infected people is very large and tends to increase, it is practically impossible to ensure access to hospital beds for all patients when the number of cases increases abruptly, in the same country or region, at the same time. Milan, New York, Guayaquil and Manaus are examples of this.

For this reason, WHO and the most important scientific studies recommend social distance measures as the most effective, at the moment, to ensure access to the health system to a high number of patients, since it “flattens the contamination curve”, slowing down and allowing health systems to absorb demand and prevent deaths.⁴⁷

However, all world authorities recognize that measures of social distance that involve quarantine and closing commercial, industrial, school and other establishments cause immense damage to countries' economies⁴⁸ and people's livelihoods. In a recent WHO press release, its Director said:

⁴⁷ We know that in some countries cases are doubling every three to four days. However while COVID-19 accelerates very fast it decelerates much more slowly. In other words the way down is much slower than the way up. That means control measures must be lifted slowly and with control. It cannot happen all at once. Control measures can only be lifted if the right public health measures are in place including significant capacity for contact tracing. But while some countries are considering how to ease restrictions others are considering whether to introduce them, especially many low and middle-income countries in Africa, Asia and Latin America. In countries with large poor populations the stay-at-home orders and other restrictions used in some high-income countries may not be practical. Many poor people, migrants and refugees are already living in overcrowded conditions with few resources and little access to healthcare. In: WHO. **COVID-19 virtual press conference - 13 April, 2020.** Disponível em https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-13apr2020.pdf?sfvrsn=3d574d9e_2. Acesso em 18Abr2020.

⁴⁸ IMF estimates that, as a result of the pandemic, the global economy is expected to contract sharply by -3% in 2020, much worse than during the 2008-09 financial crisis. Disponível em <https://www.imf.org/en/Publications/WEO/Issues/2020/04/14/weo-april-2020>. Regarding the situation of the Brazilian economy, the Fund estimated a 5.3% reduction in the Brazilian gross domestic product (GDP) this year. Disponível em <https://www.imf.org/en/Countries/BRA>. Acesso em 18Abr2020.

How do you survive a lock-down when you depend on your daily labour to eat? News reports from around the world describe how many people are in danger of being left without access to food. Meanwhile schools have closed for an estimated 1.4 billion children. This has halted their education, opened some to increased risk of abuse and deprived many children of their primary source of food. As I have said many times, physical distancing restrictions are only part of the equation and there are many other basic public health measures that need to be put in place. We also call on all countries to ensure that where stay-at-home measures are used they must not be at the expense of human rights. Each government must assess their situation while protecting all their citizens and especially the most vulnerable.⁴⁹

This poses a dilemma for governments, especially in Brazil. As they promote measures of social isolation, they force a considerable number of people to quarantine and prevent them from seeking their own livelihood, through work, which particularly affects the most vulnerable. Not only is your personal freedom (including the freedom to come and go and economic freedoms) limited, but the right to life itself can be violated through quarantine.

Three questions arise here: 1) is it legal and legitimate to restrict the freedom to come and go and economic freedoms in this pandemic context ?; 2) if the answer to the previous question is positive, what obligations should the States - especially the Brazilian State - fulfill in order to guarantee the right to life of people who are prevented from providing their own livelihood? 3) in cases where there is no capacity for mass testing or health systems prepared for the extremely high demand for beds, do States have another choice if they do not adopt some kind of social isolation measure?

Regarding the first question. From a legal point of view, States can temporarily suspend the right to personal freedoms, including the personal

⁴⁹ WHO. **COVID-19 virtual press conference - 13 April, 2020.** (Tradução nossa) Disponível em https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-13apr2020.pdf?sfvrsn=3d574d9e_2. Acesso em 18Abr2020.

freedom and the freedom to exercise economic activity.⁵⁰ In international human rights law, states can suspend rights in cases of emergency and, among the exceptions to suspension, is the right to life, but not the right to personal freedom.⁵¹ States must observe certain requirements to proceed with this suspension.⁵² COVID-19 is a health emergency that puts people's lives at risk

⁵⁰ ICCPR: ARTICLE 4. 1. When exceptional situations threaten the existence of the nation and are officially proclaimed, the States Parties to the present Covenant may adopt, to the extent required by the situation, measures that suspend the obligations arising from this Covenant, provided that such measures are not incompatible with the other obligations imposed on them by international law and do not entail any discrimination solely on the basis of race, color, sex, language, religion or social origin.

2. The preceding provision does not authorize any suspension of articles 6, 7, 8 (paragraphs 1 and 2) 11, 15, 16, and 18.

