

Commentary

Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles

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One of the key components of CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (GC 14) is the recognition that human rights are necessarily interdependent and that the social determinants of health are important to the promotion of health itself; as stated in paragraph 3 “...other [human] rights and freedoms [e.g., food, housing] address integral components of the right to health.”¹ GC 14, paragraph 16 maintains that a right to health also includes the right to control the spread of infectious diseases via a variety of control measures, some of which are restrictive. The use of restrictive measures during infectious disease outbreaks, including measures like quarantine, isolation, and travel prohibitions, restrict or limit basic human rights prescribed by the Universal Declaration of Human Rights, such as freedom of movement (Article 13) and the right to peaceful assembly (Article 20), for the sake of protecting and promoting the health of individuals and communities.²

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Limitations on rights and freedoms are justified on the basis that restrictive measures are sometimes required to protect the public's health during emergencies, as articulated not only in GC 14 but also in the International Covenant on Civil and Political Rights (ICCPR).³ Paragraph 28 of GC 14 notes that limitations are "...intended to protect the rights of individuals rather than to permit the imposition of limitation by States" and that States have the "burden of justifying such serious measures," i.e., they must demonstrate that restrictive measures are necessary to curb the spread of infectious diseases so as to ultimately promote the rights and freedoms of individuals.⁴ Paragraph 29 of GC 14 states that any limitations "... must be proportional, i.e., the least restrictive alternative must be adopted..." and "...they should be of limited duration and subject to review."⁵ In the ICCPR, we find that freedom of movement (Article 12), the right to hold opinions (Article 19), the right to peaceful assembly (Article 21), and the freedom of association (Article 22) are all subject to justified limitations in the context of public safety or emergencies, including that of public health.⁶

The specific conditions and interpretations that seek to legitimize the limitations on the grounds of public emergencies as found in articles 12, 19, 21, and 22 of the ICCPR, including public health emergencies, are articulated in the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights—hereafter the "Siracusa Principles."⁷ As Lawrence Gostin notes, what it means to legitimize limitations under the Siracusa Principles includes being "...in accordance with the law; based on a legitimate objective; strictly necessary in a democratic society; the least restrictive and intrusive means available; and not arbitrary, unreasonable, or discriminatory."⁸ As is readily evident, the ideas of necessity and proportionality, found in the Siracusa Principles, were explicitly adopted in GC 14, paragraphs 28 and 29.

Recently, it has been argued that the restrictive measures taken to address the current Ebola virus disease (EVD) outbreak in Guinea, Sierra Leone, and Liberia reflect the sorts of limitations whose legal justification is enshrined in the Siracusa Principles.⁹ In the past, the Siracusa Principles have also been invoked to legitimize restrictive measures in cases of TB and Marburg virus disease.¹⁰ We maintain, however, that the Siracusa Principles alone are insufficient to legitimize restrictions on human rights to curb the spread of infectious diseases, as is the case with the current EVD outbreak. In particular, we will argue that the principle of reciprocity, which has been used with increased frequency in the public health ethics literature, provides an important theoretical tool to help legitimize restrictions as articulated in the Siracusa Principles. In the context of public health, and as will be explained in greater detail below, reciprocity maintains that when an individual is subject to a limitation on their human rights or freedoms for the sake of a public health emergency, the State must support and compensate that individual for his or her loss, so they are not unduly harmed. Moreover, we argue that reciprocity can help clarify the least restrictive means clause already present in the Siracusa Principles, and by extension, the proportionality claim in Article 29 of the ICCPR. We then describe some insights that can be gleaned regarding the role of reciprocity in the context of restrictive measures by examining those measures being used in the current EVD outbreak, and explore how these insights might extend to discussions of what is owed to communities in contrast to individuals during public health emergencies.