3. States Parties to the present Covenant that make use of the right of suspension shall immediately communicate to the other States Parties to the present Covenant, through the Secretary-General of the United Nations, the provisions they have suspended, as well as the reasons for such suspension. suspension. States Parties shall make a new communication, also through the Secretary-General of the United Nations, on the date on which the suspension ends. ACHR. Article 27. Suspension of guarantees

1. In the event of war, public danger, or other emergency that threatens the independence or security of the State Party, it may adopt provisions that, to the extent and for the time strictly limited to the requirements of the situation, suspend the obligations contracted by virtue of this Convention, provided that these provisions are not incompatible with the other obligations imposed by international law and do not end any discrimination based on reasons of race, color, sex, language, religion or social origin. 2. The preceding provision does not authorize the suspension of the rights determined in the following articles: 3 (Right to recognition of legal personality); 4 (Right to life); 5 (Right to personal integrity); 6 (Prohibition of slavery and servitude); 9 (Principle of legality and retroactivity); 12 (Freedom of conscience and religion); 17 (Protection of the family); 18 (Right to name); 19 (Rights of the child); 20 (Right to nationality) and 23 (Political rights), nor the guarantees essential for the protection of such rights.

3. Any State Party that makes use of the right of suspension shall immediately inform the other States Parties to the present Convention, through the Secretary General of the Organization of American States, of the provisions whose application has been suspended, the reasons for the suspension and the date where such suspension has ended.

⁵¹ NACIONES UNIDAS. Comité de los Derechos Humanos. Pacto Internacional de Derechos Civiles y Políticos. Observación General num. 29. Suspensión de obligaciones durante un estado de excepción (artículo 4). 24 de julio de 2001. Disponível em https://conf-dts1.unog.ch/1%20SPA/Tradutek/Derechos_hum_Base/CCPR/00_2_obs_grales_Cte%20DerHum%20%5BCCPR%5D.html#GEN29 . Acesso em 19Abr2020.

⁵² "Measures that suspend the application of any provision of the Pact must be exceptional and temporary. Before a State adopts the decision to invoke Article 4, two fundamental conditions must be met: that the situation is of an exceptional nature that endangers the life of the nation and that the State Party has officially proclaimed the state of exception." (Tradução nossa) In: Id.

and, as such, was declared by the Ministry of Health in Brazil,⁵³ after WHO declared it a pandemic.

Let us now examine the question of legitimacy because it is highly problematic in Brazil nowadays. In the classical liberal perspective, restrictions on freedom by the State are, *a priori*, inadmissible and can only occur under strict conditions. Liberalism is the political theory of the limitation of state power,⁵⁴ but it could never deny that state, for example, the prerogative of arresting people who commit crimes (prison is the most classic deprivation of the right to personal freedom). The question of public emergencies, which demand coordinated responses, end up transferring to the States powers over the private life and the freedom of people much greater than they would have in “normal” times.⁵⁵ It is theoretically justified in the preservation of the rights of people threatened in these emergencies. Emergencies institute the so-called states of exception,⁵⁶ the same ones that characterize authoritarian regimes and, therefore, require extreme vigilance on the part of civil society and democratic institutions. The point is that the response to COVID-19 involves, in many cases, the impossibility of freely moving and working. The right to work, from a liberal perspective, is one of the several faces of the right to freedom,⁵⁷ unlike many other ethical-political streams, which understand labor as a means to provide sustenance, but not necessarily a freedom. Anyway, even if the free exercise of economic activity is

⁵³ BRASIL. PORTARIA No 188, de 03/02/ 2020. Disponível <http://www.in.gov.br/web/dou/-/portaria-n-188-de-3-de-fevereiro-de-2020-241408388> . Acesso em 18Abr2020.

⁵⁴ BOBBIO, Norberto. Liberalismo e democracia. 6. ed. São Paulo: Brasiliense, 1998.

⁵⁵ Ver art. 3º. da Lei LEI Nº 13.979/20.

⁵⁶ Concerned about the emergence of states of exception, on whose characteristics and consequences Giorgio Agamben has several works, the author even published a critical article on February 26, 2020, in Italy, questioning the beginning of the restrictive measures that would come to be then imposed: "It almost seems that, when terrorism is exhausted as a cause of exceptional measures, the invention of an epidemic can offer the ideal pretext to expand them beyond any limit". Disponível em <http://www.ihu.unisinos.br/78-noticias/596584-o-estado-de-excecao-provocado-por-uma-emergencia-imotivada>. 2020. Disponível <http://www.in.gov.br/web/dou/-/portaria-n-188-de-3-de-fevereiro-de-2020-241408388> . Acesso em 21Abr2020.