Reciprocity and the Siracusa Principles

As noted above, restrictive measures, which limit certain human rights, are justified in the case of infectious disease outbreaks because their application will likely arrest—or help arrest—the spread of an infectious disease. This reasoning

is further clarified in Article 25 of the Siracusa Principles, which states that rights and freedoms can be limited “...to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.”¹¹

However, several public health ethics scholars have argued that the principle of reciprocity must also be satisfied to legitimize the use of restrictive measures during public health emergencies.¹² In its simplest and most common formulation, reciprocity “...demands an appropriate balancing of the benefits and burdens of the social cooperation necessary to obtain the good of public health” and “...requires that one return the good one has received, or responds to harms performed, in a fitting manner.”¹³ Different ethical and political theories will provide different articulations and justifications for the importance of the principle of reciprocity in public life; for our purposes, it is enough to merely state—but not argue—that its general use in public health is normatively overdetermined. In the context of using restrictive measures to arrest the spread of infectious diseases, reciprocity demands that society provides resources such as food and water to those burdened by restrictive measures like isolation or quarantine. This would ensure that (a) restricted individuals are not left to struggle on their own for survival, and (b) the burden of abiding by restrictive measures edicts is diminished, which may render those measures more likely to be followed, constituting an imperative instrumental benefit to society. If society does not discharge its reciprocal duties to support those burdened by restrictive measures, then those measures are deemed illegitimate and unethical.

A small number of authors that maintain the Siracusa Principles provide the necessary conditions to legitimize restrictive measure in public health emergencies also speak to the importance of upholding the principle of reciprocity.¹⁴ We argue, however, that the principle of reciprocity also provides further normative impetus to the Siracusa Principles’ requirement that limitations of rights and freedoms be proportionate to the nature and

extent of the public emergency (as per Articles 10.d and 51). The clearest claim for a proportionate response in the Siracusa Principles is found in the “least restrictive means clause”—Article 11—which reads: “In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.”¹⁵

The least restrictive means clause may be interpreted as curtailing the degree of limitations a State can impose on a person to the very least amount of interference and disruption associated with a particular human right, for example, freedom of movement. Stated differently, under this interpretation of the clause, those whose rights are being limited still have a negative right of least interference from the State in its fulfillment of public health measures as understood in the Siracusa Principles. For example, if the spread of a particular airborne infectious disease can be adequately arrested through the use of masks without restricting interaction with others, then that person should not also be subjected to complete physical isolation from other people. However, if the principle of reciprocity is accepted and adopted, then persons subject to isolation orders have a positive right to measures that would *lessen* any real limitations to their human rights. In this sense, the duty of the State not to impose any restrictions beyond the minimum necessary to protect the public would include the duty to provide at least those basic life necessities to individuals whose human rights are restricted for the public good. For example, if a person is ordered to remain at home either as part of his or her isolation or quarantine orders, not having food delivered to them imposes a greater burden than if food was provided to them by the State. A person in isolation or quarantine might depend on family and friends—assuming they have family or friends—to provide them with food, thereby placing the individual in a position of charity. However, provision of food should not be interpreted as charity but as a necessary condition of what it means to impose the least amount of restrictions on a person whose human rights are being limited for the public’s health. In the context of applying restrictive measures, as the State is generally held as the only legitimate authority to

impose such measures, it would appear to follow, then, that the State also bears the responsibility to discharge its obligation to support and compensate those individuals that have been justifiably restricted. Providing food and other basic necessities minimizes the restriction. The justification for this more robust version of the least restrictive means clause of the Siracusa Principles is therefore based on the reciprocity principle.

Ebola, reciprocity, and human rights

The current outbreak of EVD in West Africa highlights several unique challenges at the intersection of ethics and human rights regarding the use of restrictive measures in public health, including: (1) long-term disadvantage to individuals and communities, (2) expanding reciprocal obligations to communities and populations, and (3) expanding responsibilities for reciprocity beyond the individual State.

The public health response to EVD included many instances of applying restrictive measures against individuals, yet perhaps the most concerning and complex measure was cordon sanitaire; this multinational measure involved almost entirely restricting movement in and out of a large area of West Africa through military enforcement.¹⁶ While having the potential to effectively curb the spread of EVD beyond the cordoned region, such a measure has the potential for devastating short-term effects—for example, rising food prices and the decrease in supplies necessary for survival—as well as long-term effects, including the decimation of farms and other businesses requiring frequent trade outside the cordoned region. Reciprocity in the form of supplying basic necessities like food and water to individuals within the cordon is absolutely necessary, which has been acknowledged in this context, and can clearly help to lessen the restriction of human rights.¹⁷ However, the supply of basic necessities for survival does not begin to compensate for the potentially severe short- and long-term impacts on whole communities. Communities affected by restrictive public health measures ought not to be unduly burdened during the implementation of such measures, since

restrictions imposed on communities ultimately affects individuals' enjoyment of human rights. Such disadvantage may diminish resiliency and even perpetuate the very conditions involved in the emergence and spread of infectious diseases like EVD.

Reciprocity as a necessary condition of legitimizing justified public health restrictions of individuals perhaps ought to be extended as State obligations to whole communities or populations. As the EVD outbreak has illustrated, restrictive public health measures burden communities as well as individuals. Yet compensatory measures under the rubric of reciprocity will tend to look much different for individuals than they will for communities. Compensatory measures for individuals will more than likely fail to redress more system-level burdens incurred by communities, such as the weakening of a local industry or destruction of infrastructure, and may ignore the structural power imbalances that may have led to emergencies in the first place. It must be acknowledged that, in order to be effective, whole communities must sometimes bear the burden of restrictive measures (for example, cordon sanitaire and border closures), and that these unique burdens may necessitate reciprocal compensation distinct from that which may be owed to the individuals themselves. From a human rights perspective, positive measures must also be taken to ensure that whole communities also enjoy the least restrictive means clause as found in the Siracusa Principles.

Finally, the Siracusa Principles place the justificatory burden of rights limitations on the State (Article 12). A reasonable justification that a State like Liberia might invoke for limiting rights is to protect the health of its own citizens. However, other States, such as neighboring Côte d'Ivoire, might also benefit from rights-limiting measures implemented and justified by individual States like Liberia. Sealing borders and restricting travel, whether a country like Liberia implements such measures or an external country imposes them (for example, during the recent EVD outbreak, Côte d'Ivoire closed its borders and restricted travel to affected countries) illustrates that the justification for limiting rights may include the protection of

those outside the affected jurisdictions.¹⁸ This raises the question of whether reciprocity in the context of global health can be extended to include moral—though perhaps not legally binding—obligations on other States to support those affected by infectious disease outbreaks like EVD. Stated differently, the obligation to support and reduce the functional amount of limits on basic human rights should not be borne solely by those States involved in justifiably limiting their citizens' rights, but rather by the broader international community that benefits from such measures. Such an extension of the principle of reciprocity beyond borders may be in keeping with current trends in human rights scholarship toward conceptualizing the promotion and protection of rights and freedoms via extraterritorial obligations, i.e., obligations of State x to help State y fulfil its human rights obligations, as maintained in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.¹⁹ GC 14 specifically maintains that the international community ought to support those States affected by health emergencies; paragraph 40 reads:

...given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.²⁰

As such, the collective responsibility of the international community to support affected States during infectious diseases outbreaks might extend to the need to support these affected States discharge their obligations under the principle of reciprocity.

Moving forward

In an era of drug-resistant strains of infectious diseases, we may need to rely more heavily on restrictive public health measures to curb the spread of infections, now and in the future. Infectious diseases with very little or no effective treatment that are capable of causing high rates of mortality—

for example, drug-resistant strains of TB—will likely require renewed consideration of the ethical justifications and legitimate conditions for isolation and other restrictive measures, which ultimately limit certain human rights. Ethical principles such as reciprocity need to be carefully considered as potential, though imperfect, remedies for such limits, which would also be in keeping with a robust interpretation of the least restrictive means clause already present in the Siracusa Principles.

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