⁵⁷ CHAMPEIL-DESPLATS, Véronique. Libertés économiques, droits de l'homme et droits fondamentaux. In: RUIZ, Castor M. M. Bartolomé (coord.). Direito à justiça, memória e reparação: a condição humana nos estados de exceção. São Leopoldo: Casa Leiria, 2010.

covered by the general rights of liberty, emergencies provide context for its limitation, since no freedom is justified if its exercise can endanger the lives of thousands of people. The objective of saving the greatest possible number of lives thus justifies the deprivation of freedoms by means of measures, such as those set forth in article 3 of Law 13,979/20 (isolation, quarantine, determination of mandatory medical examinations, among others).

However, prolonged social isolation measures can lead to new threats to people's right to life. This requires other responses from States, which become responsible for the livelihood of those who are prevented from providing them during social isolation. It is clearly a duty to guarantee, in its dimension of provision, established for those States that submit to international human rights law and, more especially, for those states, like Brazil, whose Constitutions establish obligations to provide social rights for the poor.⁵⁸ Vulnerable people can be helped by family, friends, and the community, but the legal responsibility rests with the State. In this sense, the Brazilian National Congress approved the payment of an aid of R\$ 600.00 (six hundred reais) for several categories of workers.⁵⁹ Many other Brazilians in vulnerable conditions, however, were not

⁵⁸ No caso brasileiro, o dever de assistência social é previsto no art. 203, da Constituição da República de 1988.

⁵⁹ BRASIL, LEI Nº 13.982, DE 02/04/2020. Disponível em http://www.planalto.gov.br/ccivil_03/ Ato2019-2022/2020/Lei/L13982.htm. Acesso em 21Abr2020.

Art. 2 During the period of 3 (three) months, as from the publication of this Law, emergency aid in the amount of R \$ 600.00 (six hundred reais) will be granted monthly to the worker who cumulatively fulfills the following requirements:

I - is over 18 (eighteen) years of age;

II - does not have an active formal job;

III - does not hold a social security or assistance benefit or is a beneficiary of unemployment insurance or a federal income transfer program, except, under the terms of §§ 1 and 2, Bolsa Família;

IV - whose per capita monthly family income is up to 1/2 (half) minimum wage or the total monthly family income is up to 3 (three) minimum wages;

V - that, in 2018, did not receive taxable income above R \$ 28,559.70 (twenty-eight thousand, five hundred and fifty-nine reais and seventy cents); and

VI - who carries out activity on the condition that:

a) individual microentrepreneur (MEI);

reached by this policy, which amounts to a strong disincentive for them to comply with stay-at-home orders or recommendations, increasing the risk for themselves and the whole society. Financial aid measures are thus being implemented in several countries so that the most vulnerable people can comply with orders or recommendations to stay at home.⁶⁰

In Brazil, after, on average, a month of restrictions, resistance from sectors of society to measures of social isolation grows, either because they want to or because they need to work,⁶¹ as well as on the part of the President of the Republic, who never supported the businesses closing.⁶² In an analysis of the government program for the 2018 elections of Mr. Jair Bolsonaro, Lemos characterizes it as a liberal-conservative program, centered on the problem of property security and minimal state interventionism in the economic sphere. In this program, it is assumed that “market economies have historically been the

b) individual contributor to the General Social Security System who contributes in the form of the caput or item I of § 2 of art. 21 of Law No. 8,212, of July 24, 1991; or
c) informal worker, whether employed, self-employed or unemployed, of any nature, including the intermittent inactive, registered in the Single Registry for Social Programs of the Federal Government (CadÚnico) until March 20, 2020, or who, in terms of self-declaration, complies the requirement of item IV.

⁶⁰ ESTADÃO. Ao menos 45 países já adotaram medidas para conter impactos da covid-19 em emprego e renda. 23/03/2020. Disponível em <https://economia.estadao.com.br/noticias/geral,ao-menos-45-paises-ja-adotaram-medidas-para-conter-impactos-da-covid-19-em-emprego-e-renda,70003244688>. Acesso em 21Abr2020.

⁶¹ After almost a month of horizontal isolation, a Datafolha survey carried out with adult Brazilians who have cell phones shows that seven out of ten (68%) estimate that at the moment it is more important to keep people at home in order to prevent the spread of the coronavirus, even if it harms the economy and causes unemployment. On the other hand, 22% consider that ending isolation is the most important in order to stimulate the economy and prevent unemployment, even if this contributes to the spread of the coronavirus. A 10% share did not express an opinion. In: DATAFOLHA. Apoio ao isolamento recua de 76% para 68%. 20/04/2020. Disponível em <http://datafolha.folha.uol.com.br/opiniaopublica/2020/04/1988683-apoio-ao-isolamento-recua-de-76-para-68.shtml> . Acesso em 21Abr2020.

⁶² G1. Bolsonaro defende fim de medidas de isolamento nesta semana. 20/04/2020. Disponível em <https://oglobo.globo.com/brasil/bolsonaro-defende-fim-de-medidas-de-isolamento-nesta-semana-24382957> . EXAME. Um dia após protesto, Bolsonaro critica isolamento e defende democracia. 20/04/2020. Disponível em <https://exame.abril.com.br/brasil/um-dia-apos-protesto-bolsonaro-repreende-apoiador-que-pede-stf-fechado/>. VALOR INVESTE. Bolsonaro defende fim de isolamento social já nesta semana. <https://valorinveste.globo.com/mercados/brasil-e-politica/noticia/2020/04/20/bolsonaro-defende-fim-de-isolamento-social-j-nesta-semana.ghtml>. Todos com acesso em 21Abr2020.

greatest instrument for generating income, employment, prosperity and social inclusion.” Lemos points out that Von Mises and Hayek's theoretical ideas, in their fight against socialism and against any form of economic collectivism, serves as a theoretical basis for Brazilian liberal-conservatism, which is on the agenda of 'State Reforms' (labor, social security, fiscal and tax) its point of convergence in Brazil.⁶³

In the current government, divided into different nuclei, sometimes contradicting each other, economic policy, under the responsibility of Minister Paulo Guedes, is located in the neoliberal nucleus.⁶⁴ The neoliberal or monetarist model, on which the government of Jair Bolsonaro is inspired, is not only about rejecting the communist or socialist models, but also the post-Keynesian-inspired welfare state, that neoliberalism began to supplant in many places in the world in the 1970s.⁶⁵

As Avelãs Nunes explains, one of the fundamental points of neoliberalism is the idea that “the market is the only rational mechanism for allocating scarce resources to alternative uses. Liberal ideas reject the objective of reducing inequalities, in the name of promoting equity and justice, because policies with this objective are always seen as an attack on individual freedom.”⁶⁶ And, therefore, the solutions include “privatization of the State's business sector and public services, the separation of the political sphere (which would be the

⁶³ LEMOS, Amarildo Mendes. Menos Marx, mais Mises: o pensamento liberal- conservador no brasil do século XXI. Revista Ágora - Vitória - n. 29 - 2019 - p. 123-143 - ISSN: 1980-0096.

⁶⁴ PINTO, Eduardo Costa. Bolsonaro e os Quartéis: a loucura com método. Texto para Discussão 006 | 2019. Instituto de Economia da Universidade Federal do Rio de Janeiro (UFRJ). Disponível em <http://www.ie.ufrj.br/index.php/index-publicacoes/textos-para-discussao> . Acesso em 21Abr2020.

⁶⁵ NUNES, António José Avelãs. Neoliberalismo e direitos humanos. Revista Da Faculdade De Direito, Universidade De São Paulo, 98, 423-462. 2003. P. 424-427. Disponível em <http://www.revistas.usp.br/rfdusp/article/view/67596>. Acesso em 21Abr2020.

⁶⁶ Id., p. 440.

responsibility of the State), the economic sphere (the exclusive forum of individuals), and the liberation of civil society".⁶⁷

Where an expansion of the State's sphere of responsibility and an extension of its field of intervention are inexorable, as is the case of the COVID-19 pandemic that prevents markets from functioning simply because workers must stay at home, a panic in neoliberal or liberal-conservative governments take place. In this context, it is not uncommon to see governments adopt positions of denial of the tragic dimensions of the pandemic, in order to justify the immediate return of economic activities, despite all the consequences that this may have.

In spite of the neoliberal orientation and the corresponding campaign promises, from the legal point of view, the answer to the third question cannot be other than that, in this pandemic, States must adopt a measure of social isolation compatible with their needs if they lack the capacity for mass testing and health systems prepared for the very high demand for beds. In addition, in doing so, they have to take on the livelihood of those who cannot provide for it. According to the WHO and the main international studies, a policy of social isolation in contexts of lack of sufficient infrastructure is the only measure to save the greatest possible number of lives, an obligation that all States are subject to, even those of neoliberal fashion. This does not mean to deny that such measures do, in fact, immeasurable damage to economies, as shown by the forecasts of international financial organizations,⁶⁸ in addition to psychological problems, but, in the absence of an alternative, it becomes an unavoidable harm, when the objective is to save as many lives as possible.

No state can be held legally responsible because, in determining social isolation, it did not preserve jobs or because it hampered the economic freedoms of its citizens during the health crisis. They are perfectly supported to do this, as long as they offer financial assistance to those who need to survive. In addition,

⁶⁷ Id., p. 450.

⁶⁸ See IMF prediction above.

good administrations will be able to take measures beyond this, in order to prevent further damage to the economy of their countries, even if they adopt measures of social isolation. However, States and their representatives can be held responsible if, knowing the concrete danger and having the objective possibility of preventing deaths, they failed to take a sensible and appropriate measure - social isolation - or rushed to relax it when there was no conditions for that.